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

Delivered: **23/06/2005**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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RE Z AND T (FREEING ORDER APPLICATION)

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GILLEN J

[1] The judgment in this matter is being distributed on the strict understanding that in any report no person other than the advocates or solicitors instructing them (and any other person identified by name in the judgment itself) may be identified by name or location and in particular the anonymity of the children and the adult members of their family must be strictly preserved as such.

[2] In this matter a health and social services trust which I do not propose to identify ("the Trust") seeks an order pursuant to Article 18 of the 1987 Adoption (NI) Order ("the 1987 Order") in relation to two children, namely Z born on 13 March 1999 and T born on 23 June 2000. O is the mother of these children and does not consent to the application by the Trust. R, who does not have parental responsibility, is the father of Z also objects to the application and alternatively wishes Z to be rehabilitated with a family member. K, who does not have parental responsibility, is the father of T.

[3] At the commencement of this case I was informed that K has played no part in the care proceedings preceding this matter and has taken no active role in the current application. Evidence was called before me on behalf of the Trust which satisfied me that all reasonable efforts had been made to contact K about these proceedings but his whereabouts are unknown. I am satisfied that no other reasonable step could have been taken by the Trust to ascertain his views on these proceedings or to make him aware that they were currently proceeding. Mr Ferriss QC, on behalf of R, informed me at the commencement of the hearing that R had not appeared for the trial and despite efforts by his solicitor to contact him by his mobile telephone the

efforts had been to no avail. I was satisfied that he had been made aware of the date of the hearing and that the case should proceed in his absence. Mr Ferriss continued to represent him and I have taken into account his views and wishes.

Background circumstances

[4] Mr Long QC who appeared on behalf of the mother, and who carried the substance of the objection to the Trust case, made it clear to me from the outset that in the wake of the care order which had been made in this matter on 18 November 2004, it was his case that adoption was not in the best interests of either child as it would serve to weaken or sever the existing emotional bonds and attachments between each child and his/her mother and half-siblings. He did not seek to materially challenge any of the history of this case but essentially relied on the fact that these children, with their siblings, had all enjoyed family life with each other and with the first respondent and that an order freeing these children for adoption would be a disproportionate response to the situation in which the children now are. In those circumstances it was his submission that the first respondent was not acting unreasonably in the legal sense in withholding her consent. Mr Ferriss, on behalf of R, made a similar argument that the children should be placed in long term foster care and that adoption is not a proportionate response. I was satisfied that notwithstanding that R is an unmarried father, in the absence of a good reason not to do so the court did require to canvas his views and take them into account. (re J and S (Care Order: Freeing without consent) (2001) 8 BNIL 41.

Background facts

[5] Given the responsible approach adopted by Mr Long and Mr Ferriss, little time was taken up with the history of this matter and the essential factual background was unchallenged. In brief the background was that O is a woman who had suffered great difficulties in her family life with a period of care and subsequent imprisonment for offences clearly fuelled by alcohol and disorderly behaviour. In 1989 she had met J and embarked on a relationship characterised by extreme violence and abuse. D was a child born of this relationship in 1991, J1 in 1993, J2 in 1995 with O and J marrying in 1995. They separated in 1997 although in that year another child of their union was born namely A. Social services concerns commenced in 1997/1998 centring on O's lifestyle of drinking, abuse of drugs and mental health problems. There were multiple house moves and inattention to the health and dental needs of the children. In 1999 Z was born as a result of a relationship with R and T was born in the year 2000 as a result of a relationship with K. O claimed that K had returned to Algeria in that year. In 2002 the maternal grandmother referred O to social services following difficulties in managing D's behaviour. Concerns about neglect of the children and frequent moves of

household raised by anonymous callers to social services attracted the attention of the social services. The children's names were eventually placed on the Child Protection Register in 2003. On 23 July 2003 the Trust initiated emergency protection orders in respect of all the children and they were placed in temporary foster care following a row between the maternal grandmother and O. O was subsequently admitted to the Ulster Hospital with a drug overdose and later transferred on a voluntary admission to a psychiatric nursing. Auditory and visual hallucinations were reported including instructions to "attack her children with a bread knife dipped in beetroot". Subsequent psychiatric assessment indicated that O's presentation was "psychotic in nature" related to alcohol misuse and that she posed a risk to her children because of command hallucinations. In January 2004 she commenced parenting sessions but still presented as paranoid with symptoms of auditory and visual hallucinations. During the course of the parenting sessions at Simpson Family Resource Centre in April/May 2004 O presented with evidence of having taken alcohol, expressing a wish to kill her father and evidence of ongoing hallucinations. Concern was expressed about incidents of self-harm. Assessment at the resource centre concluded that rehabilitation would not be in children's best interests due to her inability to care for her children despite a desire to do so and concerns about her limited insight into the Trust's concerns.

[6] In April 2004 Z, who had been placed with D, was transferred to a joint placement with T. In September 2004 O was arrested on an extremely serious charge of attempted murder of a police officer. In November 2004 care orders were granted in relation to D, A, Z and T. A residence order was granted to the maternal grandfather in respect of J1 and J2. Since November 2004 O has been released on bail on the charges and has supervised contact with the children on a monthly basis. The Adoption Panel met on 17 August 2004 to consider the case of these two children Z and T and recommended adoption in both cases. The Trust decided to opt for adoption on 30 September 2004. On 18 November 2004 care orders were made in respect of Z and T (and for that matter D and A) at a Family Care Centre.

Evidence

[7] The first witness to be called in this case was Patricia Donnelly, a consultant clinical psychologist with the Royal Hospitals Belfast. She had observed all six children in contact with their mother during the course of two two hour contact visits, but her report which is before me of 31 March 2005 principally dealt with an assessment of Z and T on behalf of all parties in this case. In the course of that report she undertook a qualitative assessment of the attachment that existed between the children, principally Z and T, and their mother to determine whether it was secure, insecure or otherwise. She also undertook a qualitative assessment of the attachment which exists between all six siblings and commented on the children's emotional stability.

[8] This witness also gave evidence before me and was cross-examined by all the counsel in the case. From her report and her evidence the following points emerged:

(i) The quality of attachments varies generally but can be grouped within recognised categories. Theses are:

(a) Secure – which represents healthy attachment where the child later develops a capacity to become emotionally independent from the attachment figure and form other relationships.

(b) Anxious, insecure – in which the child has limited capacity to self-soothe, a common feature where the parent is emotionally or physically unavailable to the child.

(c) Resistant, insecure – where the child is insufficiently secure to develop further attachments and becomes independent from the carers remaining emotionally dependent and vulnerable.

(d) Avoidant/ambivalent, disorganised – where the child shows signs of attachment with some secure behaviours in the presence of the attachment figure, but is sufficiently secure to function well in other environments.

(ii) Turning to the issue of long term fostering care as opposed to adoption, this witness helpfully set out the result of research studies which agree that long term foster care is a preferred option in some cases. Long term fostering can provide a child with a sense of permanency and an opportunity to form attachments to the main carers, the main indicators for placement being:

(a) The child is clear that she does not wish to be adopted. In this case, T had no view on the matter and the witness's evidence was that whilst Z might state she does not want to be adopted, she had no capacity to decide this.

(b) The child who is strongly attached to their foster carers for whom a move would not be in their best interests. The witness's evidence was that Z was not strongly attached to the foster carer in this instance and whilst T was, that should not preclude change. My attention was drawn to a drawing made by Z of herself and her foster carers which showed that she did relate to them. The witness's view was that Z has a dependent relationship with their foster carers in that they meet her needs (ie category "d" above).

(c) The child with a high level of continuous family involvement, such as a strong attachment to a parent or sibling and frequent contact. It was Dr Donnelly's opinion that in the present case contact was not of a high

continuous level with the family but that Z did have a strong attachment to her mother. T had an attachment but it was somewhat milder.

(d) Where there is some hope of eventual rehabilitation to the birth parent. It was common case in this instance that there was no hope of eventual rehabilitation to the birth parent.

(e) Where the child, especially older children, and their carers wish to get to know each other better. That did not apply in this instance.

(f) The older child was at risk of placement breakdown. This usually applies to the young adolescent where it is difficult to get an adoptive placement which is stable. The witness observed that she did not believe that there was any risk of placement breakdown with Z because she is very easily managed. On the other hand T was a very active challenging child whose behaviour could be very challenging and the concern of the witness was that it created a danger that a foster carer could withdraw from the placement, particularly as this boy gets older.

(iii) The witness then turned to the research findings on adoption concluding that there was extensive opinion that a child's permanency needs are best met through adoption should family placement fail and rehabilitation of the child to the family of origin not be viable. She relied on a number of distinguished papers asserting this. She concluded that it has been identified that adoption:

(a) Provides a permanent and secure care arrangement outside public care.

(b) Facilitates life long commitment to the child as few adoptions break down.

(c) Is the most "normal" circumstances outside the family of origin and reduces the child's sense of difference.

(d) Affords significantly lower rates of maladjustment than those in long term foster care.

(e) Provides, in adulthood, a stronger sense of self-worth and adopted children function more adequately at the personal, social and economic level than those fostered.

(iv) She went on to record however that there are also clear disadvantages to adoption such as:

(a) The disadvantage to the birth family and their loss of relationship with the child.

(b) The child's loss of contact with their parents can lead to a deficit through the potential loss of identity.

(c) The adoptive family does need to be thoroughly prepared to best meet the needs of the child particularly to meet the challenges in the older child who is adopted later.

[9] Ms Donnelly had observed all six children in contact with their mother for two two hour contact visits at a contact centre. Inter alia, her observations to me about these sessions were as follows:

(i) Z kept close contact with her mother. There clearly was a mutual affection. Ms Donnelly regarded this as coming into the category of an ambivalent and disorganised attachment which was a reflection of the child's life and the emotional unavailability of her mother at appropriate stages. The older children clearly had more secure attachments because, unlike Z and A they had not suffered the unpredictability of the parental behaviour which had developed with this mother. Z had strongest attachments of all to the eldest child D and least attachment to T, probably because of the age of the T and her "parental" role with reference to his behaviour which she may regard as a small burden upon her. D had clearly played a strong parental role in the family.

(ii) T was observed to be an extremely lively boy who likes an audience but need to be actively channelled and has all the hallmarks of problems for the future. He has a mild attachment to his mother in that he liked the attention she gave him but he was also very independent of her and clearly enjoyed the company of others. He was not particularly close to anyone else. He of course has not seen his father for some time and he is not a person of substance in his life. Z was not terribly interested in her own father and has a very neutral view of him.

[10] Ms Donnelly made a number of recommendations to this court as follows:

(i) In deciding whether or not these children should be freed for adoption or avail of long term foster care, she considered that it was a very finely based judgment. She was satisfied that rehabilitation to mother or fathers was out of the question and therefore there had to be some permanent plan. She concluded that she could clearly see arguments for both long term foster care and adoption in each instance.

(ii) Her view was that if the court was looking purely at Z, then on balance she was in favour of long term foster care for this child rather than adoption. She favoured long term foster care in her case because she has the strongest attachment to her mother. She would face difficulties in not living with her mother and may struggle to form attachments with new carers although Ms Donnelly was of the view that this certainly could be done. She does have strong attachment to her siblings (in particular D) and albeit a lesser attachment to her mother this indicated that there is a strong argument for continued contact at such a level that could only realistically be maintained in long term foster care. She has made no strong attachment to her carers and it is one of the indicators against adoption that the child should have a strongly held wish not to be so placed.

(iii) In cross-examination of this witness by Mr Ferriss, the witness acknowledged that Z currently has not much concept of her father but as time goes on this is an issue that will need addressing. It was the view of the witness that within the next two years indirect contact by way of letter or card could be introduced perhaps leading to direct contact when she was somewhat older depending upon her own views. Introducing direct contact might help address her sense of identity if properly prepared although this would only work if there was consistency on the part of R and to that end such indirect contact should be of low frequency.

(iv) So far as T was concerned, Ms Donnelly on balance came down in favour of this child being freed for adoption because of his challenging behaviour. She did see advantages in T being with Z but her own preference was to split these children with Z going into long term foster care and T being adopted. T has attachment to his mother and to his carers and can clearly form other attachments. It was her view however that the challenging nature of T's behaviour could well put long term foster care placement under enormous strain whereas adoption is likely to provide for him stronger family support both in the immediate and the extended family. Moreover there is likely to be more support for him in the long term future if he has a permanent adopting family. In other words the after support concept built into an adoptive family might be more advantageous to him than the somewhat looser concept of long term foster care.

[11] In cross-examination by Mr Long on behalf of the mother, the witness acknowledged that she had not referred to T's racial background in the course of her report. It was suggested to her that if he was the only one of the six children to be adopted, he would be aware not only of that but also of the different colour of his skin which might add to the feelings of rejection. The witness however said that she has come across mixed race issues before, and in her opinion provided the issues of rejection of his parents were taken up positively and sensitively with him, she was satisfied that it could be dealt with appropriately.

[12] Cross-examined by Mr Long about the nature of the behavioural problem which T has, Ms Donnelly acknowledged that whilst it had not been diagnosed as ADHD nonetheless the combination of behavioural difficulties will make it difficult to maintain a placement as he gets older. It was suggested to the witness that if the behaviour is challenging then it is better that he is in long term foster care where statutory resources will be readily available whereas adoptive parents might conceive it as a failure to invoke the possibilities of such help. Once again the witness indicated that with appropriate training and explanations, adoptive parents would be prepared to avail of such help.

[13] Ms Donnelly did acknowledge that the views of the other children should be taken into account and particularly the three older children would be distressed and bereaved if T was adopted.

[14] In terms of contact for the children after these proceedings, Ms Donnelly felt there was no value in confusing T by introducing the father who was a very peripheral figure in any event. She felt that the advantages for contact between T and the mother were rather more equivocal in that they largely rest with the advantages to the parent and not to the child given that it might distress him and risk unsettling the placement. Moreover, the mother's history of mental illness and alcohol abuse could pose a serious risk to the placement. However, eventually she agreed that if appropriate supervision was made eg. a Trust official being satisfied that the mother was in a fit state and only then the child being told of the contact, post adoption contact for T could be beneficial with his mother. Similarly the same concerns arose in relation to direct contact between Z and her mother which should take place provided there was appropriate supervision to ensure that the mother was in a fit state.

[15] Ms Donnelly rejected the suggestion by the guardian ad litem that the question of T's placement should be adjourned on the basis that the Trust had been looking for a placement for both children but that if the decision was taken to place Z in long term foster care, they would now have to commence again for T on his own. There have been difficulties already finding a place for T because of the challenging behaviour and his mixed race. Nonetheless, it was the witness's view that to postpone this would only create further uncertainty and since he would be the child who is likely to be least affected by the decision of long term foster care or adoption, there was no reason to postpone the decision in her view.

[16] I pause to observe that I found this witness extremely well informed, measured and cogent. She had clearly given this matter a great deal of thought and was fully aware of all the recent literature on the vexed area of long term foster care/adoption.

Ms R

[17] Ms R was the social worker in charge of T and Z from September 2004 onwards. I make it clear at the outset that I found this an eloquent and well prepared witness who was both insightful and persuasive on a number of issues in this case, albeit I have not agreed with her conclusions in several material respects. In the course of her reports, her examination-in-chief in her cross-examination the following points emerged from her evidence:

(i) She had made a number of attempts to contact K, having written to him on eight occasions and attempted home visits in order to engage him, but all to no avail. Similarly I am satisfied that she attempted to facilitate wherever possible contact between O and the children.

(ii) She referred to some of the difficulties with T. He did exhibit sexually explicit behaviour making attempts to touch female adults inappropriately at certain contact meetings. However she felt he had been goaded into this behaviour by the older children and that A in particular provided an audience for T. This aspect of his behaviour has been referred for consideration to the children development team. I observe at this stage that Ms R basically shared the view of the guardian ad litem that this boy's behaviour significantly has not involved inappropriate sexual activity with children his own age and that in all likelihood he is simply reacting to the encouragement of older children. She also described him as having behavioural problems. He is too young for a diagnosis of ADHD, albeit some of his behaviour may be similar to this condition. However, she considered his behaviour manageable so that at times he can sit down and concentrate although he cannot sustain this.

(iii) This witness was not pessimistic about his chances of being adopted. She did recognise the difficulties. First, there was his personality problems. Secondly, there would be a need to maintain some sibling contact which some adoptive parents could accept and others could not. Thirdly, there would need to be some insight into the question of his mixed race although this was not a child whose mixed race background was immediately obvious upon looking at him. Thirdly, the adoptive parents would have to recognise that Z and T in her opinion did have a strong relationship.

On the other hand it was her opinion it was likely this boy would be adopted because of the following characteristics. He was an endearing child, he was young, there were signs of improvement in his behaviour in the last six months, he was attractive and engaging, and would clearly benefit from a stable home.

(iv) Ms R gave evidence that the care Trust plan for both children was adoption with them being placed together. She emphasised that she has intimate knowledge of these children having seen them about thirty times, and had been to their school, liaised with other professionals and link workers, and attended all but one of the mother's contacts with them. She challenged the view of Ms Donnelly that Z and T were not a natural pair. They have been together since May 2004 and have formed a close relationship sharing the same bed, school, church and playtime.

(v) Turing to their views, the witness said that Z perceived that she is different from other children at school and was aware of the notion of adoption. She was concerned that she would be the only child in the school to be adopted and was fearful of this. On other hand T is not fearful of the future and instead becomes fixed on notions about the past such as his father.

(vi) Ms R adumbrated the difficulties that arise with long term foster care. In her opinion these were:

(a) There is a different sense of belonging to that of adoption.

(b) Children are not as fully integrated into the family. Adoption lends a greater psychosocial basis to them.

(c) There is continued support with long term foster care which is not present with adoption. Children do object particularly in adolescence to the intrusion of social workers.

(d) The fact that children continue to have a different name is a daily reminder to them that they are different.

(e) Long term foster care does not necessarily lead to the same permanent loving relationship in afterlife as adoption.

On the other hand she recognised that there would be more contact with the family in long term foster care and greater opportunity to re-establish contact with their fathers. Dealing with Z, the witness indicated that whilst Z enjoys contact and accepts it for what it is, she is able to compartmentalise her feelings. Although she still does see T and the older children as her family, on a day to day basis she is separated from her siblings and can deal with this.

(f) It was clear that this witness has considered the current research on issues touching on adoption and long term foster care. It was her view that open adoption was a comparatively recent innovation in Northern Ireland and it remains to be seen what will emerge from it. Nevertheless she accepts that there now is a clear movement to embrace more open notions of

adoption with siblings and birth parents. She drew my attention to Professor Tresiliotis' view that the gap is narrowing on outcomes between long term foster care and adoption.

(vii) Dealing with T, the witness agreed with Mrs D that there was a greater likelihood of breakdown in the case of this child because of his challenging behaviour notwithstanding that he has a number of very endearing qualities. His difficulties in focusing on the task in hand, abiding by rules and his desire to be an exhibitionist all meant it was necessary to keep a very regular eye upon him. She is undertaking self-protection work with him. On balance she considered whilst they had looked at a care plan for the two children individually, she felt it was in their best interests to be placed together as a recognition of their individual needs. Her concerns about T being separated from S were that T would notice that he was only one of the six children with adopted status. Moreover it had been their experience that obtaining long term foster carers can present difficulties.

(viii) The witness had made attempts to engage R but he had not attended arrangements made. His sister was at one stage suggested as an alternative carer but she was not in a position to offer a place for T and felt the two children should be together. She has now said she does not wish to be involved other than in a supportive capacity.

(ix) Ms R made the point that so far as contact with the guardian ad litem was concerned, she had only had one telephone conversation with her and a brief discussion in court. The guardian had been invited to attend a LAC review but had been unable to be present. In early May the guardian ad litem had contacted the witness regarding an update and had read the files in the middle of May.

(x) Dealing with the question of the likelihood of adoption, the witness conceded that they had exhausted their current lists of people wanting to be adopters without success. They had now turned to the Family Care Society. They had viewed the two children as needing a placement together.

(xi) She told Mr Long that the current placement for the children was not long term because the carer was struggling with disciplinary methods for the two children. Whilst she did recognise that there would be some difficulties explaining to the children why they were no longer living together it was the view of this witness that if Z was to be given over to long term foster care, she still felt that T required the benefit of option.

(xii) The witness did make the point that in open adoption, the norm for contact was two to three times per year with siblings or birth parents. In an ideal world it could be four to six times per year but in reality it usually worked out at two to three times. However, she added there could be

additional support/contact through videos e-mails etc. Of the other four children, two were subject to a residence order and two were in foster care.

(xiii) Her attention was drawn to the Department of Health and Social Services guidance for Trusts "Permanency Planning for Children; Adoption; Addressing the Right Balance". Paragraph 6.8 of that document dealing with care proceedings and adoption reads at paragraph 6.8 inter alia:

> "….Where adoption is envisaged in preparing the care plan, the following steps should be taken before the final care hearing …
>
> - Trust initiates a search for an appropriate placement including the involvement of its Family Placement Team.
>
> 6.9 By the date of the final hearing for a care order, the following should have been achieved:
>
> - Prospective adopters identified.
>
> ….
>
> - Adoption panel has recommended the match of the child with the perspective adopters."

Whilst the witness was aware of this document, she indicated that the Trust does not always follow this. It was the view of this Trust that requiring children to move to a foster placement in the hope that it would be permanent runs risks of insensitivity to both child and placement if the adoption order is not obtained at the court. In certain cases she indicated that children will be dealt with in this way depending on their age, the length of the placement, the likelihood of a freeing order and adoption taking place and the personality of the child. I pause to observe at this stage that I consider the DHSS guidance to be good practice and this Trust should seriously examine its practice in light of the DHSS guidance, albeit of course it cannot be an inflexible approach on each occasion.

(xiv) In cross-examination by the guardian ad litem, and dealing with the difference between her opinion and that of the psychologist Ms Donnelly, the witness drew attention to the fact that Ms Donnelly is not a practitioner of placements albeit she largely agreed with most her written report. She did agree however that Z had strong attachment to her siblings and that T had milder attachments.

(xv) The witness confirmed that the referral to the Family Care Society had been made on 6 April 2005. This Society has now accepted the role of identifying a placement. They recently had placed a similar aged child to T and she felt that over the summer Z and T may be able to benefit from the input of the Family Care Society. She reiterated that in her opinion it was likely that both children could be adopted.

Mrs G

[18] Mrs G is the team leader and social worker on the Permanence Team with this Trust. In the course of her examination-in-chief and cross-examination the following matters emerged:

(i) Dealing with the Trust efforts to find a placement for Z and T since September 2004 when the Permanence Team had been appointed to carry out this task, she indicated that as the team got to know Z and T better, they recognised that there were issues that needed to be explored in order to give a full and accurate picture of the children. The team liaised with Adoption Services to match appropriate couples. E-mailed pen pictures of the children (which were before me) were produced and meetings were arranged with several other Trusts to see if they had adoptive parents available but this was unsuccessful. In her opinion however it was still highly likely that the children would be placed for adoption particularly now that they had been referred to the Family Care Centre. She indicated that the Trust must explore all avenues before incurring the cost of referring the matter to the Family Care Society (FCS) but this Society has helped to place older children in the past eg. in April of this year a nine and a six year old were placed. The Trust has used this Society on three or four occasions.

(ii) The witness then produced an extremely helpful table of permanent placements by this Trust since 2000. Several have been placed by the FCS. The witness said that a significant number of these children did have behavioural problems similar to T. In her opinion the ethnicity of this child will not present any particular difficulties since in Northern Ireland there have been a not insubstantial number of inter-country adoptions from countries throughout the globe. In her experience of children who are adopted, the vast majority of those on the list since the year 2000 have ongoing contact with siblings and/or birth mothers. Couples can be anxious at the start about the prospect of contact with birth parents but less so with sibling groups. She said it is now a common occurrence for post-adoption contact with birth mothers. However in her experience the highest contact with siblings or birth parents per year is six and it is more often two to three times per year.

(iii) It was her experience that FCS had not failed to place a child in the last two years. The Society had said that if the child was not placed by August, then they would set up a special recruitment programme for them.

(iv) The witness conceded that when she had appeared in the care order proceedings, she had also stated that at that stage she had been confident that the children could be placed imminently. Seven months on, this had not been achieved but she was still hopeful and confident. Whilst placements could take 6-12 months, there was only one child that she could recall in this Trust which had ended up not being placed. This year alone FCS had placed five groups of older children.

(v) Her attention was drawn to the annual report of the FCS which at paragraph 4.5 stated:

> "Placement of children for adoption
>
> Over the years the Society had noticed a large number of children being referred for placement with a relatively small proportion being placed by adoption by the Society. The significant amount of time spent in managing these referrals was never reflected in the placement outcome."

The witness indicated that she had not been aware of this report but her only experience of FCS was that they were successful in placing the children. (I observe that a witness from FCS was later called to explain this entry.)

(vi) The witness was unhappy with his suggestion by the guardian ad litem that there should be delay in making any freeing order until a placement had been found. It was the witness's view that there is need for finality for this matter sooner rather than later.

(vii) In answer to Mr Edmundson on behalf of the guardian ad litem, the witness asserted that the reason why she felt the Trust had not been able to place these children during the seven months period, was because their list of potential adopters had been depleted and it takes quite a while to recruit a new list. They also needed some clarification and assessment of the children. However the major factor in her opinion leading to the failure to place the children to date was the depletion of the list. That list is being built up again. In particular, dealing with T, she expressed the view that this child is adaptable and whilst he does have some behavioural problems, other children have been placed who were much more difficult than him.

Ms I of the Family Care Society

[19] This witness was a senior practitioner and social worker with the Family Care Society. She explained the entry which had been referred to in the annual report of the FCS by indicating that this referred to the fact that often Trusts contacted the FCS to see if a child could be placed, the Society wasted time researching the matter, but then the child has not come through. The purpose of that entry was to indicate that a great deal of time was being wasted. On the other hand when actual placements are sought, the FCS has never been unable to place a child over the ten years that this witness had been involved. Three were placed last year and since the New Year seven had been placed. In her experience if a child is freed for adoption six months is the average time it takes the FCS to place the child. She was confident on the information they had to date about Z and T, although somewhat limited, that these children could be placed. Of the seven that have been placed this year, the eldest was nine, there was one baby, and five were five years and upwards. All had behavioural problems. She did not consider mixed race to be a difficulty, having had experience last year of placing such a child. The Society is familiar with older siblings and the issue of contact with them. She could think of one recent placement alone where direct contact with the birth mother was not taking place and it was her experience that whilst children do require the opportunity to form new attachments to the new placement with perhaps an attendant postponement of contact for a period, that thereafter most adoptive parents accept birth family contact. However she recognised that frequency of contact can be a problem because children do need to form attachments to the new family for the new relationship to form. In that context she found no difficulty with contact 3/4 times per year but she did feel that 5 plus was necessary in order to keep up a relationship. She concluded by reiterating she saw no difficulty in these children being placed.

Guardian ad litem

[20] The guardian ad litem provided a report which I have read day of 2005. In addition she gave evidence before me. In the course of her report, her evidence-in-chief and the cross-examination of her, the following matters emerged:

(i) I feel constrained to observe at the outset that the effectiveness of this witness was materially diluted by the paucity of her direct involvement with the personalities in this case. She had only spoken to the social worker on a very few occasions, she had not witnessed inter-sibling or parental contact and was not in a strong position to interpret the children's wishes or feelings. I found this comparative lack of involvement seared her evidence and contributed to the general air of uncertainty that in my view she manifested in her evidence. In her opinion Z was properly assessed as having a strong attachment to her siblings especially D and a lesser attachment to her mother.

She pointed out that Dr Donnelly had predicted that Z would feel "quite a strong bereavement" on loss of relevant contact with her siblings. She felt that consideration must be given to Z's right to have this attachment maintained. On the other hand T had been assessed as having "no strong attachments to any family member" and the potential loss sustained by his adoption would not be as substantial as that likely to be experienced by Z.

(ii) On the question of likelihood of placement, she noted that whilst the Trust had consistently stated an ability to place Z and T in an adoptive home which would meet both their needs, clearly, after several months of searching, this had not come to fruition. Her understanding was that the Trust had trawled all other Trusts and failed to find a placement. Consequently a referral was made to Family Care Society in April 2005 and the efforts of that agency to locate a placement are at a very early stage.

(iii) Dealing with the issue of adoption/long term fostering, the guardian ad litem had researched the literature on this matter. In particular she drew my attention to. Triseliotis 2002 who concluded that the main defining difference between the two forms of parenting was the emotional sense of security expressed by those growing up adopted as opposed to those who are long term fostered. Thoburn "Out of Home Care for the Abused or Neglected Child: Research Planning and Practice" highlights that the psychological basis on which the child is placed an important factor. Regardless of legal status the child and the carers deem the placement in adoption to be permanent. Thirdly, it was the guardian's view that a key determinant of placement stability in respect of both fostering and adoption is generally accepted to be the age at placement. The younger the child, the more stable the placement. Fourthly, she again drew my attention to Triseliotis (2002) who had stated:

> "If studies carried out before 1990 are included then it is long term fostering experience which shows significant higher break down rates compared with adoption. However if studies carried out after 1990 were contrasted, then they would show that fostering breakdowns are still higher, but the gap between these two forms of substitute parenting is narrowing."

The guardian went on to assert that indications are that adoptive homes are more difficult to find for children who have a high level of family involvement. If the child is older and has substantial contact with the birth family, long term fostering is more commonly used as a placement outcome. Thoburn (1999) acknowledges the significance of the child's attachment and stresses that this should be given consideration when planning a placement.

(iv) The guardian confirmed that these children could not safely be returned home and therefore alternative placement have to be found.

(v) The guardian's evidence was that she had met with Ms Donnelly on 12 May 2005 and discussed her assessment. She was satisfied at the same time that the Trust had made strenuous efforts over a significant period. Because of the inability of the Trust to find a placement, she was not convinced of the likelihood of adoption. She drew my attention to the fact that a Government White Paper had indicated that 18% of child placements for adoption break down before the actual order takes place.

(vi) In essence her recommendations, in light of the evidence of the social workers which I have set out, was as follows:

(vii) She agreed with Mrs D that based on the child's strong attachment to the older siblings that Z would be strongly bereaved by a break down of that relationship, particularly where the Trust contemplated contact at two to three times per year. She felt it was realistic to assume that such contact would not sustain the attachment but assist in identity issues only. She had spoken to Professor Tresiliotis recently and that was his view as well. In essence therefore she made the clear point that the paucity of contact with her older siblings, which would be part of an adoption approach, would not sustain those attachments. For that reason she felt that on balance long term foster care was better for this child in order that she could sustain those attachments which were very important to her.

(viii) So far as T is concerned, she recognised that he had much more challenging behaviour. Whilst she had heard the evidence of Mrs D that these were not a natural pair, she was also mindful of the evidence of Ms R, the social worker who thought they should be placed together. Currently there was no placement for either. It was her view that the Trust should consider a fost/adopt placement of the two of them together. In other words initially they would placed for foster care but in a placement where adoption could later emerge. In essence therefore she was in favour of long term foster care for Z which conceivably could lead to adoption later depending on the child's views and whether or not the foster carers could cope with the degree of contact necessary for this child with the siblings. She felt there was a stronger argument for adoption for T but she was persuaded that it was unlikely that he would be adopted given his personality problems.

(ix) However when asked how she felt the children would react if Z was not freed and T was freed for adoption, she pointed out that she had discussed this matter with Ms Donnelly who thought that T would accept this given that he has lesser attachment to the family than to his foster carers and accordingly he would get over this separation particularly with the benefit of life story work. The witness accepted the view of Ms Donnelly in this regard.

Similarly, although she did think there was potential for T feeling he was singled out for adoption because of his colour, nonetheless she felt this could be overcome. She did accept however that it was a very fine balance, "a close and difficult decision" and that differing legitimate views could be held about whether the children should be adopted or left in long term foster care.

(vii) The guardian ad litem therefore had shifted her view somewhat having heard the evidence although she was still adamant that Z should not be freed because of the attachment but was now less clear about T taking into account her view that the Trust had not established a likelihood of placement. For that reason she felt it was not appropriate to make a freeing order. Her preference was a fost/adopt placement. She accepted however having spoken to the FCS that they did not indicate any difficult in their view in finding a placement for these children.

(viii) In essence this witness made the case that freeing orders should be rejected in both cases with both children being placed in the meantime in a foster/adoption placement where hopefully it would evolve into adoption for T with time and that the situation with reference to Z could be looked at again depending on whether or not that placement could cope with the degree of familial contact which Z required.

Conclusions

[21](1) I commence by recognising that freeing a child for adoption is amongst the most draconian and terminal order that a court can make in respect of a family. In Bronda v Italy (1998) EHRLR 756 paragraph 51 the European Court of Human Rights said:

> "The court recalls that the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and that domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8."

In Kroon v Netherlands (1994) 19 EHRR 263 at para. 32 the courts said:

> "The State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible as from the moment of birth or soon as practicable thereafter the child's integration in his family."

(See also Kutzner v Germany (2003) 1 FCR 249 at para. 61).

(2) Article 9 of the Adoption Order (NI) 1987 ("the 1987 Order") sets out the duty to promote the welfare of the child in its determination of any course of action in relation to the adoption of a child. The article goes on to enjoin the court to 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;

(ii) The need to safeguard and promote the welfare of the child throughout its childhood;

(iii) The importance of providing the child with a stable and harmonious home;

(iv) 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."

(3) Applying these principles in this statute to the case of Z, I have concluded that I am not satisfied that an order freeing this child for adoption should be made. I found the evidence of Dr Donnelly in this matter extremely convincing. Before I could reject such evidence, it would only be on the firmest ground that I should tread. On the contrary, I am satisfied that what she has said provides a secure foundation in fact upon which I can rely with confidence in coming to a conclusion that the Trust application should be refused. Given the infinite variety of facts which drive the discretion exercised by the courts to determine whether or not a child should be freed for adoption or whether long term foster care is more appropriate, it would be inappropriate of me to make any generalisation about the approach to be adopted by any court. In this particular instance of Z however, I am satisfied that the strength of this child's attachment to her siblings, especially D, and the attachment to her mother, albeit it lesser, would visit on this child a strong sense of bereavement if I was to sever the parental/familial link to the extent which freeing for adoption would envisage. I am unpersuaded that this child should be exposed to the losses which would inevitably flow from the fracture of existing attachments implicit in the order now sought by the Trust.

In Re B (adoption order) (2001) 2 FLR 26, where a child had been happily accommodated at his mother's request with a foster mother, the court rejected an adoption order with Lady Justice Hale at para. 24 page 31 stating:

> "It is important, it seems to me, that everyone concerned recognises that there is more than one way

> of securing legal permanence. One way is adoption. But in a case such as this, there are at least three problems with it. The first is that it takes something away from J. It removes his relationship with his father, his brothers and his father's family."

I pause to observe at this stage that I consider that this is precisely the danger that would exist in this case.

> "Secondly, it is only a viable solution in a case like this if it is combined with a contact order. That is something which generally the courts are not willing to impose upon the adoptive parents, although there may be cases where it is entirely appropriate to do so. But, more importantly, it is designed to maintain a level of continuing contact between J and his whole paternal family which calls in question the appropriateness of the wholesale transfer in legal terms which adoption brings about."

That is precisely the thinking that has driven my conclusions in this case with relation to Z. Ms Ramsey on behalf of the Trust drew my attention to a case of Re K (Application to adopt) 2004 NI Fam. 4 where I had made an order of adoption with contact once per month. I regard that case as wholly distinguishable from the present circumstance. In Re K not only had the child made it perfectly clear that she wished to be adopted but it was also her express wish that contact should be at the level that I determined. This had been the situation for many years and the prospective adoptive parents, with whom the child had been for many years, had been managing this level of contact for a very long time. There was ample evidence that the child was able to accommodate emotionally managing both the birth family and her prospective adopters and there was therefore no reason to change a circumstance where the child was so strongly wishing to embrace both her adopted family and her birth family. In Re K I drew attention to recent research into the topic of post adoption contact where it was a common thread that post-adoption contact at the frequency anticipated was the exception rather than the rule. I do not consider that this is such an exceptional case. No adopted family has yet been identified, the child does not wish to be adopted, and I consider therefore that this case should conform to the normal approach which is that where a very high degree of post-adoption contact is required, then that undermines the appropriateness of the wholesale transfer in legal terms which adoption brings about. The Trust proposal that inter-sibling relationship should occur 3/4 times per year, even with the flexibility built into that proposal is insufficient for the needs of this child.

Whilst I recognise that this child is not Gillick competent and would, as Dr Donnelly suggests, accommodate herself to an adoption, nonetheless I regard her stated wishes that she does not want to be adopted as having some significance. At the least they underline the strength of her current family attachment. I must look at each case individually and I have considered that the interests of Z must not be deflected by any desire on the part of the court wherever possible to ensure that Z and T should be accommodated in a shared home. I am satisfied that with the strength of her other family around her she will quickly adjust to being separated from T. I therefore dismiss the Trust application on the grounds they have not satisfied me that under Article 9 of the 1987 Order adoption it would promote the welfare of this child in all the circumstances.

(4) In contrast, I have come to the conclusion regarding the welfare of the child as the most important consideration, and having regard to all the circumstances, that adoption would be in the best interests of T. I have read at length the reports of and the evidence concerning T's challenging behaviour. He has been assessed at having milder or indeed no significant as attachments to his family and to have the clear ability to reattach to new carers. His behaviour however is clearly much more challenging than that of Z. She is an easily managed child unlikely to pose challenges to any carer whereas on the contrary T's placement is obviously rife with problems given his behavioural difficulties. I believe that Dr Donnelly is correct to posit the view that this behavioural presentation coupled with the need to actively channel his attention might put too big a strain on long term foster carers whereas an adoption setting would provide additional commitment consequently lessening the possibility of placement breakdown particularly as he gets older. I do not believe that there is any basis for the suggestion that adoptive parents, appropriately trained and prepared, would be any less likely to invoke the assistance of statutory service resources than would long term foster carers. Moreover I consider that Dr Donnelly is correct in opining that this boy would not regard himself as treated differently from the others by virtue of his colour merely because he had been placed for adoption and they had not. His individual needs must be looked at in an holistic context, and I am certain that with appropriate explanation and care, this child is not likely to consider himself to be more rejected than the other children by virtue of his adoption. His limited attachment to his birth family serves to underline in my view the likelihood of adoption succeeding in this instance.

(5) Article 18 of the 1987 Order 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.

(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."

Since there is a care order, I am of course satisfied that the child is in the care of the adoption agency. Much time in this case was taken up with the question as to whether it is likely that this child will be placed for adoption. Pen pictures of the child have been sent to a number of adoption teams and the need for a placement has also been raised with the adoption services manager in other Board areas within Northern Ireland. At the date of this hearing no couples that could be considered an appropriate match have yet been obtained. The matter has been referred to the Family Care Society on 6 April2 005 requesting that they recruit and assess couples specifically for Z and T. An initial meeting was scheduled for 9 May 2005. The behavioural issues in respect of T and the fact that T is a mixed race child will be factors that will have to be taken into account. The Trust have set aside a 12 month period to identify a suitable placement for these children together. However I must recognise that the test imposed by Parliament is that I have to be satisfied it is likely this child will be placed for adoption.

In this regard I was particularly impressed by the evidence of Ms R on behalf of the Trust. She has seen and observed this child more than any other professional in the case. She described him in very engaging terms and she left me in no doubt that such a child, despite his difficulties, would in all likelihood be adopted. I accept her assessment of this child. I was also very impressed by the measured and careful evidence of Ms I from the FCS who satisfied me as to the very high success rate in placing difficult children which this Society has achieved. I felt able to repose confidence in her firm belief that this child will be placed. I have therefore come to the conclusion that it is likely that this child will be adopted.

(6) I must then determine whether or not the agreement of the mother in this case (who is the only person with parental responsibility) should be dispensed with on a ground specified in Article 16(2) namely that she is

withholding her agreement unreasonably. I have concluded that this mother is unreasonably withholding her consent. The leading authority on the meaning of this ground and the tests that the courts should apply is Re W (1971) 2 AR 49. During the course of the leading judgment, Lord Hailsham described the test in this way:

> "The test is reasonableness and nothing else. It is not culpability, it is not indifference. It is not failure to discharge parental duties. It is reasonableness and reasonableness in the context of the totality of the circumstances. But, although welfare per se is not the test, the fact that a reasonable parent does pay regard to the welfare of his child must enter into the question of reasonableness as a relevant factor. It is relevant in all cases if, and to the extent that a reasonable parent would take it into account. It is decisive in those cases where a reasonable parent must so regard it."

Lord Hodson at p. 718B stated:

> "The test of reasonableness is objective, and it has been repeatedly held that the withholding of consent could not be held to be unreasonable merely because the order made would conduce to the welfare of the child."

In JN (2005) NICA 14 Sheil LJ stated at para. 26:

> "In many cases, and this is one of them, there is a tension between what is in the best interests of the child and the question of whether a parent is withholding his or her consent unreasonably."

In Re F (2000) 2 FLR at 505-509 Thorpe LJ referred to the joint judgment of Steyn and Hoffman LJJ in the case of Re C (a minor) (adoption; parental agreement; contact) (1993) 2 FLR 268-272 where they stated:

> "The characteristics of the notional responsible parent have been expounded on many occasions; see for example Lord Wilberforce in Re D (an infant) (adoption; parents' consent) (1977) AC 602 at 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 Re W (supra):
>
> > 'Two reasonable parents can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their right 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 appears sufficiently strongly 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."

In this case I recognise that the reasonableness of the parent's refusal to consent must be judged at the time of the hearing and I am doing that. I have taken into account all the circumstances of the case. I have recognised that whilst the welfare of the child must be taken into account it is not the sole or necessary paramount criterion. I have applied an objective test in the case of this parent. I have recognised that the test is reasonableness and nothing else. I have been wary not to substitute my own view for that of the reasonable parent. I consider that there is band of possible reasonable decisions each of which may be reasonable in any given case. I have come to the conclusion that this parent is unreasonably withholding her consent for the following reasons:

(i) A reasonable parent would recognise that T has certain behavioural aspects which could radically undermine a long term family placement. Whilst I consider this boy has a number of attractive qualities which will engage an adoptive couple, nonetheless I recognise that he is sufficiently challenging to trigger a danger of fragility to the placement. I accept the evidence that the cement of an adoptive placement is more likely to

withstand this than a long term foster placement. Being satisfied that rehabilitation with his mother is inconceivable, I consider he needs the strength of an adopted family in order to provide him with the security and permanency which will lead to an harmonious and stable home both now and in the future. It is only this vehicle which in my view will afford him sufficient long term protection. I don not consider that this is the type of case where there is a room for more than one objectively correct parental view on this issue. The fact that witnesses feel it is a fine decision does not prevent a conclusion that there is only one objectively correct decision. It is not without significance that all witnesses in this case, concluded that, if it can be achieved, adoption is the best solution for T.

(ii) I recognise that a reasonable mother could properly give weight to the interests of all the children including T and Z. This would include the interests of the older children who could be caused distress by separation from T. (see Re E (a minor) (adoption) 1989 1 FLR 126). However this case is clearly distinguishable from Re E. In this instance rehabilitation is not a possibility and in any event I am not satisfied that there is such a close attachment between T and the other siblings that adoption will cause significant distress. While T is close to Z, I am satisfied both children will soon come to terms with this separation particularly since Z will continue to have the regular and frequent company of the older children and will see T periodically. I therefore do not consider this ground for withholding consent comes within the broad band of decisions that a hypothetical reasonable parent could properly make in the circumstances.

(iii) Given that I am satisfied that it is likely that T will be adopted, I can see no benefit accruing from further delaying the decision to free this child. The "wait and see" policy advocated by the guardian springs I feel from her failure to recognise his real qualities which will attract a prospective couple and the need to ensure an early permanent placement whilst he is sufficiently young to fit well into such a situation. Uncertainty is the last thing this child needs and I share entirely the misgiving of Ms Donnelly the consultant psychologist about any further delay. The significant breakdown rate of placements prior to an order of adoption and the guardians personal knowledge of recent discharge applications did not dissuade me from my conviction that this child can and will be successfully placed. In consequence I do not believe the application by the Trust is premature or that he needs to avail a "fost-adopt" placement.

[22] Before making a final determination I have taken into account the rights of the mother who has parental responsibility and the rights of the father who does not have parental responsibility pursuant to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 as contained in the Human Rights Act 1998. Two recent authorities are apposite in considering the impact on a case such as this. They

are K A v Finland (2003) 1 FCR 201 and Kutzner v Germany (2003) 1 FCR 249. These authorities make it clear that the essential object of Article 8 of the Convention is to protect the individual against arbitrary action by public authorities. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life. Any interference with the right to respect for family life entails a violation of Article 8 unless it is "in accordance with the law", has an aim or aims that is or are legitimate under Article 8(2) and is necessary in the democratic society for the aforesaid aims. The notion of necessity implies that the interference corresponds to a pressing social needs and in particular that it is proportionate to the legitimate aim pursued. The court must look at what individual measures of support can be put in place or what alternatives can be visited which will obviate the need to make an order of such an extreme nature as an order freeing a child for adoption. In this context I must also take into account the Article 8 rights of the other children in the family. I have come to the conclusion that the legitimate aim of securing a permanent home for this child is in his best interests and renders an order freeing this child for adoption a proportionate response for all the reasons that I have earlier set out. I have therefore engaged in the balancing exercise necessary under the ECHR and I have come to the conclusion that a right to a family life for this child in a permanent adoptive situation is both proper and proportionate. Before coming to this conclusion I have looked at the question of contact. In my view this child's needs and wishes may change as time progresses and accordingly I do not consider it appropriate to make an order dealing with contact. I consider that the no order principle should apply in this matter of contact and that the flexibility which necessarily attends upon the developing needs and wishes of the child is the best option. I therefore make no order on contact other than to indicate my view that inter-sibling contact between T and the other children should continue somewhere in the range of 3/4 times per year after taking into account the views of the adoptive placement. I also consider that some measure of direct post adoption contact should take place between birth mother and the child provided that her mental health can sustain it and that it is appropriately supervised by someone who has assured herself that the mother is in a fit state. In addition there should be a measure of indirect contact. The purpose of this direct contact would be for identity issues and not to sustain the birth mother/son relationship. I see no benefit to be found in any form of direct contact between the natural father and T.

[23] I am satisfied that the mother in this case has been afforded the opportunity to make the appropriate declaration under Article 17(5) of the 1987 Order. I am also satisfied that the father in this case, pursuant to Article 17(6) of the 1987 Order has no intention of making an application for a residence order or parental responsibility and that if he did so it would be refused.

[24] Accordingly I dismiss the application by the Trust for a freeing order in the case of Z and I grant such an application in the case of T.