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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **06/01/16**

IN THE COUNTY COURT FOR THE DIVISION OF FERMANAGH AND TYRONE

IN THE MATTER OF THE ADOPTION (NORTHERN IRELAND) ORDER (1987)

BETWEEN:

THE TRUST	**APPLICANT**
and	
KM	
And	**RESPONDENTS**
NB	
CB	
LB	**CHILDREN**

HHJ McREYNOLDS

Background and Evidence

[1] This is an application by a Trust pursuant to Article 18(1) of the Adoption (Northern Ireland) Order 1987 to free for adoption two male children, namely C, born in 2008 and L, born in 2009. Nothing should be published which would identify either of the children or any member of their extended families.

[2] The First Respondent (KM) and the Second Respondent (NB) are the biological parents of the younger boy L. Mr B is named on this child's birth certificate and so both Respondents have parental responsibility for LB, which they currently share with the Trust on foot of a Full Care Order granted at Omagh Family Proceedings Court on 20 February 2014. The Care Orders were the subject of unsuccessful appeal. The second Respondent Mr B was also named on the birth certificate of the elder boy but conceded he was not his natural father. DNA testing in 2013 established the identity of the biological father as Mr O, who subsequently died in Australia. The biological father of CB had no significant involvement in his life. The family of the deceased also appears to have taken no particular interest in the child, following confirmation of his parentage during a trip home from the country to which he had emigrated. No application for Parental Responsibility was filed and no contact sought. To date it appears that no-one has pursued any claim against the estate of the deceased on behalf of C.

[3] Ms M herself had a very troubled early life. She and her four siblings were the subject of Wardship proceedings in 1993 and lived for a time with their maternal grandmother. Her father, with whom she currently has considerable contact, was in 2004, acquitted by a majority verdict of allegations of a sexual nature in respect of which she and another sibling were named as complainants. The Respondent Mother was assessed by Dr. Galbraith as having an IQ falling at the overlap between borderline and learning disability, but short of categorization for Learning Disability register purposes. The Respondent father's IQ was average.

[4] The issue in the case is very clearly defined. Neither Respondent seeks to argue that he or she can provide care for either child. They are no longer together and so are separately represented. The children are now aged 6 and 7 and have not resided in the care of either parent for 4 years. The current placement is the third since their removal into care. The view of the

Respondent Parents is that the children should reside in their current placement on a long term fostering basis. The Trust and Guardian argue that the children's best interests require adoption and that the parents are unreasonably withholding their agreement to the making of an adoption order.

[5] There has been social work involvement in relation to the children since a referral was made on the 8th October 2008, immediately prior to the birth of the elder child C in October 2008. The younger child L was born in December 2009. L has significant developmental delay as a result of his Agenesis of the Corpus Collusom, a birth defect which means the structure which connects the two hemispheres of the brain is either partially or totally absent. There was Social Work involvement in the family with concerns surrounding neglect, poor routines, and failure to supervise the children, multiple house moves, lifestyle issues and domestic violence. The Trust also found the parties reluctant to accept advice and incapable of adhering to safe care plans. The children were ultimately voluntarily accommodated with their maternal uncle on 28 November 2011. The children remained in that placement until 19 December 2012. This placement proved problematic. In time it was established that no kinship carer capable of passing the assessment was identifiable within the wider family circle of either Respondent Parent. The children were next placed within a short term foster placement outside the family, where they remained until they were moved to their dually approved carers in February 2015. Both children were voluntarily accommodated under the 'No Order' principle until the making of the final care orders on the 20th February 2014. The Respondent Mother and the maternal grandmother appealed the care orders. These appeals were heard and dismissed on the 1st July 2014. Care plans for the children of freeing for adoption were agreed at the LAC on the 4th December 2013. The Trust adoption panel made a 'best interests' recommendation on the 27th February 2014. This decision was approved by the Director of Women and

Children Services on the 13th May 2014. The prospective adoptive parents, with whom the children are currently living, were identified following the children's presentation at the Adoption Regional Information Service (ARIS). They are dually approved and their primary wish is that they would adopt the children but they would not withdraw the placement should the court refuse to free the children for adoption.

It is agreed by all that they are an excellent match, particularly because the prospective adoptive mother is a Special Needs Teacher and has considerable insight into L's needs which arise as a result of his ACC, an unusual condition with little predictability. The prospective adoptive father and C appear to have developed a strong attachment.

[6] I have read all papers including the adopted reports which were supplemented by oral evidence (taken out of turn by skype because of pressure on court time) from Professor Thoburn (expert witness on behalf of the Respondent parents) and from Roma McGrory (Social worker) and Katherine McKevitt (Specialist Adoption Social Worker), from both Respondent Parents and from Kara Doran, Guardian ad Litem. The focus of the evidence in this hearing was on the issue whether the children's best interests require an adoptive placement or whether long term foster care is the appropriate long term placement for them.

[7] In the reports and oral evidence the Trust and Guardians reports were adopted. Both Social Workers and Guardian strongly favor adoption over long term foster care. Evidence was received that the needs of L are unascertained and potentially limitless. The speech and language therapy knowledge of the prospective adoptive mother has been especially valuable. The Respondent Mother told the court, "L has come on leaps and bounds with B (his dually approved carer)". She explained that before he moved she (his mother) could hardly make out what he was saying and communication at the contact which takes place every six weeks has improved. She was

delighted that L now has a little reading book. She acknowledged that the prospective adopters have a good bond with each child and her main objection to adoption is based on the planned diminution of contact. She acknowledged that C wants to have his name match that of the prospective adoptive parents. This point was echoed by the Respondent Father who recounted that he had treated C as his own child and regards him as such. He said he had missed only three contact sessions in a year. On one occasion he was ill, on another had a medical appointment and he forgot one appointment. He said he wanted to maintain his parental rights through fostering because he would want to be informed if, for example, a medical issue arose. Contact was also a concern. He said he was content for the children to take on the surname of their carers. He said he had a conversation about this with seven year old C and had told C he could use the surname of his carers. C had responded "Thank you". Both parents agreed that rehabilitation to the care of either of them was not an option. They each confirmed that in their view the children have been well 'matched' with their current carers.

[8] Ms McKevitt and the Guardian gave evidence of growing concern about C's needs for emotional security. As the elder sibling of a disabled child he presents as having considerable need for emotional reassurance. He has every reason to feel he has been let down in the past and to worry about the potential loss of the placement which closely fits the needs of both. This placement potentially relieves him of the worries he naturally fosters on L's behalf. Their paternal uncle had difficulty coping and C will have some memory of this period. The voluminous papers provide insight into C's early life experiences. He is vigilant and worries about his biological parents in addition to having concerns for L. Ms McKevitt observed that the prospective adoptive father (whom C calls by his first name at home and refers to at school as 'Daddy') is an engaging person who manages the sibling group well, particularly assisting C who can be avoidant. She described the

prospective adoptive mother as having unique qualities in respect of therapeutic parenting, acting as an advocate to source practical services in respect of L's special needs and interacting empathetically with the birth parents.

[9] Within the evidence there were varying recommendations for post adoption contact. Ms McGrory felt one or two sessions per year were appropriate. Ms McKevitt favoured two or three and the Guardian recommended two direct contacts. Professor Thoburn, on whether the framework should be fostering or adoption, suggested three contacts.

[10] Professor Thoburn was instructed on a joint letter of instruction dated 29 May 2015 and provided a main report and an addendum report. Professor Thoburn is Emeritus Professor of Social Work, University of East Anglia. Her last publications directly concerned with the issue in this case are 'Stability through Adoption for Children in Care' (2005) and her contribution to Sellick, Thoburn and Philpot's 'What works in Adoption and Fostering' (2004). More recently, her research work has focused on comparative work in respect of placements in other countries. The Professor gave the court her views in respect of some more current work on the comparable outcomes of adoption and long term foster placement. Unfortunately, she considered the legal aid rates payable restricted the scope of what it was reasonable to research. She had not checked Northern Ireland statistics but felt the region was comparable to Norwich, with which she is familiar. The exercise in which the Professor engaged was conducted without meeting the parents or children or, for example, examining video clips of interactions between any of the protagonists. It was an entirely paper based reporting exercise, aimed at providing an overview of relevant research. Counsel for the Respondent Mother drew the court's attention to the professor's evidence suggesting that statistics which 'at first glance' appear to show better outcomes for adopted children over fostered children can be misleading because they are not

necessarily comparing like with like. It was submitted that this is particularly because of the differences in the age of placement of the child, which she suggested is younger generally in an adopted placement than it is in a foster placement. In paragraph 16 of her main report, Professor Thoburn states that the difference in breakdown rates is not statistically significant between the two options. Turning to outcomes, Professor Thoburn suggested the research indicates that there is no significant statistical difference in average scores on tests measuring emotional and behavioural difficulties of children who have experienced either option and children in adoptive placements fare no better with respect to educational participation and progress (Paragraph 25).

[11] In cross examination Professor Thoburn was asked about Northern Ireland statistics. She said she knew there was greater Social Work continuity here which should mean increased support for long term foster placements. I am indebted to Counsel for directing me to sources for the Northern Ireland statistics which confirm that, contrary to what Professor Thoburn understood to be the case, Northern Ireland actually has a relatively high rate of adoption for older children (28% of children adopted in Northern Ireland during the year ended 31 March 2014 were aged 5-9 compared to 19% in England and 18% in Wales). Northern Ireland also has a higher rate of 'Open' adoption, namely adoption with birth parent contact than other parts of the United Kingdom. Breakdown rates appear to correspond approximately to those observed in the modern research for England and Wales. Professor Thoburn agreed with the research findings that permanent placements in respect of children who are subject to disabilities are generally less likely to break down than those of children without any disabilities.

[12] At Paragraph 15 of her main report, in the course of her consideration of the 2014 and 2013 work of Selwyn et al and Neil at al to, in the context of statistics which Professor Thoburn considers show better outcomes for adoption '**at first glimpse only'** she states as follows:-

" More recent research (eg Selwyn et al 2014; and Neil et al 2013) cite lower percentages of adopted children experiencing breakdown but these tend to have smaller numbers in the age groups of **'these three children'**…"

L and C are two children.

[13] Professor Thoburn referred in paragraph 25 to the paper of Biehal et al entitled *'Belonging and Permanence: Long-term outcomes in foster care and adoption'*. The numbers and timespan involved in this study are relatively substantial. The study followed up 374 children for seven or more years after they entered an *index* foster placement. (The index placement was the foster placement in which they had lived prior to adoption or, for children who had not been adopted, in which they had lived for three years or more.) All but one of the children ranged from seven to 18 years. The study found that:

(i) 36 per cent had been adopted;
(ii) Just under 5 per cent had been reunited with their parents;
(iii) Just under 5 per cent had residence orders;
(iv) 32 per cent were still in their long-term foster placements (classified as being in a "stable foster care" group);
(v) 23 per cent had left their original foster placements after three years or more and were still being looked after (classified as being in an "unstable care" group).

[14] *The 'Belonging and Permanence'* study found that although long-term foster care was intended to be permanent, for many children it was not. The disruption rates found were as follows:-

(a) 11% of the children who had been placed for adoption had experienced an adoption breakdown;

(b) 28% had experienced a breakdown of their long term foster placement.

The study acknowledged the difficulties involved in comparing long term foster breakdowns with adoption and the research suggested that age at the time of placement for both long term foster care and adoption has been a strong indicator of a placement breakdown. The study found that the adopted children, as Professor Thoburn pointed out were 'doing no better or worse' than those in stable foster placements. The statistical gap in the placement breakdown rate is, however, significant.

[15] I am indebted to Counsel for their research into the overall statistics, including the Northern Ireland figures. I appreciate that this is not something for which they are paid. In addition to the Biehal et al report I have taken the opportunity to peruse a number of the reports referred to in the report of Professor Thoburn, in particular that of Selwyn et al. In paragraph 15 of her report Professor Thoburn draws a distinction between the experiences set out in, for example, the Selwyn report of 2014 and the age of 'these three children'. The Selwyn study related to relatively young children. I am not, however, satisfied that her assertion in Paragraph 16 is correct. In that paragraph she states:-

> *"When children of similar ages with similar characteristics are compared, there is no statistically significant difference between breakdown rates for those placed from care for permanent foster care and those placed for adoption (Fratter et al 1991; Gibbons et al, 1995; Thoburn et al, 2000)"*

I do not consider the reference to more recent European experiences in a non-comparable framework to be of assistance to the court. It is difficult to distinguish, qualify or challenge the recent research through use of research, the vintage of which is looking backwards from the Millennium. Fifteen

years is a long time in terms of social change. I found the modern research, in particular that in Biehal et al's 'Belonging and Permanence Study more persuasive and relevant than the evidence of Professor Thoburn in respect of the statistics for breakdown of adoptive and long term foster placements generally. I am satisfied, and find as a fact, on the basis of the original research reports referred to in the report of Professor Thoburn, that there is a significant gap between the rates of breakdown for those placed from care for permanent foster care and those placed for adoption. Based on the same research, however, I am not satisfied to the appropriate standard of the existence of a measurable gap in wellbeing or educational success as between adults who have experienced either of the two options as children. I found Professor Thoburn's evidence in respect of the greater success for placement of sibling groups both consistent with other sources and persuasive, as were her comments on contact.

The Law

[16] Article 9 of the Adoption (Northern Ireland) Order 1987 sets out the best interests test. The welfare of the child is the most important consideration and the court must be satisfied that adoption is in the *best interests* of the subject child. Article 18(1) of the Adoption (Northern Ireland) Order 1987 enables a court to dispense with a parent's consent to the making of an adoption order in the event that it considers that a ground specified in Article 16(2) of the Order is met. The Trust relies upon Article 16(2)(b) in this regard maintaining that the Respondent Parents are unreasonably withholding their consent to the adoption of the two boys.

[17] The 'machinery' which the reasonable parent test represents has to assume convention compliance as a relevant consideration within this delicate balancing exercise. This thread has run through Northern Ireland's Family

Law decision making for more than a decade. In Re L and O (care order) [2005] NI Fam 18 Gillen J at paragraph 42 stated:

> *"It is difficult to imagine any piece of legislation potentially more invasive than that which enables a court to break irrevocably the bond between parent and child and to take steps irretrievably inconsistent with the aim of reuniting natural parent and child. I appreciate fully that the mutual enjoyment by parent and child of each other's company constitute a fundamental element of family life and that domestic measures hindering such enjoyment do amount to an interference with the right to such protection by Article 8 of the European Convention of Human Rights and Fundamental Freedoms..."*

The three elements of this difficult balancing exercise are therefore *'best interests'*, the *'reasonable parent test'* and *'proportionality'*.

[18] In accordance with Article 9 of the Adoption (Northern Ireland) Order 1987 the Court in deciding on any course of action in relation to the adoption of a child, shall regard the welfare of the child as the most important consideration. Consideration must be given to a child's welfare "throughout his childhood" when coming to a decision in relation to adoption.

[19] The test was considered in some detail in the decision of Morgan LCJ in *TM and RM (Freeing Order) [2010] NI Fam 23*. At paragraph 6 he noted the leading authorities on the test the court should apply are *Re W (An Infant)*, *Re C (A Minor (Adoption: Parental Agreement: Contact) [1993] 2 FLR 260)* and *Down and Lisburn Trust v H and R* which expressly approved the test proposed by Lord Steyn and Lord Hoffmann in *Re C*, ultimately referring to the 1971 dictum of Lord Hailsham of Marylebone LC in Re W:

> *"…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 Re D (Adoption: Parents' Consent) ("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 (An Infant)* [1971] AC 682;

'… two reasonable parents can perfectly well 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 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 on 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."

[20] In YC v United Kingdom (2012) 55 EHRR 33, the European Court of Human Rights set out (at paragraph 134):

"The Court reiterates that in cases concerning the placing of a child for adoption, which entails the permanent severance of family ties, the best

interests of the child are paramount. In identifying the child's best interests in a particular case, two considerations must be borne in mind: first, it is in the child's best interests that his ties with his family be maintained except in cases where the family has proved particularly unfit; and secondly, it is in the child's best interests to ensure his development in a safe and secure environment. It is clear from the foregoing that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, where appropriate, to 'rebuild' the family. It is not enough to show that a child could be placed in a more beneficial environment for his upbringing. However, where the maintenance of family ties would harm the child's health and development, a parent is not entitled under article 8 to insist that such ties be maintained."

[21] In Re B (A Child)(Care Proceedings: Threshold criteria) [2013] UKSC 33 the Supreme Court judges, whilst differing in some respects, expressed a shared view of 'proportionality' in the context of Article 8 of the European Convention as requiring nothing short of '*necessity*' when making a Care Order with a care plan of adoption. At paragraph 34 Lord Wilson noted that domestic law runs broadly in parallel with the demands of Article 8 when considering such matters. He stated:

"Thus domestic law makes clear that:

(a) it is not enough that it would be better for the child to be adopted than to live with his natural family…. and

(b) a parent's consent to the making of an adoption order can be dispensed with only if the child's welfare so requires.. There is therefore no point in making a care order with a view to adoption unless there are good grounds for considering that this statutory test will be satisfied. The same thread therefore runs through both domestic law and Convention law, namely that the interests of the child must render it necessary to make an adoption order."

Lord Clarke summed up the different approaches taken at paragraph 135 when he stated:

> *"However, there is a difference in principle between the approaches of an appellate court to the making of a care order adopted by Lord Wilson and Lord Neuberger on the one hand and Lord Kerr and Lady Hale on the other.*
>
> *I suspect that in the vast majority of cases that difference would not affect the ultimate disposal of a case of this kind, in which it is agreed on all sides that a care order cannot be made unless it is necessary in the best interests of the child. Nothing less than necessity will do, either under our domestic law or under the European Convention on Human Rights. Only in a case of necessity will an adoption order removing a child from his or her parents be proportionate."*

[22] In Re B-S (Children) [2013] EWCA CIV 1146 the Court of Appeal dismissed a mother's appeal against refusal of leave to oppose an adoption following a care order, on the basis that she had effected positive change. Munby P in considering Re B referred to the passage from Hale LJ (as she then was) in Re C and B [2001] 1 FLR 611 at paragraph 34 when she stated:

> *"Intervention in the family may be appropriate, but the aim should be to reunite the family when the circumstances enable that, and the effort should be devoted towards that end. Cutting off all contact and the relationship between the child or children and their family is only justified by the overriding necessity of the interests of the child".*

[23] Munby P, at paragraphs 26-29, analysed Lord Neuberger's decision in Re B as involving three principal elements:

(i) Firstly, that the child's interests in an adoption case are paramount but that these interests also include being brought up by his natural parents if that is possible.

(ii) Secondly, that the court must consider all options before coming to a decision. These options include the making of no order at one end of the spectrum to the making of an adoption order at the other. In between there may be such orders as return of the child to the parents under the auspices of a Supervision Order or placement with kinship carers.

(iii) Thirdly, that the court must consider what assistance the local authority could provide to the parents to assist them in discharging their parental responsibility towards the child.

[24] The test was considered again in CM v Blackburn with Darwen Borough Council [2014] EWCA Civ 1479. The Court of Appeal concluded that Re B had not changed the test or landscape for adoption. The "*nothing else will do*" test is a "*process of deductive reasoning*". The court should analyse all options and consider whether the Trust's request is a proportionate interference in the family life of the child.

> *"it does not require there to be no other realistic option on the table, even less so no other option or that there is only one possible course for the child. It is not a standard of proof. It is a description of the conclusion of a process of deductive reasoning within which there has been a careful consideration of each of the realistic options that are available on the facts so that there is no other comparable option that will meet the best interests of the child."*

[25] Re V (children) [2013] EWCA Civ 913 involved an appeal against the Trial Judge's decision to refuse a local authority's plan of adoption for 2 children aged 9 and 4 years. The Trial Judge refused to endorse a plan of adoption believing that long term foster care was the more appropriate option. The

Appellate Court reversed the findings of the lower court thereby allowing the appeal. At paragraph 95 Black LJ noted that she did not believe that *"fostering and adoption can, in fact, be equated in terms of what they offer by way of security"*. She went on to make observations about the comparisons between the two options at paragraph 96.

(i) *"Adoption makes the child a permanent part of the adoptive family to which he or she fully belongs. To the child, it is likely therefore to "feel" different from fostering. Adoptions do, of course, fail but the commitment of the adoptive family is of a different nature to that of a local authority foster carer whose circumstances may change, however devoted he or she is, and who is free to determine the caring arrangement.*

(ii) *Whereas the parents may apply for the discharge of a care order with a view to getting the child back to live with them, once an adoption order is made, it is made for all time.*

(iii) *Contact in the adoption context is also a different matter from contact in the context of a fostering arrangement. Where a child is in the care of a local authority, the starting point is that the authority is obliged to allow the child reasonable contact with his parents (section 34(1) Children Act 1989). The contact position can, of course, be regulated by alternative orders under section 34 but the situation still contrasts markedly with that of an adoptive child. There are open adoptions, where the child sees his or her natural parents, but I think it would be fair to say that such arrangements tend not to be seen where the adoptive parents are not in full agreement. Once the adoption order has been made, the natural parents normally need leave before they can apply for contact.*

(iv) Routine life is different for the adopted child in that once he or she is adopted, the local authority have no further role in his or her life (no local authority medicals, no local authority reviews, no need to consult the social worker over school trips abroad, for example)."

[26] In Northern Ireland our courts have taken full account of the developments in the Supreme Court decision and Court of Appeal in England and Wales. Maguire J in the Northern Ireland decision of *LC and RC v B McK [2014] NI Fam 12* at Para 17 referred to the cited cases and commented:

> *"In short there can be no serious doubt that in approaching the issue of adoption of a child by a stranger the intention of the Supreme Court was to set a high threshold which had to be met before an adoption order could be made."*

The Positions of the Parties and Approach of the Court

[27] The Trust has quite appropriately concluded that C and L each require long term stability and maintains its original plan for permanence by adoption as the preferred option. In the case of Re B-S the requirement was stressed for an analysis in the Trust case of the arguments for and arguments against all realistically possible placement options.

[28] The feasible options in this case are limited. The Trust position, supported by the Guardian, is that Adoption by the dually approved Carers is the only option. In other words, they say that "nothing else will do". The Respondent Parents each indicate that they want C and L to stay within their current placement until they are adult. The Respondent Mother is concerned about diminution of contact whilst the Respondent Father wishes to preserve his rights and to be informed in respect of, for example, medical issues. They oppose adoption and favour Long Term Foster Care. The prospective

adoptive parents express commitment to the children, regardless of whether that be in a long term foster placement or through adoption.

[29] It is argued on behalf of the Respondent Parents that, because they are acceptant of the fact that the children cannot be rehabilitated to their care, they are unlikely to disrupt a long term foster placement through court action. Track record cannot be ignored when predictions are made and the court is obliged to take proportionate account of the fact that the original Care Orders were the subject of appeal.

[30] In Re M-H [2014] EWCA Civ 1396 Macur LJ provided further assistance in respect of interpretation of Re B necessity. At Paragraph 8 he stated:

> *"[8] However, I note that the terminology frequently deployed in arguments to this court and, no doubt to those at first instance, omit a significant element of the test as framed by both the Supreme Court and this court, which qualifies the literal interpretation of "nothing else will do". That is, the orders are to be made "only in exceptional circumstances and where motivated by the overriding requirements pertaining to the child's best interests." (See In Re B, paragraph 215). In doing so I make clear that this latter comment is not to seek to undermine the fundamental principle expressed in the judgment, merely to redress the difficulty created by the isolation and oft subsequently suggested interpretation of the words "nothing else will do" to the exclusion of any "overriding" welfare considerations in the particular child's case.*
>
> *[9] It stands to reason that in any contested application there will always be another option to that being sought. In some cases the alternative option will be so imperfect as to merit summary dismissal. In others, the options will be more finely balanced and will call for critical and often anxious scrutiny. However, the fact that there is another credible option worthy of examination will not mean that the test of "nothing else will do" automatically bites.*

At paragraph 11 he continued:

> *[11] The "holistic" balancing exercise of the available options that must be deployed in applications concerning adoption is not so as to undertake a direct comparison of what probably would be best but in order to ascertain whether or not the particular child's welfare demands adoption. In doing so it may well be that some features of one or other option taken in isolation would produce a better outcome in one particular area for the child throughout minority and beyond. It would be intellectually dishonest not to acknowledge the benefits. But this is not to say that finding one or more benefits trumps all and means that it cannot be said that "nothing else will do". All will depend upon the judge's assessment of the whole picture determined by the particular characteristics and needs of the child in question no doubt often informed by the harm which s/he has suffered or been exposed to.*

[31] The general differences between long term foster care and adoption have been considered by the Court of Appeal in Northern Ireland and more recently by the Court of Appeal in England and Wales. In this jurisdiction in Down and Lisburn HSCT v H and R [2005] NICA 47(1) Nicholson LJ, in considering the relative benefits of adoption to long term foster care, referred to the judgment of Gillen (J as he then was) in Re Z and T - Freeing Application [2005] NI Fam 6 stating:

"Gillen J accepted that it has been identified that adoption:

(a) provides a permanent and secure care arrangement outside public care;

(b) facilitates lifelong 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;

But he also accepted that there are clear disadvantages to adoption:

(i) the disadvantage to the birth family and their loss of relationship with the child;

(ii) the child's loss of contact with its parents can lead to a deficit through the potential loss of identity;

(iii) the adoptive family does need to be thoroughly prepared to best meet the needs of the child."

[32] The general conclusions of Black LJ in Re V (above) closely reflect those set out by Gillen J (as he then was).

[33] The analyses of Gillen J and Black LJ are useful but do not release the court from the significant duty described in Re B-S to consider the pros and cons for C and L as individual children in detail. It remains the duty of the court to determine what course is in the *best interests* of each of the two children as part of a sibling group, whether such a choice is *proportionate* and whether the position of a Respondent Parent is beyond the ' *bands of reason'*.

[34] It was established in R1 Court Order: Freeing without Parental Consent [2002] NI Fam 25 that the logical approach is for the court to approach the relevant questions sequentially: namely;

(i) Which order is in the best interests of C and of L?

(ii) If it is adoption, are the Respondents withholding their consent unreasonably?

(iii) Is adoption a proportionate measure, in accordance with Re B and the further case law?

Which order is in the best interests of C and L?

[35] The options in this case, taking account of the conclusions which I have reached above, are effectively Adoption or Long Term Foster Care. Special Guardianship is not available in Northern Ireland, and neither Respondent has an identifiable family member capable of passing the necessary assessment. The Respondents themselves rule out rehabilitation and actively ask that the children remain with their current carers into adulthood. The relative advantages and disadvantages of an order for Adoption or a Care Order on foot of a plan for long term foster care therefore must be balanced.

[36] Within the Trust Statements of Facts there are detailed lists of the advantages and disadvantages for the adoptive option which the Trust and Guardian each support. I have considered both these checklists and the suggestions of the Respondent parents in this regard in the context of the welfare checklist as it applies to the individual needs, history, age and characteristics of each child. Having read all papers and reports in this case I identify the following as the primary (but not only) advantages of adoption in this case

(i) *Adoption would provide each child with a permanent and secure home within a family unit and in this case a very supportive wider family network, outside the public care system;*

(ii) *Both C and L would legally 'belong' to the adoptive family. This should strengthen C's sense of identity and provide him with stability, certainty, love and support (both emotional and practical) into adult life as part of an extended family network. It would provide L with parents who can meet his particular needs for therapeutic parenting and disability service advocacy and support into adult life ;*

(iii) *Given my findings on the evidence, it is my conclusion that the probability of placement breaking down is lower in adoption than in long term foster care;*

(iv) *If they are adopted, the children are less likely to be the subject of court disputes;*

(v) *Given that the prospective adoptive parents became involved with these children in the context of their own life plan to adopt, rather than foster, it is more likely that their commitment would withstand the challenges which raising this sibling pair might pose in future if they were their legal adoptive parents than if the children were with them on foot of a long term fostering arrangement;*

(vi) *The wider extended family of the prospective adoptive couple would gain legal kinship and might through legal kinship be more inclined to extend practical support to the working mother taking on two challenging children ;*

(vii) *C, aged 7, has an insight into the meaning of Adoption. He is demonstrating anxiety in respect of the risk of losing his new home and has expressed a clear wish to belong to the prospective adoptive family and take on its name. Adoption (an event at which he would be present) would give this child (who has suffered inconsistent care and neglect) a sense of security which he clearly needs, taking account of his age, understanding and what he has experienced.*

[37] I take account of the real disadvantages of an Adoption Order, including the loss of social services support in respect of contact, given that birth parent contact is in contemplation by both Guardian and Trust. I take account also of the financial implications for the carers, given that the Respondent Mother

has taken a career break but needs to return to work for financial reasons and will lose eligibility for fostering allowance if the children are adopted. In this context, however, I am principally concerned with the potential disadvantages to the children in respect of the following:-

(i) Each child would have limited connections with his birth family. Already C is demonstrating a level of concern for the wellbeing of the absent parent;

(ii) The children's legal status as a member of their birth family would be extinguished. This could undermine their sense of identity in later life.

[38] I am also mindful of the relative advantages and disadvantages of a Long Term Care Order.

Counsel for the Respondent Father made the following submission in this regard:-

"The advantages of long term foster care for the subject children are as follows:

- *The existing parental link with the children is maintained.*
- *Children's sense of identity is better maintained when parental link has not been severed.*
- *Contact levels, as yet not decided, would hopefully take place at least 3 times per year for the parents. If an adoption order is made this may be even as little as once per year. The responsibility passes to the carers and they become solely in control of contact. Under a long term fostering arrangement assistance via the Trust will remain available to all.*

- *The research shows there are comparable outcomes between long term foster care and adoption if the children are placed young and the research referred to by the expert and forwarded to the court supports this.*

- *From L's point of view he is likely to have considerable medical and therapeutic needs. Under long term foster care these services will be more readily available to him."*

Counsel for the Respondent Father continued:-

"In relation to the perceived disadvantages as outlined by the Trust:

- *It is submitted that the perceived continued interference in family life by social workers for C and L will not be as significant as suggested. The Trust can delegate parental responsibility to the carers on a number of issues. There is huge scope for limiting interference. The LAC's take place twice per year and the carers do not even need to attend they can give their input through the social worker. The decisions made at the LAC's are communicated to the carers.*

- *The yearly medicals are not overly intrusive. The children have had no issue with Social Work visits to date. In fact the Social worker seems to have a very supportive relationship. Professor Thoburn gave evidence that many children welcome the continued involvement of social services in their lives and do not see it as a disadvantage.*

- *A lot of reliance has been placed on the issue of the children particularly C seeking to call himself by the carer's surname. This is very easily remedied without dispensing with the parental link. The parents have both indicated their willingness and consent to permit a name change.*

- *Satisfactory outcomes for permanence are achievable through long-term foster care. It has been noted that both children particularly L have thrived in each of their previous foster placements and there is no evidence to suggest this placement is any different. It is correct that there has been a number of changes of placement but on each occasion the children have been placed together. The inter sibling bond has been noted to be the most important and consistent feature of the young children's lives. This will remain to be the case in long term foster care."*

[39] There is merit in the submissions of Counsel for the Respondent Father, although I do not accept the assertion that both children thrived in the kinship placement. I am also not satisfied that the point in respect of L accessing services more easily as a Looked after Child is supported in the evidence. Although Professor Thoburn's report refers to the English experience in this regard, Ms McKevitt's evidence in respect of the success of the dually approved female carer accessing services L needs was largely unchallenged. The most significant consideration is that if Long Term Care were the selected option, the blood tie would be maintained. Each child would retain his connections to his birth family and the Respondents would have input into decisions such as education.

[40] In Re V (above) Black LJ referred to some of the disadvantages of a child remaining subject to a Care Order. The practical effects are far reaching. The children would be subject to LAC reviews, annual medicals and corporate decision making. They would have regular visits by social workers asking how C, for example, feels about the significant adults in his life. There would inevitably be changes of social worker. I am confident that major decision making (in respect of schooling etc.) could be relatively collaborative in this case. There are, however, limitations imposed on children such as C simply on foot of their status as looked after children. At school C already refers to

his foster carer as 'Daddy', whilst using his first name at home. The boy is vigilant and demonstrably keen to 'fit in'. These restrictions mean even authorization of sleepovers and trips can be complex. Foster parents are now actually subject to safeguarding policies which regulate degrees of permitted expressions of affection.

[41] I have taken care in attributing appropriate weight to the evidence in respect of the pros and cons of each possible arrangement in deciding which can best serve the interests of each boy in his individual circumstances. C, in particular, has experienced inconsistent parenting. Both children are placed in a secure and nurturing environment. C has a clear need for reassurance. L has needs which are relatively unique and extremely well met by the female dually approved carer. I have accepted the evidence of Professor Thoburn in respect of the lack of statistically discernible emotional and educational wellbeing benefits as an outcome of adoption. Risk of breakdown (whilst lessened in a case of sibling placement as a group and in a case where a carer is committed to a child with disability) has to be assessed in the context of the differing but considerable challenges which each boy in this group presents. The court also has to take account of the potential consequences of placement breakdown in the individual circumstances of each child. In this case I cannot disregard the improbability of such good fortune striking twice for these children. Each of these children has a need for security. Adoption would provide each boy with a secure family and home throughout his childhood and support in adult life. It would protect him from the shortcomings of being brought up as a looked after child. Taking account of all the evidence and balancing the pros and cons of each available option (both the 'plums' and the 'duffs') I have reached the conclusion that adoption is in the best interests of each of these two children.

Is the consent of the Respondent Parents being withheld unreasonably?

[42] The conclusion that adoption is in the best interests the children is not itself decisive. The welfare principle is not the only consideration for a court in deciding whether or not to grant a Freeing Order. Ultimately the court is obliged to examine the circumstances by which a parent is withholding consent and ask, taking into account the welfare of the children, are their actions reasonable? This is an objective test.

[43] I have to consider, the Respondents having conceded that there is no prospect for rehabilitation, that currently the Respondents still attend supervised contact every six weeks. The maternal grandmother attends sometimes just before or after her daughter and sometimes overlapping, dependent on bus times. She was unsuccessfully assessed as a potential carer. The Respondent Mother sometimes takes C to a softball play area, if she can afford this, and sometimes simply plays with him outside the Family Centre. L likes to play 'house' and pretend to make tea. The evidence is that each child is fond of the Respondents and is pleased to see them, engages positively and parts easily. Neither contact nor the lack of contact per se decides the issue of whether a parent is unreasonably with holding consent to adoption but it is a factor which the court will look at in this context.

[44] The Trust plan post adoption appears to envisage potentially phasing contact down to once per year. Professor Thoburn deals with the perceivable merits and demerits of contact frequency/infrequency and favours three contacts per year, whether adoption or Long Term Foster Care are envisaged. The Respondent Father would also like 'box' contact.

[45] I remind myself of the dissenting, but helpful dictum of Baroness Hale, who in the **House of Lords decision in Down Lisburn Health & Social Services Trust –v- H & R UKHL 36 at para 23** stated that the court should approach the question of unreasonable withholding consent in this way:-

"Provided that the parent's decision is within the band of decisions which a reasonable parent might make at the time and in all the circumstances of the case, it is not for the court to substitute its own view".

[46] I have referred above at some length to way a court should approach the issue of whether or not a parent is unreasonable withholding consent to adoption as set out by Lords Steyn and Hoffman at page 272 and approved by Lord Carswell in the House Of Lord's decision in **Down Lisburn Trust –v- H & R [2006] UKHL 36:-**

> "The judge asking himself whether, showing 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".

[47] There is an established bond between the Respondents and C and L who were jointly their primary carers until they separated when C was two and L was one. They were in the sole care of their mother for a year thereafter, by which stage C was a bright three year old. The connection has been maintained through the current contact arrangements but that connection could be maintained at some level, by appropriate post adoptive contact.

[48] For a considerable time the Respondent parents have been aware that rehabilitation is not viable and they state their full acceptance of this position. They are aware that the Trust has had a plan for adoption since December 2013. Both are very content with the current placement with a couple who were matched specifically as prospective adoptive parents.

[49] The Guardian Ad Litem is firmly of the view that adoption is in the best interests of the children, but it must be remembered that she is advising the court as to the interests of the child and does not have to balance the rights of the parent.

[50] The question the court must ask itself is whether an objective reasonable parent could come to the decision in the circumstances of his case that it would be within the bands of reasonableness to withhold consent to adoption.

[51] That parent would have to ask himself whether the quality and amount of contact and connection which they currently have with each boy, in the absence of any prospect of rehabilitation, is sufficient to justify them refusing to give the children the opportunity of a permanent home and thus avoiding in future the vagaries of the care system. In reaching that conclusion they would be taking into account the age of C and L, and the fact rehabilitation is neither viable nor even an aspiration for either parent.

[52] While the court can appreciate the desire of a parent in the Respondents' situation to maintain frequent regular contact with their children, and attempt to maintain a significant connection, I do not believe that is sufficient reason to withhold consent to the adoption of C and L, particularly as this is clearly a case for direct post adoption contact. For my own part I see no reason why the Respondents, who have demonstrated that they can handle their emotions during contact and even encourage the children to regard their prospective adopters as parents, should not have direct contact three times a year, as this is recommended by Professor Thoburn and is not far from the suggestion of the Guardian and Ms McKevitt. Both parents have regularly maintained contact with the children and the point is well made in the evidence that contact should not fall too close to Christmas. It is always helpful for adoptive parents to have regular contact dates such as within 7 days either

side of Halloween or Holy Wednesday. Easter and Halloween are good times for parents to source interesting modest gifts and discuss plans to celebrate the events. A further session between the two birthdays has the advantages of leaving adoptive parents free to organise the summer and maintaining relations during the bleaker part of the year for absent birth parents. Birth parent contact should dovetail and potentially overlap, rather than taking place on separate days. The concept of 'Box' contact is quite resource intensive and is something of an anachronism in a digital age as the birth parents will have telephones and can easily take a photograph at contact.

[53] Both children need security and support through childhood and into adulthood. It is the view of this court that a reasonable parent should be able to appreciate this and recognise that it is in the best interests of C and L to be freed for adoption. It is therefore the conclusion of the court that the consent of the Respondent parents is being withheld unreasonably.

Is Adoption proportionate in this case?

[54] I have outlined the stringency of the test in respect of proportionality. C is a child who as the elder brother of a disabled sibling demonstrates signs of vigilance and insecurity. He is concerned that his third placement as a Looked after Child might break down and has a clearly expressed desire to be part of the family with which he is currently placed. He has, therefore, a quite exceptional need for nurturing parenting. L suffers from Agenesis of Corpus Callosum. Clear prognosis remains impossible. His needs are wide ranging. He has developmental delay. His circumstances are quite exceptional. Nonetheless, as I set out in paragraph 26 (above) the options available for the future care of the children are very limited. The court has approached the decision making process taking account of the age, background and needs of each child and an objective assessment of the pros and cons of what is available in terms of a structure, against the background of the children

having found what even the Respondents almost concede is an excellent match for their respective needs. In scrutinizing the arguments for and against the two remaining options earnestly and carefully I have reminded myself of the warning of Macur LJ in Re M-H [2014] EWCA Civ 1396 which I referred to at paragraph 28 above

[55] The options in this case are, as I have said, limited. The decision is one calling for anxious scrutiny. These boys each have unique and quite exceptional needs. The overriding need for C in this case is to be parented in a way which convinces him he has a secure home within a family to which he will belong forever. Looking at his particular needs, age and characteristics, I am satisfied that Adoption is the only option which will meet his immediate needs for stable, consistent, nurturing parenting , which he can be convinced will always be available to him, regardless of the challenges he and his brother may bring. It is therefore the conclusion of the court that C's is a case in which adoption is necessary and nothing else will do. Despite its draconian nature, I am satisfied that adoption is therefore proportionate and Convention compliant.

[56] The overriding need for L is somewhat different. He needs parenting which is therapeutic; informed and skilled in respect of his medical and developmental needs and his unpredictable potential needs. He needs parenting which is capable of advocating on his behalf in respect of disability services and/or medical intervention. His parenting needs are substantial and he needs above all to avoid placement breakdown. It is therefore the conclusion of the court that again in L's case adoption is necessary and nothing else will do. I am satisfied that it is proportionate and Convention compliant.

[57] As outlined above, I endorse the view of the Guardian and expert witness in respect of contact.

[58] I am therefore dispensing with the consent of the Respondent Parents to adoptions and I grant the applicant Trust a Freeing Order in respect of each child.

[59] The Guardian Ad Litem is discharged from these proceedings.

[60] I confirm that this is a case in which Article 3 Certification is appropriate, extending to both Solicitors and Counsel for all parties, save for the Trust and thank all Counsel for their considerable assistance.