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Kinship Care – Statutory Framework and Case Law

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The statutory duty on a HSCT to place looked after children in the care of a relative is found in article 27(2)(a) of the Children (NI) Order 1995:

> **27** (2) An authority shall provide accommodation and maintenance for any child whom it is looking after by -
>
> (a)placing him (subject to paragraph (5) and any regulations made by the Department) with:
>
> (i)a family;
>
> **(ii)a relative of his; or**
>
> (iii)any other suitable person,
>
> on such terms as to payment by the authority and otherwise as the authority may determine; …

Art 27(3) provides that any person with whom a child has been placed under art 27(2)(a) is referred to as an 'authority foster parent' – save for some exceptions e.g. where a child is placed at home with a parent[1].

A child is 'placed' by a HSCT with a relative under regulations made by the Department[2]. There is therefore a necessity for a relative with whom the child is placed to be approved as a kinship foster carer by the HSCT, otherwise the placement is 'unregulated'.

[1] Art 27(4) – Children (NI) Order 1995
[2] Arrangements for Placement of Children General Regulations (NI) 1996.

Within article 27 there is also a parallel duty on a HSCT when providing accommodation to a child to, '*so far as is reasonably practicable and consistent with his welfare*', accommodate that child with a sibling if they are also being provided by the HSCT with accommodation.[3]

These duties are often complimentary and placements of siblings together in kinship care is achieved in many cases.

In other cases, there is a clash and the HSCT and ultimately the court has had to decide where the priority lies – placing siblings together or placing a child in kinship care.

In the following cases the overarching principles of Re B[4] resonate – even in those which pre-date that judgment! There is and has always been an emphasis on achieving an outcome in the best interests of the child, balancing the competing interests and ensuring the overall decision is compliant with the statutory duties under the Human Rights Act.

Case 1:

Belfast HSCT v RMB, MMcC and MG [2013] MAG 8835 – Maguire J

This is a judgment of Maguire J delivered on 15 March 2013. The facts are that a 1 year old child was presented to hospital with a number of non-accidental injuries. The child was placed in foster care and in the course of proceedings the child's paternal grandmother sought to be assessed and then was approved as a kinship carer for her grandson.

[3] Article 27(8).

[4] B (A Child) [2013] UKSC 33

The court conducted a hearing to determine whether the child, who by then was 2 years old, should move from his foster placement, where he had been for approximately 11 months to live with his grandmother while assessments of the parents were completed. It was envisaged that the assessments would take many months.

This plan was contested by the mother who had a poor relationship with the grandmother.

In this judgment Maguire J made a number of important statements:

i. Provided there is a suitable kinship carer available, it seems to the court that a placement with such a carer is likely to be preferable to the continuation of what has already been a lengthy placement of J in foster care.
ii. The court regards a move to kinship care on an interim basis, all other things being equal, as being in J's best interests, consistent with the thrust of the law in this area and, in particular, the provisions of Article 27 of the Order.

Case 2:

AC and CH's Applications [2015] NIFam 9 – O'Hara J

This case concerned parallel applications for freeing orders relating to 2 maternal half-siblings called AC and CH. They were Slovakian citizens born to Slovakian parents in Northern Ireland. AC was born in 2007 and CH was born in 2010.

The safeguarding concerns related to parental domestic violence and alcohol misuse and neglect.

The children were removed from their mother and CH's father's care in February 2012 on foot of an EPO.

The children had been placed separately for approximately 4 weeks but then brought together in one placement and remained together from that point on.

The applications for freeing order were made in August 2014 - more than 2 years after the children's placement in foster care.

In October 2014 they were moved to a dually approved placement with a couple who, if the freeing order was granted, intended to apply to adopt the children.

The mother did not actively oppose the applications and she was anxious that AC and CH should be kept together in the one placement.

AC's father took a similar position.

CH's father, however, did oppose the application and he did so on the basis that his brother and sister-in-law i.e. the child's paternal uncle and aunt who lived in Slovakia, had come forward and were willing and able to provide the child with a kinship placement. However, they were not willing to also provide a placement to AC, who was not their biological relative. This couple had also come forward at an earlier stage but assessment of them seemed to have run aground.

CH's father proposed that kinship care should be the plan for his son, even if that meant separating CH from AC. He advanced this case on the basis of the following arguments:

i. The legal test of necessity (from Re B) could not be satisfied when there was a kinship placement available.

ii. The Trust was was wrong in treating the 2 applications as one and should have considered each child's circumstances separately – presumably prioritising the potential kinship placement for CH over the established sibling relationship which he had with AC.

iii. There was a lack of evidence of the harm to CH if separated from AC and vice versa if CH was placed with his aunt and uncle in Slovakia.

iv. In any event, if CH was placed with them, the aunt and uncle had proposed that they would bring CH to Northern Ireland to see AC 2-3 times each year.

v. An adoptive placement of CH in Northern Ireland would not meet CH's cultural needs – he would lose his Slovakian identity and culture.

O'Hara J in considering the pros and cons of the options for CH, referred to the Supreme Court decision of Re B. He acknowledged that in most cases a:

> "…viable kinship placement is preferred to a route which leads to adoption by strangers or non-family members. That is because there is generally less interference with family rights if a child stays within the extended family than if the child is placed outside it."

O'Hara J acknowledged that in most cases placing a child for adoption when a kinship placement is available would be an '*excessive and disproportionate*' step BUT not in this case.

The Judge set out a number of the issues which led him to that conclusion.

i. The Judge questioned the extent of the family relationship that was being potentially lost to CH. He said that this relationship was '*at risk*

of being overstated'. This was after all an uncle who had no existing relationship with the child.

ii. There was a lack of up to date information from or about the uncle – he had not played an active role in the proceedings and there was no statement of evidence from him.

iii. There was a lack of information about the family in Slovakia – whether the lack of English speakers would be an issue for the child and how that could be remedied.

iv. A significant issue was that the uncle and aunt were clear that they could not provide a placement for both children. A consequence of their position, which the Judge did not criticise them for taking, was that the children would be separated and their bond would be hugely weakened.

The Judge highlighted that the essential problem with the father's case was that to achieve a kinship placement for CH would simultaneously separate him from his brother who was the most significant family member in his life – they had been together from birth save for one 4-week period:

> "…there is a relationship between CH and AC which is of enormous importance to each of them. That relationship would be lost or at least substantially damaged if CH went to Slovakia, even if AC followed him there to an institution. There is no near equivalence between the actual relationship between CH and AC and the potential relationship between CH and his aunt and uncle – the established value of the former relationship greatly outweighs the potential but unknown value of the latter."

O'Hara J made orders freeing both children for adoption.

Case 3:

<u>In the matter of Breno (a pseudonym) (Care Proceedings: Portuguese kinship placement)</u> [2010] NIFam 2 – Stephens J

This case concerned a child, born in Northern Ireland, but a Portuguese national of African origin, who was the subject of a care order application. The care plan for the child was either adoption in Northern Ireland or placement with a kinship carer in Portugal.

There was no established sibling relationship for Breno in Northern Ireland. A kinship placement, with a family member in Portugal was prioritised for him. The court recognised the clear benefits to the child of being raised within his family of origin, even where he had no established relationship with them.

<u>Cases from England and Wales:</u>

These cases should be considered carefully in light of the different statutory provisions in England and Wales regarding 'placement orders', the statutory checklist and the tests applied. However, there are overarching principles which are applicable.

<u>Case 4:</u>

<u>A and B v Rotherham Metropolitan Borough Council</u> - [2015] 2 FLR 381
Holman J at first instance in the High Court.

The child concerned, C, had been removed from the care of his mother at birth and was placed in foster care. All professionals and the court accepted the mother's assertion that her partner was the child's biological father.

The local authority applied for a care order and a placement order allowing the child to be placed for adoption. At just 7 months of age C was moved to an adoptive placement and 3 months later the carers made their application to adopt.

It was at this stage that a man came forward claiming to be the child's biological father and DNA testing confirmed this to be the case.

The biological father accepted that he could not care full time for the child himself, but strongly contended that C should move to live with his sister, the child's paternal aunt. The father relied on a number of reasons for this including the fact that such a placement would give the child the opportunity to be raised within his biological family and enjoy a normal relationship with his father, a paternal half-sibling and other members of the extended paternal family. The father also raised a cultural/ethnicity issue as he was of African origin and the child's proposed adopters were of white European origin.

When the case came on for hearing the child was 20 months old and had been with his carers for 13 months. He was described as very well attached to them and they were described as the 'perfect adopters'.

It was acknowledged by all that had the father come forward at a much earlier stage, then it was highly unlikely that the child would have been placed for adoption and would almost certainly have been placed with the aunt as she had been assessed as a suitable carer for the child.

The essential question for the court was whether C's welfare throughout his life (using the English test) was safeguarded and promoted by him remaining with his potential adoptive carers, his *de facto* parents for 13 months, or whether the adoption order should be refused and he should be moved to live with his aunt with a transitional arrangement being made and supports put in place.

The parties were divided but so were the professionals involved including the social workers for the carers and the aunt, expert witnesses and the child's guardian.

Holman J approached the case by taking both a short-term and a long-term view with an analysis of the pros and cons of the various options. In a lengthy judgment, he ultimately came down on the side of the kinship placement, despite the fact that this would inevitably lead to the removal of the child from the placement in which he had resided for the previous 13 months.

The Judge's conclusion was that the obvious benefit to the child of being raised within his birth family outweighed the many positives of his current placement.

This approach and outcome can be contrasted with the next case, also from England and Wales. These contrasts emphasise the very fact specific nature of each case.

Case 5:

W (A Child) [2016] EWCA Civ 793 (Court of Appeal)

The child, A, was born on 1 May 2014. Neither of her parents were in a position to look after her and she was placed with foster carers when she was one day old.

The local authority had tried to identify family members but due to the non-cooperation of the parents this could not be progressed.

On 21 October 2014 a care and placement order was made. A was 5 months old.

In December 2014 A was placed with her prospective adopters.

A's parents had remained in a relationship and in June 2015 they had another child, a boy called J. When enquiries about kinship options were made, this time the parents identified J's paternal grandparents. Contact was made with them and J was placed within his paternal family.

As a result of their involvement, the grandparents for the first time discovered that they also had a granddaughter A.

On 1 April 2015 A's carers made an application to adopt her.

A's father and her grandparents made known their opposition to the adoption application. The grandparents, supported by their son, applied to the court for a special guardianship order. Their application was successful. The adoption application by A's carers was dismissed and on 20 May 2016 a special guardianship order was made in favour of A's grandparents.

The prospective adopters appealed.

The appeal raised a number of issues and 3 are relevant here:

1. What is the correct approach to be taken in determining a child's long-term welfare once the child has become settled in a prospective adoptive home and, late in the day, a viable family placement is identified?

2. Is there a natural family presumption/right?

3. What is the application of the Supreme Court judgment in *Re B* [2013] UKSC 33 ("nothing else will do") in that context?

McFarlane LJ gave the judgment of the court and I highlight the following statements:

i. Where an application for a placement order is made, the balance to be struck naturally falls towards a kinship placement where the relatives have been assessed as being able to provide good, long term care for a child within the family.

ii. The reason for this is that the question of the likely harm to the child as a result of leaving their placement will normally not arise at that stage given that the existing placement is more likely to be temporary and the child will have to move in any event either on to an adoptive placement or back to the natural family.

iii. Where a child has been placed in a long-term adoptive placement and significant time has passed, and it can be seen that the child has established the much-desired level of secure, stable and robust attachment, the welfare balance to be struck is more difficult when a family member comes forward at this late stage to offer the child a home.

iv. The balance to be struck must include consideration of the child's new circumstances and the impact of that change on him or her.

v. The court will almost invariably require some expert evidence of the strength of the attachment that exists between the particular child and the particular carers and the likely emotional and psychological consequences of ending it.

In this case McFarlane LJ looked at the position of the Trust and GAL who had supported the placement of the child with her paternal grandparents. He felt that they had fallen into error by considering that

there was in law a presumption in favour of the child residing with the biological family.

McFarlane LJ set out the legal position on the existence of a legal presumption in favour of the natural/biological family:

> "71. The repeated reference to a 'right' for a child to be brought up by his or her natural family, or the assumption that there is a presumption to that effect, needs to be firmly and clearly laid to rest. No such 'right' or presumption exists. The only 'right' is for the arrangements for the child to be determined by affording paramount consideration to her welfare throughout her life (in an adoption case) in a manner which is proportionate and compatible with the need to respect any ECHR Art 8 rights which are engaged.
>
> 73. It may be that some confusion leading to the idea of there being a natural family presumption has arisen from the use of the phrase 'nothing else will do'. But that phrase does not establish a presumption or right in favour of the natural family; what it does do, most importantly, is to require the welfare balance for the child to be undertaken, after considering the pros and cons of each of the realistic options, in such a manner that adoption is only chosen as the route for the child if that outcome is necessary to meet the child's welfare needs and it is proportionate to those welfare needs."

McFarlane J also commented on the "nothing else will do" test highlighting:

> **'...**The phrase is meaningless, and potentially dangerous, if it is applied as some freestanding, shortcut test divorced from, or even in place of, an overall evaluation of the child's welfare…
>
> 69. Once the comprehensive, full welfare analysis has been

undertaken of the pros and cons it is then, and only then, that the overall proportionality of any plan for adoption falls to be evaluated and the phrase "nothing else will do" can properly be deployed. If the ultimate outcome of the case is to favour placement for adoption or the making of an adoption order it is that outcome that falls to be evaluated against the yardstick of necessity, proportionality and "nothing else will do".'

It seems to me, however, that if a viable kinship option is available, and the impact of moving a child to that placement can be managed, then such a plan would be the proportionate response, rather than a plan of stranger adoption.

Case 6:

B (A Child) (care proceedings) [2018] EWCA Civ 20

Sir James Munby, President of the Family Division

This was an appeal from an order of the Family Court at Leicester hearing care proceedings in relation to a little girl, B, who was born in the spring of 2016. B had an elder full brother, H, who was born in 2015. He was adopted in 2016. The essential issue before the Judge was whether B should be placed with H's adoptive parents or with her father's cousin, I, and her partner R.

The Judge gave judgment and made her order on 21 August 2017. She made care and placement orders with a view to B's adoption by H's adoptive parents.

The Court of Appeal was hugely impressed by the reasoned decision of the Judge at first instance and quoted extensively from it. The appellant's criticism of the judgment was on a number of fronts including the ground that the Judge had erred in prioritising the child's relationship with his sibling H, who had already been adopted, over the relationship with the wider family if B was placed with her father's cousin.

The Appeal Court disagreed holding that the Judge had not prioritised one over the other but treated both as viable and realistic options for B. She had carefully evaluated the competing evidence and arguments before coming to her conclusion, acknowledging the argument that:

> "…to prioritise the relationship with a brother will be at the expense of all other family relationships. They do not have an existing relationship which can currently be given weight to, but rather the potential for a unique relationship lasting throughout their lives which the Guardian and social worker say should be prioritised."

What is clear from this case is the importance which the court attached to the careful analysis and balancing of the options before coming to a conclusion as to what the right outcome would be for the child.

Andrew Magee BL
21 May 2019