

C . C . Bord Uchtala

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1984 No. 86 sp

THE HIGH COURT

IN THE MATTER OF THE ADOPTION ACTS 1952 TO 1976

BETWEEN:

K.C. AND A.C.

Applicants

and

AN BORD UCHTALA

Respondents

and

M.C. AND M.C. AND

AN tARD-CHLARAITHEOIR

Notice Parties

Judgment of Mr. Justice Lynch delivered the 10<sup>th</sup> day of August, 1984.

Preliminary

This case concerns the future life of a child who is a girl and who is hereinafter referred to as the child.

The applicants are the prospective adopting parents of the child and are hereinafter collectively referred to as the adopting parents and individually as the adopting father and the adopting mother respectively.

The respondents are An Bord Uchtala hereinafter referred to as the Board but the real respondents are notice parties, namely the natural parents of the child who are hereinafter collectively referred to as the parents and individually as the father and the mother respectively.

The proceedings commenced by Special Summons issued on the 7th February, 1984 between the adopting parents as applicants and the Board

as respondents in which, inter alia, the adopting parents sought an order pursuant to Section 3 of the Adoption Act 1974 authorising the Board to dispense with the consent of the mother to the making of an Adoption Order in favour of the adopting parents in respect of the child and giving custody of the child to the adopting parents. The Special Summons was supported by an affidavit sworn jointly by the adopting parents on the 3rd February, 1984.

Subsequently the mother was added as a notice party and a replying affidavit was sworn by her on the 21st May, 1984.

The matter came for hearing on oral evidence before me on Wednesday and Thursday, the 6th and 7th June, 1984. On Thursday the 7th June, 1984 I added the father as a notice party on his consent given by Counsel and Solicitor instructed by the mother in these proceedings who are also instructed by the father and by consent I dispensed with the service of any documents on or by him. On the same day I added An tArd-Chlaraitheoir as a notice party and made an order prohibiting him from re-registering the birth of the child pending the outcome of these proceedings and until further order.

The oral evidence concluded on the 7th June, 1984 and I heard legal submissions from Counsel for the parties on the 12th July, 1984.

The Facts

The child was born on the 25th September, 1982. It was cared for by the mother for one week during her stay in the Nursing Home and was then placed with foster parents with whom it remained for just short of three months.

On the 22nd December, 1982 the child was placed for adoption with the adopting parents and has been with them ever since and they applied to adopt the child in February, 1983.

The adopting father was born in 1955. The adopting mother was born in 1951. The adopting parents married in 1977. It transpired that the adopting parents were unable to have children of their own and accordingly they decided to adopt a child or children.

They first adopted a boy who had been born in 1981. The boy was placed with them for adoption in the month of June 1981 and an Adoption Order was duly made thereafter. This adoption has been eminently successful and since the child has joined the home of the adopting parents in December 1982 she and the boy have become as sister and brother, the children of the adopting parents.

No issue was raised either in the pleadings, affidavits or in the course of the oral evidence before me as to the suitability of the adopting

parents to adopt the child and it is manifest that they are of excellent character and disposition and suitable to adopt the child. As no issue was raised as to their suitability it is not necessary for me to review the evidence which establishes their many attributes that qualify them to be adopting parents.

The Endorsement of Claim on the Special Summons includes a claim for a declaration that the mother has abandoned her rights to the child. It seems to me that this claim inferentially questions the suitability or fitness of the mother to have custody of and/or to rear the child. It is therefore necessary to consider the mother and her circumstances in somewhat greater detail than was necessary in the case of the adopting parents.

The mother was born in 1941. Her father was a bank official and the family comprising her father and mother, herself being the eldest child, and two brothers lived in a provincial town. The mother was educated to leaving certificate standard in a convent boarding school and thereafter pursued third level education for three years but did not obtain a degree. Her student life ended about 1963 and she was then intending to seek employment when her mother became seriously ill. As a result the mother had to stay at home to look after her mother and thus lost the opportunity

of getting paid employment.

At the same time her father was suffering from a heart condition from which he died suddenly in 1976. Her mother died in the summer of 1981 whereupon the mother became the absolute owner of the house in which she had been living with her parents since in or about 1962, her two brothers having long since married and gone to live elsewhere. In addition to the house the mother was also left by her parents sufficient means to enable her to live comfortably and in addition to support, rear and educate the child.

The mother had known the father for some years before her mother died. Subsequent to the death of her mother the mother became intimate with the father in late 1981 and became pregnant by him with the child in December, 1981.

Both during the pregnancy and thereafter the mother wished to keep and rear the child herself but she decided against doing so for the sake of the child having knowledge of cases where young illegitimate children being reared by their unmarried mothers had been treated cruelly by the society in which she lived. Accordingly she placed the child in fosterage on leaving the nursing home: she consented to its placement for adoption in December, 1982: and she consented to its adoption in

February, 1983. The mother ultimately withdrew her consent to the adoption of the child in correspondence and discussions with the Board and with a social worker employed by the Adoption Society between December 1983 and February 1984.

The mother refused an offer of marriage by the father during her pregnancy because she did not want to marry at a time when the father might marry her more because of the pregnancy and the pending birth of the child than because of a real wish to marry her for herself. The mother and the father continued to associate and she became pregnant by him again in February, 1984 of a child which is expected in October, 1984. The mother and the father intermarried on the 26th day of March, 1984.

A conflict arose on the evidence of Dr. Paul McQuaid on the one hand and of Mrs. Anne Murphy, social worker and Ms. Marie Louise Colbert, senior social worker, on the other hand as to the stability of the mother's character. Having heard not only the evidence of these three witnesses but also of the mother herself I am quite satisfied that the mother is of stable character and sound common sense. She is an intelligent and affective person and insofar as she was uncertain at times as to what she should do in relation to the child this was due to the conflict between her longing to keep and rear the child herself and her belief that

adoption rather than being reared in a one parent family would be best for the child in the social climate in which she lived.

I am satisfied that the mother never abandoned or deserted the child or abandoned her rights to the child and that she is a fit person to have custody of and to rear the child.

The father was born in 1926. He was previously married and has four grown up children, all of whom are self supporting. His first wife died in 1979 after an illness of some ten years duration during which time the father looked after his wife and four children. He is a self employed man of stable character and sound common sense. He always acknowledged that he was the father of the child and he is a fit person to have custody of and to rear the child.

At the time of their marriage on the 26th of March, 1984 neither the father nor the mother was aware of the provisions as to re-registration of the birth of the child in the Legitimacy Act 1931 or the Adoption Act 1964. Having been advised as to these provisions they applied to re-register the birth on the 6th of June, 1984 shortly before the commencement of the hearing before me as a result of which I made the order already referred to prohibiting the re-registration of the birth

pending the determination of these proceedings.

The Law

In the course of submissions by Counsel on behalf of the parties I was referred to Articles 40, 41 and 42 of the Constitution, to the Adoption Acts 1952 to 1976 and to the following decisions of the Superior Courts:

In re: O'Brien an infant (1954) I.R. 1

Ryan -v- Attorney General (1965) I.R. 294

In re: J. an infant (1966) I.R. 295

The State (Nicolaou) -v- An Bord Uchtala (1966) I.R. 567

M. and M. -v- An Bord Uchtala and Attorney General (1977) I.R. 287

S. -v- Eastern Health Board, Finlay P. 28th February, 1979

G. -v- An Bord Uchtala & Ors. (1980) I.R. 32

Mulhall -v- Haren (1981) I.R. 364

McC -v- An Bord Uchtala (1982) ILRM 159

McF -v- An Bord Uchtala (1983) ILRM 228, and

N.B. and T.B. -v- An Bord Uchtala, McWilliam J. 13th February, 1983

Prior to the enactment of section 3 of the Adoption Act 1974 the



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natural mother of an illegitimate child had an absolute right to refuse or withdraw her consent to the adoption of her child whereupon no Adoption Order could be made. It was submitted on behalf of the parents that the problem which section 3 of the Adoption Act 1974 was designed to remedy was the situation which arose where the natural mother would neither consent to the adoption of her child nor undertake the task of rearing the child herself, thus leaving her child and the prospective adopters in a very unsatisfactory situation. It may be that the foregoing was the main problem motivating the enactment of section 3 of the Adoption Act 1974 but the section as enacted has a wider application. Nevertheless the section must be read consistently with the continuing right of a natural mother to refuse or withdraw her consent to the adoption of her child without such refusal or withdrawal being liable to be automatically overridden by an order of the Court under the section should the prospective adopters apply for such an order. Section 3 of the Adoption Act 1974 does not purport to repeal or abolish the natural mother's right to refuse or withdraw her consent to the adoption of her child and indeed that right has been reiterated in section 3 (1) (c) (i) of the Adoption Act 1976.

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The Court must therefore respect a natural mother's right to refuse or withdraw her consent to the adoption of her child and should only override such refusal or withdrawal where the particular circumstances of the case make it clear that it is necessary for the welfare or in the best interests of her child to do so. In this case it is not clear that it is necessary for the welfare or in the best interests of the child to override the mother's withdrawal of her consent to the adoption where there now exists a stable and prosperous home available to the child with the parents. Or to quote from the judgment of Finlay P. in G. -v- An Bord Uchtala at page 49 of the report:-

"I am clearly satisfied on the evidence before me that the welfare of this child does not in any sense overwhelmingly require that she should remain in the custody of her present custodians and not be returned to the custody of her mother."

Furthermore, there can be no doubt but that the child has been legitimated by the marriage of the parents and that these three persons now constitute a family within the meaning of that term as used in Articles 41 and 42 of the Constitution. See in re: J. an infant above.

Were it not for my order prohibiting the re-registration of the

birth of the child such re-registration would probably have been effected by now in which event the child would no longer be capable of being adopted. As re-registration has not in fact been completed by virtue of my order the child remains capable of being adopted but in considering whether to make an order under section 3 of the Adoption Act 1974 the Court must bear in mind the provisions of Articles 41 and 42 of the Constitution.

The law of this State made no provision whatever for the adoption of children until the enactment of the Adoption Act 1952. Adoption is therefore the creature of statute and exists only insofar as the statutes and of course the Constitution provide for and permit it. Section 10 of the Adoption Act, 1952 provides, inter alia, that an Adoption Order shall not be made unless the child is illegitimate or an orphan. By virtue of this section once a child was legitimated under the provisions of the Legitimacy Act 1931 by the subsequent marriage of its parents it became incapable of adoption. See in re: J. an infant and M. and M. -v- An Bord Uchtala & Ors. above.

Section 2 of the Adoption Act 1964 altered this situation where the birth of the illegitimate child had not been re-registered notwithstanding

the subsequent marriage of its parents. Such failure to re-register, apart from ignorance of the statutory provisions as to re-registration, would probably arise most often where the father did not acknowledge his paternity or even though acknowledging his paternity did not wish to accept responsibility for rearing his child. Neither of these situations arises in this case.

Section 2 (1) of the Adoption Act 1964 concludes with the proviso "that the father of the child gives his consent to the making of an Adoption Order or such consent is dispensed with in accordance with section 14 of the Principal Act." By the interaction of this proviso and section 3 of the Adoption Act 1974 the consent of the father to the adoption of the child may be dispensed with by the Court if the father agreed to the placing of the child for adoption.

The onus therefore lies on the adopting parents to prove that the father agreed to the placing of the child for adoption before they can invoke the jurisdiction conferred on the Court by section 3 of the Adoption Act 1974. The adopting parents case on this issue is that the father's agreement to the placing of the child for adoption should be implied from the circumstances of the case. It is not suggested that the

father consented to the actual adoption of the child as distinct from agreeing to the placing of the child for adoption.

The adopting parents case is that the father acquiesced in the placing of the child for adoption by the mother and that it should therefore be inferred that he agreed to the placing of the child for adoption. However, the father had no power to prevent the mother from placing the child for adoption when she did so. See the State (Nicolaou) -v- An Bord Uchtala above. Nevertheless, even though the father had no power to prevent the mother from placing the child for adoption, the adopting parents correctly submit that the father could positively agree to the placing of the child for adoption. The Court should not however infer such an agreement on the part of the father from acquiescence in the mother's decision to place the child for adoption when he had no power to prevent such placing by her as readily as it might otherwise draw such inference if the father had power to prevent such placing of the child for adoption.

I do not think that the facts of this case justify an inference that the father agreed to the placing of the child for adoption within the meaning of that term as used in section 3 (1) of the Adoption Act 1974.

It follows that the powers conferred on the Court by section 3 (2) of the Adoption Act 1974 do not arise in this case for want of the conditions precedent to such powers as contained in section 3 (1) of that Act.

The only proceedings before me are those entitled as above in which the primary relief sought by the adopting parents was an order under section 3 of the Adoption Act 1974. It follows from the foregoing judgment that I must refuse the order sought to authorise the Board to dispense with the consent of the parents to the making of an Adoption Order in respect of the child and that I must also refuse the order sought granting custody of the child to the adopting parents. I am informed that other proceedings have been instituted claiming general custody of the child and I assume that these proceedings have been issued on behalf of the parents. It is unfortunate that these proceedings were not ready to come before me for trial concurrently with the present proceedings so as to achieve finality in the matter. It is most undesirable that there should be any further significant delay in determining what should be the future for the child. The parties indicated at the outset that this case may well go on appeal to the Supreme Court no matter which way I decided it but even if that is so it seems to me very desirable that the parties should endeavour to arrange that the child be introduced to the

parents through the Adoption Society whilst preserving anonymity as between the adopting parents and the parents. I would hope that some such arrangement might be worked out between the parties and their legal advisers.

The case is one where it was of course completely proper for the adopting parents to bring the proceedings and I accordingly certify to this effect and that it is a case in which the Attorney General's scheme providing for costs should operate.



Kevin Lyne