[2020] IEHC 419

THE HIGH COURT
FAMILY LAW

[2020 No. 17 M]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 54(2) OF THE ADOPTION ACT 2010 (as amended) AND IN THE MATTER OF M.L. A MINOR

BETWEEN

CHILD AND FAMILY AGENCY
AND
G.K. AND C.K.

APPLICANTS

AND

THE ADOPTION AUTHORITY OF IRELAND AND M.L.

RESPONDENTS

JUDGMENT of Mr. Justice Jordan delivered on the 23rd day of July 2020

1. These proceedings were commenced by way of special summons which was issued on the 4th of March, 2020. The first named applicant is a statutory authority established under the Child and Family Agency Act 2013. The second and third named applicants are a married couple who reside together in Co. Dublin. They are the foster carers and prospective adoptive parents of M.L., the minor named in the title of the proceedings.

2. The first named respondent is the Adoption Authority of Ireland and it was established and carries out statutory functions under the Adoption Act 2010, as amended. The second named respondent is the birth mother of M.L. and she also resides in Dublin.

3. M.L. was born on the 4th November 2002. She was placed in foster care when she was just four days old. The first named applicant says that the placement in foster care was pursuant to a voluntary arrangement with the birth mother. This is disputed by the birth mother.

4. The birth mother was born on the 4th of February, 1970 and M.L. is her second child. She also has a son, M., who was born in 1995. There were concerns about the safety and care of M. when he was a child and the evidence indicates that he was placed in the care of his father, who did not live with the birth mother, as a private family arrangement. The evidence of the birth mother, which is not contradicted, is that her son was returned to her in 2010 when he was 14 years of age and continues to reside with her. According to the birth mother, she reared him from then onwards and steered him through difficult adolescent years. She says he is currently in employment and that she has a close relationship with him. It is a curious feature of this case that the first named applicant appears to know little about M. and of his progress in life. Given the circumstances in which M.L. was taken into care and has remained in care one would have thought that the first named applicant would have monitored the progress of the son of the birth mother and be able to provide some evidence in that regard. Very little information is provided by the first named applicant in relation to the son, although there is some reference to the granting of interim care orders in respect of M. in 2000/2001.

5. The evidence shows that the birth mother became extremely unwell after the birth of her son. She was admitted to a psychiatric hospital on an involuntary basis in August 2000 and a diagnosis of schizophrenia was made. It is clear from the evidence that the birth mother was unable to look after her daughter when her daughter was born in 2002. It is also apparent that the mother of the birth mother (the 'grandmother') had previously raised concerns about the safety and care of M., as had the public health nurse. The evidence indicates that the grandmother was with the birth mother at a meeting, apparently in the maternity hospital, on the 5th November 2002 and appeared to encourage her daughter to sign M.L. into care as she was concerned regarding the birth mother's ability to look after the child. The evidence establishes that M.L. was signed into voluntary care by the birth mother on the 8th November 2002 for an agreed period of six months. The birth mother has raised an issue as to the validity of the original voluntary care agreement which was entered on the 8th November 2002, in circumstances where she was then suffering from a severe mental illness, with a diagnosis of schizophrenia. This is not an issue for determination in these proceedings. If it was an issue for determination it would be determined by reference to the medical evidence available in relation to the birth mother's capacity or lack of capacity to understand and to enter into such a binding legal agreement at the time. The fact that the birth mother was unable to look after her new born child and was suffering from schizophrenia for which she was receiving treatment does not in itself prove lack of capacity. It is worth noting also that care proceedings were subsequently litigated in the District Court.

6. It appears that M.L. was subject to court proceedings from the 23rd April 2004 onwards as follows;

Interim Care Orders were obtained on the following dates:

23rd March, 2004, 20th April, 2004, 18th May, 2004, 15th June, 2004, 13th July, 2004 (two-month order), 14th September, 2004, 12th October, 2004, 9th November, 2004 and 7th December, 2004.
A Care Order was granted on the 17th January 2005 for a two-year period until the 17th January 2007.

Further Interim Care Orders were granted as follows:

16th January 2007, 14th February 2007, 21st March 2007, (three-month order).
A full Care Order was granted on 25th June 2007 until M.L. is 18 years old.
The second and third named applicants were granted enhanced rights in the District Court under s.43A of the Child Care Act 1991 on the 18th December 2015.

7. The birth mother did have legal representation during the District Court proceedings although there were some gaps in the legal representation. She was consistent in her opposition in the Care Order proceedings.

8. Unfortunately for the birth mother she had multiple so-called "negative symptoms" of schizophrenia, including decreased energy, decreased spontaneity, decreased ability to initiate and complete complex tasks and decreased speech with a degree of social withdrawal. These symptoms impacted severely on her ability to care for a young child and there is no real contest but that the birth mother was unable to do so when M.L. was young. She was nonetheless able to seek and attend access even if it was difficult on both sides.

9. The evidence does show that the birth mother did improve with treatment. Correspondence received from the treating psychiatrist by the first named applicant tracked this improvement. An email from the treating psychiatrist dated 6th May 2011, following a meeting with the birth mother the day before, described the birth mother as markedly improved from when she had been seen in the past - with no evidence of psychiatric illness. Her last appointment with the treating psychiatrist had been in February 2008. The treating psychiatrist did also say in the email that the birth mother remained vulnerable to alcohol abuse recurring but that she reported as being largely abstinent at that point in time.

10. According to the first named applicant there are no medical records on the social work files following the email from the treating psychiatrist on 6th May 2011. That this is so is difficult to comprehend given that the reason for the child being in care was the mental health of the birth mother. This puzzle is more remarkable in light of the evidence that the son, the half sibling of M.L., was returned to the birth mother in 2010 when he was 14 years of age. They siblings do now have contact although limited.

11. The right of a parent to have access with his or her child in care and the right of that child to have access with his or her parent or parents are basic rights. Arranging such access will frequently present challenges and obstacles. The first named applicant has an obligation to do all that it can to nurture ongoing access and to nurture the relationship between parent and child even when the parent is unable to care for the child.

12. In this case access was arranged initially to occur weekly. It does seem clear from the evidence that there was little or no interaction between M.L. and her birth mother during this access. This was clearly due to the mother's illness. Access decreased thereafter and the last recorded access took place on the 3rd of March of 2008. A social worker of late allocated to M.L. prepared a detailed "*Social Work Report: Fostercare to Adoption Case*" for presentation to the first named respondent dated 28thSeptember 2018 and he refers to that report as an exhibit to his affidavit which is before the court. The part of his report which gives the history of access with the birth parents was obtained by him from the social work files and electronic records. It comes largely from case notes, reviews and court reports.

13. There is no information available in relation to the father of M.L. save that he is of African origin. The birth mother never identified him.

14. When M.L. first came into care in November 2002 access was arranged to occur weekly, and to be fully supervised. There were four visits in 2002 and these were of one-hour duration. The notes in relation to these visits indicate that there was little or no interaction between the birth mother and her daughter, and such that occurred was initiated by the supervising social worker.

15. In 2003 access continued to be weekly up until the end of March. The notes again indicate that the birth mother was unable to show her daughter affection. There were periods of time when M.L. was crying and her mother made no attempt to soothe her. Notes state the birth mother showed *"no maternal instinct or insight"* and that she required constant direction. At the child in care review on 25th March 2003 a decision was made to change access to monthly as "*M.L. is getting little from it".* The same issues were present during these monthly meetings including the birth mother's refusal to change M.L.'s nappy. M.L. was upset during the visits and it was decided that C.K. (foster carer) would sit in to see if M.L. would settle. In December 2003 it was decided that the access would reduce to two-monthly. There were fourteen access visits in 2003.

16. In 2004, the first access of the year was cancelled due to the foster carer's illness. At the subsequent visits the same issues of the birth mother's non-engagement were present. M.L.'s uncle M. attended one of the access visits. The access was changed back to monthly in September. There were five access visits in 2004.

17. In 2005, the birth mother did not attend one visit and another was cancelled due to the foster carer's illness. The same issues of mother's poor interaction with M.L. are noted for the visits. There were three access visits in 2005.

18. The first visit of 2006 was not attended by the birth mother. During subsequent visits C.K. sat in to try to keep M.L. calm. The birth mother did not attend visits arranged for August, September and December of that year. There were three access visits in 2006.

19. In 2007 the birth mother said she would not attend visits pending the completion of court proceedings, despite being encouraged to do so to build her bond with her daughter. The notes record that the visits that were attended were not positive for M.L. as her mother was still finding it difficult to engage with her. The social worker always had to initiate interaction and soothe M.L. when she cried. On 6th November 2007 the birth mother stated that she will not attend access and "*will tell S.W. when she is ready".* M.L.'s grandmother and uncle did attend. There were three access visits in 2007.

20. At the start of 2008, the birth mother was uncontactable, but there was a visit in March which was described as positive. On 19th September 2008 the birth mother according to the records stated that she was "*pulling the plug on access*" if she can't get M.L. back. There was one visit with the grandmother in December 2008. The file indicates that numerous efforts were made to arrange access at a purpose built access centre (Ohana House) during 2008 but this proved unsuccessful. As a result the place at Ohana House was lost. There was therefore only one access visit in 2008.

21. There is no record of any access visits between M.L. and her mother during 2009 and 2010. There was no allocated social worker between 11th March 2009 and 12th August 2010 .

22. According to the records, on 24th February 2011 the allocated social worker met with the birth mother "*who did not express a wish to recommence visits with her daughter".* The records note that the grandmother told the social worker that the birth mother did not want to have access with her daughter.

23. In 2010, M.L. told her social worker that she did not wish to see her mother. At a visit with the grandmother in April another uncle, F., met with C.K. and they exchanged contact details. Since that time M.L. has had contact with him and his family, arranged by the foster carers.

24. In 2014, the social worker tried unsuccessfully to contact the birth mother.

25. On 23rd February 2015 the birth mother contacted the social worker, after receiving correspondence, and stated that she "*doesn't want to see or talk about M.L. anymore".*

Number of visits between M.L. and her mother.
26. 2002 - 4, 2003 - 14, 2004 - 5, 2005 - 3, 2006 - 3, 2007 - 3, 2008 - 1.

The last time M.L. met with her mother was on 3rd March 2008.

27. The social work records also indicate that -

> *"the birth mother required a high level of guidance and supervision during access. She showed an inability to show affection or warmth towards M.L. and was not able to offer any kind of stimulation. She also did not have the ability to soothe M.L. when she cried. There is no indication that the birth mother deliberately tried to upset her daughter but this may have been symptomatic of her mental illness. It is clear that M.L. got little positive experience from these visits and in fact frequently became upset during them. M.L. now states that she does not wish to see her mother.*
>
> *The records indicate that every effort was made to facilitate the birth mother in building her relationship with her daughter, but she was unable to take the opportunity.*
>
> *Positively M.L. has maintained a relationship with her extended maternal family (aunts, uncles and cousins). This contact is arranged informally between the family and M.L.'s carers and either occurs in the community or in the family members' homes. M.L.'s carers and extended family ensure that she is part of any important family celebrations and the family are also invited and part of M.L.'s important celebrations.*

M.L. also met her half-brother in 2017 (M.L. was not ready for this to occur prior to this time), supported by the foster carers and extended family. And they continue to have contact particularly through texts and social media".

28. The court is satisfied that:

(a) The birth mother was not able to look after M.L. when she was an infant and a young child. The situation is much less clear cut after 2008 and certainly after 2011 when one has regard to the available medical evidence and to the fact that M.L.'s half-brother was apparently living with and in the care of his mother (the mother of M.L.) from 2010 onwards. Also the access which took place in March 2008 was described as positive.

(b) The access detailed above between the birth mother and child was in the main quite difficult when it took place. This was clearly due to the mental illness of the birth mother. The court is satisfied that the social workers did try hard to make that access work and failed despite their best efforts.

(c) The court does accept that the birth mother did say on 19th September 2008 that she was pulling the plug on access if she could not get her daughter back. This ties in with what happened subsequently and does mark a turning point in the access situation and the efforts made by the social workers to arrange and nurture same. The fact that M.L. has continued to have contact with extended maternal family members does show that the foster carers were prepared to facilitate access with the extended birth family.

(d) The court does however conclude that the first named applicant could and ought to have done more after March 2008 to reopen the lines of communication concerning access with the birth mother and to endeavour to arrange same and nurture a relationship. After all the medical situation had improved and the half-brother of M.L. was back home and living with the birth mother from 2010 onwards. It appears from the available evidence that the home situation of the birth mother was not monitored after 2008 and the situation concerning the birth mother's state of health and ability to cope was not properly monitored either. At an important time in the chronology of events there was no allocated social worker between 11th March 2009 and the 12th August 2010. In an affidavit sworn on 12th June 2020 the social worker, Mr. P.S., on behalf of the first named applicant, states that this period coincided with the economic recession and restrictions on the ability of the applicant agency to hire new staff where previously allocated social workers left their positions or were promoted. This is a bald assertion in terms of explaining the absence of an allocated social worker and the failure of any follow up for the period in question and beyond. It is an inadequate explanation.

(e) It does appear from the evidence that the issue of access and any possibility of reunification was let drift by the first named applicant after 2008. It is true to say that any possibility of reunification must have been very remote after 2008 as M.L.

had been in the care of her foster carers and was well settled in that family since infancy. However, considering the ongoing contact between M.L. and other members of the extended maternal family unit it is difficult not to wonder if a more meaningful relationship could have been nurtured and created between the birth mother and M.L. if the first named applicant was at all proactive and determined in that regard after 2008. There is little to be gained by speculating on what might have been as, in determining the issues before it, the court is obliged to look at the position as it now is as opposed to what might have been. As Counsel for the birth mother ruefully observed - "*we are where we are".*

29. The Adoption Authority of Ireland received papers in respect of the application for an order pursuant to s. 54 from the Child and Family Agency on 1st March 2019. The Authority issued a declaration of eligibility and suitability in respect of the second and third named applicants on 12th March 2019.

30. A hearing in respect of the application for an order pursuant to s.54 was scheduled for the 8th October 2019. Having heard the evidence in relation to the application the Board concluded that it would be proper for the Adoption Order to be made if a s. 54 (2) Order was made by the High Court. On the 14th January 2020 the Adoption Authority adjourned the application and declared that, if an order is made under s.54(2) of the Adoption Act 2010, it will, subject to s. 53 (2) of the said Act, make the Adoption Order sought.

31. C.K. swore an affidavit on 5th June 2020 on behalf of herself and the second named applicant. In her affidavit C.K. details the fact that M.L. was placed in the care of herself and her husband when she was just four days old and has remained in their care since that time. She explains how M.L. has had some additional needs but she has progressed well in school and socially. The foster mother also explains that in or about 2010 M.L. decided that she did not want continued access with her birth mother, following a difficult pattern of access. She says that M.L. has remained firm in that decision since that time. She explains that she and her husband have spoken with her about this and while they are always supportive of her continuing relationship with her birth family, they must respect her decision in this regard as she is resolute. She points out that M.L. maintained contact with her maternal grandmother until she died and that she has continued contact with her extended maternal family. She points out that this is arranged between her family and M.L.'s maternal uncle. She says that M.L. understands the nature and consequences of an Adoption Order and has advised them (the foster parents) for some time that she does not wish to have contact with her birth mother. She says that the option of guardianship has been explored with M.L. and that she is firm in her views that this is not what she wants.

32. The foster mother says that she and her husband believe that the contact by M.L. with her maternal family has given her a stronger sense of identity and that they and M.L. believe that it does not conflict with her wish to be adopted. In addition, the third named

applicant says that M.L. wishes for the contact to continue should the order be made and that they (the foster parents) are happy to facilitate and support her in this choice.

33. C.K. says that she and her husband have developed a strong mutual bond with M.L. since she was placed with them at just four days old and that they are fully committed to her and she has totally integrated into the family. She says that they see the application to adopt her as the official expression of the psychological and emotion ties that have existed for them for many years. She says that they have fulfilled the role of parents to her in every respect and that M.L. views them both as her parents in everything but law.

34. It is apparent from the evidence before the court that: -

    (a) The foster parents have been devoted to M.L.

    (b) M.L. has thrived in their care.

    (c) The foster parents took on the role of parents and acted as her parents in every respect since she was an infant.

    (d) M.L. is part of the family of the second and third named applicants and sees the second and third named applicants as her parents.

    (e) The court does accept that M.L. herself decided that she did not want continued access with her birth mother in or about 2010 and that this was because of the difficult access which she had experienced prior to then and due to the fact that she had no real relationship with her birth mother. As already observed by the court it is the case that there were shortcomings on the part of the first named applicant in dealing with the birth mother who was a person suffering from a significant psychiatric illness. There is no doubt but that this situation has been most challenging for the first-named applicant and indeed for the foster parents. However, the birth mother and the child have rights in terms of their relationship and the first named applicant had a statutory obligation to have regard to those rights and to adhere to its statutory obligations. It failed to do so particularly in terms of its interaction with the birth mother, or lack of interaction. It is the position that her mental health has improved with medication over the years and had clearly improved significantly at the time her son was returned to her care and at the time of the email from her treating psychiatrist to the first named applicant in May of 2011. Notwithstanding the improvement in her mental health and situation it does appear that the first named applicant did virtually nothing to be proactive in terms of nurturing a relationship between mother and daughter after 2008. Whether or not additional efforts on the part of the first named applicant would have altered how things have turned out will never be known. But the additional effort ought to have been made. If there had been additional engagement by social workers and experts on the part of the first named applicant, with the mother and child, the situation may not have ended up as polarised as it now is between mother and daughter.

35. The affidavit of the birth mother records her mental health difficulties and the practical difficulties the symptoms presented. She describes a very difficult period after her discharge from hospital with periods of time in homeless hostels. It took a long time to find the correct medication to manage her illness and she accepts that she was very unwell when her daughter was born.

36. The birth mother, as already referred to, takes issue with the assertion that the agreement pursuant to which her daughter was taken from her was voluntary. In addition, she says that M.L. was christened in hospital a few days after her birth and that she did not organise the christening nor did she ask that M.L. be christened in hospital. In fact, she says that she was shocked to be told that her baby was being christened in hospital and that she should attend the christening. The birth mother says that she did not give a full, free and informed consent either to her daughter being taken away or to any agreement she purportedly signed. As already observed, this issue of capacity to consent is not a matter for determination by this Court and these proceedings cannot be a collateral challenge to the Care Orders made in the District Court many years ago. The Care Order proceedings were contested by the birth mother and she did have legal representation during the Care Order proceedings. The point is also made that the birth mother did not lodge any appeal in respect of any of the orders made. In this regard, and having regard to the evidence before the court, it is understandable that no appeal was lodged in respect of any of the care orders made up to and including the full Care Order which was granted on the 25th June 2007 until M.L. is 18 years old. The birth mother was simply unable by reason of her medical condition to care for M.L. when these orders were made. She was not however unable to have access. Later, a new dynamic existed when the foster carers were granted enhanced rights in the District Court under s.43A of the Child Care Act 1991 on the 18th December 2015. At that time any hope of a relationship between the mother and child was sundered as there had really been no contact between mother and daughter since 2008.

37. The birth mother describes how her son was returned to her in 2010 when he was 14 years of age and has continued to reside with her to date and is in employment. She says she has a close relationship with him and reared him and steered him through difficult adolescent years. She makes a point that she would have a close relationship with her daughter if she had received support or encouragement. This latter assertion is not without some foundation. The birth mother makes the point that any lack of engagement on her part with M.L. was a consequence of her illness as opposed to being attributable to lack of interest. She says that the social workers should have known this and that she did not receive any support from them. After 2008 it does seem clear that she received little or no support.

38. Referring to the affidavit of M.W. (social worker, on behalf of the first named applicant) the birth mother says that there is nothing in it to show that the first named applicant made any effort to support the development of a relationship between herself and her daughter or ever left the door open for her return to her mother's care after she recovered (to the extent that her illness was managed and controlled) even though her

daughter's brother (her half-brother) was in his mother's care. Again, this assertion is not without substance. It is troubling that the absence of any evidence of support is probably because there was no such support.

39. The birth mother does make a point that the only practical benefit of adoption to her child who is now at the cusp of majority is a contingent financial benefit. She says that her child will be an adult shortly and it is not for that reason necessary for the State to supply the place of parents. Although this point is an understandable argument, particularly given the long delay in progressing this application, it is not correct. Adoption is important in terms of creating a sense of identity and belonging for a child. This is particularly so where that child has been part of the family into which it is proposed she be adopted and has been reared throughout with that family, since four days of age.

40. In the legal submissions on behalf of the applicants (although the submissions read as those of the first named applicant in the main) the point is made in relation to the care proceedings that the birth mother was actively engaged in the proceedings before the District Court from 2004 to 2007. The birth mother was represented by a solicitor employed by the Legal Aid Board who appeared and acted on the instructions of the birth mother for most of the applications during that period. The applicants make the point, referred to above, that an application pursuant to s. 54 of the 2010 Act should not be treated as a collateral challenge to the Care Orders in the District Court. However, for completeness, the applicants state that the birth mother participated in the care proceedings up to and including the full Care Order which was made on the 25th June 2007 and did not seek to appeal the findings of the District Court Judge on that occasion. The applicants also submit that the active engagement of the birth mother during the proceedings, and her stated position that she wanted increased access and on occasion, the return of the child, meant that it was not appropriate for the Agency to consider the question of adoption at that time. The court's attention is drawn by the applicants to a submission of Barnardos, a charity that works with vulnerable children and their families, which was made some years ago on the review of the Child Care Act 1991 which was produced in 2018. This supported a key recommendation of the Child Care Law Reporting Project of 2015 under the auspices of Dr. Carol Coulter. While the applicants touch on a sentence in the submission made by Barnardos it is worthwhile setting out the following extract from the submission on the review of the Child Care Act 1991 (at p.9): -

> *"Family reunification should be the aim in the vast majority of cases. In applying for care orders the Child and Family Agency must clearly outline the conditions which must be met for family reunification to take place. Contact between parents and children during the duration of the care order is key to successful family reunification. In all but exceptional cases courts should set minimum access levels which are sufficient for the child or children to maintain a meaningful relationship with their parent and extended family when making care orders. Supervised access should take place in child friendly environments where adequate support and supervision (if necessary) is in place. It is important that contact is facilitated at a convenient time and location, which is suitable for children. In some cases,*

reunification is not possible or in the best interests of the child. In such cases repeated attempts at reunification where there is little hope of success can be harmful to the development of the child."

41. Although the first named applicant submits that the records show that it made every effort to support the relationship between the child and her birth mother the court does not find this to be so. Contrary to what the first named applicant submits, it is clear from the evidence produced to the court that the first named applicant fell short in terms of the efforts made to support the relationship between the child and her birth mother after 2008.

42. In the course of the submissions the first named applicant states that in the proceedings before the District Court the consultant psychiatrist who was treating the birth mother was called by the first named applicant and gave evidence. The submissions go on to say that the report exhibited by the social worker (and referred to earlier) illustrates that there was ongoing correspondence with this consultant psychiatrist from the time of M.L.'s reception into care in 2002, again in 2004, 2005, 2006, in the course of the care proceedings in 2007 and again in 2011. It is submitted that this engagement with the birth mother's consultant psychiatrist illustrates a concerted effort on the part of the Agency in respect of the psychiatric difficulties of the birth mother with a view to assisting it in assessing whether her ability to care for her daughter remained affected. Unfortunately, this very submission illustrates the shortcomings in terms of the follow-up concerning the plaintiff's mental health, the success of treatment and the recovery made. There are significant gaps in these early years and a complete absence of follow-up from 2011.

43. Whilst the first named applicant submits that it reassessed the question of access when appropriate, it fails to deal with the non-engagement with the birth mother after 2008. Instead, in the submissions it is stated*:-"that there is no evidence on the care files that the birth mother ever sought a reintroduction of access with M.L. at any time, whether after her son was returned to her care in 2010 or at any time when her illness was managed and controlled.*"

44. Again, this submission identifies a significant difficulty in the approach it adopted. Notwithstanding the care orders made it was always the position when the matter was before the District Court that the birth mother was to be facilitated with access to her daughter. In a report to the birth mother's solicitor dated the 23rd August 2004 which is before this Court the treating psychiatrist expressed the view that: *"Weekly visiting rights, supervised in nature, would appear to be a reasonable recommendation. Ms. L. may or may not be able to attend regularly for these; however it would seem reasonable, fair and appropriate for us to suggest such a visiting schedule*".

45. Quite apart from this the first named applicant had an obligation to be proactive in relation to access for the sake of the mother and the daughter, and a relationship between them both. The mother was a person suffering with significant mental illness and it was never going to be easy. However, she made significant progress with her

treatment and was significantly improved after 2008. The first named applicant did virtually nothing after 2008 to assist in helping to create some form of relationship between mother and child and somewhat tellingly, in reciting the history of access, the submissions refer to "*the final visit in 2008".*

46. In dealing with the balancing of the parental duties and parental rights, the first named applicant accepts that the birth mother has availed of access over the period of the child's placement. It submits however, that she has displayed an inability to be consistent in relation to the access and this inconsistency and the lack of stability and certainty has had a significant effect on the child and her ability to rely on the actions of her birth mother. It also submits that, in particular, the birth mother has made no efforts to renew contact with the child in the recent past and that this has led the child to feel rejected. Again, this submission fails to acknowledge the obligations of the first named applicant in terms of doing all that is possible and feasible to create the opportunity and space and willingness of parent and child to meet and have a relationship with one another.

47. In the submissions on behalf of the first named respondent, it sets out its role as a statutory decision maker under s. 53 of the Adoption Acts 2010 to 2017. It goes on to say, and as outlined in para. 4 of the affidavit of P.C. sworn on its behalf on the 16th June of 2020, that the Authority must be satisfied that *"it would be proper to make the Adoption Order*" in the application before it prior to the matter being brought before this Court. As such, the Authority in adjourning the matter to allow it to be brought before this Court, confirmed that its view was that it was proper for an Adoption Order to be made in the case. It submits that this decision was made following a consideration of the evidence and the legal issues arising, including the strong evidence that an order would be in the best interests of the child, the expressed views of the child, the absence of any evidence that the second-named respondent would be willing or able to care for the child prior to her turning 18, and to the lack of organised contact since 2008.

48. The Authority is, accordingly, supportive of the application being made. Conscious of its broader functions under the Acts, the Authority submits that its primary objective in the submissions is to provide such assistance to the court as may be useful in ensuring that these applications are dealt with in a clear and consistent manner that takes due account of the rights of all interested parties.

49. Although dealing with the law in light of the legal submissions later, the court does wish to deal here with certain submissions of the first named respondent. It states that as a matter of policy, it would have concerns about a position in which an Adoption Order under S.54 of the Act could not be sought for children over, for example, sixteen years of age. This is especially so when its experience is that there are number of cases each year in which the child is already sixteen or seventeen when the Authority first becomes aware of an application being made. The first named respondent points out that there is nothing in the acts which would suggest that adoption should not be available as an option for certain categories of children once they reach a particular age or point of maturity. The court does not disagree in principle with the submissions made in this regard.

50. The concern raised by the court insofar as this "*late application*" is concerned is a concern that exists by reason of a delay in progressing an application which the court finds could and should have been made at a much younger age insofar as the child is concerned. This delay will be dealt with in greater detail later in this Judgment. It is apparent from the evidence before the court that the first occasion adoption was discussed with the foster carers was during a home visit by child care personnel of the first named applicant in August 2004 when M.L. was just one year and nine months old. It appears that this was just an initial enquiry. It is also apparent from the evidence that the adoption of M.L. by the foster carers was a recurring topic of discussion between the social workers and the foster parents since those very early days. In fact, there is a note on file from the *"Child in Care*" review held on the 18th August of 2005 stating that the social worker would start the adoption application.

51. In the context of the evidence presented to the court it enquired as to the reasons why the application has come before the court so late in the day and in circumstances where the child will turn eighteen in November. In this regard, the court is satisfied that the first named respondent has dealt with a complex application with expedition but, notwithstanding the explanations tendered by the first named applicant, the court remains at a loss as to why this adoption application was not proceeded with many years ago. On any view, it is difficult to understand why the adoption application was not made and progressed at the time of the application to the District Court in 2015 for the Enhanced Rights Order under S.43A of the 1991 Act - or indeed in the years immediately preceding 2015. It is clear from the evidence before the court that a decision was made many years ago that the foster carers would apply to adopt M.L.

52. According to the evidence presented to the court, a court report prepared by the allocated Social Worker (D.C.) dated the 23rd April 2012 states that the Health Service Executive (now the Child and Family Agency) supports the foster carers' application to adopt M.L. Ms. C.G. (the guardian *ad litem* appointed at that time) stated in her court report dated the 21st April 2012 that she supported the adoption application. There is a letter on file from the Adoption Service (a unit within the Child and Family Agency) confirming receipt of the application.

53. Once the decision is made to adopt any delay in progressing the matter should in the view of this Court be avoided in circumstances where the welfare of the child is the paramount consideration. Any delay in progressing adoption applications will inevitably introduce a possibility of the time lost negatively impacting on the best interests of a child. This is even more so when there is an obligation to progress adoption applications with reasonable expedition, in the interests of fairness and due process to all of those concerned - and especially to the child, to the birth parent or parents and to the applicants.

54. Prolonged delay is usually inimical to the interests of justice.

55. In its submissions the first named respondent submits that it is relevant to bear in mind that the welfare of the child in an adoption law context is, factually, not necessarily

identical to the welfare of a child in a child care context. Adoption, by potentially providing what McGuinness J. has described as "*the security of adoption*" in appropriate cases, engages long term considerations of identity, security and stability in relationships which are distinct from the considerations of immediate risk or harm that arise in many proceedings under the Child Care Act 1991, as amended.

56. The first named respondent goes on to submit that the fact that the "*best interests of the child*" in an adoption context is not simply about protection from harm but must also engage and take account of considerations such as their views, their *"physical, psychological and emotional needs"*, the *"likely effect of adoption" on them, the facts of "their upbringing and care*" and their relationships not only with their birth parents but also their guardians and carers. The first named respondent submits that these considerations are illustrative of the importance in any assessment of the child's best interests in an adoption context of the child's identity and the long-term relationships which they have as a matter of fact developed as elements of their personal, social and family identity.

57. The Court does accept that the welfare of the child in an adoption law context brings into play factors over and above those ordinarily at play in child care proceedings. At its most basic the circumstances in which a child lives, and the relationships of the child are important factors in determining the best interests of the child. It could not be otherwise.

58. The written submissions on behalf of the birth mother are detailed and lengthy. As with the other parties the written submissions were supplemented by oral submissions following the conclusion of the evidence. Insofar as these submissions are concerned it is necessary to point out that many of the submissions made are assertions which are unsupported by any evidence. Submissions or assertions which are made to the Court and which are bare assertions and unsupported by evidence in the case must be discounted by the Court. The Court must decide the case on the evidence presented in light of the law and the authorities.

59. In the submissions of the birth mother it is submitted that the court should be mindful to ensure that the parent has not been prevented or obstructed from fulfilling his or her duty to the child either by the State or by the proposed adoptive parents. This is a valid submission which must be borne in mind by the court when considering the evidence and balancing the respective rights involved.

60. The submissions on behalf of the birth mother also draw attention to the facts of the cases relied upon by the applicants and the distinctions between those cases and the facts of this case. In dealing with the *Southern Health Board* case, the *Northern Health Board* case, the case of *R. a Minor* and the case of *C.W. a minor*, the submissions of the birth mother make the following points by way of summary: -

    (a) In three of the four cases there was evidence that the natural parents had behaved in a way that was consciously harmful to the child or another child in the family.

(b) In only one of the four cases was the natural parents behaviour to the child or another child in the same family not consciously harmful as the parent had a condition from which she would not recover - namely a mental handicap.

(c) None of the cases concerned a child placed in care at the time of the child's birth because the natural parent had a treatable medical condition.

(d) None of the cases considered circumstances where the natural parent had not harmed a child or another child in the same family and had a treatable condition.

(e) The facts and concerns in each of the above cases were such that the child being returned to the mother (i.e. family reunification) was never a viable option.

61. The submissions on behalf of the birth mother are correct in drawing the attention of the court to the facts of the cases which are relied on as authorities. The "*general principles"* extracted from the authorities must be read in the context of the facts of the particular cases as a failure to do so would mistakenly be to adopt a "*one size fits all*" approach in complex cases.

62. It is appropriate to touch at this point on one particular submission made on behalf of the birth mother. That is the submission that a positive statutory obligation lies on the first named applicant to have regard to the principle that a child should be brought up in her own family. In this regard, s.3 of the Child Care Act, 1991 is relied upon.

63. Section 3(1) of the 1991 Act provides that "*it shall be a function of the Child and Family Agency to promote the welfare of children who are not receiving adequate care and protection."*

64. Section 3(2)(c) provides that "*the Child and Family Agency shall have regard to the principle that it is generally in the best interests of a child to be brought up in his or her own family.*"

65. The submissions point also to s.54(1)(a) of the Adoption Act 2010 which provides: -

> *"Where applicants, in whose favour the Authority has made a declaration under s.53(1), request the Child and Family Agency to apply to the High Court for an order under this section -*
>
> *(a) if the Child and Family Agency is satisfied that every reasonable effort has been made to support the parents of the child to whom the declaration under s.53(1) relates,*
>
> *(a) if the Child and Family Agency considers it proper to do so and an application in accordance with para. (b) has not been made by the applicants, the Child and Family Agency may apply to the High Court for the order…"*

66. These statutory obligations are significant. It is perhaps useful at this point to set out the law relating to Applications such as this before returning to the submissions on behalf of the birth mother and the decision of the Court.

Legal Position
The Law

67. Article 41, dealing with the family, states as follows:-

'1 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

2 1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

3 1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

2° A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that -

I there is no reasonable prospect of a reconciliation between the spouses,
II such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and
III any further conditions prescribed by law are complied with.

3° Provision may be made by law for the recognition under the law of the State of a dissolution of marriage granted under the civil law of another state.

4° Marriage may be contracted in accordance with law by two persons without distinction as to their sex.'

68. Article 42A states as follows:-

'1 The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

2 1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.

3 Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.

4 1° Provision shall be made by law that in the resolution of all proceedings-

i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or

ii concerning the adoption, guardianship or custody of, or access to, any child,the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.'

Irish Jurisprudence

69. The courts have adjudicated upon this issue in a series of cases both prior to, and after, the enactment of the Adoption Act 2010. Denham J. in *Southern Health Board v. An Bord Uchtála* [2000] 1 I.R. 165, at page 178, in the context of the Adoption Act 1988, and more particularly s. 3 of that Act, sets out a 'three stage process' in respect of applications such as this.

70. The submissions on behalf of the Child & Family Agency point out that in addition to what is set out below, the 2010 Act, as amended, has extended the questions to be considered by the Court. The original three stage approach is as follows:-

> "There are a number of steps to be taken under s. 3 of the Act. Those relevant to this case commence with the requirement that in construing s. 3 the first step is to determine whether the parents have, for physical or moral reasons, within the required time, failed in their duty towards the child. This step has a high threshold. There must be strong evidence to establish a failure of duty by parents towards the child. On the facts of this case I am satisfied that there was evidence upon which this conclusion could be reached.

> The second step is the determination whether such failure will continue without interruption until the child is eighteen years of age. In the circumstances of this case, on the uncontradicted evidence of Dr. Murray, it is clear that the failure of the parents caused the post-traumatic stress disorder (which is relevant to F O'D.'s relationship with his parents) and which will continue at least until he is eighteen.
>
> The third step is to determine whether the failure constitutes an abandonment. In this case it is not a simple abandonment in the ordinary meaning of the word. The question is whether it should be deemed to be an abandonment within the legal term. The evidence must be such that it establishes that the parents by acts or omissions so failed in their duty to a child that the circumstances are such that they may be deemed to have abandoned the child.
>
> The section does not require that there be an intention to abandon. While there may well be cases under s. 3 where there is simple abandonment of a child and an intention to abandon a child these are not the only circumstances where s. 3 may be applied. The legal term "abandon" can be used also where, by their actions, parents have failed in their duty so as to enable a court to deem that their failure constitutes an abandonment of parental rights. The parents in this case did not abandon F O'D. in the sense of leaving him physically in a place, but that does not preclude the operation of the section. The term "abandon" is wider."

71. The Supreme Court considered the matter again in *Northern Area Health Board v. An Bord Uchtála* [2002] 4 I.R. 252. McGuinness J.'s consideration of the concept and meaning of 'abandonment' (albeit as it applied to the 1988 Act) is relevant to the facts of these proceedings. At p. 274 McGuinness J. states :-

> "Thus, it [the term] raises images of deserting or forsaking a child. However in section 3(1)(I)(C) the word 'abandonment' is used as a special legal term."

72. The Judge continued:-

> "The section does not require that there be an intention to abandon. While there may well be cases under s. 3 where there is simple abandonment of a child and an intention to abandon a child, these are not the only circumstances where s. 3 may be applied. The legal term 'abandon' can be used also where, by their actions, parents have failed in their duty so as to enable a court to deem that their failure constitutes an abandonment of parental rights. The parents in this case did not abandon F.O'D in the sense of deserting him physically in a place, but that does not preclude the operation of the section. The word 'abandon' has a special legal meaning."

73. McGuinness, in that case, placed reliance on *P.W. v. A.W*. (Unreported, High Court, 21st April 1980) in which Ellis J. stated:-

> "I also hold that insofar as it was or is the duty of the parents, (and in the circumstances of this case, the duty of A.W.) to provide for the requirements of A. specified in Article 42.1 or generally, that A.W. has failed in such for physical reasons. In my view the word physical as used in Article 42.5 need not include intentional or purposeful reasons, and would include reasons of health, and hence would and does include the illness and all its detrimental effects and consequences already fully described which have combined to prevent and render her unfit or unable to carry out her required duty or duties towards A. and hence to have failed in such respect'."

74. This was subsequently quoted with approval, and adopted by O'Higgins J. in *Southern Health Board v. An Bord Uchtála* (Unreported, High Court, 20th December, 2001).

75. Hogan J. in the Court of Appeal in *Chigaru & Ors v. Minister for Justice and Equality & Ors* [2015] IECA 167 stated, at para. 29:

> 'It is clear that the right of children to the care and company of their parents is a core constitutional value which is inherent in the entire structure of Article 41, Article 42 and Article 42A of the Constitution.: see, e.g., *Re JH (an infant*) [1985] I.R. 375, 394-395, per Finlay C.J.'

The 'best interests of the child'

76. The Court is mindful of the decision of the Supreme Court in *Re J.B. & K.B. (Minors)* [2019] 1 I.R. 270. While that case considered the interplay between the Adoption Act, The Hague Convention and Article 42A of the Constitution, aspects of the decision are worth noting in the context of this case - and in particular the following *obiter* comments in the dissenting judgment of McKechnie J. - at p. 320:

> 'What has become more prevalent in recent times is that some courts have subverted these expressions as meaning that there is a right, separate, distinct and unconnected from the subject matter, to determine a particular case having regard almost exclusively to the "best interests" argument. Such is only a short step from suggesting that a single paragraph of legislative enactment, namely, that adoption should be carried out "in the best interest of a child", would suffice. That would of course be utterly untenable. Accordingly, I do not accept any suggestion of a freestanding right over and above the Convention or the 2010 Act by which the situation of these children can be determined on the basis of their best interests.'

77. Reynolds J., considered a case with a similar factual matrix to the one at issue in *The Child and Family Agency v The Adoption Authority of Ireland* [2018] IEHC 172. In that case, the child was born in 2000 and proceedings were commenced in 2017 by way of special summons. It was an application to dispense with the consent of the birth mother in circumstances where she objected from the outset. The child's birth father consented and was a notice party in the proceedings.

78. The child first came to the attention of the child protection services in 2000, aged just two years. There were notable difficulties and concerns in relation to the child and their siblings over the years; inter alia, sexual abuse, domestic violence and chronic neglect.

79. In 2007 an emergency care order was made grounded upon the concerns around the limited parenting capacity of the birth parents to meet the needs of the child and their siblings. A full Care Order was sought and granted in 2012 in circumstances where it was fully contested. However, no appeal of that decision was pursued.

80. The judgment gives an account of the access arrangements between the birthmother and the child and, despite the support of the relevant agency, the access was difficult. The mother attended 'almost every access visit' while the father's attendance was poor. The access that occurred was supervised access.

81. In her decision, Reynolds J. states at para. 26, that:-

> 'The best interests of the child, as a constitutional right, must be the paramount consideration in this application'.

82. The Judge goes on to detail the matters she had taken into account and states:-

> '28. It is clear from the evidence that R. has been in the custody of and has had a secure and loving home with her foster carers for over seven years and that they are committed to providing a safe and secure environment for her now and into the future. The child has developed relationships with her foster carers' adult children and grandchildren and has thrived in a loving and caring environment. It is clear that they have demonstrated their ability to make all the necessary and practical decisions in relation to her health and welfare during that time and have provided evidence for how they propose to do so into the future. In all the circumstances, this Court must conclude that where the foster carers have fulfilled the role of parents to the child in every respect over the past almost eight years and have demonstrated their commitment to providing for her best welfare interests, now and into the future, that it is in the child's best interests that the adoption order proceed.'

83. MacGrath J. decided a similar application in *The Child and Family Agency v The Adoption Authority of Ireland* [2018] IEHC 515 which followed later in the same year as the case recited in the paragraphs above. In considering the care that must be taken in deciding such applications, he observed, at para. 129:-

> 'It is only in exceptional cases that the consent of birth parents to an adoption should be dispensed with. That is particularly so in a case such as this where the birth parents have been married for many years, although recently separated, and have other children for whom they care. This makes the application highly unusual and difficult. Nevertheless, in my view, in the particular circumstances, this must be regarded as an exceptional case.'

84. Again, not unlike the holistic assessment engaged in by Reynolds J. in the earlier case, McGrath J. stated at para. 130:-

> 'The child is on the cusp of adulthood. He has been in the care of the foster parents for practically all of his life. He has significant ties to his foster family including his foster siblings. He regards himself as a de facto a member of the family. He is opposed to being reunited with his birth parents. His sense of belonging is to the foster family and the county in which he lives. He has close ties not only with his foster family but in the local community. He has excelled in his education and sport. He wishes to be adopted by his foster family. He has been raised in an exemplary manner, something which has been very fairly acknowledged by his birth mother. While it has been suggested that adoption is not necessary and that all of the above mentioned and all such ties will remain, the strong desire of the C.W. to be regarded as a legal member of his foster family should not be understated. On the other hand his blood link is with his birth parents and family, in what might be described as his natural place of succour, support and security in life. His birth parents have rights to his care and to be involved in his upbringing. But none of these rights are absolute and they must be balanced.'

85. The Court is also alert to the need for of due process and fairness. The decision of the U.S. Supreme Court in *Santosky v. Kramer* 455 U.S. 745 (1982) is instructive in this regard. In that case, the State of New York sought to terminate the rights of certain natural parents. The parents challenged the constitutionality of this provision. The Statute provided that the standard by which a finding of permanent neglect would be arrived at would be a standard of 'fair preponderance of the evidence'. Blackmun J. in considering the standard of proof to be applied in such circumstances found that the standard of 'fair preponderance of the evidence' (applied in the Family Court and appellate Court in New York) violated the Fourteenth Amendment. Instead, a standard of 'clear and convincing evidence' was required in such proceedings.

86. Blackmun J. stated, at p. 753:-

> 'The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.'

United Nations Convention on the Rights of Persons with Disabilities

87. Counsel for the birth mother urged on the Court that the United Nations Convention (CRPD) on the Rights of Persons with Disabilities should be taken into account. The CRPD

was adopted in 2006 and the Irish Government signed it in 2007. It was ratified in this jurisdiction in March 2018. Article 1 of the Convention provides that:-

> 'The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.'
>
> The Court must have regard for the Convention in considering this Application and does so.

European Convention on Human Rights

88. The European Convention on Human Rights is also relied on by the birth mother. It was ratified in 1953. However, it was not incorporated into Domestic law until the enactment of the European Convention on Human Rights Act 2003. Since 1953 several cases have been taken against Ireland, the first being *Lawless v. Ireland* (1979-1980) 1 EHRR 1, which concerned internment in times of emergency. The Court also considered the denial of access to a court in respect of a family law proceedings as being a breach of Article 6 and Article 8 of the Convention in *Airey v. Ireland* Airey [1979] 2 E.H.R.R. 305. In this case, the 'effective rights guarantee doctrine was trenchantly stated by the court'; Kilkelly (ed.), *ECHR and Irish Law* (2nd ed., Jordans Publishing, 2009). In *Open Door & Others v. Ireland* (1992) 14 E.H.R.R. 319, the Court considered the prohibition on abortion information concerning a perpetual injunction granted by the Supreme Court in this jurisdiction as being a breach of Article 10 of the Convention. The Convention, as applied by the Court in Strasbourg, has clearly had an impact on Irish life and society and this Court must and does have regard for it in considering the competing arguments and issues which arise in deciding on this application.

89. Many decisions of the European Court of Human Rights are of persuasive value. This is so in respect of the decision of the European Court of Human Rights in *K. & T. v. Finland* (2001) 31 E.H.R.R. 18. The facts of that case are somewhat analogous to those in these proceedings, not least because the mother involved had also been diagnosed with schizophrenia.

90. The Finnish authorities had been in touch with the family for some time before the birth of the children the subject of the child welfare proceedings. The situation of the birth mother's illness was complicated by an access dispute. It appears from the judgment that there were a number of hospital admissions on foot of the birth mother's illness. It would also appear that the episodic incidents of illness were not insignificant in terms of their severity. Added to this was the children began to exhibit problematic behaviour.

91. The problem arose in respect of the restrictions that were imposed in respect of access. These led to the prevention of a family reunification and the negative attitude of the Finnish authorities was notably striking and disproportionate.

92. A violation was found to have occurred in respect of the appellants' submissions that there was a failure to take steps to reunite the family. The premise for this finding was the guiding principle that the public care of a child should, in principle, be regarded as a temporary measure. As such, it should be discontinued when the circumstances of the case allow. The implementation of these temporary care orders should be consistent with the ultimate aim of reuniting the family, that is the natural parents and the child.

93. There is a positive duty to take measures to facilitate family reunification as soon as is reasonably feasible. This positive duty became more pressing the longer the period of care lasted, subject always to its being balanced against the duty to consider the best interests of the child. The Court stated at p. 40:-

> '178. The Grand Chamber, like the Chamber, would first recall the guiding principle whereby a care order should be regarded as a temporary measure, to be discontinued as soon as circumstances permit, and that any measures implementing temporary care should be consistent with the ultimate aim of reuniting the natural parents and the child (see, in particular, *Olsson (no. 1*), cited above, pp. 36-37, § 81). The positive duty to take measures to facilitate family reunification as soon as reasonably feasible will begin to weigh on the competent authorities with progressively increasing force as from the commencement of the period of care, subject always to its being balanced against the duty to consider the best interests of the child.'

94. The Court, in considering the matter, noted that some enquiries were carried out with the aim of ascertaining whether the applicant birth parents would be able to bond with the children. But, it was noted, these did not amount to a serious or sustained effort to facilitate family reunification.

95. The following passage is instructive: -

> '179. In the instant case, the Court notes that enquiries were made in order to ascertain whether the applicants would be able to bond with the children (see paragraph 67 above). They did not, however, amount to a serious or sustained effort directed towards facilitating family reunification such as could reasonably be expected for the purposes of Article 8 § 2 - especially since they constituted the sole effort on the authorities' part to that effect in the seven years during which the children have been in care. The minimum to be expected of the authorities is to examine the situation anew from time to time to see whether there has been any improvement in the family's situation. The possibilities of reunification will be progressively diminished and eventually destroyed if the biological parents and the children are not allowed to meet each other at all, or only so rarely that no natural bonding between them is likely to occur. The restrictions and prohibitions imposed on the applicants' access to their children, far from preparing a possible reunification of the family, rather contributed to hindering it. What is striking in the present case is the exceptionally firm negative attitude of the authorities. Consequently, the Grand Chamber agrees with the Chamber that there has been a violation of Article 8 of

the Convention as a result of the authorities' failure to take sufficient steps towards a possible reunification of the applicants' family regardless of any evidence of a positive improvement in the applicants' situation.'

96. Some nineteen years have passed since the decision of the Court in *K. & T. v. Finland.* Conscious of this the Court has had regard also to a recent decision of the Court considering similar issues in *Pedersen & Ors. v. Norway* (2020 - no official citation available) (No. 39710/15). The applicants contended that there had been a breach of Article 8 of the Convention in that their right to respect for their family life had been infringed by the Norwegian authorities' decision to deprive them of their parental responsibility of their birth child, allowing the child's adoption and restricting subsequent contact with the child. They further contended that the authorities failed to try to reunite the family and that the Norwegian procedure had been unfair since they had not been sufficiently involved in the process The matter had been decided before a Board, a District Court, the High Court and ultimately the Norwegian Supreme Court.

97. The Czech Government were granted leave to intervene in the proceedings as a third party and made a submission in relation to the concept of 'the best interests of the child'. It is useful to set it out :-

> 'The Czech Government stressed that the principle of the best interests of children was not designed to be a "trump card", noting that the rights of biological parents had to be duly taken into account.' [from p. 13, para. 57]

98. The Court again set out the guiding principles from its well-established case law on child welfare measures. Specific reference in this regard was made to its earlier decision in *Strand Lobben and Others v. Norway* [GC], No. 37283/13, §§ 122-139, 10 September 2019. The general principles, in part, are as follows :-

> '….For the purpose of the present analysis, the Court reiterates that regard to family unity and for family reunification in the event of separation are inherent considerations in the right to respect for family life under Article 8 of the Convention. Accordingly, in the case of imposition of public care restricting family life, a positive duty lies on the authorities to take measures to facilitate family reunification as soon as reasonably feasible. Moreover, any measure implementing such temporary care should be consistent with the ultimate aim of reuniting the natural parents and the child. The positive duty to take measures to facilitate family reunification as soon as reasonably feasible will begin to weigh on the competent authorities with progressively increasing force as from the commencement of the period of care, subject always to its being balanced against the duty to consider the best interests of the child. The ties between members of a family, and the prospect of their successful reunification will perforce be weakened if impediments are placed in the way of their having easy and regular access to each other (ibid., §§ 205 and 208).

Furthermore, the Court recalls that in instances where the respective interests of a child and those of the parents come into conflict, Article 8 requires that the domestic authorities should strike a fair balance between those interests and that, in the balancing process, particular importance should be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents. Moreover, family ties may only be severed in "very exceptional circumstances" (ibid., §§ 206 and 207).

The Court also reiterates that the margin of appreciation to be accorded to the competent national authorities will vary in light of the nature of the issues and the seriousness of the interests at stake, such as, on the one hand, the importance of protecting a child in a situation which is assessed as seriously threatening his or her health or development and, on the other hand, the aim to reunite the family as soon as circumstances permit. The Court thus recognises that the authorities enjoy a wide margin of appreciation in assessing the necessity of taking a child into care. A "stricter scrutiny" is called for in any further limitations, such as restrictions placed by the authorities on parental rights of access, and of any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between the parents and a young child are effectively curtailed (ibid., § 211).'

99. It continues, at para. 68:-

'68. The Court emphasises that to the extent that these decisions implied that the authorities had given up reunification of the child and the natural parents as the ultimate goal, the conclusion that placement must be considered to be long-term should only have been drawn after careful consideration and also taking account of the authorities' positive duty to take measures to facilitate family reunion. However, in this case the decision to impose a very strict visiting regime cemented the situation at the very outset, making it highly probable that the child would become attached to the foster parents and alienated from the natural parents, thus precluding any realistic possibility of eventual reunification. Indeed, this is precisely what happened in the present case. In this respect, the Court recalls that where the authorities are responsible for a situation of family breakdown because they have failed in their obligation to take measures to facilitate family reunification, they may not base a decision to authorise adoption on the grounds of the absence of bonds between the parents and the child (see *Strand Lobben and Others*, cited above, § 208).'

100. The conclusions of the ECtHR are noteworthy, at p. 18:-

'70. The Court also notes that in the present case the adoption was "open" in the sense that contact visits were maintained even after the adoption (see paragraph 32 above). However, while the Supreme Court gave decisive weight to the importance of maintaining X's ties with his biological parents, the purpose of those visits was

only to ensure that he would not be cut off from his roots and his ethnic background. The Court considers that while maintenance of contact between an adopted child and his or her biological parents, in a situation where there are clearly no prospects of reunification, may be a relevant factor in ensuring continuing respect for family life (see Aune, cited above, § 78), the extremely limited nature of the contact arrangements in the present case - two hours twice a year - rendered them incapable even of allowing the development of a meaningful relationship.

In the light of the above, the Court considers that in the proceedings through which the adoption of X was ultimately authorised, insufficient importance was attached to the aim that a placement in care be temporary and the family be reunited, and that insufficient regard was paid to the positive duty to take measures to facilitate family reunification as soon as reasonably feasible. That being the case, and taking additional account of the very limited contact arrangements set by the Supreme Court, the Court does not find the "open" character of the adoption to be decisive.

The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 8 of the Convention.' [from p. 14]

101. There is no doubt in this case that the efforts of the Child and Family Agency were wanting in terms of facilitating the reunification of this family or access after 2008.

European Law

102. This Court, albeit in the context of a relocation case, *L.D. v. N.D*. [2020] IEHC 267 at paras. 33 & 34, had regard to a decision of the Court of Justice of the European Union as follows:-

"This Court must also have regard to the decision of the Court of Justice of the European Union of 5th October, 2010, in *J. McB. v. L.E.*, Case C-400/10 PPU, where, referring to Article 7 of the Charter of Fundamental Rights (respect for private and family life, home and communications), that Court observed at paragraph 60 of the judgment, that the Article must be read in such a manner so as to respect the obligation to take into consideration the child's best interest, and the fundamental right of the child to "maintain on a regular basis a personal relationship and direct contact with both of his or her parents…….

The Charter likewise recognises, in Article 7, the right to respect for private or family life. This provision must be read in conjunction with the obligation to have regard to the child's best interests, which are recognised in Article 24(2) of the Charter, and taking account of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both his or her parents"

As pointed out by this Court in that case the above principles should be respected and do accord with the basic welfare considerations which apply under Irish Law.

United Nations Convention on the Rights of the Child

103. Ireland signed up to the United National Convention on the Rights of the Child (U.N.C.R.C.) in 1992. For present purposes, it is useful to set out relevant portions of the preamble to the Convention:-

> 'Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance, Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community, Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding…..'

and it goes on:-

> 'Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth"'

104. There are several Articles of the Convention that are relevant here.

Article 2 (3) of the Convention provides :-

> 'States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.'

Article 9 (3) provides:-

> 'States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.'

105. Article 11 deals with adoption and it is appropriate to set out part (a) as the remainder applies to inter-country adoptions:-

> 'States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:
>
> (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and

legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

106. It is very clear from both the preamble and the articles of the Convention that the best interests of the child are the lifeblood which flows through it and the vindication of the rights of the child is its spirit. The right to regular contact between parent and child is again emphasized.

107. Both the Convention and European Law underline rights and obligations which are to be found elsewhere in domestic law.

108. For present purposes the relevant part of Section 19 of the Adoption Act 2010 provides:-

'19.(1) In any matter, application or proceedings under this Act which is, or are, before -

(a) the Authority, or
(b) any court,

the Authority or the court, as the case may be, shall regard the best interests of the child as the paramount consideration in the resolution of such matter, application or proceedings.

(2) In determining for the purposes of subsection (1) what is in the best interests of the child, the Authority or the court, as the case may be, shall have regard to all of the factors or circumstances that it considers relevant to the child who is the subject of the matter, application or proceedings concerned including -

(a) the child' s age and maturity,
(b) the physical, psychological and emotional needs of the child,
(c) the likely effect of adoption on the child,
(d) the child' s views on his or her proposed adoption,
(e) the child' s social, intellectual and educational needs,
(f) the child' s upbringing and care,
(g) the child' s relationship with his or her parent, guardian or relative, as the case may be, and
(h) any other particular circumstances pertaining to the child concerned.

(3) In so far as practicable, in relation to any matter, application or proceedings referred to in subsection (1) , in respect of any child who is capable of forming his or her own views, the Authority or the court, as the case may be, shall ascertain those views and such views shall be given due weight having regard to the age and maturity of the child".

109. Section 54 provides as follows:-

54.-(1) Where applicants, in whose favour the Authority has made a declaration under section 53(1) , request the Child and Family Agency to apply to the High Court for an order under this section-

(a) if the Child and Family Agency is satisfied that every reasonable effort has been made to support the parents of the child to whom the declaration under section 53(1) relates,

(a) if the Child and Family Agency considers it proper to do so and an application in accordance with paragraph (b) has not been made by the applicants, the Child and Family Agency may apply to the High Court for the order, and

(b) if, within the period of 3 months from the day on which the request was given, the Child and Family Agency either-

(i) by notice in writing given to the applicants, declines to accede to the request, or

(ii) does not give the applicants a notice under subparagraph (i) of this paragraph in relation to the request but does not make an application under paragraph (a) for the order,

the applicants may apply to the High Court for the order.

(2) On an application being made under paragraph (a) or (b) of subsection (1) , the High Court by order may authorise the Authority to make an adoption order in relation to the child in favour of the applicants and to dispense with the consent of any person whose consent is necessary to the making of the adoption order.

(2A) Before making an order under subsection (2) , the High Court shall be satisfied that -

(a) for a continuous period of not less than 36 months immediately preceding the time of the making of the application, the parents of the child to whom the declaration under section 53(1) relates, have failed in their duty towards the child to such extent that the safety or welfare of the child is likely to be prejudicially affected,

(b) there is no reasonable prospect that the parents will be able to care for the child in a manner that will not prejudicially affect his or her safety or welfare,

(c) the failure constitutes an abandonment on the part of the parents of all parental rights, whether under the Constitution or otherwise, with respect to the child,

(d) by reason of the failure, the State, as guardian of the common good, should supply the place of the parents,

(e) the child -

(i) at the time of the making of the application, is in the custody of and has a home with the applicants, and

(ii) for a continuous period of not less than 18 months immediately preceding that time, has been in the custody of and has had a home with the applicants,

and

(f) that the adoption of the child by the applicants is a proportionate means by which to supply the place of the parents.

(3) In considering an application for an order under subsection (2) , the High Court shall -

(a) have regard to the following:

(i) the rights, whether under the Constitution or otherwise, of the persons concerned (including the natural and imprescriptible rights of the child);

(ii) any other matter which the High Court considers relevant to the application,

and

(b) in so far as is practicable, in a case where the child concerned is capable of forming his or her own views, give due weight to the views of that child, having regard to the age and maturity of the child,

and, in the resolution of any such application, the best interests of the child shall be the paramount consideration……."

110. Insofar as the submissions made on behalf of the birth mother are concerned, the court is satisfied that there is a positive duty on the Child and Family Agency to be proactive in circumstances such as those which did arise in this case. The available evidence leads the court inevitably to the conclusion that it was not. The fact of the matter is that very little if anything, of substance, was done by the Child and Family Agency to endeavour to create access and/or to nurture some relationship between the mother and child after 2008. The possibility of family reunification seems to have been completely written off notwithstanding the improvement in the birth mother's mental state with treatment - and her changed position in life. As already pointed out the treating psychiatrist had stated in May 2011 that his last appointment with the birth mother had been in February 2008 until he saw her on the 5th May 2011 and at that meeting in May 2011 the birth mother was markedly improved from when she had been seen in the past with no evidence of psychotic illness. Although she remained vulnerable to alcohol abuse recurring she reported as being largely abstinent in May 2011. There are no medical records on the social work file following this and there appears to be a lack of knowledge or follow-up in relation to the son of the birth mother who was apparently returned to her in 2010 when he was fourteen years of age and continued to reside with her from that date. One must therefore question what evidence the Child and Family Agency relied upon to satisfy it that every reasonable effort was made to support the birth mother in the terms set out in s. 54 (1)(a) of the 2010 Act.

111. The submissions on behalf of the birth mother are correct to draw attention to the fact that the evidence establishes that the first time adoption was discussed was during a home visit to the foster carers in August of 2004 when M.L. was just one year and nine months old. This is referred to in the evidence before the court as a brief discussion between the second and third named applicants and the allocated social worker and fostering link worker. It is correct also to point to the evidence that the foster mother was present at access visits from an early stage ostensibly as a support for the child.

112. It is submitted on behalf of the birth mother that the very restricted access regime and the nature of the access provided can be interpreted as being designed to prevent a relationship developing between the mother and child. It is submitted that access was set up to fail. It is understandable why such a submission is made. However, the Court is not satisfied on the evidence that there was a plan or a grand scheme to prevent a relationship developing between the mother and child. It is clear from the evidence, including the available medical evidence, that the birth mother had profound mental health difficulties by reason of her diagnosis of schizophrenia at the time of the child's birth and that these problems continued right up to 2008 and even perhaps for a time thereafter but with significant improvement noted by her treating psychiatrist and communicated by him to the first named applicant in May 2011. The Court is satisfied on the evidence that the first named applicant was doing all that it believed reasonable in relation to access between the child's birth and 2008 but that the mental health difficulties which the birth mother was suffering from presented an extremely difficult situation insofar as their efforts to nurture the relationship between mother and child was concerned. There is little point speculating as to whether a different approach to access in the early years and the use of expert medical guidance in that regard would have worked better.

113. However, and as already observed in this judgment, it is difficult to comprehend why the relationship and the access could not have been worked on with a view to improvement when the mother's mental health had improved after 2008. The first named applicant ought to have done more after 2008 about the relationship of mother and daughter, access and the possibility (however remote) of family reunification.

114. In the submissions on behalf of the birth mother reference is made to the intention of the District Court during the care order proceedings to leave open the return of the child to the respondent and reference is also made to the social workers acting contrary to the views of the District Court. In order to deal with this submission, it is appropriate to set out in full the content of two attendances of the first named applicants solicitors in relation to the District Court care proceedings. These attendances are evidence presented by the first named applicant in that they are exhibits to the affidavit of Mr. P.S. (social worker attached to the first named applicant) which affidavit was sworn on the 12th June 2020. The first court attendance is dated the 17th January 2005 and records the following: -

"I confirm that I attended before Judge Watkin at District Court 20, Dolphin House, East Essex Street, Dublin 2 on the 17th of January last in relation to the above matter.

Ms. A.S. was present on behalf of M.L. and Dr. R.F. (Consultant Psychiatrist) was present having been asked to attend by myself.

I indicated when the matter was called that I would like to call Dr. R.F. first in relation to his evidence so that he could be released back to the clinic. Judge Watkin stated that she had no objection to this and Dr. F. was called in evidence. Dr. F. began to give some evidence and Judge Watkin interjected and stated that she wished merely to hear what was the nature of the respondent's mother's illness and was it simply schizophrenia. Dr. F. stated that it was. I asked him if he felt that it would impact on her ability to look after her child and he said that it would. He talked about emotional blunting, about inertia and learning disabilities and the fact that there was no prognosis in respect of this matter.

Judge Watkin once again interjected stating that she wanted to know had all options been tried in respect of medication and Dr. F. said that there was one final medication yet to be tried. Judge Watkin then looked at me and the social workers and stated that she was not minded to grant a full Care Order in the circumstances and that a shorter period of time should be negotiated between the parties. She directed that we leave the court room and that appropriate negotiations should take place. I was also in the other case of R.S. and asked for a couple of minutes to deal with the M.L. matter. In the interim, a colleague also had a case which was pressing and that matter went before the court.

I negotiated with A.S. in respect of the matter and it was agreed that the child M.L. should be placed in the care of the HSE for a period of two years.

In the interim, the new medication is to be tried and it should be much clearer as to what the position will be on the 17th of January when the matter is next before the court.

The Judge made a care order for a period of two years and has listed the matter before District Court No. 20 on the 17th of January, 2007, in respect of access, the order that she has made is that access shall remain at present levels with a view to being increased if and when appropriate.

The matter now stands adjourned."

115. This court attendance has the name of the solicitor who attended appended to it and is dated the 17th January 2005.

116. .Following that court hearing on the 17th January 2005 the solicitor who prepared the attendance already referred to wrote to the solicitor acting for the birth mother as follows: -

"We write in reference to our attendance before Judge Watkin on the 17th of January last.

I confirm that on consent Judge Watkin granted a care order in respect of baby M.L. for a period of two years. The matter will come before the court for a renewal of the application on the 17th of January, 2007.

As you are aware, Judge Watkin was not minded to hear evidence and was of the view having listened to Dr. R.F. (Consultant Psychiatrist) in respect of a possible change in medication for your client, wished to leave the door open for the child to return to her. She directed that the parties negotiate and that some type of compromise would be reached. Further thereto, we agreed with the consent of your client that the matter be extended on the terms outlined above. We also confirm that in respect of access, it is the intention of the HSE that should things improve between the child and your client, access will be increased, obviously if this is in the best interests of the child. However, we are instructed that there has been little interaction between your client and her daughter at any of the access visits that have been arranged.

Judge Watkins stated that access was to be on a monthly basis and to be reviewed when and if appropriate.

Many thanks."

117. A court attendance again exhibited in the same affidavit and dated the 25th June 2007 and with a different solicitor from the firm acting for the first named applicant attending, records as follows: -

"I attended at Court 20 on the 25th of June, 2007. Present on behalf of the HSE was M.M. Social Worker. His team leader, J.F. was not there and there was no one to replace him.

A.S. was present with the birth mother and grandmother. The grandmother came into court and we had no objection to this. I called Dr. R.F., Consultant Psychiatrist. He gave his evidence. There was no cross-examination by A.S. I then called M.M. I went through his report with him and he confirmed his professional opinion that the child should not stay with her mother as her mother was not in a position to deal with her.

A.S. did not cross-examine on the substantive matter of the need for the care order. Rather, she cross-examined on the basis of access. She also asked M.M. about life-story work being done with the child so that she knows who her mother is. M.M. was not a terribly good witness and could not confirm that good meaningful life-story work was being done so as to ensure the child knew of her mother and background.

Judge Lucey then spoke directly to the respondent, after which the respondent consented to the making of the care order. I submitted that the care order should be made until the child is eighteen and the judge agreed that this would be so. At this point we would be coming up to lunchtime. Judge Lucey would not leave access at the discretion of the HSE as he said that he was concerned that the child did not seem to know who her real mother was and he noted the birth mother's solicitor's comments that there was a problem with access. He told us to talk over lunch and come back at 2.15pm.

I spoke to M.M. He had no difficulty with extending access. I spoke with A.S. after lunch to see if she would accept an arrangement whereby an order could be made in relation to access as agreed from time to time with a three-month review and liberty to re-enter. He was not happy with this. She said that her client gets extremely anxious in the Health Centre as it holds very bad memories of failed access visits in the past. She said that her client clams up and gets very stressed out and, as a result, access in the Health Centre room will simply not work. She asked whether we could agree to access outside, such as to the park or the zoo or to a play centre in a shopping centre. I took full instructions from M.M. He had no difficulty with any of these suggestions. My opinion is that they were good suggestions as it is quite clear that the access between mother and child is not going well which has led to mother not taking up access for the last number of months.

Accordingly, we agreed that we would draw up a schedule of access arrangements to be given to A.S. in writing within two weeks of the date of the hearing and that, at access visits while the foster mother would bring the child to the access visits, she would withdraw to allow the birth mother and grandmother have access on their own with the baby. We then said that we could review the matter of access in about six months' time. Judge Lucey was very happy that we have made this arrangement and made the order in those terms."

118. Notwithstanding a focus on continuing access at and after both court hearings and agreements in that regard the access ultimately petered out - as previously described.

119. In referring to the care proceedings, the submissions on behalf of the birth mother refer to the social workers acting contrary to the court's views. In that regard, reference is made to the evidence presented on behalf of the first named applicant - and in particular to the report prepared for presentation to the first named respondent which has been referred to already above. In dealing with the "*adoption decision*" in that report the author refers to the first time adoption having been mentioned in August 2004. It also refers to a subsequent discussion with the foster carers in relation to adoption. That portion of the report reads: -

"Ms. K. (the third named applicant) again enquired about the possibility of adopting M.L. in a discussion with social workers M.M. and the fostering link worker on

20/6/2005. There is a brief note from the Child in Care Review held on 18/8/2005 stating that the social worker would start the adoption application."

120. In the submissions on behalf of the birth mother it is submitted that "*it is egregious that the social workers knowing that the court was minded to return the child discussed adoption and intended starting an adoption application. Rather than support the natural mother and increase access the social workers evinced an intention to start adoption showing scant regard for the rights of the natural mother, the child or respect for the court.*"

121. This submission on behalf of the birth mother is grounded in the evidence and points to another area of concern. Notwithstanding its statutory obligations referred to above the first named applicant has itself presented evidence to the court which suggests that it had in 2005 formed a view that family reunification was not really an option notwithstanding the ongoing medical treatment and the view expressed by the District Judge.

122. In an affidavit sworn by S.M. (social worker employed by the first named applicant) and dated the 12th June 2020 there is an averment explaining that adoption was not being discussed by the carers in 2010 and that when the child was aged eight or nine she became interested in her family of origin and background and adoption was not an appropriate consideration, given this interest, at that time as the child had started building relationships with her extended family. She goes on to say that the social worker attached to the child did contact the Adoption Services Department in 2012 to inquire about adoption and recalls following up with the foster carers regarding the progress of their completion of the application pack for adoption which had apparently been sent to the foster carers following an inquiry to the Adoption Services Department of the applicant Agency regarding adoption in April 2012. There is therefore no evidence before the court as to whether or not the social worker attached to the child did in fact start the adoption application following the earlier review which was held on 8th August 2005. However, the fact remains that the social worker dealing with the child was actively considering an enquiry from the third named applicant about the possibility of adopting M.L. following a discussion in June of 2005.

123. The submissions also refer to the Child Care Placement of Children in Foster Care Regulations 1995 (S.I. No. 260 of 1995). These regulations apply in respect of the placement of children in foster care under the Child Care Act 1991. As one would expect the welfare of the child in question is the first and paramount consideration in any matter relating to the placing of a child in foster care or the review of the case of a child in foster care or the removal of a child from foster care.

124. At the regular Child in Foster Care Reviews which must take place in accordance with the regulations the first named applicant must have regard to various matters concerning the welfare of the child - including those matters set out at Article 18 (5) of the Regulations and the first named applicant is obliged to consider: -

"(i) Whether all reasonable measures are being taken to promote the welfare of the child,

(ii) whether the care being provided for the child continues to be suitable to the child's needs,

(iii) whether the circumstances of the parents of the child have changed,

(iv) whether it would be in the best interests of the child to be given into the custody of his or her parents, and

(v) in the case of a child who is due to leave the care of the Child and Family Agency within the following two years, the child's need for assistance in accordance with the provisions of s.45 of the Act."

125. It is clear from the evidence presented to the Court that the necessary reviews or at least most of them did take place. However, there is little information or evidence as to what transpired at the reviews.

126. Counsel on behalf of the birth mother makes the point that Judge Lucey in the District Court on the 25th June 2007 expressed concern that the child did not seem to know who her real mother was in addition to noting the birth mother's solicitor's comment that there was a problem with access. Despite the concern expressed it is apparent that no life story was done in 2007, 2008, 2009 or 2010. The evidence shows that the life story work commenced in May 2011 when the child was eight and a half years of age. Furthermore, it seems that the first named applicant had not kept abreast of the changes in the circumstances of the mother. It did not keep abreast of the improvement with treatment in her medical condition and it appears that it was unaware of the fact that her son was back living with her since 2010.

127. If proper Child in (Foster) Care Reviews did take place as required by the legislation, then one wonders how it could be that the first named applicant was unaware of the improvement in the birth mother's medical condition during the period 2008 to 2011 and one wonders how it was unaware of the fact that the child's half sibling was living at home with his mother. How did it happen that no home visit to the birth mother took place and that there was little contact with the mother after 2008.The evidence indicates that the allocated social worker met with the birth mother on 24th February 2011 and that the social worker tried unsuccessfully to contact the birth mother in 2014. It is recorded that the birth mother contacted the social worker after receiving correspondence on 23rd February 2015 and stated that she did not want to see or talk about M.L. anymore.

128. Contact was re-established in 2017/2018, specifically in relation to the adoption application which had by then commenced. This contact commenced with correspondence to the birth mother on the 15th November 2017 with a request that the birth mother make contact with the social worker to discuss another matter relating to

the care of M.L. (the social worker did not specify adoption at that stage). There was no reply to that letter and the social worker wrote again to the birth mother on the 7th December 2017 and specifically mentioned that the carers were applying to adopt M.L. The birth mother then contacted the adoption social worker M.H. and a joint home visit was arranged for the 11th January 2018.

129. The exhibited report already referred to contains the following paragraph in a summary of the history of contact between the birth mother and the first named applicant: -

> *"The birth mother did attend a number of meetings with the Social Work Department when she was often supported by her own mother. As time went on she became less able to liaise with the Social Work Department and attended less meetings. This withdrawal led to her access visits becoming less frequent and eventually to there being no contact with the Social Work Department at all from about 2009 onwards. Eventually in February 2015 the birth mother told the social worker that she wanted no more contact in relation to M.L."*

130. Notwithstanding its statutory obligations, the first named applicant appears to have reacted to the statement of the birth mother on the 19th September 2008 that she was "*pulling the plug on access*" if she could not get her daughter back as an absolution from its statutory obligations. Apart from the meeting on the 24th February 2011 and the contact on the 23rd February 2015 there was no engagement at all with the birth mother after 2008 until the adoption application rekindled contact late in 2017.

131. A theme running through the submissions made on behalf of the birth mother is that foster care placements are not and should not be allowed to be a gateway to adoption. A difficulty for the applicants in this case is the fact that the circumstances established in evidence and referred to above - and in particular the failure to engage with the birth mother after 2008 - does lend credence to the theory that the applicants did around that time begin to treat the long term placement of M.L. in foster care as a situation which would inevitably result in her adoption by the foster carers and result in the exclusion of the birth mother. It is of course a powerful reply to that argument that the foster carers themselves facilitated and nurtured access between M.L. and extended family members on the birth mother's side. But this argument is somewhat equivocal. Firstly, it seems clear that this arrangement was attended to by the foster carers with little input by the first named applicant. Secondly, if that level of contact and access and relationship building was possible then how did it come to pass that the birth mother and child moved further apart with time - instead of moving at least a little closer.

132. There is in the submissions on behalf of the birth mother some direct criticism of the foster carers. The criticism is unfair. It is clear from the evidence that the foster carers have been of extraordinary benefit in the life and upbringing of M.L. It is a fact that she has benefitted from the love, care and stability which they have provided. The truth is that M.L. is loved dearly by the second and third named applicants and she in turn loves them and those in their family unit just as much. They cannot really be criticized for loving and wanting M.L. as their own as she has become such to them and this has been

so for years. That is a natural human process of parents caring for and rearing a child from infancy even if the child is born to another. This is a constant challenge to be managed professionally by the first named applicant when it places children in foster care. And that bond is where we are in the life of M.L. That cannot be changed. Nor unfortunately can we change the reality that there is no relationship between M.L. and her birth mother as things presently stand. The first named applicant has had the significant role in bringing M.L. and her birth mother to where they now are. Compliance with its statutory obligations may have led them closer.

133. The submissions on behalf of the birth mother also include a submission that one of the factors which the court must consider is the impact making the order sought will have on the birth mother. The submissions state, and the Court does accept, that this application has been unimaginably difficult for the birth mother, reminding her as it does of a difficult time in her life and what she has lost.

134. It is submitted to the Court that if the birth mother loses what she highly values, then it is likely to have a very adverse effect on her health and one that may have very grave consequences and that this would be grievously unfair to her.

135. The Court accepts the force of this submission. This is all the more so when the court is compelled by the evidence to find that the first named applicant ought to have engaged more with her over the years and ought ultimately to have moved with greater expedition in relation to the proposed adoption once it became clear that the second and third named applicants did intend to apply to adopt M.L. The Court is satisfied that the decision in this regard was certainly made as far back as 2015 and was probably made as far back as 2012 or possibly earlier. The disengagement by the first named applicant with the birth mother and then after a period of years the delay in progressing the adoption application has been unfair to the birth mother.

136. The submissions on behalf of the birth mother also point to the fact that the Court has no independent expert report before it about the possible impact of adoption on the child. The point is made that it is of significance that the court has no evidence before it as to whether, if adoption did in fact occur, it might be damaging for the child in the long term. This is indeed so but this is a matter on which the Court must nevertheless exercise a judgment in light of all of the available evidence.

137. On behalf of the birth mother it is submitted that the Court should not grant the order sought as to do so would be to endorse the significant wrong done to her to date.

138. The Court respects the force and depth of the birth mothers grievance at how she has been treated by the "system". Yet, her interest in the welfare of her daughter is as obvious as is her desire to wind the clock back to avail of the chance she believes was taken from her. The Court believes that she will appreciate that it too is striving to achieve what is best for her daughter. This is not a civil action in which the birth mother is seeking a remedy against the first-named applicant in respect of the matters she complains of.

139. It is appropriate to turn to the "*delay*" issue in more detail. In this regard, it is again worthwhile setting out clearly the evidence of the first named applicant in relation to the *"adoption decision*" as set out in the report already referred to. In that report the author states the following: -

> *"Having reviewed all of the files pertaining to M.L. the first time adoption was discussed was during a home visit to the foster carers in August 2004, when M.L. was just one year nine months old. This was a brief discussion between C.K. and G.K and the allocated social worker S.F. and the fostering link worker. It would appear that this was just an initial inquiry. Ms. K. again inquired about the possibility of adopting M.L. in a discussion with social worker M.M. and the fostering link worker on 20/6/2005. There is a brief note from the Child in Care Review held on 18/8/2005 stating that the social worker would start the adoption application.*
>
> *The next note that this S.W. found on file was a conversation between C.K. and the social worker by phone on 28/2/2011, during which C.K. states that their (her and G.K.) ultimate goal is adoption. On 26/1/2012 C.K. informed the social worker that she had been in touch with the Adoption Services to make inquiries about the adoption process.*
>
> *A court report prepared by the allocated social worker D.C., dated 23/4/2012 states that the HSE (now CFA) supports the foster carers' application to adopt M.L. Ms. C.G., who was the guardian ad litem appointed at that time stated in her court report dated 21/4/2012 that she supported the adoption application. There is a letter on file from the Adoption Service confirming receipt of the application.*
>
> *The minutes of the Child in Care Review meeting held on 12/2/2015 state that the foster carers had mislaid the information pack provided to them by the Adoption Services and had now received another one. At this time the carers were in the process of applying for enhanced rights in relation to M.L.*
>
> *The above information shows that from a very early stage the foster carers were committed to M.L. in a very serious way and were thinking long into the future when considering adopting her.*
>
> *The care plans for 2016, 2017 and 2018 all state that the adoption process is to be proceeded with. A decision in the 2017 Care Plan states that the adoption of M.L. by C.K and G.K. is to be progressed and supported by the Social Work Department.*
>
> *This S.W. attended a meeting at the Adoption Service on 14/11/2017 with both foster carers, their link worker and three members of the Adoption Service Social Work Team.*
>
> *The first mention of M.L.'s view on adoption is a note of a meeting between the social worker and M.L. and her foster mother C.K. on 4/12/15. During this*

conversation, which was primarily to discuss the upcoming enhanced rights application, M.L. said she wished to be adopted in the future.

During statutory visits to M.L. in September and November 2016 and again in February 2017 the adoption process was discussed with her and her carers. At a meeting with M.L. on 12/6/17 M.L. told this S.W. that she was keen for the adoption to happen. This S.W. had a further discussion with M.L. about the adoption process on 10/10/17 and again on 27/2/18. M.L. is aware that this S.W. had met with her mother and that she was likely to object to the adoption going ahead. M.L. remains content that the adoption process will continue despite her mother's wishes. On 8/6/18 M.L. informed this S.W. that she had met the S.W. from the Adoption Service."

140. On the 12th June 2020 a social worker employed as a team leader with the Adoption Services Unit of the first named applicant swore an affidavit giving further details in relation to the adoption application, which can be summarised as follows: -

(1) In or about April 2012 the allocated social worker to the child made an inquiry to the Adoption Services Department of the first named applicant and an application pack was then sent to the second and third named applicants.

(2) Save in exceptional circumstances the assessment process does not commence until the applicants return the completed documentation.

(3) The first application pack sent to the second and third named applicants was not returned and they subsequently advised that they had mislaid it. A second pack was then sent to them.

(4) The case had been unallocated for a couple of years prior to one D.C. becoming the allocated Children in Care social worker for the case and she had that role from 2010 to 2016. According to her, adoption was not being discussed by the carers in 2010 in circumstances where life story work was being attended to.

(5) The allocated social worker D.C. contacted the Adoption Services Department in 2012 to inquire about adoption and she recalls following up with the foster carers regarding the progress of their completion of their application pack.

(6) Another application pack was sent to the second and third named applicants around the 5th September 2014. The second and third named applicants applied to the District Court for enhanced rights in December 2015 and it is stated that they devoted themselves totally to that application process at that time - which the applicant agency was fully supportive of.

(7) Another adoption application pack was sent to the second and third named applicants around the 17th November 2016. The completed application pack was received back on the 31st May 2017. The documentation was submitted and the second and third named respondents were passed medically fit.

(8) In October 2017 C.K. was diagnosed with left-sided breast cancer through the Breast Check screening programme. She underwent surgery and further medical reports had to be awaited before the adoption application could be progressed.

(9) Final approval by the medical adviser came through on the 9th January 2019. *(Thus, the delay between October 2017 and the 9th January 2019 is a delay for which there is a full explanation).*

(10) The required declaration of eligibility and suitability was made on the 12th March 2019.

(11) Consultation with the birth mother was happening simultaneously. The paperwork for the s. 53 application was prepared by the applicant agency including the legal submissions and executive summary and this was submitted in August 2019 to the Adoption Authority.

141. The Court has already commented on the timeline and the delay involved in progressing the adoption application. The delay is manifest when one considers the above chronology. Apart from the period between October 2017 and the 9th January 2019 there is no substantial explanation for the applicants not progressing the adoption application years before it was eventually progressed by the submission of a completed application pack on the 31st May 2017. The evidence also shows that the first named applicant was in a strong position to influence and expedite the process and its commencement even if the second and third named applicants had to submit the actual application.

142. The exhibited social worker's report already referred to in some detail points out that the child completed her life story work in 2011/2012 to give her an understanding of why she was in care and why she had two mothers. It says that the work commenced in May 2011 and ended in January 2012. The work was carried out over seventeen sessions in that period and the report states that the foster carers were kept informed of all of the topics being covered. The report continues: -

> *"Having reviewed the child care worker's file, it is apparent that the following subjects were discussed with M.L: -*
>
> " *The fact that there is no information available about M.L.'s father.*
>
> " *Why she has a different skin colour to her mother and foster carers.*
>
> " *The effects of mental health difficulties on her mother's ability to care for her.*
>
> " *M.L. spoke about not wishing to see her mother.*
>
> " *Her sense of belonging to the K. family and that it is her family.*

143. The Court is satisfied on the evidence that the application for adoption could and should as a matter of probability have been progressed in 2012 after the completion of the life story work. The Court is also satisfied that no worthwhile reason or justification or explanation has been advanced for the years of delay in making the application in the intervening period, except for the period between October 2017 and the 9th January 2019. This delay creates an unfairness in the entire process. It works to the disadvantage of the birth mother in circumstances such as those which exist in this case. It works to the advantage of the applicants. It is not in the interests of the welfare of the child who needs certainty and stability in her life. The delay also creates evidential difficulties for a court revisiting issues and attempting to establish the factual narrative in the case. Memories have faded, social workers have moved on, people have changed and grown older and the dynamics have changed significantly in terms of the actual situation as it existed in 2012 as opposed to those which exist in 2019/2020. In a nutshell, the delay creates a fundamental unfairness for the birth mother here. In the absence of any adequate explanation for the delay, it must weigh heavily in the scales when the court comes to balance the respective rights of the parties.

Decision

144. The Court has dealt in detail with the evidence and the submissions in circumstances where it has from the outset of the hearing been apparent that the birth mother considers that she has not been listened to and has been treated unfairly by the system which ought to uphold her rights. Much of what has been detailed above might be regarded as surplus to what is necessary to decide on the application before the court. But it is not. As the birth mother deserves to have her complaints heard and considered in a transparent manner and deserves to know that her voice is heard and taken seriously before a decision is arrived at.

145. The evidence establishes that:-

(i) The birthmother was unable to care for her daughter M.L. at birth in 2002. The significant illness which impeded her doing so continued unabated for many years.

(ii) The birthmother's mental condition and general circumstances did improve with treatment and medication. It is clear that she had made significant progress by 2008 and certainly between then and 2011. Her treating psychiatrist was of the opinion in May 2011 that she had markedly improved from when she had been seen in February 2008 and had by then no evidence of psychiatric illness. The first named applicant did not keep appraised of the birthmother's progress with treatment. There was inadequate follow-up in that regard after 2008.

(iii) The first named applicant ought to have done more in terms of keeping abreast of the birthmother's recovery from her mental illness after the full care order was granted in the District Court in June 2007.

(iv) The first named applicant ought to have kept abreast of the personal and family circumstances of the birthmother after the full care order was granted in June

2007. The evidence is that the half-sibling of M.L. has been resident with the birthmother since 2010 and has been reared by her since he was fourteen years of age.

(v) Up until and during 2008, the first named applicant did try in very challenging circumstances to make access work. It did not work well, and the visits were distressing for M.L. by reason of her birthmother's non-engagement. However, the visit in March 2008 was described as positive. It is worth noting that this positive engagement at access coincides with the evidence which shows that the treatment was beginning to help the birthmother in terms of her recovery from her psychiatric illness - as the email from her treating psychiatrist in May 2011 states that her last appointment with him had been in February 2008 and she had no evidence of psychiatric illness when he saw her in May, 2011.

(vi) In 2008, the first named applicant did try to arrange access at a purpose-built access centre but this proved unsuccessful.

(vii) The birthmother did communicate to the first named applicant in September 2008 that she was 'pulling the plug' on access if she could not get M.L. back. After that communication, it does appear that the first named applicant's involvement with the birthmother in terms of attempting to create a pathway for access between herself and her daughter, M.L., petered out. The first named applicant was inactive in that regard after 2008. Had it complied with its statutory obligations, it would have done more than it did.

(viii) In 2010, M.L. told her social worker that she did not wish to see her mother. This is hardly surprising as M.L. really had no bond or relationship with her mother at that point in time. That may not have been or remained so if the first named applicant was more proactive after 2008 than it was.

(ix) The birthmother did contact the allocated social worker in February 2015, after receiving correspondence, and stated that she did not want to see her or about M.L. anymore. At that point in time, the daughter who had been taken from her at birth, as she saw it, was twelve years of age and her efforts to get her daughter back had failed. Moreover, she had not seen her daughter since 2008.

(x) M.L. has had and maintains a relationship with family members on her mother's side with the assistance of the foster carers.

(xi) The situation between the birthmother and M.L. might not be as polarised if the first named applicant had been attentive to its statutory obligations in terms of nurturing the relationship between mother and daughter after 2008 and even if the possibility of reunification became more and more remote as time passed. Instead, virtually nothing was done in that regard by the first named applicant. The reference in the "report" that "*the records indicated that every effort was made to facilitate the birthmother in building her relationship with her daughter, but she was*

unable to take the opportunity" is a reference to what transpired before and during 2008. It cannot be a reference to what occurred afterwards because no real efforts were made in that regard after 2008.

(xii) At a point between 2012 and 2015 - and perhaps prior to then - a situation existed where reunification of mother and daughter in the family unit was impossible. As of 2012, M.L. was nine years of age and totally imbedded in the family unit of her foster carers where she had been reared since four days of age. M.L. had not seen her birthmother since March 2008. She did not know her and had said in 2010 that she did not want to see her. The birthmother had stated in 2008 that she was 'pulling the plug' on access if she was not getting her daughter back. Adoption had been on the cards for years but nothing was done about it at that time. The child deserved certainty. The birthmother deserved certainty. The foster carers deserved certainty. Leaving the issue in abeyance for years after 2012 smacks of a lack of due process when the fact of the matter is that the first named applicant had disengaged from interaction with the birthmother after 2008. In observing this apparent lack of due process, the court is concerned that the first named applicant's non-engagement after 2008 with the birthmother whilst M.L. was in a long-term foster care placement created a situation whereby the strength of the foster carer's application for adoption and the weakness of the birthmother's opposition to it were each augmented by the passage of time. That was unfair to the birthmother.

146. If we turn then to consider the situation that exists at this moment in time insofar as M.L. is concerned.

147. The Court has had the opportunity to meet informally with M.L. and to have a discussion with her. The court did so in order to ascertain her own views in relation to the proposed adoption. Having met with M.L. and having regard to the evidence in the case, the court is satisfied that: -

(a) M.L. presents as a child who is almost 18 years of age with the maturity of a girl of that age. Her presentation on meeting her is in that regard entirely consistent with the evidence.

(b) The evidence in relation to her physical, psychological and emotional needs is not particularly remarkable. It is the position that the court was not presented with any medical evidence or opinion of a psychologist but there is nothing in the evidence nor in her presentation at the informal meeting which suggests that such expert evidence is necessary insofar as her current physical, psychological and emotional needs are concerned. A report from an appropriate expert, such as a psychologist or an expert in the area, in relation to the future impact of the granting or refusal of the order sought (i.e. permitting or declining to permit her adoption) might well be of assistance to the court. However, the court must deal with the application in light of the evidence presented. It should also be said that it is apparent from the evidence and from ascertaining the views of the child by

speaking to her that she does harbour a sense of rejection by reason of the fact that her mother is missing from her life. She does also attach huge importance to achieving success, as she sees it, in terms of being adopted by her foster carers whom she regards as her parents. It is clear from the evidence and from speaking to her that she believes that this will create a proper sense of belonging and identity for her.

(c) As to the likely effect of adoption on the child, the evidence that is available to the court persuades it that M.L. believes that she is entitled to be adopted by her foster parents. Indeed, she is totally unable to comprehend how or why a court would prevent her adoption by her foster parents. The court is satisfied that the adoption will be good for her, not least because she has her heart set on attaining such a goal. Moreover, and perhaps more importantly, the court believes that not granting the approval sought and thereby preventing the adoption proceeding would be a major disappointment to M.L. and a huge blow to her confidence and state of mind going forward. Put simply, the court is satisfied that such an outcome would probably cause her to feel rejected on the double.

(d) Insofar as her social, intellectual and educational needs are concerned, the fact of the matter is that these have been and continue to be looked after and nurtured positively by her foster carers and within the family unit which she has belonged to without interruption since infancy. It is clear on the evidence that she is achieving her potential within that environment which she knows, trusts and is comfortable in. Her best interests are best served by allowing this to continue and approval of the order sought will assist significantly in this regard whereas refusal of the order sought will not.

(e) The upbringing and care of M.L. and her relationship with her foster carers are positive. It is clear on the evidence that she has had a happy childhood save for the sense of rejection she feels by reason of the absence of her mother from her life. She does not know, and she has never known her father. Unfortunately, it is a fact that she does not have a bond or any worthwhile relationship with her birth mother. As already observed in this judgment the position might have been otherwise if the first named applicant had been more proactive and if it had tried harder, or at all, in that regard between 2008 and now.

148. Turning then to the test set out in the now expanded s. 54 (2A) The Court must deal with the application in accordance with Statute and in line with the legal authorities. This application must focus on the applicable test in light of the evidence. The evidence before the Court satisfies it as follows:-

(a) For a continuous period of not less than 36 months immediately preceding the time of the making of the application, the birthmother has failed in her duty towards M.L. to such an extent that the safety or welfare of M.L. is likely to be prejudicially affected. This is a statement of fact. In 2008, the birthmother said that she was 'pulling the plug' on access if she was not getting her daughter back. In 2015, she

said that she did not want to see or talk about M.L. anymore. She walked away from the situation completely. Although this is so, the Court cannot but observe that there are circumstances recited in considerable detail in this judgment describing the context in which this state of affairs came about.

(b) There is no reasonable prospect that the birthmother will be able to care for M.L. in a manner that will not prejudicially affect her safety or welfare. At this point in time, the reality is that M.L. is living in a family unit with her foster carers which she regards as her family and in circumstances where she regards her foster carers as her parents. She has no relationship or bond with her birthmother. Her needs exist daily and her safety and welfare are a constant consideration. Her birth mother is unfortunately like a stranger to M.L. and there is no prospect of her adequately fulfilling the role of a parent to M.L. now or at any time before she reaches 18. Again, this statement of fact may sound hollow given that the child will be eighteen in a few months' time. But although that is so, it would be wrong to approach the situation on the basis that parental care and it's benefit and importance ceases when a child turns eighteen or shortly beforehand.

(c) The failure of the birthmother constitutes an abandonment on the part of the birthmother of all parental rights, whether under the Constitution or otherwise, with respect to the child. This is a finding made having regard to the special meaning ascribed to the word "*abandonment*" and having regard to the evidence in the case. The factual situation is that the foster carers (the second and third named applicants) have satisfied all of the child's needs since she was an infant. It is clear from the evidence that the birthmother was unable, by reason of psychiatric illness, to fulfil her parental duties and to look after M.L. at the time of her birth and for many years afterwards. This situation continued up until 2008 and perhaps afterwards. In September of 2008 the birth mother walked away from the situation because she was not getting her daughter back. However, it is only right to repeat once more that the situation did improve and the situation of "abandonment" might not have existed or continued if the first named applicant had provided more support, or any support, to the birthmother after 2008.

(d) By reason of the failure, the State, as guardian of the common good, should supply the place of the parents/the birthmother. This is so, at this point in time, and in circumstances where M.L. knows the second and third named applicants as her parents and knows the family unit where they are the parents and in which she has been reared since infancy as her home and as her only home and only family.

(e) As things currently stand, M.L. is in the custody of and has a home with the second and third named applicants and that has been so since she was an infant.

(f) The adoption of M.L. by the second and third named applicants is a proportionate means by which to supply the place of the parents, and, in particular, of the birthmother. The birthfather is unknown. It is correct to approve of the adoption in circumstances where M.L. as a matter of fact belongs to the family unit of the

second and third named applicants in the sense that she has been reared by them in that family unit since she was four days old. It is correct to allow her to achieve her desire to be adopted by the second and third named applicants. It is correct to allow the family which she believes she belongs to, and wants to belong to, to be her family in law by allowing her foster carers to adopt her.

149. Under subs. 54(3), this Court must have regard to:-

(1) the rights, whether under the Constitution or otherwise, of the persons concerned (including the natural and imprescriptible rights of the child),

(2) any other matter which the court considers relevant to the application, and

(3) insofar as is practicable, in a case where the child concerned is capable of forming his or her own views, give due weight to the views of that child, having regard to the age and maturity of the child.

150. In the resolution of the application, the best interests of the child are the paramount consideration.

151. The Court has already dealt with the views of the child. It is abundantly clear that she wants the adoption to proceed and that she has her heart set on being adopted by the second and third named applicants. Having regard to the evidence and having spoken to the child, the Court has very real concerns about the impact a refusal might have on the welfare of the child.

152. Insofar as subs. (1) and (2) are concerned, the Court has, in some detail, considered the rights under the Constitution and otherwise which impact on its considerations. It has dealt in detail with the failures of the first-named applicant and the delay involved in bringing this application before the first named respondent and before this Court. It is the view of the court that the birthmother ought to have been involved more and recognised more by the first named applicant. It does appear that her rights as a mother were not taken seriously after 2008 and it does seem clear from the evidence that the first named applicant did not comply with its statutory obligations to the birthmother whose child was in care. This appears manifestly so after 2008.

153. The Court is conscious that the first named applicant was dealing with a particularly difficult situation in dealing with a birthmother who had a significant psychiatric illness at the time of the child's birth and for several years afterwards. There is no doubt but that the situation was difficult to manage and the probability is that the first named applicant was proceeding based on what it considered best for the child. It is also true that we do not know how things would have turned out if the first named applicant had been proactive throughout after 2008 in endeavouring to nurture and maintain a relationship between the birthmother and M.L. The efforts may have succeeded, or they may have failed. It may well be that reunification would never have proved possible. We do not know. The greatest unfairness to the mother is that the first named applicant did not do

what it ought to have done in terms of being proactive in those respects to allow the birthmother the opportunities which she was entitled to both in terms of consideration of reunification, workable access and the creation of a relationship between her and her child.

154. The birthmother should not have been side-lined by the first named applicant after 2008 - and that is what happened. This impacted also on the rights of M.L. She had an entitlement to a relationship with her mother, or at least to have all opportunities exhausted to that end, and the failures of the first named applicant impacted also on her.

155. Thereafter, the delay in processing the adoption application when it was inevitable that there would be such an application was unfair to all concerned and in particular to the birth mother.

156. The childhood of M.L. has now passed by. The Court is concerned that granting approval to the adoption might be seen as tolerating something which ought not to be tolerated. Granting approval might well send out all the incorrect signals and be detrimental in terms of the rights of parents and children if one looks at the bigger picture. In answer to the Court's questions on this it has been reminded that the best interests of the child must be the paramount consideration in the resolution of this application. But that answer evokes all of the concerns about the use of such a trump card when a state agency finds itself in some difficulty.

157. Ultimately however, this Court cannot remedy the effects of the passage of time. M.L. lives with and has been brought up in a family where the second and third named applicants are the parents - and the only parents she knows. She loves them as her Mam and Dad and they love her as their daughter. Time has made this so.

158. Having regard to the situation that exists today and applying the test which must be applied and having regard to the authorities and all the matters which must be considered, the Court is satisfied that the threshold is met in terms of the statutory requirements. The Court is entirely satisfied that the best interests of M.L. as things presently stand require the granting of the approval sought.

159. It would be wrong of the Court to refuse to grant the approval sought by reason of the shortcomings of the first-named applicant and although the Court has made clear its dismay at what has transpired. To refuse the approval sought would negatively impact on the best interests of M.L. and would effectively set to one side that paramount consideration. That would be wrong. Accordingly, the Court is granting the order as sought.