

**THE HIGH COURT
FAMILY LAW**

[2022] IEHC 301

[2022 15 M]

[2022 18 SP]

**IN THE MATTER OF AN APPLICATION PURSUANT TO
SECTION 54(2) OF THE ADOPTION ACT 2010 (AS
AMENDED)**

AND IN THE MATTER OF A., A MINOR AND B., A MINOR

BETWEEN:

**CHILD AND FAMILY AGENCY and A.X. and P.X.
Applicants**

-AND-

THE ADOPTION AUTHORITY OF IRELAND

Respondent

-AND-

C.

Respondent

**EX TEMPORE JUDGMENT of Mr. Justice Jordan delivered on the 3rd day of
March, 2022**

1. These two applications come before the court by way of special summonses issued on behalf of the applicants, the first being the Child and Family Agency and the second and third applicants being the applicants for the adoption of the children, the subject matter of the applications. Those proceedings were issued in the case of A.

who was born in April, 2004, on 18th February last and bear record no. 2022/15M. The proceedings in respect of B. were instituted by special summons on 22nd February, 2022, and bear record no. 2022/18M. B. was born in July of 2005.

2. The position in relation to these applications is that they have been heard together in circumstances where the applicants for adoption are Mr. X. and Mrs X. and in both cases because they are the foster parents of both children. The situation in relation to the children is that they have the same birth mother but different birth fathers according to the mother. As far as A. is concerned the birth mother has given the information that he is a British citizen of Jamaican origin and that she left him and came to Ireland and went to the south-west of the country when she was pregnant with A. Insofar as B. is concerned, according to the birth mother, the birth father is a Nigerian national who she says left Ireland a week after B. was born. The initials of his name, according to the court paperwork and according to her, are D.E.

3. The position in relation to the birth mother is that she was, at the time of the birth of the children, a vulnerable woman originally from Nigeria who has been diagnosed in the past with significant psychiatric illness. As a result of that psychiatric illness, both of the children the subject matter of the proceedings, have been with the applicants since 2010 after the mother was detained for the second time under the Mental Health Act of 2001 by reason of the psychiatric illness which she suffered. The first time she had been detained after the birth of the children was in January of 2009. The children were in care between January of 2009 and August of 2009 when they were returned to the birth mother, but things broke down shortly afterwards as a result of which both children came to live with Mr X. and Mrs X.

4. Insofar as the psychiatric illness is concerned, the evidence before the court is that the birth mother was diagnosed while in Ireland with paranoid schizophrenia and a suspected underlying intellectual disability.

5. It is clear from the paperwork that the birth mother C. has been at the hard edge of life for a long time now and certainly for most if not all of the lives of the children because of the challenges she has as a result of her psychiatric illness and her level of intellectual functioning. Of note is the fact that A. was with his birth mother for most of the time between his birth and the time he was taken into care for the second time and fostered with Mr X. and Mrs X. He was five or six years with his birth mother and he does have a recollection of her and an attachment to her which B. does not have according to the paperwork - at least to the same extent. This may go in some way towards explaining A.'s struggling with the concept of adoption during lockdown when it did appear that he was oscillating somewhat in terms of his desire to be adopted. That is the main reason that the court wished to speak to the children. It did not have any difficulty in relation to the position articulated in the paperwork in so far as the voice of B. was concerned. It was consistent throughout but the court did need to ascertain from A. and be satisfied as to his position - and of course there was little point in speaking to one of them without speaking to them both. But having spoken to them both there is no doubt in the court's mind that both understand the concept and consequences of adoption and both of them want to be adopted by Mr X. and Mrs X. They were very careful to articulate their view clearly in that regard when the court spoke to them on Zoom a short while ago.

6. It is the position that C. did have access with the children on a number of occasions after they were fostered by Mr X. and Mrs X. but the level of engagement was poor and the supports provided to facilitate the engagement were largely

unsuccessful. It is the position that she returned to Nigeria in January, 2016 without a goodbye visit. Although efforts were made to get her to meet the children for a goodbye visit she declined and left without leaving any note. Although she was given a blank card on which to write a message, she declined to do so. The court says this not by way of criticism but because it is part of the factual background in terms of the application which is before the court. It is also the position that she did not make any effort after returning to Nigeria to make contact with the children and the efforts to make contact with her were unsuccessful until eventually, apparently by reason of a phone call to ascertain what medication C. had been on in Ireland, that phone call being made by an older sister of hers, a contact number was obtained and there has been subsequent contact with R. the older sister of C. There has also been contact as it happens by a relative in the United Kingdom who became involved apparently at the request of the older sister because she had a better command of English but as it happened the main contact has remained with the older sister of C., who apparently is looking after C. in Nigeria.

7. Insofar as the current situation of the birth mother is concerned, it is very clear on the evidence that she is suffering from the psychiatric illness which she was suffering from in Ireland - which comes as no surprise given the diagnosis made in Ireland.

8. Insofar as the biological fathers of both children are concerned, there has never been any contact by either of them and nothing is known about either of them.

9. It is also the position that a s.18 Care Order was made in the District Court in respect of both children in May, 2013. It is the position that A. and B. are both settled and thriving in a loving home.

10. Insofar as the birth mother's position is concerned, there is, as happens in many of these cases, an underlying sadness and that underlying sadness results from the mental health difficulties and intellectual difficulties which the mother is burdened with.

11. This Court did appoint a guardian *ad litem* on behalf of the birth mother. She has participated with the assistance of a legal team in these proceedings and has provided on affidavit her view in the matter. That affidavit was sworn on 1st March, 2022 and exhibits her report in relation to what she has done to fulfil her obligations to the birth mother in the context of the applications made in these proceedings. She concludes that C. is too ill to engage in any discussion about the adoption application in respect of her two children. Her sister stated that she has been ill for a period of almost seven years and there does not appear to be any real prospect of an imminent recovery. The older sister R. has confirmed that C. has not been well enough for even minimal contact with her children over recent years and that nobody in the maternal family has met the two children or had any recent contact with them. They know of them and they have photographs of them in the home but they have never met them. R. does mention speaking to A. three or four times when he was very young on the phone.

12. The guardian goes on to conclude that R. has expressed concerns on behalf of her sister about the adoption application on the basis that it is unfair to proceed when C. is ill. She also points out that it is not culturally acceptable and that the family has a question about the involvement of A. and B. in C.'s future care. The guardian Ms. D. concludes that in all of the above circumstances it can only be concluded that C. is not in a position to consent to the adoption application. The court is not reading the

entirety of the report of the guardian or the affidavit but it and the other affidavits before the court can be taken as read.

13. Insofar as cultural differences and opposition by the family of C. to the adoption process is concerned, it is summarised in the report of the guardian and in the affidavit of Ms. Y. sworn on 17th February, 2022. The opposition articulated by R. in a phone call on 25th January, 2022, included the following: -

“We do not want the children to be adopted. C. is still alive so the children cannot be adopted, their mother needs them and C. is still sick and cannot attend to this matter now. The family believe if the children are adopted they will abandon their mother”.

That is the position of the family of the birth mother and can be explained in the context of the culture in Nigeria - and in circumstances where the family of the birth mother in Nigeria are anxious to look out for her and do the best for her in terms of the future. It is not entirely clear what attitude the birth mother would adopt to this application if she was in a position to consider it and to articulate a view - that is if she was not suffering from the psychiatric illness that has been described in the documentation and affidavit evidence before the court. It is abundantly clear from the evidence before the court that C. is profoundly ill with a mental illness at the moment and needs the care and support of her family in Nigeria in order to survive from day to day.

14. At para. 1.2 of the report of the guardian *ad litem*, the report which is exhibited with her affidavit she says:

“It has not been possible to speak directly to C. in light of her poor health. I made contact by telephone and email with her sister R. on 28th February, 2022 and 1st March, 2022. R. advises that her sister is unable to walk, has memory

loss and is not responsive. R. further advised that she has attempted to raise the issue of adoption with her sister in the past week but it is clear that she does not understand and she has been unable to make any response.”

15. At para. 4.7 of the report Ms. D. the guardian *ad litem* says:

“R. stated that the family understands the potential benefits of adoption for A. and B. and she stated that there is a possibility that her sister may have consented to this had she been well enough. However, the fact remains that C. is too unwell to engage and she requested that the court be told that the family believes this to be unfair.”

16. The court is conscious in deciding this matter that C. is more vulnerable now than she was when she gave birth to the children because, according to the evidence, her condition has deteriorated. The court is conscious of the UN Convention on the Rights of Persons with Disability and the 2003 European Convention on Human Rights. It is a fact that it is unfortunate that the birth mother is in the position she is in and is unable to participate in the lives of the children, is unable to participate in any meaningful way in the decisions that have to be made concerning the children and is unable to participate in a meaningful way in the proceedings. However, she is represented and every effort has been made to afford her a voice and representation and to respect her rights insofar as this application is concerned.

17. The court will refer briefly to the law and say that having read the written submissions of counsel for the applicants detailing the legal principles to be applied in applications of this nature, it is happy to adopt the legal position as set out in terms of the legislation, the constitutional imperative and the precedents in the area. The recent authority in this area is the decision of Judge MacGrath in the *Child and Family Agency and HR & FR applicants and the Adoption Authority of Ireland & PW and AW*

which is reported at [2018] IEHC p.515 . The court is happy to adopt the statement of the law as set out in that decision by Judge MacGrath . The court is not going to repeat what it said in the subsequent case *the Child and Family Agency. and X.X. and Y.Y. v the Adoption Authority of Ireland and Z.Z.* [2019] IEHC 312 but it should be taken as read because as it happens there are a lot of similarities between that case and this.

18. In relation to the issues before this Court, it is satisfied in relation to the s.53 declaration in respect of both children dated 7th December, 2021. It is satisfied also in relation to the declaration of eligibility and suitability which issued to the second and third named applicants on 30th November, 2021 and which remains current.

19. Turning then to part. 7 of the Act which includes the section under which this application is brought, it is satisfied that it is appropriate to proceed having regard to the provisions of s.55 of the Adoption Act, 2010 (as amended) notwithstanding the absence of evidence from C., the birth mother, in circumstances where it is satisfied that she is incapable by reason of mental infirmity of giving reliable evidence to the High Court. It is satisfied that it is appropriate in these circumstances to dispense with her giving evidence insofar as it may be necessary to make that order. The court is not entirely sure that it is, but makes it nonetheless - she is not here, she cannot be here because she suffers from significant psychiatric illness and is being minded by her family and in particular by her older sister in Nigeria.

20. Insofar as the birth fathers are concerned, they are not here, they are not known, they haven't been identified, and it is not really possible to identify them. They have never been involved in the life of either of the two children and having regard to the provisions in s.55 the court is satisfied that it is appropriate to proceed in the absence of the biological father of A. and in the absence of the biological father of

B. In that regard the court is satisfied that all appropriate measures have been taken to ascertain the identity of the birth fathers of A. and B. It has never been possible because the information available from the birth mother was insufficient to identify them.

21. The court must turn then to the proofs which are required before the High Court can make the orders sought in these two applications. These are matters of fact which have to be looked at in the context of the evidence available to the court at this moment in time. Insofar as para. (a) is concerned, that is s.54(2)(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 s.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”.

The court is satisfied of that as a matter of fact on the evidence which is before the court. The position is that the birth mother has been in Nigeria since January 2016 and has had no contact with the children. She has in truth been unavailable to either of them since September 2010 because of her psychiatric illness. As a matter of fact, the court is satisfied of the requirement which it requires to be satisfied of under sub. (a).

At sub. (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.”*

Before moving to that, the court should perhaps say, although it is obvious, that in circumstances where the birth father of A. and the birth father of B. have never been in their lives it is obvious that the requirement at sub.(a) is met. It is not alone for a period of not less than 36 months, they have never been available as fathers, or as a father to A. and as a father to B.

22. 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 and welfare - in that regard insofar as the birth father of A. or the birth father of B. is concerned, they are complete strangers. That requirement is clearly met insofar as the birth fathers are concerned. Insofar as the birth mother C. is concerned, she is unfortunately suffering from mental illness and the truth of the matter on the evidence is that she is not able to look after herself, not to mention looking after two children whom she barely knows. There is no reasonable prospect that she will ever be able to care for either of the children. That is sad and that is unfortunate but it is a fact.

23. At sub. (c) it is stated:- *“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”*. Again, the court is satisfied that is the position. It is sad, it is unfortunate that this mother, through mental illness, has lost her children. She didn't abandon them at the side of the road. She knew where they were when she left for Nigeria and one cannot help but think, although it is speculation, that in her mind, troubled and all as it was, she knew that they were in a better position than the place she could provide for them. Whatever way one looks at it, the truth of the situation is that there was an abandonment by her of all parental rights whether under the Constitution or otherwise with respect to the children - but it was not deliberate. It happened because she is burdened with mental illness and intellectual challenges. The abandonment, although it is a harsh word, is a word that is interpreted in accordance with the authorities in a certain way and what happened here constitutes such abandonment.

24. At sub. (d) it states *“by reason of the failure the State as guardian of the common good should supply the place of the parents”* . It is best to read this with sub.

(f) - *“the adoption of the child by the applicants is a proportionate means by which to supply the place of the parents”*. It is obvious to the court on the evidence that it was and is necessary to supply the place of the parents and that the adoption of the children by the foster parents is a proportionate means by which to supply the place of the parents. The birth father of A. is nowhere to be found. The birth father of B. is nowhere to be found. They are unknown. They are strangers. The court is satisfied in relation to *D & F*. It is proportionate and it is necessary and it is reasonable having regard to the evidence in the case.

25. At sub. (e) it states:-

“the child at the time of making of the application is in the custody of and has a home with the applicants and for a continuous period of not less than eighteen months immediately preceding that time has been in the custody of and has had a home with the applicants”.

That is the factual position in respect of A. and B.

26. In this application the court must have regard to the rights, whether under the Constitution or otherwise, of the persons concerned including the natural and imprescriptible rights of the child - and any other matter which the court considers relevant to the application. This is a balancing exercise insofar as the respective rights are concerned and it does involve a welfare assessment in respect of A. and B. It does involve a consideration of the position of the birth mother. It does involve the court, when resolving the application, to have as the paramount consideration the best interests of the child. The court has no doubt as to what is in the best interests of the child in each case. It is in A.'s best interest that he be adopted by Mr X. and Mrs X. It is in B.'s best interest that she be adopted by Mr X. and Mrs X. In arriving at this decision, the court has, as it has already indicated, had regard to what both of them

want. They are clear in articulating their views and they are of an age where the sincerity and consistency and sense of the views they express cannot be ignored.

27. Having regard to the other rights of the stakeholders brings the court back to the rights of the birth mother. This is not a rubberstamping exercise and the court can understand the opposition to the application in both cases. However, a balance has to be struck in relation to the competing rights at issue and against the backdrop that the court is entirely satisfied of the proofs recited at paras (a), (b), (c), (d),(e) and (f) of s.542A.

28. Insofar as other matters are concerned, there is an obligation on the court to have regard to any other matter which the High Court considers relevant to the application and again the court is concerned about the delay in progressing applications like this. It shouldn't be the case that this Court is dealing with an application to adopt a child who will be an adult in a month's time. That is not fair to anyone involved. It is not fair to the child. It is not fair to the foster parents or the applicants for adoption. It is not fair to the biological parents. Everybody, no matter how small one considers oneself as a cog in the wheels that grind so slowly in these processes, should look at what they can do to expedite the dealing with applications of this nature. It has happened that there was space in the list today to cater for this application but that is not always so. If these delays continue - in addition to the unfairness of leaving things as late in the day as they are so routinely left - the Child and Family Agency, the applicants for the adoption and the Adoption Authority will find themselves appearing before this Court some Monday morning looking for a date and find there is none available. There are many other cases in the High Court list requiring priority. There are many others that are urgent and it is not fair to the system that applications like this are dragged out to the extent they are. The court appreciates

that people are under pressure. It appreciates that assessments take time. It appreciates that when you are trying to deal with a mentally challenged person in Nigeria there will inevitably be delays - but that situation did not come about overnight. Something needs to be done about these delays at senior level and all the way down in the Child and Family Agency in particular - and also in the Adoption Authority. Action is required to stop these delays happening.

29. A. and B. should have had a decision on the adoption process a long time ago. The court believes, although it is not a matter that it is deciding, from looking at this case and earlier cases, that a different approach would result in greater expedition. In some cases delay cannot be avoided but in a large number of them matters could move much faster. This court does want to be overly critical but these delays are now falling into a category of concern that may count as another matter which the court considers relevant in applications going forward - and it may ultimately result in orders being refused because the delay is so gross that the court cannot countenance making the orders which it would have made if the matter was before the court earlier.

30. Having said all of that, the court is satisfied in all respects in relation to the applications which are before the court. In the case bearing record no. 2022/15M it will grant the two orders sought at paras. 1 and 2, that is an order pursuant to s.54(2) of the Adoption Act 2010 (as amended) authorising the Adoption Authority of Ireland to make an Adoption Order in respect of A. in favour of Mr X. and Mrs X. and it will make an order pursuant to s.54(2) of the Adoption Act 2010 dispensing with the consent of any person whose consent is required to the making of that Adoption Order.

31. In relation to record no. 2022/18M involving B. the court will make an order in the same terms as the previous order - that is the orders sought at paras. 1 and 2 in the same form as just recited in respect of B.