THE HIGH COURT

[2024] IEHC 89

Record No. H MCA 2023/396

IN THE MATTER OF AN APPLICATION BY THE ADOPTION AUTHORITY OF IRELAND (THE APPLICANT HEREIN) PURSUANT TO SECTION 30(5) OF THE ADOPTION ACT 2010 – 2017 (AS AMENDED)

-AND-

IN THE MATTER OF THE PROPOSED ADOPTION OF 'B' (A MINOR, BORN [STATED DATE])

JUDGMENT of Ms. Justice Nuala Jackson delivered on the 12th day of February 2024

INTRODUCTION

1. This matter comes before me pursuant to an Originating Notice of Motion dated the 22nd November 2023, issued by the Adoption Authority of Ireland ('the AAI'), in which the AAI seeks, in the alternative, an Order pursuant to Section 30(3) of the Adoption Act, 2010 approving the making of an adoption order in respect of B by the Applicant, without consultation with the birth father, in circumstances in which it is asserted that the nature of the relationship between the birth father and the mother make such consultation inappropriate or, alternatively, an order pursuant to section 30(5) of the Adoption Act 2010 – 2017 ('the Acts') approving the making of an order for the adoption of a child ('B') without consulting the natural father in circumstances which the natural mother is unable to identify the natural father and the AAI has no other practical means of ascertaining the natural father's identity. It should be noted that section 30(3) of the Acts also envisages that consultation may be dispensed with on the basis of the inappropriateness of so doing having regard to the circumstances of conception. No relief based on this statutory ground was sought herein and, in my view, correctly so, as there was no evidence adduced before

me pertaining to the circumstances of conception in this case. Likewise, section 30(5) of the Acts has a further ground for non-consultation based upon the refusal of the birth mother to reveal the identity of the father of the child. This ground is also not engaged in this instance.

2. When the matter came before me on the 8th December 2023, having heard and received the evidence adduced by the AAI and submissions of Counsel, I indicated that I would dispense with the requirement for consultation with the birth father while indicating that a reserved judgment would be delivered in which I would set out the legislative basis upon which such dispensation would be granted and the reasons for same. This is that judgment.

FACTUAL BACKGROUND

3. The Application herein was grounded upon the Affidavit of Mark Kirwan and there were a number of exhibits thereto including a statutory declaration of the birth mother (as required in section 30(5)(a) of the Acts) and also a Report prepared by Tusla personnel for the AAI on consultation with the birth father.

4. The child in this instance was born on the [redacted] 2014, in circumstances in which there had been community care social worker involvement with the birth mother for some time prior to this birth. The child was received into voluntary care within days of birth and never lived with the birth mother. The proposed adopter has been the care giver for the child throughout this time. Both the child and the proposed adopter are anxious to give legal recognition to their relationship through adoption.

5. Prior to and at the time of birth, the birth mother was cohabiting with X and indicated that he was the father of the child. He was registered as such on the child's birth certificate. Subsequently, X was confirmed not to be the father by DNA testing. In due course, the birth certificate was amended to reflect this. The birth mother thereafter indicated that she "had been sure" that X was the father of the child but that there two other possibilities in relation to paternity. In the case of Y, the birth mother reported that he was deceased having died abroad in violent circumstances. Few details were revealed by the birth mother about this person. In the case of Z, the birth mother indicated a relationship with him of short duration only and she had contact details (he lived abroad and was not of Irish origin) and

expressed a willingness to make contact with Z to inform him of the situation arising. The birth mother indicated that she was not in a position to state whether Y or Z was the father of the child. Contact was made with Z by the birth mother and Z was reported by her to be shocked by the possibility of parenthood and further, while he was not agreeable to his telephone number and address being provided to Tusla Adoption Services, he was agreeable to his email address being provided to them. The birth mother reported that Z had initially told her that he was prepared to engage with social workers and to undergo DNA testing but later he indicated to her reluctance in relation to this. The birth mother furnished Z's email address to the Tusla social workers. Communication was sent to Z by the Tusla (via email) on two occasions and neither email was responded to by him. The AAI was subsequently informed by the birth mother that Z did not wish to engage further and that he did not believe he was the father of the child. It has not been possible for the AAI or Tusla to succeed in having engagement by Z in advancing whether or not he is B's birth father. The most that can be concluded on the evidence before me is that the birth mother indicates that he may be the birth father but that he may not be and that Z himself has refused to engage and his position is that "he did not believe that he was B's father" (Tusla Report to AAI on the Consultation with the Birth Father, 8th May 2023).

6. The birth mother is consenting to the adoption. The wishes of the child have been ascertained by the AAI and it has been confirmed that B wishes to be adopted, expressing cogent reasons for this including the proposed adopter and her family being the *de facto* family and that B wishes the security which adoption will afford. A Social Work Report has concluded that adoption is in B's best interests.

PRELIMINARY OBSERVATIONS

7. The lack of a *legitimus contradictor* in applications such as the present has been previously highlighted in judgments of this Court. Barrett J. reflected in ***Adoption Authority of Ireland v Y*** [2020] IEHC 494:

> *"13. In passing, and by way of obiter observation, the court cannot but note that an inherent weakness of the format of the within application, for which weakness the Authority bears no responsibility, is that it involves the Authority making application and presenting its proofs (which will typically be supportive*

of that application – why else would the Authority be before the court?), with the court essentially being called upon by the statutory system in place to refuse the approval sought in the face of a well-intentioned but typically one-sided presentation, without input from a legitimus contradictor. It would be interesting to know just how often the courts have departed from such chiming expert evidence as is placed before them in the context of s.30 applications. Certainly, this Court would be slow to depart from the broadly chiming evidence of numerous experts. After all, some degree of judicial humility is required in the face of agreeing experts, just as a degree of judicial courage can be demanded in the face of dissenting experts".

In the present case, there has been little corroboration of events. The birth mother believed X to be the birth father of her child. This has been definitively disproved. It is simply not possible to definitively conclude the identity of the birth father on the evidence before me. I am most conscious that Z has failed to respond to communication from Tusla and that the information which I have in relation to his response to the suggestion of parentage is exclusively based on the hearsay account of the birth mother. However, all reasonable routes of direct contact with him seem to have been availed of and to have yielded no response.

LEGISLATIVE PROVISIONS

8. The legislative provisions which are engaged in this matter are, primarily:

Section 30(3) of the Acts:

"(3) Where the Authority is satisfied that, having regard to-

(a) The nature of the relationship between the relevant non-guardian of a child and the mother or guardian of the child, or

(b) …,

it would be inappropriate for the Authority to consult the relevant non-guardian in respect of the adoption of the child, the Authority may, after first obtaining the approval of the High Court, make the adoption order without consulting the relevant non-guardian concerned."

and

Section 30(5) of the Acts:

(5) After counselling the mother or guardian of the child under subsection (4), the Authority may, after first obtaining the approval of the High Court, make the adoption order without consulting that father if—

(a) the mother or guardian of the child either refuses to reveal the identity of that father of the child, or provides the Authority with a statutory declaration that he or she is unable to identify that father, and

(b) the Authority has no other practical means of ascertaining the identity of that father."

and Section 19 of the Acts:

"*19.— (1) In any matter, application or proceedings 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."

MATTERS TO BE PROVED (I) –

9. Section 30(3)(a):
   (A) What is the nature of the relationship between the relevant non-guardian and the birth mother?
   (B) Is this relationship such that it is inappropriate to consult with the relevant non-guardian?

In relation to (A) above, the distinguishing factor in the relationship is whether family life rights have been engaged or not. The issue at (B) as to the appropriateness of consultation must be considered in the light of the nature of the relationship. In the event that family life arises, the more likely it is that consultation should occur although there will be circumstances in which, notwithstanding family life rights having been engaged, consultation will be inappropriate.

FAMILY LIFE

10. The issue of notice to a non-guardian birth father prior to the making of an adoption order in respect of a child was comprehensively addressed by O'Neill J. *in* ***WS v The Adoption Board*** [2010] 2 IR 530, albeit in the context of the pre-2010 legislative scheme applicable to adoptions. It is clear from this decision that the legal position will vary based upon whether or not "family life" rights pursuant to Article 8 of the European Convention of Human Rights are or have been engaged on the facts of a particular case. Referring to the

decision of the European Court of Human Rights in ***Keegan v Ireland*** (1994) 18 EHRR 342 and in particular to Para. 45 of the Judgment:

> "*45. In the present case, the relationship between the applicant and the child's mother lasted for two years during one of which they co-habited. Moreover, the conception of their child was the result of a deliberate decision and they had also planned to get married. Their relationship at this time had thus the hallmarked of family life for the purposes of Article 8. The fact that it subsequently broke down does not alter this conclusion any more than it would for a couple who were lawfully married and in a similar situation. It follows that from the moment of the child's birth there existed between the applicant and his daughter a bond amounting to family life*."

11. O'Neill J. then went on to address the manner in which 'family life' is to be identified in non-marital situations:

> *"8.10 Family life within the meaning of Article 8 extends beyond families based on marriage, as noted in Keegan to include other de facto families, as when parties live together. A child born within such a relationship would enjoy a relationship amounting to family life with its parents. The existence or non-existence of family life under Article 8 is a question of fact which depends upon the existence of the requisite personal ties. Evidence of personal ties, in the context of a child born into a non-marital relationship, could include the following matters as identified by the Court in Lebbink v. The Netherlands (2004) 2 F.L.R. 463: -*
>
> *"[36] ... Where it concerns a potential relationship which could develop between a child born out of wedlock and its natural father, relevant factors include the nature of the relationship between the natural parents and the demonstrable interest in and commitment by the father to the child both before and after its birth ...."*

8.11 In Boughanemi v. France (1996) 22 E.H.R.R. 228 the Court held that family life existed in circumstances where the applicant father had separated from the mother several months before the child's birth and was subsequently deported. The Court, at para.35, indicated that family life, once established, could only be broken thereafter in exceptional circumstances: -

"35. ... The concept of family life on which Article 8 is based embraces, even where there is no cohabitation, the tie between a parent and his or her child, regardless of whether or not the latter is legitimate. Although that tie may be broken by subsequent events, this can only happen in exceptional circumstances. In the present case neither the belated character of the formal recognition nor the applicant's alleged conduct in regard to the child constitutes such a circumstance."

8.12 The Court in Ciliz v. The Netherlands (Judgment of the European Court of Human Rights, 11th July 2000) dealt with the circumstances in which family ties can be severed. In that case the parents of the child had been married and later separated. During the period immediately following the separation the applicant father made no attempt to see his son and when he did express a desire to meet him, he did not keep his appointments. After some time, the applicant began to meet with his son with some frequency and he made a number of applications to court in respect of access. Ultimately the Court found that "exceptional circumstances capable of breaking the ties of 'family life'" were not demonstrated.

8.13 In Gul v. Switzerland (Judgment of the European Court of Human Rights dated the 22nd of January, 1996) the Court found that the separation of a natural father from his son for seven years since the birth of his child was not sufficient to terminate family life between them, though in that case the applicant father was married to the mother.

8.14 In establishing whether family life exists as between a natural father and his child it is apparent that the Court will adopt a pragmatic approach in identifying the necessary personal ties. If this relationship exists, a very high

threshold must be reached to demonstrate that those ties have been extinguished by subsequent events. If a natural father who enjoys family life with his child is deprived of any participation in adoption proceedings this may or may not result in a finding of a breach of Article 8. It will have to be established, in the context of the specific case, whether such a decision to exclude him was "in accordance with the law ", pursued a " legitimate aim " and whether it was " necessary in a democratic society ", in the sense of being a proportionate measure in the circumstances. It is clear that a child's interests may override that of a natural parent."

12. Applying these principles in the present case, it is amply clear that this is a case in which family life rights are not engaged. The position might be different in relation to X (the birth mother was cohabiting with him, had named him on the birth certificate and she was in a relationship with him at the time of birth) in which case different issues might arise in considering appropriateness of consultation or otherwise. Clearly, there is a different and weightier test to be satisfied if non-consultation is to be authorised in circumstances where there was family life (it is not necessary to examine in this case the circumstances in which such a situation might arise but it was clearly envisaged in ***WS*** that there were such situations perhaps in circumstances of extreme abuse evidencing that it is in the child's best interests that the relationship be terminated. Indeed, in ***Keegan v. Ireland*** [1994] 18 EHRR 342, the European Court of Human Rights indicated that for justification for intrusion into family life rights to arise, Ireland would have needed to advance:

" ... reasons relevant to the welfare of the applicant's daughter to justify such a departure from the principles that govern respect for family ties.").

13. However, DNA has proved him not to be the father of the child. The other two possible fathers, Y and Z, are people with whom the birth mother was never in a relationship and there was never any aspect of family life arising with these persons. They knew nothing of the child save in the context of the adoption process and, in this context, only to a very minimal degree, if any. Therefore, the issue here is in what circumstances is it inappropriate to consult with a relevant non-guardian where there have never been family life rights arising?

"INAPPROPRIATE"

14. In the ***WS*** case, O'Neill J. stated:

> *"Under the umbrella of the nature of the relationship, a critical important factor in deciding to notify or not would be the duration of any relationship between the father and the child and hence the degree of any engagement between the father and the child or the depth or lack of it of any commitment by the father to the child. If the duration of the relationship was so short as to be negligible in the sense of demonstrating that no parental filial bond could have been realistically formed between father and child, this would clearly be a factor which would sway the Adoption Authority towards a refusal of notification. If the relationship was one of some longevity, such that the normal parental bond was formed between father and child, unless there was present in that relationship an abusive element of some sort, such as to lead to a conclusion that the relationship should be terminated in the interests of the welfare of the child, then the Adoption Authority should be swayed towards notification."*

15. The required standards in section 30(3)(a) cases, absent a finding of family life, have also been addressed by Barrett J. in ***In the Matter of a Proposed Adoption of X*** [2020] IEHC 493:

> *"First, the Authority has gone to great lengths to seek to consult with the natural father. Second, once the natural father said that he wanted to apply for custody of X, the Authority set out clearly in correspondence that it would give the natural father a period of eight weeks to issue that application (and, in reality, he was granted a great deal more time). Third, there is a clear welfare issue that presents as regards X and it is in X's best interests that the adoption order be made; that is quite different from the situation that presented in Keegan."*

16. In its ordinary meaning, "inappropriate" connotes that which is unsuitable or improper in the circumstances. This involves a consideration of the
    (i) Duration of relationship
    (ii) Degree of engagement/commitment
    (iii) Presence of filial bond

(iv) Presence of abuse (exacerbated where the abuse is towards the child[1])

(v) Efforts towards consultation which have occurred and response of father to same

(vi) Welfare and best interests of the child

17. All of these features, save for (iv) which is not engaged due to the lack of any involvement of the father post or, indeed, pre-conception, tend towards permitting non-consultation in the present case and, in consequence, I find that the legal requirements of section 30(3) of the 2010 Act have been established by the AAI.

MATTERS TO BE PROVED (II) -

18. Section 30(5):

(A) That the birth mother is unable to identify the father (the issue of refusal to identify does not arise in this present instance);

I find that this requirement is satisfied herein. The person the birth mother believed to be the father of the child has been definitively proven not to be such. The only evidence before me is that she does not know who the birth father and, absent DNA testing, it is impossible to establish paternity. The height of the evidence is that the birth mother has identified two persons who might be the birth father of the child. One of them is deceased and the other has demonstrated no ability to engage or to assist in this regard and, indeed, has formed and expressed the view that he is unlikely to be the birth father. Therefore, the father cannot be identified whether by the birth mother or anyone else. There is no indication that the birth mother has not been fully co-operative in this regard.

(B) That the AAI has no other practical means of ascertaining the identity of the father.

19. In ***In the Matter of a Proposed Adoption of IBO*** [2021] IEHC 378 (Jordan J.), it is stated:

[1] Ref. ***In the matter of a proposed Adoption of X*** [2019] IEHC 946 (Jordan J.), a decision in the context of a relationship in which family life rights were found not to have been engaged.

"28. This Court is satisfied that a purposive approach is required in the interpretation of s.30. A child centred approach is appropriate to the interpretation of the section in circumstances where the welfare of the child is the first and paramount consideration.

29. Non-notification of a birth father can create a risk as identified by O'Neill J. in W.S., that the process may be flawed or kiltered by the sole reliance on one-sided information that may turn out to be inaccurate or otherwise unreliable. This can cause a grave risk of a very serious breach of the natural father's constitutional right to fair procedures and natural justice and his rights under the Convention, resulting in a very serious injustice being done to the natural father and, by extension, the child, if the natural father is excluded from the process on the basis of reliance solely on information supplied by the mother. However, those concerns do not arise in the circumstances of this case. The fact of the matter here is that every effort has been made to involve the birth father but those efforts have failed because he cannot be found. He has not been excluded but has rather excluded himself. The Court is alert to the possibility that he might be unable to make contact. However, there is no evidence to support or to suggest that this is so and the Court considers it a remote possibility given all of the evidence."

The statutory provision is not in absolute terms. It does not require exhaustive searches to be carried out. It requires that the AAI has no other practical means of ascertaining the natural father's identity. In normal, everyday usage, "practical" has been defined as "relating to experience, real situations or actions rather than ideas or imagination" and "suitable for the situation" (Cambridge Dictionary). In the circumstances of this case, I find that the AAI has satisfied the proofs required by Section 30(5) such that it is entitled to the relief sought under this statutory provision also.

BEST INTERESTS OF THE CHILD

20. It is clear from section 19 of the Act that in considering an application in relation to non-consultation, whether section 30(3) or section 30(5) is being invoked, the paramount consideration must be the best interests of the child. It is my view that in the present case there is no doubt that adoption is the best course of action for the child and furthermore that this should be achieved in as timely a manner as possible.

(a) Facts pertaining to the welfare of A

- A Declaration of Eligibility and Suitability has been made by the AAI in favour of the Applicant and the Deponent herein on behalf of the AAI has deposed to the AAI being of the view that the proposed adoption is in the best interests of A.
- A Social Work Report has been provided to me which reaches the same conclusion.
- In applying the "best interests" test, the wishes of the child have been ascertained and those wishes accord with what has also been objectively determined to be in the best interests of the child.

DETERMINATION

21. Based upon these factual circumstances, I am satisfied to make an Order pursuant to both of the provisions under which relief is being sought as both appear to me to be satisfied. In so doing, it is important to state that this is not a case in which family life rights are engaged so far as the relevant non-guardian is concerned. In the circumstances which pertain herein, I find that this is a case in which, by virtue of the relationship between parents, it is inappropriate that there would be consultation and further I find that the birth mother is unable to identify the father of the child and the AAI has no other practical means of determining such identity, particularly in light of the non-engagement of Z.