

**Neutral Citation No: [2023] NIFam 24**

*Ref:* **McF12369**

*ICOS:* **23/098444**

*Judgment: approved by the court for handing down  
(subject to editorial corrections)\**

*Delivered:* **11/12/2023**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**FAMILY DIVISION**

**OFFICE OF CARE AND PROTECTION**

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**IN THE MATTER OF AN APPLICATION UNDER ARTICLE 57(1) OF THE  
ADOPTION (NI) ORDER 1987**

**IN THE MATTER OF CT A 15 YEAR OLD CHILD**

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**The applicants appeared without legal representation  
Ms M Smyth KC with Ms L Murphy (instructed by the Directorate of Legal Services) for  
the Health and Social Care Trust  
Mr A Magee KC with Ms M McHugh (instructed by Babingtons Solicitors) for the child  
by his Court Children’s Guardian**

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**McFARLAND J**

***Introduction***

[1] The applicants are the child’s paternal uncle and his wife. They are domiciled in the USA. They have applied for a court order giving them parental responsibility to enable them to progress their application to adopt the child in the USA. I have used the randomly selected cipher CT to describe the child in order that his anonymity is preserved.

[2] CT has been made the subject of a care order and he has been freed for adoption by this court. The Trust are a notice party to these proceedings and have agreed to provide legal assistance to the applicants.

[3] Article 57(1) of the Adoption (NI) Order 1987 (“the Adoption Order”) provides that –

“Where on an application made in respect of a child by a person who is not domiciled in Northern Ireland or England and Wales or Scotland an authorised court is

satisfied that he intends to adopt the child under the law of or within the country in which the applicant is domiciled, the court may, subject to the provisions of this Article, make an order giving him parental responsibility for the child”

Article 57(2) of the Adoption Order states that certain provisions set out in Part III of the Adoption Order shall apply, including Article 13(1) and that Article 13(1) should be altered with substituted time periods when it is being considered in the context of an Article 57(1) application. The altered Article 13(1) provides that:

“Where –

(a) the applicant, or one of the applicants, is a parent, step-parent or relative of the child, or

(b) ...

an adoption order shall not be made unless the child is at least 32 weeks old and at all times during the preceding 26 weeks had his home with the applicants or one of them.”

[4] I am satisfied that the applicants have a clear intention to adopt CT in the USA. The uncle is a relative of the child and the child is over 32 weeks old. The only issue before the court is whether the child has had his home with the applicants during the preceding 26 weeks. The application is dated 9 November 2023 so the relevant period is 9 May – 9 November 2023.

[5] The judgment of the court will turn on the appropriate interpretation of the phrase “had his home with the applicants or one of them”.

[6] The court is not being asked to make an adoption order. It is deciding on a course of action in relation to the adoption of a child, and it is determining a question with respect to the upbringing of the child. The welfare provisions of Article 9 of the Adoption Order and Article 3 of the Children (NI) Order 1995 (“the Children Order”) therefore apply to the consideration. It is not necessary to discuss the difference between the wording of the two Orders and the difference, if any, between the welfare of the child being the most important or the paramount consideration.

### *The case-law*

[7] In the course of its submission, the Trust referred to several authorities. The first was the decision of O’Hara J in *Trust v KM & RR* [2014] NIFam 6. In that case twins were in the care of the Trust under a care order with a care plan of adoption. The prospective adopters were the paternal aunt and her husband who were domiciled in the USA. The Trust applied for a declaration as to the meaning of Article

13(1) of the Adoption Order. The issue before O'Hara J was more focussed on the whereabouts of a home, given an earlier judgment of Higgins J in *Re JA & LB* [2003] NIJB 22 and a potential conflict with an interpretation provided by equivalent provision in England in *Re A* [2009] EWCA Civ 41. O'Hara J determined that "home" was not geographically defined and that the phrase "home with the applicant" fitted far more readily with the home outside the jurisdiction, *i.e.* where the home of the prospective adopters truly was.

[8] I was also referred to a decision of Arbuthnot J in *A v R & YP* [2021] EWHC 3168. That case involved an application for an adoption order in respect of a 17 year old. The circumstances of the applicant were not straightforward. He was a successful businessman aged 88 years living in London. The child lived in Switzerland. He was married to the mother but divorced in 2002. The child was born in February 2003. The applicant remarried but was divorced again before the applicant and the mother reunited and they and the child became a family unit. It was therefore a step-father application.

[9] The equivalent legislation in England also required proof that the child had his home with the applicant at all times during the six months preceding the application.

[10] Arbuthnot J reviewed some of the relevant case law including:

- (a) *Re G* [2008] EWCA Civ 105, when the Court of Appeal upheld a ruling that as neither "residence" nor "continually in the care of" had not been used in the legislation it was clear that the presence of a child at a particular geographical location and the presence of the adults with the child at any particular time were not factors critical to the existence of the concept of a child having a home with them. This was considered to be a sensible and purposive construction as one purpose of the provision was to ensure that a relationship should begin to be established (see Potter P at [22]).
- (b) *Re KT* [1993] Fam Law 567, when Ward J held that the child had his "home" with his aunt (the prospective adopter) notwithstanding the fact that the child actually lived with his aunt only at the weekend.
- (c) *Re Y* (1985) Fam D 33 when Sheldon J held that a person could have two homes as long as the homes comprise elements of regular occupation (whether past, present, or intended in the future, even if intermittent).

[11] It was concluded that "home" should be given a wide and flexible interpretation. In that case the child was physically in Switzerland and the applicant was physically in England for the entirety of the six month period. However, Arbuthnot J considered that:

"This is not a case where a particular geographical location is required, I do not consider that [the mother] and [the child] need to be living with [the applicant] in one place for

[the child] to have a home with [the applicant]. I have concluded that home in this context of an 18 year old who has known the applicant almost all his life, who is bound to him emotionally and sometimes geographically and regards him as his father meets the requirement of having "had his home with the applicant...at all times during the period of six months preceding the application" even though [the child] was in Switzerland during this period."

[12] This decision was reached on the basis of the need for a purposive interpretation of the legislation particularly in the context of the Article 8 ECHR rights of the child and to secure his welfare. Arbuthnot J also referred to the limits of an over-extension of the interpretive powers open to a judge with reference to *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [115]:

"In any given case, however, there may come a point where, standing back, the only proper conclusion is that the scale of what is proposed would go beyond any implication that could possibly be derived from reading the existing legislation in a way that was compatible with the Convention right in question. In that event, the boundary line will have been crossed and only Parliament can effect, the necessary change."

### *The background evidence*

[13] CT was born in 2007. He initially lived abroad with his parents and returned to Northern Ireland with his father in October 2015.

[14] In November 2015, CT was voluntarily accommodated under Article 21 of the Children Order and placed in the care of his paternal grandmother. A care order was made, with that care plan, in February 2018. Due to the grandmother's serious illness CT's uncle (one of the applicants) returned from the USA in April 2020 to care for her and for CT for a period of about six months. With the grandmother incapacitated, the uncle took over the main parenting role for CT.

[15] The uncle then returned to the USA in October 2020 and by July 2021 the applicants had decided to put themselves forward as full-time carers of CT. The couple were approved as kinship carers in December 2021.

[16] The uncle came to Northern Ireland in December 2021 and then returned to the USA with the grandmother and CT. They remained living in the USA with the applicants until March 2022 with the applicants undertaking the main parenting role for CT.

[17] CT and his grandmother returned to Northern Ireland in March 2022. At that point the Trust had approved a care plan of adoption by the applicants. It became

impossible for the grandmother to continue to care for CT and there followed short-term placements with relatives.

[18] CT was freed for adoption in May 2023 by this court.

[19] The applicants live in a house in the USA which includes four bedrooms one of which is CT's.

[20] Since returning to Northern Ireland in March 2022, CT has also lived with the applicants in the USA when he was able to travel to the USA on an ESTA visa waiver for holiday periods totalling seven weeks in June 2022 – August 2022 and July 2023 – July 2023.

[21] CT lived with his uncle in Northern Ireland when the uncle came to support and assist CT for approximately seven weeks in March 2022, October 2022 – November 2022, February 2023 and April 2023.

[22] In addition to these periods of residence, family and home life has been established and progressed by a number of initiatives, for example:

- (a) Contact directly between either or both of the applicants and CT on at least a weekly basis via phone/video call or messaging;
- (b) Regular contact between the applicant and CT's current carer to address any of CT's needs;
- (c) CT has his own bedroom and living area within the applicant's home in the USA which he has used when able to travel to stay in the USA and which is maintained for him;
- (d) Rules, boundaries and routines have been established which include CT within the applicants' family;
- (e) The applicants have engaged directly with the Trust, which holds parental responsibility for CT, and they communicate freely with respect to CT and decisions that need to be made in respect of him;
- (f) CT has been supported by the applicants to establish links in the USA through peer friendships since 2019, which he maintains by social media whilst in Northern Ireland; and
- (g) The applicants, with the consent and encouragement of the Trust, have assumed a parental role in respect of CT, planning for his education, health care and social life.

[23] At present USA immigration requirements severely restrict the ability of CT to enter the USA and to take up physical residence with the applicants.

### *Consideration*

[24] The case-law does permit an expansive consideration of the meaning of “having a home with” beyond the confines of the bricks and mortar of a building occupied as a residence. There is a need to have a purposive approach to the understanding of the phrase, taking into account the purpose of the legislative provision, the importance placed on the welfare of the child, and the obligation to respect the private and family lives of the child and the applicants.

[25] The approach adopted by Arbthnot J in *A v R & YP* is not a radical departure from the use of “home” in the English language. It was the poet Lord Byron in 1819 who spoke of Don Juan’s homecoming:

“He enter’d in the house – his home no more,  
For without hearts there is no home”

[26] The meaning of home has never been restricted to the mere curtilage of a building and has incorporated the concept of “the heart”, *i.e.* how the person perceives his home and if it is shared with others, the relationships between those who consider that dwelling to be their home. This approach does not go beyond what could be ordinarily derived from reading Article 13 of the Adoption Order, and therefore does not fall within the scope of the position envisaged in *Ghaidan* (see [12] above).

[27] CT was not present in the dwelling in the USA occupied by his uncle and aunt during the period 9 May - 9 November 2023, save for 10 days in July 2023. Despite this, I consider that during this period CT intended it to be his home with the applicants, and that the applicants intended it to be their home with him. In coming to this conclusion I am taking into account the conduct over a significant period prior to May 2023 and the future intentions that can be inferred from the evidence. CT has remained in close contact with his uncle and aunt from May – November 2023, he has maintained a bedroom in the dwelling and maintains links with a wider peer group in that locality. The uncle and aunt continue to make significant decisions about CT’s welfare and his future.

### *Conclusion*

[28] For the reasons given I consider that CT has had his home with the applicants for the period 9 May – 9 November 2023 and that the provisions of Article 13(1) of the Adoption Order are satisfied. As a consequence the provisions of Article 57 are also satisfied, and I will make the order giving the applicants parental responsibility for CT.