

THE HIGH COURT

FAMILY LAW

[2017 No. 63 M.]

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

AND

IN THE MATTER OF R., A MINOR

BETWEEN

CHILD AND FAMILY AGENCY AND T. W. AND M. W.

APPLICANTS

AND

THE ADOPTION AUTHORITY OF IRELAND AND E. M.

RESPONDENTS

AND

G. O'B.

NOTICE PARTY

JUDGMENT of Ms. Justice Reynolds delivered on the 28th of March, 2018

1. This is an application brought by the Child and Family Agency for an order pursuant to s. 54(2) of the Adoption Act 2010, authorising the first named respondent to make an adoption order in relation to the child R. in favour of T. W. and M. W. and further dispensing with the consent of the second named respondent, the birth mother, to the making of such order.

Background

2. R. was born on the 26th May, 2000 and is the natural daughter of E. M. and G. O'B. The child's parents were married at the time of her birth. She has four siblings, two of whom are now over the age of eighteen and reside with the birth mother and her second husband. A third sibling is also no longer dependent and lives independently in residential accommodation. The fourth sibling is a minor and resides in foster care.

3. The child, the subject matter of these proceedings, was first referred to the Child Protection Services on 1st July, 2002, aged two years. Despite extensive efforts made to assist the birth parents in enabling them to meet their children's needs and to provide a safe and secure environment for them, difficulties continued over the years. In particular, concerns centred around child sexual abuse allegations perpetrated by a family friend who had convictions for sexual offences against children; consistent and chronic neglect; domestic violence and poor parenting ability notwithstanding support and assistance from the Child Protection Services.

4. In 2007, R. was received into care on foot of an Emergency Care Order. This Order was granted based on concerns around limited parenting capacity to meet R. and her siblings needs, a suspicion of domestic violence and reports to Social Workers of neglect and physical abuse. Subsequently in early 2012, a Full Care Order was granted following a fully contested hearing by the birth mother. Full Care Orders were granted in respect of all five children of the birth father and birth mother in these proceedings. The birth mother did not seek to appeal those orders.

5. Following the making of the orders, access arrangements were put in place with individual access between the child and her birth parents alternating with access to the whole family. The birth parents struggled with the access despite one-to-one support parenting from Outreach workers. Whilst the child's birth father's attendances at access were poor, the birth mother has attended almost every access visit. However, in circumstances where the birth parents appeared to be unable to control and manage the access appropriately, said access has remained supervised over the years. Currently access is held on a monthly basis with each month alternating between individual access and family access. The second and third named applicants, the foster carers, volunteered to assist in individual access and continue to facilitate same.

6. Following the child's initial reception into care in 2007, she was placed in short-term foster care. After a number of failed placements, the child was placed with the second and third named applicants in July 2010.

7. The child herein has a moderate learning disability and requires 24-hour care and support. She has had numerous diagnoses, including epilepsy, psychosis, dyspraxia and intellectual disability. She attends a special needs school, catering for pupils with a moderate general learning disorder.

8. Since the child's placement with the second and third named applicants, she has developed and thrived under their care. At the time of her placement, when she was ten years old, she was not toilet trained and was unable to properly speak. She has progressed well since that time and all of her health, educational and welfare needs have been met. They have demonstrated their full commitment to her and hold a valid Declaration of Eligibility and Suitability to adopt and have at all times cooperated with the Child and Family Agency in relation to the within application.

Proceedings before this Court

9. The special summons issued on the 21st September, 2017. By order dated the 22nd January, 2018, the birth mother was joined as respondent and the birth father as notice party. The hearing proceeded before this Court on the 23rd and 26th March, 2018 and all parties were legally represented. Counsel on behalf of the birth father indicated at the outset that he was consenting to the application. However, the birth mother's position is that she is objecting to same.

The Law

10. Section 54(2) of the Adoption Act 2010 states as follows:-

"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, if—

(a) having due regard for the rights, whether under the Constitution or otherwise, of the persons concerned (including the natural and imprescriptible rights of the child), the High Court is satisfied that it would be in the best interests of the child to grant the authorisation, and

(b) it is shown to the satisfaction of the High Court as follows:-

(i) that—

(1) for a continuous period of not less than 12 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, for physical or moral reasons, have failed in their duty towards the child,

(2) it is likely that the failure will continue without interruption until the child attains the age of 18 years,

(3) 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, and

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

(ii) that the child—

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

(2) for a continuous period of not less than 12 months immediately preceding that time, has been in the custody of and has had a home with the applicants;

and

(iii) that the adoption of the child by the applicants is an appropriate means by which to supply the place of the parents."

Article 42A of the Constitution has been ratified since 28th April, 2015. It 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."

11. It is clear therefore, that in determining the within application, the best interests of the child must be the paramount consideration. It is submitted by the applicant that having regard to the history of the child's life to date and her own very special and significant needs that her adoption by the second and third named applicants is in her best interest. Whilst it was initially contended on behalf of the birth mother that the child should be returned to her care, the second named respondent in her evidence conceded that due to her own personal difficulties she is unable to meet the very complex needs of the child and is no longer pursuing the return of the child to her care when she reaches eighteen years of age. However, it is submitted on her behalf that the orders sought herein should be refused in circumstances where there are other more proportionate means as provided by law to meet the best interests of the child. In this regard it is contended that such alternatives include guardianship and wardship.

12. The Supreme Court in *Southern Health Board v. An Bord Uchtála M.O'D & M.O.D.* [2001] 1 I.R. 165 outlined a three-step process in the operation of s. 3 of the Adoption Act 1988, (the precursor to s. 54 of the 2010 Act) as follows:-

"(a) whether the parents have, for physical or moral reasons failed in their duty towards the child;

(b) whether such failure will continue without interruption until the child attains the age of eighteen;

(c) whether the failure constitutes abandonment."

Failure of Parental Duty for Physical or Moral Reasons

13. The evidence in this case is that R. was taken into care at seven years of age due to chronic neglect and physical abuse. A parenting assessment in respect of the birth parents at that time detailed that the birth mother did not have the capacity to care for R. and referred to her own mild intellectual difficulties. It is clear that the birth mother's limited capacity, of itself is a failure "for physical reasons". In *Northern Area Health Board W.H.P.H. v. An Bord Uchtála; P. O'D.* [2002] 4 I.R. 252, McGuinness J. held that there did not have to be blame in relation to a person who by reason of mental handicap was not able to look after her child. However, that failure was nonetheless considered by the court to be a failure for physical reasons. It is clear that in the instant case the birth mother has not fulfilled any parental duties since the child was received into care in 2007. Since the child's placement with her foster carers, they have carried out all parental duties in respect of the child and have provided for her physical and emotional care, her welfare, her education and her significant medical needs. In the circumstances, this Court must conclude that there has been a failure of parental duty by the birth mother.

Failure to Continue without Interruption to Age Eighteen

14. R. will be eighteen years of age in just under two months time. The birth mother has conceded that she does not have the capacity to care for the child and is no longer seeking a return of the child to her care. It is therefore clear that this failure will continue to the age of eighteen, in circumstances where the status quo will be maintained pending the child's eighteenth birthday.

Failure Constituting Abandonment

15. This Court accepts that the birth mother has had very challenging personal issues to deal with over the years together with mild intellectual disability which rendered her unable to care for her child. Further, it is clear that she has had no active role in terms of parenting the child since she was seven years of age albeit that she has maintained regular access with the child on a monthly basis since her placement with her foster carers.

16. In *Southern Health Board v. An Bord Uchtála* [2000] 1 I.R. 165, Denham J. considered the legal meaning of the term "abandonment" in the context of the Adoption Acts and noted as follows:-

"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."

17. In the instant case, it is clear from the evidence that there was no intention by the birth mother to neglect or abandon her child, she simply did not have the capacity to adequately and properly care for her. However, in applying the "special legal meaning" as referred to by Denham J., it is clear that the failure of parental duty in this case constitutes "abandonment" of parental rights in the legal sense.

Views of the Child

18. It is common case that R. is not capable of understanding the nature of the within application. Mr. de Villiers, Educational Psychologist, who carried out an assessment has concluded that the child does not have the cognitive ability or capacity to understand the concept of "adoption". However, he noted from his observations that there was a strong attachment between R. and her foster carers, and concluded that she would be regarded as being psychologically closer to them than to her biological parents.

The Birth Mother's Position

19. The birth mother now accepts that due to her own personal circumstances, she is no longer seeking to have the child returned to her care once she reaches eighteen years of age. However, she disputes there was any failure in her duty to the child and/or that the child has been abandoned in the legal sense. As already outlined, this Court accepts that there was no wilful or intentional failure on her part in this regard and that she simply did not have the capacity to care for the child who has very significant and complex needs.

20. It is submitted on behalf of the birth mother that the option of adoption is a disproportionate measure to supply the place of the birth mother. In this regard, it is contended that the best interests of the child would be maintained by having an ongoing secure relationship with the birth mother and her siblings. In considering this submission, the court has to be mindful of the fact that R.'s current access arrangements with her birth mother comprises of a monthly one hour access visit, alternating each month between individual access and family access. In addition, this Court is mindful of the fact that the access has at all times been supervised, having regard to the birth mother's limited capacity and due to very real child protection concerns.

21. Further, it is clear that the child's foster carers are thoroughly supportive of maintaining links for the child with her birth parents and siblings and indeed the evidence from the second named applicant, under oath, was that the access will continue to be facilitated as heretofore.

22. It is submitted on behalf of the birth mother that alternative remedies are available to the court to protect the welfare of the child and to provide for the child's best interests. In the first instance, it is submitted that special guardianship orders could be made in favour of the second and third named applicants. However, in circumstances where the child will be eighteen years of age in less than two months time, there is little merit in this contention.

23. Further, it is considered that wardship is an alternative remedy to meet the needs of the child in circumstances where the birth mother posits that this option is a more proportionate measure than severing all links between the child and her birth mother and siblings.

24. In this regard, it was submitted that the approach to be taken by the court is to "evaluate all the options, undertaking a global, holistic and multi-faceted evaluation of the child's welfare which takes into account all the negatives and the positives, all the pros and cons, of each option", as per the approach enunciated by Lord Mumby and the English Court of Appeal in the case of *B. - S. (Children)* [2013] EWCA 1146.

The Foster Carers

25. It is common case that R. has thrived from the time of her placement into care with the second and third named applicants. She has developed a sense of self and a feeling of security for herself within their family unit. It is clear that they are committed to

providing for her very extensive needs and to supporting and caring for her throughout her life. In this regard, a detailed Care Plan in regard to the child's future care was furnished by the foster carers in pursuit of their application herein.

Best Interests of the Child

26. The best interests of the child, as a constitutional right, must be the paramount consideration in this application. The applicants contend that the orders being sought are conducive to the best welfare interests of the child and meet her needs. Further, it is submitted that the alternative remedies available to the court to protect the welfare of the child, as contended for on behalf of the birth mother, are wholly inappropriate. The applicants reject the suggestion of wardship as an alternative remedy for this child in circumstances where it is clear that the second and third named defendants are in a position to care and provide for the child into the future, to her eighteenth birthday and beyond. In this regard, it is clear that they have taken all crucial and practical decisions in relation to her health and welfare for almost eight years and have provided evidence to the court in terms of the detailed Care Plan as to how they propose to do so into the future, including beyond their death. It is contended that in making the child a Ward of Court, all decision making power, currently exercised in a wholly appropriate and child-centred manner by the second and third named applicants, would be removed from them. They would have no legal relationship with the child, nor she with them and any position of Committee would be subject to change. It is submitted that this is a wholly undesirable option for the child and contrary to her best interests.

Findings

27. As already stated, this Court is satisfied that the birth mother has failed in her parental duty to the child, for the reasons as outlined and that such failure constitutes "abandonment" on her part of all parental rights, whether under the Constitution or otherwise. The issue thereafter to be determined by the court is whether the adoption of the child by the second and third named applicants is an appropriate means by which to supply the place of the birth mother. In this regard, the court is bound to make its determination having regard to the best interests of the child.

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.

29. In so doing, the court is very mindful of the birth mother's opposition to the adoption order and the alternative options that the court has been obliged to consider in reaching its determination. The court is satisfied that the birth mother's misgivings in relation to the adoption order are misplaced when weighed against what is undoubtedly in the best interests of this child.

30. In all the circumstances, I grant the following relief:-

(a) An Order pursuant to s. 54(2) of the Act authorising the respondent to make an adoption order in relation to the child in favour of the second and third named applicants herein;

(b) An Order pursuant to s. 54(2) of the Act dispensing with the consent of the birth mother to the making of an adoption order.