Neutral Citation Number: [2014] IEHC 82

**THE HIGH COURT**

**FAMILY LAW**

**[2013 No. 91 MCA]**

**IN THE MATTER OF THE ADOPTION ACT 2010, AND**

**IN THE MATTER OF R. FORMERLY L.V.**

**BETWEEN**

**S.H.**

**AND**

**A.H.**

**APPLICANTS**

**AND**

**ÚDARÁS UCHTÁLA NA hÉIREANN**

**RESPONDENT**

**JUDGMENT of Mr. Justice Henry Abbott delivered on 24th January, 2014**

**The Application**
1. This application by notice of motion dated 31st July, 2013, returnable for 8th November, 2013, is for the respondent to make discovery of "all documents relating to any entry of particulars by the respondent in the Register of Inter Country Adoptions since the commencement of the Adoption Act 2010, and of entry Inter Country Adoptions effected in Mexico and/or Inter Country Adoptions of children who were habitually resident in Mexico, including any documents relating to the applications for such entries".

**Background to the Application**
2. The applicants are persons seeking to have the child, (called R. only for the purpose of anonymity in this judgment), registered in the Register of Adoptions as appropriate, following the refusal of the respondent to do so. Of central importance to all parties concerned in this application is that Ireland ratified the 1993 Hague Convention on Inter Country Adoption on 1st November, 2010, and Mexico ratified the Convention on 1st May, 1995.

3. Article 2 of the Convention states that:-

> "The Convention shall apply where a child habitually resident in one contracting state ("the state of origin") has been, is being, or is to be moved to another contracting state ("the receiving state") either after his or her adoption in the state of origin by spouses or a person habitually resident in the receiving state, or for the purposes of such adoption in the receiving state or in the state of origin."

The applicants had been assessed by the respondent as being eligible as prospective adopters for a foreign adoption and before the ratification of the Convention on 1st November, 2010, they already had embarked upon the process of locating and making arrangements for the prospective adoption of a child in Mexico. After the 1st November, 2010, the child, R. was found, and arrangements were made with his mother in Mexico for formalisation of the proposed adoption process from the Mexican side. Subsequently, an adoption order was handed down by the judicial branch of a local State, Civil Court of First Instance of Playas del (……..) Mexico. The Mexican court ruled that it would not issue a separate document as a certificate pursuant to Article 23 of the Hague Convention, but rather, it would integrate it into the Deed of Adoption. The applicants returned to Ireland with the child, R., on 17th April, 2011, and on 15th May, 2011, the applicants applied to the respondent to have the child's adoption entered on the Register of Foreign Adoptions. Such application was refused, as a consequence the present proceedings before this Court were initiated.

**Purpose of Application**
4. In a letter of 18th June, 2013, the applicants set out why they required the requested documents, and their justifications appear to be as follows:-

> A. To establish whether or not the respondent has a statutory power and/or jurisdiction to recognise the (Mexican) adoption.
>
> B. To determine whether and why the authority believes that it does not have such power or jurisdiction, and
>
> C. To determine pursuant to which sections of the Adoption Act the respondent does not, or claims not to have, the power to register the within adoption.

**Submissions**
5. Written submissions were submitted on behalf of the applicants by Sophie Honahan B.L., and Dervla Browne S.C., and on behalf of

the respondent by Barbara O'Neill B.L, and David Barniville S.C. Counsel for the parties argued these extensive submissions before the court at the hearing of the motion.

**Decision**

6. While counsel for the applicants relied on the fact that the overriding consideration for the court in deciding any application in proceedings under the 2010 Act, is the best interests of the child the subject of the proceedings, and referred to the judgment of Finlay P. in *S.M. & M.M. v. G.M. & Ors* [1985] 5 ILRM 186, it must be noted that the application of the best interest principle by Finlay P. in that case related to the disclosure of records as being in the best interests of the child to whom the records relate. The arguments between the parties drew the attention of the court to the distinction between the best interests of the child to whom the application related and the best interests of the child to whom the records, (whether register or documents), relate.

7. Although the judgment of Finlay P. in *S.M. & M.M. v. G.M. & Ors* [1985] 5 ILRM 186 and the earlier judgments were not brought to the attention of the court hearing the case, *D.C. v. D.M.* [1992] 2 I.R. 150, I am satisfied that the judgment of Macken J. in that case, in dealing with an alternative decision (not an obiter), persuades me that the distinction made in the 2010 Act is in favour of the paramountcy principle applying to the child to whom the register or documents relate, rather than to the child to whom the application relates. At p. 157 Macken J. stated:-

> "Some considerable importance must be attached to the words "the best interests of any child concerned to do so" because it makes it clear that the statute intends that the only circumstances in which the discovery can be made is where it is in the best interests of the "child concerned". It seems to me that the "child concerned" in the context of the modification found against the absolute blanket prohibition which s. 8 imposes, is the child concerned with the particulars documents sought to be discovered. Neither child concerned with any adoption in 1982 or in 1985 which generated the assessment reports sought to be made available by discovery in this motion, is a plaintiff in these proceedings, or a notice party to these proceedings, or in any way concerned whatsoever with these proceedings. it is insufficient for the Health Board defendants to argue that such children are "neutral" in the context of the application for discovery and I accept the argument put forward both by counsel on behalf of the Adoption Society and by counsel on behalf of the Adoption Board that such children may not be neutral, in particular in circumstances where such information could be passed or would be capable of being passed to the first defendant in these proceedings. no case has been made out to me upon which I could justifiably find that the making of an order for discovery in respect of assessments carried out by the Adoption Society or by the Adoption Board in the context of the present proceedings could be "in the best interests" of either of the children concerned in the adoptions of 1982 or 1985."

8. In that case, Macken J. was considering the legislation which reflected closely the wording of the relevant provisions of the 2010 Act. For the sake of completeness, I have examined the relevant provisions of the 2010 Act and find that the use of the words "any child" might arguably suggest either applicant in a case such as this or the child described in the register or documents. The context in which these words appear clearly point to the meaning of "any child" being the child to whom the entry in the register or the documents relate, and named therein. I have firmly come to this conclusion having considered the affect of the provisions of s. 86(1) which states:-

> "An t-Ard Chláraitheoir shall keep an index to make traceable the connection between each entry in the Adopted Children Register and the corresponding entry in the Register of Births."

The use of the word "each" in relation to entry which is to correspond to an entry in the Registry of Births clearly relates to one child – not just any child – and when s. 88 of the Act of 2010 relating to privacy of adoption records states 'unless the court is satisfied that it is in the best interest of any child concerned to make the order', the position becomes clear. That is because the use of the word "concerned" after child has no meaning of itself, as, its use in the context of the section is that of a qualifying word. What word does it qualify in this context? It might be argued (looking at para. (b)), that it could relate to any child – anywhere - to whom discovery or inspection of documents etc might relate. However, looking at para. (a) of s. 88 the context for the word to be qualified is set by the words "referred to in s. 86(2)". This relates clearly to the register of "each" child. The use of the word "concerned" as a qualifier plainly relates to the records of each child in s. 86(2), and to posit any other qualifying role in para. (b) of s. 88 would be to introduce a contradiction, or anomaly, in the face of the plain meaning of s. 88, when read in conjunction with s. 86(2)."

9. Accordingly, the court refuses the application for discovery herein.