

## THE HIGH COURT

[2018 No. 33 SS]

## IN THE MATTER OF THE ADOPTION ACT 2010, SECTION 49(2)

## THE ADOPTION AUTHORITY OF IRELAND

APPLICANT

THE CHILD AND FAMILY AGENCY, F.T., G.T. AND K.R. (A MINOR)

NOTICE PARTIES

**JUDGMENT of Mr. Justice MacGrath delivered on the 19th day of October, 2018.**

### Case Stated

1. This is a case stated pursuant to s. 49(2) of the Adoption Act 2010 (*"the Act of 2010"*) by the Adoption Authority of Ireland (*"the Authority"*) at the request of the Child and Family Agency, for the determination of certain questions of law arising on the application for an adoption order by the second and third named notice parties, a married couple who are the child's foster parents. It is their wish to adopt the fourth named notice party (K.R. who is a minor).

2. Pursuant to s. 49 of Act of 2010, the Authority may refer a question of law arising from an application for adoption to the High Court. Section 49(2) provides as follows:-

*"Notwithstanding subsection (1), the Authority, unless it considers a question of law arising on an application for an adoption order or the recognition of an intercountry adoption effected outside the State to be frivolous, shall refer the question of law to the High Court for determination if requested to do so by—*

*(a) an applicant for the order or the recognition of the intercountry adoption effected outside the State,*

*(b) the mother or guardian of the child, or*

*(c) any person having charge of or control over the child."*

The Authority is obliged to state a case in circumstances where it requested to so do by any person having charge or control over the child, save where it considers the question to be frivolous.

### The Request

3. By letter dated 8th August, 2016, the Child and Family Agency wrote to the Authority formally requesting that a case be stated concerning:-

(a) whether the consent of the birth mother, birth father, and/or guardian is required when they are deceased; and

(b) whether consent is required where the birth mother is deceased and the birth father who is not a guardian is consenting to the adoption.

### The Questions

4. The following questions of law are posed at para. 16 of the case stated:-

*"The Authority, having considered the facts and matters identified above and the Request, hereby refers the following questions of law which arise thereon:*

*(a) Where a person, whose consent to the adoption of a child is necessary, has died, is it necessary to dispense with the consent of that person?*

*(b) If so, is it necessary to bring an application to the High Court under section 26(1)(d) and section 54(2) of the 2010 Act in every such case?*

*(c) Where such a person has died, will the requirements of section 54(2) of the 2010 Act be automatically satisfied in every such case?*

*(d) Where a person, whose consent to the adoption of a child is necessary, has died and the child to be adopted is a Ward of Court, and the Office of the Wards of Court has confirmed that it has no objection to the adoption of the child, is it necessary to apply to the High Court to dispense with such consent as set out in question (ii) [sic – understood to be (b)].*

*(e) Where a person, whose consent to the adoption of a child is necessary, has died and the birth father (who is not a guardian) is consenting to the adoption, is it necessary to apply to the High Court to dispense with such consent as set out at question (b) above?*

*(f) Where a relevant non-guardian of a child has died, is it necessary for the Authority to obtain the approval of the High Court under section 30 of the 2010 Act in every such case, prior to making an adoption order in respect of such child."*

### Factual background

5. The facts outlined in the case stated are:-

(i) K.R. was born in 2001 and will achieve majority in 2019.

(ii) K.R.'s mother was born in 1974 and died in 2008.

(iii) K.R.'s birth father was born in 1968 and died in 2012.

(iv) Searches have indicated that both the mother and father died intestate. No question of testamentary guardianship arises.

(v) At para. 6 of the case stated it is recorded that the child was born outside marriage and her birth father was not her legal guardian. Therefore no issue arises in relation to the consent of the child's birth father.

(vi) Since August, 2001, K.R. has been in the care of the Child and Family Agency under a long term foster care arrangement.

(vii) Arising from an assault by her birth mother in 2001, K.R. suffered very severe injuries as an infant. In consequence she has serious and complex health and educational needs which will continue into adulthood.

(viii) A number of orders have been made during the course of the child's life pursuant to the Child Care Act 1991 including emergency, interim and full care orders. A full care order was made on 23rd July, 2001, and will remain in effect until the child reaches the age of eighteen.

(ix) On 24th October, 2011, an order was made in the District Court pursuant to s. 43A of the Child Care Act 1991, granting the foster carers control over the child as if the foster parents were the child's parents. The order did not interfere with the birth parents' guardianship status.

(x) A wardship order was made in respect of K.R. on 25th March, 2015 as a result of which the child was taken into the wardship of the High Court and the child's foster mother was appointed guardian of the child's fortune.

6. Pursuant to s. 37 of the Act of 2010, on 31st July, 2015 the foster parents applied to the Child and Family Agency for an assessment and for a declaration of eligibility and suitability to adopt. A social worker for the Child and Family Agency strongly recommended that the board of the Authority grant such declaration in their favour, stating that it was in the best interests of the child that it be adopted by them.

7. On 18th November, 2015, the Authority granted a declaration of eligibility and suitability to adopt in favour of the foster parents, which declaration expires on 18th November, 2018.

8. On 7th April, 2016, a social worker advised that the best long term care option for the child was to be adopted by the foster parents, and in his report, fully supported such adoption.

9. K.R., the child, is a ward of court. By letter dated 8th October, 2015 the Office of the Wards of Court confirmed that it had no objection to the adoption of the child by the foster parents.

10. A further issue which is stated to arise is whether the consultation procedures in s. 30 of the Act of 2010, as amended by s. 13 of the Adoption (Amendment) Act 2017, require the Authority to first obtain the approval of the High Court to make an adoption order without consulting with the father (or other relevant non-guardian of the child) where the father (or other relevant non-guardian of the child) is deceased.

11. The Child and Family Relationships Act 2015 was commenced on 18th January, 2016, and has broadened the definition of "guardian" to include many additional persons from whom the Authority must now seek consent prior to adoption.

#### **Relevant Provisions of the Act of 2010 as amended**

12. Within the framework of the Act of 2010, ss. 26 to 32 are contained in Part 4 which is entitled "*Domestic Adoptions and Intercountry Adoptions*". Part 4, chapter 2 is entitled "*Consents to Adoption Orders*". Section 54(2) is contained in Part 7 which is entitled "*Adoption Orders in Exceptional Cases and the Role of the High Court*". Section 54 is however referred to in s. 26(1)(d).

13. Section 26 provides:-

*"(1) The Authority shall not make an adoption order without the consent of every person, being the child's mother or guardian or other person having charge of or control over the child, unless the Authority dispenses with the consent—*

*(a) with the sanction of the High Court if the person whose consent is necessary is a ward of court,*

*(b) in accordance with an authorisation of the High Court by order under this section, if—*

*(i) the person whose consent is necessary is not a ward of court, and*

*(ii) the High Court is satisfied that the person is incapable by reason of mental infirmity of giving consent or cannot be found,*

*(c) in accordance with an authorisation of the High Court by order under section 31 in a case to which that section applies, or*

*(d) in accordance with an authorisation of the High Court by order under section 54 in a case to which that section applies.*

*(2) A person may give consent to the making of an adoption order without knowing the identity of the applicant for the order.*

*(3) A consent shall be given in writing in the prescribed form.*

*(4) A consent may be withdrawn at any time before the making of an adoption order."*

14. Section 30 obliges the Authority to take such steps as are reasonably practicable to ensure that every relevant non-guardian of the child is consulted in relation to the adoption, a task which must be performed by the Authority on the receipt of an application for an adoption order. In this section, "father" includes a person who believes himself to be the father of the child. Section 30 (3) provides:-

*"Where the Authority is satisfied that, having regard to:-*

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

*(b) other than in a case where the relevant non-guardian of the child is a person referred to in paragraph (b), (c) or (d) of the definition of 'relevant non-guardian', the circumstances of the conception of the child,*

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

In this case the relevant non-guardian is the father.

15. Section 31 empowers the court to authorise the Authority to dispense with the consent (the final consent) of a necessary party who has previously consented to the placing of the child for adoption but who fails, neglects or refuses to give the consent, or who withdraws an earlier consent to the adoption.

16. Section 54 provides, *inter alia*, as follows:-

*"(2) 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.*

*(2A) Before making an order under subsection (2), the High Court shall be satisfied that —*

*(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 section 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,*

*(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,*

*(c) 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,*

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

*(e) the child —*

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

*(ii) for a continuous period of not less than 18 months immediately preceding that time, has been in the custody of and has had a home with the applicants,*

*and*

*(f) that the adoption of the child by the applicants is a proportionate means by which to supply the place of the parents."*

*(3) In considering an application for an order under subsection (2), the High Court shall —*

*(a) have regard to the following:*

*(i) the rights, whether under the Constitution or otherwise, of the persons concerned (including the natural and imprescriptible rights of the child);*

*(ii) any other matter which the High Court considers relevant to the application,*

*and*

*(b) in so far as is practicable, in a case where the child concerned is capable of forming his or her own views, give due weight to the views of that child, having regard to the age and maturity of the child, and, in the resolution of any such application, the best interests of the child shall be the paramount consideration."*

17. In the case stated, it is observed that none of the foregoing provisions directly concern circumstances where a person whose consent is required has died.

18. Further, it is suggested that there are obvious and practical difficulties in requiring the Child and Family Agency to apply for an authorisation under s. 54(2) in every case of a person whose consent is required has died. The notice parties support this observation and submit that an application under s. 54(2) which requires the Court to apply the test of abandonment to deceased persons, may be an inapposite test in many cases. Reference is made to a decision of Abbott J. in *Child and Family Agency and A.T. and J.T. v.*

*Adoption Authority of Ireland and D.W.* [2015] IEHC 563 ("*D.W.*") which I will address later in this judgment.

#### **Submissions on behalf of the Child and Family Agency**

19. The Child and Family Agency submits that on the plain reading of the Act, the Oireachtas has considered that in all cases where the Authority may dispense with a consent required under the Act, it must do so with the authorisation or sanction of the High Court.

20. Similar principles, it is argued, apply to the s. 30 question and that:-

*"...in all cases where a departure from the actions of the Authority is permitted under the Act, the legislature has required that the approval, sanction or authorisation of the High Court is necessary. There is no other procedure to obtain such approval, sanction or authorisation, save in accordance with the legislative provisions set out in the Act."*

It is also submitted that a contrary intention cannot be imputed to the legislature because if that was its intention, specific provision would have been made. Further, the recent amending legislation, the Adoption (Amendment) Act 2017, makes no such provision. Therefore, the Child and Family Agency submits that the answer to questions (a) and (b) should be in the affirmative.

21. With regard to the third question, it is submitted that the answer to this question is also in the affirmative. It is argued, however, that where the death of a birth parent has occurred, such death, of itself and in the absence of further evidence, cannot be sufficient evidence to establish abandonment. The decision of Abbott J. in *D.W.*, it is argued, must be viewed in the light of the circumstances of that case; that death was considered to be abandonment only in the context of the special circumstances of the case where there was ample evidence of abandonment prior to death.

22. In the context of the child who is a ward of court, the Child and Family Agency submits that s. 26 specifically requires that the High Court must sanction the making of an order where the person whose consent is necessary is a ward of court and the required consent is absent. It is contended that the legislature has considered the position of the ward of court and has deemed it necessary that there be a further and distinct level of protection in such cases. It is argued that it cannot be that the Oireachtas seeks to limit the protection set out in the Act in circumstances where the ward is deceased. Such interpretation would be to remove a protection specifically laid down and any contrary interpretation would have to be set out in clear terms. In this regard, the Child and Family Agency refers to *Erin Executor and Trustee Company Ltd. v. Revenue Commissioners* [1998] 2 I.R. 287, a decision which concerns the operation of a deeming provision in the Tax Acts, in which Barron J. stated at p. 303:-

*"If the legislature had intended the result contended for by the respondents, it would have said so in clear terms."*

It is submitted that similar sentiments apply to the removal of a statutory protection, in particular where the legislature had the opportunity to make provision for the removal of such protection but had chosen not to do so. It therefore submits that the Court should answer this question in the affirmative.

23. The Child and Family Agency contends that it is also necessary to apply to the court for an order dispensing with consent where a person whose consent to the adoption of a child has died and the birth father, who is not a guardian, is consenting to the adoption. If the legislature had intended to elevate the status of non-guardians from a position where they must be consulted, to a position where their consent would allow an adoption order to be granted in the absence of the approval of the court, such intention would have been clearly laid out in unambiguous terms. It is also submitted that *"nothing in the decision of the court in D.W. seeks to correlate the position of the non-guardian with that of a guardian under the Act"*. Therefore, it is submitted that the answer to question (e) should be in the affirmative.

24. Finally, it is argued that as there is no legislative intention to remove the protections provided for under s. 30, an application is required to be made to court where a relevant non-guardian of a child has died. It is once again suggested that if the legislature had intended a contrary position it would have made provision for same when enacting the Adoption (Amendment) Act 2017. Reliance is placed on *dicta* of Hogan J. in *Ó hAonghusa v. DCC plc* [2011] 3 I.R. 348 where he stated at p. 354:-

*"There is, of course, a presumption against unclear changes in the law (see, e.g., the comments of Henchy J. in Minister for Industry and Commerce v. Hales [1967] I.R. 50 at p. 76) and it would indeed be surprising if the Oireachtas could have intended that a legal rule as fundamental as a primary limitation period rule could have been amended in this quite oblique fashion."*

#### **Submissions on behalf of the foster parents**

25. The foster and prospective adoptive parents, believe that the essential question is that contained in para. 16(a) of the case stated, namely whether it is necessary to apply to the court to dispense with the consent of every person whose consent is required under s. 26 in circumstances where that person has died. If there is such requirement then it is submitted that this is an unnecessary obstacle to adoption in a case such as this. They refer to the decision in *D.W.*, and point to the practical difficulties in requiring the Child and Family Agency to apply for an authorisation under s. 54(2) of the Act of 2010 in every case where a person whose consent is required has died. It is submitted that the foster parents have proven themselves to be exemplary carers and that to compel them to meet what is described as a further inapposite test in their efforts to promote the child's long term best interests by adopting her is an unnecessary and inappropriate requirement. The notice parties do not specifically address each of the questions raised.

#### **The Authority's position**

26. The Authority has adopted a neutral stance on this application.

#### **Breadth of the case stated**

27. Section 49(1) of the Act provides that the Authority may refer *"any question of law arising on an application for an adoption order"* to the High Court. *Prima facie*, it would appear that the question referred must arise in the context of an application for an adoption order in a particular case; and that such question or questions of law should arise from the facts and circumstances of the particular adoption; rather than to adoptions generally.

28. If this is correct then certain of the questions posed do not arise on the facts of the proposed adoption in this case. Both the birth mother and birth father of the child have died and the child is a ward of court. The child's foster mother has been appointed the guardian of the fortune of the child. The child's mother was not a ward of court.

29. Looking for example at the question posed at para. 16(e) of the case stated, this does not arise on the facts as the birth father in this case is deceased and has not consented to the adoption. The question so posed does not advance the central issues in this

case and I believe that it may be unhelpful to attempt to address such question on facts which do not arise. I have similar reservations in relation the questions 16(b) and (c) which, as framed, are quite broad, referring as they do to "every such case". I am mindful in this regard, that this Court is exercising a jurisdiction which has a different statutory basis to that which it exercises in the case stated procedure under the Courts (Supplemental Provisions) Act 1961. It is clear from the authorities regarding the jurisdiction of this Court under that Act that there must be specific findings of fact by the court posing the questions and the question must be relevant to the facts as so found. In this regard, a considerable body of jurisprudence has evolved (see for example, the decision of Charleton J. in *Director of Public Prosecutions v. Buckley* [2007] 3 I.R. 745).

30. It may be that such jurisprudence is not directly applicable to the jurisdiction of this Court in the context of a case stated by the Authority, but it appears to me that in exercising the jurisdiction conferred by s. 49 of the Act of 2010, while the court should provide such assistance as it possibly can, there must be at least a general connection between the questions posed and the facts relevant to, and arising from, the particular adoption being considered. Having said this, however, the nature of the test to be applied was not addressed in argument before the Court and therefore remains to be considered in an appropriate case.

#### **"Person" and "Consent"**

31. The meaning of the words "person" and "consent" in the context of the particular statutory provisions must be addressed. To understand the meaning of a relevant consent under the Act, it is instructive not only to inquire into the person or persons who is or are expressly stated to be required to give such consent; but also, and importantly, to address the manner in which the giving of a relevant consent is required to be done.

32. In s. 26 "person" is described in qualified terms, referring to the child's mother or guardian or other person having charge or control over the child. Although the disjunctive is used, it appears to me that the section must be read in a conjunctive manner such that the consent of each of the described persons must separately be sought. To construe it otherwise might, for example, lead to a situation whereby if a guardian gave consent then the consent of the mother would not be required. Given the importance placed in the Act on the requirement to obtain the consent of the birth mother, the manner in which that should be done and the consequences for not so doing, it seems highly unlikely that the contrary was the legislature's intention. In my view, the section should be interpreted as meaning that should, for example, in any given case there be a carer or guardian, other than the child's birth mother, the consent of each is required.

33. In this case, the child is subject to a care order and therefore is statutorily in the care of the Child and Family Agency, under s. 18(3)(a) of the Child Care Act 1991. The foster parents provide for the day to day care of the child, one of whom has now been appointed her guardian and both of whom have the benefit of orders made under s. 43 of the Act of 1991. On the face of it, therefore, the consent of the Child and Family Agency and the child's foster parents may be required under s. 26 of the Act of 2010. As this issue does not arise from the case as stated, however, I make no determination on same. Nevertheless, the section as so worded suggests that the word "person" has a specific meaning in the Act.

34. Other than what is stated in s. 26, "person" is not otherwise described, defined or qualified in the Act. Further, s. 26 employs the word "person", and not, for example, the words "deceased person".

35. The Interpretation Act 2005 does not advance matters significantly. Section 18 of that Act provides that:-

*"'Person' shall be read as importing a body corporate (whether a corporation aggregate or a corporation sole) and an unincorporated body of persons, as well as an individual, and the subsequent use of any pronoun in place of a further use of 'person' shall be read accordingly."*

36. In the Succession Act 1965, the expression "deceased persons" is used and "personal representative" is defined as meaning the "executor or the administrator for the time being of a deceased person".

37. Dictionary definitions may be of assistance, although as Dodd observes in *Statutory Interpretation in Ireland*, (Tottel Publishing, 2008), at para. 5.40, that while "[d]ictionaries may be instructive as to the meanings of a word and may be used to assist interpretation", dictionaries are "not authoritative exponents of the meaning of words used in legislation and do not bind judges in their determinations as to legal meaning of statutory provisions". In the Oxford English Dictionary, "person" is defined as a "human being" who is regarded as an individual. Other definitions of person in other dictionaries also lay emphasis on the word "being"; a derivation of the verb "to be".

38. While such definition is of assistance, it seems to me that in the context of the Act under review, one must also look at what is required, or not, as the case may be, in relation to, and of, the 'person' under consideration.

39. The Child and Family Agency places particular emphasis on the provisions of s. 26(1)(a) and (b) as indicative of the necessity to apply to court to dispense with the consent of those persons who cannot give consent. However, it appears to me that paras. (a) and (b) concern the dispensing with the consent of persons who are living but who, for legal or medical reasons, are incapable of giving such consent. In my view, those situations differ from that of a person who cannot give consent because of death.

40. One would have thought that the giving of a consent normally involves a voluntary interaction. It appears to the Court that a literal interpretation of the word "consent" in the context of the statutory provisions under consideration must mean to give a permission, to agree, or to assent, and to have the physical, mental and legal capacity to do so. Under the Act the consent required is not merely an assent in the general sense of that word. The Act makes provision for the manner in which consent must be given. Section 26(3) is stated in mandatory terms. The requisite consent must be given in a prescribed form, within a particular timeframe and, once given, is capable of being withdrawn before the making of the adoption order. Looking at the provisions in the Adoption Acts concerning the detailed mechanism by which consents must be given, in my view, it cannot be said that a deceased person could fulfil or comply with such requirements. It is difficult to see how any person other than a living person could ever give, or withdraw, such consent in the manner provided. Also, the statute makes specific provisions for those who do not have such capacity, or who cannot be found.

41. It must also be recalled that, to be valid under the Adoption Acts, a consent must be full, free and informed (*G v. An Bord Uchtála* [1980] I.R. 32). The matter has been explored by Shannon, *Children and Family Relationships Law in Ireland*, (Clarus Press, 2016) at paras. 7-46 et seq. as follows:-

*"The Meaning of 'Consent'*

*It is well-established for these purposes that, where consent is required, and not dispensed with by virtue of the 2010*

*Act, it must be a real and not merely an apparent consent to the adoption. In other words, it is not enough for the person whose consent is required merely to state, in writing, that he or she has consented as required. It must be shown that the consent is 'full, free and informed' (G v An Bord Uchtála [1980] IR 32). This stipulation is closely linked to the fact that the rights being ceded by the natural mother by virtue of the adoption are not merely legal rights, but are, rather, rights of a constitutional origin. The mother's personal right to the care and custody of her child are guaranteed by Article 40.3 of the Constitution, therefore any waiver of such rights must be as free as it feasibly can be in all the circumstances. The consent must be given with as full as possible an understanding of the consequences of both the placement and the final adoption order.*

*A relevant and instructive case on the issue of consent is AC v St Patrick's Guild Adoption Society (HC, 31 July 1995), wherein Flood J stated as follows:*

*The true test is whether in the circumstances which prevail at the time she makes her decision, that decision reflects her will or the will or somebody else.*

*[...]*

*Prior to the granting of the adoption order by the Adoption Authority, the final consent to the making of such an order must be obtained by the accredited body or the CFA. The final consent may only be given after the child has attained the age of six weeks, and not earlier than three months before the adoption application (Adoption Act 2010, section 28). This consent must be made on oath, with a full understanding of the consequences. It must be unconditional, and must not have been withdrawn at the time of the adoption hearing. The natural mother or legal guardian must be advised of his or her right to be heard on the application for the adoption order. He or she may decide not to be heard, or consulted again, in relation to the application for the order. If he or she decides to be heard, however, he or she may be heard in person or through a solicitor or counsel. He or she must be informed of the date of the hearing (Adoption Act 2010, section 27). As discussed above, if the natural mother or legal guardian withdraws his or her consent, or simply does not complete the final consent, an application may be made to the High Court to dispense with his or her final consent, thereby enabling the Adoption Authority to make an adoption order in favour of the prospective adopters (Adoption Act 2010, section 31)."*

42. Regulations made by the Minister pursuant to s. 150 of the Act of 2010 require that consents to adoption must be made on affidavit in the form prescribed by those Regulations – see the Adoption Act 2010 (Consent to Adoption Order) (Forms) Regulations 2017 (S.I. No. 535 of 2017). The initial regulations providing for prescribed forms under the Adoption Act 1952 were made in 1953 (Adoption Act 1952, Rules 1953 – S.I. No. 104 of 1953).

43. An analysis of the history of the Adoption Acts may also assist. The Act of 2010 repealed and replaced the previous Acts, being the Adoption Acts of 1952 to 1998. The Adoption Act 1952, provided in s. 10, *inter alia*, that an adoption order could not be made unless the child was born out of wedlock or was an orphan. Consent to adoption was required pursuant to s. 14 of the Act of 1952, and an adoption order could not be made without the consent of every person, being the child's mother or guardian or having charge of or control over the child, unless the board (An Bord Uchtála) dispensed with any such consent in accordance with that section. The wording is somewhat similar to that employed in s. 26 of the Act of 2010. The categories of children who may be adopted and the categories of persons who may adopt have changed over the years. The essential wording of the original s. 14, however, has not altered materially (save in the context of the requirement to seek the authorisation of the Court in the case of persons of mental infirmity who are not wards of court, or where a person cannot be found).

44. Given the detailed provisions enacted to regulate the manner of the giving of a required consent under the Act of 1952, it seems to me that the requirement to obtain consent applied only to the mother of the non-marital child and not to an orphan. In my view, if the Oireachtas had intended otherwise, specific provision would have been made for procedures to be applied in the case of consents to the adoption of an orphan child.

45. Viewed in a historical context, and considering the various changes to the legislation over the years, I do not believe that it was the intention of the legislature when enacting the consent provisions contained in s. 26 of the Act of 2010, to require that the consent of a deceased person ought now be sought or dispensed with. The position of a deceased mother or guardian is not specifically provided for, no procedures are prescribed as to how and from whom such consent might be sought, obtained or given, as in the case of a living person who is obliged to swear an affidavit appropriate to the circumstances. More fundamentally, it is difficult to see how, from a practical perspective, the requirements relating to the manner of the giving of a consent under the Act could be fulfilled in the case of a deceased person.

46. Also of relevance, it seems to me, to the interpretation of the meaning of consent within the statutory framework considered in its entirety, are the provisions of s. 31. Section 31 provides for applications to be made to Court in certain circumstances, such as refusal to give a final consent or where the original consent has been withdrawn. Acts of withdrawal or refusal, in this context, one would have thought must involve a positive action on the part of the person who initially agreed to place the child for adoption. There is nothing in the Act which states, expressly or by implication, that the fact of death should be deemed to be a withdrawal or refusal or for that matter a neglect to give a consent for the purposes of the Act.

47. In the case of a person who is known to have died, how can it be said that the requirements and mechanism of the Act in relation to the giving or withdrawing of a consent could ever be fulfilled? If it is not required in such a case, then unless there is a statutory provision for the contrary, how can it be said that there is a requirement to apply to court to dispense with a consent which cannot be given?

48. I do not believe that the provisions of s. 26 were ever intended to apply to a deceased person and I find it difficult to accept the submission of the Child and Family Agency that if it had been intended by the Oireachtas that the consent of a deceased person was not required under the Act, it would have been specifically provided for.

## **Section 54(2)**

49. I should now address arguments relating to s. 54(2) of the Act of 2010. The provisions of s. 54 are silent in respect of the requirement of consent in circumstances where the child's parents are deceased. As previously noted, s. 26 and s. 54 are contained in different Parts of the Act, but given the reference to an application under s. 54(2) within s. 26(1)(d), I do not think that there is any reason to believe that the 'consent' in s. 54 bears a meaning different to that which properly applies to it in Part 4.

50. Section 3 of the Adoption Act 1988 made provision for the adoption of a child in circumstances where its welfare was being

neglected by its parents. Prior to its enactment, an Article 26 reference was made to the Supreme Court and the Bill's constitutional validity was upheld. The wording of s. 3 is to all intents and purposes equivalent to the wording in s. 54. Thus the Act of 1988 permitted the non-voluntary adoption of non-marital children in very exceptional circumstances where their welfare required it. The Adoption (Amendment) Act 2017 enables children born of a marriage relationship to be adopted. Section 54 of the Act of 2010 (as amended by the Act of 2017), makes provision for the making of an order dispensing with the consent of the parents of the child, although they are married (see for example, *Child and Family Agency v. Adoption Authority of Ireland* [2018] IEHC 515, and *Child and Family Agency v. Adoption Authority of Ireland* [2018] IEHC 172).

51. In D.W., the child had been taken into care in 2002 at the request of his birth mother who was struggling to cope with him. His birth mother died in 2008. The child's birth father, who was not married to his birth mother, gave his consent to the adoption. The child's parents shared a troubled and turbulent history which contributed to their becoming homeless in March, 2002. An application for adoption was made by the persons into whose care the child had been placed. In this context, an application was subsequently made by the Child and Family Agency and the prospective adoptive parents pursuant to s. 54(2) of the Act. Abbott J., at paras. 8 and 9 of his judgment, stated as follows:-

*"8. The birth mother of the child has demonstrated herself to have failed her child through alcohol abuse and the consequences of such abuse including the inappropriate care of her child, her negligence towards him and her decision to place him into care so to allow her to find accommodation in his absence. In considering whether such actions, at times constituting gross breaches of her duties as a birth mother, are sufficient to constitute parental abandonment for the purposes of sect. 54(2) of the 2010 Act, the natural and imprescriptible rights of the mother and her child must be balanced. Such would be the ordinary point of analysis; however, it is known that the birth mother died in or about the 7th July 2008 and it is at this juncture that the judgment departs.*

*9. This Court must be satisfied that for a continuous period of not less than 12 months immediately preceding the time of the making of the application, the mother of the child, to whom the declaration under section 53(1) relates, for physical or moral reasons, has failed in her duty towards her child; such being likely that the failure will continue without interruption until the child attains the age of 18 years; that the failure constitutes an abandonment on the part of the birth mother of all parental rights, whether under the Constitution or otherwise, with respect to the child; and, by reason of the failure, the State, as guardian of the common good, should supply the place of the birth mother. Death, in the absence of testamentary provision or the election of a testamentary guardian, has, in the special circumstances of this case, caused the mother of the child to have failed in her duty towards her child. Having failed to provide for her child, in any meaningful way which would influence the determination of this Court, the death of the mother has caused her failure, existent at the time of her death, to be ongoing and perpetual. Upon this basis the court is satisfied that the birth mother of the child D.W. has failed in her duty towards her child, and satisfied that such will continue until such time that the child will reach his majority. Such failure has indeed constituted abandonment on her part of all parental rights, they being now impossible to realise or indeed redeem."*

52. This *dicta* must be viewed in the context of the facts of the case as described by Abbott J. While he referred to the absence of a testamentary guardian, he found that the mother's failure was "*existent at the time of her death*". It does not seem that Abbott J. was thereby stating that death, in and of itself, constitutes an abandonment of the child for the purposes of the Act. Further and importantly, there is nothing to indicate that the issue which has been raised in this case – whether it is in fact *necessary* to apply to court to dispense with the consent of a deceased birth parent (in that case, the child's mother) – was argued before the learned judge.

53. It is clear from a consideration of decisions concerning s. 54(2) and the section which it replaced (s. 3 of the Act of 1988), that it is necessary that each of the requirements of the section be satisfied before a consent to adoption may be dispensed with. Each of those requirements are not merely matters to be taken into consideration by the court in exercising a general discretion in determining whether to dispense with consent. They are essential proofs requiring separately to be established. As Finlay C.J. pointed out in *The Adoption (No. 2) Bill*, 1987 [1989] I.R. 656 at 664:-

*"Failure in any one of these proofs absolutely prohibits the making of an authorising order, no matter how strong might be the evidence available of its desirability from the point of view of the interests of the child."*

54. This must be viewed in the light of the provisions of Article 42A of the Constitution which imposes an overarching constitutional imperative, as statutorily enacted in s. 53(3) of the Act of 2010 (and as amended by the Act of 2017), that in a consideration of an application under s. 54(2) the court is obliged to consider the best interests of the child as being the paramount consideration. It is difficult to see how the fact of death, in and of itself, can be said to give rise to or be a basis upon which a court could conclude that the requirements of that subsection have been fulfilled in any given case, without the establishment of proof of each of the matters therein referred to. I agree with the submissions of the parties that the decision of Abbott J. must be viewed in the light of the special circumstances of that case and that death was considered to be abandonment, there being sufficient evidence of abandonment prior to death.

#### **Extra layer of protection**

55. It is argued that in the event that this Court should come to the conclusion that application to court is not necessary where the relevant person has died, such a conclusion would result in the removal of a layer of protection for the child which otherwise exists. I do not believe that it has been established that any such extra layer of protection previously existed.

56. The Act imposes an overriding obligation on the Authority, or any or other person in whose care the child might be, to act in his or her best interests. That the best interests of the child is the paramount consideration in the adoption process is reflected in s. 19 of the Act of 2010, which imposes statutory obligations on the Authority to act in the child's best interests, when considering applications to it. If the Oireachtas intended that an application should also be made to court in the case of a deceased parent, in my view, it would have specifically so provided.

#### **Wardship**

57. In this case, the child is a ward of court and in accordance with the requirements of s. 26(1)(a), the sanction of the High Court is separately required. If the Office of the Wards of Court and the committee have confirmed that they have no objection to the adoption of the child, for the reasons similar to those outlined above, it does not appear to me that a separate application ought to be made in the case of a parent who is deceased. It is to be assumed that in the context of any matter concerning the wardship of a child, all relevant facts, including the death of the child's parents or parent, will be considered. It appears to me that this is a matter for the Office of the Wards of Court and for the President of the High Court in the exercise of his powers in wardship matters.

### Section 30 consultations

58. Section 30 of the Act of 2010 provides as follows:-

*"(1) In this section 'father', in relation to a child, includes a person who believes himself to be the father of the child.*

*(2) Subject to this section, on the receipt of an application for an adoption order, the Authority shall take such steps as are reasonably practicable to ensure that every relevant non-guardian of the child is consulted in relation to the adoption.*

*(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) other than in a case where the relevant non-guardian of the child is a person referred to in paragraph (b), (c) or (d) of the definition of 'relevant non-guardian', the circumstances of the conception of the child,*

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

*(4) If the identity of the father referred to in paragraph (a) of the definition of 'relevant non-guardian' (in this section referred to as 'that father'), is unknown to the Authority and the mother or guardian of the child will not or is unable to disclose the identity of that father, the Authority shall counsel the mother or guardian of the child, indicating—*

*(a) that the adoption may be delayed,*

*(b) the possibility of that father of the child contesting the adoption at some later date,*

*(c) that the absence of information about the medical, genetic and social background of the child may be detrimental to the health, development or welfare of the child, and*

*(d) such other matters as the Authority considers appropriate in the circumstances.*

*(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.*

*(6) The Child and Family Agency or an accredited body, at the Authority's request, shall assist in carrying out the Authority's functions under this section.*

*(7) An application for approval under this section shall be heard in private."*

59. The procedure envisaged under s. 30 is that of consultation. By virtue of s. 30(3), the requirement to make application to court for approval arises where the Authority is satisfied that it would be inappropriate to consult a relevant non-guardian in respect of the adoption. The Authority must take into account the nature of the relationship between the relevant non-guardian of the child and its mother or guardian.

60. Section 3 of the Act of 2010, as amended by the Act of 2017, provides as follows:-

*"'relevant non-guardian', means, in relation to a child—*

*(a) a father of the child who is not a guardian of the child pursuant to the Act of 1964,*

*(b) ...*

*(c) a person who is appointed as a guardian of the child pursuant to section 6C of the Act of 1964 where subsection (9) of that section applies to that appointment but in respect of which the court has not made an order that the person enjoys the rights and responsibilities specified in subsection (11)(f) of that section, or*

*(d) a person appointed by the court to be a temporary guardian of the child under section 6E of the Act of 1964."*

61. Therefore, on the facts, had the father been alive he would have come within the definition of a relevant non-guardian. Reading s. 30 in its entirety, it is difficult to see how subsection (4) could be said to apply where a father is deceased. I refer in particular to the obligation of the Authority under that subsection to counsel the mother or guardian of the possibility of the father contesting the adoption at a later stage, where the mother or guardian will not, or is unable to disclose the identity of the father. I cannot see how this could be said to apply in the case of a father who is known to have died. I believe that the framework of s. 30, when read in its entirety, is directed at the requirement imposed upon the Authority to consult with a father or other non-guardian who is alive.

62. Further, I do not think that s. 30 can be viewed in isolation. Section 16 entitles a relevant non-guardian to serve notice to the Authority that he wishes to be consulted in relation to a proposal to place the child for adoption, or, in certain circumstances, an



application for an adoption order. Section 18 empowers the Authority to authorise an accredited body to place the child for adoption, if it is satisfied that that body has taken such steps as are reasonably practicable to consult the non-guardian father (the relevant non-guardian).

63. Section 17 of the Act of 2010 also imposes an obligation on an accredited body to take such steps as are reasonably practicable to consult any relevant non-guardian. Under s. 17(3), where the non-guardian of the child indicates that he or she has no objection to the placement, the accredited body may place the child for adoption. Where there is an objection, there is an obligation on the accredited body to notify the relevant non-guardian in writing that it is deferring the placement for a period of not less than 21 days *"for the purpose of affording the relevant non-guardian an opportunity to make an application to Court under the Act of 1964"*.

64. It seems clear that such procedure relating to objection envisages a positive action on the part of a relevant non-guardian, something which in my view is incapable of being performed where the relevant non-guardian has died.

65. In the light of the foregoing, the following are the answers raised at para. 16 of the case stated:-

- (a) No.
- (b) In this case, no.
- (c) In this case, no.
- (d) No.
- (e) Does not arise on the facts of this adoption.
- (f) In this case, no.