THE HIGH COURT
FAMILY LAW

[2024] IEHC 352
Record No. H.M. 2024.61

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 54 OF THE ADOPTION ACT 2010 (AS AMENDED)
AND IN THE MATTER OF B.I., A MINOR

Between:

CHILD AND FAMILY AGENCY AND U.D. AND M.D.

Applicants

-and-

THE ADOPTION AUTHORITY OF IRELAND

-and-

C.I.

Respondents

JUDGMENT of Ms. Justice Nuala Jackson delivered on the 28th May 2024

Introduction

1. The case under consideration concerns an application for an Order pursuant to section 54(2) of the Adoption Acts 2010 – 2017 ('the Acts') authorising the adoption of B.I. by U.D. and M.D.. Section 54(2) of the Acts states:

   "(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."

2. B.I. is a child on the cusp of adulthood and she has lived with, been in the care of and has been cared for by U.D. and M.D. for a very considerable portion of her childhood. Their commitment to her has been unwavering. There is no evidence

before me that this position will alter in the future. C.I. is B.I's birth mother and she has had involvement in B.I.'s life, to varying degrees which will be outlined below, throughout her life. That she loves her child and that this is an enduring love cannot be doubted.

3. At the outset of this judgment, I wish to recognise the very considerable assistance given to me by all of the parties and by their lawyers in the presentation of this application. It is undoubtedly the case that the issues which have to be addressed in applications such as the present are difficult and emotive ones and they often involve travelling back to consider very difficult times in life. These issues were bravely addressed in this instance by all concerned and, while B.I. has challenges and will continue to have challenges in her life, she is most fortunate to have the support of champions for her.

Chronology and background

(a) B.I. was born in 2006. C.I. is her mother and her father is not unknown. C.I. not wishing to identify him at that time or at any time thereafter.

(b) B.I. was placed in voluntary care when she was six months old. At this point, the child had been admitted to hospital on three occasions, considered to be *"social admissions"* and there is evidence before me that C.I. was finding it difficult to cope and *"needed a break"*. At the time of the admission to voluntary care and for a period thereafter (for a period of at least one year), there was a shared care arrangement in place with B.I. spending four days (and nights) with her foster family and three days (and nights) with C.I.. This diminished over time with overnight access ceasing (in or about 2010 as deemed not to be in B.I.'s best interests) and access changing from being unsupervised to being supervised. The progression of this diminution in contact remains somewhat opaque, particularly in relation to the years between the current placement and the basis for B.I. being in care changing from voluntary to court ordered. It would appear that access has steadily diminished over time going from two hours per week in 2013 to one hour per month in 2015 to one hour every three months in 2018. Physical access ceased entirely during the Covid-19 pandemic, with a short period of resumption in 2022. At the time of the hearing before me, apart from one contact at a milestone event which

would appear to have encountered difficulties, there had been no contact between B.I. and her mother since 2022. The evidence before me is that B.I. is now oppositional to such visits. It would not appear that this was always the case.

(c) Following an initial short-term placement, she was placed in fosterage with U.D. and M.D. when she was approximately 15 months old. They have been her primary caregivers since that time. That is not to say that C.I. had no role in her life. C.I. has had ongoing contact with B.I. throughout her life but, having been extensive in nature when B.I. was young, this contact has steadily diminished over time such that it is now minimal and has been minimal over the last number of years. I will consider this further below. B.I.'s younger half sibling is also in the care of U.D. and M.D..

(d) A psychological assessment of C.I. took place in 2010. I have been provided with a copy of the resultant report. Following this assessment, application was made for a two-year care order which was granted.

(e) A parenting capacity test was carried out in 2012. I have been provided with a copy of the resultant report. Following this assessment, application was made for a Full Care Order. This was granted on a date in 2013.

(f) A court application for increased autonomy was made by and granted to U.D. and M.D. in or about 2018. This was not consented to by B.I..

(g) The Affidavits filed on behalf of the Child and Family Agency ('the CFA') indicate that U.D. and M.D. first raised the possibility of adoption of B.I. in 2022. It must, however, be noted that in the Domestic Adoption Assessment Report for a Fostering to Adoption Application, dated the 12th December 2023, U.D. and M.D. are recorded as stating:

> *"With regards to the decision on adoption, [M and U] say that they were interested in adopting [B] when she was younger but Tusla did not believe it was appropriate at the time given the level of involvement of [B's] mother and the uncertainty surrounding [B's] health and prognosis. With the change in the legislation (Adoption Amendment Act 2017) [M and U] raised the matter with Tusla again.*
>
> *At a recent meeting of foster carers, [M] spoke to other foster carers in a similar situation who were going through the adoption process. She and [U] decided they would ask again and they spoke to their fostering linkworker. She liaised with her colleagues in the Children in Care team and it was agreed that an urgent application should be made by [M and U] with Tusla's support."*

A formal request for adoption was raised with the social work department of the CFA in October 2023.

(h) An application to adopt B.I. and for a Declaration of Eligibility and Suitability for Adoption was received from U.D. and M.D by the Authority in January 2024 and such Declaration was granted in February 2024.

(i) Following hearings in February and March 2024, the Authority granted a Declaration pursuant to section 53 of the Acts on the 5th March 2024. In consequence of this Declaration, the Authority has confirmed that it is satisfied that, if an order is made in the application now being considered by me in favour of the prospective adoptive parents, U.D. and M.D., it would be proper to make the adoption order sought.

(j) This application was heard by me over a two day hearing. There was written and oral evidence before me. In this regard, I have considered the Affidavit of Áine Fitzgerald sworn on the 23rd April 2024; the Affidavit of Sinead McDonnell sworn on the 23rd April 2023; the Affidavit of Mark Kirwan sworn on the 25th April 2023 and the Affidavit of C.I. sworn on the 8th May 2024. Opportunity for oral testimony and for cross-examination was afforded all parties and, in consequence, Ms. McDonnell was cross-examined by Counsel for C.I. and oral evidence was given by C.I.. She was not cross-examined.

Health and Medical Issues

4. The evidence relating to B.I.'s complex health needs is uncontroverted. These needs are physical and intellectual in nature. There are extensive medical interventions and health professionals involved in her life. It is not disputed that B.I.'s needs in this regard will continue into adulthood and she will not be capable of independent living. It is uncontroverted that U.D. and M.D. have been assiduous in caring for B.I. and they have, over many years, been the persons who have taken responsibility for ensuring that she has the very best medical care possible. The evidence is clear that these are responsibilities which they desire to and are committed to continuing into B.I.'s adulthood. I heard and fully accepted the evidence of C.I. as to her desire to be involved in B.I.'s care going forward and as to the support which she would receive from her partner of a number of years. I do not doubt C.I.'s sincerity in this regard. However, I was uncertain as to whether she fully appreciated the onerous task involved. It is amply clear to me from the

evidence before me that B.I. has particular needs which dictate the very significant importance of future stability and support beyond her minority.

Preliminary observations

A. Section 54(1) of the Acts:

Section 54(1) of the Acts states:

"(1) Where applicants, in whose favour the Authority has made a declaration under section 53(1), request the Child and Family Agency to apply to the High Court for an order under this section—

(a) if the Child and Family Agency considers it proper to do so and an application in accordance with paragraph (b) has not been made by the applicants, the Child and Family Agency may apply to the High Court for the order, and

(a) if the Child and Family Agency is satisfied that every reasonable effort has been made to support the parents of the child to whom the declaration under section 53(1) relates,

(b) if, within the period of 3 months from the day on which the request was given, the Child and Family Agency either—

(i) by notice in writing given to the applicants, declines to accede to the request, or

(ii) does not give the applicants a notice under subparagraph (i) of this paragraph in relation to the request but does not make an application under paragraph (a) for the order,

the applicants may apply to the High Court for the order.

(underlining added)

5. As has been previously determined, the requirements of Section 54(1) of the Acts are a matter for the CFA. The fulfilment of the requirements of subsection (1)(a) as amended by the 2017 Act has been considered previously by this Court and by the Court of Appeal. In **CFA & Ors v The Adoption Authority of Ireland & Ors** [2018] IEHC 515, McGrath J. noted that the CFA must satisfy itself that every reasonable effort has been made to support the parents of the child, before making

the application under Section 53(1) of the 2010 Act, as amended. In considering Section 54(1)(a), McGrath J states:

> '*Section 54(1)(a) therefore appears to stipulate that this is a matter within the competency of the Agency. It is not specified in section 54(2) that this Court must also satisfy itself that the Child and Family Agency has complied with the provisions of section 54(1) before it may consider the making of an authorisation order or an order dispensing with the consent of a person whose consent is required, or that the application under section 54(2) should act as an appeal from a decision, declaration or determination of the Child and Family Agency in that regard. On the face of it, therefore, it seems to me that any remedy or challenge to compliance with the provisions of s. 54(1)(a) may lie in a different forum*.'

6. The above was confirmed in **CFA & Ors v The Adoption Authority of Ireland & Ors** [2022] IECA 196. The application of Section 54(1)(a) was further considered by Jordan J. in **CFA & Ors v AAI [2021] IEHC 677**, with it being noted that it does not matter whether the court agrees with the conclusion reached by the CFA. Indeed, I am unsure whether I could do so in the present case.

7. The CFA has confirmed to me that it is satisfied that it has complied with these provisions. Counsel for the CFA informed me that it is satisfied that every reasonable effort was made to support C.I. in respect of the care and maintenance of a relationship with B. A Family Support worker was appointed, shared access was initiated and the birth mother was supported with the level of access she was capable of engaging with. Voluntary Care Arrangements were in place for four years in order to assist and maintain the mother and child bond as well as the family unit. The two-year care order was only sought after the original assessment by Dr. Asgharian and subsequently, the full care order was only sought after the Parental Capacity Assessment with Dr. Shine in July 2012. Dr. Shine concluded that the birth mother's scores in such assessment lie within the exceptionally low range of cognitive functioning. While Dr. Shine did not consider this alone to be a risk factor, combined with the significant personality difficulties of the birth mother, Dr. Shine

concluded it is likely that the birth mother has limited ability to protect and care for her children and provide them with a safe and nurturing environment.

8. It would be impermissible for me to become an appeal from this decision. I must, however, record my concern as to the huge diminution in contact between the birth mother and B.I. over the period when B.I. was in the care of the State. It is clear that at the commencement of B.I. being in care, contact with C.I. was so extensive that there was, effectively, a shared care arrangement. I accept that during this time, C.I. was residing in her family home of origin with the support and, in part, supervision of her own mother, B.I.'s grandmother, and that circumstances changed when C.I.'s accommodation arrangements changed. I am also mindful of times when there was a failure on the part of C.I. to engage with social workers and that concerns were raised in relation to the conduct of C.I. in the context of access. However, the deterioration in contact from overnight and, later, extensive day time access to a small number of hours per month and, laterally, a small number of hours every three months, followed by complete cessation during the pandemic period is most concerning in the context of making every reasonable effort to support C.I.. In this regard, I note that in the Social Work Report: Fostercare to Adoption Case (dated 4.1.2024) it is stated:

   "Generally at access [C] is attentive to [B] and tries hard to engage with her, she can be loving, warm and affectionate towards her. She likes to bring gifts for [B]. What does cause difficulty at access is how [C] speaks to Tusla staff and sometimes to [B's] foster carer, this confuses [B] and she does not like it."

9. In so commenting, I am mindful of the obligations arising pursuant to Article 8 of the European Convention on Human Rights and the ECtHR jurisprudence in this regard. It is clear that section 54(1)(a) of the 2010 Act as amended is reflective of State obligations in support of family unification/reunification. These obligations are addressed by Hogan J. in the **Child and Family Agency and B v. Adoption Authority of Ireland and C and Z** [2023] IESC 12 ('**the B Case**') at Paragraphs 86 – 94. These obligations have an important role to play in the context of family life rights and are obligations to which the CFA must have the very highest of regard.

B. Timing of application:

10. I have very considerable concerns arising from the lateness of this application and the implications arising from the last minute timing of same. In this regard, there would appear to be some factual contradiction and I would refer to "Chronology and background Paragraph (g)" above. The Special Summons herein issued on the 15th April 2024 with a return date before this Court seven days later, on the 22nd April 2024. The full hearing of the application was listed and heard by me on the 10th and 14th May 2024. Having regard to the commitments of the Authority and given the requisite steps to be taken by the Authority post-hearing, if the order sought is acceded to, this could only be described as a last minute application having regard to the imminent attaining of majority by B.I.. The lateness of the application in this case (and such late applications are, regrettably, all too common) has many ramifications such that I believe it appropriate to reflect thereon, as this court has previously done. In this regard, I refer to **Child and Family Agency v Adoption Authority of Ireland** [2020] IEHC 419 where Jordan J. stated:

> *"53. Once the decision is made to adopt any delay in progressing the matter should in the view of this Court be avoided in circumstances where the welfare of the child is the paramount consideration. Any delay in progressing adoption applications will inevitably introduce a possibility of the time lost negatively impacting on the best interests of a child. This is even more so when there is an obligation to progress adoption applications with reasonable expedition, in the interests of fairness and due process to all of those concerned - and especially to the child, to the birth parent or parents and to the applicants.*
>
> *54. Prolonged delay is usually inimical to the interests of justice.*
>
> *143. The Court is satisfied on the evidence that the application for adoption could and should as a matter of probability have been progressed in 2012 after the completion of the life story work. The Court is also satisfied that no worthwhile reason or justification or explanation has been advanced for the years of delay in making the application in the intervening period, except for the period between October 2017 and the 9th January 2019. This delay creates an unfairness in the entire process. It works to the disadvantage of the birth mother in circumstances such as those which exist in this case. It works to the*

advantage of the applicants. It is not in the interests of the welfare of the child who needs certainty and stability in her life. The delay also creates evidential difficulties for a court revisiting issues and attempting to establish the factual narrative in the case. Memories have faded, social workers have moved on, people have changed and grown older and the dynamics have changed significantly in terms of the actual situation as it existed in 2012 as opposed to those which exist in 2019/2020. In a nutshell, the delay creates a fundamental unfairness for the birth mother here. In the absence of any adequate explanation for the delay, it must weigh heavily in the scales when the court comes to balance the respective rights of the parties."

Furthermore, in **Child and Family Agency v Adoption Authority of Ireland** [2021] IEHC 677 (affirmed and cited in **CFA v AAI** [2022] IECA 196) Jordan J. stated:

"Here I am again looking at another last-minute application which I consider could and should have been avoided if necessary and timely action was taken at an earlier stage to advise people in relation to adoption, to counsel people in relation to adoption and to see to it that the process started some years ago. A system failure is what has us here now and has A here and genuinely stressed and upset. This happening at this hour in the life of S (the child) and in her own life, and I have to say that this timeline of delay in applications of this nature, is a very significant aspect in these applications when they are made late, and falls squarely, in my view, within something that must be considered by the court with a view to deciding whether or not it is just to grant the approval."

11. Again, in **Child and Family Agency & Anor v Adoption Authority of Ireland & Anor** [2022] IEHC 301 Jordan J. stated:

"28. Insofar as other matters are concerned, there is an obligation on the court to have regard to any other matter which the High Court considers relevant to the application and again the court is concerned about the delay in progressing applications like this. It shouldn't be the case that this Court is dealing with an application to adopt a child who will be an adult in a month's time. That is not

fair to anyone involved. It is not fair to the child. It is not fair to the foster parents or the applicants for adoption. It is not fair to the biological parents. Everybody, no matter how small one considers oneself as a cog in the wheels that grind so slowly in these processes, should look at what they can do to expedite the dealing with applications of this nature. It has happened that there was space in the list today to cater for this application but that is not always so. If these delays continue - in addition to the unfairness of leaving things as late in the day as they are so routinely left - the Child and Family Agency, the applicants for the adoption and the Adoption Authority will find themselves appearing before this Court some Monday morning looking for a date and find there is none available. There are many other cases in the High Court list requiring priority. There are many others that are urgent and it is not fair to the system that applications like this are dragged out to the extent they are. The court appreciates that people are under pressure. It appreciates that assessments take time. It appreciates that when you are trying to deal with a mentally challenged person in Nigeria there will inevitably be delays - but that situation did not come about overnight. Something needs to be done about these delays at senior level and all the way down in the Child and Family Agency in particular - and also in the Adoption Authority. Action is required to stop these delays happening.

29. A. and B. should have had a decision on the adoption process a long time ago. The court believes, although it is not a matter that it is deciding, from looking at this case and earlier cases, that a different approach would result in greater expedition. In some cases delay cannot be avoided but in a large number of them matters could move much faster. This court does want to be overly critical but these delays are now falling into a category of concern that may count as another matter which the court considers relevant in applications going forward - and it may ultimately result in orders being refused because the delay is so gross that the court cannot countenance making the orders which it would have made if the matter was before the court earlier."

12. I agree with the concerns reflected in these *dicta*. There are a number of reasons why these applications being made in very close proximity to the attaining of

majority is unsatisfactory and, indeed, unfair. Statute mandates that the welfare of the child is to be the paramount consideration (section 19 of the Acts). Clearly, factors relevant to such welfare are stability and predictability. Late applications, far from supporting preparation and calm, are contrary to them. Secondly, the birth parents should have sufficient time to consider the applications and the matters arising therefrom. There should be sufficient time for them to receive comprehensive legal advice and counselling as is appropriate and desirable and this should not be done in circumstances of extreme haste. In the present case, the Affidavit of C.I. was sworn just two days prior to the hearing date. This was due in no part to any delay on the part of her lawyers who clearly worked assiduously in taking instructions and acting upon them. However, in this case, the Summons was served by summons server at the home of C.I. on the 15th April 2024 accompanied by a letter indicating that the matter would be before this Court some seven days later. While not arising in this case, complications relating to service of documents may cause further disadvantage to parent respondents. I have referenced previously the difficulties which these late applications lead to from the point of view of the Authority, having regard to its statutory duties and responsibilities.

13. There is also the issue of appeals. In the **B Case** which came before the Supreme Court, a similar issue of proximity to "ageing out" had arisen and, in circumstances in which the application was acceded to, the adoption order was made by the Authority on the basis that it would be set aside if the Supreme Court appeal was successful (Hogan J., Paragraph 18). However, very significant issues would arise in the event of the order being sought being refused and the prospective adopters wishing to appeal, in which circumstances the adoption order could not be made with the contingency of setting it aside subsequently. This has the potential to have a fundamental impact on the rights of the litigants involved and the rights of the child. I am also mindful of the fact that in cases in which orders pursuant to section 54(2) of the Acts are made, it is often necessary to abridge the statutory time within which to appeal in order to ensure that the adoption order may be made before the child reaches the age of 18 years. This is highly unsatisfactory.

14. I leave until last, but not to be forgotten, the impact on the resources of this Court in facilitating the hearing of complex proceedings with such a fundamental impact

on the legal status of child concerned. In the affidavits filed by the CFA herein, it is averred that the prospective adopters first raised the possibility of adopting B.I. in 2022 (the precise date is unclear), with a formal request being made in October 2023. The information in certain of the reports provided to me contradicts this. Whatever the true position is, it is difficult to understand why this issue would not have been raised informally at an earlier stage given required child in care reviews at regular intervals throughout the period when the child is in care but, additionally, the lapse of a period of approximately one year between the possibility of adoption being raised and the application being made is difficult to comprehend.

C. Voice of the child:

15. Article 42A of Bunreacht na hÉireann states:

"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."

16. Section 54(3)(b) of the 2010 Act, as amended, mandates that:

"…, 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, …"

17. Sinead McDonnell, social worker, addresses this at Paragraphs 85 to 88 of her affidavit sworn herein. She states:

> *"85. However, I say that she presents as a very happy, contented girl. I say that your deponent visited her on the 10th November 2023 to talk to her about adoption and future plans for her.*
>
> *86. I say that [B.I.] said she wants thing "to stay the same" and that she wants to "always live here", that being with the Second and Third Applicants' family.*
>
> *87. I say that your deponent explained the concept of adoption to her and reassured her that if she is adopted, she will always be able to continue to see her biological mother and that it will be her decision if she goes to access or not. I say that [B.I.] indicated that she understood this by nodding her head and agreeing with what your deponent was saying.*
>
> *88. I say that although [B.I.'s] speech is limited and she can find it difficult to express herself verbally, it is the view of your deponent that [B.I.] expresses her wishes clearly through her actions, her body language & her relationship with her foster carers. I say that the implication of [B.I.] statements to your deponent is that she wishes for the adoption to proceed."*

In the Social Work Report: Fostercare to Adoption (dated 4.1.2024), Ms. McDonnell acknowledges:

> *"… it can be difficult to garner her wishes and opinions."*

18. C.I. disputes that the child's views in relation to adoption have been heard. In her affidavit, she avers at Paragraph 10:

> *"Sinead McDonnell alleges that [B.I.] has expressed her view that she wishes for things to remain the same and to stay with the [Ds]. However, [B.I.] has difficulty communicating and believe that this is mere speculation on the part of Sinead McDonnell. The Applicants have not produced a report from a psychologist or the medical specialist who has examined [B.I.] and has categorically stated that this is [B.I.'s] wishes."*

19. This is not unlike the situation which pertained in the **B Case** although, on the evidence before me, it would appear that B.I.'s challenges are still greater than those being experienced by B in that case. There was no suggestion by any of the parties involved that I should meet with B and my inquiries in this regard indicated that this

would not be appropriate given B.I.'s disabilities. Consideration was given as to whether a specialist report should be sought but, with the agreement of all concerned, it was determined that such report would not advance matters any further so far as B.I.'s voice is concerned. Clearly, Ms. McDonnell is an experienced social worker with postgraduate qualifications in this field to Masters level. Additionally, she is well known to B.I. and freely communicated with her in accordance with her (B.I.'s) capacities. It was agreed between the parties that:

(i) B.I.'s capacity is such that she would not be able to understand the concept of adoption;

(ii) B.I. is a person who communicates through a combination of verbal language (although she may find such expression difficult), body language, the expression of her feelings and her actions towards and responses to others;

(iii) B.I. understands senses of security, contentment and stability and she experiences these positive feelings in her current *de facto* family with the Ds.

It was further agreed that no more comprehensive information concerning B.I.'s wishes was likely to be elicited through a specialist report.

20. In the "Access to Justice for Children with Cognitive Disabilities IRELAND COUNTRY REPORT" (2013), pre-dating the amendment of the Constitution, Jennifer Kline and Dr Eilionóir Flynn of the Centre for Disability Law and Policy, National University of Ireland Galway (2013) stated, referencing children with disabilities:

> *"Nevertheless, efforts to ascertain the views of the child, in accordance with the child's age and maturity, can still be made. While the views of children with cognitive disabilities about where and with whom to live might be even more difficult to ascertain, this process is essential to ensure effective access to justice for children with cognitive disabilities in care in Ireland."*

21. Subsequent to the amendment of the Constitution, the report, commissioned by the Ombudsman for Children, entitled "Mind the Gap - Barriers to the realisation of the rights of children with disabilities in Ireland" (2021)(Dr Catriona Moloney, Clíona

de Bhailís, Dr Danielle Kennan, Dr Carmen Kealy, Dr Shivaun Quinlivan, Professor Eilionóir Flynn and Jacqueline Phiri, Centre for Disability Law and Policy, NUI Galway) opined:

> *"9.2.1 Current Irish Context: Overview of law and policy*
>
> *Civil Law*
>
> *Access to the courts is protected as an implied personal right under article 40.3.1 of the Irish Constitution. Article 42A of the Constitution enshrines a child's right to express their views and have their views given due weight based on their age and maturity in proceedings regarding their care. This right is limited to proceedings regarding guardianship, custody and adoption and proceedings which are initiated as a result of a fear for the child's welfare. This is not consistent with article 12 of the UNCRC, which clearly states that children's right to express their views extends to 'all matters affecting the child' and which the CRC Committee's General Comment No. 12 clarified is to be understood broadly. It should be noted that under the Constitution the opportunity to be heard is limited to 'any child who is capable of forming his or her own view.' It is not clear how this provision might apply to children with cognitive disabilities who may be viewed as not capable of forming a view or expressing an autonomous opinion. This is not consistent with the UNCRPD, the text of which removed this capability qualification and which states that children with disabilities should be provided with support to their express their views.*
>
> (underlining added)

22. One of the issues for consideration by me is how the views of B.I. are to be interpreted and applied in this instance. Is B.I.'s voice to be unheard because she does not understand the concept of adoption or because she cannot verbally articulate her wishes? I do not believe that this is what the Constitution or the legislation intends. It seems to me that the Constitution and the legislation require:
    (a) A determination of the capacity of the child to form views pertinent to the matter(s) at issue, the extent of such capacity will vary depending upon the

abilities of the particular child and, in this context, the manner and mode of expressing such views may vary. This is a subjective test which must be applied relative to the particular abilities and disabilities of the particular child. Capacity in this context is not binary, amenable only to a determination that a person is capacitous or incapacitous. Rather the extent and gradation of capacity of the particular child must be determined;

(b) this must then be followed by a determination of the weight and due regard to be given to such views which, again, is subjective to the age and maturity of the child concerned.

23. Applying these tests, while B.I. may not be in a position to understand or express views in relation to the legally complex concept of adoption, B.I. is in a position to express views in relation to her lived experience and her contentment or otherwise with this. It is to these verbal and non-verbal expressions that I must have due regard.

Issues of conflict and submissions

24. The Applicants contend that the necessary proofs set out in section 54(2A) of the Acts are satisfied in this case. They submit that adoption is in the best interests of the child and that, having due regard for the expression of her voice by B.I. in the context of her abilities and disabilities, and, furthermore, having regard to the Constitutional rights of all persons concerned (and in particular the birth mother and the child), the relief sought should be granted.

25. The birth mother asserts that she has maintained contact with B.I. through contact visits. She denies that she has failed in her duty towards her but rather says that she was not able to take part in the day to day upbringing of B.I. due to her being in care. She denies that she has abdicated responsibility for B.I.. She asserts that she wishes to and has the capacity to resume the care of B.I. and she asserts that her circumstances are such as can facilitate this or, to the extent that they are not, she will alter her lifestyle and work commitments to accommodate B.I.'s needs. The birth mother disputes allegations of uncooperative behaviour and allegations of failure to attend for access visits made against her and she references inadequacies

and failures on the part of the CFA in nurturing and supporting a relationship between her and her child. She complains about certain day to day care failures pertaining to B.I. with the child being permitted to engage in activities which she does not believe were in her best interests. These complaints related to diet and personal care.

26. Counsel for C.I. submits that there has been no failure of duty on her part, that she is able to care for her child and that there has been no abdication of parental role by her. He referred in particular to the significant parental role afforded to C.I. when B.I. was a small child. In support of these contentions, reference was made to Paragraph 13.5 of the report of Dr. Anna Moore Asgharian, dated July 2010, which stated:

> *"[C.I.] has been seen to show deep affection for her child. She has professed her love for her child and her belief that a child should only be with its natural parents. Her skills observed in relation to meeting the basic needs of her child in the observation session demonstrated an ability that is a strength of [C.I's] particularly in comparison with her level of cognition. [C.I.'s] ability to bond with the child is recognised as a significant achievement. [C.I.] has shown her practical ability in being able to look after her household and her own self."*

He asserted that Section 54(2A)(a) is focused on the future, referencing the term "likely". It was submitted that there had been no abandonment of her child by C.I. She had cared for her child during infancy and all court orders sought in relation to the child were absent her consent although she did not contest them. There was no dispute that C.I. did not bring any applications seeking to review the situation which had arisen. In relation to proportionality, it was submitted that the Assisted Decision Making legislation would assist and protect B.I. during her future adulthood (the Court having been informed that it is intended to make such an application upon attainment of her majority).

The Law – section 54(2A) of the Acts

"(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.

(4) The High Court, of its own motion or on application to it in that behalf, may make orders—

(a) adding other persons as parties to proceedings under this section, and

(b) for the payment—

(i) of any costs, in relation to the proceedings, that are incurred by the person and are not paid by another party, if legal aid for the proceedings under any scheme operated by or on behalf of the State for the provision of legal aid has been refused, or

(ii) by the person of any costs in relation to the proceedings that are incurred by any other party.

(5) The Child and Family Agency shall be joined as a party to proceedings under subsection (1)(b).

(6) Proceedings under this section shall be heard in private.

(7) A request to the Child and Family Agency under subsection (1)—

(a) may be given by handing it, or by sending it by prepaid post, to an employee of the Child and Family Agency at its premises, and

(b) for the purposes of subsection (1)(b), is given to the Child and Family Agency on the day on which it is handed or posted to it."

27. The history and provisions of section 54(2A) of the Acts have been considered in some detail in the judgment of Hogan J. in the recent Supreme Court case of **Child and Family Agency and B v. The Adoption Authority of Ireland and C and Z** [2023] IESC 12 ('**the B case**') (which decision was considered and applied by me in **CFA and Ors v. AAI and Ors** [2024] IEHC 227). Hogan J. states (paragraph 37):

> "*In essence, the question arising in these proceedings has largely reduced itself to the issue of whether the proposed adoption would satisfy these various statutory pre-conditions."*

28. The Supreme Court then proceeded to consider each of the statutory conditions arising. I have set out the relevant *dicta* at some length due to the similarities between that case and the present:

> ***"Section 54(2A)(a): whether parents failed in their duty***
> *58. This sub-section provides that the High Court must satisfied that for a "continuous period of not less than 36 months" immediately preceding the date of the making of the application the parents had failed in their duty towards the child "to such an extent that the safety or welfare of the child is likely to be prejudicially affected."*
> *59. ... The concept of failure of parental duty has, as I noted at outset of this judgment, been a central feature of this aspect of our adoption law since 1988. In Adoption (No.2) Bill Finlay C.J. observed ([1988] IR 656, at 664) that the concept of failure must be construed as "total in character". He continued:*
>
> > *"No mere inadequacy of standard in the discharge of parental duty would…suffice to establish this proof…This does not mean that the failure must necessarily in every case be blameworthy, but it does mean that a failure due to externally originating circumstances such as poverty would not constitute a failure within the meaning of the sub-clause."*
>
> *60. This passage was subsequently applied by this Court in Northern Area Health Board v. An Bord Uchtála [2002] 4 IR 252, a case arising under the*

1988 Act. Here a child had been in foster care for some years. Although her father had not been involved in her care, her mother opposed the adoption application. She, however, suffered from severe mental health issues and the High Court found that she was too ill to look after the child. In this McGuinness J. held ([2002] 4 IR 252, at 272) that there was

> *"ample evidence to establish that on account of her disability [the mother] had been unable to fulfil her parental role, not alone for the required twelve-month period but for the entire of [the child's] life."*

She also added ([2002] 4 IR 252, at 272) that this finding was not offset by the level of access to the child on the part of the mother, agreeing with Herbert J.'s description of her that she was "more of a visitor than a parent" to the child.

61. A similar view was taken by MacGrath J. in HR and FR. In this case the natural parents had six children, one of whom died in infancy in circumstances that were never fully explained to the satisfaction of the authorities. The mother was pregnant with CW at the time of the death and, following his birth, he was taken into care. Because of the parents' concerns regarding the question of whether other children would be taken into care, they appear to have left the State to live variously in either the United Kingdom or Nigeria (from whence they had originally come).

62. It is unnecessary to detail the complex facts of what subsequently happened. It is sufficient to say that CW lived all his life with loving foster parents and both he and they sought an adoption order shortly before he attained his majority. While MacGrath J. described the application as "highly unusual and difficult", he nonetheless held that the statutory proofs for the purposes of s. 54(2A) had been satisfied and he made the order sought."

Section 54(2A)(b): whether natural parents unable to care for the child to the extent that her safety or welfare would be prejudicially affected

29. Examining this requirement, Hogan J. addressed the circumstance of improvement which had occurred in the life conditions of the birth parents as is the position in the present case.

"65. That, however, is not the relevant statutory test. It is not a question of parental capacity simpliciter because the sub-section goes on instead to stipulate that this parental care must be exercisable in a manner "that will not prejudicially affect…her safety or welfare." All the evidence is that Ms. B.'s welfare would be best served by leaving her to reside in the only house which she has known as her family home. This is where her centre of interests lies, and she has come to love and value the rural life and landscape which her foster home offers. She should not be uprooted from that home environment, not least given the nature of her disability and personal disadvantage.

66. Section 54(2)(b) is accordingly not concerned with parental capacity in the abstract. This statutory test is rather concerned with the concrete welfare and interests of the particular child in question. Given the circumstances of Ms. B.'s life to date, any arrangements in her living environment would cause a very significant rupture in her life and would be fraught with risk.

67. I appreciate, of course, that it is no part of Ms. C.'s case that in the event that this appeal were to succeed that Ms. B. would then come to live with her. The point, however, is that Ms. C.'s own subjective intentions in this regard are not directly relevant to the application of this specific statutory test. Rather the High Court is required to ask itself whether the natural parents would be in a position to care for the child in a manner which would not prejudicially affect her safety or welfare. Here I agree with the comments of Whelan J. in the Court of Appeal to the effect that any conclusion to the contrary simply overlooks what she described as "the lived reality" of Ms. B. To that extent, therefore, I consider that this test is also satisfied in that there is no reasonable prospect that Ms. B's mother would be able to care for her in a way which would not prejudicially affect her welfare."

Section 54(2A)(c): abandonment of parental rights

"68. … As Denham J. (in Southern Health Board) and McGuinness J. (in Northern Area Health Board) both respectively observed in the context of the similarly worded 1988 Act, this term must be accorded a meaning according to its statutory context and is has - as both of these judges in their respective

judgments stressed - a "special legal meaning". While the word "abandon" has gloomy overtones reminiscent of the novels of Hugo and Dickens, and it is, moreover, a word which, as Denham J. said in Southern Health Board, is one which "in its ordinary meaning would distress parents" ([2000] 1 IR 165 at 177), it does not necessarily mean or imply abandonment in the sense of the physical abandonment of a child (although, of course, it could do so). The sub-section is rather directed at the question of the abandonment of parental rights vis-a vis the child.

69. In Northern Area Health Board, McGuinness J. said ([2002] 4 IR 252, at 276): "Here P.O'D has agreed to the continuing care of J. by Mr and Mrs H. over virtually J's entire life to date. She is, in addition, happy that this situation should continue. She has allowed and willingly continues to allow J. to become in a practical sense a member of the H. family. She has, in my view, abandoned the custody and care of her daughter to Mr and Mrs H. She has left and will continue to leave to them the crucial decisions regarding J's health and education and the carrying into effect of those decisions, together with the by no means insubstantial financial costs that arise from them. In my view this situation amounts in a real and objective sense to abandonment of her rights as a parent. As Walsh J. pointed out in the passage quoted above [from G. v. An Bord Úchtala [1980] IR 32 at 67-68] a parent may be deemed to have abandoned his position as a parent. In my view the infrequent visits by P. to her daughter, largely initiated by others, are not inconsistent with the reality of her abandonment of her position as a parent. It is true that P. has consistently expressed her opposition to adoption. I would, however, agree that such opposition in itself does not contradict the fact of abandonment. The test of abandonment must be an objective one."

Section 54(2A)(d): whether necessary for the State to have intervened

"71. There can really be little argument regarding compliance with sub-section (d). This requires the High Court to be satisfied that it was necessary that the State, as guardian of the common good, should supply the place of the parents. The unfortunate reality in the present case was that Ms. C.'s marriage and,

consequently, her ability to care for her children, was overwhelmed by a series of crushing vicissitudes. She herself was unable to cope and this is why Ms. B. was first admitted into care and then fostered. This is a clear case of where the State had to supply the place of the parents."

Section 54(2A)(e): whether the child is in the custody of the foster parents

"72. Here again there can be little argument regarding compliance with this specific statutory condition. This sub-section provides that the High Court must be satisfied that the child in question is in the custody of Ms A and that she has a home with her for at least an 18-month period. It is not disputed but that Ms. B has been living with Ms. A and in her custody for virtually the entirety of her life or, indeed, that Ms. A has provided a loving and caring home for her."

Section 54(2A)(f): proportionality of the proposed adoption order

30. In the **B Case**, Hogan J. comprehensively addressed the issue of what is to be considered proportionate in the context of applications such as the present. He stated:

"75. .... Adoption is an institution which is designed to meet the deep-seated human needs for family stability, security and the ties and love of a family in circumstances where – for whatever reason – the natural parents have been unable to provide such an environment for the child. Adoption is accordingly rather more than simply the question of a name or a right to inherit or even the entitlement to look to others for guidance and direction in the making of important life decisions such as might in the past have been provided by wardship or now (since 26 April 2023) by assisted decision-making. Adoption is rather a question of status which has lifetime consequences going well beyond the issue of care during the minority of the child. The making of an adoption order reflects the fact that a new family relationship has been created and this is one which is underpinned and supported by the State and its legal system. This point is underscored by the fact that this very institution is provided for and

acknowledged by two separate constitutional provisions, namely, Article 37.2 and Article 42A.

76. It is also worth observing that the ties created by an adoption do not cease when the adopted child attains his or her majority. This has been the position since the Adoption Act 1952. It reflects a clear and consistent view on the part of the Oireachtas that there is a lifelong value to the relationship created by adoption."

Section 54(2A)(3): the constitutional rights of the parents and the child

"82. Section 54(2A)(3)(as amended by the 2017 Act) supplements all of this by requiring the High Court to have regard to the constitutional and other rights of all persons concerned (including the child) and to any other matter which the Court considers "relevant to the application." In the Court of Appeal Power J. dissented [at 87] on precisely this issue because she was not convinced – just as Barrett J. had not been in the High Court – that "having regard to the enduring and positive nature of the relationship that has prevailed between them, a relationship that time and attention can strengthen, that it would truly be in this child's best interests to sever the constitutional link that currently exists and to change her legal identity."

Decision

31. Having regard to the principles to be applied, I have decided that this is a case in which the statutory proofs required pursuant to section 54(2A) of the Acts have been satisfied such that it is appropriate for me to make an Order under section 54(2) of the Acts authorising the Authority to make an adoption order in relation to B.I. in favour of U.D. and M.D. and dispensing with the consent of C.I and of the birth father (in relation to B.I.'s birth father, I am satisfied that the provisions of section 55(4)(a) of the Acts are applicable).

32. Section 54(2A)(a) of the Acts requires that there has been a failure of duty by the parents of the child towards that child for a continuous period of not less than 36 months immediately preceding the date of the making of the application and that

this failure has been to such an extent that the safety or welfare of the child is likely to be prejudicially affected. In this instance, B.I. has been in care since infanthood. She is a child with extensive and particular additional needs and these needs have at all material times (and for a period far longer than 36 months) been addressed and cared for by the prospective adopters both within the home and in the context of external professional interventions which are required. There is some degree of factual dispute between the CFA and C.I. in relation to C.I.'s behaviours and attitudes towards access and her abilities in the context of B.I.'s needs and there are differences of interpretation of certain events and circumstances but when B.I.'s circumstances of childhood are considered by way of overview, there is little factual dispute arising. While I have heard the evidence of C.I. as to her wish to care for B.I. and her belief that she would be in a position to do so and I believe that she was entirely in earnest in this regard, the preponderance of the evidence seems to contradict this. In this context, I must have regard to the absence of involvement to date, the reports in relation to capacity (and in particular the report of Dr. Liam Shine (dated 21.08.12)) and I formed the view that the magnitude of the task was probably not appreciated by C.I.. I do not attribute blame to C.I.. Fault is not a relevant feature in the application of this statutory requirement. Rather, having regard to the legal meaning of a "failure of duty" in this context, it is clear from the evidence before me (and in particular the Affidavit of Sinead McDonnell and the exhibits thereto which were largely uncontradicted in this context) that C.I. has displayed an incapacity in relation to fulfilment of parental role over a long number of years and that, even during the period when access was taking place, was more a visitor than a parent. It is clear that all welfare and day to day care and decision-making relating to B.I. have been made by the Ds over a very considerable period.

33. Section 54(2A)(b) of the Acts requires that there is no reasonable prospect that C.I. will be able to care for B.I. in a manner that will not prejudicially affect her safety or welfare. This is not a parenting capacity test but rather requires the caring ability to be viewed in the context of the child's life to date so that the safety and welfare of the child will not be prejudiced. The evidence before me does raise issues relating to the parenting capacity of the birth mother but I do not believe that it is necessary for me to dwell on this. B.I. has been in the day to day care of the Ds over a very considerable period and she is comfortable and secure in their care. It is my view

that given the circumstances of B.I.'s life to date, any alteration in her care arrangements would likely cause significant prejudice, would rupture her life and would be fraught with danger. The *"lived reality"* for B.I., as described by Whelan J. in the Court of Appeal in the **B Case**, is her life with the Ds.

34. Section 54(2A)(c) of the Acts is perhaps the most fraught provision. It requires an abandonment on the part of the parents of all parental rights. This can be a distressing provision due to the harshness of the word "abandon". However, it is important to focus on the precise wording of the provision; the abandonment is of all parental rights, not an abandonment of the child. I have formed the view that this legislative proof is satisfied in so far as the care and custody of B.I. has been entirely left to the Ds. Crucial decision making relating to B.I. has been left to the Ds. Crucial decisions relating to B.I's health and education and the carrying into effect of those decisions have been left to the Ds. This unfortunate term, as used in the legislation being considered, as explained by the Supreme Court in **Northern Area Health Board v. An Bord Uchtala** [2002] 4 IR 252 (McGuinness J.), is satisfied here.

35. Was it necessary in this instance that the State, as guardian of the common good, supply the place of the parents due to the failure which has occurred? Section 54(2A)(d) of the Acts so requires. On the facts of this case and the duration of B.I. being in care together with the circumstances leading to the child being admitted to care, there seems little doubt that this requirement is satisfied.

36. There is no doubt that B.I. has been in the custody of the prospective adopters as foster parents and has had her home with them for at least an 18-month period. The requirements of section 54(2A)(e) are thus satisfied.

37. In relation to the issue of proportionality (as required in Section 54(2A)(f) of the Acts), I am strongly of the view that adoption is proportionate in the present case. B.I. is a child requiring extensive care and commitment. These requirements will not cease when she attains her majority but will be lifelong in nature. Assistance with decision making will be but one of her ongoing requirements. She will very clearly need family stability, security and support. These needs can be optimally provided by adoption.

38. I am of the view that the legal concept of adoption is not a concept with can be explained to or understood by B.I.. However, I do not believe that her views are to be ignored for this reason. She is a person with additional, indeed complex, needs but she does have views about her life and her circumstances and she does have the ability to communicate her sense of comfort in her present home, her love for and the love she receives from her *de facto* family unit and her desire that her living circumstances not alter. In circumstances in which I have determined that adoption is proportionate due to the stability, security and support which it affords, I have decided that the views of B.I. in relation to these very matters as recited above are matters to which I should have due regard. In accordance with section 54(3)(b) of the Acts, I believe that B.I. has formed her own views, consistent with her capacity, in such manner and of such nature that due weight should be given to them.

39. Clearly, there are conflicting Constitutional rights operating in the current circumstances. I have had due regard to the Constitutional positions of B.I. and C.I.. However, I have determined that the best interests of B.I., as defined in section 19 of the Acts, and as the Constitutionally mandated paramount consideration, dictate that the order being sought should be made. In this regard, I have considered each of the factors listed in section 19(2) of the Acts and I have formed the view that each of these factors favours the making of an adoption order as being in the best interests of B.I..

40. As I indicated to C.I. during the course of the hearing and subsequent to her evidence, her role as B.I.'s birth mother can never be altered. Her love for her child and her hopes for and emotional bonds with her can never be severed. It is to be hoped that some level of resumption of contact between B.I. and C.I. can be achieved during B.I.'s adulthood but, of course, this will be a matter for B.I. to determine. However, time does not stand still and altered circumstances and roles which have pertained over a very considerable period of time cannot be ignored if to do so would entirely destabilize now long established relationships which operate to the substantial benefit of B.I..