THE HIGH COURT

FAMILY LAW

[2024] IEHC 678

Record No. 2024 140 HM

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 54 OF THE ADOPTION ACT 2010 (AS AMENDED) AND IN THE MATTER OF L. T A MINOR BORN ON [DATE REDACTED]

Between

CHILD AND FAMILY AGENCY and H. L. M.

Applicants

-AND-

THE ADOPTION AUTHORITY OF IRELAND

First Named Respondent

-AND-

T. G. T.

Second Named Respondent

-AND-

N. T.

Third Named Respondent

Ex Tempore JUDGMENT of Ms. Justice Nuala Jackson delivered on the 12th Day of November 2024.

INTRODUCTION

1. I would like to thank N.T. for attending court today and I wish to say at the outset that I appreciate how difficult this application is both for N.T. and for the birth mother T.

G. T.. It is important at the outset to reflect upon the fact that Mr. and Mrs T, regardless of the outcome of this application, will always be L's birth parents. In the context of the severe curtailments which circumstances have imposed upon their relationship together over many years, it is clear that L and her birth parents have preserved a relationship with each other over this period and while I appreciate that there are concerns expressed by the birth parents in relation to the continuation of this relationship post adoption, it does appear to me that one must likewise have concerns about the continuation of their relationships (albeit that these are most curtailed relationships) if adoption is denied L, having regard to her expressed wishes. To attempt to reach a conclusion in this regard, is to wander into the unknown. L will be an adult in a number of weeks and her relationships will be for her to determine whether or not she is adopted by the second named applicant herein.

2. I wish to express my gratitude to all of the legal practitioners for their assistance in this case. Their submissions were most useful and the pleadings/affidavits are comprehensive and thorough. Both of the birth parents are opposing the application. On the evidence before me and on the submissions received, I have formed the view that the attitude of the birth mother is not so much one of opposition but rather that she cannot consent. She has very understandably deposed to the fact that having voluntarily agreed to L going into care, she cannot consent to a further step which would terminate her parental relationship with L. In the case of the birth father, I formed the view that he opposed L's adoption for reasons set out in his Affidavit of the 5th November 2024.

3. In the context of this application, I have considered;
    a. The Affidavit of Lizzie Lyng of the 2nd October 2024 together with the exhibits thereto;
    b. The Affidavit of Mark Kirwan of the 26th September 2024 together with the exhibits thereto
    c. The Affidavit of T. G. T. of the 31st October 2024
    d. The Affidavit of N.T. of the 5th November 2024.

4. I also have received considerable information in relation to L's wishes. In this regard, Mr. Benson BL opened to me portions of Ms Sinead Murray's (social care leader) Report on Visit to L. T. regard her wish to be Adopted dated the 20th June 2023; notes of L's meeting with Ms. Murray on the 9th February 2024; the portion concerning "Child's understanding and feelings about the proposed adoption" from the Domestic Adoption Assessment Report for a Fostering to Adoption Application (at pp. 25ff) of the 1st March 2023; as well as L's handwritten letter of the 28th January 2024. I must comment upon the maturity, sensitivity and comprehension of the complexities concerned which are evident in this letter.

5. There is little dispute on the facts as between the parties. Insofar as there is a dispute, I will consider this below.

FACTS WHICH ARE AGREED

6. L is almost 18 having been born on the 6 January 2007. She has been in care since the time of her birth and, in this context, has lived with her present foster family since March 2010 (having previously been in short term fosterage). She was three years old at this time and has been living with and cared for by the second named applicant since that time.

7. There is no dispute that the birth parents have both experienced considerable difficulties in their lives. Mr. Ong BL most appropriately referred me to a portion of Ms Merity's (social worker) report of the 8th May 2024 which states:

> *"Mother and daughter have had very different life experiences and [L] has experienced stability and had all her needs met, while sadly [T] has not. Each are products of their own life journeys and that make Mother Daughter relationships even more tricky to navigate."*

8. It is agreed and evident that the participation of the birth parents in L's life has been limited to supervised access which access has been relatively frequent and constant although diminishing in accordance with L's personal commitments as she progressed to secondary school.

9. The birth parents challenges are amply set out in the Affidavits in these proceedings. It is agreed that they both consented to the voluntary placement of L. The relationship between the birth parents continued thereafter. There was a lack of engagement in assessments and therapeutic recommendations. Mr. T has deposed to his inability to engage with these recommended programmes due to lack of financial resources. This may well be the case.

10. Neither party has ever revoked their consent to the care arrangements. This is not disputed although Mr. T does depose to a lack of awareness of his entitlement so to do. In this regard, I refer to paragraph 9 of the birth father's Affidavit sworn herein.

> *'9. There are some averments in the Affidavit of Lizzy Lyng sworn on 26th September 2024 that I particularly wish to respond to as follows:*
>
> - *Contrary to the averments at Paragraph 13 that I did not maintain an ongoing relationship with my now adult children, I say that I maintained an ongoing relationship with my now adult children.*
> - *Regarding Paragraph 31, my lack of attendance of ACT appointments was due to financial issues, I was not working during this period.*
> - *In reply to Paragraph 28, I say that the idea of reunification was never expressed to me.*
> - *In reply to Paragraph 40, I was not aware I could seek to revoke my consent to [L] remaining in State care pursuant to a voluntary care arrangement.*
> - *Contrary to the averment at Paragraph 50 that I have not written to my daughter, I wrote to her recently, I have received no reply to date.'*

11. It would, as Mr Benson pointed out, appear to be accepted by all that L will remain in the care of the second named applicant for the duration of her minority. The Affidavits of the birth parents are thus premised and Mr. Benson's submission in this regard was uncontradicted.

12. The issue before me is whether or not the second named applicant ought to be permitted to adopt L, absent the consent of the birth parents. The formal proofs are deposed to

by Mr. Kirwan of the Adoption Authority of Ireland in his Affidavit sworn herein. The Declaration of Eligibility and Suitability made by AII on the 11th June 2024 has been exhibited. The section 53 Declaration, dated the 9th July 2024, has been exhibited.

13. The very comprehensive decision of Hogan J. in the Supreme Court decision of **Re B [2023] IESC 12** has been opened to me by Ms Fennell BL. This decision provides a very clear analysis of the applicable legal principles in applications such as the present. The facts in that case and this are somewhat different both as regards the circumstances of the birth mother in that instance (in particular as regards the degree of assistance of the CFA which I believe was somewhat greater in the present case than was the position in that case) and also as regards the circumstances of the child (in the B case the child had very particular needs which would continue into the future. While this is not such an extreme case, I am mindful of L's expressed fears which I refer to again below).

Statutory Proofs pursuant to section 54(2A) of the Adoption Act, 2010 (as amended)

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

14. Section 54(2A)(a) – failure of duty

> ***(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,***

15. At paragraph 6 of her Affidavit, the birth mother avers:

> *'6. I dispute all allegations and assertions made that I have failed in my duty towards [L] since her birth in [REDACTED]. While I was not able to take part in the day to day upbringing and care of [L] as she was in a long term with the*

Second Named Applicant and [R. M.]. I never abdicated all responsibility for [L]'s care to the Second Named Applicant and [R. M.]. I always maintained regular contact with [L] and did my best for her. I say that any failures on my part in respect of [L] did not constitute an abandonment on my part of parental rights in respect of [L]. I was always hopeful that reunification could occur at some appropriate time in the future.'

16. At paragraph 10 of the Affidavit of the birth father it is averred:

'10. I do not accept that I have failed in my duty to [L] since her birth. I maintained a relationship with my daughter. Any failures on my part in respect of my daughter did not constitute an abandonment of all parental rights.'

17. In this regard, I refer to paragraph 63 of the judgment of Hogan J.. The position in the present case is similar to this.

'63. ... For a variety of reasons Ms. C has been unable to discharge her parental rights for virtually the entirety of Ms. B.'s life. While not in any sense ascribing personal blame to Ms. C for this state of affairs, the plain fact of the matter is that all decisions regarding the education, welfare, up-bringing and day-today care of Ms. B were in fact taken by Ms. A., the foster mother. While, again, to her credit Ms. C sought to maintain contact with her child and sought to visit her regularly, she was at most a form of aunt to her daughter: she never exercised any decision-making role regarding the education and welfare of her daughter.'

18. Section 54(2A)(b) – Whether the natural parents are unable to care for the child to the extent that her safety or welfare would 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,'

19. In this regard, I refer to paragraph 67 of the judgment of Hogan J. and to the lived reality of L since the time of her birth.

> *'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.'*

20. Section 54(2A)(c) – abandonment

> ***'(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,'***

21. At paragraph 4 of the birth mother's Affidavit it is averred:

'4. [L] she entered into a long term placement with the Second Named Applicant and [R.M.] in about March 2010. I appreciate what they have done in helping [L] over the years. My opposition to the adoption process is no reflection on them with whom I have maintained a good relationship over the years. I have maintained contact with my daughter [L] over the years as she was growing up primarily through access visits. These access visits were regular and were largely successful in maintaining a relationship between us. [L] also attended my wedding to the Third Named Respondent in 2018. I would like these visits and contacts between us to continue into the future as mother and daughter.'

22. At paragraphs 5 and 10 of the birth father's Affidavit he avers:

'5. I have maintained regular contact with [L] throughout her life. I say that I was granted access to [L] every second week for two hours from 15:30pm to 18:00pm with additional hours during summertime. I say that when [L] began attending secondary school and additional activities and extra-curriculars, my access was reduced to once per month for 2 hours, with additional hours during special occasions and school holidays.'

and

'10. I do not accept that I have failed in my duty to [L] since her birth. I maintained a relationship with my daughter. Any failures on my part in respect of my daughter did not constitute an abandonment of all parental rights.'

23. Both of the birth parents in their Affidavits expressly reject the suggestion that they abandoned their child. They do accept that their contact with her and involvement in her life has been most constrained. Their attitudes in this regard are understandable. They have continued to be part of [L]'s life. They have attended access visits which appear to have occurred with relatively regularity in a supervised context until the fallout from this proposed application caused them to cease. However, it is long established that, in this context, 'abandonment' has a very particular meaning. In this regard, I refer again to the judgment of Hogan J. at paragraphs 68 to 70 in the B case.

> *'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 abandonment. The test of abandonment must be an objective one."

70. One can say as much in the present case as well. Ms. C agreed to the continuing care of Ms. B by Ms. A. She has left to Ms. A all the critical decisions regarding Ms. B.'s education and well-being. The fact that Ms. C visited her fairly regularly during the course of her childhood cannot take from the reality of abandonment of parental rights vis-à-vis Ms. B.'

This *dictum* applies directly to the case currently under consideration.

24. Section 54(2A)(d) – not disputed

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

25. Section 54(2A)(e) – not disputed

(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 than18 months immediately preceding that time, has been in the custody of and has had a home with the applicants,

26. Section 54(2A)(f) – proportionality

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

27. The interpretation of this proof is considered at paragraphs 75 – 80 of the judgment of Hogan J. in the B case.

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.

77. Much was also made in this context of the fact that this was a late application for adoption. It is true that the fact that the courts were asked to apply a statutory test that is essentially forward-looking when there was at the time of the initial High Court application only a matter of weeks before the child became an adult in law makes the entire exercise somewhat artificial. I nevertheless find myself in agreement with the contention made by Ms. Browne SC on behalf of the CFA that this was not so much a consequence of a dilatory approach on the part of the Agency as rather the almost inevitable by-product of statutory tests such as "abandonment" and "no reasonable prospect of being able to care for the child". These are tests which are, frankly, difficult to establish in early childhood at a time when, ideally and all other things being equal, adoption orders should preferably be made in order to advance the bests interests of the child in question.

78. One might further observe that the current adoption legislation arguably still carries too much of the imprint of the 1988 Act structure. As I have already noted, this legislation itself set a very high bar for the adoption of children of married parents in order to avoid potential constitutional difficulties arising from the (old) Article 42.5. (Whether those historic concerns were, in fact, actually well-founded is really immaterial for present purposes). One of the objects of Article 42A was to facilitate the adoption of children in foster-care and it may be that the current statutory provisions do not fully reflect the nature of the change brought about by this constitutional amendment.

79. In these circumstances Ms. B is entitled to enjoy the emotional and legal security of family membership which adoption entails. Any other conclusion would, on the facts of this case, be inconsistent with the obligation imposed upon this Court by Article 42A.4. As O'Donnell J. observed in Re JB and KB (minors) [2018] IESC 30, [2019] 1 IR 270, the 31 application of Article 42A requires it to be performed in a manner which is child-centred in which the paramount consideration is, in fact, the child's best interests. Posed in this manner this question really answers itself.

80. While Ms. B is on the cusp of adulthood, her condition and arrested mental development means that many of the delights of young adulthood – travel, adventure, romance, further education and employment – are likely to be denied to her. Her future is regrettably an uncertain one. If ever there was a young adult

who needed the stability and security offered by a family environment, it is in fact Ms. B. It is only through adoption that these ties of emotional stability and family support can be given a full legal reality.

28. It is in this context that the difference in capacities of the children as between B and L must be considered. I refer to a portion of paragraph 3 of the birth mother's Affidavit sworn herein.

> *'3. .... I do not understand why the adoption process is necessary in [L]'s situation as she approaches her majority. [L] does not have any special needs and is capable of managing her own affairs as she approaches adulthood, and will not require ongoing care to be provide[d] for her into the future. It has never been explained to me as to how it is in [L]'s best interests that she be adopted which will severe [sic] all legal ties between myself and [L], and also between [L] and her half siblings [L. K.] and [L. K]. I can understand what [L] means about wanting to feel secure. I believe this can be achieved without going through the process of adoption.'*

However, I believe that Hogan J's *dicta* recited above in relation to the proportionality of adoption apply equally in this instance. Applying these principles, I find that the authorising of the making of an adoption order is proportionate on the facts of the instant case.

29. Section 54(3) – balancing of rights – including the rights of the child.

Pursuant to Article 42A of Bunreacht na hÉireann, a child has a constitutional right to have a best interests test applied in applications concerning adoption. Likewise, Article 42A recognises the child's right to have its wishes taken into account in such applications, always having regard to age and maturity (these latter two not being any way in doubt in the present case). The birth parents also have family rights vested in themselves and L as a family together with their own personal rights. Hogan J. discusses the balancing of these rights at paragraphs 82 – 84 of his judgment:

> *'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."

83. While I recognise the force of these observations, I would nonetheless conclude that they are overborne by the fact that it is very much in the interest of Ms. B that she should enjoy the emotional security and other supports which membership of the family of Ms. A – the family which, after all, who has cared for her all her life - would actually provide. While I appreciate that Ms. B may not have a precise conception of what this step actually entails in law, it seems clear that Barrett J. found, having discussed the matter with her, that she is in favour of this step. This is further supported by the averments of the principal social worker familiar with this case.

84. Applying, therefore, the criteria specified in s. 19 of the 2010 Act (as amended), it seems to me that judged by all these statutory metrics adoptions would in fact be in Ms. B.'s best interests for all the reasons I have already set out.'

Balancing these rights, I conclude that I must favour the making of an order authorising the first named respondent to make the adoption order which has been applied for. In this regard, I have considered the factors provided for in section 19 of the 2010 Act. I have formed a clear view that [L]'s wishes and best interests favour the making of the Order sought herein and these factors overbear the relationship which has evolved from the very curtailed participation of the birth parents in [L]'s life.

30. In term of L's best interests, apart from her very clearly expressed views, I am influenced in particular by the report of Ms Murray of the 9th February 2024 where it is stated *"[L] also worries that the adoption will not occur. [L] spoke about these worries never leaving her head. This one is her biggest fear."*

31. I also have had regard to the averment in the Affidavit of the birth mother at paragraph 4 thereof in which she recognises the role which the foster parents have played in [L]'s life:

> *'4. [L] she entered into a long term placement with the Second Named Applicant and [R. M.] in about March 2010. I appreciate what they have done in helping [L] over the years. My opposition to the adoption process is in reflection on them with whom I have maintained a good relationship over the years.'*

32. Likewise in Affidavit of birth father at paragraph 7 thereof, he avers:

> *'I say that I have no issue with the [L M] family.'*

33. I have also had regard to the assurances of second named applicant, proffered through counsel, that she will support and encourage L to maintain a relationship with her birth parents in adulthood.

34. I am mindful of the personal history of the birth father as deposed to by him at Paragraph 11 of his Affidavit sworn herein.

> '*11. I feel distrustful of Tusla due to my own experience of having been adopted and the unexpected nature of the within proceedings'*

Such concerns and feelings are understandable based upon his personal experiences. Fortunately, it appears that L's experience has been very different to that of her birth father. Additionally, the fact remains, that the Second and Third Named Respondents are and will remain L's birth parents.

35. Having regard to all of the circumstances herein, I find that the statutory proofs have been complied with and I will make an Order pursuant to section 54(2) of the 2010 Act as sought by the Applicants herein.