

THE HIGH COURT

[2021] IEHC 829

[2021 No. 225 MCA]

**IN THE MATTER OF AN APPLICATION BY THE ADOPTION AUTHORITY OF
IRELAND (THE APPLICANT HEREIN) UNDER SECTION 30 OF THE ADOPTION
ACTS 2010 TO 2017 AND IN THE MATTER OF A PROPOSED ADOPTION OF AB
(A MINOR, BORN ON ——)**

JUDGMENT of Mr Justice Max Barrett delivered on 23rd November 2021.

SUMMARY

Lex non cogit ad impossibilia ('The law requires nothing impossible' and thus does not compel a person to do that which that person cannot possibly perform). Hence the counselling of a mother or guardian (as appropriate) contemplated by s.30(4) of the Adoption Act 2010 cannot possibly be done (and is not required to be done) where, the mother or guardian is dead at the time when that counselling would otherwise fall to be done. In such circumstances, and bringing the same maxim to bear, s.30(5) falls to be construed as indicated hereafter.

1. This is a case which has a sad beginning, arising from a tragic instance in which, some years ago, a non-Irish mother died soon after childbirth and the child she delivered also died. As a result, a non-national child (the 'Child') with whom the mother had come to Ireland ended up being placed in foster-care here. *Very* extensive efforts, utilising various different persons, including diplomatic and less formal actors, have unfortunately failed to identify who the Child's natural father is. There is, however, a happy ending to the story. The child's foster-mother here in Ireland wishes to adopt the Child, now a teenager, and the Child in turn wishes to be adopted by the foster-mother. So this is one of those life-affirming cases which sometimes crop up on the Family List and suggest that goodness and happiness are still abundant in the world.

2. In the circumstances presenting, the Adoption Authority has come to court seeking *either* of order (i) or (ii) hereafter, leaving the court to decide which is the more appropriate form of order: (i) an order pursuant to s.30(3) of the Adoption Acts 2010-17 approving the making of an order for the adoption of the Child without consulting the natural father in circumstances where the Authority is satisfied that having regard to the nature of the relationship between the natural father and the natural mother of the child, it would be inappropriate for the Authority to consult the natural father; and/or (ii) an order pursuant to s.30(5) of the said Acts approving the making of an order for the adoption of the Child without consulting the natural father in

circumstances where the natural mother is unable to confirm the identity of the natural father and the applicant has no other practical means of ascertaining the natural father's identity.

3. Normally, this type of application would be approved on the day in court without need for a written judgment. Here, however, although the court indicated on the day of the application that it would make an adoption order, it also indicated that it would give a written judgment because of the issue arising as to which of the two provisions would be the more appropriate provision to rely upon in terms of making the order sought.

4. Section 30(3) of the Act of 2010 provides as follows:

“(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.”

5. In this regard, an affidavit sworn for the Adoption Authority contains, amongst other matters, the following averments:

“29. I say that it is appropriate for an order to be made pursuant to s.30(3) in the circumstances of the within case....The Mother came to Ireland alone and was compelled to place the Child in the voluntary care of the CFA as she had no-one to look after [the Child]...while she was in hospital. I say that while there is very limited information available about the relationship between the Mother and the Father, the evidence does not indicate that the relationship was in existence at the time the Mother travelled to Ireland or that the Father had any involvement in the Child's life prior to then.

30. The Child has resided in care since the day [the Child]...came to Ireland....[The Child] has been placed with the Applicant [since a very young

age]....*The identity of the Father is not known and despite extensive efforts, the Father has not come forward in the last [stated number of]...years.*

31. *I further say that the evidence presented to the Authority indicates that the nature of the relationship between the Father and Child is non-existent and that the Child has no knowledge of [the Child's]...birth father. I say, in particular, that the Father has never applied for guardianship, access to or custody of the Child at any point in the Child's life nor has the Father ever met the Child since [the Child]...has been in this jurisdiction.*
32. *I say therefore that the Authority is satisfied that having regard to the nature of the relationship between the natural father and natural mother of the Child, and the absence of any detailed information pertaining to same, as well as crucially, the nature of the relationship between the natural father and the Child, it would be inappropriate for the Authority to consult the Father in respect of the adoption of the Child."*

6. When one looks to the best interests of the Child (considered later below) it seems to the court that one can properly state in this case not just that it is impossible for the Authority to consult the natural father but also that in all the circumstances it would now be inappropriate to do so as this would not be consistent with the best interests of the Child. Thus it seems to the court that an order can properly be made under s.30(3).

7. Section 30(5) of the Act of 2010 must be read in conjunction with s.30(4). Between them those two provisions provide as follows:

"(4) If the identity of the 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.”*

8. In this regard, an affidavit sworn for the Adoption Authority contains, amongst other matters, the following averments:

- “34. *Despite the efforts made in the within application, I say that the Authority has not been able to ascertain the identity of the Father. The materials supplied to the Authority by the CFA indicate that the Father is unknown and cannot be identified. It has been confirmed that the Mother’s husband is not the Child’s Father and the two men who have been proposed by the maternal family as a putative birth father cannot be accurately identified, located, or traced.*
35. *Where the CFA has made all reasonable efforts to identify the Father, I say that the Authority has no other practical means of ascertaining [the Child’s] identity.*
36. *I say, however, that in light of the Mother’s death in 2008, the Authority has not been provided with a statutory declaration of the Mother that she is unable to identify the Father as is required by s.30(5), nor has it been provided with evidence of counselling pursuant to s.30(4) of the Acts.*
37. *In this situation, however, I say that it would be contrary to the rights and interests of the other interested parties, and, in particular to the best interests of the child, for the application to be obstructed by the inability of the Authority to obtain a statutory declaration from the Mother in relation to the Father’s identity in circumstances where she has died....I say that where a mother has died, the requirement to provide a statutory declaration does not arise, given that s.30(4) and (5) envisage a type of positive action that only may be carried out by a living person. In practical terms, a statutory declaration cannot be obtained from a deceased person and it is difficult to*

see how the counselling as mandated by s.30(4) could apply where a mother is deceased.”

9. *Lex non cogit ad impossibilia*, i.e. ‘The law requires nothing impossible’ and does not compel a person to do that which they cannot possibly perform. Thus the counselling of a mother or guardian (as appropriate) contemplated by s.30(4) of the Act of 2010 cannot possibly be done (and is not required to be done) where the mother or guardian (as appropriate) is dead at the time when that counselling would otherwise fall to be done. In such circumstances, and bringing the same maxim to bear, s.30(5) falls to be construed as though the words “*After counselling the mother or guardian of the child under subsection (4)*” and item (a) that follows had been excised from that provision. Otherwise s.30(5), in such circumstances, would rest on the performance of an impossibility. Obviously the High Court in such cases would want to be presented with the type of evidence that has been presented here, showing that every reasonable effort has been made to ascertain the identity of the father (and here, as mentioned, *very extensive* efforts have been made) before it could properly conclude that the Authority is in a situation where “*no other practical means of ascertaining the identity of [the]...father*” present. When one looks to the best interests of the Child (considered below) it seems to the court that in all the circumstances presenting here an order may also issue under s.30(5). The court sees nothing in the foregoing that is not reconcilable with the conclusions reached in *The Adoption Authority of Ireland v. The Child and Family Agency and Ors* [2018] IEHC 632.

10. When it comes to the best interests of the Child, the court respectfully adopts and agrees with the reasoning proffered by the Adoption Authority in the pleadings in this regard, *i.e.*:

“38. [I]t is in the best interests of the Child that the adoption application be permitted to proceed and that [the Child’s]...best interests must operate as the overriding consideration for [the court]....The application engages the Child’s rights and interests in respect of [the Child’s]...family life, personal welfare, sense of identity and self, and related physical, psychological and emotional needs. Moreover, the information supplied indicates that the Child has expressed a strong wish to proceed with the adoption. This is a matter to which regard must be had given [the Child’s]...age and maturity...which [the Child]...is entitled to have taken into account in determining the application.”

11. Given (i) the rights and interests of the parties in the determination of the application, (ii) the age, views and needs of the child, (iii) the requirement that the Child's best interests be regarded as the paramount consideration; (iv) the limited information concerning the relationship between the Father and Mother; and (v) the absence of any relationship between father and child throughout the Child's life to this time (and, so far as same may be predicted, likely for all time), and taking something of a 'belt and braces' approach to the form of order that will issue, the court is satisfied to grant (a) an order pursuant to s.30(3) approving the making of an order for the adoption of the Child without consulting the natural father; and also (b) an order pursuant to s.30(5) approving the making of an order for the adoption of the Child without consulting the natural father.