Neutral Citation No: [2022] NIFam 21	*Ref:*	**McF11845**
	ICOS No:	**11/041310**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**20/05/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

Between:

A BIOLOGICAL MOTHER

Applicant

-v-

THE ADOPTIVE PARENTS

Respondents

-and-

A HEALTH AND SOCIAL CARE TRUST

Notice Party

(IN THE MATTER OF A PAIR OF SIBLINGS)

Ms S Trainor BL (instructed by Edwards & Co solicitors) for the biological mother
The adoptive parents represented themselves
Ms C McCloskey BL (instructed by the Directorate of Legal Services) for the Trust

McFARLAND J

Introduction

[1] This is an application by a biological mother ("the applicant") for contact with a pair of siblings born to her and now adopted by the adoptive parents ("the respondents"). It came before the High Court as an appeal against a decision of Deputy County Court Judge Loughran ("Judge Loughran") sitting in Craigavon Family Care Centre on 23 May 2019 whereby Judge Loughran refused to grant the applicant leave to commence proceedings.

[2] This judgment has been anonymised to protect the identity of the children. I

do not propose to reveal their gender or ages. Nothing can be published that will identify them.

Background

[2] The children were removed from the applicant's care very shortly after they both were born and care orders were made in respect of the children on 5 March 2012. The children were placed with the respondents in late 2012. The children were freed for adoption on 3 September 2013 and the children were formally adopted in 2014.

[3] At the time of freeing for adoption contact was ordered at three times a year (twice direct and once indirect by letters/cards). After the adoption order, contact was to continue at this regularity and the applicant signed a 'post-adoption agreement' in October 2014.

[4] Only one direct contact took place after the adoption order. This was at Trust premises in November 2014. The applicant has not had direct contact since that date. After this contact the respondents raised with the Trust the significant behavioural difficulties being displayed by both children after contact and expressed their concern about the adverse impact that contact was having on the children.

[5] A change in Trust personnel resulted in this case falling into abeyance as neither the applicant nor the respondents had contacted the Trust. The Trust did contact the applicant and respondents in 2015 about the arrangements and the respondents again expressed their opinion that direct contact was not in the interests of either child. The respondents had offered to meet the applicant but the applicant declined at this stage stating that she wished to take legal advice. Nothing came of this.

[6] In early 2017 the Trust was contacted by an advocate on behalf of the applicant. The advocate had been involved during the care and freeing proceedings. The advocate was advised of the offer by the respondents to meet the applicant. In May 2017 the applicant's solicitors wrote to the Trust and the matter was referred on to the respondents. No further action was taken by the Trust as it had no direct responsibility and it assumed the matter was being resolved between the parties. Indirect contact was sent by the applicant to the Trust in 2019.

[7] During this period the Trust lost contact with the respondents as they had moved home without advising the Trust of their new address. Since the adoption order in 2014 there had been only been one direct contact (in late 2014) and one indirect contact (in 2019).

The appeal

[8] Keegan J effectively allowed the appeal by granting leave on 24 June 2021, but

the matter was not referred back to the Family Care Centre for determination of the application for contact and was retained in the High Court.

[9] Discussions between the parties were encouraged by the court and facilitated by the Trust. A broad level of agreement has been reached and it has been committed to writing. There are several matters which cannot be agreed and the court has been asked to adjudicate on these issues. I will deal with the terms of the agreement and the outstanding issues in more detail below.

The law as it relates to the application

[10] The status of the parties had altered radically on the making of the freeing order and then the adoption order. The respondents are now the legal parents of the children and exercise full and exclusive parental responsibility for the children. The applicant as the biological mother has no special status, although the biological relationship is a very important factor to be taken into account when considering the best interests of the children. However, it is just one of the factors to be taken into account.

[10] The purpose of contact between a child and its biological parent also alters radically on adoption. The purpose is not to retain or develop any attachment, but rather to enable the child to understand more fully its life-story, and in the words of Lord Carswell in *Down & Lisburn HSCT v H* [2006] UKHL 36 at [44] to contribute to their reassurance and security and their feeling of identity as adopted children. Lord Carswell did however recognise that each case will very much depend on the individual circumstances.

[11] All decisions relating to the upbringing of a child, which will include decisions about contact with the applicant, must be determined on the basis of the best interests of the child. This will include taking into account the provisions of the 'welfare checklist' set out in Article 3(3) of the Children (Northern Ireland) Order 1995 ("the Children Order"):

a) The ascertainable wishes and feelings of the child;

b) Their physical, emotional and educational needs;

c) The likely effect on the child of any change in circumstances;

d) The child's age, sex, background and any other relevant characteristics;

e) Any harm which the child have suffered or are at risk of suffering;

f) How capable of meeting the child's needs is each of the parents, and any other person considered to be relevant;

g) The range of powers and orders available to the court.

[12] O'Hara J in *Re Kate & William* [2017] NIFam 13 at [16] stated that when adopters and biological parents reach agreement concerning future contact that agreement should be maintained. It should not be altered by a reduction in contact "in the absence of any developments which are genuinely fresh or significant enough to warrant such alterations".

[13] McFarlane P in *Re B* [2019] EWCA 29 carried out an extensive review of the development of the law relating to this issue. It is an important judgment as it considers the case-law in the context of the legislative framework prevailing at the time. In Northern Ireland we still operate under the provisions of the Adoption (NI) Order 1987. That position is therefore equivalent to the English position in 2005 prior to the commencement of the Adoption and Children Act 2002. Wall LJ's judgment in *Re R* [2005] EWCA 1128 is therefore of particular significance.

[14] At [49] Wall LJ stated that contact with biological parents was becoming more common:

> "but nonetheless the jurisprudence I think is clear. The imposition on prospective adopters of orders for contact with which they are not in agreement is extremely, and remains extremely, unusual."

[15] It is also important to note that this approach is still regarded as good law despite the legislative changes with both enactment of the 2002 Act and subsequent changes to that Act with the insertion of sections 51A and 51B by the Children and Families Act 2014. These new sections set out detailed provisions concerning post-adoption contact with biological parents. (These provisions are now replicated in Northern Ireland in the recent Adoption and Children (NI) Act 2022 but are not yet in force.)

Consideration

[16] I conducted a hearing of the case hearing submissions on behalf of the applicant and the Trust, and I also heard from both of the respondents.

[17] The agreement that had been reached provided for a mechanism of two-way provision of information twice a year. The first will be before 30 June and will involve the respondents providing to the Trust information on the likes, dislikes and hobbies of the children. A photograph of each child will be provided. The Trust will forward the information to the applicant. She will then reply by 31 July by way of a letter or card, a small token or gift and a photograph, again to the Trust for onward transmission to the respondents to be given to the children. The second provision of information will occur by 31 October with the response by 30 November.

[18] An outstanding issue relates to what is to happen to the photographs of the

children. The applicant wishes to receive the photographs and to be able to retain them. The respondents wish the Trust to retain them and to allow the applicant to have access from time to time to look at them.

[19] A second outstanding issue relates to how the respondents will involve the children in the provision of information. It is intended that the respondents will involve the children in the preparation of the information for the applicant, however the applicant wants this to be a mandatory requirement and the respondents only wish "to use their best efforts" to involve the children.

[20] The final issue relates to the form of this agreement. The respondents wish it to be agreement, but the applicant wishes it to be a formal court order, and enforceable as such.

[21] The first point for consideration is the relevance of the *Re R* decision. For a court to force on any adoptive parents conditions relating to contact about which they disagree, in the words of Wall LJ, would be "extremely unusual." One interesting matter from the judgment of McFarlane P's judgment in *Re C* is that there was a mild rebuke of the trial judge in actually going as far as carrying out a welfare evaluation as opposed to relying on the views of the adoptive parents (see [56]:

> "The judge went on to conduct a conspicuously fair, balanced and thorough welfare analysis. In so doing, it might have been argued that the judge had fallen into error by moving away from the need to afford priority in the welfare evaluation to the views of the adopters."

[22] O'Hara J in *Re Kate & William* emphasised the need to ensure that agreement and orders made at the freeing or adoption order stage should be maintained "in the absence of any developments which are genuinely fresh or significant enough to warrant such alterations." I consider that there have been fresh and significant developments in this case. The first one is that there has been a breakdown in contact, with the children not having direct contact with the applicant since 2014. It would be wrong to apportion blame for this development as in my view both parties and the Trust must bear some responsibility for the circumstances that developed during this period. The applicant, correctly, refers to the respondents moving address and not advising the Trust, however the applicant must also bear some responsibility as she declined to press for a meeting with the respondents after 2015 when the respondents offered to speak with the applicant.

[23] There then followed a meeting on 2 November 2019 when the applicant with her advocate met the respondents with a social worker present. The note prepared by the social worker does not make for pleasant reading. It includes inappropriate interventions by the advocate and one instance of the applicant (in a public setting of a supermarket coffee shop) becoming angry and shouting "that she had rights." On reading this note it is clear that the applicant did not fully appreciate the

circumstances of the respondents having exclusive parental responsibility for the children including the responsibility for protecting the children, promoting their well-being and meeting their needs at a physical, psychological and emotional level.

[24] The children are now 7½ years older from when they last met the applicant. This is a significant period in their young lives. In addition, the respondents have referred to certain health issues which I do not need to set out. I have no reason to doubt their assessment of the impact that these health issues have on their lives. They have been given the responsibility to care for the children and the court must trust and respect their judgment.

[25] In all the circumstances, I consider that the decision in *Re R* is particularly persuasive. The parents do not wish to have imposed on them conditions that they are unhappy with. That alone would be enough for me to rule that these three outstanding issues should be determined in their favour.

[26] I will, however, comment on the applicant's case for her benefit and the benefit of the respondents.

[27] The handing over of physical possession of the photographs is an important issue for the respondents. They fear that the images will be distributed more widely and beyond the personal use of the applicant. There is no evidence to suggest that the applicant intends to publicise the photographs, and no evidence that she has done so in relation to another adopted child. However, we are at a confidence building stage. The respondents have genuine concerns about the applicant, not least because of her conduct at the meeting in November 2019, and those concerns have to be respected. The applicant will have access to the photographs to view whenever she wishes to do so. It will involve a degree of inconvenience to visit Trust premises but I consider that it is reasonable in the context of preserving the confidence of the respondents in the overall indirect contact arrangements.

[28] The other two issues relate to enforcement powers. The court would very rarely contemplate ever enforcing contact orders of this type and it is inappropriate for the applicant to consider enforcement as a possibility at this stage. It is correct that previous agreed contact arrangements have not been maintained but this was not solely the responsibility of the respondents. Insofar as they did contribute to the breakdown I consider that their motives were both appropriate and centred on the well-being of their children. I believe that the respondents are now genuine in their attempts to re-establish contact at a level appropriate to the needs of their children through these indirect contact arrangements. As the legal parents of the children they are best placed to make decisions involving the children, and not the applicant or the court.

Conclusion

[29] In all the circumstances and for the reasons given, I rule that the matter should be determined on a 'no order' basis as per Article 3(5) of the Children Order as it is in the best interests of the children. The matter is resolved between the parties in the terms of the agreement and by the clarification provided by this ruling in respect of the photographs and the respondents using their best endeavours.

[30] I direct that a final agreement be prepared by the applicant's solicitors, and then after approval by the respondents and the Trust, it can be signed by the applicant and the respondents. It will not form part of the court order and will have the status of a private agreement between the applicant and the respondents.

[31] There will be no order as to costs, save for the usual taxation order for legally assisted parties.