Neutral Citation no. [2004] NIFam 3 | *Ref:* **GILC4074**

Judgment: approved by the Court for handing down | *Delivered:* **06.01.04**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

IN THE MATTER OF M (ADOPTION: JOINT RESIDENCE ORDER: SAME SEX COUPLE)

GILLEN J

[1] I have prepared this judgment in an anonymised form. Nothing must be published which might lead, either directly or indirectly, to the identification of the child or the parties involved in this case.

[2] There are two applications before this court. First an application by J seeking adoption of a child M born on 26 February 1991. Secondly an application by J and A for a joint Residence Order in respect of the child M.

BACKGROUND

[3] The mother of this child is B and she died in April 2001. The whereabouts of the father are presently unknown and I have been satisfied in the course of this hearing that all reasonable steps have been taken to identify his whereabouts. Accordingly I have dispensed with any further attempt to serve these proceedings upon him.

[4] The child's mother had a longstanding problem with alcohol abuse and a chaotic lifestyle. The child was made the subject of a Fit Person Order on 4 June 1991 and eventually placed with the applicant J on 30 October 1992 who at that time was married. The child was unsuccessfully returned to her mother's care between March 1993 and December 1993 when she was again returned to the care of J and her husband. She has remained with J since that date. In April 1995 J separated from her husband and is now divorced. Subsequent to that parting she commenced to live with her current partner A in a lesbian partnership. The child has resided with the couple since that time. In September 1996 A was approved as a short-term carer by a Health and Social Services Trust which I do not propose to identify ("the Trust"). On 16 December 1997 A was approved as a long-term carer for children by the

Trust. At a looked after child review on 30 November 2001, the view of the Trust was that adoption was in the best interests of the child. J was subsequently assessed favourably and accordingly has made an application to adopt the child. The Trust has no objections to the placement of the child with a same sex couple and together with the Guardian ad Litem appointed in the matter, recommend this adoption should take place.

THE LEGAL PRINCIPLES OF ADOPTION IN THIS CASE

[5] Where relevant, the following articles of the Adoption (Northern Ireland) Order 1987 ("the 1987 Order") apply:-

(1) Article 9 sets out the duty to promote the welfare of the child as follows:

> "In deciding any course of action in relation to the adoption of a child, a court or adoption agency shall regard the welfare of the child as the most important consideration and shall:
>
> (a) Have regard to all the circumstances, full consideration being given to –
>
> (1) the need to be satisfied that adoption or adoption by a particular person or persons will be in the best interests of the child; and
>
> (2) the need to safeguard and promote the welfare of the child throughout his childhood; and
>
> (3) the importance of providing the child with a stable and harmonious home.
>
> (b) So far as practicable, first ascertain the wishes and feelings of the child regard the decision and give due consideration to them, having regard to his age and understanding."

(2) Article 14 deals only with adoption by a married couple. Therefore an Adoption Order cannot be made in favour of both J and A as they are not married and hence the application is properly made only in the name of one of them, namely J pursuant to Article 15.

(3) Article 15(1) of the Order recites:

> "(1) An Adoption Order may be made on the application of one person where he has attained the age of 21 years and –
>
> (a) is not married …"
>
> (2) An Adoption Order shall not be made on the application of one person unless he is domiciled in a part of the United Kingdom …"

Accordingly the applicant J does satisfy the requirements of that Article in that she is over 21 years of age, she is not married and she is domiciled in Northern Ireland.

[6] In this case all the other prerequisites of the Order have been fulfilled. Article 17(6) was satisfied in that I had concluded that the father had no intention of applying for a Parental Responsibility Order or a Residence Order or that if he did make such an application it would likely be refused. I had also come to the conclusion that since there was no parent or guardian with parental responsibility for the child, there was no one whose consent needed to be dispensed with and therefore Article 16 of the Order did not arise (See *N, K, T and TM* [2002] NI 38 at 42).

[7] I was also satisfied that it was in the child's best interests that she be adopted. The reports from the social workers and the Guardian ad Litem made it clear that the child had lived with the applicant and her partner from the age of 2 years until the present and had settled and thrived well in that setting. Pursuant to the admonition of Article 9(b) of the Order that I should ascertain the wishes and feelings of the child, the Guardian ad Litem made it clear that this child was well aware of what adoption amounted to and she was positive in her wish to become adopted. There is a need to provide her with a sense of belonging and permanence as a child who has experienced a series of care managements in the past before being finally parented by J and her husband and subsequently J and A. In effect J has been this child's foster carer since she was a 2 year old and has been a consistent factor in her life thereafter. A has become increasingly important to M and, according to the Guardian ad Litem, appears to fulfil a parental role in M's life. Irrespective of what order I make, she will continue to live as part of this family household whether as a foster child, adoptive daughter or subject of a Residence Order.

[8] I have concluded that the provisions of the 1987 Order are drawn widely and do not distinguish as a matter of public policy between one member of a lesbian cohabiting couple, a homosexual cohabiting couple or a heterosexual cohabiting couple applying to adopt a child. Each can successfully do so.

[9] The law is not moribund. It must move to reflect changing social values and a shifting cultural climate. In 1997, where a homosexual successfully obtained an Adoption Order for a child in *Re W (Adoption: Homosexual Adopter)* [1997] 2 FLR 406 at p411 Singer J said:

> "… I am prepared to accept the likelihood that the framers of this legislation did not contemplate that a single homosexual applicant might apply for and obtain an Adoption Order. Indeed were such an applicant's sexual orientation to be known, they might well have thought it implausible that he or she would be successful whether living alone or in cohabitation. But the reason for that would have been not because of the words of the Act, which I find contains no prohibition express or implied against such an application, but because arrangements for the adoption of children and the placement of children for adoptions were the responsibility of adoption agencies. … The likely attitude of adoption agencies (for the most part, local authorities) would, again I am prepared to accept, 20 years ago have been to withhold approval from would be applicants whose homosexual orientation was made clear.
>
> But since then times, and the attitude of adoption agencies, have clearly changed, and whereas it has not been commonplace for children to be placed in the care of homosexual carers whether for fostering or prospective adoption purposes, it is by no means unknown."

He went on to say at page 412b:

> "This spectrum of approach over a relatively short span of years warns me clearly how unruly is the horse of public policy which I am asked to mount, and upon what shifting sands I would be riding if I did so. I have formed the firm conclusion not only that the Act cannot be construed and so restricted in as discriminatory a fashion as is proposed, but also that public policy consideration should not fall within the province of judges to define within this sphere. If there is to be a line drawn as a matter of policy to prevent homosexual

> cohabiting couples or single persons with homosexual orientation applying to adopt, then it is for Parliament so to conclude and with clarity to enact. But at the moment the 1970 Act [*which is comparable to our 1987 Order*] is drawn in words so wide as to cover all these categories. If that conceals a gap in the intended construction of the Act then it is for Parliament and not the courts to close it."

[10] This approach is in harmony with a number of cases. In *Re E (Adoption: Freeing Order)* [1995] 1 FLR 382 the Court of Appeal in England declined to interfere with a Freeing Order made by the County Court judge where, with a view to adoption by the child's existing foster carer, a woman of lesbian orientation was offering to care for the child as a single parent.

[11] In Scotland the Inner House of the Court of Session in the case of *T Petitioner* [1997] SLT 724, held that there was no fundamental objection in principle to an application for the adoption of a young, disabled boy by a homosexual man who proposed to bring him up jointly with his male partner. That involved a construction of the relevant provisions of the Adoption (Scotland) Act 1978 which is identical to those of the Adoption Act 1976 and our own 1987 Order.

[12] In this context I have considered the case of *Frette v France* [2003] 2 FLR 9 which was a case heard before the European Court of Human Rights. In that case the French applicant had been refused prior authorisation to adopt a child from the Paris Social Services Youth and Health Department because he was a homosexual. He complained to the European Court of Human Rights alleging breaches of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention) and of Article 14 taken together with Article 8 of the Convention. The court by a majority of four to three held that there had been no breach of Article 14 concluding that there was no right to adopt under the European Convention, that there was no common ground among contracting States as to the merits of permitting adoption by homosexuals and that therefore the State had a margin of appreciation in how it assessed the issue. The minority judgments concluded that a blanket ban on homosexual adoption should have been seen as a disproportionate response and the lack of a European consensus was irrelevant.

[13] I consider that this decision is easily distinguishable from the present situation. In the first place, the applicant in *Frette's* case was applying to adopt a child who had not been identified whereas in this case the child has been living with the applicant for 10 years and is well settled. Secondly in the present case the best interests of this child are clearly served by adoption into

this applicant's family. Thirdly the Trust in this instance have already approved this applicant as a suitable person to adopt whereas in *Frette's* case, the French authorities had rejected him at the preliminary stage.

[14] Reason therefore must colour the thread of the court's approach at a time when basic assumptions may be shifting and the law must be in tune with the ever changing needs and values of society. In England and Wales, under the Adoption and Children Act 2002, 49(1) and 144(4), a "couple" – meaning "two people (whether of different sexes or of the same sex) living as partners in an enduring family relationship" and thus including homosexual couples – will be able to apply to adopt. This is but one more indication of the evolving nature of the law albeit that the Act does not apply in Northern Ireland.

[15] I have therefore come to the conclusion that the 1987 Order permits an adoption application to be successfully made by a single applicant, whether he or she at that time lives alone or cohabits in a heterosexual, homosexual, lesbian or even asexual relationship with another person who it is proposed should fulfil a quasi parental role towards the child. Any other conclusion would be both illogical, arbitrary and inappropriately discriminatory in a context where the court's duty is to regard the welfare of the child as the most important consideration. I therefore grant the application sought by the applicant in the terms of the Originating Summons.

SHARED RESIDENCE APPLICATION

[16] The principles governing an application for a shared Residence Order are those that I set out in *Re R (Shared Residence Application: Contact)* (Unreported at GILC3787 24 October 2002). Contrary to earlier case law, it is no longer necessary to show that exceptional circumstances must exist before a shared Residence Order may be granted. In *D v D (Shared Residence Order)* [2001] 1 FLR 495 Dame Elizabeth Sloss said that it is probably no longer necessary to show a positive benefit to the child. What is required is to demonstrate that the order is in the interests of the child in accordance with the requirements of the Children's Order (Northern Ireland) 1995.

[17] In *Re B (Adoption: Joint Residence)* [1996] 1 FLR 27, which was determined prior to *D v* D and thus at a time when it was felt that exceptional circumstances needed to exist, Cazalet J said at page 38:

> "In those circumstances I see nothing inconsistent in making both an Adoption Order and a Joint Residence Order in the way I have indicated. In my view such orders are positively for the benefit of A. It is clearly of importance in regard to Miss G since, although there is complete trust between

> her and Mr E, it does reflect that she is the primary carer in the home. Furthermore, if some untoward mishap were to befall Mr E, then she would be on the scene with that parental responsibility and able to make decisions about A. That could be significant in regard to medical matters and so forth; otherwise she would be left in a state of limbo."

In Re B the child had been placed with foster parents who were an unmarried couple. The foster father Mr E had applied to adopt A and the foster father and foster mother Miss G thereafter applied successfully for a joint Residence Order in relation to the child. I consider that the same reasoning applies in the instant case and I intent to adopt the same approach.

The general principles relevant to any Article 8 application under the 1995 Order apply. Accordingly I have had regard to the paramouncy of the child's welfare, I have recognised that delay in determining the question is likely to prejudice the welfare of the child, I have applied and considered the welfare checklist set out at Article 3(3) of the 1995 Order notwithstanding that this application is unopposed and therefore such a consideration is not mandatory, and I have recognised the presumption against making an order unless to do so would be better for the children than making no order at all. I am also satisfied that this child is in the care of the Trust. As the applicants have the consent of that Trust they do not require the leave of the court to make such an application.

[18] On a factual basis I have come to the conclusion that this child is now well used to shared care from both J and A. It might only serve to cause confusion in her life if parental responsibility were to be vested in only one whereas equality in practice had prevailed as a matter of fact in the past between J and A. It is highly appropriate that both parties should be in a position to make decisions about this child especially if some unfortunate mishap were to befall J. Medical matters, schooling, education and so forth are all areas where it is important that no hiatus should occur with this child. I have no doubt therefore that a Shared Residence Order in this context is entirely apposite, reflects the reality of this child's life and is clearly in her best interests in accordance with the requirements of the 1995 Order.

[19] I conclude by recognising the enormous help that all counsel in this case have afforded me with meticulously prepared skeleton arguments augmented with admirably concise oral submissions. This judgment is a written account of an ex tempore judgment that I have already given wherein I dealt with a number of other outstanding ancillary matters.