THE PLACE OF BIRTH FATHERS IN A CHANGING SOCIETY

Historic

Historically Negative attitudes classed the birth father as either irrelevant or an intruder. In a chapter entitled ' The Birth Father ',Tugendhat quotes a leading figure in post adoption circles as follows ;

'Lifton describes her father as the type who used to be called a bounder or a cad; I see my father and his type in the chimpanzee male, who, having had his sport ,is off to other parts of the forest'[1].

Change

The father's role in the Adoption process was not acknowledged. Such negative attitudes changed with the leading case of Keegan v Ireland [2]which established the legal right of the birth father to be consulted. As the family unit underwent change in Ireland the rights of the unmarried father came into focus and this was enshrined in the Adoption Act of 1998 .The Children and Family Relationship Act 2015, introduced in January 2016 goes much further with unmarried father's rights .It provides that the consent of a father who is a guardian must be obtained prior to a placement of his child for adoption unless it is dispensed with by order of the High Court. As this Act also gives automatic guardianship rights to fathers in certain circumstances .It goes a long way towards redressing the previous perceived imbalance .It also gives a more complex definition of 'father'. S.17 of the 2010 Act replaces the term 'father' with 'relevant non-guardian' as defined in S. 3 of the Adoption Amendment Bill and while the section of the Act dealing with Donor assisted human reproduction has not yet commenced s 43 defines the word 'parent' to include a person who is, under section 5 of the Children and Family Relationship Act 2015 ,a parent of the child where the child is a donor conceived child.

Facts of Case

The rights of a father of a donor conceived child were considered by both the High and supreme Courts some years ago in the case of J.McD. v P.L. and B.M.[3]The respondents were a same sex couple who had lived together in a long term relationship which had been formally solemnized by a civil union in England. They wished to have a child who would be part of what they considered to be their family unit. Eventually, the respondents entered into a written agreement with the Applicant whereby he would donate sperm with a view to allowing the first named respondent to conceive a child. Central to the agreement was the intention that while the child would know that the Applicant was his or her father and would have contact with the Applicant at the discretion of the respondents, the Applicant would have no parental role, the parents being the first and second named respondents. The Applicant would instead be known to the child as a 'favourite uncle' and he would have no financial obligations to the child. Sperm donations were made by the Applicant as a result of which the first respondent conceived and gave birth to a male child.

Shortly after the birth of the child the Respondents became concerned that the Applicant was behaving more like a father than a 'favourite uncle' and intruding into their family life. Following a heated meeting between the parties when the child was 6 months old at which the applicant said 'I am a father and I have rights ' the Respondents perceived that the Applicant saw himself as a father rather than an uncle and that this role was not consistent with what he had agreed..

[1] Clapton Gary ,Birth Fathers and their adoption experiences (Jessica Kingsley Publishers London 2003)
[2] (1994) 18E.H.H.R.342
[3] 2010 2IR 199

The applicant brought proceedings seeking guardianship of and access to the child. The Court ordered an assessor be appointed pursuant to S.47 of the family law Act 1995 to prepare a report for the Court assessing the relationship between the parties and the child in order to assist in determining the best interests of the child.

Consideration of Section 47 report

When the matter came for hearing before the High Court Judge Hedigan heard evidence over a period of 14 days. The learned Judge carefully considered the S 47 report.

In summary the report accepted that the child should have knowledge of both parents, that it is an important part of the identity formation of a child and that a child should have access to both parents unless there are compelling reasons against it. It accepted that the child had no relationship with the Applicant other than a biological one .That the relationship between the Applicant and the first named respondent was 'poisonous' and that there was no trust between the applicant and the Respondents it suggested that the parties could not cooperate in such a way to avoid exposing the child to conflict. In conclusion the report suggested that the Applicant should not have any role in the child's life that would give him rights that would interfere with the child's family life with the Respondents. Judge Hedigan decided that he should accept the recommendations in the S 47 report on the basis that the expert producing the report does so on the instructions of the court rather than either party and as such has no bias.

Family Rights as between Applicant and child

The applicant claimed rights under Article 8 of the European Convention on Human Rights in that there existed between him and the child ties of such a close personal nature that give rise to family rights under the article. He argued that there was an 'intertwining ' of the lives of himself and the respondents and the child but this was not borne out by the evidence. The s 47 report expressed the view that there was no relationship between the Applicant and the child. Judge Hedigan concluded that Article 8 was not applicable to the relationship between the Applicant and the child and consequently no family rights arose.

Family Rights as between the Respondents and the Child

The Respondents had lived together for 13 years in a loving committed and supportive relationship. Their relationship now included a child supported and nurtured by them. Judge Hedigan stated that the relationship while solemnised by a civil union in England which was not at the time recognised in law here ,did satisfy the requirements of the European Court of human Rights as set out in X,Y and Z v United Kingdom and that there existed between the respondents and the child such close personal ties as give rights to family rights under Article 8and that the relationship between them is that of a de facto family within the meaning of Article 8 which does not conflict with Irish law.

High Court Decision

Judge Hedigan decided having considered all the evidence that it would be highly probable that the integrity of the family would be seriously and even possibly broken by making the orders sought in this case and that in addition to the paramount welfare of the child he refused to make the orders. He also held that the agreement between the parties was unenforceable since he considered that the issues which arose in this case fell to be determined by reference to the best interests of the child.

The Applicant appealed the decision and the matter came before the Supreme Court.

Considerations of the Supreme Court

The Agreement

The four Judges of the Supreme Court who heard the Appeal agreed with the judgement of Judge Hedigan with regard to the Agreement being unenforceable although relevant as a factual background and context to the issues under consideration. Judge Murray stated that it was the welfare of the child as the first and paramount consideration, which is central to the determination of the issues in this case. He referred to the argument put forward in the High Court that a father in the situation of the Applicant could give his consent in a way that paralleled the consent which a mother or even a married couple could give with regard to adoption .He argued that even if that were a true parallel, a consent of a mother to adoption prior to the conception or birth of a child could not, in his view, be considered a full or valid consent. A person in the position of the Applicant, when faced after birth with the reality of a child, a person, who is his son or daughter, may ,quite foreseeably ,experience strong natural feelings of parental empathy and identity which may overcome previous perceptions of the relationship between father and child arrived at in the more abstract situation before the child was even conceived .That such a change of heart would occur must also be foreseeable as at least a real possibility by parties in a similar situation to that of the Respondents .Although the rights of such a father are limited such a change of heart may be, as it was in this case, an event which raises issues as to whether in the interests of the child, access or guardianship ought to be granted to the Applicant. Such considerations transcend any pre conception agreement between the Applicant and the Respondents. They noted that in the agreement the parties aspired to a situation where the child would know its father and have contact with him and that these are admirable aspirations.

The s.47 Report

The Judges concluded that undue weight was given by the trial Judge to the psychiatric report obtained pursuant to s 47 of the Family law Act 1995. They stated that a trial judge must be free to depart in his or her findings from evidence contained in such a report either because there is more persuasive evidence or because he or she is not sufficiently persuaded by the report as to the correctness of a particular fact or conclusion in it.

The De Facto family

The Judges gave significant focus in their judgements on the status of the European Convention on Human Rights and the relevance of Article 8 and to the approach of the trial Judge to the de facto family which, it was submitted, was an error. In proceeding to examine that question the judge did not identify any statutory provision or rule of law which required interpretation for the purposes of s2 of the act of 2003.They decided that the Trial Judge embarked on what appeared to be an autonomous direct application of article 8 which in the circumstances of this case was not correct and accordingly there was no basis in law for applying article 8.

The Blood Link

When referring to rights or interests of concern arising from the blood link Judge Geoghegan interpreted that as meaning that he is referring to limited natural rights of a kind which do not have constitutional recognition. He felt the court would have to consider the blood link in the context of its affording a beneficial reason from the child's point of view as to whether there be contact to some degree with the child.

Judge Geoghegan referred to the agreement drawn up between the parties and said that the use of the term 'favourite uncle' was a clever expression and that if there was any form of contact relationship between a sperm donor natural father and the resulting child being reared in a stable lesbian partnership that is the only viable role for the donor. Any connection closer than that, in the absence of complete agreement would be bound to be wholly disruptive and against the child's interest. He felt that while the agreement was not legally enforceable any court would pay due respect to it and if the terms are beneficial to the child an appointment as guardian would not be warranted.

Judge Denham felt that while not determinative, the trial Judge gave insufficient weight to the fact that the Applicant was the biological father of the child .She stated that there was a benefit to a child in general to have the society of his father, and that the trial Judge gave insufficient weight to this factor.

The Best Interest Principle

Judge Geoghegan also referred to in his judgement to the case of G.v An Bord Uctala [4].The principle he quoted from the judgement of Walsh J. in this case is as follows;

'the word 'paramount' by itself is not by any means an indication of exclusivity; no doubt if the Oireachtas had intended the welfare of the child to be the sole consideration it would have said so. The use of the word 'paramount' certainly indicates that the welfare of the child is to be the superior or the most important consideration ,in so far as it can be having regard to the law or the provisions of the constitution applicable to any given case.'

Decision

The appeal was allowed in respect of the access application only and was remitted back to the High Court to be reconsidered .Following a further hearing Hedigan J. ordered access by the applicant to the child on a favourite uncle basis with the true nature of the relationship not to be disclosed until the respondents considered it age appropriate as set out in his judgement of 27th April 2010[5].

Conclusion

Would the Judges have found differently if the matter come before the courts now in the light of recent legislation? The Child and family Relationship Act incorporates a lot of the considered thinking and decision making in this case.

Let us look firstly at the Applicant's position. While not yet commenced S 5(5) of the Child and Family Relationship Act 2015 specifically sets out the situation in relation to a child born of a donor assisted human reproduction procedure in that a donor is not the parent of a child born of such procedure and will have no parental rights or duties in respect of such a child. There is no connection legal or otherwise between the donor and the child. The donor must consent to personal information being recorded and that a child born from such a procedure can access this information.

S5(1) provides that the second parent shall be the husband, civil partner or cohabitant of the intending mother as long as he/she consents to be so, but the unmarried father will only be presumed to be the father where an order is made appointing him a guardian.S43 provides that the definition of 'father' excludes a man not married to the child's mother unless he is appointed a guardian of a child and automatic guardianship is conferred where he has cohabitated with the

[4] [1980]I.R.32
[5] [2010]1ECH 120.

mother for not less than 12 months including a period of not less than 3 months after the birth of the Child. Clearly the Applicant would not qualify for guardianship under this heading.

If anything the position of the Respondents is strengthen by this new legislation and they would now be considered a family unit.

With regard to the best interest principle, which all of the Judges who dealt with case had regard to, this has been defined in the 2015 Act.S63 of the 2015 sets out a detailed statutory framework or checklist of factors for ascertaining the best interests of the child.[6] It provides a new definition of Best Interests for Irish law and is no longer indeterminate and subject to prejudicial assumptions and tightens the shortcomings in the principle as outlined by Judge Geoghegan in the G v. An Bord Uctala case. S 19 of the Adoption Act 2010 also enshrines this principle and this principle is further expanded at S 10 of the Adoption Amendment Bill. All four judges of the Supreme Court and indeed the trial Judge in this case all gave considerable thought to this principle and formed the view that it was in the child's best interest to have contact with his father but only as a favourite uncle until such time as was age appropriate to inform the child that he was his biological father. Would that the new legislative framework work have made a difference to this thinking?

For these reasons it seems likely that the outcome of this case would remain the same, that there would be no guardianship rights for the Applicant and given that although as a donor he has no parental rights there is a possibility that a Court would allow access in the interest of the child. As this judgement was handed down 6 years ago and the child is now aged 10 it would be most interesting to see how the access arrangements have worked out between the parties.

Since the Adoption Amendment bill goes further with the best interest principle and also recognises the changing shape of the modern family unit perhaps it falls somewhat short of by failing to allow access orders to continue in being after the making of an Adoption Order .

Also as the Best interest principle is enhanced to include the ascertaining the child's views some thought should be given to allowing for the appointment of a guardian ad litem in certain cases.

All in all the adoption Amendment bill is to be welcome and will assist in the delivery in a fair and equitable manner of the services provided by our Board.

[6] Shannon,Geoffrey .Children and Family Relationship Law in Ireland Practice and Proceedure Clarus Press 2016