

## Adoption (Information and Tracing ) Bill 2016 -Birth father's Rights

### Introduction

*'The need to know the details of one's birth is a deep primal yearning'*. Michelle McColm writes *'The quest to validate one's existence by seeking one's roots is a basic human need and a fundamental right*. Only now are we learning that trying to erase a child's entire genetic lineage complicates rather than simplifies the lives of Adoptees. Acknowledging this fact is the first step towards healing the wounds caused by yesterday's closed adoptions .Pursuing a reunion is the next logical step'<sup>1</sup>. The Introduction of the Adoption (Information and Tracing ) Bill 2016 is a further step along this path. The main purpose of the Act is to provide a system whereby adoption information including information required to access birth certificates, may be provided to an adopted person subject to certain conditions.It provides for the establishment of the Register of Adoption contact enquiries <sup>2</sup>and for a tracing service<sup>3</sup> to facilitate information sharing and contact between adopted persons and their birth parents and other persons.

The theoretical themes in adoption with particular relevance to birth fathers rights are openness, contact, permanence, attachment, identity and loss<sup>4</sup>. We shall examine these themes under headings of severing links and the importance of family of origin, right to contact ,information and tracing and the contact register.

#### Severing Links and importance of family of origin

For many years the courts have been grappling with the issue of the biological tie in relationship to the psychological bonding and the issue of child's right to remain in his/her family of origin. In the case of *J., an Infant*<sup>5</sup>, the mother within a month of giving birth, signed a consent to the child being placed for adoption .The consent was invalid as at that time it could only have been given after 6 months had elapsed.The applicants obtained an adoption order and shortly afterwards the mother married the father of the child.The father and mother then sought custody of the child from the applicants but they refused to part with her. The adoption order was quashed and the father and mother then obtained as prosecutors a conditional order of habeus corpus.This was served on the applicants who showed cause as respondents.The prosecutors submitted that the child had been legitimised by their subsequent marriage and that they were entitled to custody as the child's parents because they, with the child, constituted a family within the meaning of articles 41 and 42 of the constitution.The respondents submitted that they could provide a more substantial and financially secure background for the child than could be provided by the prosecutors and that the child would be harmed by a change in custody and that the court should regard the welfare of the infant as the first and paramount consideration.The Court held that the conditional order should be made absolute,and custody be awarded to the prosecutors the birth parents and that they as ,as parents, had an absolute right to the custody of the child.The child by this time was 17 months old.

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<sup>1</sup> McColm,M .*Adoption Reunions* Second Story Press 1993

<sup>2</sup> S.14 Adoption (Information and Tracing) Bill 2016

<sup>3</sup> S.16 adoption (information and Tracing) Bill 2016

<sup>4</sup> Loftus, C. *The Child's knowledge of Origins in Stepfamily Adoption in Ireland* Dissertation submitted to National University of Ireland July 2002

<sup>5</sup> In re J.,An Infant(1966)I.R. 295

Likewise, in a later case of *Re J.H. (otherwise R)*<sup>6</sup> the infant was placed for adoption within 3 months of birth. Although the mother knew the birth father she did not wish to marry him solely because of the pregnancy, she later married him and they applied to re-register the birth pursuant to the Legitimacy Act 1931. In the High Court Lynch J. in granting custody to the adopting parents but refusing to dispense with the consent of the parents, held that it would not be in the best interest of the child to dispense with the parents consent in view of the fact that the marriage of the parents resulted in the infant forming part of a family within the meaning of Articles 41 and 42 of the constitution. He went on to say that having regard of the limited ability of the natural father to object to the placement of the child for adoption, there was a heavy onus on the adopting parents to prove such consent and in view of the father's willingness to be responsible for the infant an acquiescence in the mother's original decision to place the child was not sufficient to discharge the burden of proof. He went on to grant custody to the adopting parents. On appeal to the supreme court on the custody issue it was held by the supreme court in remitting the matter back to the high court that the test as to the welfare of the child must be given a meaning consistent with the infant's rights as stated in articles 41 and 42 as a member of her family in view of the subsequent remarriage of her parents. Interestingly, Henchy J. stated in the course of his judgment that while there is a constitutional presumption that the welfare of the child is to be found within the family unless there are compelling reasons why this cannot be achieved such as a failure for moral or physical reasons on the part of the parents, he was not satisfied that such was the case in this instance, that even if he felt that the mother for did so. When the matter was remitted back to the high court Lynch J., in awarding custody to the parents, held that it had not been established in evidence that any possible adverse effects would arise such as to rebut the presumption that the child's welfare was to be found within the family.

In more recent case *In the matter of Ann an Infant*<sup>7</sup> where the parents married after the child had been placed for adoption and the parents sought the return of the child, McMenamin J. considered both the cases of *Re J* and *Re Jh* above. He concluded that having regard to Article 42.5 of the constitution there were compelling reasons why Ann's custody should not be altered and that she should remain in the care of the adoptive parents. The Court considered the psychological harm that might be caused to the child by her being returned to her natural parents and that the constitutional right of the child to the protection of her health and welfare should be vindicated. The decision was overturned by the supreme court and Ann was returned to her parents. The amendment to Article 42A of the constitution will likely have an effect on such cases into the future. It is probable that the Supreme Court would not have overturned the decision if the case had come before it after the introduction of the constitutional amendment. In a most unusual English case of *B v P*<sup>8</sup> the child was born after the relationship between the father and mother had ended. The father was working abroad and did not know of the pregnancy. The birth mother had no interest in the child and when she was 4 days old she was placed by the council with foster carers with a view to finding an adoptive placement. A council employee recognised the father's name on documents to do with the case and he was contacted and assessed as carer for the child. The assessment was favourable and the child flourished in his care. The father applied to adopt the child with the agreement of the mother. The official Solicitor on behalf of the child, objected to the adoption on the basis that there was no good reason to justify the exclusion of the mother. Bracewell J. Held that the welfare of the child demanded that there be an adoption order to promote her welfare throughout her childhood

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<sup>6</sup> 1984 IR 375

<sup>7</sup> [2006 no.181 SS

<sup>8</sup> [2000]2 FLR 717

and the requirements with respect to justification of the exclusion of the other parent and the exceptional circumstances required by Re C (a minor; adoption by parent)<sup>9</sup> were satisfied by the mother's rejection of the child and by her agreement with the adoption.

In the English case of *Re W*<sup>10</sup> where a 2 year old child was placed in foster care because of her Mother's mental health problems which necessitated her living away from home. The father looked after the three older siblings. 16 months later the foster parents applied to adopt the child and this was successfully contested by the father. In refusing to grant the adoption order Russell J. held that the child should not be denied a place within her own family of origin given that the father had the commitment and the emotional intelligence to support her in what would be a difficult and distressing transition in the short term. It is notable however that the three other children were not represented in court and consequently their views not heard<sup>11</sup>.

While these cases illustrate the importance the courts have attached to the concept of a child remaining in his or her family of origin, Caroline Bridge and Heather Swindell Q.C. contend that 'European case law has suggested that apart from the mother/child relationship, family life does not exist merely by virtue of the blood tie, but, rather is a question of fact the quality of the relationship and its importance to the relative and in particular the child, rather than the ..... nominal relationship alone'.<sup>12</sup>

However, in the case of *RMS v Spain*<sup>13</sup> a decision of the European Court of Human Rights delivered 18th June 2013 the court held that the crucial question was 'whether the National Authorities took all necessary and appropriate measures that could reasonably be expected of them to ensure that the child could lead a normal family life within her own family before placing with a foster family with a view to adoption'. Similarly, in the case of *AK & L v Croatia*<sup>14</sup>, a judgment delivered by a European Court of Human Rights on 8th January 2013 the court considered whether or not the parents had been given an opportunity to exercise their right to have their parental rights restored before the child was placed for adoption. The failure identified in this case to allow this to happen was considered a breach of article 8.

The importance the courts attach to the child's family of origin, is now encapsulated in the Adoption ( Information and Tracing ) Bill allowing Adoptees access to their birth information including that of their birth father. According to Evelyn Burns Robinson '*there are many potential benefits for all three of you ( the adoptee, the birth mother and father ) in confronting the events of the past and in exploring potential relationships for the future.*'<sup>15</sup>

#### Right to contact and Information re identity

Good adoption practice pre placement would seem to require the gathering of the fullest possible information about the birth father and for the safeguarding of his significant rights for the benefit of

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<sup>9</sup> [1986] Fam Law 360

<sup>10</sup> [2015] EWHC 2039 (Fam)

<sup>11</sup> See General Comment No. 12 The right of the child to be heard CRC/C/GC/12 (2009)

<sup>12</sup> Bridge, C. Swindells, H. *Family Law and the Human Rights Act 1998* (family law, 1999) para 652

<sup>13</sup> Application no. 28775/12

<sup>14</sup> Application no. 37956/11

<sup>15</sup> Robinson, E.B. *Adoption and Recovery Solving the Mystery of Reunion* Clova publications South Australia 2004 p.185

the child who may seek knowledge of him in later life.<sup>16</sup> In the case of Adoption children can lead a double life, the surface one shared with the adoptive family and a phantom one lurking in the background<sup>17</sup>. Vincent begley describes this dilemma as follows; *'That woman ,too, was my mother but not in the same sense as that my mother – my adoptive mother –was. One woman gave me life ; the other gave me living . I couldn't have survived with one and not the other.The fact that it had taken two women to accomplish what is normally the role of one did not lessen either of their singular gifts . On the contrary , they had shared accomplishments . They had a link that bound them together as much as the links that bound each of them to me'*.

The United Nations Convention on the rights of the child promotes the right of a child to have contact with his or her family following separation and article 8 provides for right of the child to preserve his or her identity without unlawful interference including a right to extended family members.

In the case of *Olsson v Sweden*<sup>18</sup> the court noted that there was an obligation on the authorities to take appropriate practical measures to facilitate reunion with parents. The three Olsson children were taken into foster care and placed with different families geographically distant from one another and members of their family and resulted in loss of contact. Failure to consult or provide a parent with adequate information regarding their children constitutes a violation of article 8 unless it is justified under article 8 (2). Access to and protection of personal information also falls within the ambit of private life.<sup>19</sup>

Similarly, in the case of *Gorgulu v Germany*<sup>20</sup> where an unmarried father sought contact with his child who was living with prospective adopters, the European court noted the importance of contact stating that it was in the child's best interest for family ties to be maintained as 'severing such ties means cutting a child off from its roots, which can only be justified in exceptional circumstances'. (p 904)

In *Marckx v Belgium*<sup>21</sup> the European court defined 'family life' under article 8 as including 'at least ties between their relatives since such relatives play a considerable part in family life' and concluded that respect for family life under art 8 (1) 'implies an obligation for the state to act in a manner calculated to allow these ties to develop normally'.

#### Information and Tracing

Previously the unmarried father was judged to be so marginalised from the constitutional protected unit that his parenting responsibilities could legally neither be enforced nor surrendered .According to Gary Coles many birth fathers may be completely unaware of the birth and their child. This explains in part the low numbers of birth fathers of that era who come forward. They cannot acknowledge a paternity they never knew was theirs to claim<sup>22</sup> He goes on to quote Severson (undated)

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<sup>16</sup> Clapton, G. *Birth Fathers and their Adoption Experiences* (Jessica Kingsley Publishers London 2003)

<sup>17</sup> McCann R. *On their own Boys growing up underfathered* Finch Publishing Sydney 2000

<sup>18</sup> (1998) 25 EHRR 259

<sup>19</sup> Walls, M. *The Human Rights Convention; The impact of Family law in the Irish Context* [2003] Fam LJ Autumn [2004] 1 FLR 894

<sup>21</sup> (1979) 2 EHRR 330

<sup>22</sup> Coles, G. *Ever After Fathers and the Impact of Adoption* Clova Publications South Australia 2004

*'But some guys –far more, I think, than anyone believes –ran not because they wanted to, but because they did not know what else they could do. They did not know what doing the right thing meant'.*

In his study Sachdev(1991) reports how birth fathers are perceived by other parties in the Adoption process and how the attitudes of birth mothers vary from animosity to grudging acceptance (in the interest of the adopted child) of the importance of information about the birth father. He found that of all three parties adopted children, birth mothers and adoptive parents the adopted children were the most positive in their regard for information sharing with their birth fathers and the adoptive parents were most negative in their attitudes towards birth fathers<sup>23</sup>. In stepfamily adoption, the mother has relevant information about the birth father, which if imparted to the child as part of the family history, can be instrumental in the child's development of a strong identity.<sup>24</sup> In practice, when birth fathers are contacted about the adoption they are often glad to know that the truth has not been concealed from the child.<sup>25</sup> Social work needs to highlight and promote the place of fathers in adoption<sup>26</sup> and to educate the parties involved in the process of the importance of this information being made available. An opportunity for this will arise when the section of the Birth Registration Act 2014 regarding birth registration is commenced.

#### Contact Register

Part 3 of the Adoption ( Information and tracing )Bill when introduced will allow for the first time access to birth records for the the categories of persons set out in Part 4 of the Bill. It provides for the establishment of an information and tracing service and for the establishment of an Adoption Information Register to facilitate information sharing and contact. While the National Adoption Contact Preference Register has been in operation since 2005, this is a passive register which facilitates contact only where both parties have registered and are seeking a reunion. Parties can also register with the NACPR the fact they do not wish to be contacted. The new register will provide information to registered parties and will create links even if only 1 party registers. It is interesting to note that since the inception of the register 465 birth fathers have registered and only 18 of these have registered for no contact.

Under the new Bill <sup>27</sup> Adoptees can apply for information relating to his or her birth father. As the Children and Family Relationship Act 2016 sets out a new definition of father and extends this category to include a relevant non guardian, donor fathers and and a father who is not married but has cohabited with a mother of his child for a period of not less than 18 consecutive months to include a period of three months following the birth. This is likely to have far reaching consequences and also further extends the right of adoptees to information concerning their origins. The information will be supplied to the Adoptee where the birth father is deceased or the birth father was consulted in relation to the adoption or where the Adoptee gives an undertaking not to contact the birth father or where there is no entry in the register relating to the birth father.

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<sup>23</sup> Clapton, G. *Birth Fathers and their Adoption Experiences*, London Jessica Kingsley Publishers 2003

<sup>24</sup> Loftus, C. *The child's knowledge of origins in Stepfamily Adoption in Ireland* A dissertation submitted to the National University of Ireland in part fulfillment of the degree of Social Science July 2002 p 34

<sup>25</sup> Ibid p. 34

<sup>26</sup> O'Carroll, E. *Traditional Adoption in Ireland* A dissertation submitted to the National University of Ireland in part fulfillment of the degree of master of social Science August 2002

<sup>27</sup> S.23(1)(h) Adoption (Information and Tracing) Bill 2016

Where there is an entry in the register relating to the birth father, where the adoption occurs after the commencement of this section or the information is held in a record of the agency .The information can be released on an undertaking from the Adoptee that they will not make contact with the birth father. Where both the above do not apply the agency will attempt to locate the birth father if he is still living<sup>28</sup>, the agency shall notify him informing him of the application, the effect of this section and of his entitlement to make a statement setting out compelling reasons, if any, of his wish for the information not to be imparted<sup>29</sup>and his entitlement to support and guidance . The agency can determine, if the reasons are sufficiently compelling, for the information not to be imparted to the applicant and can decide not to do so but must seek the approval of the circuit court of its decision. If the Agency it considers the information not to be compelling the father has a right to appeal the decision to the circuit court for determination. If either party are not satisfied with the decision there is a further right of appeal to the high court<sup>30</sup>. The agency can supply the information where the father has not availed of his entitlements to object or where he has indicated that he does not wish to do so or the agency has made a determination which he has not appealed and the determination has been upheld by the circuit court or the high Court following an appeal.

There are similar provisions in the Bill in relation to birth mothers. However Previously the mother was gauranteed the right to privacy and only her rights were taken into account in the Adoption Process. The issue of the right to privacy of the mother and the right of the child to his/her identity was considered by the Supreme Court in the case stated of *I.O'T. v. B*<sup>31</sup>. Having considered the judgement in the case of *G. v. An Bord Uchtala*<sup>32</sup>, the majority held that the right to know the identity of one's natural mother was a basic right flowing from the natural and special relationship flowing from a mother and a child and that while the the applicant and the plaintiff enjoyed the constitutional right to know the identity of their respective mothers, the exercise of such right might be restricted by the constitutional right and confidentiality of the mothers. They stated that the natural mother did not have an absolute constitutional or legal right to have the anonymity gauranteed them at the time they placed the applicant and the plaintiff for adoption, preserved and that neither the right to privacy nor to privilege in respect of confidential communications was absolute. They unanimously agreed, in deciding that it was not possible or desirable to lay down all the criteria to be applied in balancing the of the constitutional right of the child to know the identity of its natural mother and the constitutional right to privacy of the natural mother. In the opinion of Baron J. *'since both rights are not absolute the court must seek to strike a balance between them. In striking a balance it is not so much the rights themselves which must be considered but the effect on the respective parties in the event of the vindication of one right rather than the other.*<sup>33</sup>

When enacted this Bill is likely to have an impact on those mothers whose children were placed for adoption prior to the mid nineteen seventies. These were closed adoptions where it was never envisaged that there would ever be an kind of contact. The current provisions of the Bill as drafted strives to strike a balance in a similar fashion as described by Dr. David Owen who introduced the

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<sup>28</sup> S 28 (1) Adoption (information and Tracing ) Bill 2016

<sup>29</sup> S. 28 (5)Adoption (Information and Tracing Act 2016Where the birth father has not availed of his entitlements under Subsection

<sup>30</sup> S"8 (15) and (17) Adoption (Information and Tracing ) Act 2016

<sup>31</sup> [1998] 2IR 322

<sup>32</sup> [1980] I.R. 32

<sup>33</sup> Ibid p382

second reading of the Children Act 1975 which gave access to birth records in England<sup>34</sup> between the parties by balancing *'unknown distress and anxiety with known distress to a large number of people excluded from the right to their birth information'*<sup>35</sup>. It is however, reassuring to note that in the research carried out by Walby and Symons in England following the introduction of access to birth records they found that *Respondants were generally felt to be stable, reasonably well adjusted individuals, concerned about and sensitive to the feelings of their birth and adoptive parents. Their primary allegiance was to those who had actually carried out the parenting role. There were no examples in the study of irresponsible and damaging behaviour by respondents, despite the use of a number of unusual and enterprising strategies. This confirms other findings and suggests the fears expressed in 1976, often in extreme and hysterical parlance were largely groundless.*<sup>36</sup>

This was against a background of consternation, controversy and maximum adverse publicity in the months following the introduction of the Act in England.

In Scotland access to birth records has been available to Adoptees since 1930.<sup>37</sup> The Houghton Report published in 1972 was a working paper set up to elicit comment from all interested parties on various topics to include a study of the provision in Scottish law for the use made of access to birth records.<sup>38</sup> The records for the Registrar General of Scotland did not apparently yield any records of complaint from birth relatives and the committee concluded that *'the fear of being traced may have been unduly magnified'* and that as the social climate was changing *'mothers are becoming less concerned to conceal the fact that they had an illegitimate child'*.<sup>39</sup>

The Adoption Contact Register for Scotland was introduced in 1984. This register was set up to be a meeting place for adults separated by adoption. Relatively Unknown<sup>40</sup> is a compilation of experiences from questionnaires that were distributed to people who had used the register in 2001/2002 This is the account of one birth father looking for his son;

*'I decided to register with Birthlink as I came across the name on the Internet as I was browsing the web. I had been thinking about it for a long time but I did not know how to go about it. I wrote to Birthlink on the off chance that he might have registered so far I have received no contact from him but by doing it this way I know that if he wants to find me it will be easier for him. If you are a man there is not much help out there but thanks to organisations like Birthlink you can at least have some hope. As I have said I have had no contact yet but there is always the future and it gives you some hope to know that you are on the register'.*

## Conclusion

The permanence and security offered to a child through adoption remains a significant reason for families to undergo the process. However, the possible benefits for a child of contact with the birth

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<sup>34</sup> S.26 Children Act 1926 gives effect to the recommendation of the Houghton Committee that adopted people who have reached the age of 18 should be entitled to a copy of their original birth certificate.

<sup>35</sup> Walby, C. Symons, B. *Who Am I ?* British Agencies for Adoption and Fostering 1990 p47

<sup>36</sup> *Ibid* P.74

<sup>37</sup> Adoption of Children (Scotland) Act 1930

<sup>38</sup> Report of the departmental committee on the adoption of children (Houghton Report) (Cmnd 5107) HMSQ.1970

<sup>39</sup> Walby, C. Symons, B. *Who Am I ?* British Agencies for Adoption and Fostering 1990 p.44

<sup>40</sup> Clapton, G. *Relatively unknown A year in the life of the Contact Register for Scotland* Family Care ISBN:0-9508117-6-9 2003

father needs to be considered also<sup>41</sup>. Wanting to know who we are, what makes us tick and where we come from is such a basic right that it seems odd that it should ever have been denied.<sup>42</sup>

An acknowledgement of the importance of a child's true origin and contact with the birth family is not always forthcoming. This needs to be addressed by way of education of the parties involved in the process.

The consequences of the secret adoptions of the sixties and seventies (and before) remain personal and family issues for thousands of people today. O'Halloran summarises the situation thus<sup>43</sup>;

*'In all common law jurisdictions, the policy relating to post-adoption rights of access to identifying information reflect a struggle to balance the rights of the parties involved: particularly between the traditional parental right of veto on disclosure of information given in confidence and the right of an adopted person to access information relevant to shaping their sense of identity.'*

The Adoption (Information and Tracing) Bill 2016 strives to redress this balance. It remains to be seen if the changing practice in adoptions towards openness will result in sustained contact between birth parents and their adopted children or whether some of them may need the help of the contact register to link up again in the future<sup>44</sup>

Hopefully, all of those whose lives have been affected by adoption can come to understand, that there is much to be gained from the inclusion of fathers in the reunion experience.<sup>45</sup>

To conclude in the words of Elizabeth Anglim<sup>46</sup>

*If we really believe that a child has a right to information about his natural parents and that a positive image offers him the best hope of security, we must begin to offer this image to the adoptive parents. For this, there are two basic requirements – first a conviction about and acceptance of, the principles involved and second, the time required to put these into effect. If the first becomes part of our professional thinking we will somehow, in spite of the growing pressures from all areas, find the time necessary to add another client to each case and therefore to furnish many more adoptive children a realistic and more complete picture of their biological heritage and the reason their natural parents chose adoption for them. We have long counselled adoptive parents that they must be ready for the child's inevitable question; 'Why did my mother give me up?' Now I hope we can help them to be free to answer the inevitable next question; 'But what about my father?'*

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<sup>41</sup> Loftus, C. Dissertation submitted to National University of Ireland July 2002

<sup>42</sup> Feast, J. Project Leader The Children's Society's post-adoption and care project

<sup>43</sup> O'Halloran, K. *Adoption law and Practice*

<sup>44</sup> Clapton, G. *Relatively Unknown A year in the life of the Adoption Contact Register for Scotland*. Family Care ISBN; 0-9508117-6-9 2003

<sup>45</sup> Robinson, E. B. *Adoption and Recovery Solving the Mystery of Adoption Reunion* Clova Publications South Australia 2004 p. 108

<sup>46</sup> Anglim, E. *The Adopted Child's Heritage – Two Natural Parents* Child Welfare, XLIV, June 1965

Pannor, R., Massarik, F. Evans, B. *The unmarried Father* Springer Publishing Co., Inc., New York 1971