



Neutral Citation Number: [2020] EWFC 33

Case No: FD20P00014

**IN THE FAMILY COURT**  
**Sitting at the Royal Courts of Justice**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 22/04/2020

**Before:**

**MRS JUSTICE THEIS**

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**Between:**

**X**  
**- and -**  
**W**

**Applicant**

**Respondent**

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**Ms Kathryn Cronin and Mr Tom Wilson** (instructed by **Goodman Ray**) for the **Applicants**

Hearing date: 3rd March 2020  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

**Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10.30am on 22<sup>nd</sup> April 2020.**

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MRS JUSTICE THEIS

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. The anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

## **Mrs Justice Theis DBE:**

### **Introduction**

1. The court is concerned with issues that have arisen relating to a prospective application for an adoption order under the 1993 Hague Convention (Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption ‘the Convention’). The proposed adopter is Mr X, an American citizen, habitually resident in the United States.
2. Mr X is currently present in the UK and is the guardian and cares for his 8-year-old orphaned niece, Z, who is a British citizen.
3. Mr X’s application, pursuant to section 6 (7) Children Act 1989 (‘CA 1989’), is to revoke a testamentary guardianship order and, if granted, for Z to be made a ward of court so as to ensure there is an entity to make decisions about Z pending the adoption order being made.
4. The applicant, Mr X, has the benefit of a specialist solicitor, Ms Dally, and counsel, Ms Cronin and Mr Wilson. Legal argument was heard on 3 March 2020, when the matter was adjourned for an addendum skeleton argument to be filed and notice to be given to Cafcass Legal to consider whether the child should be joined as a party. That skeleton has now been filed. It is of the highest standard, comprehensively setting out the applicable law with excellent analysis of the issues, which has been of enormous assistance to the court.

### **Relevant Background**

5. Z was born in the UK. She was removed from her birth parents by the local authority and placed for adoption with Mr X’s sister, Ms Y, when Z was 18 months old. Ms Y adopted Z when she was 2 years old. Very tragically, Ms Y became seriously ill and died when Z was 3 years old.
6. During the adoption assessment of Ms Y she had informed the local authority that in the event of her death she wished her brother, Mr X, and her cousin, Ms W, to be appointed testamentary guardians for Z. Mr X, who had travelled to the UK after his sister’s death, made a guardianship application under section 5 CA 1989. The subsequent court order, in 2015, appoints Mr X and Ms W as the joint guardians and gives them leave to remove Z from the jurisdiction. That order gives both Mr X and Ms W parental responsibility in relation to Z (s 5(6) CA 1989). In 2016 Mr X and Z went to stay in Pakistan, where the wider family lived. In 2017 Z was placed in the care of her grandmother in Pakistan, so Mr X could return to the US to secure work and financial support for Z. There came a time when Z’s grandmother was no longer able to care for her and plans were made for Mr X to resume her care. He returned with Z to this jurisdiction where he remains as the full-time carer for Z.
7. Mr X intends to permanently care for Z in the USA, where he is habitually resident. This plan could only be achieved via a Hague adoption. This has the full support of the whole family, in particular Ms W, Z’s other testamentary guardian. Ms W is based

working in another jurisdiction and is not in a position to provide for Z's day to day care.

8. Mr X has been assessed and approved as a suitable adopter by Texas accredited social worker Deborah Huehner, in accordance with Article 15. This report has been approved by the Department of Homeland Security which has determined that Mr X meets the eligibility requirements as a Hague adoptive parent. His 1-800 petition (to classify Convention adoptee as an immediate relative) has been approved. The Article 15 report confirming his suitability has been sent to the DfE and the relevant local authority. The latter are in the process of completing the Article 16 report, which is due to be completed shortly and all the indications are that it will be positive. Once that is done the requirements under Article 17 will be considered and, if met, the Central Authorities of both States can agree the adoption may proceed (Article 17 (c)).
9. It is accepted Z's habitual residence is in this jurisdiction in accordance with the principles outlined by Munby P in *S & T (Children) Re [2015] EWHC 1753 (Fam) at [60] – [61]*. Z's home with her mother, Ms Y, has been preserved and she has returned here to live there pending her adoption.
10. The issues that arise in this case concern the following
  - (1) Is the consent required under Article 4 of the Convention invalidated in any way by the fact that one of the persons giving consent is Mr X, who is consenting to his own adoption application? If so, should the guardianship order made in 2015 in favour of Mr X be revoked?
  - (2) Is the term '*entrusted to prospective adoptive parents*' in Article 17 affected by the fact that Mr X is a testamentary guardian for the child?
11. Ms W has been served with this application and is reported to consent to the application to revoke the guardianship order and agrees to Z being made a ward of court.
12. Notice of the hearing has been given to Mr Kelly at the DfE, the Central Authority of the State of origin in accordance with the Convention. He has responded to say that the DfE will be content with the court's decision on revocation, including whether it is required or not. Their view is reported to be that as long as the judge who makes the Convention adoption is satisfied that this would not constitute entrustment, they would accept this and issue the Article 17 (c) agreement.
13. The local authority who are undertaking the Article 16 assessment have also been given notice of this application and have confirmed they do not seek to make any representations.
14. Finally, Cafcass Legal have confirmed they do not consider the child needs to be joined as a party and they do not seek to make any further representations.

## Legal framework and submissions

### Consent and Article 4

15. Article 4 states

*‘An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin –*

- a) have established that the child is adoptable;*
- b) have determined, after possibilities for placement of the child within the State of origin have been given due consideration, that an intercountry adoption is in the child's best interests;*
- c) have ensured that*

*(1) the persons, institutions and authorities whose consent is necessary for adoption, have been counselled as may be necessary and duly informed of the effects of their consent, in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,*

*(2) such persons, institutions and authorities have given their consent freely, in the required legal form, and expressed or evidenced in writing,*

*(3) the consents have not been induced by payment or compensation of any kind and have not been withdrawn, and*

*(4) the consent of the mother, where required, has been given only after the birth of the child; and*

*d) have ensured, having regard to the age and degree of maturity of the child, that*

*(1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required,*

*(2) consideration has been given to the child's wishes and opinions,*

*(3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and*

*(4) such consent has not been induced by payment or compensation of any kind’*

16. The term ‘adoptable’ in (a) is not defined in the Convention or the Explanatory Report on Convention for Protection of Children and Co-Operation in Respect of Intercountry Adoption (‘the Report’) by G. Parra-Aranguren. I agree with the submissions of Ms Cronin that it is likely to be a short-hand term to encapsulate the phrase *‘that the adoption is permissible in view of the child’s status concerning parents, relatives and legal guardians’* (see para [110] and [117] of the Report). Z is in need of and free for adoption as her guardians wish to provide her with a secure and permanent family with the ability to be able to live with Mr X and his family. The evidence demonstrates that Z needs the lifelong security that would come with adoption, in that such an order would provide her with a lifelong committed parent and family identity which reflects her attachment and dependence on Mr X. Adoption is the only route to achieve this and, as a result, her situation properly meets the term ‘adoptable’ and that an intercountry adoption meets Z’s best interests (Art 4 b)).

17. Turning to the issue of consent Article 4 requires *‘that the persons, institutions and authorities whose consent is necessary for adoption...have given their consent freely,*

*and in the required legal form, and expressed or evidenced in writing'. In S & T (ibid) Munby P held 'On a plain reading of the Convention, it leaves to the domestic law of the State of origin to determine what, if any, consents are 'necessary''. As he observed this is supported by paragraph [129] of the Report.*

18. S 47 Adoption and Children Act 2002 (ACA 2002) requires the Court to be satisfied that, subject to any decisions to dispense with such consent, the child's parent or guardian consents to the making of the adoption order. For Z, this requires the consent of Mr X and Ms W. Additionally, Article 4 requires that such persons who are to give consent are counselled as to the effect of the adoption and that the consents have not been induced by payment or otherwise.
19. Both Mr X and Ms W consent to Z's adoption. In the unusual circumstances of this case Mr X is consenting to his own adoption application. It is due to this that Mr X seeks the revocation of his guardianship, thereby removing the need for his consent and therefore not benefiting from that position. In conventional circumstances, by giving consent to adoption as a person with parental responsibility the consequences usually mean, if an adoption order is made, that person will lose their status in relation to the child. Here by giving that consent Mr X will gain parental status through the adoption.

#### **Article 17**

20. Article 17 provides

*Any decision in the State of origin that a child should be entrusted to prospective adoptive parents may only be made if –*

- a) the Central Authority of that State has ensured that the prospective adoptive parents agree;*
- b) the Central Authority of the receiving State has approved such decision, where such approval is required by the law of that State or by the Central Authority of the State of origin;*
- c) the Central Authorities of both States have agreed that the adoption may proceed; and*
- d) it has been determined, in accordance with Article 5, that the prospective adoptive parents are eligible and suited to adopt and that the child is or will be authorised to enter and reside permanently in the receiving State.*

21. Articles 5 and 29 provide as follows:

Article 5:

*An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State -*

- a) have determined that the prospective adoptive parents are eligible and suited to adopt;*
- b) have ensured that the prospective adoptive parents have been counselled as may be necessary; and*
- c) have determined that the child is or will be authorised to enter and reside permanently in that State.*

Article 29:

*There shall be no contact between the prospective adoptive parents and the child's parents or any other person who has care of the child until the requirements of Article 4, sub-paragraphs a) to c), and Article 5, sub-paragraph a), have been met, unless the adoption takes place within a family or unless the contact is in compliance with the conditions established by the competent authority of the State of origin.*

22. The Report provides some assistance as to the intention behind these provisions, at paragraph [326] it states as follows

*'The procedures relating to the entrustment of the child to the prospective adoptive parents and the conditions to be met would necessarily occur before the adoption order, except in the case in which the two happened simultaneously. Thus, all the conditions for the placement of the child would have to be met either before or at the time of the adoption. Likewise, all the conditions for the transfer of the child would have to be met before the transfer and before or at the time of the adoption.'*

Further in paragraph [503] when considering the last part of Article 29 'under the conditions established by the competent authority of the State of origin' the Report states 'The idea behind the amendment is to grant flexibility and permit the setting of those conditions by the State of origin, either in general terms, by the legislator, or on a case-by-case basis, i.e. by the administrative or judicial authority, taking into account the particularities of the situation.'

23. Ms Cronin submits the combination of Articles 17, 5 and 29 make clear:

- (1) In accordance with Article 29 the child's State can sanction contact being arranged between the child and adopter in the case of adoption by relatives. In this case the competent authority has deferred to this court to set those conditions. This accords with paragraph [503] that such conditions can be done on a 'case by case' basis or in a kin adoption by administrative or judicial authorities.
- (2) Article 17 does not require that a child is placed or entrusted for adoption, its provisions focus on the conditions for and timing of any such entrustment.
- (3) Article 17 restricts an entrustment to a prospective adopter. This is different than the situation in this case, where she submits Mr X was not awarded guardianship as a prospective adopter. In Mr X's situation is a guardianship arrangement ordered at an earlier date, in different family circumstances at a time when Mr X would not be considered as a prospective adopter. This requires consideration of the term 'entrustment' and 'prospective adoptive parent'

## **Entrustment**

24. Paragraph [328] of the Report sets out why the term 'placement', which was in the original draft, was replaced by 'entrustment', it states as follows:

*'The change of the word "placement", used by article 17 of the draft, was decided by the group to avoid any possible confusion, taking into account its possible different meanings: in English, "placement" refers to the physical deliverance of the child to a person, while in French it may be understood either as the factual placement or in a legal sense, i.e. the transfer of the custody of the child to the prospective adoptive parents. Notwithstanding the persistence of some delegations all along the*

*Conference to insert the word "placement" in Article 17, as in other articles of the Convention, the term "entrustment" was maintained for the sake of clarity and because it offers the advantage that whoever does not understand its exact meaning will try to find it out and therefore obtain a satisfactory explanation.'*

25. The last part provides for some flexibility for individual States to apply their own interpretation to the term 'entrustment', which is consistent with the Convention's deferral to national adoption arrangements. The Hague Conference on Private International Law The Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: Guide to Good Practice Guide No 1 2008 states at paragraph [444] that '*Apart from the matters in respect of which the Convention establishes minimum standard and safeguards, the Convention does not require national adoption laws to be uniform. The Convention is designed to operate between systems having different internal laws relating to adoption*'. This position is re-enforced at paragraphs [504]-[505] which provides as follows '*This situation arises from the fact that the Convention is not designed to introduce a comprehensive uniform international code on adoption, but rather to set out the basic requirements necessary to ensure that intercountry adoptions take place in the best interests of the child and in particular with adequate safeguards to prevent abduction, sale of and traffic in children.*'
26. This position is echoed in the Report at paragraph [494] which states "*... for the sake of clarity, ... it is to be kept in mind that, beyond the regulation of the Convention itself, the Convention does not affect the law of the Contracting States, either the State of origin, the receiving State or any other Contracting State.*"
27. According to the extensive researches undertaken by Ms Cronin there appears to be only one other instance where the term 'entrustment' is used in the context of a child's status in relation to an adult. Article 40 of the 1996 Hague Convention concerns the administrative power of a State to issue to an individual a certificate confirming the capacity in which they are entitled to act in respect of a child. Article 40 (1) provides '*The authorities of the Contracting State of the child's habitual residence, or of the Contracting State where a measure of protection has been taken, may deliver to the person having parental responsibility or to the person entrusted with protection of the child's person or property, at his or her request, a certificate indicating the capacity in which that person is entitled to act and the powers conferred upon him or her.*' This article makes the distinction between '*a person having parental responsibility*' and '*a person entrusted with the protection of the child's person or property*'. No further elucidation of this is provided in the Explanatory Report in respect of the 1996 Hague Convention. The purpose of Article 40 is administrative, namely the provision of a certificate, which is distinct from Article 17 of the 1993 Hague Convention.
28. The term 'entrustment' has only been considered by the courts in this jurisdiction in limited ways. Prior to the introduction of the Children Act 1989, the mechanism by which a child could be committed to the care of a local authority was set out in section 43 Matrimonial Causes Act 1973, which provided as follows:  
  
*'Where...it appears to the court that there are exceptional circumstances making it impracticable or undesirable for the child to be entrusted to either of the parties to*

*the marriage or to any other individual, the court may if it thinks fit make an order committing the care of the child to [a local authority] ...'*

29. In *R v G and Surrey County Council* [1984] *FLR* 780 at 789 Sir John Arnold P held in respect of the term 'entrusted' that

*'By that verb I understand the section to be describing a state of affairs in which the parent or other individual is clothed with the totality of the responsibility for the upbringing of the child. Nothing short of that, in my judgment, amounts to entrusting the child to that parent or individual. Not only is that, in my view, the natural meaning of the words but in the context in which it finds itself, in a context which contrasts that entrusting with the committing of the child to the local authority, it seems to me inevitable that the largest interpretation must be given to the word 'entrust'.'*

30. This broader interpretation was supported in the subsequent case *Re L (Minors) (Access Order: Enforcement)* [1989] 2 *FLR* 359 Hollis J at p 361 cited *R v G* as authority for the proposition that *'the word 'entrusted' has a wider meaning than simply giving care and control'*.

31. More recently, the issue of 'entrustment' in the context of the 1993 Hague Convention arose in *London Borough of Haringey v MA and others* [2008] 2 *FLR* 1857 Charles J. That case concerned whether the decision to permit the child to live abroad with adopters, in accordance with the requirement under ACA 2002 that a prospective adopter and child live together for 10 weeks, amounted to 'entrustment' and would offend against the provisions in Article 17 if permitted prior to the requisite procedural steps having been undertaken.

32. At paragraphs [95]-[96] Charles J dealt with this issue as follows:

*'[95] To my mind "entrusted to prospective adopters":*

*i) has a meaning that relates the placement much more closely to the proposed adoption than giving or entrusting day to day care to potential adopters for the purpose of an assessment, and thus*

*ii) in English terms the concept equates to the making of a parental responsibility order under s. 84 ACA 2002, or a placement for adoption, with their respective consequences.*

*In both cases those consequences involve changes in status and the relationship between the child and the prospective adopters which can be assessed without reference to the detailed conditions precedent required by English law (or the laws of other Convention States) before such a step can be taken or order made.*

*[96] In my view this conclusion is supported by the desirability (if not the need) for the relevant Central Authorities to have information relating to an actual placement in which the potential adopters had been caring for the child before they reach the agreement referred to in Article 17(c) that the adoption can proceed.'*

33. In his analysis Charles J makes clear the term applies to parental responsibility granted or acquired with a view to adoption. Although this decision was appealed (*Re*

*A (A Child) [2009] 3 WLR 1169*) it did not interfere with the explanation given to this term by Charles J.

### **Prospective adoptive parent**

34. As Article 17 refers to *'entrustment to prospective adoptive parents'* it is necessary to consider when does a person become a *'prospective adoptive parent'*.
35. Although not defined in the 1993 Convention or the Report, the latter provides some context as to who would be entitled to qualify as a prospective adoptive parent, at paragraph [79] it states

*'The question as to the persons who could be prospective adoptive parents was discussed at length in the Special Commission, in particular whether the Convention should cover adoptions applied for by non-married persons of different sex cohabiting together in a stable manner, or by homosexuals or lesbians, living as a couple or individually. Notwithstanding the fact that these cases were thoroughly examined, the problems they raise may be qualified as false problems, since the State of origin and the receiving State shall collaborate from the very beginning and they may refuse the agreement for the adoption to continue, for instance, because of the personal conditions of the prospective adoptive parents.'*

36. This suggests that to come within this term the person concerned need not have been positively assessed as it is contemplated that there may be a refusal for the adoption to continue. This is supported by the terms of Article 5 (a) of the Convention, which provides that

*'An adoption within the scope of the Convention shall take place only if the competent authorities of the receiving State...have determined that the prospective adoptive parents are eligible and suited to adopt...'*

37. Ms Cronin submits, it is possible that a person who qualifies as a *'prospective adoptive parent'* may, in accordance with the provisions in the Convention, be deemed ineligible or unsuitable to adopt. Consequently, a *'prospective adoptive parent'* is a person who initiated the adoptive process in accordance with the Convention, namely an individual requesting an assessment pursuant to Article 15.
38. Ms Cronin submits such an interpretation is consistent with the approach to domestic adoptions in England. There is no statutory definition of a *'prospective adopter'* or any authority that seeks to define it but from the provisions of the ACA 2002 and Regulations made under that Act that a person becomes a prospective adopter when they initiate the adoption process. For example:
- i) Section 3ZA of the ACA 2002 refers to the functions of a local authority as including:
    - a) the recruitment of persons as prospective adopters;
    - b) the assessment of prospective adopters' suitability to adopt a child;
    - c) the approval of prospective adopters as suitable to adopt a child;
    - d) decisions as to whether a particular child should be placed for adoption with a particular prospective adopter;

- ii) Regulations 21 and 22 of the Adoption Agencies Regulations 2005 refer to a person as being a prospective adopter when they have '*notified an adoption agency that they want to adopt a child and the agency has notified that person that it has decided to proceed with the pre-assessment process in respect of that person*'.
39. Drawing the threads together Ms Cronin makes the following points:
- (1) The intention behind the safeguards provided by Article 17 was to prevent a child becoming unsettled by a placement/transfer to the prospective adoptive parents prior to the procedural steps required by the Convention having been completed and approved by both competent authorities.
  - (2) As paragraph [328] of the Report makes clear the term '*entrustment*' was used to allow for differences in interpretation between States.
  - (3) Within this jurisdiction, both as a matter of principle and in the context of the Convention, the term '*entrustment*' means a step more than conferring care and control of a child to an individual, but a legal step which has the effect of changing the status and relationship between the child and the prospective adoptive parent, namely the grant of parental responsibility.
  - (4) The wording of Article 17 makes it clear that the '*entrustment*' which is prohibited is '*entrustment*' to a person who is a '*prospective adoptive parent*', namely a person who has initiated the adoptive process pursuant to the Convention.
40. Ms Cronin submits against that background, and in the context of the discretion given in Article 29 for kin placements, Article 17 prohibits any changes in the status in the relationship between the child and the prospective adoptive parent between (a) the time at which the prospective adoptive parents initiates the adoption process (namely requesting an Article 15 assessment), and (b) the time at which the State of origin and the receiving State have agreed that the adoption may proceed (namely, the time of the Article 17 (c) agreement). Ms Cronin conveniently refers to this period as the '*entrustment window*'.
41. On this analysis the making of any order, or the taking of any steps, which has the effect of conferring parental responsibility upon a person during the '*entrustment window*' would offend against Article 17. This would include orders such as a child arrangements order. It would also include the formal step of placing a child with prospective adopters, whether by consent or pursuant to a placement order. Importantly, the making of a placement order would not offend against Article 17 as that alone does not confer parental responsibility upon the prospective adopters until the child is formally placed with them (s 25 (3) ACA 2002)
42. In the same way permitting a prospective adopter to care for a child would not offend against Article 17, without a change in legal status. To adopt any broader interpretation of '*entrustment*' would have wider ramifications. For example, it would render a child being cared for pursuant to the fostering Regulations by a person seeking to adopt them as being in breach of Article 17. Further it would also risk any period a child lives with a prospective adopter pursuant to s 42 ACA 2002 as being in breach of Article 17. Adoption policy and the process in this jurisdiction place

considerable importance on prospective adopters and the child living together as a ‘preliminary to adoption’, which the provisions are termed in ss 42 – 44 ACA 2002.

43. Ms Cronin submits the interpretation she contends is consistent with the intended purpose of Article 17, namely of protecting the child from significant legal steps being taken prior to the conclusion of the assessment process. Additionally, by limiting the scope of the ‘entrustment window’ it avoids the anomalous and illogical situation whereby a decision taken which changes an individual’s status in respect of a child in circumstances wholly unrelated to the adoption process do not result in a breach of the provisions in Article 17.
44. To support this analysis Ms Cronin provided a helpful table cross referencing this interpretation of Article 17 in respect of the Convention adoption process in differing circumstances to ensure such an interpretation survives such scrutiny, which it does.

### **The Applicant’s submissions applied to this case**

45. In the final part of her submissions Ms Cronin applies her analysis to the facts of this case. She submits
  - (1) The guardianship order made in 2015, which provided for Mr X’s current status in relation to Z, does not offend against Article 17 as it was not made at a time when Mr X was a ‘*prospective adoptive parent*’. Adoption was not then being contemplated; it was dealing with the tragic situation the family were presented with.
  - (2) Mr X still seeks the discharge of the guardianship order as whilst both he and Ms W do give consent to the adoption, Mr X is, in effect, giving consent to his own adoption application. It is considered that position, as a matter of principle, risks undermining the role of consent as a safeguard with the Convention adoption process.
  - (3) Mr X wishes to remove any suggestion of ‘taint’ and in the present health crisis it is submitted his preferred outcome is for Z to be made a ward of court, with care and control to Mr X and Ms W. This would only be for a relatively short period but Ms W’s continuing involvement enables the wider family to have a role in setting Z’s future if, pending the making of the adoption order, Mr X should be a casualty to the virus.
  - (4) Mr X’s position is relatively rare. Testamentary guardianship only arises where a child is orphaned and there are no birth parents to give consent.
  - (5) It is acknowledged there are other safeguards within the Convention adoption process but the rare situation, as here, where a testamentary guardian is a prospective adoptive parent in respect of a Convention adoption, the correct approach is to apply to the court to discharge the guardianship and for the child to be made a ward of court. This ensures there remains a legal framework governing the child’s relationship with the prospective adoptive parent and the need for consent to continue to operate as a meaningful safeguard, as it would be the court, as opposed to the prospective adoptive parent himself, whose consent is required.

## Discussion and decision

46. In considering the careful and cogent arguments advanced on behalf of the applicant, it is important to focus on the application the court is concerned with, namely, to revoke the testamentary guardianship order made in 2015.
47. The reason for that order being sought and made in 2015 was to provide Mr X and Ms W with legal status in relation to Z, following the unexpected death of Z's mother, Ms Y, and seeking to follow what were understood to be her wishes in the event of her death.
48. That guardianship order conferred parental responsibility on Mr X and Ms W by virtue of s 5 (6) CA 1989.
49. At that time, in 2015, there is no evidence that adoption was being considered. Over time it became clear that Mr X was in the best position to provide long term care for Z in the United States, and the only way that could be achieved was by way of a Convention adoption.
50. The Convention adoption process has a number of built in safeguards through the comprehensive assessments that have to be undertaken, the procedural requirements that need to be met and, finally, the criteria under Article 17, in particular for the agreement between the two States under Article 17 c) and that the requirements under Article 5 are fulfilled.
51. The application to revoke the testamentary is made on two basis:
  - (1) By giving consent to the adoption under Article 4, Mr X is giving consent to his own application to adopt and thereby such consent risks being tainted by that conflict and does not provide the usual safeguards provided by such consent.
  - (2) That by remaining a testamentary guardian Mr X risks not meeting the requirements under Article 17 that Z should not be '*entrusted to prospective adoptive parents*' until the requirements under Article 17 are met.
52. Taking each of those issues in turn.

## Consent

53. As was made clear by Munby P in *S & T* the plain reading of the Convention '*...leaves it to the domestic law of the State of origin to determine what, if any, consents are 'necessary'*'. As a matter of domestic law s 47 ACA 2002 requires the court to be satisfied that the child's parent or guardian consents to the making of the adoption order. In Z's situation this is Mr X and Ms W.
54. Article 4 provides the safeguards that such persons whose consent is necessary have been counselled as may be necessary, duly informed of the effects of their consent and such consents have not been induced by payment or compensation of any kind.
55. If this was a domestic adoption Mr X and Ms W's consent would still be required under s 47 ACA 2002 and, subject to the usual safeguards (such as ensuring such

consent is given freely and, where required, is in writing), it would not be considered to be invalid by virtue of the fact one or both of them are making the adoption application.

56. The Convention has safeguards in place (such as those in Article 4) and there is nothing in the Convention that undermines the validity of the consents to adoption that has been given by Mr X and Ms W, which are in accordance with Article 4.
57. This is supported by the comprehensive and entirely positive assessment that has been undertaken of Mr X regarding his suitability to adopt Z. As the author of the report in this case records, that recommendation is made '*without hesitation*'. That in itself provides a further safeguard, as if during that assessment process information became available to the person undertaking the assessment that suggested there was any taint to the consent such that it raised concerns about Mr X's suitability it would have been raised, possibly resulting in a negative assessment. This would mean the Convention adoption would be unlikely to proceed, as one of the key elements in the Article 15 report, namely Mr X's suitability to adopt, would not be met.
58. In those circumstances, whilst understanding the concern Mr X has about the consent he has given, those concerns are not shared by the court as his consent is valid under domestic law and the Convention, and there remain additional safeguards under the Convention.
59. An additional safeguard in this case is the position of Ms W. Her consent is required as well and has been given. If she had concerns about Mr X's suitability or otherwise her consent is unlikely to have been forthcoming.
60. Having reached that conclusion, I do not consider there is a basis for revoking the testamentary guardianship order under s 6 (7) (a) CA 1989. Both Mr X and Ms W will retain parental responsibility for Z until any adoption order is made, which meets Z's current welfare needs, as it has to date.

### **Entrustment under Article 17**

61. The second issue, although not directly put forward as a reason for the application to revoke the guardianship order, is the uncertainty that by remaining a testamentary guardian there is a risk that Mr X will not meet the Article 17 criteria as he could be considered to be a '*prospective adoptive parent*' who Z had been '*entrusted*' to before the relevant criteria are met under Article 17.
62. As set out above, the DfE as the Central Authority under the Convention, have notice of this application and are content for this issue to be determined by the court.
63. Article 17 seeks to restrict an entrustment of the child to prospective adoptive parents, which necessarily requires an analysis of what the terms '*entrustment*' and '*prospective adoptive parent*' mean in this context.
64. Ms Cronin submits '*entrustment*' in the domestic context, as set out most recently by Charles J in *London Borough of Haringey v MA and others*, makes clear the term applies to parental responsibility granted or acquired with a view to adoption. She

submits that is not the position here as the granting of the testamentary guardianship order in 2015, in the context of Ms Y's sudden death, when the immediate need for the family was to provide a structure for Z's care, was at a time when adoption was not considered as an option. I accept those submissions, which are supported by the factual evidence before the court.

65. Ms Cronin also submits that whilst '*prospective adoptive parent*' is not specifically defined in the Convention or the Report, the term is consistent with the processes within the Convention when a person initiates the adoptive process, which in practice will be the request for an assessment under Article 15. It is right, as Ms Cronin points out, this can include someone who may, during the process initiated by them, be considered ineligible or unsuitable to adopt.
66. I accept Ms Cronin's submissions in relation to this interpretation of '*prospective adoptive parent*'. It not only chimes with the structure of the Convention, as the initiating process is the request under Article 15 but is also consistent with the approach to domestic adoptions. As Ms Cronin points out, there is no domestic statutory definition of '*prospective adopter*' however her interpretation is consistent with the provisions in s3ZA ACA 2002 and Regulations 21 and 22 of the Adoption Agencies Regulations 2005, where persons are described as a '*prospective adopter*'.
67. I also accept Ms Cronin's final analysis as to what can take place during what she terms the '*entrustment window*'. That is the period between (a) the time at which the prospective adopter initiates the adoption process under the Convention (requesting an Article 15 assessment), and (b) the time at which the State of origin and the receiving State have agreed that the adoption may proceed under Article 17 (c). Ms Cronin's interpretation is supported by the following reasons:
  - (1) During this window Article 17 prohibits any changes in the status and relationship between the child and the prospective adoptive parent, which is consistent with its intended purpose of protecting the child from significant legal steps being taken prior to the conclusion of the assessment process.
  - (2) It does not prevent the prospective adoptive parent caring for the child during this window, providing there is no change in their legal relationship prior to the conclusion of the assessment process and the Article 17 (c) agreement being in place.
  - (3) Any broader interpretation of '*entrustment*' could risk preventing Convention adoptions in situations where the child is being cared for by the prospective adoptive parent during the assessment process which may have come about in an entirely unrelated way, such as in this case.
  - (4) By limiting the scope of Article 17 to the arrangements during the '*entrustment window*' avoids the situation whereby a decision that has been taken some years previously, which changes the individual's status in respect to the child in a wholly unrelated situation, would result in a breach of Article 17 and thereby risk the Convention adoption not being able to proceed.
68. For the reasons set out above, I refuse the application to revoke the testamentary guardianship order made in favour of Mr X and Ms W in 2015.