THE HIGH COURT

[2023] IEHC 785

RECORD NO: [REDACTED]

BETWEEN:

B. G.

APPLICANT

-AND-

J. C.

RESPONDENT

-AND-

C. C.

(suing by her next friend B.G. by order of the Court)

-AND-

D. C.

(suing by his next friend B.G. by order of the Court)

NOTICE PARTIES

Judgment of Ms. Justice Nuala Jackson delivered on the 14th day of December 2023.

1. This matter comes before me by way of an appeal from the Circuit Family Court and in particular the Order of that Court of the 26th October 2023. There is an appeal and a cross-appeal in this case extant before me, the other appeals in this case having already been previously dealt with. The appeal and cross-appeal before me relate to a declaration of parentage and certain parental responsibility orders in respect of twin children, C and D, born on the [REDACTED] 2021. The refusal of an Order for costs in favour of the Applicant father by the Court below is also before me, with the cross-appeal seeking the Applicant's costs before the Circuit Family Court. The Applicant also seeks his costs in respect of this appeal.

2. It should be noted that a representative from the Chief State Solicitor's Office appeared on the first day assigned for the hearing herein on behalf of the Attorney General and indicated that the Attorney General did not intend to participate in the hearing but that, for the purposes of section 35(9) of the Status of Children Act, 1987 ('the 1987 Act'), it was accepted that any declaration of parentage made would be binding upon the State. The Attorney General had been joined as a Notice Party in the proceedings by Order of the Circuit Family Court of the 28th November 2022 which Order was not appealed.

3. There were a considerable number of appeals brought before this court and, for clarity, it is important to list these and the current status thereof.

    I. [RECORD NUMBER 1] – motion to extend time to appeal the Order of the Circuit Family Court of the 21st December 2022 (appointment of section 32 assessor). This Order included an Order that the costs of the report of the assessor were to be borne on a 50/50 basis by the parties. The Master refused an extension of time to appeal. It is to be noted that there was no stay on this Order of the Circuit Family Court. I heard evidence that the Respondent had not complied with this Order in so far as all of the costs of the report had been discharged by the Applicant. It goes without saying that this Order remains good and effective and no application pertaining to it was before me. It should be stated that the Respondent did participate in the assessment and no complaint was made in this respect.

II. [RECORD NUMBER 2] – motion to extend time to appeal the Order of the Circuit Family Court of the 24th April 2023 (Order directing the taking of DNA samples in respect of the children). The Master refused an extension of time to appeal. It is to be noted that there was no stay granted on this Order of the Circuit Family Court. I heard evidence that the Respondent has not complied with this Order. The Respondent was written to by the Applicant's solicitors by letter of the 2nd May 2023 wherein the Applicant sought to progress such DNA testing. This was again raised by the Applicant's solicitors in correspondence on the 9th May 2022 and a further comprehensive letter seeking to make the appropriate arrangements for such testing was sent to the Respondent on the 10th May 2023. This letter was responded to by the Respondent by letter of the 17th May 2023 which, in its material parts, states:

"Since nothing at all turns on DNA testing here – my entitled answer to your requirement recently notified is – NO.

I have 100% Family Law Rights in my single parent family – of three only 24/7, 365 days per year and wherever my children are, I have 100% right to be with them.

We are a single parent family and your client's sole role/function is assistive at height like the ovum donor and both he and she must respect myself as the sole parent in my family neither the sperm provider or the ovum provider to the laboratory based procedure out of this jurisdiction is validly named as family with myself.

All dealing with each donor is at arm's length and if your client has been misled here as alleged, he has sole responsibility for such, seeking to attach that responsibility to myself is entire error."

4. It is fair to say that this letter clearly demonstrates the decision of the Respondent not to comply with the directions of the Court in relation to DNA testing. It is important to have regard to the Order of the Circuit Family Court in this regard. The Respondent was not herself being required to provide samples for testing. The obligation upon her was to facilitate the taking to DNA samples from the children the subject of the within proceedings. Samples were only required from the Applicant and the children. The involvement of the Respondent was simply to facilitate this and to consent to the taking of such samples in her role as the lawful mother and, at that time and to date, sole legal

guardian of the children. However, this was an Order for the benefit of the children. This was an Order which was aimed at providing to the Court below (and, if necessary, to this Court) scientific evidence in relation to the parentage of the children. In circumstances in which the origins and background of children are an important issue in their identity and where the DNA testing was clearly to provide pertinent evidence in relation to the children in the context of the issues to be determined, it is most concerning that the Respondent saw fit to unilaterally deny the children of their entitlement to have their parentage and origins definitively determined. In this regard, I am concerned that the lawful mother and currently sole guardian of the children would thus impede the gathering of evidence in respect of parentage and this is particularly so in light of the factors which this Court (and the Circuit Family Court) are legislatively mandated to have regard to in the determination of the best interests of children and, in particular, Section 31(2) (a) and 31(2)(j) of the Guardianship of Infants Act, 1964 (as amended).

> *"(2) The factors and circumstances referred to in subsection (1) include:*
>
> *(a) the benefit to the child of having a meaningful relationship with each of his or her parents and with the other relatives and persons who are involved in the child's upbringing and, except where such contact is not in the child's best interests, of having sufficient contact with them to maintain such relationships;*
> *...*
>
> *(j) the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and his or her relatives;"*

5. Of course, the law in relation to testing of this nature is very clear. Section 38 of the 1987 Act provides that a court may give directions in relation to testing in any civil proceedings and this may be done by the court in question of its own motion or upon application. Section 39 of the 1987 Act considers the issue of consent. The consent of

the Appellant was required (section 39(3)(a) of the 1987 Act). She chose not to give this consent.

6. Section 42 of the 1987 Act is clear that attendance for testing or consent to testing cannot be forced but, in the event that Court Orders in this regard are ignored, the Court may make inferences. The relevant statutory provisions in the present case is sub-sections (1) and (4) of this section:

> *"42.—(1) Where a court gives a direction under section 38 of this Act and any person fails to take any step required of him for the purpose of giving effect to the direction, the court may draw such inferences, if any, from that fact as appear proper in the circumstances.*
>
> *(2) Where in proceedings on an application under section 35 of this Act a court gives a direction under section 38 of this Act for the taking of blood samples then, if any person named in the direction fails, within such period as may be specified by the court, to take any step required of him for the purpose of giving effect to the direction, the court may dismiss the application.*
>
> *(3) Where in any civil proceedings in which the parentage of any person falls to be determined by the court hearing those proceedings there is, by virtue of section 46 of this Act, a presumption of paternity relating to such person, then if—*
>
> > *(a) a direction is given under section 38 of this Act in those proceedings, and*
> >
> > *(b) any party who is claiming any relief in the proceedings and who for the purpose of obtaining that relief is entitled to rely on the presumption fails to take any step required of him for the purpose of giving effect to the direction,*
>
> *the court may adjourn the hearing for such period as it thinks fit to enable that party to take that step, and if at the end of that period he has failed without reasonable cause to take it the court may, without prejudice to subsection (1) of*

this section, dismiss his claim for relief notwithstanding the absence of evidence to rebut the presumption.

(4) Where any person named in a direction under section 38 of this Act fails to consent to the taking of a blood sample from himself or from any person named in the direction whom he has charge of or control over, he shall be deemed for the purposes of this section to have failed to take a step required of him for the purpose of giving effect to the direction.'

7. In the circumstances of this case, therefore, the Court below was entitled, and this Court may likewise make inferences from the Respondent's non-compliance with the Order of the 24th April 2023. I will deal with this matter further hereinafter.

III. [RECORD NUMBER 3] – this was an appeal from the Order of the Circuit Family Court of the 17th July 2023 giving liberty to the Applicant to amend the Family Law Civil Bill. This procedural appeal was dealt with by me on the 29th November 2023 and Orders were made by me at that time. I dismissed the appeal in relation to the amendment of the Civil Bill and, having regard to the welfare of the children, the need for expedition in this matter having regard to the Civil Bill herein having issued on the 21st day of February 2022 and having regard to the fact that the Applicant was, inter alia, seeking parental responsibility orders and had not seen the children (save for a very brief period in the context of the section 32 assessment) since February 2022 and having regard to the provisions of section 35(1B) of the Status of Children Act, 1987 (as amended), I joined the infant children as Notice Parties in the within proceedings. I indicated that it was my view that as the lawful mother and sole guardian of the children, the Respondent was the appropriate next friend for the children. I indicated that I was satisfied that all arguments in relation to the welfare of the children would be advanced by either the Applicant and/or the Respondent (and the Court also had the benefit of a section 32 report) and in consequence the interests of the children would be fully addressed and articulated. The Respondent then indicated that she wished to seek legal advice as to whether or not she would consent to being the next friend for her infant children. I therefore afforded her until close of business on the 30th November 2023 to decide whether she wished to assume this role or not and, if not, that the Applicant would be

appointed next friend for the children (as he had agreed to be in the amended Civil Bill). It remains unclear to me whether the Respondent wishes to assume the role of next friend or not but it is my view that if one wishes to be a next friend for a minor who's interests require to be protected in litigation, it is a fundamental and primary pre-requisite that the next friend be present at the proceedings (or make the requisite application for an adjournment) and that there is an appearance by her or on her behalf. Given that the Respondent determined not to appear in the within proceedings when listed for hearing on Tuesday, Wednesday and Thursday (5th, 6th and 7th December 2023), it was my view that she clearly was not accepting the role of next friend and therefore the matter proceeded with the children as Notice Parties to the proceedings, with the Applicant as their next friend as provided for in my Order of the 29th November 2023. Appeal number 2023/50CA was fully dealt with on the 29th November 2023.

IV. [RECORD NUMBER 4] – this is an appeal from the Judgement of the Circuit Family Court of the 16th August 2023. Judge Hutton in the Circuit Family Court provided a written judgment on that date, which judgment was subsequently converted into an Order of the Circuit Family Court of the 26th October 2023. The Order mentioned is the Order reflecting the terms of the judgment. It is the Order and not the judgment which it is necessary and appropriate to appeal. The judgment is a narrative of the evidence heard, the facts determined, the orders made and the reasons for so doing. It is the consequent Order, which is appealed, if any party to the proceedings so wishes. Therefore, this appeal was struck out by me in circumstances in which the substantive appeal was from the Order of the 26th October 2023, referenced hereinafter.

V. [RECORD NUMBER 5] – this was a motion for a stay on the Order of the Circuit Family Court of the 26th October 2023. I heard this motion on the 15th November 2023 and I granted a stay on the basis that there were arguable grounds of appeal and a hearing date had been fixed for the appeal (5th, 6th and 8th December 2023) which hearing date was in early course. The stay was granted only to the 5th December 2023 with liberty to the Applicant to re-open the matter at that time if

required. As the Respondent did not attend Court on the 5th December 2023 when the motion was again listed and it was her motion, this motion was struck out on that date.

VI. [RECORD NUMBER 6]– this was the substantive appeal and cross-appeal from the Order of the Circuit Family Court of the 26th October 2023. These matters proceeded for hearing on the 5th December 2023 and thereafter. It is to this appeal and cross-appeal that this judgment relates.

NON-APPEARANCE OF THE RESPONDENT

8. It is a matter of concern to me that the Respondent did not appear at the hearing herein. I made an *ex tempore* ruling in this regard on the 6th December 2023. I believe it appropriate that I refer to this matter further in the context of this judgment. The matter appeared in the weekly callover on the 4th December 2023 at which time, it is my understanding, Counsel (instructed by a solicitor) appeared on behalf of the Respondent (although there was no formal appearance entered by the solicitor concerned). A short, vague and non-specific medical report from a general practitioner was provided to the Court and an adjournment sought which was refused. Therefore, the matter was proceeding on the 5th December 2023 although, obviously, the application for an adjournment could be repeated at that time. The same medical report was submitted by email early in the morning of the 5th December 2023. There was no appearance by or on behalf of the Respondent on that date. The hearing was delayed as I requested that the solicitor who had appeared at the callover be contacted in order to ascertain if he was instructed in this matter. It transpired that he was not. The hearing was then adjourned to 11 am on the 6th December 2023 with the Respondent being communicated with and informed that, if an application for an adjournment was being advanced at that time on medical grounds, the doctor in question would have to be available to the Court and facilities for a remote hearing of the Respondent and/or the doctor in this context were arranged and log in details provided to the Respondent. Despite remote facilitation, there was no appearance by the Respondent or on her behalf and no evidence was called by her or on her behalf in support of an adjournment application. It is perplexing and not a little disrespectful to the Court that this position

of no, even remote, appearance pertained notwithstanding continual email communication being received from the Respondent and the Court being informed that the Respondent was in a position to attend at the surgery of her General Practitioner. In these circumstances, the hearing proceeded. It should be noted that the Respondent retained a stenographer for the purposes of applications before the Court (and also, I understand, before the Circuit Family Court). The entitlement of litigants in respect of stenography services was addressed by Cooke J. in ***Tracey v. Malone*** [2009] IEHC] 14 at para. 16 where he stated:

> *"16. At the hearing of the present application the court expressed the view that the applicant did not need any permission from the District Judge to be accompanied at a case heard in open court by a person to take notes on his behalf whether that person was a professional stenographer retained at his own expense or a gifted amateur able to provide a verbatim note. Subject only to the general entitlement and duty of the judge to ensure the orderly, fair and efficient conduct of the proceedings, no permission of the court was required. Counsel for the Director of Public Prosecutions concurred in this proposition."*

The pertinent word in this dictum is "accompanied". As indicated in *Delany and McGrath on Civil Procedure, 4th Ed., 2018* and para. 21-40:

> *"…, it is open to a party to have a stenographer present to record the evidence and produce a transcript which can then be used for the purpose of cross-examination and closing submissions."*

The purpose of a stenographer is not one of representation or court surveillance for the non-attending litigant.

9. Likewise, absent the attendance of the Respondent, there was no role or function for the "McKenzie friend" who had been appointed by the Circuit Family Court and previously attended with the Respondent before me. As clearly explained in *Delany and McGrath* at para. 6-182:

> *"The term "McKenzie friend" derives from a decision of the English Court of Appeal in McKenzie v. McKenzie, in which Davies LJ cited with approval the*

following obiter comment from the judgment of Lord Tenterden in Collier v. Hicks:

> *"Any person, whether he be a professional man or not, may attend as a friend of either party, may taken notes, may quietly make suggestions, and give advice; but no one can demand to take part in the proceedings as an advocate, contrarr to the regulations of the court as settled by the discretion of the justices.""*

MATTERS FOR HEARING

10. The appeal of the Respondent herein is in respect of the whole of the Order of the 26th October 2023. The appeal of the Applicant is from part only of the said Order relating only to (a) the refusal of the Circuit Family Court to appoint the Applicant a guardian of the children and (b) from the refusal by the Circuit Family Court of an Order for costs in favour of the Applicant. As the Respondent did not appear to prosecute her appeal, the Orders below were affirmed (save to the extent that modification is required due to the passage of time and limited other modifications which I believe to be required based upon the welfare of the children and save to the extent that such Orders were subject to a cross-appeal). In this regard, there were three relevant Orders under appeal by the Respondent:
    a. An Order pursuant to section 35 of the Status of Children Act, 1987 (the 1987 Act) declaring the Applicant, [redacted], as the father of the infant children, C, born on the [redacted] 2021 and D, born on the [redacted] 2021;
    b. An Order pursuant to Section 11 of the Guardianship of Infants Act, 1964, that the Applicant, [redacted], shall have joint custody of the infant children, C, born on the [redacted] 2021 and D, born on the [redacted] 2021. The Respondent to have primary care and control of the said infant children;
    c. An Order pursuant to Section 11 of the Guardianship of Infants Act, 1964 giving the Applicant, [redacted], access to the infant children, C and D, in accordance with the recommendation set out in the Report of [redacted].

11. There were two relevant Orders the subject of a cross-appeal by the Applicant:

' a) The refusal of the Her Honour Judge Kathryn Hutton to appoint the Applicant, [redacted], as Guardian to the infant children, C, born on the [redacted] 2021, and D, born on the [redacted] 2021.

b) The refusal of Her Honour Judge Kathryn Hutton to make an Order for the Applicant's Costs as against the Respondent in relation to Circuit Court Proceedings.'

12. I will deal first with the Orders the subject of the appeal. The circumstances in which the Respondent did not engage with the hearing have been recited hereinbefore. In these circumstances, her appeal was struck out and the Orders of the Circuit Family Court affirmed although some small changes are necessary for reasons set out at 10. above.

(a) While I have affirmed the Declaration of Parentage of the Applicant having regard to the non-prosecution of her appeal by the Respondent, as this is a status matter, I asked that evidence in relation to this matter be adduced by the Applicant before me. The burden of proving parentage would be on the Applicant and the standard of proof is on the balance of probabilities (section 35(8) of the 1987 Act). I am satisfied, based on the evidence adduced before me, to make such a Declaration in favour of the Applicant. I do so based upon:

- The inferences that I am entitled to draw from the failure on the part of the Respondent to comply with the Orders in relation to DNA testing for the children;
- The evidence of the sister of the Respondent that it was a well-recognised assumption by all in the Respondent's community that the Applicant was the father of the children;
- The contemporaneous messages which passed between the parties in the context of the conception of the children. These messages were opened to me at length, and they do seem to support the genetic link between the Applicant and the children. In this regard, I make specific reference to:
  (i) The continued involvement of the Respondent in the process, an involvement which exceeded that which would be required if he was a mere sperm donor;

(ii) The tone and content of messages which indicated that the parties were embarking on a joint endeavour including in messages with third parties. I make reference in particular to the emails to the clinic from the Respondent (and the Applicant) of on or about the 15th January 2020 – "*[The Applicant] is 100% on board and willing to do whatever it takes! We are 100% committed to baby [G] one way or the other*";

(iii) The numerous references to the child/children using the surname of the Applicant;

(iv) References by the Applicant in messages to himself and the Respondent as "*parents*" which messages were not contradicted by the Respondent;

(v) The messages indicating the involvement of the Applicant in the selection of the egg donor;

(vi) Perhaps, most compelling, the message from the Respondent in April 2021, "At the time I thought you would be such a nice man to be the dad we can do it!!" and the exchange in May 2021, "I am so lucky u agreed to this" followed by "No we are both lucky that we found someone who wants the same thing.", followed by an exchange in June 2021, "*Did you see that dads not allowed in coombe … I am having it in the street so!!!! There is no way I am going in on my own*" followed by "*Lol, it might have changed by then*" and a few days later in June 2021 from the Respondent to the Applicant, "*I put u down as next of kin and they say relationship I put down father but your not my father*";

(vii) The Respondent sought to place reliance on a reference by the Applicant in a text message, exhibited in her Affidavit of the 27th April 2022, to himself as 'a donor'. The context of this text message was entirely satisfactorily explained in oral evidence by him (relating to a food allergy and the impact that eating such food might have on his wellbeing) but, additionally, it must be remembered that the Respondent on occasions referred to herself as an "oven".

- The evidence of the expert assessor both orally and in her report, in relation to the narrative of both parties to her in relation to the issue of the parentage of the children.

13. I am of the view that the Applicant has proved parentage of the children on the balance of probabilities. This is what the law requires of him. If the Respondent sought to contest this evidence, it was open to her to co-operate with the scientific testing. She chose not to do so.

14. In this context, it is perhaps an appropriate time to set out the somewhat unusual background circumstances in this case. The Respondent is an unmarried person who was desirous of having a child or children. The Applicant, at the time of conception, was a single man in a homosexual relationship with a long term partner who he has since married. This is where agreement between the parties ends. The Applicant contends that he too was desirous of having children and that there was a co-parenting agreement from which the Respondent resiled. The Respondent contends (in her Affidavits) that the sole role of the Applicant was to provide genetic material (sperm) to enable conception and that it was never envisaged that he would have an ongoing role in the lives of the children. The nature of the arrangement between the parties is a focus of huge acrimony and descension between them. It is common case that there was no written agreement between them as to what their respective roles were intended to be after the birth of the children. This is what significantly distinguishes this case from ***McD v. L*** [2009] IESC 81. Additionally, there is no genetic link between the Respondent and the children, donor eggs having been used for conception. For the avoidance of doubt, on the evidence received by me, I am of the view that prior to and at the initial stages of the pregnancy, it was envisaged by all concerned that the Applicant would have an ongoing, hands on, role in relation to the child/children if conception was achieved. There is also no doubt that the position of the Respondent at least fundamentally altered over time. I am reminded of the dictum of Geoghegan J. in ***McD v. L*** wherein he reflected upon the difference between making arrangements for the conception of a child "in the cold light of day" and the birth of a child.

15. The issue of parentage under Irish law is well established. The woman who gives birth to a child is the lawful mother of that child regardless of whether or not there is any genetic link between them. The man who provides the genetic material (sperm) for the conception of a child is the father of the child under Irish law but the circumstances pertaining will dictate if he has parental rights and the nature of same. Where these parties are married, they are joint guardians of the child. Where they are not married,

the lawful mother is the sole guardian while there are a variety of routes by which such unmarried father may become or be declared to be a guardian to a child including by a consent process. The statutory right to apply route is the applicable one in the current circumstances. Therefore, whatever the arrangements between the parties in the context of the conception of the children or thereafter, the manner in which parentage is derived is straight forward in the current circumstances. The Respondent has sought to argue that, as a mere donor of genetic material, the Applicant is not the lawful father of these children and is not entitled to a consequent declaration of parentage. This argument might be pertinent if the provisions of Part II of the Child and Family Relationships Act, 2015 applied but they do not. The provisions of that part are not complied with in this case for a number of reasons including the absence of necessary consents and the fact that the DAHR procedure was undertaken outside Ireland in Ukraine. Thus, the Applicant is entitled to a declaration of parentage if he can show his genetic link with the children. On the evidence before me, I am satisfied that he has done so. It is important to note that this declaration of parentage is a scientific matter, unrelated to the welfare of the children.

16. The next Orders are the parental responsibility-type orders. In the circumstances, I am affirming these orders, subject to revision based on changed circumstances since the preparation of the section 32 report and/or since the date of the hearing before and judgment of the Circuit Family Court and save to the extent that the best interests of the children, on the evidence before me, otherwise dictate. The Order of the Circuit Family Court granted joint custody to the parties with primary care and control to the Respondent and access to the Applicant in accordance with the recommendations set out in the report of the expert assessor dated the 8th February 2023. The legal principles applicable to matters of custody and access are the best interests of the child as provided in section 3 of the Guardianship of Infants Act, 1964 as amended (the 1964 Act):

> *"**3.**— (1) Where, in any proceedings before any court, the—*
>
> *(a) guardianship, custody or upbringing of, or access to, a child, or*
>
> *(b) administration of any property belonging to or held on trust for a child or the application of the income thereof,*

is in question, the court, in deciding that question, shall regard the best interests of the child as the paramount consideration.

(2) In proceedings to which subsection (1) applies, the court shall determine the best interests of the child concerned in accordance with Part V."

17. The relevant factors to be taken into account in determining such best interests are recited in section 31 of the 1964 Act. I have taken these factors into account herein in so far as applicable and specifically relevant issues have been inserted after each factor:

*"**31.** (1) In determining for the purposes of this Act what is in the best interests of a child, the court shall have regard to all of the factors or circumstances that it regards as relevant to the child concerned and his or her family.*

(2) The factors and circumstances referred to in subsection (1) include:

(a) the benefit to the child of having a meaningful relationship with each of his or her parents and with the other relatives and persons who are involved in the child's upbringing and, except where such contact is not in the child's best interests, of having sufficient contact with them to maintain such relationships;

The importance of children having a meaningful relationship with both parents has oft been repeated and requires no elaboration. In this case, the report and recommendations of the expert assessor dealt with this in detail. Having heard the evidence of the Applicant, I have no doubt that he is a committed parent, wants only the best for the children and that his participation in the children's lives will give them considerable benefit. It is also clear from the evidence that the Respondent is oppositional to this relationship and has failed to facilitate it. She has diminished same and appears not to understand the importance of children having positive engagements with both parents. It is hoped that she will come to see the importance of this.

(b) the views of the child concerned that are ascertainable (whether in accordance with section 32 or otherwise);

The children here are of tender years and their views are, as such, not ascertainable.

(c) the physical, psychological and emotional needs of the child concerned, taking into consideration the child's age and stage of development and the likely effect on him or her of any change of circumstances;

I had the benefit of the report of the expert assessor in this regard and, in addition, I heard oral testimony from the Applicant. I also saw photographs of the Applicant and the children from the time shortly after their births when they did have contact with him. All of these factors support arrangements for the development of a meaningful relationship between the children and their father being put into operation as soon as possible.

(d) the history of the child's upbringing and care, including the nature of the relationship between the child and each of his or her parents and the other relatives and persons referred to in paragraph (a), and the desirability of preserving and strengthening such relationships;

The pre-birth circumstances here are somewhat unusual but I am mindful of the mandate of the Supreme Court in ***McD v. L*** that it is entirely inappropriate for me to moralise. Both parents were involved with the children in the immediate aftermath of their birth and the relationships of both parents with the children at that time appears entirely appropriate. The relationship between the Respondent and the children has been permitted to continue to develop but, through the unilateral decision and actions of the Respondent, the children's relationship with their father has been severely curtailed. It is important on the evidence before me that the relationship between the children and their father be revived, preserved and strengthened.

(e) the child's religious, spiritual, cultural and linguistic upbringing and needs;

There is no indication in the evidence I have heard herein of any significant difference in religious, spiritual, cultural or linguistic

circumstances between the parents of these children. Indeed, I considered the social 'chat' and engagement between them prior to the conception of the children and their social and cultural similarities appeared obvious.

(f) the child's social, intellectual and educational upbringing and needs;

On the evidence I have heard, it appears to me that both parents have much to offer the children in this regard.

(g) the child's age and any special characteristics;

In this context, I am conscious of the long period which has elapsed since there was contact between the Applicant and the children. I am also conscious of the very real attachment issues which arise in the context of the children being denied the opportunity to develop a relationship with their father.

(h) any harm which the child has suffered or is at risk of suffering, including harm as a result of household violence, and the protection of the child's safety and psychological well-being;

There were concerns expressed at the hearing herein in relation to the caring abilities of the Respondent. I deal with this in some detail hereinafter. There have been allegations and criticisms made of the Respondent and her maternal abilities. Some of these have involved anonymous complaints to the relevant authorities. I am mindful of the challenges which the Respondent undoubtedly faced in the context of being an older mother and a single parent with a multiple birth. I am mindful that anonymous and quasi-anonymous complaints in this regard can make the parenting and primary carer role more difficult. The evidence before me, however, indicates that the Respondent appears to have fully co-operated with all agencies who reacted to these allegations and all of these independent agencies concluded that there was no deficit in her caregiving. It was the Respondent who secured the case notes from the relevant authorities and provided them to the expert assessor.

(i) where applicable, proposals made for the child's custody, care, development and upbringing and for access to and contact with the child, having regard to the desirability of the parents or guardians of the child agreeing to such proposals and co-operating with each other in relation to them;

No such proposals have been made by the Respondent. I have had regard for the proposals made by the Applicant. I have also had regard to the recommendations of the expert assessor. In relation to the latter, I am also conscious that the children concerned in this case are of tender years and the report of February 2023 has not been updated since that time. In this context, the time which has elapsed since the preparation of the report is approximately 40% of the children's lives. It would have been most useful to have even a brief overview assessment more contemporaneous to the hearing.

(j) the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and his or her relatives;

This is a significant issue in this case. The Respondent is oppositional to contact. The importance of the blood link between parent and child has been referenced by the Supreme Court in the ***McD v L*** case. This is not an overriding but is a very relevant matter. The importance of identity is well recognised internationally and is amply evidenced in the report of the expert assessor herein. In addition, absent contra-indicators, it is clearly beneficial to children to have the benefit of the care and company of two loving parents and to have the opportunity to develop a full, loving and functional relationship with both. There are no contra-indicators here. I must, therefore, having regard to the welfare of the children and their best interests, make orders which will promote the children's entitlement to a relationship with both parents.

(k) the capacity of each person in respect of whom an application is made under this Act—

(i) to care for and meet the needs of the child,

(ii) to communicate and co-operate on issues relating to the child, and

(iii) to exercise the relevant powers, responsibilities and entitlements to which the application relates."

I believe that both parents here have capacity to parent. My concerns relate to their abilities to parent together whether as co-parents, parallel parents or simply two parents respectful of each other and of their role in the children's lives. There is undoubtedly work to be done by both and efforts to be made. However, this is their duty and responsibility as parents and I urge them to use their best endeavours in this regard for the well-being of the children.

18. The Court was assisted by a report prepared under section 32(1)(a) of the 1964 Act. It should be noted that a report under section 32(1)(b) of the 1964 Act was also ordered herein by Order of the Circuit Family Court of the [redacted] 2022, but it is difficult to understand how a report to ascertain the wishes of the children could be envisaged or prepared where the children concerned were but four days past their first birthday when the Order was made. The report of the expert assessor has been of assistance, but it must be stated would have been of greater assistance had it incorporated a home visit or visits (to both parties), had greater corroboration been pursued from independent third parties (always being mindful of evidential challenges which said inquiries may give rise to at hearing) and had there been greater detail on direct observation of the caring behaviours of the Respondent. I was also concerned about the antiquity of the report and the ability to make updated recommendations having regard to the lack of assessment update.

19. Having regard to the foregoing, I affirm the Order in respect of joint custody of the children to the parties and granting primary care and control to the Respondent. I do so by way of interim orders for reasons set out hereinafter. I have determined that the best interests of the children are served by the following interim Orders being made in

respect of access to the Applicant (subject to review as provided for hereinafter) pursuant to section 11 of the 1964 Act:

1. Contact between the children and their father needs to resume as soon as possible and to be such as provide them with ample opportunity to develop a relationship and secure attachment with their father;
2. I am concerned about having a multiplicity of assessors involved in this case and it seems to me to be appropriate that there would be a psychological assessment of the Respondent, but this should take place in the context of the overall review assessment, and in this context, it is my view that such review assessment should be undertaken by a psychologist. This will enable the psychological assessor to observe all relevant persons and the children. I will hear submissions from the parties as to who should be appointed in this regard. It is important that this review assessment and report would be available by the review date provided for hereinafter. The costs of this review assessment and report must be borne by the parties equally;
3. A daily access schedule for a number of hours per day, on a number of consecutive days should commence straight away. It is envisaged that this Order will commence on the 16th December 2023 and there should be five days of daytime access on five consecutive days between that date and the 23rd December 2023. A similar arrangement can occur between the 27th December 2023 and the 3rd January 2024. This daytime access should take place at the Applicant's parents' home in [REDACTED]. The precise dates are for the Applicant to select, and these may be transmitted by email to the Respondent at the address usually used by her;
4. I have been told that the work schedule of the Applicant does not now involve shift work and he has regular time off at weekends. This means that a more regular access schedule may operate. In this regard, from the weekend of the 5th January 2024, I am ordering a four week schedule as follows:

   Week 1 – Friday 3 pm to Sunday 3 pm;

   Week 2 – at the option of the Applicant, Friday 3 pm to Saturday 3 pm or Saturday 3 pm to Sunday 3 pm (the same each week 2 but as chosen by the Applicant);

   Week 3 – Friday 3 pm to Sunday 3 pm;

   Week 4 – no access.

20. The Respondent is a person who is in full time employment and also is caring for two children of tender years. In these circumstances, it is appropriate that the children have some weekend time with her and she with them. In addition, I am of the view that the welfare of the children dictates that they should have one weekend in four when they are in their primary home or elsewhere with their primary caregiver. There is to be no locational curtailment on the Applicant for these weekend visits.

21. The collection and return point should be a garda station which is open 24 hours. I will hear from the parties as to an appropriate station. I hope that within a short time the parties will be able to agree another arrangement for collection and return which is more child appropriate (particularly as the children get older and develop a greater awareness of their surroundings) but, regrettably, a garda station seems the appropriate option for the moment. The drop off/collection may be by the child minder of the children if the Respondent so desires.

22. It is my understanding that the Respondent has fixed days upon which she works. The report of the expert assessor indicates that she works on Mondays and Wednesdays. This may have altered since the date of the said report, but her work commitments may be clarified. On these days, the Applicant is to be entitled to such daytime access as he wishes, consistent with the Respondent's work hours, this to take place in [REDACTED]. The hours during which the Applicant wishes to avail of access on these occasions should be communicated to the Respondent by email to her usual address.

23. This matter will be listed before me for review in the [REDACTED] week of March 2024, I suggest the Friday of that week.

24. The children should not be removed from the jurisdiction without the consent of the parties or by Order of the Circuit Family Court and the *in camera* rule is lifted to allow the garda, port and airport authorities to be informed of the making of this Order.

25. If passports are obtained for the children, they are to be held by the solicitors for the Applicant and I lift the *in camera* rule to so inform the Department of Foreign Affairs/Passport Office. I make this Order pursuant to section 12A of the 1964 Act.

26. I direct that if the children miss access due to illness, missed access is to be compensated with additional access.

27. It is recommended that both parties complete a Parenting When Separated course. I also recommend that the Respondent consider the merit of engaging in personal counselling at this time.

28. I am ordering that a psychologist be appointed to undertake a section 32(1)(a) review report, such report to be available in advance of the March 2024 review date. The said psychologist to be provided with such part or whole of the report of the current expert assessor as the psychologist considers to be required. If required, I lift the *in camera* rule to this end.

29. I grant liberty to apply.

THE CROSS APPEAL

(A) GUARDIANSHIP

30. I have been assisted by the decision of ***R.C. v I.S.*** [2003] 4 IR 431 (Finlay Geoghegan J.) and the dicta therein opened to me by Counsel for the Applicant in relation to the definition of "guardianship" –

> *"Guardianship and custody are two different concepts under Irish law. In Shatter's Family Law (4th ed.) at p. 531 it is stated:-*
>
> > *"Guardianship describes the group of rights and responsibilities automatically vested in the parents of a child born within marriage and in the mother of a child born outside marriage in relation to the upbringing of the child. ... Guardianship encompasses the duty to maintain and properly care for a child and the right to make decisions*

about a child's religious and secular education, health requirements and general welfare. The right to custody of a child is one of the rights that arises under the guardianship relationship."”

31. I have considered the report of the expert assessor in some detail in this regard, and it is clear from this that, despite a number of reports to Tusla, the provenance of which caused me some concern, the statutory and public authorities charged with the safety and welfare of children were of one voice. In this regard, I note the following:

    A. There was an anonymous referral to Tusla on the 24th April 2022. Tusla concluded: "Case closed following IR, no harm evidenced."
    B. A planned home visit on the 27th April 2022 concluded there were no concerns arising. The expert assessor states: *"It was clear from the content of the case notes that there were no concerns in relation to [the Respondent's] parenting of the children."* Indeed, the section 32 report narrative states: *"The social worker also commented within the case notes that she observed [the Respondent] 'to dote over her babies' and stated 'her face lit up as she spoke about them and show the social worker pictures.' It was also noted that [the Respondent] was keen to seek advice from the public health nurse. The case note concluded 'SW left home visit with zero child protection concerns for C and D, appears this referral may be caused by ongoing acrimony and court issues"*
    C. There was a further referral on the 27th September 2022. A variety of allegations were made against the Respondent. However, the expert assessor's report, at Paragraphs 144 - 146 records:

    "144.0 A case note recorded by Mr. Marc Byrne dated the 10th of October, noted that Ms. [redacted], Public Health Nurse, had no concerns for C and D. [The Respondent] was reported to be appropriate and attended all appointments. Whilst 'the twins weight was down at the last check-up, however this was not a concern and can be normal in premature babies'. It was noted that the public health nurse had advised [the Respondent] to commence the twins on solid foods and gave her ideas around meals and a food plan. As [the Respondent] was feeding the twins 'twelve ready-made formula milk bottles a day' [the Respondent] Was advised to feed the twins powder formula as the ready-made bottles are expensive.

145.0 A further case note of Mr. Marc Byrne, dated 18th of October 2022, noted that the social worker informed the public health nurse, [redacted], that there are not concerns following home visit. It was noted that a referral was completed to the Community Mother's Programme. As noted earlier, [the Respondent] has spoke positively of the support she receives from this programme. It was noted in a separate case note of Mr. Marc Byrne, Team Leader, that a home visit had been completed. It was recorded that the 'case will close following intake'.

146.0 [The Respondent] has provided ninety pages of Tusla case notes that she secured through a Freedom of Information request. According to the case notes dated the 7th November 2022 written by Ms. O'K, Social Worker, of Tusla's intake team in [redacted], the public health nurse ([redacted]) 'had absolutely no concerns' for C and D. She found [the Respondent] extremely appropriate and observed her feeding and tending to the babies with ease She informed very evident that [the Respondent] dotes on the babies and that they will want for nothing."

D. These Tusla notes and records were obtained by the Respondent under data protection legislation, it would appear, and it was the Respondent who brought them to the attention of the expert assessor.

E. Additionally, there was a letter from An Garda Siochana dated the 17th February 2023 which was detailed and positive and which was compiled after a home visit by An Garda Siochana which concluded that there were *"no concerns for the welfare of C and D."* This letter followed an unannounced visit. It indicates that An Garda Siochana was *ad idem* with the conclusions of Tusla and the public health nurse.

32. I am aware that complaints have been made by the Applicant and by members of the Respondent's family. However, I do not believe I can ignore the consistency of opinion of the authorities referenced above. These opinions do not find a deficit in the Respondent's care of the children. It is for this reason that I would greatly welcome first hand observations of the home and the caring abilities and routines of the Respondent from an expert assessor.

33. However, the issue here is whether the Applicant should be appointed a guardian of the children to act in this capacity with the Respondent or not. In ***J.K. v. V.W.*** [1990] 2 IR 437 at 447, Finlay CJ stated:

> *"I am satisfied that the correct construction of section 6A is that it gives to the natural father a right to apply to the court to be appointed as guardian, as distinct from event a defeasible right to be a guardian. The discretion vested in the court on the making of such an application must be exercised regarding the welfare of the infant as the first and paramount consideration. The blood link between the infant and the father and the possibility for the infant to have the benefit of the guardianship by, and the society of its father is one of the many factors which may be viewed by the court as relevant to its welfare."*

The test was considered by Hamilton CJ in ***WO'R v. EH*** [1996] 2 IR 248 at 269:

> *"The rights of interest or concern in the context of the guardianship application arise on the making of the application. However, the basic issue for the trial judge is the welfare of the children. In so determining, consideration must be given to all relevant factors. The blood link between the natural father and the children will be one of the many factors for the judge to consider, and the weight it will be given will depend on the circumstances as a whole. Thus, the link, if it is only a blood link in the absence of other factors beneficial to the children, and in the presence of factors negative to the children's welfare, is of small weight and would not be a determining factor. But where the children are born as a result of a stable and established relationship and nurtured at the commencement of life by father and mother in a de facto family as opposed to a constitutional] family, then the natural father, on application to the Court under s. 6A of the Guardianship of Infants Act, 1964, has extensive rights of interest and concern However, they are subordinate to the paramount concern of the court which is the welfare of the children."*

34. The applicable tests were considered at length by the Supreme Court in ***McD v. L*** [2003] 4 IR 431 and, in particular, in the judgment of Geoghegan J. who stated, *inter alia*:

"In all these cases, the judge dealing with the application, must stand back and consider what is the just and common sense solution, always bearing in mind that the child's welfare is the first a paramount consideration."

He proceeded to set out some guiding principles which are pertinent in the present circumstances:

(a) The best interests of the child are paramount;

(b) There must be an analysis of the factual situation, to be done "without any element of moralising";

(c) The agreement of the parties, irrespective of whether legally enforceable or not, is an important relevant factor (this was particularly important on the facts of that case as there was a detailed, written agreement which was considered at length by the Supreme Court);

(d) Any future disharmony could be against the best interests of the child. The Court held that future fractious relations between the parties was not something to simply be assumed:

"The learned trial judge should have made an assessment of the probabilities in this regard…. The evidence suggests that there was originally complete goodwill and bond fide negotiations between the parties. I am not convinced that the good relations cannot be restored."

35. Of course, there has been a significant legislative change since that time in the form of the list of relevant factors in determining in the best interests of the child which has been set down in section 31 of the 1964 Act (which provisions have been recited previously herein and commented upon the context of this case), always remembering that these are but particularly relevant issues and the legislation in clear that all circumstances must be taken into account.

36. The factual situation which pertains here is a complex and difficult one for all concerned. The parenting of children between persons who have had an erstwhile relationship can be difficult post separation, but this becomes still more challenging where there has been no such relationship and the children are born into a situation where the bonds of a prior relationship, even if now broken or severely damaged, never existed. As previously indicated herein, on balance, I believe that the intentions of the

parties at the outset of this journey probably accord more closely to those described by the Applicant based on contemporaneous communication. However, it is (d) above that has caused me concern herein in the context of the Applicant's guardianship application. I noticed that in giving evidence the Applicant was not definitive in his commitment to call the male child by the name by which he has been addressed, at this point, for almost two years (whatever views one might have about the circumstances of the naming of the children). In evidence, he repeatedly called the child by the alternative name, perhaps agreed but subsequently changed by the Respondent (which as sole guardian she was entitled to do). In addition, there was much criticism of the care giving abilities of the Respondent despite the positive assessments from the various authorities which were not recited and should be a cause of considerable comfort to the Applicant. It is clear that the Applicant has reported the Respondent to the authorities in respect of her caring on at least one occasion. There were allegations in relation to gender identity confusion being advanced by the Respondent based upon the colour of clothing being worn by one of the children. This was simply not supported by the photographs shown to me or by the video clips which I was requested to watch. Based upon the above factors and upon the demeanour of the Applicant and the nature of his evidence, I have concerns that appointing him a guardian will serve only to increase acrimony and to afford a forum for criticism.

37. I have had to balance this against the concerns I have about the Respondent's behaviours and attitudes (in particular her lack of awareness of or unwillingness to embrace the importance of a relationship between the children and their father and her opposition to recognising the importance of identity in the future well being of the children). Additionally, save for some clothing around the time of their birth, I heard no evidence of any financial support for the children being provided by the Applicant although I must also have regard for the very significant sums which he has expended in endeavouring to retrieve his relationship with the children through the legal process, a retrieval towards which the Respondent has been oppositional and obstructive at every turn. I must also recognise the many positive parental features demonstrated by the Applicant. He clearly had a loving relationship with the children for the short period at the early part of their lives when he was permitted to have such. He clearly wishes to have an opportunity to love the children in a real way, to develop an attachment with them and to be part of their care and nurture going forward.

38. Balancing all of the above, I have determined that the best interests of the children dictate that the Applicant should be appointed a guardian of them, and I am doing so on an interim basis at this time. Overall, I believe that this is in their best interests but, in so deciding, I would hope that the Applicant would use this position not to cause disruption to the children's lives or to advance opposition towards the Respondent. She is and always will be the children's mother and her role as such should be promoted and supported by the Applicant.

39. I was requested by the Applicant herein to retain seisin of this matter for a review before this court. I am acceding to this request, and, in these circumstances, I am adjourning this matter for review in respect of all matters (guardianship, custody and access) as indicated hereinbefore at which time I will make final orders. However, the interim orders made herein are no less Orders of the Court then if they were final orders. Enforcement remains a matter for the Circuit Family Court in the first instance. In acceding to the application for a review, I am, however, mindful that this matter comes before me as an appeal from the Circuit Family Court and it is therefore not appropriate that the matter would be retained before the appellate court for a prolonged period given the legal constraints that that implies.

(B) COSTS

40. I was asked to review the costs order made by the Circuit Family Court on the basis that the refusal of costs to the Applicant was not in accordance with section 169 of the Legal Service Regulation Act, 2015. This section endorses the general principle that costs follow the event but provides assistance and guidance as to the relevant factors to apply where there is to be a departure from the general rule.

> "*169. (1) A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including—*

(a) conduct before and during the proceedings,

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,

(c) the manner in which the parties conducted all or any part of their cases,

(d) whether a successful party exaggerated his or her claim,

(e) whether a party made a payment into court and the date of that payment,

(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and

(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise) and the court considers that one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.

(2) Where the court orders that a party who is entirely successful in civil proceedings is not entitled to an award of costs against a party who is not successful in those proceedings, it shall give reasons for that order.

(3) Where a party succeeds against one or more than one of the parties to civil proceedings but not against all of them, the court may order, to the extent that the court considers that it is proper to do so in all the circumstances, that—

(a) the successful party pay any or all of the costs of the party against whom he or she has not succeeded, or

(b) the party or more than one of the parties against whom the successful party has succeeded pay not only the costs of the successful party but also any or all of the costs that the successful party is liable to pay under paragraph (a).

(4) Unless the court before which civil proceedings were commenced orders otherwise, or the parties to those proceedings agree otherwise, a party who discontinues or abandons the proceedings after they are commenced (including discontinuance or abandonment of an appeal) is liable to pay the reasonable costs of every other party who has incurred costs in the defence of the civil proceedings concerned until the discontinuance or abandonment.

(5) Nothing in this Part shall be construed as affecting section 50B of the Planning and Development Act 2000 or Part 2 of the Environment (Miscellaneous Provisions) Act 2011."

41. In the judgment of the Circuit Family Court, the reason given for departing from the general rule is, essentially, a welfare argument namely that the future relationship of the parents will be further damaged with consequent negative repercussions for the child if costs are ordered. The reasons given by the Circuit Family Court are ones which often arise in family law disputes. While family law disputes are not excluded from the application of section 169, there has long been authority for a different approach to costs in family law matters. In the case of hearings concerning a decree of judicial separation/divorce with ancillary relief orders, there is often a strong argument not to award costs but rather to include the liability likely to arise in this regard in the general achievement of proper provision. However, outside of this particular situation in family law, the awarding of costs requires a somewhat different consideration. Costs may often be used to reflect prolongation of the hearing, litigation misconduct or, indeed, the normal rule of costs following the event may be deemed appropriate in the particular case. Of course, given that there are often many issues arising in a single family law case, finding the event or calibrating events which have attracted no, partial or full success may be difficult.

42. The issue of costs in family law has been addressed in a number of recent cases. In ***BC v PK*** **[**2020] IEHC 432, Jordan J. awarded costs in the context of a re-entry of an issue

pertaining to a child where the applicant for relief was unsuccessful. There was a single relief sought and it was refused. Jordan J. stated:

> *"The applicant says that an order for costs ought not to be made and that the usual rule applied in family law proceedings ought to be applied, that is, that there ought to be no order as to costs. Firstly, I have already said that I believe that this application is singularly unwise. Secondly, the notion that there should be no order as to costs in family law proceedings as a standing protocol is a myth. It is a view which McKechnie J. has dealt with in some detail in B.D. v. J.D. (unreported, High Court, 4th May 2005) and which is quoted in the recent judgment which this court gave in B.R. v. P.T. [2020] IEHC 205. It is the position when a court is dealing with substantive proceedings involving a resolution of a dispute concerning matrimonial assets owned by either one or both of the parties following a relationship breakdown that it will ordinarily make no order as to costs. This is so in circumstances where the Court, will in the ordinary course of events, have regard to the cost of the litigation in deciding the issues in the case including the division of the matrimonial assets. There is frequently evidence given in relation to those costs in the substantive proceedings. But where applications, such as motions of an interlocutory nature or applications such as this, after the resolution of matters, are made or brought, then the court is entitled to exercise its discretion in relation to an award of costs in the ordinary way. It seems to me, that in an application such as this, the court needs to be persuaded to depart from the position that costs ordinarily follow the event if it is to decide to make no order as to costs."*

43. The issue of costs has most recently been considered by the Court of Appeal in ***BN v. DO'H***. [2023] IECA 264. The principles applicable, as set out in the judgment of Binchy J., may be summarised as follows:

    1. In the normal course, costs should follow the event;
    2. The starting position is that the party who has been 'entirely successful', in accordance with the phrase used in section 169(1), should get their full costs;
    3. If so, is there any reason why, having regard to section 169(1) (a) –(g), all of the costs should not be ordered in favour of the party?

4. If neither party has been ‘entirely successful’, have one or more of the parties been ‘partially successful’ within the meaning of section 168(2)?
5. If any parties have been ‘partially successful’ and having regard to section 169(1) (a) – (g), should some of the costs be ordered in favour of the party or parties that were ‘partially successful’ and if so, what should those costs be?
6. Departure from the foregoing should be considered by a court where the winning party added materially to the costs of the proceedings by raising additional grounds or arguments that the court considered to be “unmeritorious” by way of a view to be taken which is not narrowly measuring time but looking at the proceedings in their entirety being materially increased.

44. There is also the matter of judicial discretion and the extent to which this should be interfered with by an appeal court was also considered in the Court of Appeal decision. It must, however, also be remembered that in this instance the appeal before me was a full rehearing with oral testimony. The relevant principles in this regard would appear to be:

1. While costs orders are discretionary, the appeal Court nonetheless has full appellate jurisdiction in respect of such orders.
2. It follows that the Court may substitute its own discretion in place of that of the trial judge.
3. The jurisdiction is not dependent on having to establish an error of law or otherwise on proving that in the exercise of such discretion the trial judge acted erroneously.
4. At the same time, however, an appellate court will, in general, be slow to interfere with the exercise of a trial judge's discretion in awarding costs:
5. Furthermore, an appellate court should not simply substitute its own assessment of what the appropriate order ought to have been but should afford an appropriate deference to the view of the trial judge who will have been much closer to the nuts and bolts of “the event” itself.
6. Absent some error of principle on the part of the trial judge, an appellate court should intervene only where it feels that the exercise by the trial judge of an

assessment in relation to costs has gone outside of the parameters of that margin of appreciation which the trial judge enjoys.

45. In all of the circumstances of this case, I do not intend to interfere with the Order of the Circuit Family Court in respect of costs. I so determine for a number of reasons. First, the Applicant was not entirely successful. No Order for guardianship was made and, it is my view, this was the correct decision at the time the matter was before that court. My decision in this regard might have been very different had access been complied with in accordance with the Order of the Circuit Family Court or had some access arrangements been put in place during the course of the litigation herein. Secondly, I am of the view that the reason for departing from costs following the event (where the Applicant had been substantially successful) as set out in the judgment of the Circuit Family Court was a good and proper one at that time. The Circuit Family Court heard both parties in evidence over a number of days and, in these circumstances, I would be reluctant to interfere with the discretion exercised in respect of costs but, were I minded to do so, I am of the view that the Judge exercised her discretion in this regard entirely correctly. I am also mindful of the monies expended by the Respondent in connection with the conception of the children and of the lack of financial support of the children by the Applicant over the past two years.

COSTS IN THIS COURT

46. In this regard, I will hear submissions from the parties. I would propose to do so at the review hearing date.