AN CHÚIRT UACHTARACH

THE SUPREME COURT

S:AP:IE:2022:0000063

O'Donnell C.J.

Dunne J.

O'Malley J.

Baker J.

Hogan J.

Murray J.

Collins J.

IN THE MATTER OF:

THE ADOPTION ACT 2010, SECTIONS 49(1) AND 49(3)

AND IN THE MATTER OF A (A MINOR) AND B (A MINOR), C AND D (FIRST AND SECOND NOTICE PARTIES/ RESPONDENTS) AND THE ATTORNEY GENERAL (THIRD NOTICE PARTY/ RESPONDENT)

Judgment of Mr. Justice O'Donnell, Chief Justice delivered on the 30th day of March, 2023.

Introduction

1. The children in these proceedings, who are designated by the initials A and B, were born in Colorado in the USA in 2014 pursuant to a surrogacy arrangement entered into by C and D, a same sex married couple living in New Jersey in the USA. C is the natural father of the children. D obtained a decree of stepparent adoption from the District Court of Colorado in February, 2015.

2. On 25 October, 2017, an application was made by D to the Irish Adoption Authority seeking to register the decree of stepparent adoption in the Register of Intercountry Adoptions ("RICA") which is provided for by s. 90 of the Adoption Act, 2010 ("the 2010 Act"). The RICA is principally directed towards the recognition of Hague Convention compliant foreign adoptions effected by Irish domiciled adopters. However, it also contemplates the registration of, what the High Court judgment usefully described as, foreign domestic adoptions, that is adoptions effected under the law of the country of domicile of the adopters and the child. Although s. 90(4) of the 2010 Act imposes an obligation to enter the particulars of an intercountry adoption not later than three months after the date when a child first enters the State after his or her intercountry adoption in another State by parents habitually resident in this State, it does not impose any such obligation in respect of adoptions effected by parents habitually resident in another State or, indeed, require any particular connection with this jurisdiction. S. 90(7) of the 2010 Act provides that if the Authority is satisfied that the adoption is an intercountry adoption effected outside the State that complies with the requirements of the 2010 Act in relation to such adoption then "the Authority shall enter particulars of the adoption in the register of intercountry adoptions…" (emphasis added).

3. S. 57 of the 2010 Act provides for recognition of an intercountry adoption effected outside the State and provides, by s. 57(2)(b), that if an adoption is certified by the State of the adoption as having been effected by an adopter or adopters who were habitually resident in that State at the time of adoption under and in accordance with the law of that State, then such adoption, "unless contrary to public policy, is hereby

recognised, and is deemed to have been effected by a valid adoption order…" (emphasis added).

4. Under s. 49(1) of the 2010 Act, the Adoption Authority *may* refer any question of law arising on an application for an adoption order or the recognition of an intercountry adoption effected outside the State to the High Court for determination, and subsection 3 provides that the Authority *shall* refer any question in relation to public policy arising with respect to entries in the RICA to the High Court. In this case, the Authority has, by way of case stated dated 7 December, 2020, referred to the High Court for determination a number of issues relating to public policy arising from the adoption and the antecedent surrogacy arrangements in this case.

5. I agree with Hogan J. that the recognition of the stepparent adoption in this case is not contrary to public policy, and accordingly, is recognised pursuant to s. 57 of the 2010 Act. Therefore, the Adoption Authority may be satisfied under s. 90(7) that the adoption is an intercountry adoption effected outside this State that complies with the requirements of the 2010 Act in relation to such an adoption. The Authority may, therefore, enter particulars of the adoption in the RICA together with a copy of the certification of the adoption from Colorado. I set out my more detailed reasons for this conclusion in the following paragraphs.

Preliminary matters

6. At the outset, it should be said that it is profoundly unsatisfactory that the absence of legislation in this area means that this question must be resolved by judicial proceedings with the cost, delay, and uncertainty that this entails.

7. As was observed at the hearing of the appeal, it is very distressing for the individuals involved that the question of the inclusion of an entry in the RICA should remain unresolved for more than five years of the children's lives. Furthermore, the issue of whether or not the adoptions in this case may be entered in the RICA has involved protracted, detailed correspondence with, and legal submissions to, the Adoption Authority and hearings in the High Court and then this Court courts, with all the stress necessarily involved in legal proceedings, and aggravated in this case by having to hear discussion of central aspects of the lives of the individuals concerned, in terms which can appear unsympathetic, and sometimes by reference to hypothetical circumstances that easily give offence if misunderstood.

8. Furthermore, this case is something of a test case which involves issues that arise in a range of other comparable applications for entry in the RICA. It is very unsatisfactory that there are other parties, whose personal status remains uncertain so far as the law of Ireland is concerned, and who must await the outcome of these proceedings and who are not represented in these proceedings. There is also a large cohort of people, including Irish citizens who have effected foreign surrogacies abroad and which may or may not involve adoption, and those who wish to avail of domestic surrogacy arrangements, whose legal status this case does not involve, address, or resolve at all. This cohort is at one further removed from the issues in this case but are at risk that the outcome of the case may give rise to uncertainty to or even affect their position in law.

9. Moreover, it should be a matter of more general concern that the State has no clear legislative provisions relating to surrogacy, and which may inform couples and individuals who have sought, or are seeking, to have children, of what is and is not permissible under Irish law before any arrangement is entered. Quite apart from any understandable concern and sympathy for couples seeking to arrange surrogacy so that they may have children, and whose legal status is and remains uncertain in Irish law, a mature society should be in a position to formulate its own policy on the many ethical and moral issues that the developments in science present, and where further developments can be clearly anticipated. As a society, we should be able to decide what surrogacy arrangements may be permitted in Ireland, what regulation is required, and what surrogacy arrangements in other countries will be recognised and given effect to, either in circumstances where any of the persons involved are habitually resident in Ireland, or where they are habitually resident elsewhere and who come to Ireland and seek recognition. There are a wide range of views about surrogacy. Surrogacy – and in particular commercial surrogacy – raises many important and complex legal, social, and moral issues about which different persons and different societies can – and do – take different positions and in respect of which there is nothing like an international consensus.

10. Some countries in Europe and elsewhere prohibit surrogacy altogether, others permit it subject to stringent regulation, and still others are more permissive. Even in those countries which facilitate surrogacy, there are important issues to be determined in relation to matters such as the age of prospective parents; the necessity for there to be any genetic link between any child and either commissioning parent; the

circumstances, if any, in which such a genetic link should not be required; the question of gene editing; selection of sex of the baby; the number of persons allowed to obtain a parental order; and the extent, if any, to which commercial arrangements would be permitted or precluded. In respect of each of these questions of policy there is also the question of the impact on the status of any children born where the surrogacy or adoption arrangement fails to comply with the regulatory regime prescribed. There are, therefore, a number of issues that must be addressed by the legislature and a range of possible provisions and it is no part of the function of this Court to express any view thereon, still less purport to decide such issues.

11. What is surely unacceptable, however, is that legislation should not address the position at all, and the matter left to be dealt with in almost all cases after children have been born and by reference to a legal code in circumstances where major elements of which were established long before the possibility of assisted human reproduction was capable of being contemplated. Even then, such proceedings involve cost, delay, and uncertainty and even if successful can provide only partial and incomplete outcomes, which are not well-adapted to the circumstances presented by surrogacy arrangements.

12. There have been developments in this jurisdiction. A Commission on Assisted Human Reproduction, reporting in 2005, provided a very detailed, careful, and expert analysis of all the issues which, even at that stage, were anticipated to arise in the field of assisted human reproduction, donor assisted human reproduction, surrogacy, and use of embryos for research. It is also important to observe that the Child and Family Relationships Act, 2015 ("the 2015 Act") regulated, for the first time, the donation of gametes for the purposes of assisted reproduction. If procedures set out in the Act are followed, then the donor is able to be excluded from the status of parent having any parental rights or duties, and it is, moreover, provided that the parents of any child born as a result of donation, will be the mother (defined as "the woman who has given birth to the child") and, where appropriate, her spouse, civil partner or cohabitant. This Act, however, simply does not address surrogacy. Therefore, the Act does not address the problems faced by heterosexual couples where the female partner has difficulty in sustaining pregnancy or giving birth or male same-sex couples where, self-evidently, neither partner can become pregnant or give birth. In each such case, the couples can only have a child that is genetically related to one or both of them if they enter into a surrogacy arrangement with a

woman willing to act as a surrogate. The 2015 Act simply does not address that issue.

13. In this regard, it should be said that in the course of these proceedings the Court, in the course of these proceedings, was provided with the Health (Assisted Human Reproduction) Bill, 2022, which proposes a detailed system of regulation for domestic surrogacy. We were further informed that it is the Government's intention also to arrange for the enactment of legislation by the Oireachtas for the recognition of surrogacies effected abroad (whether by persons habitually resident in Ireland, or elsewhere) and it is further proposed to permit surrogacies containing some commercial element, and to recognise the status of children born as a result of such arrangements. In this regard, the announced policy is consistent with the recommendations of the Oireachtas Joint Committee on International Surrogacy which published its Final Report in July, 2022.

14. It is clearly not a matter for this court to comment upon the detail of proposed legislation, and still less indications of Governmental intentions in respect of draft legislation which has not as yet been formulated or published. However, it is a profoundly unsatisfactory situation when surrogacies are being effected in increasing numbers in the absence of a comprehensive regulatory regime. Whatever regime is ultimately adopted by the State in respect of surrogacy both domestically and abroad, it is surely beyond argument that *some* legislation in this regard is now urgently required.

15. However, quite apart from many moral or philosophical arguments as to the necessity for legislation, it should also be recognised that inertia is not a viable option even in the near term. It is quite clear that relationships of adults and children living together and forming a household, gives rise to issues of constitutional law, the law of the European Convention on Human Rights, and conceivably the law of the European Union in relation to their relationship to each other and their right to know their identity. In my judgment in *O.R. and ors v. An tArd Chláraitheoir and ors* [2014] IESC 60, [2014] 3 I.R. 533 ("*O.R.*"), at paragraph 243 I observed, that is constitutionally permissible to have a birth registration system registering the birth mother, *initially*. But I observed: -

> "…that only illustrates the fact that serious constitutional issues must necessarily arise if that position is maintained for all time and for all purposes. From a human point of view it is completely wrong that a system, having failed

> to regulate in any way the process of assisted reproduction, and which accordingly permits children to be born, nevertheless fails to provide any system which acknowledges the existence of a genetic mother not merely for the purpose of registration, but also in the realities of life including not just important financial issues such as inheritance and taxation, but also the many important details of family and personal life which the Constitution recognises as vital to the human person. Very different issues would arise in such circumstances".

16. It has only become clearer in the period since the delivery of that judgment that the legislative vacuum in relation to surrogacy, both domestic and international, will generate increasing litigation in these courts, Strasbourg, and Luxembourg, possibly resulting in a form of negative regulation by default, in terms that cannot provide the clarity, detail, and nuance of legislation. Even if inconsistency between judgments could be avoided (and that is, in the nature of decisions made by different decisionmakers, unlikely) courts can only find matters to be in breach of the State's obligations, and even then, only by reference to the facts of particular cases. Courts cannot put in place a comprehensive regime for regulation or make the different policy decisions involved. In this difficult case, where the Court is required to address one aspect of this delicate and nuanced situation with old fashioned tools ill-adjusted to the task, the need for comprehensive legislation is by far the clearest conclusion that can be drawn.

17. Nothing in what follows, should be understood as restricting the freedom of decision making on the part of the Oireachtas as discussed at paragraph 10 above. There are a significant number of issues and a range of possible decisions, in relation to domestic surrogacy arrangements and surrogacy arrangements effected by individuals abroad, whether Irish domiciled or not, but who wish for their parental status to be recognised in Ireland, which are for the Oireachtas to decide upon. This judgment does not purport to express any view on such options and should not be understood as doing so or as in any way restricting the freedom of action of the Oireachtas in relation to legislating for the recognition and enforcement of surrogacy arrangements domestic or international, altruistic or commercial or in determining the appropriate conditions for such recognition and enforcement. These are properly matters for the Oireachtas.

Surrogacy

18. Prior to the scientific advances that made in vitro fertilisation ("IVF") possible, the only form of surrogacy arrangement involved intercourse between the prospective father and a surrogate and a surrender of the child to the father and his partner. Such arrangements were, of their nature, private and extra-legal and rarely, if at all, came before courts in any jurisdiction. The development of IVF changed everything and made a number of different arrangements possible. For the purpose of this case, surrogacy can be understood as an arrangement in which a woman agrees to attempt to become pregnant by the use of an egg other than her own, and in circumstances where any child born is intended to be cared for and raised by others as the intended parents or by a single intended parent. As a matter of science, surrogacy simply requires scientific and medical expertise to provide a successful outcome by fertilization of an ovum and implantation of the embryo in the uterus of the surrogate. But the outcome desired by the parties involves not merely the successful birth of a child but must also have legal consequences. It must be possible to both *exclude* any parental relationship duties, rights, or obligations which otherwise might arise on birth on the part of the surrogate mother, and indeed, any gamete donor, and at the same time *confer* the status of parent on the intended parent or parents which would not otherwise arise by operation of law. In *O.R.* at paragraph 147 Murray J. noted "[a]lthough there is no law either authorising or regulating surrogacy in any form, it is not unlawful, as such". Murray J. had already observed that surrogacy was expressly prohibited in some countries, and strictly regulated in others. He was here observing that no similar prohibition was contained in Irish law. But it is quite clear that the legislative lacuna which he identified meant that it was and is not possible under Irish law to permit the voluntary alteration of status in a manner which is necessary, if full effect is to be given to any surrogacy arrangement. A starting point, therefore, is the simple fact that Irish law does not permit the exclusion of parental rights arising from genetic connection or the conferral of parental status on the intended parent with no genetic link to the child that is required to give effect to any surrogacy arrangements in Irish law, other than in specific circumstances contemplated by s. 6 of the 2015 Act. This is the backdrop against which the issues in this case arise and must be analysed.

Facts

19. There are six parties to this case all identified by initials. A and B are the children who were born as a result of the surrogacy arrangements to be described, and who were the subject of a stepparent adoption order which was sought to be recognised and have included in the RICA. C is the married same sex partner whose sperm was used to fertilise the ovum. D is the same sex partner who has no genetic link to the children but is now their parent so far as the law of Colorado is concerned, by virtue of the stepparent adoption order made and which is sought to be recognised in these proceedings. The successful pregnancy involved the obtaining of eggs from an egg donor, F, and its fertilisation and implantation under a surrogacy agreement with a woman, E, referred to under that agreement as "the gestational carrier" and who I will refer to hereafter as "the surrogate".

20. The terms just used can appear insensitive or be thought to indicate some underlying view as to the merits of the case or the advisability or otherwise of surrogacy arrangements. I do not intend the use of these terms in this way. They are used simply to distinguish the respective role of the individual parties. While the children A and B are the centre of these proceedings, it will hereafter be necessary to principally focus on the roles of C, D, E and F, i.e., the genetic father, the stepparent adopter, the surrogate, and the egg donor respectively.

21. C and D are from England and Northern Ireland respectively and were married in the USA in 2009 where they now live. Both C and D have UK and US passports, (as do the children A and B) and D also has an Irish passport.

22. More than a decade ago, C and D engaged an agency based in Texas in the USA to assist them in contracting with an egg donor, and a related company in the same state which offered services in relation to the gestational surrogacy.

Contractual agreements with the agency

23. The gestational surrogacy retainer agreement was made in January, 2013 between C and D and the agency in Texas. It provided that the agency would attempt to provide a surrogate match and to manage the surrogacy process including facilitating payment to the gestational carrier, and to facilitate the contractual agreements between C and D, described in the agreement as the "Intended Parents" and the gestational carrier/surrogate. The agency also agreed to coordinate the post-delivery

legal process. The intended parents agreed to cooperate with their attorney regarding the filings necessary to establish the parent-child relationship. The intended parents also agreed to pay a total of $11,300 to the agency and the legal fees involved in drafting any agreement. Section VI, paragraph 4 was headed Surrogacy Expenses and provides as follows:

> "The Intended Parent(s) have been advised that Surrogate parenting is a very expensive process and has many unknown implications. State, agency or independent adoption is far less expensive compared to obtaining a child through a Surrogate arrangement.
>
> Intended Parent(s) understand that general surrogacy expenses may include, but are not limited to the following:
>
> Costs of Fresh IVF Cycle: $15,000 - $30,000 (paid directly to IVF clinic)
>
> [Agency] Fee: $11,300 (paid directly to Agency)
>
> [Agency] International Fee: $2,000 (paid directly to Agency)
>
> Legal Fees: $5,000 - $15,000 (paid to attorney)
>
> Surrogate Base Payments: $24,000 - $50,000
>
> Contingent Extras for Surrogate (lost wages, travel, etc): $3,000 - $10,000
>
> Medical expenses (if not covered by insurance).
>
> Intended Parent(s) understand that the agency fee only provides for the services listed in Section II and all other surrogacy related expenses must be covered directly by the Intended Parent(s) and paid directly to the provider of services".

24. A similar agreement appears to have been made with the agency who was assisting C and D to match and contract with an egg donor, but that has not been provided to the Court. Nothing, however, appears to turn on the absence of this agreement.

The Known Egg Donor Agreement

25. The Known Egg Donor Agreement (so-called because the egg donor was identified and not anonymous) was made in February, 2014. It was governed by the law of Texas. In the agreement, the intended parents and the egg donor acknowledged that the agreement related to a subject matter that is an unsettled area of the law in Texas and while they intended to be bound by its terms, they understood that it was possible that the agreement be declared by a court of law to be void as against public policy

or held unenforceable on other grounds. Both the intended parents and egg donor warranted that they would not seek a declaration for the contract to be declared void as against public policy or unenforceable on those other grounds. The intention of the parties is set out in Part III of the agreement which provided that: -

> "… THE PARTIES are entering into this agreement with the express understanding and intent that INTENDED PARENTS shall be the sole legal parent of the child; INTENDED PARENTS shall assume all parental, custodial, inheritance, and testamentary rights to the CHILD; DONOR shall not be the legal parent of the CHILD; DONOR shall not have any rights or obligations whatsoever, whether legal or otherwise, with respect to the CHILD, including the right to inherit from the CHILD".

26. It was also provided that "DONOR agrees that INTENDED PARENTS are the sole legal parents of the CHILD and that INTENDED PARENTS shall have all the rights and responsibilities associated therewith".

27. The agreement provided that the donor may be contacted by the agency and/or the IVF clinic on behalf of the Intended Parents and/or the child after the child is old enough to understand the circumstances surrounding his or her conception, if the child has questions about the donor and the intended parents consented in writing. If the child did contact the donor, the donor was not to communicate with the child until the donor had received written approval from the intended parents of any such communication. The agreement appears to have provided for a donor fee of $7,500, attorney fees, and the donor's expenses.

The Gestational Carrier Agreements

28. Identical individual gestational carrier agreements were entered into by C and D respectively, on the same day in November, 2013 with the surrogate. The recitals provided as follows:

> "… C. The Intended Parents desire to become parents of a child or children by means of assisted reproduction; and
>
> D. The parties desire to enter into an agreement in which the Gestational Carrier will give birth to a child who is genetically unrelated to her and conceived by means of assisted reproduction and will relinquish all parental rights to the child to the Intended Parents…"

29. Clause 1 is headed "Purpose and Intent of the Parties" and provides:

> "The sole purpose and intend of this agreement is to provide a means for the Intended Parents to become parents of a child who is carried and birthed by Gestational Carrier, after in vitro fertilisation of Donor's egg(s) and semen from either Intended Father and transfer of fertilised egg(s) to Gestational Carrier's uterus ("the IVF procedure")… Gestational Carrier shall not be genetically related to the child. It is expressly not the Gestational Carrier's intention to raise any child conceived through the IVF procedure contemplated herein".

30. Clause 2 is headed "Gestational Carrier Agreement" and sub-paragraphs (b) and (c) provide:

> "(b) The Gestational Carrier and the egg donor shall relinquish all parental rights and duties with respect to any child conceived through assisted reproduction under this Agreement.
>
> I The Gestational Carrier agrees and understands that although the Intended Parents are not both genetically related to the child, the Intended Parents will be the parents of any child conceived by means of assisted reproduction under this Agreement".

31. The Gestational Carrier Agreement also contains detailed provisions on prohibited activities of the Gestational Carrier during the pregnancy period related both to the foods that can be eaten and the activities which she may not engage in, such as the consumption or alcohol or cigarettes, piercing of any body part, or application of hair dye or artificial nails.

32. Among the more notable provisions in the agreement is the provision that the Gestational Carrier shall not engage in sexual intercourse during a time period recommended by a physician and without the approval of the physician, an agreement not to travel outside the state after 32 weeks of pregnancy (or 26 weeks in the case of twins) and not to get married during the currency of the agreement. The Gestational Carrier also agreed not to terminate the pregnancy unless the obstetrician considers it necessary to do so for her health or the foetus has been determined to be physiologically abnormal or with foetal malformation. Any decision to terminate the pregnancy shall be made by the Gestational Carrier only with the consent of the Intended Parents. However, the agreement also provides that the parties understand that a pregnant woman has the right to abort or not to abort

any foetus she is carrying, and any promise to the contrary may be unenforceable. It is also provided that if the Gestational Carrier is seriously injured, she may be sustained on life support to protect the foetus's viability in an effort to facilitate a healthy birth, though the parties again acknowledge that the decision will ultimately be made by the Gestational Carrier's designated health care agent.

33. It should be said, however, that none of these clauses were required to be invoked, and that while the surrogate had some medical complications during the pregnancy, the pregnancy resulted in the safe birth of the children, and the performance of the agreement and delivery of the children to the Intended Parents. This case does not involve, at least directly, any application to enforce the agreement, or declare it unenforceable.

34. By clause 12 of the agreement the Gestational Carrier covenanted and agreed to "timely execute any and all necessary affidavits and documents and to attend any and all court hearings or proceedings necessary to further the intent and purpose of this Agreement" and covenanted that "the Intended Parents shall name the child and both Intended Parents will be named the child's legal Parents".

35. The debate and, in some, respects the legislation both here and in other countries in relation to adoption, assisted reproduction, and surrogacy tends to make a distinction between commercial arrangements and non-commercial/ altruistic arrangements. Under this analysis, there can be no doubt that this was a commercial surrogacy arrangement. The involvement of agencies, the payment of fees to those agencies and to the gamete donors and the surrogate cannot be described as no more than the payment of reasonable expenses.

The legal proceedings to recognise the parentage of the intended parents

36. During the currency of the pregnancy and before the birth of the children, C and D brought a petition for determination of parent and child relationship, and sought an order that C be declared the father of each unborn child and for an order that the birth certificate conform to the determination of parentage in Colorado. Paragraph 5 of the petition stated: -

> "Both Petitioners are the intended natural and lawful parents of the Unborn Children. The Petitioners acknowledge their paternity of the Unborn Children. See Admission of Paternity of [C] filed herewith and incorporated herein by

reference. The Petitioners agree that [C] will be listed as the Unborn Children's sole legal parent on the birth certificate. [D] will be added as the Unborn Children's second legal parent through a step-parent adoption after the birth of the Children".

37. The surrogate, E, was served with notice of the proceedings. She filed a document described as an "admission of non-maternity" paragraphs 2, 3 and 4 of which provided: -

"2. I freely admit that I am not the natural, genetic nor intended mother of the Unborn Children I am currently carrying.

3. I understand that I may have legal rights to the Unborn Children I am carrying. I do not wish to make any claim to such rights. I also understand that once Petitioners are adjudicated parents of the Unborn Children, I will not be able to petition this court for parenting time with the Unborn Children or for an allocation of parental responsibilities with respect to the Unborn Children.

4. I have entered into a gestational surrogacy agreement with Petitioners. It has always been my understanding that the natural parents of the Unborn Children are [C] and [D]".

38. Accordingly, an order was made in accordance with the terms of the petition, in August, 2014, and prior to the birth of the children in October of that year. As is clear from paragraph 5 of the petition, it was intended at that stage that D would be added as legal parent through stepparent adoption after the birth of the children. In due course, a decree of stepparent adoption was made in February, 2015, which is now sought to be recognised, and registered on the RICA.

39. The applicants in these proceedings have also filed an affidavit which exhibits opinions of lawyers in respect of the law of Colorado (the state of birth of the children and where the parental order in favour of C and the stepparent adoption in favour of D were made). The opinions have subsequently been reproduced in the form of affidavits sworn by the lawyers. Those opinions explain the legal steps which were taken. Thus, it was explained by D in his affidavit that: -

"following [F] becoming pregnant, we discussed the legal options for both your deponent herein and [C] securing parentage. I say that we were advised at that time that the status of a non-biological same-sex parent was unclear in the United States… Accordingly, I only became a prospective adopter after [F] was pregnant at which point we discussed the options with an attorney in

Colorado for securing parentage and decided that a step-parent adoption was a more secure way of achieving parental rights".

40. The legal opinion was, if anything, even clearer. It stated that: -

"The Gestational Carrier Agreement further stated that it was the intent of all parties that [C] and [D] would be the legal parents of any resulting children". Later it was stated:

"In an effort to also have the non-genetic spouse, [D], recognized as the children's second legal parent, [D] filed petitions for stepparent adoption… As the children's sole legal parent, [C] consented to [D] adoptions".

41. Further, it was said that: -

"The legal process by which [D] and [C] pursued to establish each of them as legal parents is specifically authorized and is consistent with Colorado law. This process includes: (1) initially entering into a Gestational Carrier Agreement; (2) procuring a parentage decree on behalf of the genetic father; and (3) securing a stepparent adoption on behalf of the non-genetic spouse".

42. It was explained that: -

"While [C] and [D] initially expected to file one prebirth parentage action to declare both of them as the legal parents of the children, as contemplated by the Gestational Carrier Agreement, they later changed their chosen legal pathway to establish parentage once their surrogate was pregnant based on the advice of their Colorado legal counsel... [C] and [D] thus ultimately sought to establish each as a legal parent under Colorado law through two different proceedings; one a pre-birth parentage proceeding, and secondly, a stepparent adoption proceeding filed after the children's birth. They did so on advice of counsel due to the fact that not all jurisdictions in the United States and abroad will universally recognize a parent-child legal relationship of the nongenetic father absent an *adoption* order".

43. Having reviewed some of the difficulties both in the US and in other countries in relation to the recognition of a same-sex spouse who is not genetically related to the children as a parent, the opinion continued: -

"The parties, [D] and [C], rightfully feared the potential risk that without a subsequent adoption decree, other states, countries, and even the United States federal government could refuse to recognize both same-sex parents as the legal parents of the children. To obtain a judicial order of adoption was thus

necessary to ensure that [D]'s parentage is fully recognized by all entities and subject to full faith and credit under the United States Constitution. By obtaining the subsequent stepparent adoption orders, [D] and [C] ensured that they would both be legally recognized as the children's two parents regardless of whether they travelled interstate or abroad".

44. The opinion goes on to explain that because the order had been made after the declaration of non-maternity, the surrogate was not regarded as having any parental rights or obligations in respect of the unborn children, and that C was the only lawful and natural parent and had all parental rights. Accordingly, only his consent was necessary under the law of Colorado to the stepparent adoption which resulted in turn in the order of February, 2015. Consequently, C and D were able to file an affidavit from their Colorado lawyer, verifying that the adoption conformed to the definition of foreign adoption contained in s. 1 of the Adoption Act, 1991 ("the 1991 Act") and, in particular, that the consent to the adoption of every person whose consent to the adoption was, under the law of the Colorado, required to be obtained or dispensed with under that law.

45. The final factual step which is necessary to record is in relation to the proceedings in the United Kingdom. It will be recalled that C was born in England. An application was brought by C and D in the courts of England and Wales under which they obtained parental orders under s. 54 of the Human Fertilisation and Embryology Act, 2008 and registry of the parental order in the Parental Orders Register, and reregistration of the birth certificates. In the course of those proceedings, the parties filed an agreement to the making of those orders by the gestational carrier. That agreement provided that she understood those orders. The agreement recited the gestational surrogacy agreement and that she understood that English law nonetheless treated her as the children's legal mother until steps were taken in English courts to extinguish her status, and she then consented to the making of parental orders. There is some difficulty in reconciling the basis upon which such parental orders were made in the UK, and the status of the parties by reference to the law of the US and which is sought to be recognised here. However, counsel for C and D expressly disclaimed any reliance on the parental orders in the UK and I do not draw any inference from that procedure other than recognizing it as an illustration of the legal thicket which couples seeking children by surrogacy find themselves in, in many different countries. It is agreed, however, that the Court may

have regard to the fact that as late as 2019, the gestational surrogate was consenting to a process which fully and permanently extinguished her status and parental responsibility under English law and stated that she was fully supportive of C and D being treated as the children's legal parents and had sworn a detailed affidavit to that effect, a copy of which was furnished to the Court in the course of the appeal hearing.

The decision of the High Court

46. It was argued on behalf of the applicants and the Attorney General in the High Court, and accepted by the High Court judge, that the background of surrogacy was entirely irrelevant to the consideration by the Adoption Authority or the High Court of any question of public policy. The correct focus, it was argued, was merely the stepparent adoption order of 27 February, 2015. Stepparent adoptions are by no means unknown in Irish law. It follows, it was said, that there could be no question of any public policy tending against recognition of the February, 2015 adoption. Paragraph 56 of the judgment of the High Court states:

> "… the Case Stated concerns the recognition by the State of foreign domestic adoptions. It happens that the foreign domestic adoptions in this case arose following a pregnancy which involved a surrogacy arrangement. But the case is fundamentally about the recognition (in truth quite straightforward recognition) of two foreign domestic adoptions, something readily done 'within the four walls' of the Adoption Acts".

47. For a number of reasons, albeit viewed in the unforgiving light of hindsight, the manner in which the case proceeded in the High Court was unsatisfactory. It appears that there was a degree of consensus between all of the parties that the adoptions could be recognised and certainly there was no contrary argument strongly advanced. Perhaps as a consequence, it appears that the High Court judge did not have regard to some of the features of the agreement which could undoubtedly raise questions of public policy, which do not appear to be recorded or considered in the judgment.

48. I think it was unfortunate that the court was persuaded to adopt an approach which focused on the question of recognition of stepparent adoptions to the almost total exclusion of the surrogacy arrangement. This argument was maintained in this Court, but in my view, it is not possible to adopt this approach. The Court must

address the issues involved here. It is clear that the surrogacy arrangement and the adoption order were closely linked as a matter of both fact and law. The purpose of the surrogacy agreement was not merely to secure the birth of a child or children, it was to achieve for C and D the status of parents of the children, and for those children the status of children of C and D. Clause 2(c) of the Gestational Carrier Agreement provided that it was understood that "the Intended Parents were to be the parents of any child conceived by means of assisted reproduction". The legal opinion makes quite clear that the stepparent adoption sought to be recognised in this case was an effort to achieve that objective in respect of D, described as the non-genetic spouse. The process by which D became an adoptive parent of the children, was a process lawfully pursued by C and D under the law of Colorado to establish themselves as legal parents, and as the opinion put it succinctly, "this process includes; (1) initially entering into a Gestational Carrier Agreement; (2) procuring a parentage decree on behalf of the genetic father; and (3) securing a stepparent adoption on behalf of the non-genetic spouse".

49. In my view, the stepparent adoption in this case cannot be isolated from the legal process designed to obtain it, which includes the Gestational Carrier Agreement. While the approach of an almost exclusive focus on the stepparent adoption order made by the Colorado court was no doubt advanced from the best of motives, I consider that to attempt to reduce this case to a question of whether that adoption, shorn of its factual context should be recognised, would be to evade rather than engage with the difficult issues raised by this case.

Enforcement and recognition of acts of foreign States

50. The approach of attempting to confine the court's consideration to the adoption order itself and nothing else, is driven by a realisation that the provisions of the contracts may give rise to problems of enforceability and public policy more generally. These issues cannot, however, be ignored. But the insistence that the Court focus solely on the adoption order also distracts from an important, indeed critical distinction between enforcement and recognition. This distinction was adverted to in a passage from Dicey, Morris and Collins *The Conflict of Laws Volume II* (16th edn, Sweet & Maxwell 2022) at paragraph 21.127, which was indirectly referenced in the decision of the High Court:-

> "… Adoption is taken very seriously indeed in this country and is surrounded by all the safeguards which an active social policy can devise. In some other countries it is taken far less seriously and serves quite different objects. If the foreign adoption was designed to promote some immoral or mercenary object, like prostitution or financial gain to the adopter, it is improbable that it would be recognised in England. But, apart from exceptional cases like these, it is submitted that the court should be slow to refuse recognition to a foreign adoption on the ground of public policy merely because the requirements for adoption in the foreign law differ from those of English law. Here again the distinction between recognising the status and giving effect to its results is of vital importance. Public policy may sometimes require that a particular result of a foreign adoption should not be given effect to in England; but public policy should only on the rarest occasions be invoked in order to deny recognition to the status itself. For example, the fact that the foreign law permits the adoption of adults, or permits adoption otherwise than by court order, or does not require that the adopter and the child should live together for a trial period before the order is made, should not prevent the recognition of the status in England. There are, indeed, some American decisions or dicta which deny recognition to foreign adoptions on such grounds; but they have been justly criticised on the grounds that they confuse recognition of the status with giving effect to its incidents."

This passage, with which I agree, undermines rather than supports the argument that a court should look only at the adoption order itself. If that were so, it would be even more clearly irrelevant that, to take an extreme example, an order was sought to advance "some mercenary object, like prostitution or financial gain". These are factors which are extraneous to any adoption order, but necessarily require an inquiry into the surrounding facts. That is only logical, but if so, it applies even more clearly in relation to the legal process antecedent to the adoption and of which the adoption sought to be recognised was the culminating event.

51. Private International Law has always recognised an important distinction between recognition and enforcement, particularly when it comes to matters of status. This, albeit formulated in reverse, was explained long ago by Kingsmill Moore J. in *Mayo-*

Perrott v. Mayo-Perrott [1958] I.R. 336 which involved the question of enforcement of a costs judgment in a foreign divorce. At page 350 of the reported judgment Kingsmill Moore J. observed: -

> "But to hold that our law accepts the cardinal principle that questions as to married or unmarried status depends on the law of the domicile of the parties at the time when such status is created or dissolved is not to say that our law will give active assistance to facilitate in any way the effecting of a dissolution of marriage in another country where the parties are domiciled".

The recognition of status was separate from the enforcement of the legal process by which it was achieved. The judgment illustrates the strength of the principle that status conferred by the State of domicile ought to be recognised. Notwithstanding the strong public policy against divorce contained at that time in the Constitution itself at Article 41.3.2, the court found that a foreign divorce could be recognised, even if, as in the case itself, it would not be enforced. This is indeed consistent with general principles of Private International Law. Dicey, Morris and Collins, *op. cit.* at paragraph 20-127 state that "[a]doption affects status and traditionally the law of domicile has a paramount controlling influence over the creation of status"

52. Clearly, the law relating to recognition and enforcement of foreign divorce has changed significantly in the intervening 65 years, but the distinction between recognition of status and enforcement remains valid and indeed essential. The fact that while public policy may sometimes require that the terms of a particular agreement should not be given effect to, but it is only rarely that public policy should be invoked to deny recognition of a status accorded by the law of a domicile, is a key distinction which is central to this case. Public policy may arise in the case of foreign contracts which are sought to be enforced, and where enforcement may be refused by a court on grounds of public policy. It is apparent even on the face of a number of the contracts entered into in this case, that they were drafted against the background of an awareness that the enforceability of some or all of the provisions of those contracts could not be guaranteed even within the United States. It might be said at one level that the public policy involved in refusing to enforce provisions of a contract in relation to adoption must be the same public policy to which s. 57(2)(b) of the 2010 Act refers, but that is to blur a critical distinction. While public policy

may mean that a court should not give active enforcement to the terms of a contract, it does not follow that the same public policy requires that a status recognised by the law of a domicile should be refused recognition here, even when that status is the product of an agreement which is or may be unenforceable in Irish law either in whole or in part.

Public Policy

53. The ascertainment of public policy has always been a central aspect of Private International Law. Until relatively recently, Private International Law was a matter of common law and therefore found in the decisions of the courts. Courts are often invited to enforce contracts made under the law of a foreign state and judgments of foreign courts or recognise and sometimes give effect to status conferred by the laws of foreign states. In each case, public policy plays an unavoidable, indeed necessary role. It permits a degree of flexibility, so that courts are not faced with the all or nothing choice of denying effect to anything occurring outside Ireland and otherwise than in accordance with Irish law or recognising and giving force to everything done in any other country. As explained by Kingsmill Moore J. in *Buchanan v. McVey & ors* [1954] I.R. 89 ("*Buchanan*") at page 106 of the reported judgment: -

> "In deciding cases between private persons in which there is present such a foreign element as would ordinarily induce the application of the principles of a foreign law, Courts have always exercised the right to reject such law on the ground that it conflicted with public policy or affronted the accepted morality of the domestic forum. Contracts valid according to what would normally be considered the "proper law" of the contract will not be enforced if in the view of the Court, they are tainted with immorality of one kind or another. Delicts committed abroad are not actionable here unless they are torts by our law. Slavery or other status involving penal or privative disabilities is not recognised".

54. In that leading case, Kingsmill Moore J. held that Irish courts could not entertain a suit to recover assets of a company brought by the liquidator in circumstances where the claim was in substance one to enforce a revenue judgment obtained in the Scottish courts and enforceable there. Kingsmill Moore J. identified in the decisions of common law courts a general principle of public policy against the enforcement

of any penal or revenue claims of a foreign State, and his decision was upheld by the Supreme Court.

55. Indeed, as observed by Professor Morris in "Some Recent Developments in the English Private Law of Adoption" *Festschrift for FA Mann* 241 (1977) at page 249, "public policy is probably more important a reservation in the law of adoption than in any other part of the conflicts of laws, because the laws of some foreign countries differ so sharply from English law as to the objects and effects of, adoption". Dicey Morris and Collins *op. cit.* observe in the passage immediately preceding that passage quoted at paragraph 51 above that public policy is a necessary reservation in all conflicts of law cases, but is more than usually important to keep in mind in the context of foreign adoptions because the law in some foreign countries differs so widely as to the object and effect of adoption. I consider the same can be said of surrogacy, and, therefore, public policy must be considered particularly carefully in the case of a foreign adoption effected after surrogacy.

56. The negotiation and execution of international conventions, particularly in the field of family relations, and the developing law of the EU in respect of jurisdictional enforcement of judgments, are a welcome development tending to provide objective rules applicable generally and where the issue for the court is one of interpretation of legislation, rather than a general ascertainment of public policy. However, most if not all of these conventions and agreements come with a built-in public policy exception, which is necessary to provide some degree of flexibility, and avoid forcing courts to enforce orders which would be completely contrary to the values of its domestic legal system. The Adoption Act, 1991 was the first legislative intervention into the question of recognition of foreign adoptions. Sections 2 and 3 of the 1991 Act provided that foreign adoptions whether effected before or after the commencement of the Act which were effected in or recognised under the law of the country in which the parties were either domiciled or had their habitual residence, would be deemed to have been effected by a valid adoption order made on that date "unless such deeming would be contrary to public policy". However, this is not simply the expression in statutory terms of the pre-existing common law. These provisions, while maintaining a role for public policy, narrow its scope. The 1991 Act defines a foreign adoption as one where five conditions are satisfied:

(a) the consent of the adoption of every person whose consent was necessary under the law of the country of adoption has been obtained or dispensed with under that law;

(b) the adoption has essentially the same legal effect as an Irish adoption order.

(c) the law of the place of the adoption required an inquiry to be carried out into the adopters, the child, and the parents or guardian.

(d) the law of that place required due consideration to be given to the interests and welfare of the child.

(e) the adopters have not received, made, given or caused to be made or given any other payment or reward (other than a payment reasonably made in connection with the making of arrangements for the adoption in consideration of the adoption) or agreed to do so.

57. These are all matters which would previously have been addressed by reference to public policy, and where a court might seek to deduce public policy from existing provisions of Irish domestic law. Under the 1991 Act, these matters are now embedded in the definitional section, so that only adoptions which conform to these criteria can be considered foreign adoptions which the deeming provisions of sections 2 and 3 can apply, and which may be recognized and included on the RICA. There is no discretion or flexibility in that regard. So, to take an example which is apposite in the context of this case, it would appear that even a relatively small payment over and above a payment reasonably made in connection with the arrangements for an adoption, would preclude recognition. But this approach means, in my view, that the public policy exception contemplated by sections 2 and 3 should not be given a broad and unrestricted scope. Some matters, indeed, perhaps the most important matters, are now specifically addressed in the definitional section, and refusal of recognition on grounds of public policy becomes a residual category.

58. The 2010 Act defines an "intercountry adoption effected outside the State" as meaning an adoption of a child other than an intercountry adoption (i.e. where a child habitually resident in one State is being or is to be transferred into another state) effected outside the State at any time on or after the establishment date that conforms to the definition of foreign adoption in s. 1 of the 1991 Act as it read on 30 May, 1991. This builds the 1991 Act's definition into the definition of an intercountry adoption effected outside the State. S. 57 then provides for the recognition of such

adoptions which are deemed to have been effected by a valid adoption order "unless contrary to public policy". The Court is, therefore, obliged to consider public policy in relation to the recognition of any foreign adoption. In that regard, however, it is relevant in my view that, as set out above the definition of foreign adoption in the 1991 Act continued for the purposes of the 2010 Act, contains an expression of public policy, so that the reference to public policy in s. 57 must be seen as a residual category. Furthermore, it is also relevant that the section provides for almost automatic recognition of foreign adoptions satisfying the 1991 Act definition and so certified by the competent authority of the State of the adoption, unless such recognition is contrary to public policy.

59. Modern judges are perhaps more comfortable in interpreting statutory provisions than being invited to consider and to some extent declare public policy. Judges should be, and are, aware of the risks of mistaking one's own views and predilections, however strongly and confidently held, for the public policy of the State. This is perhaps particularly important in areas of social and family relationships, where approaches can differ radically between groups and generations. By the same token, however, judges should also be aware that concluding that a foreign adoption is not contrary to public policy, runs precisely the same risk. The issue for decision should not slip into an expression of opinion as to what public policy ought to be, rather than is. The Court in these proceedings is not being called upon to decide whether this adoption order and similar post-surrogacy adoption orders *ought* to be recognised. The views of the members of the Court are strictly irrelevant, and judges should be astute to scrutinise reasoning and arguments under the rubric of public policy that are no more than expressions of views on desirable social policy.

Sources of Public Policy

60. Historically, questions of recognition were a matter for the common law and not a matter directly addressed by the provisions of the Constitution or statute law. Where, however, questions of recognition are expressly dealt with by the Constitution or by statute, then there is no remaining ground for any question of public policy. The conclusion of any case becomes the matter of constitutional or statutory interpretation. Where, however, there is no provision dealing directly and explicitly

with recognition and enforcement of foreign transactions, the Constitution or statute law of the State dealing with the same subject matter within the State is the best and firmest guide to public policy. If, for example, certain matters when occurring within the jurisdiction of the State, are prohibited by the criminal law, or certain types of contracts made or to be performed in the State are by statute to be treated as unenforceable, then such matters represent a very clear guide to public policy. Moreover, such primary law tends to suggest that such matters, although lawful when carried out abroad, may be considered to offend against public policy in Ireland, so that effect might not be given to a contract containing certain terms. I agree, therefore, that the public law of the State is the best and surest guide to public policy, but I do not agree that in considering public policy a court is, or should be, confined to the provisions of the Constitution or the contents of the statute book.

61. As already touched on, the question which is central to this case is not merely the existence of a public policy, but its precise contours, and the strength with which it applies. Once a public policy can be identified, the next question for the Court is, does that public policy require non-recognition of a status accorded by the State of the person's domicile or habitual residence? The fact, as already recognised, that public policy may require that contracts are not enforceable, but nevertheless that a status obtained in part thereby should be recognised, means that this is inevitably a question of degree, and moreover, one where the strength of that public policy may shift over time. It is in my view, both appropriate and helpful to consider a wide range of materials to attempt to assess not just the existence of public policy, but the strength with which it applies.

62. A court will, of necessity, afford greater weight to clear expressions of policy contained in legislation, but that in itself is no reason to exclude other matters which may be helpful. In *H.A.H. v. SAA and the Attorney General* [2017] IESC 40, [2017] 1 I.R. 372 ("*H.A.H.*), this Court in the judgment of O'Malley J. held unanimously that public policy did not require the refusal of recognition of a potentially polygamous marriage which was lawful in the State of habitual residence. Furthermore, the Court considered that such recognition of that marriage between the husband and his (first) wife could not be withdrawn if the marriage became actually polygamous, that is if the husband contracted a second marriage. However, O'Malley J. went on to express the view, with which the other members of the Court agreed, that recognition of the second marriage in an actually polygamous marriage

would be contrary to a fundamental constitutional principle and therefore, contrary to public policy. In doing so, O'Malley J. had regard to the Constitution and statute law of the State, but also to international agreements entered into by the State and the attitude of the Executive. In the course of the case, and at the request of the Court, the Attorney General set out the position of a number of different state agencies in respect of the status of potential and actual polygamous marriages. This is logical since international agreements entered into by the State are made pursuant to a decision of the Executive. In entering an agreement and binding the State to its terms, the Executive expresses a policy position. By the same token, I consider that the position of the Attorney General as a constitutional officer, and adviser to the Government, may be of relevance in particular cases. In *Adams v. Adams (Attorney General intervening)* [1970] 3 WLR 934, the English courts had to consider the question of the recognition of a divorce granted by the courts of Rhodesia after the unilateral declaration of independence. Sir Jocelyn Simon P. commented on the role of the Attorney General as follows:

> "I think that the Attorney-General also has the right of intervention at the invitation or with the permission of the court where the suit raises any question of public policy on which the Executive may have a view which it may desire to bring to the notice of the court. Public policy is a matter of which the courts take direct judicial cognisance, and they do not allow evidence on the point…
>
> 'Our state cannot speak with two voices… the judiciary saying one thing, the executive another' said Lord Atkin in *The Arantzazu Mendi* [1939] A.C. 256, 264. (Though Lord Atkin was speaking of recognition of foreign sovereignty, his observation seems to me, in common sense, to be of general application in a unitary state in cases such as the instant one) of course, if clear law is expressly based on considerations of public policy the executive must accept it and them unless and until the law is changed by The Queen in Parliament. But where the law is doubtful or the considerations of public policy may be in dispute, the view of the Executive may be of value to the courts — if only in indicating that this may be a matter better left for the direct determination of the constitutional sovereign, The Queen in Parliament. Several issues in the instant case turned on considerations of public policy".

63. Similar considerations apply in this jurisdiction, at least in my view. In addition, the courts look to the existing law and decisions of common law courts, as indeed occurred in *Buchanan v. McVey*. However, the question of the weight to be given to any particular source will vary. In *H.A.H.*, O'Malley J. observed that since public policy may change, the weight to be accorded to decisions of some antiquity may be more limited than might be the case in other fields. This is so, and in any event, the weight to be accorded to any particular instance must be carefully considered. In principle, it does not appear to me to be either necessary or desirable to exclude from our consideration material which may be of some assistance in dealing with a difficult issue of whether Irish public policy requires that a status accorded by the law of a person's domicile should or should not be recognised and/or enforced in Irish law.

64. In this case, it can be said that public policy is potentially engaged in a number of respects: the question of the child's right to identity; the fact that consent of the surrogate was provided before birth; the impact that the agreements, in particular the Gestational Carrier Agreement, had on the personal autonomy of the surrogate; and the commercial nature of the surrogacy. For reasons I will set out briefly later in this judgment, I agree with Hogan J. that the right to identity issue would not prevent enforcement of the contracts, and I consider that the absence of post-partum consent would not prevent enforcement, on the facts of this case. While the agreements do raise troubling and difficult issues of restrictions on core aspects of autonomy, I do not consider it necessary to attempt to assess the enforceability of individual provisions, particularly since no dispute arose in this case. The central issue in my view is the undeniable commercial aspect of the surrogacy arrangements in this case. In my view, a consideration of this matter, whether limited to statutory provisions or taking the more expansive view which I suggest, leads inevitably to a conclusion that that public policy would not permit the enforcement in Irish law of the Gestational Carrier Agreement if the matter arose for determination in any case because it provides for, and indeed constitutes, commercial surrogacy. That conclusion leads to the further question of whether Irish law requires the refusal of recognition of a status achieved as a result of an agreement itself unenforceable on grounds of public policy. In my view, a consideration of the same materials leads to the conclusion that such public policy does not require refusal of recognition of the status of D as the adoptive parent of the children.

65. The starting point is the fact that adoption was not provided for by Irish law at all until 1952 and, indeed, was not introduced in the UK until 1926. In the High Court case of *Re Tamburrini* [1994] I.R. 508, there was a dispute between an Irish woman who had left a child with her parents and gone to Scotland. She married a divorced man there, and together they adopted the child under Scottish law and sought custody. A Divisional Court of the High Court refused their application and gave little weight to the adoption order, Maguire P. saying "[a]lthough Antonio Tamburrini has adopted the child… we are of opinion that in a case such as this his rights cannot be placed on the same plain as the real parent's". In effect, the Court refused to recognise the adoption at all.

66. It is of some significance therefore, that when Irish law did make provision for adoption in the Adoption Act, 1952 (the "1952 Act"), the Act contained in s. 42 an offence of receiving or agreeing to receive any payment or other reward in consideration of the adoption of a child and making a corresponding offence of agreeing to make or give any such payment. S. 42(3)(a) of the 1952 Act provided in turn that "a person who makes arrangements for the adoption of a child shall not receive, make or give any payment or other reward in consideration of the making of the arrangements or agree to do so". Therefore, at the very outset, the legislation which provided for adoption for the first time with the consequent termination of the status of the birth mother, and conferral of the status of legal parents on the adoptive parents, was coupled with a strong prohibition on any commercial aspect to the arrangement. There does not appear to have been any judicial treatment of this provision, but it was considered by one author that if contravened it could be argued that the adoption was invalid.

67. The 1952 Act only addressed domestic adoptions i.e., adoptions occurring in Ireland. It was only in the 1980s that the phenomenon of Irish people going abroad to adopt became widespread. A Law Reform Commission report was published in June, 1988 (LRC 29 – 1952) on the Recognition of Foreign Adoption Decrees. The Adoption Act, 1991 was introduced shortly afterwards. The Law Reform Commission had recommended a model whereby the Minister would list countries whose adoption orders would be recognised in the cases of persons domiciled, habitually resident or ordinarily resident there, subject to a court determining that such adoption was not contrary to public policy. The 1991 Act took a somewhat different approach. It provided for the recognition of adoptions of persons effected under the law of their

domicile, habitual residence, or ordinary residence, and that such adoptions should be deemed to have been effected by a valid adoption order "unless such deeming would be contrary to public policy". However, and importantly, as set out above, the structure of the 1991 Act is to build into the definition section certain public policy considerations with the effect that adoption orders which did not comply with that definition could not be recognised or deemed valid, at all. In this context the prohibition on adopters making or causing to make any payment or reward, contained in s. 1(e) is particularly relevant and is of course entirely consistent with the policy expressed in s. 42 of the 1952 Act.

68. The 2010 Act was introduced to bring into effect the provisions of the 1993 Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, which Ireland had ratified. The Convention is an annexed schedule to the Act and provides *inter alia* in Article 4(3) that an adoption may take place "where consents have not been induced by payment or compensation of any kind" and by Article 4(4) where the consent of the mother, where required, has been given only after the birth of the child. Article 32 of the Convention prohibits improper financial or other gain and Article 32(2) provides that "only costs and expenses including reasonable professional fees of persons involved in the adoption, may be charged or paid". S. 145 of the Act brings these prohibitions into force in Irish law, and provides that a person who is an adopter, prospective adopter, parent, or guardian shall not receive or agree to receive in consideration of the adoption of a child "any payment or other reward" and a person shall not make or agree to make any such payment. S. 145(3) further provides that a person shall not make, receive, or give any payment or other reward in consideration of the making of arrangements for the adoption of a child. The section excludes, however, reasonable costs, the receipt of gifts with the prior approval of the Adoption Authority, and payments in respect of maintenance of the child.

69. There is, therefore, a clear, consistent policy from the outset of legal adoption against the making of payments in connection with such adoptions. Furthermore, that prohibition is repeated if anything in stronger terms in the specific context of the recognition of foreign adoptions.

70. Turning then to the specific context of assisted human reproduction including surrogacy, it is, in my view, clear and entirely logical that a similar policy is detectable there. The topic of surrogacy came to prominence in the early 1980s in

the UK when it emerged in that jurisdiction that surrogacy arrangements had been made giving rise to the birth of a child. The Surrogacy Arrangements Act, 1985 in that jurisdiction permitted what has been described as altruistic or at least non-commercial surrogacy but expressly prohibited the entering into of any surrogacy arrangement on a commercial basis. Subsequently, the Human Fertilisation and Embryology Act, 1990 inserted s. 1A into the 1985 Act providing that "no surrogacy arrangements are enforceable by or against any of the persons making it". This template, permitting surrogacy subject to regulation but providing, however, that agreements were unenforceable and prohibiting commercial surrogacy, was subsequently adopted in a number of other countries and formed something of the backdrop to developments in this jurisdiction.

71. In Ireland, a Commission on Assisted Human Reproduction was established by the then Minister for Health in 2000 and reported in 2005. The Commission comprised of a number of respected experts and addressed issues including IVF, gamete donation, surrogacy and embryo research, and others. The Commission recommended the regulation of IVF, and also recommended that the donation of sperm, ova and embryos should be permitted subject to regulation. It also recommended that donors should not be paid, nor recipients charged for any donation. It expressed its opinion that "financial inducements in AHR are not acceptable. They would subject reproduction to the taint of commercialization and might put unreasonable pressure on those who are undergoing AHR treatments". It was also recommended that in the case of a child born through ovum donation or resulting from embryo donation, that the gestational mother should be recognised as the legal mother and her partner recognised as the child's second legal parent.

72. By majority, with one dissentient, the Commission also recommended that surrogacy should be permitted subject to regulation. However, in that regard, the Commission considered that great care should be taken when setting out the conditions under which such arrangements may be entered. The Commission also stated that it was: -

> "concerned with the possibility of commercial interests being involved in reproduction and, in keeping with its views on payments in donor programmes, felt that participants in surrogacy should not profit from such an arrangement. The prohibition on commercialisation reflects a concern that by placing a monetary value on a woman's reproductive capacity, the inherent value of women and children is implicitly undermined. Surrogate mothers should not

suffer financial loss, but there should be no element of profit involved in the arrangement".

73. The dissenting opinion is of some significance, since it is that of the respected advisory counsel in the office of the Attorney General with responsibility for issues relating to fertility and reproduction. That opinion is useful as it set out the legal position as it was then understood: -

> "Traditionally, the view in this jurisdiction has been that surrogacy contracts would be unenforceable as being against public policy. Within the EU, there is no jurisdiction in which surrogacy contracts are enforceable against the surrogate mother, and even in the US where a number of jurisdictions regulate surrogacy, most statutes stipulate that surrogacy contracts are unenforceable".

74. The Commission also included a summary of comparative surveys of national legal regimes governing surrogacy, which noted that: -

> "In most of the jurisdictions surveyed, surrogacy contracts are not enforceable. In a number of these jurisdictions, this is provided for in statute, while in others the courts have determined, in the absence of any statutory rule, that surrogacy contracts are unenforceable for public policy reasons".

The public policy reasons identified by the Commission were the best interests of the child.

75. Under the heading" Commercial Surrogacy", it was stated that a clear trend among the jurisdictions surveyed was: -

> "the outlawing of commercialised surrogacy involving the remuneration of (a) intermediaries and (b) the surrogate mother for their participation in the surrogacy arrangement... The general prohibition on commercialisation reflects a concern that by placing a monetary value on a woman's reproductive capacity, the inherent value of women and children is implicitly undermined".

76. The 2015 Act implements the recommendations of the Commission in respect of donor assisted human reproduction. It defines a mother as "the woman who gives birth to the child." S. 5 of the 2015 Act provides that the parents of a donor-conceived child who is born as a result of a donor-assisted human reproduction procedure are (a) the mother, and (b) the spouse, civil partner or co-habitant as the case may be of the mother. Where the Act is complied with, the donor is pursuant to

s. 5(5) not the parent of a child born as a result of the procedure and has no parental rights or duties in respect of the child. Finally, and importantly the consent of a donor under s. 6(6) (14) or (16) shall not be valid if given in exchange for financial compensation in excess of the reasonable expenses contemplated and permitted by the 2015 Act.

77. Finally, in this regard, as previously mentioned, the Court was provided with the Health (Assisted Human Reproduction) Bill, 2022, as initiated. I consider that the Court is entitled to have regard to the 2022 Bill in assessing both the existence of any public policy and the strength with which it may apply. It is of course, the case that the 2022 Bill cannot be given the same status as enacted legislation, and it is of course possible that it will not be enacted in the terms of the current draft or at all. This necessarily affects the weight that should be given to the Bill as an expression of public policy. It is important to understand the context in which regard may be had in this case to the terms of the 2022 Bill. If it were the case that the Bill clearly sought to make a change in the law that was a departure from a perhaps long settled position, I do not think much if any weight could be given to the new policy expressed in the Bill as somehow representing current public policy. To do so would be to ignore the important constitutional status of law enacted by the Oireachtas, and the constitutional process of enacting it, and treat the passage of legislation as a detail which can be overlooked. That would be incompatible with both the constitutional text and its underlying structure. However, here the Bill is referred to as illustrating a consistent public policy which would remain in place even if the significant step was taken of permitting a form of surrogacy. The Bill is a substantial and considered text which at a minimum expresses the policy of the Executive and the relevant Department. In this case, it can also be seen to be entirely consistent with the policy detectable in the 2005 Report and the 2015 Act. On that limited basis and cognisant of the gulf between a legislative proposal and enacted legislation, I consider that some regard may be had to the provisions of the Bill.

78. The Bill, if enacted, would only deal with domestic surrogacy arrangements including donation of gametes and gestational surrogacy. The Bill provides that for the purpose of any such arrangements, there should be not more than two intending parents and in the case of two intending parents, they should be spouses, civil partners, or co-habitants of one another. S. 34 of the Bill would prohibit the receipt

or agreement to receive any payment or other award in consideration of making a donation or the offering or agreeing to provide any such reward.

79. Part 7 of the Bill deals with domestic surrogacy. S. 50 identifies permitted surrogacy and excludes at s. 50(1)(c) commercial surrogacy referred to in s. 54. That section, in turn, contains a prohibition on commercial surrogacy with an exception in respect of a surrogate mother's reasonable expenses, as defined. S. 56 of the Bill also provides that a surrogacy agreement shall not be enforceable by or against a person otherwise than in relation to the payment of reasonable expenses. S. 56(2) provides that a surrogate mother has in relation to her pregnancy the same rights as a woman not being a surrogate mother has in relation to her pregnancy including the right to manage all aspects of her health during the pregnancy and to freely seek and obtain medical services in relation to it, and has furthermore, the right to confidentiality in respect of her medical treatment. If a child is born, an application can be made for a parental order in favour of the intended parent. The grant of such an order requires the surrogate to consent or for such consent to be dispensed with under s. 63(2) of the 2022 Bill.

80. Counsel for the Attorney General further informed the Court that the Government had announced its intention to enact legislation to recognise the status of Irish parents of children born as a result of surrogacy arrangements entered into abroad which would include surrogacies which have been described as "commercial surrogacies" for the purposes of these proceedings. In its Report, the Joint Oireachtas Committee on International Surrogacy had made detailed recommendations as to the recognition of such arrangements, including for the retrospective recognition of arrangements entered into in the past.

81. Counsel for the Attorney General also explained that the present position in relation to children born as a result of such surrogacy arrangements vis. children having been born to a surrogate abroad as a result of a donation of genetic material by a male partner of a couple who live in Ireland. In such circumstances, proceedings are brought in the Circuit Court on notice to the Attorney General and the Court can make a declaration of parentage in favour of the male parent (since a genetic link can be established by DNA) and after a period during which a child is in the custody of both intended parents for two years, the court can make a guardianship order in favour of the non-genetic parent under the Guardianship of Infants Act, 1964. In this way some significant, if indirect degree of legal protection can be afforded to the

bond between the intended parents and the child. There is now an established surrogacy list where this procedure is routinely followed.

82. Two conclusions might be drawn from this procedure. First, it is apparent that Irish law does not give effect to any surrogacy agreement or arrangement under which it is intended that the intended parents shall by that agreement become the legal parents of the child. What is possible, is the recognition of a biological fact, in the shape of a genetic connection were the provider of the male gamete is an intended parent, and the grant of a guardianship order to their partner, even though that may be the provider of the female gamete in some case. In such a case a guardianship order falls very far short of a recognition of the genetic connection. However, it can also be properly said that the fact that such orders are routinely made for the purposes of providing a legal structure and support for the family, on notice to the Attorney General shows that Irish law and policy is, at a minimum, tolerant of this type of surrogacy arrangement and does not seek to prohibit or invalidate it, or deny parties the declarations and orders sought because the child has been born as a result of a commercial surrogacy arrangement, if indeed that is the case.

83. Finally, in this regard, and in respect of the central issues in this case, counsel for the Attorney General submitted that the surrogacy arrangements here would not be enforceable in Irish law. However, she also submitted on behalf of the Attorney General that the recognition of the adoption order here was not contrary to public policy. Some weight should be accorded to the considered views of the Attorney General on issues of public policy.

84. There is, in my view, a clearly detectable public policy in relation to surrogacy and, in particular, commercial surrogacy. Irish law does not at the moment permit surrogacy and accordingly, intended parents of a child born by surrogacy cannot become the legal parents in Irish law nor can they exclude the consequences of the current law insomuch as it recognises parentage arising on birth. Furthermore, it seems clear that the nature of the agreement is such that the restrictions on personal autonomy coupled with provisions to transfer a child on birth, could not be enforced, and indeed if any provisions could be enforced, that could only be pursuant to a carefully drawn statute. Indeed, it might be noted that under the 2022 Bill which would permit surrogacy, only contractual provisions in relation to expenses would be enforceable – and a similar provision applies in the UK legislation. There is a clear public policy against the commercialisation of arrangements in respect of

adoption, donation of genetic material, and the recognition of foreign adoptions which were commercial in nature. It is, in my view, unavoidable that the same policy exists in respect of commercial surrogacy.

85. Somewhere below the surface of the arguments advanced in this case, is perhaps a contention that the absence of anything in the 2015 Act in relation to commercial surrogacy, akin to the limitation on effectiveness of commercial gamete donation expressed in s. 19 of the 2015 Act, should lead to the conclusion that the Oireachtas having considered the area, had decided that commercial surrogacy should not be discouraged or prohibited, and thus no public policy disapproving of commercial surrogacy can be asserted. I cannot agree. First, it might be observed that no plausible approach has been, or could be, asserted that would find the commercial donation of gametes more troubling than surrogacy that is wholly commercial in nature. Even if we limit ourselves to the triangulation points established by the provisions of sections 42 of the 1952 Act, s. 1(e) of the 1991 Act, its effective re-enactment in the 2010 Act coupled with the prohibitions contained in s. 145 of the 2010 Act and s. 19 of the 2015 Act, a clear public policy can be discerned. When those provisions are placed in a fuller context including the 2005 Commission Report, the provisions of the 2022 Bill, and the international background, the conclusion is surely irresistible. Both the 2005 Report and the 2022 Bill specifically address the question of commercial surrogacy and express opposition to it. It cannot be seriously contended that the existing public policy in 2005 was changed by default in the 2015 Act but would be restored by the 2022 Bill if enacted, all without any public debate. The 2015 Act did not merely state a prohibition of commercial surrogacy, it did not address surrogacy *at all*. The logical inference (and one which is bolstered by a consideration of the 2005 Report, but not dependent on it) is that surrogacy in all its forms was considered a more difficult problem raising even more difficult and serious issues, such as those touched on at paragraph 10 above. That legislative silence cannot plausibly be interpreted as an implicit approval of surrogacy, an approval which if it was so expressed would moreover be unqualified. Finally, it is apparent from the pattern established by the Adoption Act 1952 and the 2015 Act, that it is only when a mechanism for altering status is being permitted for the first time, that it becomes necessary to establish the limitations on what will be permissible, and in each case a disapproval of and in some cases prohibition of a commercialisation of the process.

86. Accordingly, I do not think it is plausible to approach this case on any other basis than to accept that public policy as it currently stands, certainly expresses a disapproval of commercial surrogacy which would normally require a court to refuse to enforce an agreement providing for it. This is what was submitted on behalf of the Attorney General, and I agree.

Does the identified Public Policy require refusal of recognition of status in this case?

87. Since this is a particularly fraught area where misunderstanding is easy, I wish to make it clear that in identifying this public policy, and where appropriate giving effect to it, a court is not expressing any view as to the merits, wisdom, or desirability of this policy. It is quite possible to doubt the logic of seeking to draw a bright line between commercial and non-commercial surrogacies, for example. It is also apparent that public policy in this regard is not static, and a significant development in thinking can be detected. However, legislation can best be drafted, and at a broader level, policy formed, if there is a clear understanding of what the law currently provides, and how public policy, which will determine the recognition of foreign surrogacies and adoptions, now stands. Current public policy on surrogacy and in particular commercial surrogacy is reasonably clear. The issue in this case is, however, whether that public policy requires non-recognition of the adoption order in this case. For a number of reasons, I am satisfied that it does not.

88. First, there is a strong public policy interest in recognising the status accorded to a person by the law of their domicile and/or habitual residence. The reasons for this are obvious, are long established, and apply with even greater force in a globalised world. Second, this policy is explicit in the 2010 Act which deems an adoption order made pursuant to the law of that State to be a valid adoption *unless* such deeming is considered to be contrary to public policy, which creates a form of presumption in favour of recognition. Third, I accept that only public policy which is very clear and strong, would justify the denial of a status accorded to a person by the law of their domicile and habitual residence whether as parents, or as children of those parents. Fourth, as Lady Hale observed in *Whittington Hospital NHS Trust v. X.X.* [2021] A.C. 275, the courts bend over backwards to recognise the status of children born and seek to avoid leaving them parentless and perhaps stateless. As Shannon, *Child*

and Family Law (3rd edn., Round Hall 2020) has observed there is a fundamental tension in the legal regulation of surrogacy: -

> "the need to restrict commercial surrogacy (in part because of its connection to child trafficking) needs to be balanced against the need to protect the best interests of the child born through surrogacy. Often the best interests of the child will militate towards recognition of the parent-child relationship, even when the surrogacy arrangement is itself considered to be problematic. This theme can also be found in the surrogacy law emanating from the European Court of Human Rights and has led to a phenomenon whereby it is not uncommon for States to prohibit surrogacy, but recognise the parental relationships arising from surrogacy in certain circumstances".

89. Fifth, Article 42A of the Constitution is also of some weight. It provides that provision shall be made by law that, in the resolution of all proceedings concerning the adoption, guardianship, or custody of a child, the best interests of the child shall be a paramount consideration. These proceedings, while not seeking any adoption order, can be considered proceedings concerning adoption. The case does not raise the same stark considerations as might apply if a country of domicile refused to provide recognition of and protection for the bond between the intended parents and the child, but once again this is a factor that weighs in favour of recognition. Perhaps importantly the Irish legislation itself tends to stop short of denying validity or effectiveness to arrangements which are themselves disapproved of. It is notable for example, that the 2015 Act, which is the last expression of legislative views by the Oireachtas in this area, provides only that a consent will not be valid, but does not prohibit the practice or otherwise specify the consequences of an absence of consent. It does appear that only a donor who has consented (validly) can benefit from the provisions of s. 5 and avoid parentage, and the consequent parental rights and duties that would otherwise arise. S. 50 of the 2010 Act provides that a relevant adoption shall not be declared invalid if such a declaration is not in the best interests of the child. These provisions tend to suggest a more nuanced approach to invalidity.

90. Sixth, decisions of the European Court of Human Rights (the "ECtHR") make it clear that states must provide some level of recognition to and protection for the relationships established, and as touched on above. The ECtHR jurisprudence may not be decisive here, since Irish law does not prohibit surrogacy and as described above, provides some level of legal protection for children and intended parents.

Furthermore, that issue does not arise with particular force here as the status of the children and the applicants is established under the law of their habitual residence, and indeed in the UK and what is involved here is recognition of a decision of another State. The ECtHR jurisprudence has focussed on the impact on family life where it is lived and has also not required that recognition of status be universal, but rather that the bond between the commissioning parents and the child is recognised and protected by law in the State in which they are living. *SH v. Poland* App nos. 56846/15 and 56849/15 (ECHR, 16 November, 2021) establishes that refusal of recognition of a foreign parental order pursuant to a surrogacy arrangement, was not *per se* a breach of Article 8 rights, and a possible breach could only materialise if the parties took up residence in a Convention State. While, therefore, the jurisprudence of the ECtHR may not be decisive, it is a factor tending towards recognition. It favours the recognition of the reality of family relationships arising from surrogacy and that is a factor which must be considered whenever the issue arises as it does here at least to some extent.

91. Features of this case which tend in favour of recognition (or more precisely against denial of recognition) are the fact that the surrogacy arrangements by Irish resident couples are to some extent facilitated – and certainly not expressly prohibited or invalidated – by Irish law. Furthermore, the Attorney General (who is on notice of applications for declarations of parentage in the surrogacy lists) submits that public policy does not require the refusal of recognition.

92. For completeness it is appropriate to return to the issues identified at paragraph 64 above. For the reasons set out at paragraphs 83-91 of the judgment of Hogan J., with which I agree, I do not consider that considerations relating to the child's right to identity should lead to non-enforcement of the agreements or non-recognition of status. In this case, there was no provision for post-birth consent as part of the adoption in the USA because of the way in which the arrangement was structured, as set out at paragraphs 36-44 above. That is a significant matter. As set out at above, Article 4(4) of the Hague Convention provides that the consent of the mother where required shall be provided after birth. This has always been a requirement of Irish adoption law since 1952, and the 2022 Bill in clause 63 adopts the same approach in the context of surrogacy. However, in this case, while the surrogate provided her consent before birth, she had legal advice. There is no reason to be concerned that her consent in this case was coerced or improperly obtained, or was anything other

than the expression of her free will. Furthermore, and significantly, in this case the surrogate has subsequently expressly re-iterated her consent to the surrogacy arrangements, and her surrender of all parental rights in the proceedings before the UK court, which occurred long after the birth of the children. In those circumstances, I do not think that it can be said that public policy requires refusal of recognition on this basis. Finally, while the agreements might raise issues of personal autonomy if individual aspects were sought to be enforced, I do not consider it necessary to express a view on those provisions either collectively or individually in the light of the conclusion to which I have come on the issue of commerciality, which is the central question here, and where as I have sought to show, there is a clearly expressed and deducible public policy.

93. Returning then to the question of the commercial nature of the agreements here, it must be recognised that if international surrogacy is to be facilitated or accommodated at all – and as set out above, Irish law does do so, at least to a limited extent – then some element of commerciality is almost unavoidable, indeed inherent, in such arrangements. In this case, the applicants have made their home in a country where the provision of surrogacy is organised on a privatised commercial basis, and it would require some very strong considerations to penalise them for availing of surrogacy in the form it is provided in that jurisdiction. Clear prohibitions are easier to enforce than relative judgements, but the law does not always provide, and justice does not always demand, black and white lines. While it is always difficult to make some assessment of just how commercial an arrangement would have to be to lead to refusal of recognition, it should be said that the payments here seem to be standard and unexceptional in the context of the USA. It is also an important feature that there is a genetic connection in this case. C is the father of the children and is moreover married to D. Recognition of D's status as adoptive parent recognises and supports the bonds between A, B, C and D.

94. As against this, perhaps the strongest factor weighing in favour of refusal of recognition, is the prohibition on commercial adoptions contained in s. 145 of the 2010 Act. and the corresponding provisions of s. 1(e) of the 1991 Act. That Act as previously observed, specifically addresses the question of recognition, and excludes any adoption where payment or other reward made "in connection with the making of the arrangements for the adoption". This is broadly phrased. However, no party has argued that the arrangements fall within this definition, so I do not consider that

issue here. But it must be clear that given the fact that the adoption was the culmination of the arrangements which sought to provide legal parentage of the children to the non-genetic parent that, at a minimum, the situation is close enough to require consideration to be given to the policy expressed in the section, and to whether that also requires a refusal of recognition of this adoption. However, it is important that public policy in this area is not static. It is clearly developing to the point where an Oireachtas Committee has recommended recognition of foreign surrogacies including those which were organised on a commercial basis, and the Government has announced its intention to legislate to that effect. Taking into consideration the pace and direction of change and the strong policy against refusal of recognition of a status conferred by the State of domicile, I consider that the Authority is not required to refuse recognition of these adoptions.

95. This approach is enough to decide this case but is far from a satisfactory resolution of issues which are of critical importance to individuals. It is, I think, appropriate to return, therefore, to some points touched on at the outset. The difficulty of the balancing exercise in this case and the inadequacy of the tools available to the court are a stark illustration of the fact that the current state of the law should satisfy no one. In the UK, which was one of the earliest States to regulate surrogacy, Theis J. has argued that surrogacy which does not conform to the UK legislative model has led to an inability or unwillingness to register the births of children and given rise to a "ticking legal time bomb" on issues like inheritance from intended parents, divorce of those parents, or simply renewal of passports. Plainly, the situation is much more difficult in Ireland, and the consequences of the absence of clear, consistent, and comprehensive law much more serious.