AN CHÚIRT UACHTARACH

THE SUPREME COURT

` S: AP:IE: 2022:000063

[2023] IESC 6

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)

Between/

ADOPTION AUTHORITY OF IRELAND

Appellants

AND

C AND D

AND

THE ATTORNEY GENERAL

Respondents/Notice Parties

JUDGMENT of Mr. Justice Gerard Hogan delivered the 30th day of March 2023

Part I - Introduction

Background

1. This appeal presents the question of whether a stepparent adoption order made by a court in Colorado in February 2015 is entitled to recognition in this State. The two children who are the subject of the adoption order in question, A and B, are twins. They were born in 2014 as a result of a surrogacy arrangement, the details of which I shall presently describe.

2. The fundamental question which therefore arises is whether the recognition of an adoption order in such circumstances where the children were born as a result of a surrogacy agreement involving payments to both the genetic mother (as egg donor) and the gestational mother would offend against our notions of public policy for the purposes of the application of our rules of private international law. The recognition issue presented here is in fact one of very considerable difficulty precisely because in the context of surrogacy the contours of that public policy are themselves elusive and appear to be possibly changing. While there is no clear legislative policy on the matter, yet, as the specific details of the surrogacy agreements at issue in this appeal themselves graphically illustrate, aspects of surrogacy contracts present uncomfortable issues for our legal system. Here it must be said that the values of both the common law of contract and the Constitution have – at least as traditionally understood up to now - generally set aside themselves against what some might regard as the commodification of the human reproductive system.

3. A further deep-rooted aspect of our public policy is that the adoption process should not be contaminated by the making of monetary payments by or to the natural parents. Section 145 of the Adoption Act 2010 ("the 2010 Act") accordingly precludes the adopters of any child making any payment in respect of that adoption (subject to certain

exceptions such as child maintenance which are not relevant here). A similar prohibition was previously contained in (the now repealed) s. 1(3) of the Adoption Act 1991 ("the 1991 Act") insofar as it does not provide for the recognition of foreign adoptions which involve the making of payments in respect of or in consideration of the adoption of a child. (While the 1991 Act was actually repealed by the 2010 Act, this definition is nonetheless still relevant in that s. 3 of the 2010 Act defines an adoption as including a foreign adoption that confirms to the definition of 'foreign adoption' in s. 1 of the 1991 Act as it read on 30 May 1991.)

4. One of the key issues identified by the Adoption Authority ("the Authority") in these proceedings is accordingly whether the recognition of an adoption order which followed on from such a surrogacy arrangement with a payment to the gestational mother would amount, in substance, to either a violation of, or, at least, a circumvention of this statutory prohibition in a manner which contravenes the public policy of this State. While formally presented as an issue of private international law, it will be seen the Court is, to some extent, at least, obliged to confront issues pertaining to the aspects of commercial surrogacy in Irish law and the putative enforcement of those arrangements so far as our domestic law and public policy is concerned in the course of determining this appeal.

5. Although the Court has not been provided with any precise figures, it would seem that the number of children now living in this State who have been born as a result of surrogacy arrangements made abroad can probably now be measured in the thousands. While these arrangements take many different forms, it would be surprising if many – perhaps even a significant majority - did not have at least some commercial element. Even though the law has struggled - and not for the first time - to keep pace with these scientific developments, the practice of commercial surrogacy is now so ubiquitous and

widespread that the necessity for legislative regulation in this area is overwhelming. It is indeed a matter of profound regret that as of the date of the hearing of this appeal in December 2022 no such legislation had been enacted by the Oireachtas. While it is true that there have been public statements on the matter by the Government along with various reports of Oireachtas Committees, this material is really of limited assistance as under our constitutional system it is the Oireachtas alone which can change and determine the law. At the same time, the recent statement by the Government indicating that some form of recognition of commercial surrogacy agreements performed outside of this State is likely to be included in any future legislation provides some guide on the public policy issue.

6. It gives me no pleasure at all to record that the failure on the part of the Oireachtas to address the legality and regularity of surrogacy arrangements has created an intolerable situation for the commissioning parents, the various surrogates and, perhaps, most especially, the children born as a result of these arrangements. This legislative vacuum has served to create a nether world where such parties struggle against a background of profound legal uncertainty to regulate their relationships and status by contract and by other methods such as applications to the Circuit Court for a declaration of parentage under Part VI of the Status of Children Act 1987 or, as in the present case, an application to the Authority under the 2010 Act for the recognition of a foreign adoption order.

7. In addition to all of this, the present case also highlights the need for crucial guidance to be given by the Oireachtas regarding the consequences for the children in particular where children have been born as a result of commercial surrogacy arrangements, whether in this State or elsewhere. It is one thing to decry or disfavour or even prohibit commercial surrogacy. Yet the reality is that there are many children living in this State or who might be brought into the State born as a result of these arrangement and it is, I

suggest, necessary that the Oireachtas should address this reality and give clear guidance to the courts, administrators and, above all, to these children and their families.

8. In the absence of legislation enacted by the Oireachtas it nevertheless falls to this Court to decide whether these arrangements contravene public policy. The Authority originally identified certain potential public policy issues arising from this application for recognition of the adoption order. It accordingly referred certain questions of law to the High Court by way of case stated in accordance with s. 49(3) of the 2010 Act. (The relevant portions of the Case Stated are reproduced in an Annex to this judgment).

9. In the High Court Barrett J. concluded that such foreign adoption decrees with a background of commercial surrogacy should in general be recognised absent particularly egregious factors such as prostitution, trafficking or child abuse associated with the surrogacy agreement: see *Re A and B minor, A v. Adoption Authority of Irelands* [2021] IEHC 784 at [44] to [46]. The Authority considered that this judgment provided insufficient guidance on these public policy issues which fall for consideration when recognition is sought and it sought to appeal this decision. Given the manifest importance of these questions we granted the Authority leave to appeal directly to this Court pursuant to Article 34.5.4 of the Constitution: see [2022] IESCDET 89. Before considering these legal issues, it is first necessary to say something more about the background facts.

The essential facts

10. The first and second notice parties are a same sex married couple. Mr. C was born in England and Mr. D was born in Northern Ireland. They married in the United States some years ago and they continue to reside there today with their three children. Mr. D

retains strong connections with Ireland and he, Mr. C, and the children frequently return here. These connections include siblings who live in Northern Ireland and other family members who reside in this State. Mr. C's company is in fact head-quartered in Belfast and that company provides services to other companies in Northern Ireland and this State.

11. This case concerns two of those three children, A and B. They are twins who were born in Colorado pursuant to a surrogacy agreement which Mr. C and Mr. D entered in January 2013 with the surrogate mother (Ms. E). It was Ms. E who was the gestational mother who gave birth to them following an embryo transplant pursuant to what was described as a 'known egg donor agreement' with an egg donor (Ms. F) in 2014.

12. Mr. C is the natural (i.e., genetic) father of the twins and he was so registered following the filing of a verified petition for the determination of parent and child relationship in 2014, prior to the birth of the twins. The Colorado Court, on this petition, recorded Mr. C as the sole legal parent on the twin's birth certificates by order dated 18 August 2014. In that regard it took into account the admission of non-maternity of Ms. E. In that document which was filed in court she declared that though she was carrying the children she was doing so as a gestational surrogate; that she was impregnated through in-vitro fertilisation using a donor egg and the sperm of Mr. C and had no genetic link to the child. Ms. E declared that she was not the natural, genetic or intended mother, that she had always understood that Mr. C and Mr. D were to be the natural parents, and that she would not claim any rights in respect of the (then) unborn children. In those circumstances Mr. C was the only person regarded by Colorado law whose consent to the adoption of A and B by Mr. D was actually required.

13. After the children were born, Mr. D subsequently obtained a decree of stepparent adoption from a court in Colorado on 27 February 2015 in respect of both A and B. As I have indicated it is the question of whether this order should be recognised which is at the heart of the present appeal. While it appears that Colorado law prohibits the making of any commercial payment in connection with adoption in the same manner as this jurisdiction (save for legal fees and such other payments as may be approved by the court), this particular requirement was considered to have been complied with because Mr. C made no payment to Mr. D in connection with the latter's consent to the stepparent adoption

14. As it happens, Mr. C. submitted a verified statement of fees to the Colorado court on 20 December 2014 in the stepparent adoption proceedings. This statement demonstrated that the majority of the outlay consisted of medical expenses associated with the twin's having spent time in the hospital's neo-natal intensive care unit. As the applicant's expert in the law of Colorado, Mr. Seth Grob, stated in his affidavit of 3rd February 2021, Mr. D's "consent to both adoptions was therefore deemed to have been voluntarily provided without any undue influence." Mr. Grob also explained how the prior payments to both Ms. E (as gestational mother) and Ms. F. (as genetic mother) were not regarded under Colorado law as payments made in association with the adoption.

15. On 25 October 2017, Mr. D applied to the Authority pursuant to s. 90 of the 2010 Act to have the Colorado decree of stepparent adoption recognised and contained within the Register of Inter-Country Adoptions in Ireland ("RICA"). (The RICA is maintained by the Authority pursuant to this statutory provision.). As it happens, Mr. D had already made a similar application, for the same purpose, under s. 54 of the Human Fertilisation and Embryology Act 2008 in the UK, as it was the home and birthplace of Mr. C. the

genetic father of the twins. Ms. E was named as a first respondent to that application but beyond swearing an affidavit in which she disclaimed any parental rights she might otherwise have had, she declined to participate in the proceedings. The English High Court accordingly made the appropriate parental order in June 2019, declaring Mr. C and Mr. D as the parents of the twins.

16. The Authority was, however, of the view that the application before it raised one or more public policy questions and, as I have already noted, it accordingly transmitted a Case Stated to the High Court, pursuant to s.49(3) of the 2010 Act. Section 49 of the 2010 Act provides for a procedure whereby the Authority may, and, in some circumstances, must, refer questions of law and public policy arising in respect of such adoptions for determination in the High Court before such an order can be granted. Applications made under s. 49(3) are of the non-discretionary kind.

17. The Authority filed the Case Stated on the 7th of December 2020 for the determination of the certain questions of law arising on an application for entry to the RICA. The relevant provisions of the Case Stated are annexed to this judgment. For the moment it suffices to say that the Authority posed the question as whether the nature of the surrogacy agreement at issue in this case was void as contrary to the public policy and, if so, whether this precluded the recognition of the Colorado adoption order of February 2015 which represented the culmination of the surrogacy process at issue in this case.

Part II – The High Court judgment and the grant of leave to appeal to this Court

High Court Judgment

14. As I have already noted, in a reserved judgment delivered on 17 November 2021, Barrett J. concluded that there was no reason why these foreign adoption orders should not be recognised in the State: see *Re A and B (minors)* [2021] IEHC 784.

15. Barrett J. concluded [at 37] that the Case Stated concerns the recognition by Ireland of foreign domestic adoptions, in this case, one which arose following a surrogacy arrangement. The case was, in his view, fundamentally about the recognition of two foreign domestic adoptions "within the four walls" of the Adoption Acts, the rules of which are quite precise, and "have been left largely intact since they were created in 1991, despite substantial reform opportunities in 2010 and 2017". Accordingly, Barrett J. did not see it necessary [at 55] to make any decision in respect to constitutional law or principles, or any rights presenting under the ECHR, in order to conclude that the adoptions in this case are readily capable of recognition as a matter of Irish law.

16. Barrett J. further concluded [at 59] that he did not see anything to suggest that the private placement rules contained in s. 125 of the 2010 Act had been intended by the Oireachtas to apply to foreign domestic adoptions of this kind involving step-parents. Nor did he think that there were any "public policy concerns to present on the facts of this case that would prevent recognition of the adoptions." The judge likewise concluded [at 63] that s. 145 of the 2010 (prohibiting payments in respect of adoptions) similarly presents no issue in this case, because:

> "Nothing suggested that the section was intended by Oireachtas to apply to foreign domestic adoptions made in the habitual residence of the adopters. Section 4 appears not to apply to foreign domestic adoptions (and that section describes what is meant in the Act by references to the making of arrangements for the adoption of children). There are no public policy concerns."

17. On 3 December 2021, Barrett J. delivered a supplemental judgment which he annexed to the original decision (alongside an order, perfected 25 May 2022), in which the judge stated that counsel for the Attorney General brought to his attention the decision in *HAH v SAA* [2017] IESC 40, [2017] 1 IR 372 which had been inadvertently omitted from the authorities to which the court was referred at the original hearing. Barrett J. noted that it was unanimously agreed by both the parties that there was nothing in *HAH* which merited altering the original judgment of the Court. Barrett J. expressed his agreement with that position.

The Application for Leave and Determination

18. On 31 May 2022, the Authority applied to this Court, seeking leave for leapfrog appeal under Article 34.5.4° of the Constitution on the basis that the trial judge erred in his analysis of the following issues:

a. The statutory concept of public policy

b. A child's right to identity

c. The payment of money in a surrogacy arrangement

d. The private placement of children for adoption.

19. The Authority did not, however, raise any issue in relation to the personal suitability of the respondents, and thus did not seek leave to appeal the award of costs in their favour in the High Court. The Authority similarly has accepted that the adoptions are compliant with s. 1 of the Adoption Act 1991 ("the 1991 Act").

20. The respondents opposed leave mainly on the basis that it is accepted that the adoptions satisfy the statutory criteria and that, as the trial judge was correct in his analysis on each identified issue, that it is not appropriate to use this case to seek general guidance

for other cases. The Attorney General did not oppose leave but indicated that he intended to oppose the appeal generally, arguing that the trial judge did not err in his conclusions.

21. By a Determination dated 26 July 2022, this Court held that the issues raised by the Adoption Authority in their application met the constitutional threshold specified in Article 34.5.4° in respect of a direct appeal to this Court. The Court took the view that the issues would not be narrowed by an interim hearing in the Court of Appeal. However, having regard to the facts of the individual case, especially insofar as the personal suitability of the respondents had not been impugned in any way, the Court decided that the grant of leave would be conditional upon an appropriate undertaking being provided by the Authority in respect of their costs in the appeal. In the light of the fact that the interests of the two children were affected, the Court also afforded this case a priority hearing.

Part III – The issues in the appeal

Issues

22. The Authority contends that the High Court judgment provided inadequate and potentially incorrect guidance on the complex public policy issues which arise in these circumstances and this, indeed, is the reason for the present appeal. The Authority accordingly set out five issues on which it sought clarification and decisions from this Court:

1. Whether the trial court provided adequate guidance on public policy.

2. What the relevant principles of public policy are in respect of the right to identity.

3. What the relevant public principles of public policy are in respect of payments made

4. What the relevant principles of public policy are in respect of the placement of the children with Mr. C and Mr. D, in the context of prohibition of private placements for adoption.

5. Whether the Authority should proceed to enter the Adoptions on the RICA.

23. The Authority maintained that the recognition of the Colorado adoption order would offend against Irish public policy, specifically in view of the statutory prohibitions against the making of payments associated with the adoption of children. Both C and D and the Attorney General separately disputed this contention. They insisted that there was, in fact, no payment in consideration of the adoption order and that the order made by the Colorado court reflected this: it was, in fact, a stepparent adoption made in favour of the husband of the genetic father.

24. One specific and particular issue can be immediately addressed. It appears that in the High Court the Authority adopted an essentially neutral position on these public policy issues. On appeal to this Court the Authority appears to have changed its stance, now contending forcefully that the adoption orders in question offend against public policy and insisting that the trial judge gave inadequate guidance on this important topic. The Attorney General objects to what he maintains now amounts to a *volte face* on the part of the Authority.

25. I cannot avoid thinking that it might have been better had the Authority steadfastly adhered to its core arguments on public policy which it advanced in this Court right from the start. Failure to do so is potentially unfair to the other parties involved in this litigation and a neutral stance was not necessarily the most helpful position for the Authority to have taken so far as the High Court judge was concerned. It was, after all, the Authority which had carriage of the Case Stated and it was the body which had

referred the matters of public policy for determination by the High Court under s. 49(3) of the 2010 Act.

26. I do not, however, propose to dwell on the Attorney General's objections to this change of position, understandable though they may well be. The present case presents issues of considerable public importance which transcend the interests of the immediate parties and, indeed, the manner in which this litigation has been conducted. In this case the issues presented call for judicial resolution by this Court and I accordingly propose now to address these very issues.

Part IV – The scope of public policy

27. Since it is central to the question of the recognition of the Colorado adoption at issue in this appeal, it might be appropriate to commence any analysis of these issues by considering the extent of the Court's public policy jurisdiction. While s. 49(3) of the 2010 Act speaks of the question of law being referred to the High Court so that it (i.e., the Court) could determine whether the recognition of the foreign decree would be contrary to public policy, taken on their own these words are, perhaps, apt to convey a misleading impression regarding the extent of the Court's jurisdiction in this regard.

28. Article 5 of the Constitution describes the State as a democracy and, as several members of this Court observed in *Costello v. Government of Ireland* [2022] IESC 44, this is a key feature of the State's constitutional identity. As unelected personages, therefore, judges do not have - and cannot be given - a free standing role in determining issues of public policy by reference, for example, to their own subjective or intuitive views as to what public policy on any given topic such as surrogacy should be. The reference in s. 49(3) of the 2010 Act to public policy should therefore be understood as a reference to the public policy as can be objectively gleaned – whether expressly or inferentially -

from established legal sources, such as the Constitution and perhaps more particularly Acts of the Oireachtas.

29. Public policy in this sense is not, of course set in stone. At a time when the Constitution banned divorce, this Court held in *Mayo-Perrott v. Mayo-Perrott* [1958] IR 336 that it could not give effect to an English costs judgment arising from divorce proceedings. As O'Daly J. explained ([1958] IR 336 at 352):

> "Enforcement by our Courts of the costs of a decree of divorce would clearly offend against a moral principle which the Constitution asserts…If there is ever to be a case in which on grounds of repugnancy to public policy the Courts will decline to enforce a foreign judgment this is, it seems to me, one."

30. Yet when the Constitution itself was changed – and divorce was permitted – so too did public policy for the purposes of our rules of private international law.

31. The entire corpus of our private international law is accordingly really no more than a recognition that in a globalised world with over 190 nation states there will inevitably be many instances where the law and practice of other countries differs from our own, sometimes in profoundly and markedly different ways. Cultural, ethical, philosophical and religious perspectives often leave their mark on law and legal practice, and this is perhaps especially true in matters relating to legal regulation in the sphere of the family, marriage, sexuality and human reproduction.

32. All of this is reflected in the recent report of the Oireachtas Committee: see *Final Report of the Joint Committee on International Surrogacy* (July 2022). This thoughtful and reflective parliamentary report summarised the highly complex legal, moral and ethical issues arising from this question and the practical difficulties attending the issue of

legislation on this topic. Judged by this report, public opinion - if not so obviously, public policy - seems to be changing.

33. While our rules of private international law are designed to provide a mechanism whereby foreign law and foreign judgments and orders can be accommodated within the Irish legal system, the public policy exception is designed to protect fundamental policy interests and values which, generally speaking, are as I have just noted, reflected in legislation enacted by the Oireachtas and other well established legal sources. Any judicial invocation of the public policy exception does not in and of itself imply that the practice in question is illegal: it is rather that as cases such as *Mayo-Perrott* show, the courts will not lend their aid to the recognition or enforcement of a foreign law or foreign judgment or order that is adjudged to be contrary to the public policy in question.

34. There are, of course, a range of possible views regarding commercial surrogacy. Some may think that it paves the way for the exploitation of the poor and the vulnerable and the general commercialisation of the human reproductive system in a manner many consider to be objectionable. Those who oppose this practice contend that such, is to that extent, offensive to notions of human dignity. Others may think, on the other hand, that the practice can be a positive one when it is properly regulated (including ensuring that all parties – including the most vulnerable party – are properly legally advised and protected) in that it facilitates couples either to have children of their own or (in the case of homosexual couples) to have children in respect of which one of the couple has a direct genetic link.

35. Irrespective of one's personal views on the matter, one way or the other, decisions concerning the legal recognition of domestic and foreign surrogacy arrangements must,

accordingly, be made by the Oireachtas in the first instance as the democratically elected legislative body charged with the task of law-making. As O'Malley J. observed in her judgment in *HAH* (at [60] to [62]) absent such legislation the task of the judiciary is simply to examine whether this practice of international commercial surrogacy is at odds (whether directly or indirectly) with public policy articulated in existing, established legal sources, principally the Constitution, the general corpus of legislation and statute law (including the European Convention of Human Rights Act 2003) and the common law.

36. If one surveys the private international law cases where foreign judgments and orders have been refused recognition on public policy grounds it will be found that the public policy invoked in such cases for this purpose by various courts and judges is rooted in these well-established and pre-existing legal principles and, even then, in the words of Dunne J. in *Emo Oil Ltd. v. Mulligan* [2011] IEHC 552, this "will only arise in exceptional circumstances." Thus, for example, in my judgment in the High Court in *Celtic Atlantic Salmon v. Aller Acqua* [2014] IEHC 421, [2014] 3 IR 214 I refused on these grounds to enforce a Danish judgment which had granted a negative declaration that the defendant was not liable for alleged negligence in respect of the supply of contaminated feed stock which had caused a fish kill in Ireland having regard to the public policy exception contained in Article 34(1) of the Brussels Regulation.

37. I took this view because Danish procedural law only allowed expert reports which had been sanctioned *in advance by the Danish courts* to be introduced into evidence. Noting that the plaintiff could not hope to advance its case successfully without the assistance of such an expert report, I concluded that as the plaintiffs could not possibly have known of this requirement in advance of commissioning their own expert in relation to

the causes of a fish kill in an Irish river, the Danish judgment (inadvertently) breached fair procedures

38. The point here, of course, was that the public policy in question was based squarely on the requirements of an effective remedy and general fair procedures contained in Article 47 of the EU Charter of Fundamental Rights and Freedoms, principles which have been clearly enunciated by the Court of Justice in a variety of cases. Thus, for example, in Case C- 420/07 *Apostolides v. Orams* (C-420/07, EU:C: 2009: 271) the Court of Justice said that recourse to the public policy exception in (what was then) Article 34(1) of the Brussels Regulation (now Article 45(1)(a)):

> "can be envisaged only where the recognition or enforcement of the judgment given in another Member State would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought as it would infringe a fundamental principle….the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as fundamental within that legal order."

39. This point is also illustrated by *Sporting Index Ltd. v. O'Shea* [2015] IEHC 407, [2016] 3 IR 417. Here MacEochaidh J. refused on public policy grounds to enforce an English order giving judgment in respect of a gaming debt. He noted that s. 36(1) of the Gaming and Lotteries Act 1956 provided that every contract by way of gaming or wagering is void. MacEochaidh J. continued ([2016] 3 IR 417 at 424-425) by saying:

> "The intention of the legislature in relation to the relevant provisions of the 1956 Act is perfectly clear. The enforcement of any betting contracts is prohibited and I am satisfied that the statute constitutes a rule of law regarded as essential

> in the legal order of this State. There is a manifest conflict between the foreign court order arising from a gambling debt and Irish public policy as expressed in the 1956 Act. Because this rule was enacted by the Oireachtas, I am bound to find that the rule is essential in the legal order of the State. The rule reflects public policy on the control of gambling. It is an essential measure in as much as the Oireachtas has considered it necessary for the purposes of controlling gambling."

40. The decision of Finlay Geoghegan J. in *Fairfield Sentry Ltd. (In liq.) v. Citco Bank Nederland NV* [2012] IEHC 81 provides a contrasting example. Here the question was whether a Dutch order of conservatory garnishment - which, so to speak, "pre-booked" assets (or potential assets) of an insolvent company for the benefit of a particular unsecured creditor - was contrary to an Irish principle of public policy such that the Article 34(1) exception came squarely into play. In her judgment Finlay Geoghegan J. rejected the argument that the principle of the *pari passu* treatment of creditors as provided for in the Companies Acts was so fundamental in this sense that recognition of a foreign judgment inconsistent with that principle would be contrary to our public policy as expressed in our general law of insolvency. Whatever the limits of public policy, *Fairfield Sentry* provides an illustration of a wider principle that not every foreign law which treats of or regulate matters in a way very different to ours is in itself contrary to public policy.

41. One may sum up on this point by saying that, in general, private international law strongly favours the recognition and enforcement of foreign judgments, especially where the judgment emanates from a country or territory (such as the state of Colorado) committed to the rule of law and where the judgment is pronounced by courts whose commitment to the values of judicial independence and impartiality is beyond reproach.

In the particular context of the European Union this is all reflected in, for example, the provisions of Article 45(1)(a) of the Brussels Regulation No. 1215/2012 (recast) which provides that recognition of a judgment from the courts of another Member State shall be refused only "if such recognition is *manifestly* contrary to public policy (*ordre public*) in the Member State addressed." (Emphasis supplied)

42. This reluctance to refuse recognition is also, perhaps, especially pronounced in cases involving status where the judgment is pronounced by a court of the country or territory where the parties are domiciled or ordinarily reside. It is, after all, that country or territory which has the closest connection with the parties and where, almost by definition, the judgment as to status will have the greatest impact. Absent, therefore, a particularly clear form of domestic public policy, our rules of private international law suggest that we should generally defer to the judgment of that foreign court in these matters where the judgment involves persons domiciled or ordinarily resident in that foreign state.

43. In this respect I think that Barrett J. was correct in suggesting that in the context of the non-recognition of a foreign adoption order the test for refusal on public policy grounds is particularly high. As he observed (at [43]):

> "The judgment of [O'Donnell J. for] the Supreme Court in *Nottinghamshire County Council v. B* [2011] IESC 48, [2013] 4 IR 622 is also of interest (notwithstanding that it is an abduction case), for it suggests that the test as to whether the recognition of a foreign adoption in Ireland would offend against public policy, certainly in terms of offending against Irish constitutional norms, is very high, with a court in effect having to ask itself 'Is it the case that a particular adoption is not (a) so fundamentally at odds with the forms of

adoption which can be permitted under the Irish Constitution and (b) so clearly contrary to the values protected by the Irish Constitution, that an Irish court could not make an order which would in any way facilitate such a result?'"

44. This is also the general approach of the courts of England and Wales so far as the application of public policy considerations in the context of the recognition of foreign adoption orders is concerned. As Munby P. observed (at [129]) in *In re N* [2016] EWHC 3085, [2018] Fam.117 at 162]:

> "[P]ublic policy in this context has a strictly limited function and is…properly confined to particularly egregious cases, as explained, compellingly and correctly, in the [following] passage from Dicey, Morris & Collins, *The Conflict of Laws*, 15th ed, vol 2, para 20-133…: '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.'"

Part V: Public policy, status and the limits of contractual freedom

45. All of this is to say that non-recognition of foreign court judgments on grounds of public policy is very much the exception in the sphere of private international law. This

is, as I have just pointed out, especially true in the sphere of the recognition of foreign adoptions. It has been clear since the least the enactment of the 1991 Act that the recognition of foreign adoptions is the one which is legislatively favoured. This policy is currently expressed by s. 57(2) of the 2010 Act which provides – subject to certain exceptions – that where a foreign adoption:

> "(i) as having been effected by an adopter or adopters who were habitually resident in that state at the time of the adoption order and in accordance with the laws of that state, and
>
> (ii) in any other case, as having been effected in accordance with the Hague Convention or with a bilateral agreements or with an arrangements referred to in section 81, as the case may be,
>
> unless contrary to public policy, is hereby recognized, and is deemed to have been effected by a valid adoption order……"

46. What, then, are the possible areas of public policy which are (potentially) engaged by the commercial surrogacy arrangements in the present case? One may accordingly identify the following aspects of public policy presented by this appeal with regard to:

i. The egg donor agreement;

ii. The gestational carrier contract;

iii. The identity issue;

iv. The placement issue;

v. The gestational mother's consent and

vi. Article 42A of the Constitution and the best interests of the children.

47. I propose now to consider each of these specific issues in turn. Before doing so, it is worth observing that the public policy concerns potentially impact two different aspects of this case, namely, aspects of the contractual agreements between the parties on the one hand and the recognition of the adopted status of children born pursuant to such arrangements on the other. This is perhaps another way of saying that even if the aspects of the contractual agreement proved to be infirm or otherwise generally unenforceable on public policy grounds this would not necessarily require or dictate that the subsequent adoption of any children born pursuant to such arrangements should not be recognised in this State. This is because the application here concerns the putative recognition of an adoption order made by a foreign court (i.e. in respect of a matter of status) and not the enforcement of any such contractual arrangements.

48. At a more general level one must also observe that, in addition to any other consideration, these type of contractual surrogacy arrangements would, if executed and performed in this State, be generally ineffective to alter or to confer status insofar as they purport to alter a person's legal status. As this Court has pointed out on several occasions and in a variety of contexts, parties cannot change or seek to confer status simply by placing a different label on that status in the course of a contractual document which they have mutually executed. There is, moreover, the important consideration that civil status (such as marriage, parentage and adoption) is regarded by our rules of private international law as (principally) a matter for the law of the domicile of the parties: see *Mayo-Perrott v. Mayo-Perrott* [1958] IR 336 at 345-346, per Kingsmill Moore J.; Binchy, *Irish Conflicts of Law* (Dublin, 1988) at 45. This further re-inforces the point that civil status cannot simply be altered or bestowed by contractual agreements alone. It is also the case so far as surrogacy and other similar contracts are

concerned: a mother does not cease to be a mother *simply* because this change of status is attributed to her by a surrogacy contract.

49. There are, in addition, limits to the contractual freedom and autonomy of the parties insofar as the parties seek thereby to restrain the personal freedoms of the other party. It is true, of course, that in one sense many individual contracts restrain fundamental liberties: the average contract of employment may – and typically does – require the employee to attend a particular workplace at given times and dates. Some contracts may affect personal freedoms by, for example, requiring employees to comply with certain standards of attire in the workplace. Yet over and beyond this there are definite limits to the capacity of an individual to sign away by contract core fundamental liberties cherished by the Constitution and the common law alike.

50. There is, of course, a wider debate as to where these precise limits are. It is not, I think, necessary to determine this question on this appeal, save to observe that this particular issue as to the extent to which general constraints on personal freedoms can be achieved by contract is perhaps never too far away from the issues presented in this case. It is, however, against the background of these wider considerations that the specific issues of public policy presented by this appeal fall to be judged.

Part VI: Specific potential public policy considerations

The "known egg donor agreement"

51. In 2014 Mr. C and Mr. D entered into a contract (described as the "known egg donor agreement") with Ms. F. (who was based in Texas) whereby she donated human ova in return for a payment of US$7,500. This contract makes it perfectly clear that Ms. F. fully understood that any children thereafter conceived would come from the sperm of Mr. C and her donated ova. The resulting embryo would then be carried by a gestational

mother. Ms. F. renounced any parental rights in respect of that particular gamete donation.

52. In view of the provisions of s.5(5), s. 5(6) and s. 5(7) of the Children and Family Relationships Act 2015 ("the 2015 Act"), then subject to one important qualification, I do not think that an egg donor agreement can be judged to be contrary to the public policy in this State *simply by reason of this fact alone*. These sub-sections provide that the donation of human gametes (whether sperm or ova) for the purposes of assisting human reproduction does not *in itself* confer parental rights in respect of a donor:

"(5) A donor of a gamete that is used in a [donor assisted human reproduction] DAHR procedure—

(a) is not the parent of a child born as a result of that procedure, and

(b) has no parental rights or duties in respect of the child.

(6) A donor of an embryo that is used in a DAHR procedure—

(a) is not the parent of a child born as a result of that procedure, and

(b) has no parental rights or duties in respect of the child.

(7) On and after the coming into operation of this section, a reference in any enactment to—

(a) a mother or parent of a child shall be construed as not including a woman who is the donor of a gamete or embryo that was used in a DAHR procedure that resulted in the birth of the child, and

(b) a father or parent of a child shall be construed as not including a man who is the donor of a gamete or embryo that was used in a DAHR procedure that resulted in the birth of a child.".

52. There is, however, an important qualification in that s. 19(1) of the 2015 Act also precludes the making of any payment in respect of such donation (save for what are described as "reasonable expenses") by providing that the consent in respect of the donation of the gamete shall not be valid in such circumstances. "Reasonable expenses" are defined by s. 19(3) as "(a) travel costs, (b) medical expenses, and (c) any legal or counselling costs."

53. The egg-donor agreement at issue here records that the fee payable here is expressed to be in respect of pain and suffering and for the voluntary assumption of all medical and psychological risks: see the opinion of Ms. Christine Henry Andresen in relation to Texas law**,** an attorney with the State of Texas of 3 February 2021. Ms. Andresen has been a licensed attorney since 2006. She practices in family law, in particular representing intended, adoptive and birth parents in adoption cases and in cases relating to assisted reproductive technology.

54. Ms. Andersen states in her opinion of law that compensation for egg donation is common in Texas, both in the form of paying for expenses of the donor and direct payments to the donor. Anonymous or known egg donor agreements are the most prevalent form of egg donation, and the donors are nearly always compensated. Ms. Andresen states that even in altruistic cases that the intended parents would always pay for all medical fees not covered by insurance and often for an attorney for the egg donor to review the agreement.

55. Ms. Andresen goes on to state that payments in egg donor agreements are most often thought to be given for the purpose of providing payment for the pain and suffering of the donor, the time they must commit to the process, as well as any expenses they may incur in connection with the procedure, rather than a purchase price for the eggs

themselves. She further stated that egg donation is a cumbersome medical process for a donor which lasts a few months, in which the donor must give herself multiple injections, and which involves 'super-cramps' and a surgical procedure, the recovery from which can be quite painful. Ms Andresen states that such occurs after the lengthy agency application process which itself involves detailed personal and medical information screenings and personality testing.

56. Ms. Andresen also states that the fact that the parents in this case compensated their egg donor is standard practice in Texas or United States egg donation. She furthermore asserts that it is consistent with Texas public policy for them to have done so. Ms. Andresen states that egg donors in the United States are more often than not paid token compensation for their pain and suffering, a concept Ms. Andresen claims is borrowed from Texas personal injury law, and which is consistent with Texas public policy. Ms. Andresen states here that U$4,000-US$7,000 is a normal amount for such token compensation, though in extremely rare cases compensation in excess of US$10,000 is given.

57. One may, I think, reasonably assume that Ms. F may well have had certain expenses associated with the egg donation: she presumably had to undergo some form of hormone treatment and probably had to take some time off work as a result. Yet the donation nonetheless seems to have had some – admittedly, relatively minor - commercial element to it, as one might fairly ask why would Ms. F otherwise have agreed to it? Certainly, the egg donor agreement appears to be premised on the basis that this is a commercial agreement between the parties.

58. To that extent, therefore, that the egg donor agreement had a commercial element to it, it must be judged to be contrary to public policy inasmuch as a commercial agreement

of this kind would be ineffective under the law of this State in view of the provisions of s. 19(1) of the 2015 Act. The practical effect of that sub-section is that the donor is incapable of giving consent in respect of a gamete donation which (as here) as at least some commercial element to it. This is the relevant public policy as clearly articulated by the Oireachtas and this Court is bound to give effect to it.

59. It follows that while the known egg donor agreement cannot be regarded as being contrary to public policy insofar as it provided that Ms. F would not *qua* egg donor enjoy any parental rights in that regard, in view of the provisions of s. 19 of the 2015 Act, it is nonetheless contrary to public policy insofar (but only insofar) as it provides for the making of any commercial payment in respect of such donation. This, however, does not necessarily mean that for reasons I will later address the recognition of the adoption order at issue in the present case would also contravene public policy. I propose to return to this important point at a later stage in this judgment.

The gestational carrier agreement

60. While there are undoubtedly instances of what might be termed purely altruistic surrogacy arrangements, it seems clear that in practice a fee of some kind is generally paid to the gestational mother. This, after all, is the way in which international commercial surrogacy actually works and only the credulous or the naïve would suggest otherwise.

61. One can, of course, characterise such a payment in different ways. The sum paid can be regarded in some instances as a payment in respect of pain, suffering and inconvenience. In other cases, it might be said that the fee is designed simply to cover medical and other out of pocket expenses, such that if s. 19 of the 2015 Act were to

apply to the gestational mother (and it is important to stress that it does not) the payment would or could be regarded as reasonable expenses in this sense.

62. In the present case the surrogacy arrangements were regulated by a contract known as the "Gestational Carrier Agreement". Given the nature and amount of the fee paid in the present case (some US$50,000) together with the fact the arrangements were organised and put in place by a US commercial service provider it is hard to regard the present case as involving anything other than a commercial surrogacy agreement. There has been no suggestion that the sum paid was simply in respect of reasonable expenses.

63. In *MR v. An tArd Chláratheoir* [2014] IESC 60, [2014] 3 IR 533 at 576 Murray J. observed [at 147] that although "there is no law or authorising or regulating surrogacy in any form, it is not unlawful, as such." Since then, it would seem that the practice of commercial surrogacy has, if anything, become more prevalent.

64. In oral argument before this Court, counsel for the Attorney General, Ms. O'Toole SC, explained that in practice the genetic parents of children born as a result of a surrogacy arrangement where a woman carries and gives birth to a child who is the genetic child of another (whether the genetic child of both or where the genetic child of one of the parents only and where the gamete is provided by a donor) frequently apply to either the Circuit Court pursuant to Part V of the Status of Children Act 1987 for a declaration of parentage in favour of the genetic father (which applications are on notice to the Attorney General) and (after a lapse of two years) guardianship orders in favour of the non-genetic spouse or partner. In the case of a genetic mother the order is not made giving effect to parentage because in all cases the birth mother continues – as confirmed by this Court in *MR* - to be treated as the mother for registration purposes.

65. It does not appear the State has sought to oppose the making of these types of orders on the ground that the children in question were born as a result of international commercial surrogacy arrangements. In fairness, it cannot really be suggested that the State has thereby endorsed or tacitly approved of the practice, since genetic parenthood is simply a biological fact which will result in the appropriate court order if such is established by the necessary proofs. And, moreover, if children born abroad in this fashion are brought back into the State by their genetic or putative parents, it is in their interests that someone is recognised as their parent or parents.

66. In this context it is, perhaps, also worth observing that the law as it stands in the wake of *MR* does not allow for the registration of the genetic mother where she is not also the birth (gestational) mother. This is, perhaps, a matter which the Oireachtas might wish to address in any new legislation on this topic.

67. It also seems that the enactment of legislation on this topic is awaited and judged by the Government's public statement of 13th December 2022, such is, perhaps, even imminent over the coming months. As matters stand, however, I think that the gestational surrogacy agreement at issue in the present case is simply unenforceable in part because it seeks to effect a change in parental status by contract and in part because of its commercial nature. Some elements of the contract - such as the restriction on eating certain foods - would not be enforceable because the intrusion into the personal autonomy of the gestational mother would simply be too great.

68. More difficult questions might well arise if, for example, the gestational mother were to seek enforce payment in respect of the agreed fee. The question of whether the gestational mother could be compelled by court order to hand over the child after birth is an even more troubling one. If matters such as the enforceability of gestational

agreements of this nature are to be regularised, this must be achieved by legislation enacted by the Oireachtas. And, moreover, to repeat a theme which runs through both this judgment and that of the judgment of the Chief Justice, this appeal highlights the urgency of such legislation.

69. It is, nevertheless, important to stress, that for reasons I will endeavour presently to explain, that this Court is not being asked to enforce the contract which has, as it happens, long since been performed.

Payments in respect of adoption

70. The Authority placed much reliance on the provisions of s.1(e) of the 1991 Act and the corresponding provisions of s. 145 of the 2010 Act to which the Authority also drew much attention. Section 1(e) of the 1991 Act provides that the definition of foreign adoption for the purposes of the Irish recognition does not include a foreign adoption where:

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

71. Section 145 of the 2010 Act is expressed to be in similar terms, and it contains three separate sub-sections designed to prohibit this practice. It is perhaps sufficient to refer to s. 145(3):

> "A person shall not –
>
> (a) receive, make or give any payment or other reward, or

(b) agree to receive, make or give any payment or other reward, in consideration of making arrangements for the adoption of a child."

72. The argument here is that it would have been illegal (and, hence, contrary to public policy) for the gestational mother to have been paid in connection with an adoption had she had handed over the newborn twins for this purpose to Mr. C and Mr. D following their birth. It follows - or so, at least, the argument runs - that this statutory prohibition could and should not, in effect, be circumvented by ensuring that the gestational mother's parental rights were terminated by court order during the course of the pregnancy and the subsequent making of an adoption order by the Colorado courts in respect of the children in favour of Mr. D qua stepparent. While the Authority accepts that these arrangements were lawful by reference to the law of Colorado, it contends that to recognise and give effect to an adoption decree of this kind would infringe at least the spirit of s. 1(e) of the 1991 Act and s. 145 of the 2010 Act because of the payments involved.

73. While the arguments advanced by the Authority are not without considerable force, in the end I am not persuaded that the scope of s.1(e) of the 1991 Act and the corresponding provisions of s. 145(3) of the 2010 Act contain a clear statement of public policy with regard to the enforcement of the Colorado adoption order so as to preclude its recognition in this State. Perhaps it suffices here simply to note that as Mr. Grob set out in detail in his opinion of law there was no actual payment in respect of the adoption itself.

The intrusion into the personal autonomy of the gestational mother

74. The gestational agreement contract at issue in the present case contains clauses which, at one level, might be thought to involve a remarkable degree of intrusion into the

personal autonomy and fundamental liberties of the gestational mother. Ms. E. agreed, for example, not to undertake any activity that might endanger her ability to undertake an IVF transfer or that would, when pregnant, pose a health risk to the foetus. This included smoking, consuming alcohol, taking illegal or non-prescription drugs without the prior approval of her obstetrician and engaging in high-impact sports. She was also required to refrain from eating without prior medical approval certain foods which are known to pose elevated health risks for pregnant women, including, for example, raw meat, seafood and soft cheeses.

75. Continuing in this vein, clause 5 of the contract provides that the surrogate mother agrees to submit to various form of medical testing throughout her pregnancy. Clause 6 of the contract seeks to prevent the gestational mother marrying during the pregnancy or (save as approved by her physician) engaging in sexual activity by which sperm might be introduced into her body for a period of up to three weeks before and after the IVF transfer. Once pregnancy was confirmed she was to refrain from engaging in sexual intercourse until this was approved by her physician. These clauses were not only presumably designed to promote the success of the embryo transfer but also to mitigate any possible doubts as to the identity of the genetic father.

76. Other features of the contract are also striking. Clause 16 prevents her from leaving the state of Colorado after 26 weeks of pregnancy (in the case of twins) or otherwise 32 weeks. As the contract made clear, the purpose of the clause was to ensure that the ensuing child or children were born in the State of Colorado as leaving that State late in pregnancy would create the risk that the birth would take place elsewhere where the law of that place might be less favourable to the parties' intentions.

77. Clause 7 also seeks to preclude her from electing to terminate the pregnancy unless this was necessary for her health or if the foetus has a congenital defect. If this situation arose, she agreed to submit to an abortion if so requested by the commissioning parents. She also agreed to consult with them before deciding herself to terminate the pregnancy. This clause even provides that were she to suffer life-threatening injuries or illness she will be kept on life-support if desired by the intended parents, Mr. C and Mr. D.

78. It is perhaps only proper to observe that Clause 15 provided that, notwithstanding anything in the agreement to the contrary, Mr. C and Mr. D., agreed to accept "full legal, moral, parental, financial and emotional care and responsibility for any child or children" resulting from the IVF transfer, regardless of "any mental, physical or congenital defects of such child or any other circumstances whatsoever."

79. Clause 24 is headed "unenforceability". It provides that if any of the provisions of the clause are deemed unenforceable, these shall be deemed to be severable from the rest of the agreement and "…shall not cause the invalidity or unenforceability of the remainder of the Agreement." If, moreover, any such provision "shall be deemed invalid due its scope or breadth, such provision shall be deemed valid to the extent of the scope or breadth permitted by law."

80. It is perhaps worth observing that these restrictions were, of their nature, entirely temporary. They were voluntarily accepted by an adult female who had a child of her own and who was therefore familiar with the experience of pregnancy. She at all times had full, independent legal advice and access to full medical and obstetric care. Many of these contractual constraints correspond to the standard medical advice given to pregnant women and which constraints are freely adopted by many women in the interests of a healthy pregnancy. One might therefore say that at one level that as these

were freely undertaken contractual commitments there could be no question of a violation of any constitutional rights or common law constraints.

81. Yet at the same, transposed into an Irish context, many - perhaps all - of these contractual constraints are so intimately connected with core constitutional rights to privacy and the person protected by Article 40.3.1 and Article 40.3.2 respectively and are generally so intrusive into almost every aspect of personal autonomy and personal liberty that such these provisions are simply judicially unenforceable as the law presently stands. Intrusions of this kind could only be given legal effect – if, indeed, at all - by statute law which clearly set out protections and safeguards and which articulated the public policy of the State in respect of this issue, and not just simply as a matter of contract. It is, I think, not necessary in these circumstances to express any wider views on the more difficult jurisprudential question as to the limits of the rights of contracting parties to make agreements of this intrusive kind, whether in the particular context of surrogacy or otherwise or, for that matter, to consider whether the law of contract could ever act as a suitable vehicle to regulate the complex questions highlighted on this appeal. In any event, one might observe that the law of contract has long been unwilling to enforce contracts of personal service: see, for example, the discussion commencing at para. 24-15 of McDermott and McDermott, *Contract Law*, (Dublin, 2017).

82. It is accordingly sufficient to say in the particular and unusual context of these surrogacy contracts that even though many of these restraints are thus unenforceable this in itself does not necessarily mean, however, that other aspect of this arrangement should also deemed to be unenforceable or that the agreement is incapable of having legal effects and consequences. Nor does it mean that a person may not legally enter into such agreements. After all, the contract has long since been performed and it does

not appear that the gestational mother ever took objection to its terms during the currency of the agreement. It should also be recalled that not only are these elements of the contract not sought to be enforced but the enforcement (or non-enforcement) of any aspect of this contract is accordingly not directly at issue in this appeal. In fact, the contact itself has merged in the subsequent order(s) of the Colorado court and one must note that it is the latest stepparent order of February 2015 (rather than the surrogacy contract itself) which is sought to be recognised.

The identity issue

83. The Authority objects to those provisions of both the egg donor agreement and the gestational surrogacy agreement which (it says) improperly restrict or hinder the right of the children to learn about their true genetic and gestational identity once they reach adulthood. In essence both the genetic mother and the gestational mother are prevented under this agreement from contacting the children save with the consent of C and D. The Authority maintains that a restriction of this kind is contrary to public policy.

84. As Barrett J. correctly noted in his judgment, in *IOT v. B* [1998] 2 IR 321 this Court held that there was a general unenumerated constitutional right to know the identity of one's birth mother, albeit that in the context of adoption such a right naturally had to be balanced against the mother's unenumerated right to privacy. One may say immediately that one aspect of the reasoning in that case immediately calls for reconsideration in the light of this Court's subsequent decision in *Friends of the Irish Environment v. Government of Ireland* [2020] IESC 49, [2021] 3 IR 1. In *Friends of the Irish Environment,* aspects of the general unenumerated rights doctrine as it had been applied up to that point were reviewed by Clarke C.J. In his judgment Clarke C.J. stressed that these types of unenumerated or unspecified rights should henceforth be

regarded as derivative rights clearly linked to the text of the Constitution itself: see [2021] 3 IR 1 at 51-52.

85. To my mind there is no need at all in this context to have regard to some generalised unenumerated right to know one's identity. The right to know one's genetic identity is clearly an aspect of personhood: indeed, it might be said that there are few things more critical to the protection of that right than knowledge of one's genetic identity. Quite apart from the deep longing of most people to learn about their identity, knowledge of this genetic identity is obviously an important feature of modern medicine. To that extent knowledge of genetic identity is simply part of the bundle of rights associated with the protection of the person expressly enumerated in Article 40.3.2. In any event, insofar as it was necessary to do so, I would regard the right to know one's identity as a derivative constitutional right in the sense articulated by this Court in *Friends of the Irish Environment*.

86. Section VII of the Known Egg Donor Agreement provides that it is not the intention of the parties to remain anonymous. Section XI of the agreement provides for establishment of contact between the intended parents, the children and the donor. The Authority points to the fact that the consent of the intended parents is nonetheless required before the donor may communicate with the child. At the same time one cannot say that these particular contractual provisions so constrain the right of the children to obtain information regarding their the genetic mother such that these clauses must be deemed on their face to be at odds with the substance of the constitutional right identified in *IOT* and as the source of that right has been supplemented or varied by this judgment.

87. In the case of the Gestational Carrier Agreement, clause 22 of that agreement provides that the gestational carrier agrees not to contact the child, although the intended parents - Mr. C and Mr. D. - also agree to send photographs and letters to the gestational carrier at certain intervals. The Authority objects that the child's right to establish contact with the gestational mother is not otherwise addressed.

88. Since the judgment in the High Court the Oireachtas has enacted the Birth Information and Tracing Act 2022 ("the 2022 Act"). The 2022 Act clearly lays down a policy whereby adopted persons can obtain information regarding their origins. It is perhaps striking that s. 2(1)(c) of the 2022 Act provides that the Act applies to adoptions which took place outside of the State "in accordance with the law in force in the place at the time of the adoption, in a place outside the State, where the particulars of his or her adoption are entered in the register of intercountry adoptions…."

89. The net effect of this provision is that the tracing and information mechanisms made available to adopted persons by the 2022 Act will also apply to those persons who are the subject of a foreign adoption orders which have been entered on the RICA. If that is so, then, with respect, the objection based on public policy grounds under this heading simply falls away because, if the Colorado adoption is recognised in this State, then A and B will obtain all the tracing and contact rights they would enjoy as if they had been the subject of an adoption order in this State. Nor could any contractual restrictions on that right of tracing and contact otherwise found in either the known egg donor agreement or the gestational carrier agreement be enforced in this State insofar as they were inconsistent with the terms of the 2022 Act.

90. It is true, of course, that the terms of the 2022 Act could not be enforced abroad. The key point, however, is that as none of these contractual restrictions could be enforced

in this State insofar as they conflicted with that Act, it could not be said that the recognition by our courts of the Colorado adoption would conflict with public policy as reflected in the 2022 Act.

91. It follows, therefore, that the recognition of the Colorado adoption order would not offend against public policy on this particular ground.

The private placement issue

92. While it is true that s.125 of the 2010 Act generally precludes what is often termed the "private placement" of a child – i.e., where the prospective adopters seek to choose a particular child for adoption - the section also provides for certain exceptions. Section 125(b)(ii) (as substituted by s. 38(a) of the Adoption (Amendment) Act 2017) states that this exception does not apply where the prospective adopter "is the spouse of the parent of a child." As Mr. C and Mr. D are lawfully married to each other and as Mr. C is the father of A and B, it follows that this prohibition does not apply to what Barrett J. described as "domestic adoptions" of this kind and which was described as "stepparent adoption" in the course of this appeal.

93. All of this means that there is simply no public policy objection to an adoption of this kind by reason of the fact that it involves a private placement involving the spouse of a parent of the children in question.

The consent of the gestational mother

94. There is no doubt but that the requirement that the gestational mother provide post-partum consent has been an essential feature of our law since the enactment of the Adoption Act 1952. Indeed, it is clear from this Court's decision in *G. v. An Bord Uchtála* [1980] IR 32 that where (as here) the mother is not married, she has a constitutional right to the custody of the child. It is clear from the established case-law

that the mother can consent to the giving up of the child for adoption only where, in the words of Walsh J. in *G.*, the consent is a "fully informed, free and willing surrender or abandonment of these rights": [1980] IR 32 at 74.

95. These legislative requirements – and the judicial responses to that legislative policy – arose in the very different context of an Ireland where extra-marital sexual activity was strongly discouraged and where it was not at all unusual for unmarried pregnant women presented with a crisis pregnancy to face an unyielding sense of societal disapproval as a result. In those circumstances the Oireachtas was plainly concerned that such women might be vulnerable to undue pressure to surrender her own child for adoption.

96. As I have just indicated, the context here is very different. Here the pregnancy has been planned in advance and, crucially, the child will not have any genetic relationship to the gestational mother. The expressed intention of the parties is and at all times was that Ms. E. will not be the mother of the children. As Barrett J. noted in his judgment, there is no evidence at all of any form of exploitation or undue pressure. There is, moreover, satisfactory evidence of independent legal, medical and psychological assistance to Ms. E.

97. To my mind, however, what is at the core of our requirements in that regard is that the mother must freely consent to the transfer of her custody or the child or children. While it cannot be said that the timing of that consent is unimportant or that it is simply a technical detail of our existing adoption system, nevertheless provided that this consent is freely given I do not consider that the fact that - unlike the situation prevailing in this State - under the Colorado system the consent can be given pre-partum is *in itself* a reason to refuse recognition on public policy grounds. There is, at least in this context,

nothing intrinsically wrong with an alternative way of obtaining consent provided it is free and informed.

98. To that extent, therefore, I consider that in this respect the present case falls on the *Fairfield Sentry* rather than the *Sporting Index* or *Celtic Atlantic Salmon* side of the line. In this regard, it may, after all, be noted that Ms. E has already given her consent and has renounced all rights in respect of parenthood which she might otherwise have had. The effect of the Colorado order was also to relieve her of any obligations she would otherwise have had in respect of the child.

99. Ms. E. gave her consent first via the gestational surrogacy agreement in advance of becoming pregnant. She also did this in the course of her pregnancy when she executed what was described as the Admission of Non-Maternity and Advisement document on 11 August 2014 prior to the birth of the children. This latter document was executed by her as part of the application brought by Mr. C and Mr. D before the Colorado courts so that the former could be declared to be the father of the children. The Colorado court made an order to this effect on 18 August 2014. Here it may be recalled that Ms. E has had the benefit of independent legal advice and that the entire process of renouncing parental rights was, at least to some degree, overseen and supervised by the Colorado courts.

100. It is, of course, correct to say that the contractual arrangements were not, as such, judicially supervised. We are not, however, called upon to give effect to or otherwise recognise these contractual arrangements: we are rather concerned solely with the question of whether the adoption order made by the Colorado courts should be recognized. It is in that context that the entire process - together with the earlier order of 14 August 2014 – was so supervised.

101. For good measure I would also place some emphasis on the fact that Ms. E also furnished a consent in the course of the application brought by Mr. C and Mr. D to have the English courts make what is described as a parental order under the Human Fertilisation and Embryology Act 2008 in respect of the twins. It appears that under the UK system a parental order of this kind has effects akin to an adoption order and simultaneously both extinguishes and transfers parental rights. This parental order was made by the English High Court in June 2019.

102. The affidavit sworn by Ms. E.'s in the course of those proceedings can only be described as fulsome and complete. Even though she had been legally advised that under English law she could not in any sense have been obliged by virtue of prior contractual commitments contained in the gestational carrier agreement to give such consent in such proceedings, she nonetheless clearly did so and she accordingly renounced any claims to parentage rights she might otherwise have had.

103. In these circumstances where Ms. E has freely clearly given her consent and renounced all claims of parentage in respect of the children and has done so in the course of a process supervised (at least to some extent) by the Colorado courts, I do not see that this court should refuse to recognise or otherwise decline to give effect to these court orders on public policy grounds.

Article 42A.4 and the best interests of the children

104. Article 42A.4.1.ii of the Constitution states that:

> "Provision shall be made by law that in the resolution of all proceedings…. concerning the adoption, guardianship and custody or, or access to, any child, the best interests of the child shall be the paramount consideration."

105. While this is a case which concerns the recognition of a foreign adoption order - as distinct from proceedings involving the making of an adoption order in this State - these proceedings are nonetheless ones which "concern…the adoption…of any child" for the purposes of Article 42A.4.1. To that extent, therefore, this constitutional provision is necessarily engaged by this appeal.

106. If one treats the Adoption Acts (together with the recognition rules in respect of foreign adoptions contained in s. 1 of the 1991 Act and applied by the 2010 Act) as a "law" for the purposes of this provision, it is clear that this Court is obliged to treat the best interests of these children as the paramount - albeit not necessarily the decisive - consideration. It is striking that no one has ever suggested that either the making of this adoption order in the first place or its recognition by the courts of this State would not be in their best interests. It may be noted that having heard evidence on the point in August 2014 the Colorado court expressly found to this effect, noting that the applicants were good parents who provided the children with a loving and happy home. For good measure this was also the conclusion of the English Court in 2019 when making a parentage order.

107. All of this suggests that the Irish courts should similarly recognise the Colorado adoption order in this case, absent compelling public policy considerations requiring a contrary approach: this, in any event, is the general policy of the 2010 Act which favours the recognition of such adoptions in the absence of compelling reasons to the contrary. There is, of course, a strong interest in regularising the status of adopted children and avoiding what might be termed "limping" adoptions where the children were regarded as having the status of having been lawfully adopted in one jurisdiction but not in another.

108. It is true that this general desire to protect children in this way could not prevail against a clear public policy objective reflected in legislation. If, for example, Ruritanian law allowed adoptive parents to pay the natural mother in consideration of her yielding up the child for adoption, such an adoption would plainly not be recognised here in light of the provisions of s. 1(e) of the 1991 Act and s. 145 of the 2010 Act which expressly set their respective faces against recognition in such circumstances. Yet while there are aspects of commercial surrogacy which do not sit easily with our law, there is nonetheless no clear public policy contained in legislation which would justify the courts withholding the recognition in respect of the adopted status of children adopted abroad who were born as a result of such arrangements, even if there are also at least aspects of contractual arrangements providing for commercial surrogacy which would be unenforceable in this jurisdiction for all the reasons I have already set out.

109. There are, in any events, clear limits to the scope of public policy in this area. Indeed, it is worth observing that in the very similar case of *DB v. Switzerland* [2022] ECHR 1012, the European Court of Human Rights held that the child's right to respect for private life under Article 8 ECHR required the Swiss authorities to recognise a Californian adoption order where the child had been born in a similar commercial surrogacy arrangement similar to the present one and where one of the spouses was the genetic father of the child.

110. This was the case even though - unlike Ireland - the Swiss Confederation had in fact adopted an explicit public policy on this very point. Noting that Article 119(2)(d) of the Swiss Constitution prohibited "embryo donation and all forms of surrogacy", the Swiss Federal Court had refused to recognise the Californian adoption order on the ground that surrogate motherhood was contrary to public policy under Swiss law. The European Court of Human Rights took a different view on this question, saying

(according to an unofficial translation of the French text of the judgment supplied to us) [at 86] that while this argument was "certainly relevant", it was not "itself decisive in the present case." ("[La Cour] considère que cette argumentation est certes pertinente, mais pas décisive en soi dans le cas d'espèce.") Having regard to the provisions of the Convention "it was appropriate to disregard the possibly objectionable conduct of the parents so as to allow the best interests of the child to be sought which was the supreme criterion in such situations" ("…..de faire abstraction du comportement éventuellement critiquable des parents de manière à permettre la recherche de l'intérêt supérieur de l'enfant, critère suprême dans de telles situations.")

111. It is true that in *DB* the parents and the child were actually living in the country where the recognition of the foreign adoption order was sought. The non-recognition of that order in the country where the family were resident would obviously have more far more obvious and significant consequences for the family life of the child and its parents than would be the case here in the event that this State were not to recognise the Colorado adoption order since, after all, the children actually reside in the United States. At the same time, one cannot disregard the fact that Mr. D. has, in fact, extensive ties with both Northern Ireland and this State. It is accordingly understandable that he (and, of course, Mr. C.) would want to see the status of his children regularised so far as Irish law is concerned.

112. At the same time, the reasoning in *DB* provides an obvious parallel for the interpretation of Article 42A.4 in the present case. It amounts really to saying that the public policy interests in safeguarding the best interests of the children should normally prove decisive absent the existence of other compelling public policy interests. In these circumstances Article 42A.4 may be regarded as providing some further support for the conclusion that the Colorado adoption order of February 2015 should be recognised in

this State, even if some or even all aspects of contractual surrogacy arrangements which ante-dated the birth and ultimate adoption of these children would be unenforceable under the law of this State.

113. Given that, for the reasons set out in this judgment, no such contrary public policy interests have been identified, this all clearly points in the direction of the recognition of the Colorado adoption order in the present case.

Part VII - Conclusions

114. In conclusion, therefore, I would dismiss the appeal and affirm the decision of Barrett J. in the High Court, albeit for slightly different reasons. To my mind there are, for all the reasons set out in this judgment, no public policy considerations which currently stand in the way of the recognition of this Colorado adoption order, even if the children who are the subject of this order were themselves conceived and born by virtue of commercial surrogacy arrangements which would themselves be unenforceable under our law either because they attempt to change status by contract, because of their commercial nature and because at least some feature of these contracts so clearly trench on the personal autonomy of the individual – and the core constitutional rights to privacy and the person expressed in Article 40.3.1 and Article 40.3.2 – that no court would seek to enforced those elements.

115. While there are clearly aspects of commercial surrogacy which do not sit easily with our legal and constitutional traditions - specifically, what some might regard as the commodification of the female reproductive system - there is nonetheless no clear public policy which would justify withholding recognition of foreign adoption orders made by a foreign court *simply* by reason of the fact the children who are the subject of such orders were themselves born as a result of surrogacy arrangements where such

orders would otherwise have satisfied the recognition requirements contained in s. 1 of the 1991 Act and as applied by the 2010 Act..

116. In the circumstances it is, perhaps, sufficient to say that, for the reasons contained in this judgment, I cannot discern any existing legal barrier to the recognition of adoption orders of children whose birth has followed on from international commercial surrogacy arrangements, I would conclude by answering the question posed by the Authority by saying that, for the purposes of s. 49(3) of the 2010 Act, the entry of this adoption order on the RICA would not contravene any existing principle of public policy.

117. As I have already indicated, I would accordingly dismiss the appeal of the Authority and I would accordingly affirm the decision of the High Court.

ANNEX TO THE JUDGMENT

Extracts from the Case Stated and the questions posed by the Authority

1. Is it contrary to section 125(1)(a) of the Adoption Acts, as amended (the 'Acts') for a person or persons to:

    a. Enter into an agreement with a third party to assist in facilitating the birth of a child if the adoption of that child is contemplated by the parties to an agreement?

    b. Enter into an agreement with a person for the donation of genetic material if the adoption of that child is contemplated by the parties to the agreement?

c. Enter into an agreement with a person to give birth to a child in the mutual contemplation that the child will be adopted by one of the parties to the agreement?

d. Apply for a court order prior to the birth of a child in which the person to give birth abjures her legal rights to the unborn child?

e. Arrange for the obtaining of an order in which the person t ogive birth abjures her legal rights to the unborn children in the contemplation that a person who is not the natural parent of the children will be adjudicated as the legal parent after birth?

2. Is it contrary to s. 145(1) of the 2010 Act for:

a. A person to receive compensation for the donation of genetic material if the adoption of the resulting child is contemplated by the parties to the arrangement?

b. A person to receive compensation for giving birth to a child if it is contemplated that the child will be adopted by one of the parties to the arrangement?

3. Is it contrary to s. 145(2) of the 2010 Act for a person or persons to:

a. Pay monies to a person for the donation of genetic material if the adoption of any resulting child is contemplated by the parties to the arrangement?

b. Pay monies of any kind to a person giving birth to a child if it is contemplated that the child will be adopted by one of the parties to the arrangement?

c. Pay monies for compensation and inconvenience to a person giving birth to a child if it is contemplated that the child will be adopted by one of the parties to the arrangement?

d. Pay monies for un-vouched expenses to a person giving birth to a child if it is contemplated that the child will be adopted by one of the parties to the arrangement?

4. Is it contrary to section 145(3) of the 2010 Act:

a. For monies to be paid to a third party to assist in facilitating the birth of a child if the adoption of that child is contemplated by the parties to the arrangement?

b. For monies to be paid to a person in connection with the donation of genetic material if the adoption of any resulting child is contemplated by the parties to the arrangement?

c. For monies of any kind to be paid to a person giving birth to a child if it is contemplated that the child will be adopted by one of the parties to the arrangement?

d. For monies for compensation and inconvenience to be paid to a person giving birth to a child if it is contemplated that the child will be adopted by one of the parties to the arrangement?

e. For monies for un-vouched expenses to be paid to a person giving birth to a child if it is contemplated that the child will be adopted by one of the parties to the arrangement?

5. Is it consistent with the Authority's duties under s. 19 of the Acts to have regard to the best interests of the child as the paramount consideration to recognise an intercountry adoption effected outside the State where:

    a. Legal orders waiving the potential rights of a parent were obtained prior to the birth of the child?

    b. Arrangements were undertaken in contemplation of the adoption of a child prior to the child's birth?

    c. The aforesaid orders and arrangements were undertaken on foot of agreements which involved the payment of monies to the potential parent?

    d. The Authority has not been provided with evidence of any substantive assessment of the best interests of the child prior to an adoption order being made?

    e. The Authority has not been provided with evidence of any substantive assessment of the best interest of the child prior to an adoption order being made?

    f. The sole evidence before the Authority regarding the best interests of the child is an order of a foreign court that records on its face that the adoption will serve the child's best interests?

6. Is the entry of an intercountry adoption effected outside the State into the register of intercountry adoptions without reference to the identity of the genetic mother or birth mother consistent with the rights of the child under the Constitution of Ireland and the European Convention on Human Rights to information concerning their birth and identity?

7. Where an application for recognition of an intercountry adoption effected outside the State relates to an adoption in the context of assisted human reproduction, is it necessary for the consent to be obtained of:

    a. The genetic parent(s) of the child?

    b. The birth mother of the child?

8. Where the consent of a person is required to recognise an intercountry adoption effected outside the State, is that consent valid if:

    a. It is provided in the context of a contractual arrangement which provides for the payment of monies to the person providing consent?

    b. It is provided following the provision of independent legal advice that it paid for and procured by the prospective adoptive parent(s) or their agents?

    c. The consent is provided prior to the birth of the children.

    d. There is written consent to waive rights arising in respect of a process of assisted human reproduction but not in respect of the making of an adoption order.

9. Would the entry of the decrees of stepparent adoption in respect of the children in this case into the register of intercountry adoptions be:

    a. Contrary to public policy

    b. Otherwise inconsistent with the provisions of the Acts?