Editorial: The Enforcement of Child Maintenance

Introduction

Every year Treoir receives thousands of queries in relation to child maintenance. Reform of the child maintenance system in Ireland, in particular the enforcement of payments is well overdue, and is part of the Family Justice Strategy 2022–2025.* Even though both parents have a responsibility to financially support their child, it is largely seen as a personal, parental obligation and is confined to private family law. There is also a myth that paying child maintenance gives non-custodial parents extra rights in terms of access/custody, however, maintenance is separate to access/custody.

One-parent families are among those most at risk of living in poverty and experiencing deprivation. Treoir believes that child maintenance should be viewed from a children's rights perspective, as it is strongly linked to child poverty among one-parent families. This year the Minister for Social Protection signed legislation which discounts child maintenance as means for all social welfare benefits. This measure has been welcomed by many groups advocating for one-parent families; although there is still work to be done on this issue regarding secondary benefits.

Challenges and Solutions

Within the family justice system, several challenges remain. Where child maintenance has gone unpaid, the custodial parent may apply to the court to pursue arrears and an enforcement order. If the respondent fails to appear in court for non-payment of child maintenance, a judge can issue a bench warrant, and the problem arises here, as the family courts are essentially civil courts, so there is no prosecuting guard to execute said warrant. Where a bench warrant exists, the applicant cannot pursue unpaid maintenance while there is an outstanding bench warrant. Many custodial parents are left to chase child maintenance through the courts for years, and many simply give up.

In situations of domestic violence and coercive control, withholding child maintenance and forcing the other parent to keep returning to court can also be a continuation of abuse post-separation. Often survivors will not seek enforcement orders for maintenance so that they do not have to face their former abuser in court. The onus is still on the custodial parent to seek maintenance through the courts. Given that in most cases there are no real consequences for the non-payment of child maintenance, focus must shift to enforcement of court orders and other mechanisms to collect maintenance. Too many of the resources of the courts are taken up with custodial parents returning to court to try to enforce maintenance orders or arrears, not to mention the time and resources of the custodial parent. It is not surprising that many give up, but what needs to be at the centre of all family court issues are the needs and the rights of children. Ireland has one of the lowest rates of payment of child maintenance, not a title to be proud of in a wealthy, developed country.

There are several challenges in relation to the enforcement of child maintenance in Ireland:

- A summons cannot be issued for maintenance unless the applying parent can provide an address for the non-custodial parent.
- If the respondent fails to appear in court, a bench warrant may be issued, but not often enforced as there is no prosecuting garda attached.
- There are no set guidelines or template for the calculation of child maintenance, amounts set are often at the discretion of the judge.
- Where an attachment of earnings order is issued, it is linked to the employer; this means that it is no longer valid if they change employment. It also cannot be enforced on someone who is self-employed.
- For survivors of domestic violence, the risk of their former abuser seeing their current address in court documents deters taking the case to court and having to face them in the court room.

In 2023, research was commissioned by Treoir on the relationship between fathers and children who do not live together. Several findings pointed to the high level of conflict related to finances, with maintenance being the most significant source of conflict. The research also found that many custodial parents reported that maintenance orders were difficult to enforce, and there were difficulties in recouping arrears. It was noted that in some cases the non-custodial parent used maintenance to exercise power or control over the other parent. It has always been Treoir's belief that fathers who regularly pay maintenance have a better relationship with their children, as that barrier of financial conflict between the parents has been removed.

In October 2022, Treoir, along with other stakeholders from the National One Parent Family Alliance, were asked to attend the Joint Oireachtas Committee on Justice to discuss child maintenance. One suggestion from the discussion was the establishment of a new State agency to pursue and

* For further discussion on the Family Justice Stragegy 2022–2025 and reform in child maintenance, see Dr Kathryn O'Sullivan's article below at pp.4-5.

enforce child maintenance. The Minister for Justice rejected the establishment of such an agency. The model in the UK was cited as an agency system with many flaws. It must be noted here that the UK maintenance collection agencies are private companies; privatisation of such services would, of course, bring challenges. Another suggestion that arose was the option that the enforcement order for child maintenance be linked to the respondent parent's PPS number and deducted through Revenue in the same way property tax is handled. It is hoped that the Minister will decide on that option. Senator Lynn Ruanne's 2021 submission on child maintenance to the Review Committee highlighted the New Zealand model to be one to take inspiration from.

There are several benefits to enhanced child maintenance enforcement:

- A decrease in child poverty for many lone-parent families.
- Reduced costs to the court system because if there is a consequence to withholding maintenance, the respondent is more likely to abide by the court order, and is less likely to be summonsed to court repeatedly.
- Reduction in conflict between parents, resulting in better outcomes for shared parenting. This allows both parents to be more focused on the child's needs and wellbeing.
- Domestic violence survivors can apply for child maintenance without the fear of contact with their abuser.
- It removes the use of child maintenance as a mechanism to exercise power.

Conclusion

It is the responsibility of both parents to provide for their children, non-payment of child maintenance is essentially neglect, and should be treated as such. The current system in relation to child maintenance is not working, it is failing children, and failing lone parents. Parenting alone comes with many challenges, chasing the other parent to provide for their children should not be one. Time is being taken within the family courts chasing non-custodial parents to contribute toward the upbringing of their children, simply because there is rarely any consequence for non-payment. Some abusers are using the legal system to further traumatise their victims. Many custodial parents are owed back payments of child maintenance that run to several thousands. There are no negatives in the increased enforcement of child maintenance.

If a mechanism of deducting child maintenance through Revenue is established, it will significantly increase the levels of child maintenance paid. Ireland will be an outlier for a positive reason. Another important issue is that there should be a prosecuting garda to act on a bench warrant for non-compliance with a court order for maintenance. There should be consequences for non-payment of child maintenance. People are jailed for not paying for their TV licence, so why should non-custodial parents be allowed to stop providing for their dependent children? This is a children's rights issue, the right to have their basic needs met.

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** The views put forward in this article are those of the author and in no way reflect the views or beliefs of the publisher.

The "Dejudicialisation" of Family Law in Europe: Where does Ireland Stand?

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Introduction

Ireland occupies an almost unique position in an EU context. Following the Brexit Referendum, it now stands alone with Cyprus as one of only two common law jurisdictions among the 27 Member States in the EU. While Ireland adopts a broadly similar approach to the administration of family law justice to its neighbours in England and Wales, it is often quite distinctive at an EU level. Despite these differences with its continental civil law counterparts, however, it can be interesting to see whether (or to what extent) trends emerging across Europe in family law and family justice are also evident in Ireland.

In many European jurisdictions there has been a noticeable shift in the administration of justice from courts to other non-judicial authorities including notaries, civil status officials, child protection agencies, judicial officials, lawyers, and, in some cases, the individual parties themselves. This development is particularly apparent in the context of family and succession law. Issues as varied as the granting of divorce, the establishment or termination of parenthood, the granting of parental responsibility and the administration and division of estates are now liable, in several jurisdictions, to be effected by non-judicial administrators and institutions.[1] Given that EU private international law instruments are typically founded on the supposition that justice in such matters will be administered by courts, this transformation in how justice is carried out is liable to create significant difficulties vis-à-vis judicial co-operation across the European Union.[2]

This article questions to what extent, if at all, the same or similar trends may be evident in Ireland. Part I considers how justice is administered in relation to Irish family law specifically, and highlights how dependent it remains on the exercise of judicial authority. Notwithstanding this, however, Part II reflects on some recent developments which might signal more of a shift towards the out-of-court resolution of common family law disputes before Part III focuses specifically on associated recent proposals for the reform of the child maintenance system in the jurisdiction.

Part I: Current Administration of Justice in Irish Family Law

Although the range of quasi-judicial bodies and regulators in Ireland has increased in recent times, particularly in the context of areas such as media and company law,[3] Irish family law has seen few developments towards the devolution of the administration of justice to non-judicial authorities or to the parties themselves. However, Ireland takes a less bureaucratic and less judicially intensive approach to several non-adversarial family law issues than many European civil law countries. Unlike other jurisdictions, individuals can change their name or secure a gender recognition certificate quite easily and usually without the intervention of the Irish courts.[4] Similarly, the administration of estates is greatly assisted by the Probate Office (an office attached to the High Court),[5] while the Adoption Authority of Ireland plays a significant non-judicial role in facilitating adoptions in the jurisdiction.[6] However, notwithstanding these notable exceptions, Irish family law by and large continues to be characterised by the importance it places on the role of the courts to administer justice.

Moreover, to date, Irish family law has done little to help parties resolve typical family law disputes, wholly or in part, in an out-of-court setting. To the contrary, Irish family law effectively pushes parties into initiating litigation to determine, for example, on a case-by-case basis, the rights and entitlements arising from marriage. While most civil law countries apply matrimonial property regimes, which specify precisely what happens to family property (howsoever defined) on divorce—thereby reducing the role of the court in making such determinations and empowering the parties to reach settlements in the clear shadow of the law, Irish law continues to demand, at least in theory, judicial intervention to ensure that bespoke "proper provision" is made for a dependent spouse and children in all cases. Thus, unlike the rules-based approaches of our European counterparts, all aspects of provision on divorce (including both the assets to be shared and the proportions they are to be shared in) remain subject to the overriding discretion of the court, with provision varying depending on the circumstances of each individual family.

Even within common law jurisdictions, the extent to which Irish family law demands the intervention of the courts in resolving common family law issues is noteworthy. Ireland now appears to stand alone in remitting all issues to do with the quantification of child maintenance to the better judgement of the court. Although other common law jurisdictions apply a range of guidelines or formulae to determine the amount of child maintenance to be paid—with such issues also often determined with the help of a non-judicial child maintenance agency—there have been no equivalent developments in Ireland.[7]

Unfortunately, in the absence of legislatively or judicially developed scaffolds to help parties resolve such common disputes in an out-of-court setting, encouragement for alternative dispute resolution such as mediation has arguably had little meaningful effect.[8] Although, as Shatter noted, mediation in many family law cases "offers a better route and outcome for the parties than the adversarial environment of

the courts",[9] the ability to confidently enter into such mediation or otherwise seek to reach an agreement in the shadow of the law—without a guiding framework, certainty or foreseeability as to a likely outcome—is limited.

Unsurprisingly, in this context the generalist Irish courts system through which such family law disputes are addressed has come under significant strain and now appears to be characterised by ever increasing delays and costs. In 2021, the Irish Human Rights and Equality Commission described the Irish family justice system as "marked by chronic delays in court proceedings, repeat adjournments, crowded lists, excessive caseloads, delays in conducting assessments of children and adults".[10]

Conscious of these pressures and the ever-growing family law caseload in the jurisdiction, the Government recently published the Family Courts Bill 2022, with a view to introducing, for the first time, a specialist family court system in Ireland.[11] The Bill, which provides for the establishment of a specialist Family High Court, Family Circuit Court and Family District Court, aims to modernise the family justice system and improve access to justice for families.[12] Among the various measures proposed, it seeks to enable a greater share of non-contentious family law matters to be dealt with at District Court level which, it is hoped, will reduce the costs associated for litigants with accessing justice. While aspects of the Bill have been subject to some criticism, notably from the Law Society of Ireland,[13] the introduction of a specialist court system, dealing exclusively with family law matters, has been warmly welcomed.

Indeed, the introduction of the 2022 Bill could, if viewed in isolation, be regarded as proof positive that Ireland has baulked the European trends towards the non-judicial administration of justice in family law. Rather than shifting away from the courts, Ireland appears to be (belatedly) developing its judicial infrastructure to address family law issues. The reality in Ireland, however, is much more nuanced with other, more subtle, policy shifts also emerging.

Part II: Signs of a Change in Direction?

Notwithstanding that in almost every aspect of family law (and in many areas of succession law) the courts retain a significant, if not exclusive, role in the administration of justice, there appear to be signs of a change in direction—at least at a policy level. Ireland's first *Family Justice Strategy 2022–2025* was published by the Department of Justice in late 2022.[14] It now seeks to provide for "a modern, streamlined and user-friendly family justice system that supports simple, early, fair and—*where possible—non-adversarial outcomes*".[15] Goal 4 of the Strategy specifically highlights that "[p]romoting the most appropriate ways to help families resolve their problems is a central aim of this strategy, *including the increased use of non-court options"*,[16] and emphasises the benefits of alternative dispute resolution ("ADR") in "alleviating the adversarial nature of family law proceedings".[17] Conscious of the important role which will continue to be played by the courts in family law disputes, it stresses:

> "Even when a case is in court, it is proposed that ADR may be used as a way to agree other matters that *may not need a court decision* e.g. family visits and access agreements, and judges or other court officers should be able to refer cases to ADR, at any stage throughout a court process".[18]

The increased awareness of the need to provide greater certainty and foreseeability to parties involved in family law disputes is particularly evident in relation to issues concerning family property and finances. Aiming to better facilitate the out-of-court resolution of issues arising on marital breakdown, the Law Reform Commission of Ireland's *Fifth Programme of Law Reform* intended to consider how more guidance could be given to parties on divorce vis-à-vis the meaning of "proper provision".[19] It also intended to:

> "consider to what extent any further guidance may be provided in order to ensure a consistency in the approach taken to the exercise of this judicial discretion, *in particular to assist spouses to reach settlements* and resolve disputes more efficiently and at lower financial … cost".[20]

Although the project has since been discontinued, with the Law Reform Commission citing issues such as "current resourcing constraints",[21] among others, it is hoped that, given its importance, it will once again find its way into the next Programme once announced.

While the need for any settlement agreed to be subject to judicial approval before a decree of divorce or judicial separation is ordered by the courts will continue, notwithstanding the introduction of guidelines or clarification, if any, such efforts to provide greater foreseeability and certainty facilitating parties in this regard are to be welcomed and could play a significant role in reducing the demands on the court system.

Part III: Developments Towards Child Maintenance Reform

Although the vision presented in the Family Justice Strategy, and the (now abandoned) intention of the Law Reform Commission to consider how to assist parties in reaching settlements on divorce, certainly speak to an increased interest in facilitating non-judicial pathways where possible, nowhere is such a policy shift more obvious than in recent proposals adopted for the reform of the child maintenance scheme in Ireland.

Conscious of the weaknesses identified in the antiquated, discretionary and highly problematic Irish child maintenance system,[22] a number of reviews have recently been

undertaken.[23] While the introduction of a non-judicial "State Child Maintenance Agency" was unfortunately vetoed in late 2022,[24] there nevertheless appears to be a continuing political will to see the introduction of a more settlement-friendly approach to child maintenance issues, reducing the need for parties to invariably seek judicial intervention, in particular in determining the amount of child maintenance due.

In January 2024, building on the earlier findings of the Child Maintenance Review Group,[25] the Department of Justice published the results of its *Review of the Enforcement of Child Maintenance Orders*.[26] Notwithstanding the somewhat narrow sounding title, the Review adopted a relatively broad approach in considering how best to encourage and/or enforce compliance with child maintenance obligations. Its recommendations spanned three named approaches to ensure public compliance: "the deterrence based approach (punishment), the compliance based approach (monitoring or automatic withholding) and the consensus based approach (culture of paying)".[27] Crucially, in relation to the latter, it recommended the introduction of child maintenance guidelines,[28] reiterating the many benefits associated with guidelines such as the increased "consistency, predictability and certainty", the scope to "*greatly reduce the need for child maintenance to be litigated*" as well as "the potential to significantly reduce parents' need to access professionals or engage in protracted maintenance negotiations".[29] To support the introduction of such reform and best ensure user accessibility, the Review also proposed the introduction of a child maintenance calculator for guidance to "allow the public or a paying parent to quickly understand what the appropriate child maintenance amount will be".[30] Underscoring the policy objective of encouraging out-of-court processes, the Department theorised that: "Child maintenance guidelines may lead to a *greater number of parents making voluntary maintenance agreements* and would increase transparency, consistency and predictability for those seeking and paying child maintenance."[31] In a final nod to the policy focus of reducing applications to the courts for determinations in relation to child maintenance, the Review proposed that, prior to a court application for maintenance, "parents should have a mandatory mediation information session provided by the Legal Aid Board to encourage voluntary maintenance agreements".[32] It recommended that parents could be directed to the mediation service through Courts Service staff and proposed that there should be "investment in advertising the new process through media channels".[33]

Yet, while the Review's core proposals could, if framed correctly, certainly assist significantly in guiding parties with regard to the calculation of child maintenance, they did not seek to eliminate the role of the court. Rather, the Review emphasised the importance of retaining judicial discretion, noting that the courts should not "become trapped by the guidelines", but merely have regard to them in all cases.[34] Thus, even if introduced, the fate of any guidelines as accurate predictors of child maintenance would seem to rest in the hands of the judiciary and whether it ultimately endorses and supports their application. Notwithstanding this caveat, however, the publication of, and support for, such reform by a government department vis-à-vis child maintenance does mark a significant milestone in Irish family law, representing a seemingly important step towards the facilitation of non-judicial pathways for the resolution of at least one vital family law issue.

Conclusion

Unlike some of our European neighbours, the administration of justice in family law matters continues to be ensured primarily through the mainstream courts system in Ireland. With few exceptions, non-judicial authorities play a very limited role and the legislative stance to rely on judicial discretion and avoid "the imposition of a rule-based process" clearly continues.[35] In short, while at an EU level many jurisdictions may have moved towards the extra-judicial administration of justice—facilitating parties in resolving their disputes in an out-of-court setting or securing determinations from non-judicial authorities—Irish family law has yet to follow suit.

However, although it is hard to see any scenario arising where the role of the courts would be meaningfully reduced for a long time to come, there seems to be some doubts over the sustainability of retaining the status quo in Ireland and its focus on the provision of individualised justice. Increasing signs of a policy shift towards empowering parties to resolve common family law issues themselves appear to be emerging, particularly in relation to family property and finances, thereby reducing the burden on the courts.

What impact, if any, these policy shifts will have at a legislative or judicial level remains speculative. Nevertheless, it is to be hoped that the most concrete proposals advanced with a view to putting the policy into practice, namely the recommendations put forward by the Department of Justice in its review on child maintenance, will be implemented, paving the way for a more transparent approach to the calculation of child maintenance and facilitating parties in resolving such issues without necessarily having to have recourse to the courts.*

* The views put forward in this article are those of the author and in no way reflect the views or beliefs of the publisher.

1 For example, French law was recently reformed to allow a couple to divorce without any judicial involvement. See M. Ryznar & A. Devaux, "Voilà! Taking the Judge Out of Divorce" (2018) 42(1) *Seattle University Law Review* 161–183.

2 In light of these developments, a large scale EU-wide study on the matter was launched entitled the "Extra-Judicial Administration of Justice in Cross-Border Family and Succession Matters". The project is currently financed by an action grant under the Justice Programme of the European Union and conducted in cooperation between the European Law Institute, the University of Pisa and the Ludwig-Maximilians-University Munich. The aim of the project is: "to develop an outline for a harmonised European concept of courts, including i.a. notaries and other actors traditionally not qualified as courts, building on the approach of the [Court of Justice of the European Union] in its recent case law, to ensure a harmonised application of EU instruments in the Member States by detecting and developing best practices and minimum standards to be fulfilled". See *https://www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/concept-and-role-of-courts/* [last accessed 2 February 2024].

3 See, for example, the expanded role of *Coimisiún na Meán* vis-à-vis online safety.

4 Although many jurisdictions adopt complex legal rules for how an individual may change his or her name, Irish law does not regulate how a person changes their name. A Deed Poll may simply be signed through which a person may legally declare their new name and this may be relied upon for official purposes. Note, where a name is changed upon marriage, a Deed Poll is typically not required.
Where a person is aged over 18 years old, they may apply for a gender recognition certificate by completing a form available from the Department of Social Protection (Form GRC1). Again, unlike other jurisdictions, a court application is not usually required; see the Gender Recognition Act 2015. Other developments seeking to reduce the role of the courts in certain family law issues include the commencement of the Assisted Decision-Making (Capacity) Act 2015, as amended which introduced a new legal framework for supported decision-making in Ireland.

5 It may arguably be considered "non-judicial" despite its High Court links given that it is staffed by court officials rather than the judiciary.

6 The Adoption Authority of Ireland ("AAI") is an independent body established under the Adoption Act 2010. It was preceded by An Bord Uchtála. Following an assessment of prospective adoptive parents by the Child and Family Agency ("TUSLA") or an accredited adoption agency, the AAI is empowered to issue a declaration of eligibility and suitability for the purposes of adoption. It may also make adoption orders, transferring parental rights to the adoptive parents. However, note judicial review proceedings may be taken in the High Court to challenge any decisions of the AAI. Judicial intervention may also be required if, for example, the AAI wish to dispense with the consent of birth parents to an adoption under s.31(3) or s.54(2) of the Adoption Act 2010.

7 Change may, however, be coming. See below for more.

8 Although 90 per cent of divorce cases are estimated to be settled at least in part, this is often at the last minute when the judge to hear the case is named and thus a settlement may be reached in line with said judge's known preferences. See L.A. Buckley, "Irish matrimonial property division in practice: a case study" (2007) 21 *International Journal of Law, Policy and the Family* 48. See also K. O'Sullivan, "Bespoke Justice and Equitable Redistribution in Ireland: An Optical Illusion" in M. Briggs and A. Hayward (eds) *Research Handbook on Family Property and the Law* (Edward Elgar, 2024)(forthcoming). Such last-minutes settlements, often arising after a part-hearing of the case, do little to reduce the burden on the courts.
Legislative encouragement for mediation may be found in ss.5 and 6 of the Judicial Separation and Family Law Reform Act 1989 and ss.6 and 7 of the Family Law (Divorce) Act 1996, which oblige lawyers acting for separating parties to advise the latter of the availability and possible benefits of mediation (and negotiation). Note also judicial encouragement for parties reaching an out-of-court settlement: the Supreme Court in *MD v ND* [2011] IESC 18 at [30] noted: "it would be to the advantage of the parties and their children if this matter could proceed by way of agreements rather than further litigation".

9 Courts Service, *Courts Service News* (2011) 13(3) 9.

10 IHREC, *Submission on the General Scheme of the Family Court Bill 2020* (IHREC 2021) 3–4. The Joint Committee on Justice and Equality *Report on Reform of the Family Law System* at p.21 also noted the "[d]elays, excessive caseloads, inadequate facilities and lack of specialist training for judges" in relation to family law disputes and reflected on "a general consensus amongst stakeholders that the current family law system in Ireland is beset by a number of difficulties".

11 Note, Senator Mary Robinson advocated for "proper family tribunals" as far back as the 1970s, see Seanad Éireann Debate, Family Law (Maintenance of Spouses and Children) Bill 1975: Second Stage, 10 March 1976, Vol. 83 No. 12. Such calls were repeated by the *Report of the Joint Oireachtas Committee on Marriage Breakdown* (Stationary Office 1985), Chapter 9; the Law Reform Commission, *Report on Family Courts* (LRC52-1996); and the Law Society of Ireland, *Divorce in Ireland: The case for reform* (2019), p.6.

12 See "Family Court Bill aims to make system more efficient" (2022) *Law Society Gazette* available at: *https://www.lawsociety.ie/gazette/top-stories/2022/november/ministers-back-bill-to-set-up-family-court* [last accessed 2 February 2024].

13 "Child voice muffled in family-law bill—Law Society" (2023) *Law Society Gazette* available at: *https://www.lawsociety.ie/gazette/top-stories/2023/july/voice-of--child-muffled-in-family-court-bill--law-society* [last accessed 2 February 2024].

14 See Department of Justice, *Family Justice Strategy 2022–2025* (2022), available at: *https://www.gov.ie/en/collection/4790f-family-justice-strategy* [last accessed 2 February 2024].

15 Department of Justice, *Family Justice Strategy 2022–2025* (2022), available at: *https://www.gov.ie/en/collection/4790f-family-justice-strategy* [last accessed 2 February 2024] (emphasis added).

16 Department of Justice, *Family Justice Strategy 2022–2025* (2022), p.33 (emphasis added). One example of how non-court processes are being encouraged may be seen in the recent changes to encourage unmarried parents towards a non-judicial route to conferring the status of guardian on the father under s.6A of the Guardianship of Infants Act 1964. Seeking to address a common misconception, the parents of a child will now be informed when registering or re-registering the birth that if they are unmarried, merely naming the father on the birth certificate will not automatically make him a guardian. The couple will be provided with a copy of the statutory declaration conferring guardianship which they can sign, at no charge, in front of the registrar immediately or within a fortnight, reducing the potential risk of an unmarried father having to initiate legal proceedings at a later date; see s.27A of the Civil Registration Act 2004 (as inserted by s.97 of the Children and Family Relationships Act 2015). See also B. Tobin, "Guardianship and Unmarried Fathers in Ireland: One Step Forward, Two Steps Back?" (2020) 23(4) *Irish Journal of Family Law* 87–92.

17 Department of Justice, *Family Justice Strategy 2022–2025* (2022), p.34.

18 Department of Justice, *Family Justice Strategy 2022–2025* (2022) p.34 (emphasis added).

19 It is a pre-condition to a decree of divorce under Art.41 of the Constitution that "proper provision" must be made for a spouse and any dependent children. What constitutes "proper provision", however, remains undefined.

20 Law Reform Commission's *Fifth Programme of Law Reform* (2019) p.16 (emphasis added).

21 See *https://www.lawreform.ie/news/rationalisation-of-fifth-programme-of-law-reform.1122.html* [last accessed 15 February 2024].

22 The core approach employed in the determination of maintenance cases in Ireland remains almost unchanged from that introduced in the Maintenance of Spouses and Children Act 1976. Based on her empirical

research, O'Shea reported that child and spousal maintenance in the Circuit Court is based on "a highly discretionary, individualised assessment of evidence and submissions made by counsel informed, in part, by the Affidavits of Means", noting that "un-reliable Affidavits and inconsistent child and spousal maintenance orders were the hallmark of maintenance applications in the Circuit Court. During this project there was no evidence of any formulaic approach by the court, rather a rule of thumb pattern for each judge emerged"; see R. O'Shea, *Judicial Separation and Divorce in the Circuit Court* (PhD Thesis, Waterford Institute of Technology 2014), pp.130–132. Rather than the affidavit representing a factual list of expenses, she described it as a "wish list" in many cases. Note also the concerns voiced by the United Nations Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Combined Sixth and Seventh Periodic Reports of Ireland* (2017) at [57] vis-à-vis the Irish approach to maintenance issues.

23 See *Report of the Child Maintenance Review Group* (November 2022) available at: *https://www.gov.ie/en/publication/f01cd-report-of-the-child-maintenance-review-group/* [last accessed 2 February 2024]. See also Joint Committee on Justice and Equality, *Report on Reform of the Family Law System* (2019) and the Oireachtas Joint Committee on Social Protection, *Report on the Position of Lone Parents in Ireland* (JCSP01/2017).

24 For a critique of this decision, see K. O'Sullivan, "Child Maintenance Review Group Report: A Critique & Call for Reform" (2023) 26(2) *Irish Journal of Family Law* 37–44. Interestingly, conscious of the strain on the Irish judicial system, calls for the introduction of a State child maintenance agency go back 50 years. See, for example, Senator Mary Robinson's early efforts to advocate for same in the 1970s, Seanad Éireann debate, Family Law (Maintenance of Spouses and Children) Bill 1975: Committee Stage, 23 Mar 1976, Vol. 83 No. 14.

25 *Report of the Child Maintenance Review Group* (November 2022), available at: *https://www.gov.ie/en/publication/f01cd-report-of-the-child-maintenance-review-group/* [last accessed 2 February 2024].

26 Available at: *https://www.gov.ie/en/publication/de4f9-review-of-the-enforcement-of-child-maintenance-orders/* [last accessed 2 February 2024].

27 *Report of the Child Maintenance Review Group*, p.42. The review sought to "generate maximum compliance with child maintenance orders to ensure security and stability for children and to aid poverty prevention". It explained the recommendations "seek to address both categories of those who don't pay child maintenance—those who can't pay, and those who won't pay" and were "chosen to complement each other and to work together to provide a fair, effective and efficient child maintenance system".

28 Describing the current regime, the Review explained at p.44: "The Irish courts currently operate without any guidelines in the determination of child maintenance … stakeholders noted that the current system is, or can be perceived as, inconsistent, and that it is very difficult for solicitors to advise a client on how much they will receive or pay. The way maintenance is calculated was called arbitrary and subjective. Stakeholders noted that currently the amount of maintenance ordered can come down to the individual judge, whether or not each party is represented, the proofs submitted, and the interpretation of those proofs".

29 *Report of the Child Maintenance Review Group*, p.44 (emphasis added). It also noted that guidelines would likely "lead to more transparency", "increase perceived fairness" and "promote a culture of maintenance".

30 *Report of the Child Maintenance Review Group*, p.46. At p.47 the Report further recommended that maintenance figures granted by court orders should be included as data to be collected and reported for the purposes of Goal 6, Action 1.3 of the Family Justice Strategy which is currently scoping requirements "for either a new or improved data collection methods across the sector". The inclusion of such data would, the Report concluded, "increase transparency in the amount of maintenance awarded by the courts".

31 *Report of the Child Maintenance Review Group*, p.44 (emphasis added).

32 *Report of the Child Maintenance Review Group*, p.48.

33 *Report of the Child Maintenance Review Group*, p.48. Finally at p.49, the Report recommended a "national media campaign promoting the payment of maintenance and framing it as the right of the child and the responsibility of the parent to provide for their child should be rolled out".

34 *Report of the Child Maintenance Review Group*, p.44. The Review also included various supporting recommendations. To avoid difficulties arising if they are not reviewed often enough, the Review also proposed that "the guidelines be reviewed initially after one year and subsequently reviewed periodically". In terms of who would devise (and update) the guidelines, the Review proposed at p.45: "Guidelines could be produced and reviewed by an Inter-Departmental Group established by the Department of Justice and including representation from the Department of Social Protection and the Department of Children, Equality, Disability, Integration and Youth. Input could be sought from the Child Poverty and Wellbeing Office in the Department of An Taoiseach and other stakeholders as required. Bodies with experience of developing similar initiatives, such as the Vincentian Minimum Essential Standard of Living Research Centre (MESL), which inputs to the Reasonable Living Expenses used by the Insolvency Service of Ireland (ISI), could also be engaged with on this work". For an academic perspective on how such guidelines should be formulated and the considerations involved, see K. O'Sullivan, "Child Maintenance Reform in Ireland: Lessons from Abroad" (2022) 34(1) *Child and Family Law Quarterly* 41–60.

35 L. Crowley & M. Joyce, *Family Law,* 2nd edn (Dublin: Round Hall, 2023) at [11-11].

The Mother in Irish Law—Part 1

Dr Claire O'Connell

Introduction

This article analyses the position of the legal mother in Irish law in the historical context against the context of assisted human reproduction ("AHR"). AHR for the purposes of the article is confined to two parentage frameworks, those of surrogacy and donor conception. In such frameworks the historical components of motherhood, the gestational and genetic link, are split. Donor conception is regulated in Ireland under the Children and Family Relationships Act 2015 (the "2015 Act") and is a standalone framework that is generally categorised by the inclusion of the gestational link in the intending parental unit. The 2015 Act defines "mother" as the woman who gives birth to the child and treats any parentage that could be said to arise from the genetic contribution of an egg donor to be forfeited as a result of compliance with the legislative framework.

Surrogacy involves the diminishing of the gestational link in favour of a standalone framework dedicated to facilitating a legal transfer or assignment of parentage through a parental order.[1] The Health (Assisted Human Reproduction) Bill 2022 (the "2022 Bill") proposes that the legal mother in a surrogacy agreement is the surrogate.[2] It provides for a post-birth parental order model whereby a court application would be made to the Circuit Court at least 28 days after the birth of the child.[3] This article intends to clarify the precedent arising from the judgment of the Supreme Court in *MR v DR v An tArd Chlaraitheoir*,[4] which is mistakenly proffered as the underlying basis requiring such an approach.

The Female Genetic and Gestational Link in Parentage

The nature of surrogacy is that the gestational link will not be present within the intending parental unit. However, there are three elements of a surrogacy framework that relate to the level of legal significance attaching to genetics. The first is whether the surrogate should be inhibited from using her own ova, the second is whether a genetic link should be required within the intending parental unit and the third is whether the female genetic link by itself is sufficient to ground parentage. The public, policy, and practitioner perception is undoubtedly that a genetic mother cannot access parentage through proceedings pursuant to s.35 of the Status of Children Act 1987 (the "1987 Act"),[5] and this arises from the Supreme Court judgment of *MR & DR v an tArd Chlaraitheoir,*[6] which concerned the splitting of the components relating to birth registration; however, it also discussed the genetic mother's application for a declaration of parentage under s.35. In order to dispel this misconception, it is important in the first instance to review the relevant section that assigns parentage, based on the genetic link, s.35 of the 1987 Act. Section 35(1) provided, at the time of the *MR* judgment, that a person may apply to the court for a declaration that a person named in the application is their father or mother.[7] Section 35(8)(b) provides that where it is proven on the balance of probabilities that a person so named is the mother of the applicant, the court shall make the declaration accordingly. Section 35 is therefore not gender exclusive and explicitly relates to "mother" in terms of who can be declared a parent.[8] As mentioned above, parentage under this section can be definitively determined by a DNA test.[9] A blood test, or a DNA test, would only show a match between a genetic mother and her child; it would not confirm the existence of a gestational link.

Moving now, to the *MR* judgment, it should be noted at the outset that the members of the Supreme Court made particular efforts to make it clear that the judgment related to the issue of birth registration under the Civil Registration Act 2004 (the "2004 Act") only,[10] yet nonetheless dealt with the Status of Children Act 1987 (the "1987 Act"), almost in tandem. This is understandable given that the reliefs sought included a declaration under s.35 for the genetic mother, which was granted by the High Court. However, it is submitted that this could have been dealt with rather summarily based on the assertion from O'Donnell J (as he then was) that the section 35 procedure had not actually been invoked; no DNA tests had been ordered in the case and no reports were sought pursuant to the 1987 Act. However, he explained that it was counsel for the applicants who sought to make the issue solely about the "true interpretation of the statutory provisions".[11] The court was not called upon therefore to assess the meaning of "mother" under the 2004 Act and then, under the 1987 Act, but rather the meaning of "mother" when the two Acts were read together, with the 2004 Act taking precedent based on the question before the court. Therefore, the court did proceed into its analysis of the 1987 Act, and it is argued that there are three fundamental issues arising from this judgment of the Supreme Court and the public perception of its outcome. The first is that the judgment of the majority of the court arises from this requested cohesive assessment, as opposed to a standalone interpretation of the "mother" under the 1987 Act. The second is, had the court been tasked with interpreting the 1987 Act by itself, it could have done so on a literal basis, as opposed to the purposive interpretation taken when considered together with the 2004 Act. Finally, the majority of the court interchanged the historical position of the "birth mother" with the "gestational mother" who acted as the notice party in this case, which confused the ultimate outcome of the majority judgments on this point.

***MR:* Imposing the Interpretation of the 2004 Act onto the 1987 Act**

In the first instance, the court had to determine who the "mother" was under the 2004 Act, in the advent of the splitting of motherhood into the gestational and genetic components.

It firstly noted that the historical position of the "mother" was a woman comprising of both the gestational and genetic link, where no splitting of these elements had taken place. Denham CJ held that: "[t]he words [*mater semper certa est*] simply recognise a fact, which existed in times gone by and up until recently, that a birth mother was the mother: both gestational and genetic".[12] These sentiments were echoed by McKechnie,[13] O'Donnell[14] and Clarke JJ.[15] It is interesting perhaps that throughout his judgment, Murray J does not make the distinction between the historical conception of a "birth mother" with both gestational and genetic elements and a surrogate, who contributes only the gestational link:

> "Since time immemorial, and perhaps more relevant, for most of the 20th century, the only mother known to society was a mother who gave birth to the child".[16]

Murray J at no point recognises the splitting of motherhood between the applicant and the notice party before him nor any legal implications that may stem from each, as individual components. His judgment focuses on the historical "birth mother" and the surrogate being one and the same and this is the crux of his judgment.[17] While Denham CJ made only passing references to the issue of statutory interpretation,[18] and Hardiman J made none at all,[19] the majority of the court essentially held that the interpretation as to who was the mother under the 2004 Act could not be determined under the assumption that the legislature had in fact considered the splitting of motherhood when drafting the framework for birth registration. Therefore, it could not accept an interpretation that favoured the genetic mother, when traditionally the woman who had both a gestational and genetic link was considered to be the mother under the 2004 Act. For the avoidance of any doubt, no issue is taken here with this finding insofar as it acknowledges that a surrogate, comprising of the gestational link only, cannot be considered the historical "mother" envisioned by the drafters.[20]

The court then considered whether the 1987 Act did anything to change the interpretation of the 2004 Act. O'Donnell J (as he then was) held that the "mother" within the 2004 Act was the birth mother and that the 1987 Act did not change the understanding or meaning of the birth mother under the 2004 Act:

> "the Act of 1987 was instead itself based on the assumption that blood testing could establish, at least negatively, parenthood, which in the case of a woman at the time of passage of the Act of 1987 meant the woman who gave birth … the 1987 Act did not alter the identity of the person **to be registered**. That was and remained, the person giving birth" (emphasis added).[21]

This sentiment is echoed in the judgment of McKechnie J who held that "given the historical position, it seems to me … one should accord to the word 'mother', at least presumptively, the meaning which it was always understood to have".[22] McKechnie J also felt that it could not be inferred that the splitting of motherhood was within the contemplation of the legislature when it drafted the 1987 Act.[23] This was despite his pointing out that if the respondents' submissions were preferred, s.35 would be redundant; such a finding would dictate that the genetic link is not the appropriate test and the blood tests would not find a match based on gestational link:[24]

> "It is in my view beyond argument but that the Act of 1987 utilises, as the basis for determining parentage, the DNA link, or as used in the High Court judgment as a proxy, the blood link".[25]

Murray J initially found that he did not consider the "provisions of the Act of 1987 to have any bearing on the interpretation to be given to the Act of 2004".[26] He continued, "there is nothing in the Act of 1987 to suggest that the notion of father or mother was to be considered anything other than that as traditionally understood".[27] He is finding here that there is nothing contained within the 1987 Act that would impose a reading of the 2004 Act that meant that the genetic mother should be registered. He did, however, also state: "there is nothing in the [1987] Act to suggest that the legal notion of mother is a reference to anyone other than the birth mother". It is very difficult to accept this finding when relating to a section that readily determines parentage based on blood tests and inheritable characteristics.[28] Murray J held that "in a surrogacy birth, the birth mother did not pass on any inheritable characteristics to the child born, but the genetic mother did",[29] yet contended that blood tests were only to be of assistance under the 1987 Act, not determinative. This is also difficult to accept, given that there is no reported case of proceedings under the 1987 Act whereby alternative evidence is favoured to a positive blood test determining the genetic link. There is no other "assisting evidence" prescribed by the 1987 Act. As O'Donnell J accepts, "the Act of 1987 plainly lays emphasis upon blood testing as a method of proving parentage".[30] It should be said however that the tenor of Murray J's judgment relates to the 2004 Act and a mere paragraph is spent on his justification for his findings in relation to the 1987 Act. It is argued that the real crux of his judgment, and that of the majority is that, when asked to interpret the two pieces of legislation together to find a cohesive definition of mother for the purposes of birth registration, the 1987 Act did not impose a new meaning on the 2004 Act. For example, MacMenamin J similarly held that:

> "In summary, the balance of legislative tradition weighs heavily in favour of the proposition that, **unless a contrary intention is expressed**, in

> legislation, the birth mother should be regarded as being 'the mother' of the child. These considerations of purpose, intent and context weigh significantly against the construction of the Act of 1987 now urged on behalf of the applicants" (emphasis added).[31]

Clarke J, the only member of the court who granted the section 35 declaration found that:

> "Undoubtedly, the Act of 1987 emphasises genetic connection and inherited characteristics. Equally, the Act of 2004 emphasises the woman giving birth. But neither does so in a way which establishes a clear intent to alter the legal definition of "mother".[32]

In summary, Denham CJ and Hardiman J did not express a view as to whether the "mother" within s.35 was the genetic or the gestational mother. Clarke J granted the section 35 declaration to the genetic mother. O'Donnell, McKechnie and MacMenamin JJ focused more on how the 1987 Act impacted the 2004 Act than the converse and Murray J was the only judge to explicitly find that the "mother" in s.35 was the woman who gave birth.

MR: The Follies of Muddled Terminology

A further difficulty arises when the majority of the court, in making this finding, referred to both the historical understanding of the definition, and the notice party to the case, the surrogate, as the "birth mother". While Denham CJ and McKechnie J[33] referred only to the "notice party" or the "gestational mother" throughout their judgments, the majority of the court referred to the surrogate as the "birth mother".[34] Therefore, it would appear that their finding that the birth mother was the person envisioned to be registered on the birth certificate was synonymous with the surrogate being so registered. This, it is argued, does not take into account the splitting of motherhood, and the fact that the gestational link alone constituted a status that had yet to be determined. The surrogate notice party with no genetic link was not the "birth mother" envisioned by the legislature in 1880, 1987 or in 2004. Therefore, it is genuinely confusing as to whether, in their determinations to uphold the appeal, the court was proactively choosing the gestational surrogate to remain registered or simply allowing the default status prior to the High Court judgment to continue in the absence of any appropriate legislative framework. It is argued that the latter is by far the more correct view given the actual splitting of motherhood at issue in this case and the reasoning of the court, despite the regrettable overlapping in terminology.

This is not to say that the findings in relation to the 2004 Act are not otherwise a logical result. It could be argued and accepted that all things being equal, the task of the "mother" under the 2004 Act is to be the sole and primary person who is first and foremost obligated to register the particulars of the birth. There is provision for others to register particulars of the birth but that is only generally with the consent of the mother, i.e., the unmarried father, where there is a husband, which is not guaranteed, or where the mother has failed to register the particulars, the qualified informant.[35] Therefore, the woman who births the child can be singularly relied upon to be the person present at the birth of the child, and who has knowledge of the particulars, which was recognised by Clarke J.[36] She is attesting to the fact of birth, in a similar manner to the medical practitioner attesting to a death in a death certificate,[37] or a witness and solemniser attesting to a marriage in a marriage certificate.[38]

MR: Purposive Interpretation vs Literal Interpretation

It is argued that the 1987 Act is clear enough in its wording to not require a purposive interpretation which would require the court's exploration of what was intended by the drafters. The applicable principles of statutory interpretation were set out in *CM v Minister for Justice*:[39]

> "[I]f the objective intent of [the Oireachtas] … is self-evident from the ordinary and natural meaning of the words or phrases used, then the task is at an end, and the court's function has been performed".[40]

Barrett J has recently surmised that the position arising from previous case law is that the starting point is the literal approach, and if the intention of the Oireachtas is not self-evident from statute then the court moves to a purposive interpretation.[41] It is submitted that the literal approach was open to the court in interpreting the 1987 Act given that the definition of "mother" was not suspended within the Act, in search of a meaning.[42] There were 43 "mother" references in the 1987 Act, as enacted. Thirty-nine of these referred to other pieces of legislation, 36 of which were self-contained within amendments. Two were contained within s.3, which dealt with the marital status of parents and the final two references were contained within s.35. Section 35 stood to be interpreted and it did not say, for example, "the parent of the child is the mother"; it said, together with ss.38,[43] and 40,[44] that a report based on blood tests shall be used to determine who is the mother. The test applied is the balance of probabilities where inferences can be taken by the court in the event of a refusal to undergo a blood test.[45] It is therefore argued that the 1987 Act does not require an interpretation of the definition of "mother", as it creates a clear statutory test to ascertain who comes within this definition for the purposes of the 1987 Act. The status is created by virtue of the process of blood tests, not the historical or traditional understanding. The court found the submissions of the genetic mother's counsel, who sought to rely on these blood tests, as "ingenious"[46] and "attractive"[47] arguments, yet ultimately undertook a purposive interpretation

of the 1987 Act. Again, it is argued that perhaps the judgment of MacMenamin J gives some insight into why that might be; he stated that the applicants' submissions were predicated more on a process of statutory interpretation and thereby seemingly directing the court down this line of inquiry.[48]

Furthermore, it is argued that despite the majority of the court conflating the 1987 Act to complement the 2004 Act's interpretation, the two Acts are not so closely aligned in context as to require a consensus in definition between them. The 1987 Act does not act in conjunction with the principles of the 2004 Act, but operates in the event of a convergence; where there is a contest that is to be determined by court application. It does not follow that a definition applied in the 2004 Act for the specific context of birth registration, which facilitates the presumptions of parentage, flows into the 1987 Act, which often rebuts parentage through the use of blood tests. It is submitted that as such, the interpretation of one Act does not have to impose itself on another, where the secondary piece of legislation exists in a different context.[49] While the judgment of O'Donnell J notes that the 1987 Act and the 2004 Act are connected for the purposes of the registration on foot of a court declaration under s.35, this very clearly relates only to the re-registration of fathers on birth certificates.[50] While this would undoubtedly raise issues as to how a mother was supposed to be re-registered on foot of a section 35 declaration, this anomaly is not AHR specific and again, the wording of s.35 is clear. As noted by Clarke J,[51] the 2004 Act and the 1987 Act conflict with each other in terms of motherhood, and such an anomaly is to be expected in the absence of remedial legislation to deal with emerging family formations and reproductive and scientific developments.[52] However, he stated that just because scientific advances have rendered existing law obsolete, that does not mean that the courts can provide a ready solution. It is submitted that both Acts combined in the wake of AHR were particularly ill-suited to meet the circumstances of the case, as they favoured opposing aspects of motherhood as it was traditionally understood. However, it is argued that it was open to the court to register the gestational mother on the birth certificate and declare the genetic mother as the parent, for the reasons set out above; an option which no member of the court sought to do. This would have been entirely unsatisfactory as an effective framework prospectively; however, it would have aligned with the unfavourable nature of a legislative framework that provides no self-evident and harmonious approach to the splitting of motherhood. As O'Donnell J found "anomalous outcomes are possible whoever the Court decides is required to be registered on the birth certificate **initially**" (emphasis added).[53] Regardless of the outcome, it was clear that the court was remitting the issue to the Oireachtas to establish a workable framework to deal with DAHR and surrogacy. The 2014 Bill was being updated by the Department of Justice and was enacted as the Children and Family Relationships Act 2015 four months after the judgment. Therefore, it is submitted that even an unsatisfactory outcome such as is suggested here, could have been rectified relatively quickly within this legislation, albeit the surrogacy legislation remains in Bill form 10 years later.

The "Mother" in Donor-Assisted Human Reproduction

The 2015 Act focuses on the legal importance attached to the gestational link of the birth mother and allows for embryo donation whereby neither intending parent is genetically related to the child. Therefore, to an extent, the female genetic link is immaterial when an intending parental unit is able to meet the criteria set out in the legislation. However, where they fall outside the 2015 Act, there is a need to determine what legal status can attach itself to the genetic link of a female spouse or partner who engaged in reciprocal IVF, wherein she provided the egg, and her wife or partner carried the child. This is particularly noteworthy in light of the requirement under the 2015 Act that both egg and sperm donors must confirm that they will not be the parent of the child born through the DAHR procedure,[54] suggesting the egg donor has parentage which would otherwise arise.

As O'Hanlon, Winder and Reilly note, the Oireachtas effectively upheld the "mater" maxim within a couple of months of the *MR* judgment being published and "failed to take the opportunity to consider the definition of 'mother' in the age of AHR treatment".[55] The 2015 Act defines "mother" as the woman who gave birth to the child; however, it is arguable that a woman who births the child, but who is not genetically related to the child, is not entitled to parentage of that child by virtue of the gestational link alone under this framework. The key basis for this assertion is that s.5(1), which names the mother and any intending parent as the parents of the donor-conceived child, is subject to the requirements under s.5(8) of the 2015 Act. This requires "the mother" to consent under s.9 to the parentage of the child, and for her spouse, civil partner, or cohabitant to do likewise under s.11.

It is therefore submitted that if she does not comply with these criteria, she is not the parent of the child by virtue of the gestational link alone. If, however, she does use her own egg, then she is the mother for all intents and purposes under the "natural conception" principles. In such an instance, her compliance with the 2015 Act is purely for the benefit of her partner, as she would not need to otherwise comply with the provisions. If considered pragmatically, a woman who cannot produce her own ova will require medical intervention and any DAHR facility licensed in this country will require compliance with the section 9 and, if applicable, section 11 provisions. Therefore, the argument is slightly academic, but important in the analysis of the legal impact of the splitting of motherhood within the AHR context. Ultimately, it is submitted that this definition of mother is context specific, i.e., the DAHR context. No other piece of legislation, specifically those which deal with guardianship or parentage has defined the mother as the woman who birthed the child. Therefore, any suggestion

that this definition of mother expands beyond this context, and specifically into surrogacy, is misguided. There were no amendments to any other pieces of legislation referring to the "mother as defined in the 2015 Act". The 2015 Act does not define mother for the purposes of the Irish Statute Book or the Interpretation Act 2005; it defines it for the 2015 Act and no other.

The Impact of the 2015 Act on the *MR* Judgment

Finally, it is contended that if arguments and findings based on the historical understanding of the "mother" and the intention of the drafters of the 1987 Act are accepted, such have now been subsequently unravelled by the introduction of the 2015 Act. There cannot be any suggestion that the amendments to the 1987 Act by the 2015 Act were not made with the purposive intention to deal with the issue of the splitting of motherhood. While it is accepted that the 2015 Act dealt with DAHR and not surrogacy, it is submitted that it was nonetheless open to the legislature to amend s.35 to clarify the issue of who is the mother under the 1987 Act, in recognition of the reproductive developments. Any amendments made alongside the introduction of a DAHR framework arguably negate the continuation of the traditional understanding of the "mother" as being the birth mother, as defined by the majority in *MR*, from being applied. Furthermore, the 2022 Bill does not interact with s.35 at all, and there are no indications that this will be changed. Therefore, it is argued that the vast majority of the Supreme Court's findings in *MR* in relation to the 1987 Act were moot once it was plainly understood that these amendments took into account the splitting of motherhood. Section 35, when considered by the drafters implementing a framework of DAHR in the light of the *MR* judgment, could be expected to remove the reference to blood tests in determining maternity; however, it did not, and the additional element of a "second parent" was introduced instead.[56]

Even within the DAHR context, there is no test for a gestational mother to be granted a declaration of parentage under the 1987 Act; not even based on her compliance with the 2015 Act. The gestational link alone has no place under the 1987 Act. The mother's declaration of parentage remains subject to a bodily sample obtained for the purposes of a DNA test.[57] Therefore, notwithstanding public discourse that a genetic mother cannot be a parent of a child born through surrogacy, it is argued that it is open to a genetic mother to invoke s.35 of the 1987 Act and seek a declaration of parentage based on a positive DNA match with her child. Should the court refuse to grant her declaration on foot of this, further submissions should be made in favour of a literal interpretation of the 1987 Act, and in respect of the impact of the 2015 Act on the drafter's intentions, as they relate to the definition of "mother".[58] Furthermore, it is argued that if a literal assessment of the 1987 Act once more concludes that the mother is the woman who has both a gestational and genetic link to the child, that is not to say that the 2022 Bill could not, separate to the surrogacy framework, confer legal status on the female genetic link, outside of a genetic intending mother's compliance with the legislation. While a surrogacy framework definitively offers parentage to a genetic mother who does not gestate the child, it does so on the same basis as every person who does not contribute a genetic link to the conception of the child. Therefore, the female genetic link, in and of itself, is at present considered to be an empty legal entity in the 2022 Bill.

A "Mother" under the Guardianship of Infants Act 1964

While the "mother" in the contexts of registration and parentage has been discussed above, it is important to be mindful of the principles, as espoused by McKechnie J in *MR*, that: "an overarching constituent of [the exercise of statutory interpretation] is that 'context is everything'",[59] and by MacMenamin J that: "[t]he meaning of a term in one statute will not always have the same meaning in another statute".[60] The definition of "mother" has not changed since 1964 and is somewhat of a vague and non-expansive definition, and one which does not clarify the complexities arising from the gestational or genetic components of motherhood. It does not explicitly exclude or include the genetic, gestational, or intending mother. Therefore, it is argued that it is open for a genetic mother as part of a surrogacy agreement to apply for guardianship of the child. In *MR*, the genetic mother sought an order for guardianship under s.6A of the Guardianship of Infants Act 1964 (the "1964 Act") in the absence of her being registered on the birth certificate. The Supreme Court (MacMenamin J) held that it was not convinced that it would be appropriate to appoint MR as a guardian under s.6A and noted that:

> "the Act of 1964 does not, however, give an express power to appoint the fourth applicant (the genetic mother) as a guardian of the twins. Where the terms of a statute are fully clear, they cannot be construed otherwise. But the statute does not address a situation such as this one".[61]

Nonetheless, MacMenamin J would have remitted the matter to the High Court to determine, using its inherent jurisdiction, whether MR and her husband should be appointed as the children's guardians, albeit he was the only judge to suggest such a relief.[62] This judgment was provided on 7 November 2014 and while the General Scheme of the Children and Family Relationships Bill 2014 (the "2014 Bill") had been published in January 2014, it did not show any amendments to s.6A to extend the eligibility from "father" to "parent",[63] as now exists. However, the 2014 Bill did propose to change the definition of "mother" in the 1964 Act to include a female adopter, a woman named in a declaration of parentage in

either DAHR or surrogacy, and otherwise, the woman who gives birth to a child.[64] However, subsequent to the judgment, the "parent" amendment to s.6A appeared in the Children and Family Relationships Bill 2015 (the "2015 Bill") on 19 February 2015, yet the amendment to the definition of "mother" was removed. It would therefore appear that a conscious decision was made by the legislature not to distinguish between the two aspects of motherhood under the 1964 Act.

Therefore, the drafters, while legislating for DAHR as it impacts on "the mother" for the purposes of guardianship opted not to make any amendments, or perhaps more accurately for the purposes of this discussion, any restrictions. However, this argument could be unravelled slightly by reference to ss.6(1) and 6B. Following the 2015 Act, the "mother" and the "father" remain joint guardians under s.6(1), and s.6B sets out the circumstances whereby a section 5(1)(b) parent can be the guardian of their donor-conceived child. If a "mother" included a genetic mother, then a genetic mother availing of reciprocal IVF in DAHR under the 2015 Act would not need s.6B. Ultimately, however, it is submitted that this argument falls on two fronts. The first is that, as discussed above, the intending parent who provides their own gamete is considered "a donor" for the purposes of the 2015 Act. This rebuttal is less convincing as it seems this legislative anomaly arose from a drafting error. The second and more convincing argument, is that s.6B was required for non-genetic intending parents.

In summary, the "parent" who can apply for guardianship under s.6A now includes the definition of "mother" which is a non-exclusive definition that arguably opens the door to genetic mothers.[65] As the Chief Justice has recently held, guardianship under s.6C "falls very far short of a recognition of the genetic connection".[66] However for ultimate clarity and assurance, it is evident that the definition of "parent" under the 1964 Act and its interactions with its sub-definitions requires a total dismantling and replacement with specific categories and criteria to account for the segregation of the elements (namely, the gestational link, the genetic link and intent and consent prior to conception) in order for a comprehensive guardianship framework to operate.

Conclusion

This Part of the article analysed the Supreme Court judgment in *MR* with a view to clarifying the position of the genetic mother in Irish law. It ultimately concludes that while the public perception may be that a genetic mother has no standing to apply for parentage under s.35 of the 1987 Act, there is an arguable case for a successful outcome. It also illustrates the need for the Oireachtas to grapple with the legal status attaching to the female genetic link in circumstances where the 2015 Act requires egg donors to consent not to be parents, but yet publicly operates as if genetic mothers have no legal standing in relation to their child in either parentage, birth registration, or guardianship. While parentage is proposed for both reciprocal IVF and genetic mothers in surrogacy agreements in the 2022 Bill, this is only where strict compliance with the legislation can be proven; it does not recognise any legal parent-child relationship accruing from the female genetic link itself. Should this continue, not only should a more focused challenge under s.35 take place, genetic mothers should also consider an equality challenge in light of the parentage arising from the genetic father.*

* The views put forward in this article are those of the author and in no way reflect the views or beliefs of the publisher.

1 In the recent case of *A, B & C v The Minister for Foreign Affairs and Trade* [2023] IESC 10, at p.6, fn.2, the court noted that the applicants argued that the parental order applied retrospectively from birth; however, it held that it was proceeding on the basis that parental orders operate as and from the date they are made, but held that it was not a material matter to the case. Section 58 of the Adoption Act 2010 provides that adoption orders apply from the point of the order.

2 While the 2022 Bill does not actually contain any standalone provision naming the surrogate as the legal mother of the child, this is inherent in the information document under s.14 of the 2022 Bill notifying individuals seeking AHR that the surrogate is the legal mother upon the birth of the child, and s.64(1)(d) stating that the effect of a parental order is that the surrogate will lose all parental rights and is free from all parental duties in respect of the child.

3 Section 62 of the 2022 Bill.

4 *MR v DR v An tArd Chlaraitheoir* [2014] 3 I.R. 533.

5 *Final Report of the Joint Committee on International Surrogacy* (Joint Committee on International Surrogacy, July 2022) stated at p.25 that: "There is currently no route for an intended mother to be recognised as a legal parent, even if her egg was used for conception, as she is the child's genetic mother". *Issues Paper on International Surrogacy for Special Joint Oireachtas Committee January 2022* (Department of Health, Department of Justice, Department of Children, Equality, Disability, Integration and Youth, 2022) at p.4 states that: "an intending mother of a child born through surrogacy, not being the mother of the child, is not entitled to apply for a declaration of parentage under the Status of Children Act 1987. This is the case even where the intending mother provided the egg used in the surrogacy arrangement and is the genetic mother of the child". This is reiterated in *Policy Paper—International Surrogacy and Recognition of Past Surrogacy*

Arrangements (Inter-Departmental Group, December 2022) at p.7.

6 *MR v DR v An tArd Chlaraitheoir* [2014] 3 I.R. 533.

7 Section 35(4) accepts that applications may be taken by a child's "next friend".

8 Section 35(2), (8)(b) of the Status of Children Act 1987 (as enacted).

9 While the Status of Children Act 1987 was updated by the 2015 Act to amend the references to blood tests with DNA tests, it is evident from the initial explanatory memorandum on the Status of Children Bill 1986 that blood tests with the object of ascertaining inheritable characteristics would include such tests currently available as serological analysis, enzyme analysis, tissue typing and DNA profiling, *Explanatory and Financial Memorandum of the Status of Children Bill 1986* (Department of Justice) at [43].

10 Denham CJ stated that "the core issue in this appeal is the registration of a 'mother' under the Civil Registration Act 2004; and the declaration sought that the fourth applicant, the genetic mother, is entitled to have the particulars of her maternity entered on the certificate of birth, and that the twins are entitled to have their relationship to the fourth applicant recorded on their certificates of birth", *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [60]. O'Donnell J stated "I wish to make it as clear as is possible that this decision is limited to the question of immediate registration of birth; it should not be taken as deciding anything more" at [243]. See also [232–233], and [178, 584].

11 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [231].

12 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [115].

13 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [263, 324–326, 335].

14 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [233].

15 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [465, 467, 488–489, 509].

16 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [126]. When speaking about the "fundamental truth" of the Births and Deaths Registration Act (Ireland) 1880, he held that "statute law was simply recognising what society recognised, that the only person who could or should be treated at birth as the mother is the mother who gave birth to the child", at [167].

17 Murray J held that "I cannot conclude that the Act of 2004 was intended by the Oireachtas to regulate status and rights in such complex situations in the manner claimed by the applicants", at [171]. He continued, "In my view, the term "mother" in the Act of 2004 bears the meaning which it did in the preceding legislation … there is nothing in the terms of the Act of 2004 suggesting that the term mother should be not understood to mean what it has heretofore meant in law and fact" at [173].

18 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [112, 116, 119]. Denham CJ held that the 1987 Act in its long title did not provide "a statutory structure by which the alteration of maternal legal status in the situation of a surrogacy agreement can be achieved", at [95]. She neglected to mention that the long title also provided that the purpose of the 1987 Act was to "provide for declarations of parentage and for the use of blood tests to assist in the determination of parentage".

19 Hardiman J did not engage with the 1987 Act other than to say that he would depart from the finding of the High Court that the genetic mother be registered. However, he held that that was only for fear that it would tie the hands of the legislature when dealing with contexts beyond surrogacy such as DAHR, at [201].

20 Denham CJ and Hardiman J held that this was an issue that had not been dealt with by the legislature, Clarke J believed that both women comprised elements of motherhood and should recognised as such. As mentioned, Murray J did not acknowledge the splitting of motherhood as it applied to this issue and focused only on the historical understanding of a "birth mother". In terms of the remaining judgments, please see the next section: MR: The Follies of Muddled Terminology.

21 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [239].

22 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [271].

23 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [321]. He continued, "[i]n view of these and other factors it would have required clear, precise and definitive language to have intended such a dramatic departure from the past understanding of the term mother, and in addition by only making a single and isolated provision to cover such rapidly advancing new scientific circumstances, the Act of 1987 would have created a void, of enormous proportions … I must conclude … that the Act of 1987 had not within its contemplation, and therefore does not cover, a divisible situation such as that applying in this case".

24 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [287–288].

25 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [283].

26 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [175].

27 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [175]. Murray J somewhat unhelpfully continuously refers to the "birth mother" in his judgment without explaining whether he means gestational, or both gestational and genetic: "statute law was simply recognising what society recognised, that the only person who could or should be treated at birth as the mother is the mother who gave birth to the child", at [167].

28 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [175].

29 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [174].

30 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [227].

31 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [558].

32 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [486]. Clarke J concluded, at [509], "I am, therefore, satisfied that both the genetic mother and the birth mother have some of the characteristics of 'mothers' as that term is currently used in our law. The term 'mother', historically, referred to both because both were, as a matter of then scientific fact, necessarily the same person. They are no longer now, however, necessarily the same person. But neither has, in my view, by reason of that scientific advancement, necessarily lost their status".

33 McKechnie explicitly stated that "[i]n common parlance therefore … the notice party [can be described] as the birth mother or the gestational mother" at [244].

34 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [122, 158, 207, 400, 521].

35 Section 19(1) of the 2004 Act.

36 Clarke J commented that "it is argued that the term "mother" must, in that context, mean birth mother rather than genetic mother for, if they be different, the genetic mother might not necessarily even know of the birth so as to be in a position to meet the obligation to register", *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [484].

37 Section 42(2)(b) of the 2004 Act.

38 Section 49(1)(b), (c) of the 2004 Act.

39 *CM v Minister for Justice* [2017] IESC 76. These were reiterated in *X v Minister for Justice* [2020] IESC 30 and *A, B & C v The Minister for Foreign Affairs and Trade* [2021] IEHC 785.

40 *CM v Minister for Justice* [2017] IESC 76 at [57].

41 *A, B & C v The Minister for Foreign Affairs and Trade* [2021] IEHC 785 at [10–11].

42 However, there is an argument contained with the body of the text of the 1987 Act, namely that s.46 begins "(1) Where *a woman gives birth* to a child" and is followed by the presumption of paternity of her husband. Therefore, it may seem clear from this section alone that the 1987 Act indicates by virtue of presuming her husband is the father of the child, that the woman named is evidently the corresponding parent, although this is not explicitly set out. However, it could also be argued that within the same Act, the word "mother" is used repeatedly, albeit in various amendments, and that there was no evident need for the legislature to set out "where a woman gives birth to a child" instead of simply saying "mother" if not to distinguish. MacMenamin J engaged with this provision briefly, espousing that this constitutes a "strong implied contextual linkage between conception, gestation and birth", at [548]. In doing so, he ultimately favours the former argument, albeit without considering the latter.

43 Section 38 allows for the directing of blood tests for the purpose of "assisting the Court to determine whether a person named in the application or a party to the proceedings, as the case may be, is or is not a parent".

44 Section 40 provides that where blood samples are taken, they shall be tested under the control of someone who shall then provide the court with a report which will contain the results as to whether the person tested is or is not excluded from being a parent.
45 Section 42 of the 1987 Act.
46 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [239].
47 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [319].
48 MacMenamin J held that: "the applicants' submissions are, for this appeal, predicated more on a process of statutory interpretation ... what is under consideration here is how, on balance, this should interpret the relevant sections of the Acts of 1987 and 2004, which are closely connected" at [532].
49 This was explicitly set out by MacMenamin J at [540].
50 This initially arose under s.7 of the Births and Deaths Registration Act (Ireland) 1880, as inserted by s.49 of the 1987 Act, and replaced by s.23 of the 2004 Act. Both relate only to fathers. However, it should be noted that McKechnie J acknowledged this, and that no regulations had been made under the 1987 Act to enable such registration. Nonetheless, he noted that an tArd Chlaraitheoir will act on the declaration if made by the court (at [260]). Arguably, this would have been ultra vires.
51 Clarke J stated that "I have, therefore, come to the view that neither the Act of 1987 nor the Act of 2004 can be said to be couched in sufficiently clear terms to alter any previously existing common law definition of 'mother'. Undoubtedly, the Act of 1987 emphasises genetic connection and inherited characteristics. Equally, the Act of 2004 emphasises the woman giving birth. But neither does so in a way which establishes a clear intent to alter the legal definition of 'mother'", *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [486].
52 Clarke J held that "Whatever the answer, in the absence of careful, detailed and sensitive legislation, the result will be counterintuitive, messy, create a whole range of legal difficulties and, undoubtedly, be very unsatisfactory from the perspective of many persons. But there just is no solution short of the sort of legislation which may now be contemplated. In the meantime, all a court can do is to declare the position as it currently stands and invite the legislature to take urgent action", at [510–511].
53 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [225].
54 Sections 4, 6(3)(d), and 23(b) of the 2015 Act.
55 B. O'Hanlon, K. Winder, and C. O'Reilly, "A Snapshot of Surrogacy in Ireland with a Comparative Look at International Practices" (2020) 4(2) *Irish Judicial Studies Journal* 25 at 30.
56 Section 35(1)(b) of the 1987 Act.
57 Sections 37 and 38 of the 1987 Act.
58 There was recently a case in the High Court wherein the applicants were seeking a declaration that the State had failed to allow for the legal recognition of the child's genetic mother and that this amounted to discrimination, as well as a breach of the child's rights under the Constitution and the ECHR, *Egan v Ireland* (2023-33-JR). This was subsequently withdrawn based on the "progress" the couple saw in terms of the 2022 Bill, A. O'Loughlin, "Couple drop Surrogacy Case after being 'Encouraged' by Progress on Legislation" *Irish Examiner* (21 April 2023).
59 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [312].
60 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [540].
61 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [732].
62 *MR & DR v an tArd Chlaraitheoir* [2014] 3 I.R. 533 at [581].
63 Head 38(4) of the General Scheme of the Children and Family Relationships Bill 2014 provided that the surrogate alone would be the guardian of the child.
64 Head 33(1) of the 2014 Bill.
65 This is in line with the dicta of the Supreme Court who, in considering the drafting of definitions, noted that the use of the word "means" and not the word "includes" limit the definition to expressed categories only: *X v Minister for Justice and Equality* [2020] IESC 30 at [34]. This would restrict the definition of "parent" under the 1964 Act but not its sub-definitions of "father" and "mother", both of which are prescribed in terms of "includes". While this argument could be submitted to cure the deficiencies in the definition of "father", this is not what is being suggested here. While "mother" under the 1964 Act is quite vague and the concept of motherhood can be split into genetic and gestational, the definition of "father" has an expansive definition, with varying and considered parts. It is argued that given the drafting problems as outlined above, the word "includes" as contained in the definition of "father" cannot cure its defective limitations when the "natural father" was specifically previously referred to, and the 1964 Act acknowledges the exclusion of such non-guardian genetic fathers in s.6, which provides that a mother and father are the joint guardians of a child, s.6(1)(a) of the 1964 Act.
66 *Adoption Authority of Ireland v C & D* [2023] IESC 6 at [82].

Case Digests

Fiona Quigley BL

ADOPTION ACTS 2010–2017—SECTION 30(5)—INTERPRETATION—CONSULTATION WITH BIRTH FATHER—ARTICLE 8 FAMILY LIFE

In the matter of the proposed adoption of "A" (a minor) [2023] IEHC 721; High Court, Jackson J, 14 December 2023

Introduction

This matter concerned an application by the Adoption Authority of Ireland (the "AAI") pursuant to s.30(5) of the Adoption Acts 2010–2017 (the "Acts"), in which the AAI sought High Court approval for the making of an order for the adoption of a child, "A", without consulting the natural father in circumstances where the natural mother was unable to identify the natural father and the AAI had no other means of ascertaining the natural father's identity.

Law

Section 30(5) provides:

> "(5) After counselling the mother or guardian of the child under subsection (4), the Authority may, after first obtaining the approval of the High Court, make the adoption order without consulting that father if—
>
> (a) the mother or guardian of the child either refuses to reveal the identity of that father of the child, or provides the Authority with a statutory declaration that he or she is unable to identify that father, and
>
> (b) the Authority has no other practical means of ascertaining the identity of that father".

Section 19 of the Acts provides that in any proceedings before the AAI ,or any court, concerning the adoption of a child, the best interests of the child shall be the paramount consideration.

Historical Background

The court first considered O'Neill J's decision in *WS v The Adoption Board* [2010] 2 I.R. 530, in which the issue of notice to a non-guardian birth father was comprehensively addressed, albeit in the context of the pre-2010 legislative scheme. Therein, it was made clear that the legal position will vary based upon whether or not "family life" rights pursuant to Art.8 of the European Convention of Human Rights are engaged on the facts of a particular case.

O'Neill J addressed the manner in which "family life" is to be identified in non-marital situations, which he noted is a question of fact depending on the existence of the requisite personal ties. Referring to jurisprudence of the European Court of Human Rights, he noted that evidence of personal ties in a non-marital relationship could include having regard to the nature of the relationship between the natural parents and the demonstrable interest in, and commitment by, the father to the child both before and after its birth; and the tie between a parent and his child, even where there is no cohabitation. O'Neill J noted that this tie may be broken by subsequent events, but only in exceptional circumstances, and that the court is to take a pragmatic approach in identifying the necessary personal ties.

In that case, therefore, given that the natural father had had a relatively normal paternal relationship with the child for the first three years of the child's life and had a lengthy relationship of four years with the natural mother, he found that consultation should have occurred.

Preliminary Observation

Jackson J noted the absence of a legitimus contradictor in these applications, as previously highlighted by Barrett J in *The Adoption Authority of Ireland v Y* [2020] IEHC 494, where Barrett J made an obiter observation that, due to the format of these applications, which involves the AAI making an application and presenting its proofs, there is no input from a legitimus contradictor.

Factual Background

Regarding the inability to identify the father in this case, the court determined the following facts to be of particular significance:

(1) The child was conceived and born outside of Ireland a considerable time ago.
(2) There was no ongoing relationship between the parents at the time of conception. It was indicated by the mother that the association between herself and the father was of short duration and had ended prior to her discovery that she was pregnant. There was no cohabitation.
(3) The father was not named on the birth certificate.
(4) A statutory declaration was made by the mother stating that she was unable to identify the natural father. She knew only his first name (possibly abbreviated), his ethnicity (he was not local to the place where the parties lived at the relevant time) and his place of work at the relevant time. She had no contact details for him. She had no specifics as to his age, merely an approximation of his age at the time of their involvement. She had no specific address for the natural father at the time in question, merely a broad geographical location.
(5) The natural mother and father were both students at the relevant time, but they did not attend the same university.

(6) The mother did not contact the father either in relation to her pregnancy or the child's birth as she did not have information to do so. This was understandable in light of her assertion that in the immediate aftermath of the conception of the child, the mother was texted and informed that the natural father was resuming his relationship with his girlfriend.
(7) Text messages received by her from the natural father during the short period of the relationship were no longer available.
(8) The mother received counselling in accordance with s.30(4) of the Acts.
(9) The AAI confirmed that no notice from the non-guardian father of the child pursuant to s.16 of the Acts had been received.

Concerning the question as to whether there were no other practical means of ascertaining the natural father's identity, the court had regard to the following facts:

(a) the only information available was the first name (possibly abbreviated) and the address of a place of work of the natural father some considerable time ago;
(b) independent contact was made with this place of work but this did not yield any information concerning the father.

With regard to A's welfare, the court had regard to the following facts:

— The child was born a long number of years ago and was of an age and level of maturity where the child's views are extremely pertinent. A was very much in favour of the adoption and the maturity of A's wishes was evident from the evidence.
— A was bonded with the prospective adopting parent, the applicant.
— The child belonged to a de facto family comprising of the mother, her partner (the applicant) and the children of their relationship for a period of a number of years.
— A Declaration of Eligibility and Suitability had been made by the AAI in favour of the applicant and the AAI was of the view that the proposed adoption was in the best interests of the child.

Determination

Based on these factual circumstances, the court was satisfied to make an order pursuant to s.30(5). It held that this was not a case where family life rights were engaged concerning the natural father. The court found that there was, arguably, never a relationship between the parents or, at best, one of a very short duration without commitment or loyalty and which ended long before the child's birth.

The court found that there was nothing to suggest that the mother had not accurately reported the circumstances arising. It stated that the statutory provision is not in absolute terms and does not require exhaustive searches to be carried out. It requires that the AAI has no other practical means of ascertaining the natural father's identity. In normal, everyday usage, the court stated that "practical" has been defined as "relating to experience, real situations or actions rather than ideas or imagination" and "suitable for the situation" (*Cambridge Dictionary*). In the circumstances of this case, therefore, the court thus found that the AAI's effort satisfied this test.

FAMILY LAW (DIVORCE) ACT 1996—INTERPRETATION—LIVING SEPARATELY WITHIN THE FAMILY HOME POST DIVORCE—PUBLIC POLICY

R v M [2023] IEHC 748; High Court, Jordan J, 20 December 2023

Introduction

This was an appeal of a Circuit Court Judge's decision refusing to rule terms of settlement entered into between parties in divorce proceedings.

Factual Background

The parties were married in 2004. They commenced living separate and apart in July 2017, although they continued to live in the same dwelling house—the family home. There were two children of the marriage, both teenagers and both dependent. The applicant wife was diagnosed with stage four mantle cell lymphoma, a life limiting condition. Divorce proceedings were issued in July 2022 and the parties reached a compromise of all matters at issue between them.

The terms of settlement reached between the parties included an order pursuant to s.15(1)(a) of the Family Law (Divorce) Act 1996 directing the sale of the family home by 30 June 2029. That date coincided with the expected completion of third-level education by the parties' youngest child. In the event that both of the children did not undertake and/or complete third-level education, the parties agreed that the former family home would be sold as soon as reasonably possible unless they agreed otherwise. Pending the sale, the parties agreed to continue to live separate and apart in the former family home.

The Circuit Court Judge refused to rule the terms.

Statutory Proofs

At the outset, the court noted that on the evidence, it was satisfied that:

(a) at the date of institution of the proceedings, the spouses had lived apart from one another for a period of, or periods amounting to, at least two years during the previous three years;

(b) there was no reasonable prospect of a reconciliation between the spouses; and
(c) such provision as the court considered proper, having regard to the circumstances, existed or would be made for the spouses and the dependent children.

The High Court found that, although living in the same house, the parties were living separate and apart from one another since July 2017. It was satisfied that they had not lived together as a couple in an intimate and committed relationship since July 2017.

In relation to the terms, it noted that they provided for and envisaged the parties living in the same dwelling after the decree of divorce was granted, with the house being placed for sale in June 2029 or earlier depending on the circumstances regarding their children's third-level education. The question at issue was whether it was possible for the spouses to agree to continue to reside in the same property post-divorce, albeit separately.

Interpretation

The court noted that both the Constitution and the Family Law (Divorce) Act 1996 (the "1996 Act") afford the court a discretion on whether to grant a decree of divorce, if satisfied in relation to the statutory proofs, by virtue of the wording in Art.41.3.2, which states that a court *may* grant a dissolution of marriage where the statutory proofs are met.

Jordan J considered that an argument might be made that the word *may* in Art.41.3.2 ought to be construed as *shall*, acknowledging that it was difficult to envisage many circumstances in which a court could refuse to grant a decree of divorce if the statutory requirements were met, thereby forcing two spouses to remain married. However, he stated that he did not propose to decide this issue, recognising that circumstances could arise where a court might feel obliged to exercise its discretion and refuse to grant a divorce, even if the evidence did appear to satisfy the statutory requirements, for instance if there was a lack of capacity issue or where there was intent to perpetrate a fraud on the court or on the Revenue Commissioners.

The court approached the issue in this case on the basis that a discretion did exist, and the question therefore was whether or not any good reason existed to justify the discretion being exercised in such a manner as would result in the decree of divorce being refused.

Observations

The court made the following observations in its consideration of the matter:

(1) In the ordinary course of events one would expect a couple who divorce to live separate and apart after the decree. One might say that the parties' agreement to remain within the same dwelling is an afront to the nature and purpose of a decree of divorce.
(2) While s.15(2)(a) of the 1996 Act refers to it not being possible for spouses to reside together where a divorce is granted, this is not to be interpreted as a prohibition. It is rather an articulation of what is the normal position and in the context of setting out necessary considerations for the court when exercising its discretion in respect of miscellaneous ancillary orders.
(3) If a couple can be considered as living apart while living in the same dwelling provided they are not living together in an intimate and committed relationship as provided for in s.5(1)(a) of the 1996 Act, it is difficult to see any principled objection to a similar arrangement continuing by agreement after a decree of divorce is granted.
(4) In *Courtney v Courtney* [1923] 2 I.R. 31, it was decided that a couple could enter into an agreement to live apart prior to initiating proceedings for a divorce *a mena et thoro.* If the policy of the law allows spouses to be free to contract that they will not cohabit, how then could it be that former spouses (after or in anticipation of a decree of divorce) could not contract that they will cohabit—although in a non-marital arrangement.
(5) In *MMcA v XMcA* [2000] 1 I.R. 457, McCracken J was satisfied that, in the same way two people can live apart and still maintain a loving and committed relationship, two people could also live together without being in a marital relationship—it depends on the intentions of the parties.

Public Policy Considerations

Considering public policy considerations, the court found it of relevance that agreement/consensus between spouses in the event of marital breakdown is to be encouraged, avoiding the adversarial nature of court proceedings which frequently compound and increase conflict. Jordan J was of the view that public policy should encourage realistic negotiation and settlement, reducing the detrimental impact of the martial breakdown on the welfare of the children involved.

In this case, Jordan J commented that the efforts of the parties would preserve a level of stability for their children until they finish their education and their settlement was worth supporting from a public policy point of view.

Other Observations

The court also observed that:

(1) There is nothing in the legislation to support the view that the parties seeking a divorce must

establish that they will live in separate dwellings afterwards.

(2) The "spousal autonomy" described as a "core constitutional value" by Hogan J in *Gorry v Minister for Justice and Equality* [2017] IECA 282 surely indicates that a failure to respect the settlement arrived at by the parties would be an affront to their constitutional protections and rights.

(3) The settlement in this case afforded a solution that would minimise stress and upheaval in a family where the mother had a serious illness.

(4) The settlement would help provide stability for the children—consistency and familiarity being important for the wellbeing of adolescents.

Conclusion

The court thus concluded that it was correct and proper to grant the parties a decree of divorce and to make ancillary orders in the terms of the compromise entered into by the parties.

CHILD ABDUCTION—RETAINED JURISDICTION FOLLOWING NON-RETURN ORDER—BEST INTERESTS OF THE CHILD

H v I [2023] IEHC 700; High Court, Gearty J, 5 December 2023

Introduction

This case concerned the child, D, who was under 10 years old. In 2018, he was removed to Poland from Ireland, his then country of habitual residence. The applicant father applied for the return of the child under the Hague Convention (the "Convention"). The Polish court ruled that D had been wrongfully removed but that he should stay in Poland as it would pose a grave risk to him, within the meaning of art.13 of the Convention, to return to Ireland.

D had been diagnosed as being on the autism spectrum. In 2018, the father did not recognise this diagnosis or agree with it, which informed the Polish court's decision not to return him. The father since changed his view and worked hard to help D overcome some of the challenges he faced.

In circumstances where a court refuses to return a child because of a defence of grave risk, under art.11(7) of Regulation 2201/2003, the case must be reviewed in the Member State of the child's original habitual residence where, on the request of either party, the court can make a final decision on return. The father thus applied to conduct such a hearing in Ireland and this judgment relates to that hearing.

Delay

At the outset, the court noted that a request to conduct a hearing following a non-return order is one which must be addressed urgently. The father, however, brought his application in September 2019, over a year after the Polish decision. There were also numerous procedural delays in progressing the matter. The issue of delay, however was not argued as a bar to relief. The court thus proceeded to consider the application on its facts and declined to reach a final view on whether delay defeated retained jurisdiction.

Custody Dispute

The substantive issue in dispute in this hearing was that of custody of the child. Article 11(7) of Regulation 2201/2003 stipulates that the custody hearing be carried out in accordance with national law. The court thus noted that it must decide custody in accordance with the principles set out in the Guardianship of Infants Act 1964, namely whether it was in D's best interests to stay in Poland with his mother or move to be with his father in Ireland.

Best Interests of the Child

The court was guided by the detailed criteria set out in s.31 of the Guardianship of Infants Act 1964 in its assessment of the best interests of the child.

It noted that the child had an excellent relationship with both parents, enjoying regular access to them both and his half-siblings in both countries. The court pointed out that there was no evidence to suggest that he could not safely move to Ireland, but the issue was whether it would be in his best interests to do so.

The court considered the distrust between the parties, caused by the initial wrongful removal of the child by the mother and continuing conflicts. It also considered the relevance of the finding that the mother wrongfully removed the child from Ireland in 2018, concluding that it was no longer relevant in considering D's interests. The court also had regard to the fact that the father now accepted the child's diagnosis.

Expert Evidence

The father raised certain concerns regarding the child's care in Poland, in particular in relation to the child's therapies and the adequacy of the regime in place for D in Poland. In contrast, the availability of services in Ireland was a significant issue in this case.

The court thus considered the evidence of two experts; a clinical psychologist practising in Ireland, who was engaged by the father and provided reports on the child; and a Polish psychologist, who was asked by the father to provide a more up-to-date report on the child.

In evidence, the court noted that the Irish expert confirmed that suitable support was available to D in Poland, contrary to the father's beliefs. He confirmed that D had physiotherapy, play therapy and was in an appropriate school. However, with regard to Ireland, he gave evidence of issues of accessibility surrounding the services and waiting lists. He indicated he

would be concerned if D moved to Ireland without immediate access to a similar level of care as that in Poland. The Polish expert also gave no indication that the Polish services were inadequate.

The court considered the expert evidence. It noted that, while the Irish expert could not comment on the availability of services generally in Poland, he made it clear that the child was being treated appropriately there. The Polish expert did not suggest otherwise in her report. Furthermore, the court noted that the Irish expert, in his evidence, stated that if the child had quick access to a multi-disciplinary team in Ireland, he believed the child's treatment would be on a par to that in Poland. However, there was no guarantee that he would be treated by a multi-disciplinary team and accessing services in Ireland is a challenge. The court found this to be a significant barrier for the father, and highlighted this was a conclusion reached by his own expert.

The Child's Views

The Irish expert concluded in his report that the child did not have cognitive capacity to make a decision regarding his future on the basis of his development trajectory. Even if he expressed a preference, given his cognitive level, this could not be treated as a considered, reflective decision. The court accepted the expert's opinion as correct.

In relation to how the child would react living with his father full time, the expert noted that the child spent time with his father without showing signs of distress, suggesting that he would not be extremely distressed by the placement itself. However, the expert was of the view that, without a therapeutic team in place, it would break down. The court found this was strong evidence against the proposal that the child should move to Ireland. While the experts found the father to be a competent parent, the mother was equally competent, and while the mother was currently supplying all of his needs, the child had no guarantee of continuity of treatment in Ireland.

Conclusion

The court found that both parents were striving to help D and to spend as much time with him as they could. On the evidence, including crucial evidence in respect of the services available in Poland and in Ireland, the court concluded that D's interests were best served if he remained in Poland.

The court held that there was no evidence to reassure it that it would be in D's best interests to permanently change his primary carer or his home, or even if he could tolerate such a change. Moreover, it noted that it would not be in his best interests, unless there was a team waiting to take over his care and aligned with the team in Poland, and even then, only comparable treatment would be available, not better treatment. It thus concluded that his best interests required that he remain in Poland, receiving treatment from a multi-disciplinary team, which would not be immediately available in Ireland.