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THE HIGH COURT

[2011 No. 46 M]

IN THE MATTER OF AN APPEAL PURSUANT TO S. 60(8) OF THE CIVIL REGISTRATION ACT 2004, AND IN THE MATTER OF THE CONSTITUTION OF IRELAND AND IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT, 1964 AND IN THE MATTER OF THE STATUS OF CHILDREN ACT, 1987 AND IN THE MATTER OF MR AND DR (CHILDREN)

BETWEEN

MR AND DR (SUING BY THEIR FATHER AND NEXT FRIEND OR) AND OR AND CR

APPLICANTS

AND

AN tARD CHLARAITHEOIR, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Henry Abbott delivered the 5th day of March, 2013

1. In the proceedings the applicants are seeking the following:

> 1. A declaration that CR is the mother of MR and DR pursuant to section 35(8)(b) of the Status of Children Act, 1987 or otherwise pursuant in the inherent jurisdiction of this Honourable Court;

2. A declaration that the continued failure to recognise and acknowledge CR and OR as parents of MR and DR is unlawful, and fails to vindicate and protect the constitutional rights of the Applicants, in particular pursuant to the provisions of Articles 34, 40.4.1 and 40.3.2 and 41 of the Constitution;

3. A declaration that CR is entitled to be registered as the mother of MR and DR, and to have the Register of Births corrected to reflect their true parentage;

4. If necessary an order directing an tArd Chlaraitheoir to correct the Register of Births so that it records OR as the father and CR as the mother of MR and DR;

5. If necessary, a declaration that CR and OR are the guardians of the MR and DR, and then;

6. In the alternative an order pursuant to Section 6A of the Guardianship of Infants Act 1964 (as amended), or otherwise pursuant to the inherent jurisdiction of this Honourable Court appointing CR and OR as the guardians of MR and DR.

2. The central legal issue to be addressed is who, in law, is entitled to be treated as the parents of the twins and to carry out the duties, and to exercise the functions which follow from that status. In particular, who, in law, is to be treated as the mother of the twins.

BACKGROUND FACTS

3. In this case the term "genetic father" refers to the man who provides the sperm which is used in the fertilisation process. The term "genetic mother" refers to the woman who provides the ovum which is used in the fertilisation process. The term "gestational mother" refers to the woman in whose womb the zygote is implanted, who carries and subsequently gives birth to a child.

4. OR and CR are a married couple. CR was unable to give birth in the normal way, so by arrangement with her sister, the notice party, ova provided by CR were fertilised by sperm provided by her husband OR. As a result of that fertilisation, which took place in vitro, the twins, MR and DR, were created. The zygotes which were produced as a result of that fertilisation were implanted in the womb of the notice party who subsequently gave birth to the twins. The applicants had agreed prior to the birth that the two children, the twins, would be brought up and would be reared as the children of the CR and OR, and in practice that is what has happened. OR is the genetic father, CR is the genetic mother and the notice party is the gestational mother.

5. There is no dispute between the genetic parents and gestational mother as to what should happen and how they would wish these children to be treated in fact and in law. The difficulty arises because the State authorities take the view that as a matter of law the person who must be treated as the mother of the twins is the, the gestational mother. After the birth of the twins the notice party and OR attended the Registrar's office and were registered as the parents. Following registration a letter accompanied by DNA evidence was sent to the Superintendent Registrar for Dublin seeking the correction of an error under s.63 of the Civil Registration Act, 2004. This request was refused.

EXPERT WITNESS EVIDENCE

Doctor Molony

6. Dr Clíona Molony is a principal investigator directing research on genetics for Merck Pharmaceuticals and is an adjunct lecturer in genetics and statistical genetics at Brandeis University, Boston, Massachusetts. She has been involved in 25 publications on the issue of genetic analysis to dissect underlying genetics of human conditions.

7. Dr. Molony stated that the uniqueness of the human being is complete at fertilisation when the sperm and ovum have come together. The sperm is from the genetic father and the ovum is from the genetic mother. They provide the "full compilation of genetics that then ultimately give rise to who we are." She added that "DNA…ultimately controls everything".

8. She acknowledged while the gestational mother may affect the foetus in a molecular way she does not alter the DNA. She explained that the DNA does not change, however, the manner in which genes find expression is controlled by epigenetics. Epigenetics is a process of gene expression whereby some genes are turned on and some genes are turned off. What happens in the womb can activate or deactivate certain genetic traits in the baby. It is the environmental component which can change more elastically over time relative to DNA "which is directly inherited and relatively unchanged generation to generation".

9. Dr. Molony emphasised that the DNA sequence is not altered itself by epigenetics and stated that "the expected epigenetic changes…introduced during…the gestational period have been shown to be actually reversible postnatally". However, they have not proven to be reversible in every case. On cross examination she was asked about experiments in which the gestational mother was experiencing stress and the glucocorticoid receptor genes involved were methylated (turned down), so that the child had a much stronger reaction to stress. Dr. Molony responded that there was the possibility, based on animal models, that if those offspring had been cross fostered into another family, the effect of the experiences and environment that that offspring had been exposed to postnatally could be reversed. In other words the person who looks after the child after birth also has epigenetic effects on the child.

10. Another way in which the gestational mother may affect the foetus is microchimerism, which Dr. Molony described as the presence of cells in the body which are "not of oneself". It involves the migration of the mother's cells into the child. This transfer of cells occurs between the foetus and the gestational mother through the placenta and she highlighted that it does not change the core DNA of the child – the DNA remains the same. She also said it is thought that microchimerism could be considered a risk factor for autoimmune diseases "but that ultimately it is against the backdrop of maybe their own immune profile encoded based on their own genes." Microchimerism applies between gestational mother and foetus but the number of cells that exist after separation is extremely small – taking specialised techniques to find them. She believes the cell count to be in the order of 1:100,000,000.

11. Regarding the impact that environment can have on the foetus reference was made to a Swedish study conducted by Bygren on a population group who were susceptible to famine followed by abundance during the 1800's. He identified on the male line those persons who were descended from people who lived during the period of abundance and his study suggested that the descendents of those feasting lived significantly shorter lives than persons who lived during periods of famine. Following this it was put to Dr. Molony that that the gestational mother can materially affect the way a gene expresses itself in the individual foetus that she is carrying and that change could possibly be carried on to future generations of that foetus. Dr. Molony responded that it could as long as there

were no other environmental influences present to reverse it. She said of the study that the expectation is there that there would be some epigenetic influences "but the actual mapping of those events and what gave rise to them hasn't really been elucidated."

12. Dr Molony was of the opinion that the gestational mother "provides an environment that enables the embryo and foetus to grow, which interacts overall with the underlying genetic make-up." There is no evidence as to whether the epigenetic effects that take place after birth are any greater or less than the epigenetic effects that take place before birth.

Professor Green

13. Professor Green is a consultant clinical geneticist and has been the director of the Centre for Genetics in Our Lady's Hospital, Crumlin since 1997. He also holds a professorship of Medical Genetics at University College Dublin and was a member of the Commission on Assisted Human Reproduction (the "Commission") which produced a report in 2005. The Commission was set up to report on possible approaches to the regulation of all aspects of assisted human reproduction and the social, ethical and legal factors to be taken into account in determining public policy in this area. During the Commission the issue of surrogacy was discussed and it was recommended, with one member dissenting, that surrogacy should be permitted and should be subject to regulation by a regulatory body. The Commission was of the opinion that what all parties intended from the outset of the arrangement should form the basis of recommendations on legal parentage in cases of surrogacy. However, in cases where the birth mother has a genetic link with the child a minority held the view that surrogate mother would be presumed to be the legal parent of the child.

14. Professor Green stated that the genome sequence – the entirety of an individual's hereditary information – is complete on fertilisation and that the genes we inherit are fundamental to us. While these genes are an extremely important part of our development he says that they are not the whole part. He acknowledged that the child's genetic parentage plays a large role in its identity and is one of the main factors in terms of determining who a person is. He commented that he doesn't subscribe to genetic determinism – the view that everything about us is determined by the DNA sequence given to us by our parents. He sees it as very important but notes that there are other factors.

15. He agreed with Dr. Molony's evidence and said that the gestational mother will influence the development of a child within her womb through diet and epigenetics. He added that the gestational mother is not "simply a vehicle for carrying" the foetus and explained that she has a number of influences on the development and the actual outcome in terms of characteristics of the child.

16. One of the recommendations in the Commission's 2005 report regarding surrogacy was that "the child born through surrogacy should be presumed to be that of the commissioning couple". On cross examination he said that he agreed with this recommendation. He explained that parentage follows the genetic link and the intention and he sees these as important factors which allowed him to come to the above conclusion regarding surrogacy. He commented that it is very important to have 1) genetic input and 2) intent with the consent of the surrogate. This recommendation by the Commission, he agreed, highlights the basic importance of the genetic input. During the Commission he said that the issue of epigenetics was not discussed and he feels that this factor would need to be considered now, however, he has not changed his view since the report in 2005.

An tArd-Chláraitheoir

17. Mr Feely is an tArd-Chláraitheoir, the Chief Officer of the system of civil registration in

Ireland. He began by explaining that under the Status of Children Act, 1987 where the parents are married there is a presumption of paternity on the part of the woman's husband. Where a man is not married to the mother, under s. 22(1) of the Civil Registration Act, 2004 he is not required to give information to the Registrar. In such cases where it is proposed to do so, the mother and the father may attend at the Registrar's office and provide a declaration to the Registrar that he is the father. This is what occurred in the present case. Section 30 of the 2004 Act provides that the hospital must notify the Registrar of the details of the birth. Mr. Feely stated that the registration of the twins birth coincided with the details that had been notified to the office by the hospital adding, however, that the hospital could not as part of the standard form incorporate information that this was an unusual matter.

18. Following registration a letter was later sent to the Superintendent Registrar for Dublin seeking the correction of an error under s. 63 of the 2004 Act. This was accompanied by DNA evidence proving that CR was the genetic mother of the twins and a letter from the IVF Clinic describing what transpired. As a result Mr. Feely decided to carry out an enquiry under s. 65 and subsequently decided that he did not have the power to make the correction that was requested. He received legal advice that the principle of *mater semper certa est* is the correct principle to follow. He said that he could not see any grounds on which he could depart from that principle despite the fact that the DNA tests were proof of what he had been told concerning the method of conception and pregnancy and despite the fact that he was satisfied that L was not the biological mother of the twins

19. On direct examination he was asked what the consequences for the birth registration system would be if the genetics of the baby had to be enquired into at the date of birth. He replied that the benefits of the current system are "that there is simplicity and certainty surrounding it." He added that if genetics had to be enquired into before a birth could be registered he believed it would create "an enormous amount of uncertainty" and "present very practical challenges" as there would be considerable expense involved. Following on from this Mr Feely highlighted that he had reservations about DNA testing and commented that such tests provide strong evidence "provided a close relative of this person is not implicated in the paternity."

20. When questioned about the rebuttable presumption surrounding paternity and whether the same considerations should simply be transposed to issues of maternity, Mr Feely responded that "the fact of motherhood is a legal fact" while "paternity is a rebuttable presumption". They are, he said, "conceptually different."

21. On cross examination Mr Feely acknowledged that dealing with surrogacy situations was a rarity in his office. When asked if there are any guidelines in the office to deal with the situation he replied that the principle of *mater semper certa est* is followed but that it is not incorporated into any regulations or guidelines. He was made aware of this principle by his predecessor when he took office. He agreed that the advice had been passed on to him viva voce and the principle had been reduced to writing only in the form of legal advice. It had not, however, been reduced to any document – either formal or informal – in his office. He also agreed that the reason he could not act on the DNA results and make changes in the register or make a new entry in the register was due to the legal advice he was given that the whole matter was governed by the principle of *mater semper certa est*.

Doctor Breathnach

22. Dr. Breathnach is a practising consultant obstetrician at the Rotunda Hospital and is a senior lecturer in maternal foetal medicine with the Royal College of Surgeons. She is a qualified specialist in obstetrics and gynaecology with an additional post graduate

specialist qualification in the field of maternal foetal medicine.

23. According to Dr. Breathnach the gestational mother's role is "beyond essential"; she stated that "the offspring cannot exist without the biological contribution that the birth mother makes through pregnancy." She described how the gestational mother affects susceptibility to infection as there is a significant transfer of antibodies from mother to foetus across the placental barrier. This transfer results in immunity to common viral infections such as rubella and chicken pox and to other diseases such as whooping cough. She stated that the baby is born having passively inherited immunity from the maternal circulation and that immunity is subsequently lost when a baby is about three months of age. This immunity is independent of the genetic connection between the conception and the birth mother.

24. On cross examination she agreed that the embryo's genetic material drives the initial process whereby the embryo implants in the uterus. The embryo has to attach itself to the wall of the uterus and the initial cell group that develops is destined to be the placenta. These cells, developing from the embryonic cells, invade maternal tissues (maternal blood vessels in the lining of the uterus) and they drive an adaptive change in the maternal blood vessels. This allows those vessels to become wider to allow for enormous blood flow to the placental bed during pregnancy and this invasion of cells is a continuous process throughout pregnancy. It allows for the transfer of very vital constituents from mother to foetus.

25. Once the placental architecture has been built, placental blood flow, which influences or very closely correlates with foetal growth and foetal size, can be impaired by issues such as maternal smoking or high blood pressure in the birth mother. Dr. Breathnach told the Court that there are a whole host of inherited or acquired clotting abnormalities that affect blood flow to the placenta. She stated that the intrauterine environment "informs almost every outcome of the pregnancy." She explained that there are consequences to timing of delivery and the timing of delivery is very frequently driven by the health of the uterine environment. If the environment is healthy then one can anticipate that a baby will deliver at full term in good condition. However, if the environment is unhealthy then the baby may die in utero or result in pre-term delivery.

26. Finally, she said that one can observe blood flow patterns in utero and one may witness a baby shutting down its kidneys and centralising its blood flow to the brain – the baby is adapting to stress by preserving its brain and shutting down blood supply to less vital organs in an adaptive way. She added that the trigger for this foetal adaptive process unknown agreeing that it is likely to be a physiological response to impaired blood flow.

Doctor Wingfield

27. Dr. Wingfield is a consultant in obstetrics and gynaecology in Holles Street Hospital and is the clinical director of the Merrion Fertility Clinic. She is also honorary secretary of the Irish Fertility Society and has a specialist interest in reproductive medicine and in endometriosis. Initially she trained in Ireland in infertility and then spent three years in Australia working in IVF and doing research in endometriosis. She has no direct experience of surrogacy but has advised parents who need surrogacy services.

28. She stated that previously, before 2008, it was easy for Irish couples to access surrogacy services in the UK. But the law changed and now one must be a resident in the UK to access such services. She noted that there is no legislation in Ireland and due to this lack of legal certainty in Ireland most clinical directors tend not to get involved in surrogacy arrangements. She said that the advice given to clinical directors and practitioners working in infertility has been "very complex legally". She is not aware of clinics in Ireland currently facilitating surrogacy and added that couples usually travel

abroad.

29. Dr. Wingfield was on the Commission for Assisted Human Reproduction. She highlighted that none of the recommendations contained in the Commission's Report have been adopted. She commented that there has been no change in legislation apart from the introduction of the EU Tissues and Cells Directive which governs quality systems predominantly in assisted reproduction clinics but nothing has been done regarding its implementation. Presently, in Ireland it is up to individual clinics to implement what they feel is right. Guidelines were drawn up in 2011 by the Irish Fertility Society which encompasses all but one of the Irish IVF clinics. She stated that the guidelines mirror most of the guidelines in the Commission's 2005 Report.

30. Like Prof. Green she agrees with Recommendation 33 of the Commission that "the child born through surrogacy should be presumed to be that of the commissioning couple". She is of the opinion that the commissioning couple should be the ultimate parents. She noted that majority of the Commission felt that the presumption should be in favour of the commissioning couple. On cross examination she agreed that the Commission took the view that the law required a flexibility, the flexibility given by a presumption, to deal with the advances of medicine.

31. She said that "one of the problems in Ireland is we don't have a clear mechanism, but there needs to be a clear mechanism whereby the commissioning couple can become the legal parents." She also clearly stated that legislation is badly needed and that it is "tragic" that a couple have to resort to the High Court to resolve issues of surrogacy.

ORAL SUBMISSIONS OF THE APPLICANTS

32. The applicants begin by making a number of observations. Firstly, they observe that surrogacy arrangements are unregulated by statute in this jurisdiction and that no provision of Irish law prohibits such agreements. The surrogacy agreement entered into in this case was not an unlawful agreement; the arrangement was a completely altruistic act. Secondly, neither the Constitution nor the Guardianship of Infants Act, 1964, as amended, expressly sets out and defines in law who is to be treated as the mother of a child save that s. 2 of the 1964 Act provides that the term mother "includes a female adopter under an adoption order". Thirdly, scientific developments in the area of assisted human reproduction have brought about situations where there would not necessarily be coincidence between the identity of the genetic mother and the gestational mother. The applicants submit that in such circumstances it falls to the Court to define who, in law, is entitled to the status of parent or mother.

33. The applicants state that if the twins are, in law, the children of the genetic mother, and the genetic mother is married to the father of the twins, they are therefore a family. A mother who is married with her husband is the joint guardian of their children and they are jointly entitled to custody of their children. If, however, the twins are, in law, the children of the gestational mother – given that the father of the children was not married to the gestational mother – she would be in law their parent and would also be their guardian, their sole guardian, and would also in law be entitled to their custody as against anybody else.

34. The applicants highlight the undesirability of the current situation where the factual circumstances on the ground indicate that one particular set of parents and children are operating as a family but the legal status lies in another particular group. The situation is undesirable as if the genetic mother is not recognised in law as the mother then there will be issues around medical procedures, travelling and schooling. Were the twins to suffer an injury or an accident which required them to be brought to a hospital CR, the genetic mother, would not be a guardian and would not be able to give the necessary directions to hospital staff in regard to carrying out medical procedures. There are also significant

implications in terms of succession rights. Under the Succession Act, 1965 a child enjoys certain rights on intestacy in regard to their parents' estate. If in fact the twins are, in law, the child of the surrogate mother, that right to a share in the estate on intestacy would exist in regard to her estate as opposed to having a right in the share of the genetic mother's estate. There is also the matter of gifts as between the genetic mother and the children, for taxation purposes, the twins would be treated not as children but as nieces.

35. It is submitted that in this case the protection and vindication of the rights of the applicants requires the Court to adopt a definition of the term mother which does not exclude a genetic mother in the circumstances of CR. The appropriate response of the law to these radically changed circumstances in regard to parentage in general, and motherhood in particular, must be considered in light of the long standing approach of the courts to the existence and preservation of the natural bond or link between parents and their children. For over 100 years the courts in this jurisdiction have recognised the importance and the existence of what has been termed by the courts as a "blood link" between children and parents.

The Blood Link

36. The importance of the blood link has long been recognised by the Irish courts. This is clear from the judgment of Fennelly J. in the Supreme Court in *N v. Health Service Executive* [2006] 4 IR 374 (the Baby Ann case), where he says at paras. 312 – 314:

> "I turn then to the central importance of the family, founded by marriage and the natural blood links and relationship between Ann and the Byrnes…Article 41 speaks of the rights of the family being "antecedent and superior to all positive law… Even if it should become necessary to recognise the family relationships of the increasing number of couples who raise children outside marriage, such a development would be based in most cases on the natural blood bond. It would in no way undermine, but would tend to emphasise the centrality of the mutual rights and obligations of the natural parents and their children…One does not have to seek far to find that courts widely separated in time and place have accepted the need to recognise and give weight to what has been variously characterised as the blood, or natural or biological link between parent and child."

The same approach is adopted, in that case, by judges Hardiman and Geoghegan. Hardiman J. states at para. 97:

> "But it is most interesting to see that, in a jurisdiction lacking the specific social and cultural context which has led Ireland to protect the rights of the family by express constitutional provision, the interest of a child in being reared in his or her biological family is nonetheless fully acknowledged."

While Geoghegan J. says at paras. 209 and 210:

> "…it is important to emphasise that the constitutional presumption that the welfare of the child is best served by being with his married parents is not some kind of artificial presumption. It is clearly based on the perceived wisdom at the time that the Constitution was enacted and, I have no particular reason to believe that it is not still the perceived wisdom even if not wholly approved of in some

> quarters. The importance of family and marriage and quite frankly also the biological link should not be minimised…In case it should be thought in some circles that the attachment of importance to the biological link is an outdated concept and is rooted merely in some conservative Irish view of the family, it is of considerable interest that this same concept has been reiterated by the House of Lords in the recent case of *In re G. (children)* [2006] UKHL 43, [2006] 1 WLR 2305. There is, of course, no presumption in favour of the child being with the natural parents under English law ever since a statute of 1925. What the House of Lords has held however is that the biological link is an important factor to be considered in assessing the child's best interests."

37. From the approach taken by the Supreme Court in the Baby Ann case the importance of the biological link is clear and the natural family is recognised by three of the Judges in the Court. Fennelly J. concludes at para. 336 that "[i]n this case, there is a primordial constitutional principle that a child's welfare is best served in the heart of its natural family." The natural bond is a "primordial constitutional principle" which reflects a fundamental, primordial law of nature that a child's welfare is best served in the heart of its natural family. That case is acceptance of the importance of the blood link or natural relationship which exists between a child and its and its parents.

38. *G v. An Bord Uchtála* [1980] IR 32 is an important judgment in regard to the position of children and mothers under Irish law. O'Higgins C.J. accepted that a mother had a personal right under Article 40.3.1 of the Constitution to protect, care for and have the custody of her infant child. At p. 55 he states that "the Plaintiff is a mother and, as such, she has rights which derive from the fact of motherhood and from nature itself." Having set out the right to protect, care for and have the custody of her child he went on to say that "[t]his right is clearly based on the natural relationship which exists between a mother and child."

39. The applicants submit that it is obviously the case that a gestational mother would, to some degree, protect a child but the natural relationship which exists between a mother and a child is the territory of blood link. This blood link comes from what is described as pure genetics and there cannot be a gestational element in that. Irish case law is replete with references to the blood link between not just mothers but fathers and their children. When we are talking about blood links, we are talking about genetic links. Irish case law as a proposition accepts the principle that there is a natural blood bond or blood link between parents and children. Furthermore, genetic links give rise to instinctive understandings between the genetic parents and their children. As Kenny J states in *G v. An Bord Uchtála* at p. 98:

> "The blood link between the plaintiff and her child means that there is an instinctive understanding will exist between them which will not be there if the child remains with the Notice Parties."

40. In *I.O'T v. B and Others* [1998] 2 IR 321 the Supreme Court held that there was an unenumerated constitutional right to know the identity of one's mother which had to be balanced in the end against the privacy rights of the mother who had placed or had given the child to the adoption society. Hamilton C.J. stated at p. 348 that:

> "The right to know the identity of one's natural mother is a basic right flowing from the natural and special relationship which exists between a mother and her child, which relationship is clearly acknowledged from the passage quoted from the judgment of *the State (Nicolaou) v. An Bord Uchtála* and *G v. An Bord Uchtála*."

Barron J. also mentions the importance of genetics at p.381 where he states:

> "The need to keep the door open is based upon genetics. Help from a member of the cognate family might be essential in certain diseases. In *de facto* adoption that is equally important."

He specifically held that there should be a constitutional right for a child to know the identity of its mother and the need for the door to be kept open was genetics. He was willing to accept the importance of genetic factors as between parent and child.41. The Supreme Court also recognised the special relationship between a father and his child by reason of the blood link between them. In *J.K v. V.W. and Others* [1992] 2 IR 437 Finlay C.J. in the Supreme Court accepted at p. 447 that:

> "The blood link between the infant and the father and the possibility for the infant to have the benefit of the guardianship by and the society of its father is one of many factors which may be viewed by the court at relevant to its welfare."

In his dissenting judgment McCarthy J. at p. 450 said that:

> "Where, however, the welfare of the child is adequately secured, as has found to be the case here, then, in my judgment, the fact that there may be added benefits as stated if the child remains in the custody of the prospective adopters, does not outweigh the combination of the rights of the father and the benefit to the child of maintaining the blood link or, more pertinently, the learned trial judge, who is the sole judge of the primary and secondary facts, is entitled so to hold."

The applicants submit that since the father, JK, had never seen his child or had only seen him on one or two occasions. The only input on his part was the provision of genetic material. Nonetheless, the Supreme Court accepted the existence of the "blood link" and was satisfied that it was a fact to be taken into account in determining the child's future. The genetic link is recognised as being a factor to be taken into account and an important factor to be taken into account in determining where the custody and where the welfare of a child is to be found. The Court in that case was recognising the importance of genetics in establishing a natural relationship between a parent and child. This "blood link" cannot have any gestational element and must arise solely by reason of them sharing common genetic material. In reality the expression blood link or blood bond must be taken as a reference in the case law to genetic factors. Blood itself does not make a link. Similarities in blood are due to genetic factors. The fact that we share common characteristics in our blood comes from the fact that our respective genes.

42. The parental relationship was also recognised in *J.McD v. PL* [2010] 2 IR 199 where Fennelly J. at para. 304 started:

> "The blood link, as a matter of almost university experience, exerts a powerful influence on people…Scientific advances have made us aware that our unique genetic make-up derives from two independent but equally unique sources of genetic material. That is the aspect of the welfare of the child that arises."

It is a specific articulation by a Supreme Court judge of linking the concept of blood bond to genetic make-up and the importance of that in the context of relationships with children. The male input into the make-up of the child makes him a parent just because

he gave the genetic material. There can be no doubt that the presence of a blood link is an important factor and it becomes a particularly more important factor if it is linked with an emotional contact and an actual contact with the child. At para. 302 Fennelly J. says:

> "The principle is that he has the legal right to apply and to have his application considered. To the extent that Finlay C.J. and Denham J. postulated a scale for assessment of "rights of interest or concern", it seems likely that the sperm donor would be placed quite low, certainly by comparison with the natural father in a long-term relationship approximate to a family."

The point here is that it places the genetic father on the scale and it is just the blood link that places him there. Even in circumstances where the man was merely a sperm donor, nonetheless the Court had no difficulty in accepting the concept of blood link as being a consideration that had to be taken into account.

43. The applicants accept that there is an extra factor in regard to motherhood, in that somebody carries the child. But it does not take away from the fact that in regard to both mothers and fathers, the Supreme Court has accepted, on numerous occasions, the existence of a blood link or blood bond. Logically, the blood link or blood bond in regard to fathers can only have genetic origins because in some of the cases the fathers had no contact with their children at all. There is an absolute wealth of authority that recognises the blood link as between both parents and children, whether they be the father or the mother.

44. The courts have extended extensive protection to the blood bond. In the case of a child of unmarried parents such protection is afforded pursuant to Article 40.3 and is achieved by the recognition of unenumerated rights in the mother to protect, care for and have custody of her child. As per O'Higgins C.J. in *G v. An Bord Uchtála* at p. 55 these rights of the mother "derive from the fact of motherhood and from nature itself". The Supreme Court in *I.O'T v. B* stated at p. 348 that they flow "from the natural and special relationship which exists between a mother and her child."

45. In the context of married parents of course the protection of the blood bond or the blood link is represented by Articles 41 and 42 of the Constitution. In the case of married parents, under Articles 41 and 42, there is a presumption that children are to be brought up by their parents and can only be taken away or not brought up by their parents in circumstances where there has been a breach of duty under Article 42.5 or where there are compelling reasons. In *N v. Health Service Executive* Fennelly J. examined the origins and purpose of these articles making it clear that they express and reflect a fundamental obligation to protect the natural bond which exists between child and parent.

Constitutional Rights

46. The applicants submit that they are entitled, pursuant to Article 40.3 and Articles 41 and 42 of the Constitution, to the recognition and protection of the natural or blood link which exists between the parents and the twins. The Court must adopt a definition of motherhood which will ensure appropriate recognition and protection of the natural of blood link between CR and OR as genetic parents of the twins. To do otherwise would be to fail in the most fundamental manner to recognise the natural bond between the applicants and to protect the following constitutional rights:

> 1. The applicants have the right to belong to a family and to constitute a unit group possessing inalienable and imprescriptible rights antecedent and superior to all positive law. This arises as CR and OR having married produced genetic children forming a blood link which has been strengthened by the fact that those children

have since been reared and cared for by CR and OR. They are in all respects providing what can be described as a family for the children, but they are not clothed with the constitutional situation. If CR is not recognized as the mother, then the children, while living with her and her husband and in every practical respect having the outward signs of a family, are deprived of the actual recognition and security that comes from the fact of being a legally recognised family. This engages their rights under Articles 41 and 42.

2. The rights of CR and OR, under Articles 41 and 42 and Article 40.3 to educate, protect and care for the twins and the correlative rights of the twins to be so educated and cared for are also engaged. The Constitution does cloth parents with those powers and it does give the children protection by those powers and the duties in regard to the vicissitudes of life. The twins are entitled to the same protection as other children in that respect and the fact of the circumstances of their conception should not take that away from them. The applicants are entitled to the security to know where they stand legally and that they stand as a family legally, with all that follows from that.

3. The rights of the twins, pursuant to Articles 41 and 42, to have their welfare protected. In *FN & Anor v. CO & Anor* [2004] IEHC 60 (unreported 23rd March, 2004) Finlay-Geoghegan J. held that a child has a personal right pursuant to Article 40.3 of the Constitution to have decisions in relation to guardianship, custody or upbringing taken in the interests of his or her welfare. The applicants submit that the Judge adopted the principle that legislation had to be interpreted in accordance with the Constitution which ties into the best interests of the child. In *DG v. The Eastern Health Board* [1997] 3 IR 511 the Supreme Court, per Hamilton C.J. said that a child pursuant to Article 40.3 has a right to have his or her welfare protected. It would not be in the best interests of the twins that, as a matter of law, they have no legal connection or rights in relation to CR and OR.

4. There is an obligation on the State under Article 40.3 to protect and vindicate the property rights of the parties. The failure to recognise CR as the mother in this case would have significant implications for the property rights of her, the twins and indeed her sister. If in law the twins are the surrogate mother's children, on intestacy the estate would split between her children and the twins - four ways as opposed to two. Conversely, the twins would not be entitled to an automatic share in the estate of their genetic mother on an intestacy.

5. Not recognising CR as the mother has an implication for the right to marry. If in law the twins are the children of the genetic mother they would be first cousins of the children of the sister. Under Irish law one is entitled to marry one's first cousin. If they're treated in law as the children of the sister, they could not marry their siblings.

6. Under Article 40.1 of the Constitution the right to equality of treatment is infringed in a number of respects. Not to recognize CR as the mother is to discriminate against her because of her inability to conceive and to give birth in the normal way, which, would be

viewed in law as a disability. It would also be an unlawful discrimination contrary to Article 40.1 in the sense that it would mean that in Irish law, for males, parentage would turn solely on genetic factors, whereas for females, it would not and that would be, in effect, a sex discrimination as between the treatment CR as a woman and the treatment of other people, or males, who have the benefit of their parentage solely being determined by genetics.

A Rebuttable Presumption

47. The applicants submit that the Court must fashion and adopt a test to determine who, in law, is considered to be the mother of a child which recognises the natural and psychological bonds between them and which appropriately protects and vindicates their constitutional rights. This can readily be achieved if the status of mother is not confined solely to the woman who gives birth to the child but rather there is a mere rebuttable presumption that she is the mother of the child. The law should allow such a presumption where it can be shown that:

i. a person other than the woman who gave birth provided the ovum which the child was formed,

ii. there is agreement between the gestational mother (and, if married and living together, her husband), the genetic mother and the father that the child be treated and reared as the child of the father and the genetic mother,

iii. the rebuttal of the presumption is in the best interests of the child, and

iv. the rebuttal of the presumption is not contrary to public policy.

48. Such an approach would vindicate the rights and interests of the applicants without in any way making unclear or unworkable the law in regard to parentage. There is a longstanding history of the use of presumptions in ascertaining parentage, for example the presumption in favour of legitimacy. In *S. v. S.* [1983] 1 IR 68 O'Hanlon J. addressed the issue of whether the rule in *Russell v. Russell* [1924] AC 687, that you couldn't introduce evidence to bastardise a child, continued to be part of Irish law after the coming into effect of the Constitution. O'Hanlon J. held in *S v. S* that the rule was never carried over by Article 37 of the Constitution because it was, in effect, a form of absence of fair procedures because the father was placed in a position where he could never introduce the truth of what was the true position. In that case O'Hanlon J. set out a regime which he felt might work into the future for An t'Ard Chlaraitheoir. It is submitted that O'Hanlon J. adopted a pragmatic approach – if all the relevant people who were involved in the issue agreed and if there was evidence which satisfied the Registrar that the person in question could not be the father, the Registrar in those limited circumstances could proceed. Applying that approach the Registrar should be entitled to register the genetic mother as the mother of the child if all relevant persons consent and there is no contest as to parentage.

49. The applicants are seeking a declaration that CR is the mother of MR and DR pursuant to s. 35 of the Status of Children Act 1987, or otherwise pursuant in the inherent jurisdiction of the Court. This could be done if there is a rebuttable presumption that the woman who gives birth is the mother of the child. The rebuttable presumption in relation to paternity does not cause an intolerable administrative problem. The solution

the applicants propose would adequately protect any State interest that might be engaged, while at the same time vindicating the constitutional rights of all the applicants.

50. Under s. 35(1) of the Status of Children Act, 1987 a child can get a declaration that a person is their father or mother. Under subs. 4, regarding a child who is not of full age, the Court has a discretion to refuse to hear or refuse to continue hearing the case, if it would be against the interests of the child to hear the application. Part VII of the Act covers the use of blood tests in determining parentage in civil procedures. Section 38(1) of this part provides that a court may give a direction for the use of blood tests for the purpose of determining parentage. This section applies in the case of both mothers and fathers. The structure and effect of Part VII of the 1987 Act is clear; blood tests can be used to establish whether a person is or is not the father or mother of another person. The tests do so by ascertaining the presence of shared, inheritable characteristics between the two people. Section 37 defines blood test as "any test carried out under this Part and made with the object of ascertaining inheritable characteristics".

51. The presence or absence of inheritable characteristics is the test in regard to parentage, whether it is fatherhood or motherhood for all children. These characteristics are to be found by an examination of the blood and that is now being interpreted to include the genetic structure or DNA in the blood of each person. The case of *JPD v. MG* [1991] 1 IR 47 shows that a test carried out under Part VII of the Act made with the object of ascertaining inheritable characteristics covers DNA tests. In that case the Supreme Court authorized the use of "genetic fingerprinting" to determine who was or who was not the parent of the child.

52. The applicants submit that what the Oireachtas has put in place is a procedure where it is the presence or absence of inheritable characteristics which is the test in regard to whether somebody is or is not a parent under Irish law. It applies whether the parent, or whether the person is who is suggested to be a parent is a man or is a woman. The test is the same. The Oireachtas could have decided that it would only apply to paternity, but it did not do so. It is submitted that the Oireachtas has decided that parentage is to be determined in the same way regardless of how the child was born, whether they were born due to an IVF procedure or whether they were born in a normal conventional birth.

53. In England and Wales s. 20(1) of the Family Law Reform Act, 1969, as originally enacted was limited to cases of paternity, and this was determined through blood tests. However, it was amended and the version now in force relates to parentage which may be determined through scientific tests. Blood tests are now referred to as scientific tests and can be used to determine whether somebody is a mother as well as whether somebody is a father. Section 27 of the Family Law Reform Act, 1987 in England realises that in a situation of artificial insemination, if the blood test regime set out in s. 20 of the 1969 Act was applied in those circumstances, the results might exclude certain people as parents because of the fact that the genetic material came from artificial insemination. The English legislature has carefully put into its legislation that people will not be excluded because there are no such inheritable characteristics in cases which have various aspects of artificial insemination or IVF treatment. Section 27 of the Human Fertilisation and Embryology Act, 1990 follows the same reasoning. It provides:

> "The woman who is carrying or who has carried a child as a result of the placing in her of an embryo or sperm and eggs and no other woman is to be treated as the mother of the child."

54. As stated at para. 21 above Irish legislation puts in place a mechanism which ascertains mothers by use of inheritable characteristics, and that that applies to all children and to all mothers, whether the birth of the children was brought about or not brought about by IVF. This approach has not been modified or restricted by the

legislature as it has in England. It is simply not possible in the context of that statutory regime to come to a conclusion that to grant a declaration under s. 35, that somebody who is excluded by reason of the presence or absence of inheritable characteristics is in fact and in law the mother of the child.

55. Until the late 1970s, when scientific advances first came along with in vitro fertilisation, a woman who gave birth would inevitably have shared DNA and inheritable characteristics with the child born by her. In the vast majority of births at the moment that will continue to be the case. However, Part VII of the 1987 Act makes clear that it is the presence or absence of shared inheritable characteristics is to be determinative not only of who is the father of a child but also who is the mother of a child. Thus, it follows that the provisions of Part VII are inconsistent with the proposition that the identity of the person who gave birth is determinative of who is the mother. Before such advances the principle *mater semper certa est* was a simple reflection in the law of an undeniable biological fact. The principle cannot survive and does not continue in any sense after the Status of Children Act when the legislature put in place a regime based on the presence or absence of inheritable characteristics. It does not make sense that the biological truth is to be ignored on the basis of a Latin expression which is not referred to at all in the legislation.

56. The applicants' basic submission is that their approach is consistent with the case law and it would bring about a situation whereby their constitutional rights would be vindicated. It is consistent on the need in the case law to recognise and vindicate the blood link between parents and children and it is consistent with the approach in regard to inheritable characteristics in the Status of Children Act. It is relatively straightforward for the Court to declare that under s. 35, the notice party is excluded, and the genetic mother is found to be the person who has the necessary inheritable characteristics, and that she is the mother at law. That in turn renders the applicants as between them a family, and they have all the rights that go with that. That approach does not do any violence to the law, it is entirely consistent with the legal provisions which are there. Moreover, there are no elements of certainty which would be fundamentally altered.

Guardianship

57. Under the Guardianship of Infants Act, 1964 the Court may appoint CR and OR as guardians of their children as an alternative relief. It is submitted that this alternative claim would be a very poor second to the major claim. It would not cure some aspects, for example, their treatment as separate individuals in law for tax purposes and their inheritance situation would not be changed. More importantly, it does not give them what they are entitled to, which is legal recognition that they are in law a family, just like other families. The parents in the present case seek that the ties of nature be maintained and protected in the most fundamental way, that is that they be recognised and acknowledged as their parents.

58. The applicants disagree with the respondents analysis of *Roche v. Roche* [2010] 2 IR 321 and of the Constitution in relation to the definition of mother as discussed at paras. 66 -68 below. They submit that the respondents overstate what this case decided and that the Court decided what the meaning of mother was for the purpose of Article 40.3.3 of the Constitution and nothing more. The comments of the Supreme Court judges emphasised that 1) Article 40.3.3 was of limited purpose and limited effect, 2) the limited purpose and effect was to prevent the introduction of abortion into Irish law, and 3) it had a limited temporal effect – it only applies to the period of time when the child is in the womb. The amendment deals with the balance of the life of the child in the womb with that of the mother and deals solely with that time. This was not introduced to determine who would be considered a mother.

59. In that case Murray C.J. notes that gestation and birth are inextricably linked to the

mother but at para. 33 he states: "In vitro fertilisation and the creation of embryos, fertilised ova, outside the womb was probably not contemplated at the time." In that case Denham J. is refers to the definition of a mother in a particular context - where one life may be balanced against the other. This relationship arises and applies only when the child is in the womb. She states at para.138:

> ‘‘The unborn is considered in Article 40.3.3 in relation to the mother. The special relationship is acknowledged. Of course there is a relationship between the frozen embryos in the clinic and the mother and the father - but not the link and relationship envisaged in Article 40.3.3. Article 40.3.3 was drafted in light of the special relationship that exists uniquely between a mother and the child she carries. It is when this relationship exists that Article 40.3.3 applies."

60. Hardiman J. at paras.170 - 172 makes the same point regarding the temporal period when the lives of the gestational mother and child are "essentially integrated or at least linked". He states that she is the mother of the unborn and the applicants submit that he is not suggesting that she is the mother of the born. Geoghegan J., at para 209, states that "this constitutional provision is dealing exclusively with the baby in the mother's womb". He also deals to some degree with the issue of fertilisation outside the body as at para. 218 he states: "I do not believe that the constitutional provision was drafted or indeed voted upon with in vitro fertilization treatment in mind."

61. Given that each of the judges say that the temporal period which the Article addresses is a set period of time from the moment of implantation during the period of carriage, it cannot be said that *Roche* is an authority as to what the meaning of mother is during some other period of time for which the Supreme Court did not consider at all. There is not a suggestion that the Court considered it and indeed, there is every suggestion that its interpretation of Article 40.3.3 was driven precisely because of the temporal limitations on the Article and the limited effect of the Article. Therefore to construe it otherwise and to say that it has a wider effect outside the temporal period that the Judges state would be entirely to ignore the basis of the logic of the Supreme Court in coming to *Roche*.

Adoption

62. The applicants also addressed the issue of adoption as a remedy. Adoption has to be considered from two fronts: placement for adoption and abandonment. On balance, it is probable that it is not possible that adoption could take place based on placement, for the simple reason that at the time the twins were born the notice party, the aunt, was still a married woman and therefore they were children of a marriage. The applicants are speaking in the context that the referendum which was dealt with in November 2012 has not brought about a change in the Constitution. As regards abandonment, the parents would be heading into litigation without precedent. It is governed by s. 54 of the Adoption Act, 2010. One must prove abandonment and the proofs are high. There has to be a failure of duty by the parents. Adoption proceedings pose their own unique legal difficulties for which there is no precedent and there are substantial legal hurdles which would have to be overcome.

ORAL SUBMISSIONS OF THE RESPONDENTS

63. The respondents submit that in Irish law, the mother of a child is the woman who gives birth to the child. That is a fundamental and abiding principle and it is to be found not only in the common law but also in the Constitution. The principle is enunciated in the common law by virtue of the *mater semper certa est* principle. It is affirmed in the Constitution via Article 40.3.3 which provides:

> ‘‘The State acknowledges the right to life of the unborn and, with

> due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."

64. The common law principle was imported into the Constitution in 1983 by the people when the above provision was inserted by referendum. It is submitted that this provision makes it absolutely clear that the mother of the child is the pregnant woman who gives birth to the child – no other possible interpretation of it is possible. Article 40.3.3 is not just about the balancing of rights, it gives a definition of what a mother is. The certainty of that position is set out in *Roche v. Roche* [2010] 2 IR 321, when the Supreme Court, in very recent times, came to discuss what constituted an unborn and, by virtue of that discussion, discussed what constitutes a mother. So it is an inherent and fundamental principle of our law and as a constitutional norm, that a mother is a pregnant woman, who gives birth to the child and there is no other basis for motherhood other than that as a matter of constitutional jurisprudence.

65. While Article 40 in effect defines mothers, Articles 41 and 42 make reference to parents and mothers. Obviously a child can only have two parents: a mother and a father. As far as the female parent is concerned, this must mean a mother within the meaning of Article 40.3.3. This is the woman who gives birth to the child, because that is the consistent manner in which the matter has to be interpreted harmoniously in the Constitution.

66. In *Roche* at para.32 Murray C.J. states: "Of course the gestation and birth of a child is inextricably and humanly linked to the mother and its development in the womb." His discussion talks about human life beginning in the womb. This clearly demonstrates that the mother, for the purposes of the Constitution, must be a pregnant woman, not a genetic mother. From Denham J.'s judgment, quoted at para. 58 above, it could not be clearer that a mother, for the purposes of Irish constitutional law, is the woman who becomes pregnant and gives birth to the child. This is specifically set out in that paragraph. It cannot constitute the mother who is looking at a frozen embryo in a clinic, despite any genetic connection, and there was a genetic connection in *Roche.* There could not be a clearer indication that the only mother is the birth mother as a matter of Irish constitutional jurisprudence.

67. Hardiman J. at para.170 states:

> "the mother is the mother of the "unborn" and that their physical relationship is such that the right to life of the unborn is capable of impinging on the right to life of the mother. This, it appears to me, requires a physical relationship. The only relevant physical relationship is that of pregnancy."

It is transparently clear that a mother for the purposes of the Constitution is a birth mother and no other definition of "mother" is contemplated by the Constitution. Geoghegan J. continues this line of reasoning, stating at para. 209:

> "I believe that, applying the ordinary rules of interpretation applicable to a statute, which, at any rate to some extent, permit of context to be taken into account, this constitutional provision is dealing exclusively with a baby in the mother's womb. Probably the strongest indicator of this is the reference to "the equal right to life of the mother". I interpret this sub-Article as envisaging that what I might loosely call a "mother and baby situation"."

At para. 33 Geoghegan J. also states that one can look at the context in which the Article was passed by the people and he talks about the fact that at the time, nobody would have considered in vitro fertilisation and unborns, embryos frozen outside the womb, that what was in contemplation was in fact pregnancy in women.

68. It is submitted that the entire Court in the above case, including the minority judgment of the Chief Justice, is to the effect that a mother for the purposes of Irish constitutional provisions can only mean the woman who is pregnant, the woman who gives birth to the child and specifically not the genetic mother. It is the birth mother who is protected under the Constitution and it is the birth mother to whom rights inhere. Therefore, it must follow that when this Court is looking at any statutory provision, it must interpret the statutory mention of the word "mother" as meaning and being confined only to birth mothers This is the constitutional requirement and is of import in discussing the rights of the family for the purposes of Article 41 and 42,

69. The Status of Children Act, 1987 was aimed at declaring parentage where there was confusion in relation to the identity of the birth mother. These provisions cannot be used by a genetic mother in order to assert parentage because that is not within the remit of the constitutional definition of "mother" and so cannot be interpreted into the section. So for the 1987 Act to be interpreted in a constitutional manner, and for the Court to properly construe this Act, one must take every reference to "mother" in the Act as meaning birth mother. The Act provides for a situation where, if there is confusion as to the identity of a birth mother, for example babies mixed up in a hospital, impersonation, or something of that nature, then in those circumstances, blood testing which identifies genetic characteristics may assist the Court in arriving at a conclusion so as to make a declaration of parentage. But those provisions do not apply to persons in the position of the applicant who claims motherhood on the basis solely of genetics. The provisions of the 1987 Act cannot and do not so apply. No other construction of "mother" is possible as a matter of Irish law because of the provisions of our Constitution and the manner in which the people have chosen to identify the woman, who is a mother for the purposes of our legislative and constitutional principles. The same reasoning applies to the Civil Registration Act, 2004. The registration of births and references to the mother of a child for the purposes of that Act can only mean references to the woman who gave birth to the child.

70. It was at all times understood as part of the common law that the mother of the child is the person who gives birth to the child. The fact that this is reflected in the constitutional provisions, regardless of their antecedents, is not in fact any way surprising at all. It is simply an embodiment of that common law principle. When it is actually interpreted by the Supreme Court and the meaning of the provision is made clear so as to put that matter beyond doubt, then it seems that it lends even more weight to the notion that the definition of motherhood for the purposes of the Constitution, harmoniously interpreted throughout the Constitution, means the person who gave birth to the child.

71. The State may legislate at some stage to allow surrogacy arrangements to be regulated so that the birth mother's constitutional status and rights are respected and there is an ability to transfer those parental maternal rights to others based on a surrogacy arrangement. However, that notion engages a whole range of social and political issues, which are matters for the legislature, for which it is uniquely equipped. The manner in which our legislative and, more particularly, constitutional framework are established means that this matter can only be dealt with by the legislature. We are in circumstances where the Court is bound by the enunciation of the meaning of mother for the purpose of the Constitution and that means, as a matter of constitutional provenance, that the mother is the birth mother. That means that the statutes must be interpreted in a particular way, which the respondents believe precludes the relief being sought by the

applicants as to a declaration of parentage and precludes their registration, for the purposes of the Civil Registration Act, 2004, as mother and father.

The Blood Link

72. From an overview of the authorities in relation to fathers, the notion that where the only connection to a child is a genetic one is of significant value can be displaced. It has been shown to be displaced by issues such as whether the child's welfare would be better served with another couple who might be able to afford the child more opportunities or with whom the child has settled. It is a much lesser value than other considerations.

73. The respondents reject the notion that what the Court is adverting to in all of the case law is genetics. When the Judges in *G v. An Bord Uchtála*, for example, were discussing the special relationship between the natural mother and the child, they meant the fact that she bore the child for nine months and gave birth to it. This is an inescapable conclusion because if they were only valuing her genetic link to the child, why would they not just give her exactly the same value as the father's genetic link? When judges distinguish between the rights of mothers and the rights of fathers, they are talking about the physical connection between the mother and the baby, and the fact that the mother carries the child for nine months and then gives birth to it. They are comparing that to the role of the father who simply donates gametes.

74. O'Higgins C.J. in *G v. An Bord Uchtála* states at p. 55:

> "But the Plaintiff is a mother and, as such, she has rights which derive from the fact of motherhood and from nature itself. These rights are among her personal rights as a human being and they are rights which, under Article 40, s.3, sub-s. 1, the State is bound to respect, defend and vindicate. As a mother, she has the right to protect and care for, and to have the custody of, her infant child. The existence of this right was recognised in the judgment of this Court in *The State (Nicolaou) v. An Bord Uchtála*. This right is clearly based on the natural relationship which exists between a mother and child. In my view, it arises from the infant's total dependency and helplessness and from the mother's natural determination to protect and sustain her child."

It clearly refers to the physicality of the relationship. That is the special relationship between a mother and a child that does not exist between a father and a child, because there is no gestation involved in fatherhood. One cannot simply assert that motherhood is based on genetic inheritance alone.

75. Kenny J. in the same case at p. 98 states:

> "The blood link between the plaintiff and her child means that an instinctive understanding will exist between them which will not be there if the child remains with the notice parties. A child's parent is the best person to bring it up as the affinity between them leads to a love which cannot exist between adoptive parents and the child. The child is now 12 months old and children of that age are infinitely adaptable."

It is submitted that the judge is thinking of motherhood in the context of pregnancy and that blood link is not a reference to genetics. It is quite clear that what he is thinking of is the conception, gestation and birth of the child.

76. The placenta exemplifies the fundamental link between the gestational mother and the child, because through it comes not directly the blood supply from the mother, but various nutrients and compounds that are absolutely essential and which the child itself cannot produce and without which it will not develop. So the child in the womb is inherently part of the mother's organism.

77. The blood link referred to in case law cannot only mean genetics, because it does not make sense if you look at the manner in which fathers and their genetic connection is dealt with. If the blood link were so important, that would automatically give fathers a right which they do not have. What is important is the fact that the mother brings the child to birth. Parke J.'s judgment in *G v. An Bord Uchtála* at p. 99, discusses the source of the mother's rights stating:

> "They do not arise under Article 41 of the Constitution because the family there recognised as the natural primary and fundamental unit group of society is that which is based upon the institution of matrimony. In my view, however, they are among the personal rights which the State guarantees in its laws to defend and vindicate under Article 40, s.3 sub-s. 1, of the Constitution. The emotional and physical bonds between a woman and the child which she has borne give to her rights which spring from the law of nature and which have been recognised at common law long antecedent to the adoption of the Constitution."

The respondents submit that the judge is clearly talking about is the physical and emotional bonds between a mother and child. *G v. An Bord Uchtála*, is a discussion of the rights of a natural mother to her child in an adoption scenario, and it is submitted that the case makes it clear that it is not just based on a genetic link.

78. In *I. O'T v. B*, Hamilton C.J. discussing the mother's rights at p.346, states:

> "The existence of this right is recognised in the judgment of this Court in *The State (Nicolaou) v. An Bord Uchtála*. This right is clearly based on the natural relationship which exists between a mother and the child. In my view, it arises from the infant's total dependency and helplessness and from the mother's natural determination to protect and sustain her child. How far and to what extent it survives as the child grows up is not a matter of concern in the present case. Suffice to say that this plaintiff, as a mother, had a natural right to the custody of her child who was an infant, and that this natural right of hers is recognised and protected by Article 40, s. 3 sub-s.1, of the Constitution."

This paragraph echoes what was said by O'Higgins C.J. in *G v. An Bord Uchtála*, it discusses the physicality of the relationship between the child and the mother which is necessarily brought about by the dependency and helplessness of the child in the course of pregnancy and immediately after birth. Keane J. in his judgment in *I.O'T v. B* also makes it clear that he accepts what the Chief Justice said and he repeats it at p. 371 of his judgment.

79. The applicants sought to suggest that the case law in relation to the rights of natural fathers in some way demonstrated to the Court that it is the genetic link that is important. However, the respondents view the authorities in a completely different way. It is submitted that these are authorities for the view that where there is only a genetic link, that the weight or value to be attached to that link is much less than where the child has been given birth to by the mother because of what is discussed in relation to mothers is

this whole notion that the mother bears the child. The manner of the test for a person who is only genetically related to the child, albeit that the person is the male progenitor of the child, places that person very low down in the pecking order. The judgment of Murphy J. at p. 294 in *WOR v. EH* [1996] 2 IR 248 puts it very succinctly:

> "I do not think it is necessary to reach a final conclusion as to whether there is some residual right in a father in equity to custody of or guardianship over his child. That right, if it does exist, and deriving solely from the biological relationship between the father and the son is unlikely to be a factor of serious significance in determining whether an order for guardianship should be granted or withheld."

80. So genetic connection is not a value to which huge significance will be attached in and of itself. The difference for mothers is that, of course, they must bring the child through the pregnancy and to birth and it is that factor which makes mothers so completely different in social function and biology to fathers. It is just a matter of the laws of nature.

81. In *N v. Health Service Executive* the real issue in the case was whether or not the constitutional presumption that the welfare of the child was best served in its family of origin despite the child now having spent and not the significance of blood link. The case cannot be solely understood simply in the context of genetics. It is about the family having certain rights. Those are conferred by marriage, not by genetics. If genetics were the determinant, then it would not matter whether one were married or not. What would matter is whether one was genetically related but that is not the case. The respondents acknowledge that genetic connection to the child is important but the fact that one is the child's birth mother is even more important. The genetic connection alone in fact is not given a very high value. Marriage creates another level again because the Constitution establishes marriage as the foundation stone of the family and confers on the married family inalienable and imprescriptible rights.

Adoption

82. It would often be the case, where a parent is seeking to adopt a child into their married family, that that parent would in fact be a guardian of the child. So the fact that the person seeking the adoption is a parent would not be unusual in that context and they would often have guardianship rights inhering to them by virtue of that.

83. The applicants in this case would be seeking an order for adoption on the basis of the father seeking to adopt the child into his constitutional family where it has already been accepted that he is registered on the birth certificate as the father of the child and where the statutory provisions have already been satisfied in relation to the notice party's husband who actually swore the requisite declarations for the purposes of the birth registration. The respondents are not making any submission to the Court about the exact format that the adoption would take, but are pointing out the fact that there is a mechanism. There would not be a contested hearing because it is perfectly clear that everybody in this case is *ad idem*. There is a mechanism in certain circumstances which allows for the regularisation of all the difficulties complained of in this case, and that mechanism is set out in legislation which has not been explored.

84. The respondents submit that this situation is different to the situation in *N v. Health Service Executive* regarding adoption. The applicants there were not even the prospective adopters at that stage, they were the persons with whom baby Ann resided at that time. The prospect of adoption had simply come to an end and there was not going to be any prospect of adoption. In the present case CR and OR can assert rights in relation to the children. OR certainly can assert his rights and instigate adoption procedures that may result in an order allowing the applicants to adopt the two children. It is not comparable

with the situation in *N v. Health Service Executive* and in this case there are remedies available which the applicants may not be satisfied with but nonetheless those remedies are available.

Constitutional Rights

85. The applicants assert that there is a right to membership of a constitutional family inhering to the twins but they did not cite any authority in support of that view. To assert simply that children are entitled to be members of a constitutional family would suggest that any child born outside wedlock is entitled to demand that their parents marry. In practice there does not appear to be any evidence of disadvantage accruing to the children by virtue of the fact that they are not considered to be members of a constitutional family, of CR and OR's constitutional family.

86. It is asserted by the applicants that the welfare of the twins must be considered as the paramount consideration. The respondents submit that this personal right must be taken in the context of the constitutional provisions in relation to the definition of mother under the Constitution. If the Constitution sets down as a norm that a mother is a birth mother, then it must follow that it cannot be a right asserted by the twins that their welfare requires the Court to recognize somebody else as their mother.

87. The applicants submit that CR is discriminated against in this application because she is not treated as the mother of the infants for the purposes of the application. However, as discussed "mother" is defined in the Constitution as meaning the person who gives birth to the child and therefore it cannot be a discrimination in those circumstances for the legislature to recognise that fact. This lack of recognition does not give rise to a breach of rights because it is in fact applying the constitutional hierarchy as required by the Constitution itself. It is submitted that in the present circumstances, the role of the State in maintaining the integrity of the birth registration system entitles the State to take into account the difference in capacity and social function between the woman who donates the ova and woman who gives birth. More fundamentally, as a matter of Irish constitutional law, the mother who gives birth is the mother, and therefore it cannot then be complained that if some other woman is not treated as the mother, that that is a form of discrimination. In *D (a minor) v Ireland* [2010] IEHC 101, Dunne J. states:

> ‘‘the discrimination identified in Section 5 is legitimated by reason of being founded on difference of capacity, physical or moral, or on difference of social function of men and women, in a manner which is not invidious, arbitrary or capricious."

Once there is a valid reason on the basis of capacity, physical or moral, or difference of social function, the State is justified in making a discrimination between mothers. In this case, the respondents say that due to the constitutional imperative and the requirements of the birth registration system, this is a matter which is not an invidious, arbitrary or capricious discrimination, if it is a discrimination.

Allowing the genetic mother to be registered as the mother

88. To allow CR to be registered as the mother would be overturning the primary principle, which is that the birth mother is the mother. This cannot be done in any event because of the constitutional mores. Even if the Court were to consider doing that, it in and of itself creates uncertainty and raises the potential for other equally worthy people in completely different situations to raise other and more complex issues. This issue has implications for surrogate mothers, commissioning parents and, more importantly, for the resulting child. Therefore, an interference with the *mater semper certa est* principle in those circumstances, even if it were open to the Court, which the respondents say it is not, is not something that the Court should contemplate in the particular circumstances of this kind of sensitive issue.

89. There cannot be a private capacity to confer parental status based solely on intention, because as a matter of law, the mother of the child is the person who gives birth to the child under our constitutional rubric. Science has got us to a point where the role of a mother can in some way be split. Normally genetics and gestation would relate to one and the same person, and that has always been the understanding. Now that function can be split in the laboratory and the embryo implanted in a different woman to the woman who donates the genetic material. This does not, however, move us away from the basic premise that the mother of the child is the woman who gives birth to the child as a matter of law, and as a matter of public law. It is only by the mechanism provided for in the adoption legislation that it is possible to divest oneself of the status of parenthood. The Constitution designates the woman who is the birth mother of the child as the mother of the child. That cannot be altered by intention.

90. The respondents submit that the Court cannot make a declaration of parentage based on s. 35 of the Status of Children Act, 1987 and on the DNA testing. If it were possible the effect of that would bring about a seismic shift in the manner in which we deal with the issue of motherhood in this jurisdiction. Any step which suggests that the birth mother is not the mother of the children opens a range of prospects. If it then becomes the law that the birth mother is not the mother of the children, then it is simply not possible to control the outcome of that for all of the other persons affected. Such persons include those who have borne children by way of donor gametes, who now may have issues about the status of their children at a number of levels, which hitherto they simply did not have by virtue of birth mothers recognition as lawful mothers.

91. It is not possible to erect a rebuttable presumption of maternity because of the constitutional values. It cannot be done because the Constitution defines mother. Fatherhood is now a rebuttable presumption and provided that there is clarity about it, it can be dealt with and corrected, as an error of fact, by An tArd Chláraitheoir. The applicants are asking An tArd Chláraitheoir to deal with matters as a presumption of intention and not that he should correct the register based on an error of fact. Fatherhood is an objective fact because the only biological imperative is the donation of gametes. Motherhood requires genetic and gestational input in order for the child to come into being. Parenthood cannot be a matter of intention. The only absolute certainty is who gave birth and so as a matter of law, one must provide that the person who gave birth is the mother of the child, regardless of the intention. Then it falls to the legislature to decide, in accordance with all of the matters, how and in what circumstances that could be changed.

92. It is not possible by virtue of just being a genetic parent to actually have a child. Genetic parents are able to produce a blastocyst. The genetic mother can produce ova but that is not life. That is a long way from being a human being, as was set out in the *Roche* case and it is gestation that produces the human being. So if nature dictates that the manner in which motherhood is to be achieved is by the growing of the genetic organism or the genetically derived organism by birth, it is not discrimination as between mothers and fathers. Fathers do not have a gestational role. There is no discrimination in that circumstance because it is simply not possible in nature.

93. If we are to begin to look at genetics and not the birth then that raises a complex set of issues that is properly a matter for the legislature to deal with and is not something capable of being dealt with by the Court for the simple complexity of all that is involved. The Court is bound by the provisions of the Constitution as to who you can consider to be the mother. Part 3 of the Civil Registration Act, 2004 governs the registration of births in Ireland. The text refers to "parents", "mother" and "father". While "mother" is not currently defined in legislation, the respondents submit that the term refers to the woman who has given birth to the child concerned. Thus the term "mother" is given its ordinary meaning in keeping with the *mater semper certa est* principle.

94. Moreover, the Register is a historical document recording facts and events on the date of birth. It is intended to reflect the event of birth, and is not a document capable of recording later events in the existence of the person concerned, or any other event irrespective of its importance. The purpose of the Register was discussed in *Foy v. An tArd Chláraitheoir* [2002] IEHC 116 and was explained at para. 170 by McKechnie J. as follows: "The resulting register is a document of historical value, being current only at the date of birth and not beyond. It is no more than that."

CONCLUSIONS

Family Arrangements:
95. OR and CR, being husband and wife, were at all times relevant to the matters to be considered in this judgment, married to each other and they intend to continue to live together as man and wife with their children, MR and DR. They always reside and were domiciled in this jurisdiction and insofar as it is relevant to any aspect of these proceedings, the habitual residence of the applicants is Ireland for the purposes of the Brussels II *bis* Regulations. CR (wife) discovered that she had no uterus and that she could not bear children when she was aged nineteen. She was medically advised, however, that she could produce a perfectly normal and viable ovum. When she married OR the couple discussed ways of having a child and when they became aware of the possibilities of IVF treatment and surrogacy, they investigated the possibility of engaging in the process abroad, and while doing so the notice party volunteered to participate in a surrogacy arrangement, whereby the ovum of CR would be fertilised by the sperm of OR (husband) and that this process would occur by in-vitro fertilisation and that the fertilised egg would be implanted in the womb of the notice party and born and brought to birth by the notice party with the intention of all parties that the child to be borne would be the child of OR and CR. A surrogacy contract was drawn up in respect of which CR took no legal advice, the same having been proffered by the IVF Clinic to her, and in respect of which OR only took legal advice in a desultory way from a solicitor who was doing some other business for him. It is not necessary to go into the detail of this contract, save insofar as termination provisions in the contract (which appear to be in a general standard form) were struck out prior to the signing of the agreement.

96. The surrogacy arrangement progressed throughout in a very cooperative atmosphere, notwithstanding that preparatory to the actual fertilisation by means of IVF the wife and the notice party were required to undergo careful and intensive treatment. This treatment entailed regular painful injections to be administered by the wife to the notice party to synchronise and prepare her body for the implantation of the fertilised ovum in the womb. The process was attempted once and failed, and was repeated again resulting in a successful implantation of a fertilised ovum in the womb of the notice party, resulting in her pregnancy. OR and CR were present with the notice party when the notice party first self-diagnosed the likelihood of her being pregnant and also were jointly involved with her in the confirmation of pregnancy by medical personnel. OR and CR and the notice party remained in constant and cordial contact during the pregnancy, which was not an easy one insofar as it could be said that morning sickness continued right through the pregnancy and then was not limited in its extent during the day. Eventually, it transpired that the notice party would give birth to twins. The notice party had her own children prior to this time and was in a position to self-diagnose or at least strongly suspect that she was going into labour when the twins were five weeks premature (calculated on the basis applicable to IVF pregnancies). When born, the twins were in need of tube feeding in the first instance, but apart from requiring treatment in the intensive care unit, were otherwise healthy and developed rapidly. The notice party stood by to assist by the provision of breast milk during this stage and after a number of weeks when the babies had progressed sufficiently to leave hospital, OR and CR brought the twins home to be nurtured and reared as their children with the agreement and support of the notice party. Thereafter, the notice party (who lived in the vicinity of OR and CR) continued to have

contact with the twins and her relationship was always that of a loving aunt who enjoys their company but (as she says herself), is glad that she is an aunt and has the opportunity of some respite from two delightful, but very energetic young children. The notice party was married and separated before the pregnancy and birth, but she has subsequently been divorced and has not remarried. The notice party's other children attend a school which is orientated and managed through the faith which the applicants and notice party share. When the notice party began to show pregnancy and it was polite for the parents of children attending the school to which the notice party's children attended to ask questions about the matter, the notice party explained that she was pregnant in spite of being separated from her husband, and that it was a surrogacy pregnancy. She was able to negotiate the event socially in the context of the school without difficulty and with the cordiality and understanding of her neighbours. I conclude from this experience that when the time comes for the enrolment of the twins in this school (which is due shortly), the twins and their parents, OR and CR, will be easily able to negotiate such enrolment in the school notwithstanding that during the course of the hearing the Court posed a number of challenging hypotheses based on faith reservations of the particular faith and the management of the school reflecting the views of that faith in relation to surrogacy arrangements.

Registration of Births

97. The registration of the births proceeded in accordance with the usual practice applying the maxim of *mater semper certa est* with the notice party and OR registered as mother and father respectively. OR and CR allowed this process without prejudice to their claim to be registered instead as father and mother respectively. The separated husband of the notice party confirmed in writing that he was not the father. Throughout the process of registration, it must be stated that an tArd-Chláraitheoir acted with the highest of probity. When it was clear to him that OR and CR were making a claim to be registered, he consulted senior counsel and received the best advice available to him that the maxim of *mater semper certa est* applied and that as an administrative officer charged by law with the registration of births he had no option but to register the notice party and OR as mother and father respectively. The evidence of an tArd-Chláraitheoir was generally accepted by the applicants save and except in relation to his assertion that a claim by the genetic mother in a surrogacy arrangement to be registered in respect of the birth of a child would provide great (and possibly insurmountable) difficulties administratively in relation to such registration. However, while I accept that DNA testing is not foolproof in every case of claims for paternity or maternity, there are other means of determining parenthood by evidence as, no doubt shown by claims of paternity which are disputed before an tArd-Chláraitheoir and, if unresolved by an tArd-Chláraitheoir in his administrative capacity, then as determined by the court. Paternity suits pre-date DNA testing and even blood testing in the legal tradition of this jurisdiction and many others. While the establishment of paternity might have been more difficult in the absence of these two tests, it was not impossible. So it is with the establishment of maternity. The fact that the Status of Children Act allows for blood and hence, DNA testing, in relation to issues determining maternity (such as fraudulent claims of maternity as envisaged by the Law Reform Commission Report published before the passing of the Status of Children Act) means that there is a legally established if, perhaps, less used avenue for an tArd-Chláraitheoir to investigate the claims of a genetic mother in respect of children born as a result of surrogacy arrangements, provided the interpretation and influence of the maxim *mater semper certa est* does not preclude such inquiries.

Genetics versus Epigenetics

98. All of the scientific witnesses explained that up to the time of the Commission report in 2005, the science of genetics as exemplified by a straightforward deterministic view of the influence of chromosomal DNA material in relation to the determination of the identity and development of the foetus and baby held sway. These views have been supplemented by a rapidly developing science which in broad terms may be described as epigenetics. The influence of epigenetics can come from several sources; from the

transfer of non-chromosomal cells, such as microchimeric cells from mother to baby, to the influence of drug taking such as alcohol or cigarettes or heavier drugs such as cocaine, to the diet (whether of starvation/famine or that leading to obesity) and blood pressure, or diabetes or uncontrolled inherited diabetes. I find that the influence of such epigenetic occurrences is not of such significance as to alter the overriding significance of chromosomal DNA for the purpose of determining identity and inherited characteristics leading to a conclusion of the paternity and genetic maternity (without deciding the legal issues) for the following reasons:-

(1) Most but not all of the epigenetic influences such as diet, taking of drugs, diseased condition of mother arise not from the influence of cellular chromosomes but from the environment reacting with a predetermined set of cellular chromosomes which are programmed to act in various ways in response to such external stimuli from the environment, whether inside or outside the womb.

(2) Many of the epigenetic influences are dependent on elective choices or neglect on the part of the mother, such as excessive drinking, cocaine consumption or failure to control or treat diabetes or blood pressure, taking them out of the category of a strictly deterministic chromosomal marker which determines identity and development of the real person.

(3) Even where the epigenetic influences are endogenous to the mother, (such as the migration of cells including microchimeric cells from the mother's body to the body of the foetus) and are, therefore, not relating to the outside environment or dependent on any elective choices being made or not made by the mother, (while modulating the development of the child in the womb) are not such as to interfere with the inheritable characteristics of the child and are capable of treatment or correction if understood. In the case of microchimeric cells, at least, it was conceded by one scientific expert that they were mere interesting phenomena and "red herrings" in the genetic scenario.

(4) The science and research relating to many of the epigenetic phenomena such as the inheritance of a tendency to have smaller babies following famine such as demonstrated by the Swedish and Dutch studies, (while showing statistical evidence pointing to a strong correlation in the population, or epidemiological studies) are not matched by a physiological or chemical understanding of the process by which same occurs in a comparable way to the science of understanding of the action of cell chromosome components and their particular linkage to predisposition to various aspects of development, including specific diseases.

(5) When natural experiments are conducted by scientists to isolate the influence of epigenetics they very often use one individual from identical twins as the control which offers a more stable and predictable genetic model.

My conclusion in relation to the relationship between epigenetics and genetics is that while the science of both branches is likely to develop in the future, it is most unlikely that epigenetics will ever trump the deterministic quality of chromosomal DNA. I bear in mind that currently DNA testing is used in determining a 99.999% probability of paternity in certain cases which are uncomplicated by sibling or close relative factors.

99. The environment in which the foetus develops within the mother's womb is largely dependent on the chromosomal input of the cells of the foetus from embryo stage, insofar as the embryo attaches to the womb, and the manner in which its development is driven by the chromosomal material in that embryo's cells. The development of the placenta is determined by the chromosomal cells in the embryo and growing foetus and the placenta forms a series of membranes through which nutrition from the mother's blood (but not the mother's blood) is transferred to the body of the foetus which itself is developing its own organs of circulation, digestion and refinement such as kidneys and liver using its own blood circulation system. The mother's blood does not circulate within the body of the foetus while in the womb, but the mother's blood is directed through a strong and extensive network of blood vessels in the mother's womb to a membrane interface with the placenta through which nutrients for the foetus and baby are exchanged.

Conclusions on the Law

100. The maxim *mater semper certa est* is part of a series of maxims relating to maternity and paternity arising from the ancient Roman law. It can be said that the maxim achieved such prominence, acceptance and fixity by reason of the fact that before IVF the mother of the baby was determined at parturition or birth and the maxim (being an incontrovertible truth) expressed the facts of the situation. In the parlance of the common law the maxim became a presumption at law and in fact. Because it was based on incontrovertible facts, it became an irrebuttable presumption in any court proceedings. That meant that motherhood would be presumed in respect of a baby as between a woman and that baby once parturition of that baby was proven in relation to the woman. No other evidence or argument was required. The matter was self evident. No evidence could be adduced to controvert this presumption. If perchance evidence could be permitted by the law to be introduced to controvert this conclusion, then the presumption would change from being irrebuttable to rebuttable. The presumption could be rebutted by whatever evidence was appropriate. Prior to surrogacy arrangements, this possibility of the rebuttal of *mater semper certa est* did not arise. The fundamental issue in this case is whether, in the circumstances of this case of surrogacy, such a possibility arises within the current legal and constitutional framework of this jurisdiction.

101. In examining what the answer should be to the question posed by this issue, it is best to consider the very strong argument put forward by Ms. O'Toole SC on behalf the Attorney General, that the maxim *mater semper certa est* has received a constitutional approval in the pro-life amendment of the Constitution (Article 40.3.3). She has argued that the word mother appears in the Article in connection with pregnancy as unquestionably the mother who carries the baby the "unborn" (to use the specific description of the Constitution). She argued that the harmonious interpretation of the Constitution requires that the word "mother" should carry the same meaning throughout the Constitution and the statutory provisions of the Status of Children Act and all other relevant legislation. However, I am of the opinion that the word mother in this Article has a meaning specific to the Article itself, which is related to the existence of the unborn which was held by the Supreme Court in the frozen embryo case of *Roche v. Roche* to have an existence only when the foetus was in the womb and not otherwise.

102. I am particularly influenced by the passages cited on behalf of the applicants in the judgments of Fennelly J. and Geoghegan J. pointing to the specificity of that amendment. It is clear from the judgments of Fennelly J. in *N v. Health Service Executive* and *J.McD v. PL* that the concept of blood relationships or links are paramount in deciding parenthood. It should be determined what the courts meant by "blood" relationships or links. In the case of paternity it was easy enough to answer this question. It was paternity established through a DNA link as proven a by scientific test or otherwise if necessary by a blood test under the 1987 Act. However, Ms. O'Toole eloquently argued that to proceed from this conclusion, to argue that maternity should likewise be determined on the same blood test

procedure, was to compare "apples with oranges". She argued that this comparison did not recognise the fundamental difference between motherhood and fatherhood and pointed to the evidence in relation to epigenetics and the more dramatic incidence of how a mother's cocaine consuming habits could result in physical deformities to children and also the experience of persons born with deformities as a result of medical treatment by thalidomide and the like.

103. In view of my findings in relation to the determinative nature of chromosomal DNA, I find that while the input of a gestational mother to an embryo and foetus not containing genetic material from her is to be respected and treated with the care and prudence which the best medical practice dictates, the predominant determinism of the genetic material in the cells of the foetus permits a fair comparison with the law and standards for the determination of paternity. It would be invidious, irrational and unfair to do otherwise. In reaching this conclusion, I am supported by current legislative practice in the most recent Adoption Act of 2010 where the legislature recognised the importance of blood relationships by ensuring control at High Court level of the process by which a mother proposing to consent to adoption would at least be counselled in relation to the importance of knowing the genetic background of a child which is proposed to be adopted.

104. The final question is whether, in view of the conclusions of this judgment in relation to the fair comparison between fathers and mothers for the purpose of establishing blood relationships, and the feasibility of a maternal DNA test to facilitate registration, the application of the maxim *mater semper certa est* as an irrebuttable presumption is consistent with fair procedures under the Constitution. The judgment of O'Hanlon J. in *S. v. S.,* relating to the irrebuttable presumption in certain cases relating to paternity within marriage, is ample authority to enable the court to conclude that the presumption of *mater semper certa* did not survive the enactment of the Constitution insofar as it applies to the situation post IVF. To achieve fairness and constitutional and natural justice, for both the paternal and maternal genetic parents, the feasible inquiry in relation to maternity ought to be made by on a genetic basis and on being proven, the genetic mother should be registered as the mother under the Act of 2004. The conclusion does not raise the consideration of the best interest of the child which in most cases, if not in all, would be best served by an inquiry of the genetic interest.

105. As a subtext to the discussions before the Court and by way of final check in relation to the conclusions of the Court, it is important to assume that the Court inquired in relation to international consensus, in particular European consensus, in relation to the applicability of the irrebuttable presumption of *mater semper certa est*. An tArd-Chláraitheoir indicated that there was, in fact, a European consensus among a number of governments (including the Irish Government) that the irrebuttable presumption was still accepted internationally as the appropriate point of departure in relation to dealing with surrogacy questions. This perceived international position and the widespread historic acceptance of the principle of *mater semper certa est*, (although not a specific binding international instrument of legislation), is nevertheless authorative or at least the cause of taking a pause for thought, in a critical sense, in relation to the conclusions to which the Court has been driven in this judgment so far. I am strongly of the view that this so called international and historic consensus should not restrain the Court from making the conclusions so far appearing in this judgment for the reason that the Attorney General did not advance any detailed comparative law analysis to show why this consensus had arisen (apart from historical convention), such as instances of some of the constituent jurisdictions of the international consensus and having by their positive laws actually making the contract of surrogacy absolutely illegal and void, and introducing other positive law dealing with surrogacy which specifically by a statutory code recognised the maxim of *mater semper.* Indeed, in a situation where a jurisdiction had moved legislatively to declare the surrogacy contract illegal, it would follow that the maxim

mater semper certa est would be an irrebuttable presumption regardless of statutory enactment of same. As distinct from such an atmosphere of positive legislative enactment banning the surrogacy contract or positively co-defining the irrebuttable nature of *mater semper est*, the situation in this jurisdiction is one where positive legislation on this area is totally absent, meaning that the surrogacy contract in this case is not illegal. As Mr. Durcan SC said, the surrogacy contract and arrangements pursuant thereto leading to the birth of a child do not lead to any wrong, whether of a criminal or civil nature in this jurisdiction. The only weakness of the surrogacy contract in the Irish legislative context or in the context of the common law of this jurisdiction as agreed by all parties and held by the Court that its performance would not be enforceable by any court. There is nothing in the Irish legislative context that positively affirms the maxim of *mater semper certa est*, or for that matter makes illegal any surrogacy contract. Therefore, the Court should not be swayed from its conclusions or doubt same by reason of the assertion of this so called European consensus.

106. I am thus disposed to grant declarations in the forms sought in paras. 1 and 2 of the claim of the special summons herein.

Alternative Arrangements
107. Although I am not bound to do so in view of the foregoing conclusions, it may in certain circumstances be appropriate that this Court would give a view in relation to the disadvantages which will be suffered by MR and DR in the event of their genetic mother, CR, being unable to be registered as legal mother with OR, to whom she is married.

108. OR, although registered on the birth certificate as father, has never applied to be appointed a guardian of MR and DR. There is no reason why such application would be refused by a court and, in fact, with the agreement of the notice party it is possible for the father to be appointed legal guardian by way of informal statutory declaration executed by the mother on the birth certificate without recourse to court. As is apparent from the judgment of this Court in a case mentioned by the Court during the course of the hearing of this case entitled *ZP v. TF and PZ* [2011 No. 68 CAF], such appointment could lead to an order dispensing permanently with the need to have the consent of the notice party to the issue of passport. As a result of the clarification of Ms. O'Toole in her conclusions following submissions, the parties agree that the notice party may consent to the twins being placed for adoption with OR and CR, and it is likely, subject to the formalities, that such adoption would be sanctioned with the least possible difficulty. This has been clarified further by reason of the fact that the notice party and her divorced husband could never have formed a constitutional family, and the divorced husband disclaimed paternity in writing. In the event of an adoption by OR and CR of the twins, the problems envisaged with inheritance, taxation and marriage would be effectively eliminated. The only outstanding inconvenience might arise from the difficulty of obtaining the consent of OR to emergency action required by the authorities in respect of the twins when OR is out of the country and uncontactable as he very often is required to be through his employment plans. This generally would not be a problem if the twins, MR and DR, were adopted, and emergency arrangements were notified to the authorities.

Damages
109. The issues here have not been pursued and have not been considered by the Court.

110. I await further submissions from counsel in relation to the form of order and any application in respect of costs.

MEDIA REPORTING

Submissions of the Applicants
111. The applicants applied that the application be heard otherwise than in public. They

made an application pursuant to s. 36(4) of the Status of Children Act, 1987 (the "1987 Act") which provides:

> "On the hearing of an application under section 35 of this Act the Court may direct that the whole or any part of the proceedings shall be heard otherwise than in public and an application for a direction under this subsection shall be so heard unless the Court otherwise directs."

112. It is submitted that the Court has discretion pursuant to section 36(4) in regard to applications under s. 35 of the 1987 Act, to hear applications for declarations of parentage otherwise than in public. Behind that section lies that proposition that, in general, proceedings in Irish courts are to be held in public and that in some circumstances proceedings can be held otherwise than in public. One of those circumstances is the circumstance set out in s. 45 of the Court Supplemental Provisions Act, 1961 (the "1961 Act") that "justice made be administered otherwise than in public in any of the following cases" and s. 45(1)(c) provides that one of these includes proceedings involving lunacy and minor matters.

113. If the case is heard in public, it follows that anybody who wishes to attend the case is entitled to attend and anybody who wishes to report the case is entitled to report it, subject to any reporting restrictions that might be imposed by the Court. However, a case be heard otherwise than in public and this simply means is that the public are not entitled to attend the proceedings and that the normal right to report a case does not apply. However, it does not necessarily mean that there can be no reporting of the case. The position is that it is open to a court to say that it is hearing a case in private, so that members of the public do not have a right to attend, but that it is open to the Court to hear the case in private while allowing a limited reporting of that case in the public interest. This may be necessary to protect the interests of minors and the privacy interests of applicants in a case while also protecting the legitimate interests of the media in regard to publicity.

114. The applicants propose that the case is in private and that a limited amount of reporting, as is necessary in the public interest, should be allowed. That is the basis of the application that the matter be heard otherwise than in public. This approach stems from *Independent News and Media Limited and others v. A* [2010] 1 WLR 2262 which is an appeal regarding the Court of Protection in England from the judgment of Hedley J. [2009] EWHC 2858 (Fam). The Court of Protection is a court that mainly deals with incompetent adults. The rules of court state that the cases are to be dealt with in private in general, but it gives the Court a power to hear the case in public and the media in particular have a right to apply, that cases which would generally be heard in private be heard in public. That case involved somebody who was severely disabled and had significant learning difficulties, and there was an application in regard to his welfare. He happened to have particular talents in the musical area which had brought him to public recognition and because of that the media were anxious to report the case. Hedley J. said that the Court was required to balance the competing interests of Article 8 and Article 10 Convention rights and "that balance is necessarily fact-specific to the instant case and the factors that carry weight with a court in one case may not bear the same or may bear greater weight in another." He concluded at paragraph 36:

> "I have come to the conclusion in this case that that balance requires that the media should be allowed to attend these proceedings albeit that in all other respects they will remain private proceedings. I have done so because I am satisfied that it is possible to accommodate the legitimate concerns for privacy and the legitimate aspiration for publicity at the same time. I have further

> concluded that some reporting should be allowed and that it should be for the media to demonstrate what should be allowed (and thus everything else restricted) rather than 'A' having to show what should be restricted with everything else necessarily allowed."

115. The applicants submit that the Court proceed from that basis that the case is in private and then that a limited amount of reporting, as is necessary in the public interest, should be allowed. This position differs subtly from the position that the case be heard in public, but nonetheless it is an important difference. It marks the fact that, in reality, as s. 35 itself indicates and indeed the reference to minor indicates, there is a provision or a facility that these cases can be heard otherwise than in public precisely because there will be cases where it is appropriate to hear them otherwise than in public. The applicants suggest that the fact that the Court decides to hold a case otherwise than in public does not necessarily mean that a blanket descends across it and nothing can be reported. The applicants forward an approach which balances a legitimate public interest with the legitimate interests of the applicants and in particular the children here. Certain aspects of their lives are private and should be kept private. It is very important that the Court keeps control and the best way to do this is by hearing the case in private, allowing designated members of the media to attend.

Submissions of the Media

116. The media opposes the applicants' application under s. 36(4) that the matter is to be heard in private and they say that it is not mandatory that this application be heard otherwise than in public. Counsel for the media ask that the application be heard in public as there is a discretion and they ask that the Court exercise that discretion in favour of the case being heard in public, subject of course to the right of the Court to control and give directions in relation to the dissemination of any information ventilated in the course of the preliminary application. They also submit that the s. 45 application, in the ordinary event, would be heard in public. The application under s. 45 of the 1961 Act has to be heard in public unless, by statute, it is permitted to be heard in private. The Status of Children Act, 1987 and the Guardianship of Infants Act, 1961 give the Court a discretion as to whether to hear the case in private or in public. Under both s. 45 of the 1961 Act and under s. 36 of the 1987 Act, there is a discretion for the Court to rule that certain parts of the evidence will be in private but that other parts will be in public.

117. Counsel for the media indicated that the case be heard in public and that there should be a reporting restriction on the case such that the parties are not identified and no information be reported that might tend to identify them. The evidence of the individuals in question should be heard in private.

118. There is a discretion in the Court, pursuant to the application now being made, under both s. 45, which is dealt with in *Re A Ward of Court* [1996] 2 IR 79 and similarly under the 1987 Act, for the Court to rule that certain parts of the evidence will be in private but the other parts would be in public. Counsel for the media submit that these statutes do not provide for that selective reporting and the appropriate approach is that which was put to Lynch J in the *Ward of Court* case. If the Court is minded to hear the case in public, one can say the hearing of the individuals will be in private but the rest of the hearing will be in public. When the hearing is in public, it is still open to the Court to say that there are going to be reporting restrictions and that if certain issues arise regarding some of the evidence given by individuals during the public hearing then it would be appropriate for the Court to direct that any reference to the evidence of the individuals is to be excluded from reporting. That is a much easier way of working it than the way in which the applicants suggest.

119. According to counsel for the media the starting point is that the matter is to be heard in camera unless and until the Court suggests otherwise. It is also clear that

whether a case is referred to as in camera, in private or in chambers, the in camera rule is that everybody, bar the parties and their representatives, are excluded from the hearing of the case and that, accordingly, it is not possible to achieve the halfway house that the applicants are suggesting. The submission on behalf of the media is that the parties to the proceedings would give their evidence in private but that the balance of the proceedings be held in public, subject of course to the crucial safeguard that the Court, pursuant to its inherent jurisdiction, can impose restrictions as required to protect and preserve the anonymity of the parties and protect other information of a sensitive nature.

Conclusion

120. The Court invited the media to apply to the Minister for Justice to be appointed as researchers for the purposes of s. 40 of the Civil Liability and Courts Act, 2004. The media duly did so, however, this request was denied by the Minister. In this case there is a question of control being left to the Court on the basis that the Court, accepting the methodology proposed by the applicants which is derived from the thinking and analysis in the English *Independent News* case, upheld ultimately in the Court of Appeal from Mr. Justice Hedley. The Court accepts that it is a persuasive authority among all the authorities considered, and it is not only persuasive from a respected neighbouring jurisdiction but it is also very much consistent with the type of discretion the Court has to deal with in this case. The matter fits into the discretionary framework in which the Court can and must consider this case.

121. The Court accedes to the application of the applicants under the Status of Children Act, 1987 to have the matters heard otherwise than in public, but subject to the general rubric as exemplified by in Hedley J.'s judgment in *Independent News and Media Limited and others v. A.*

122. The Court directs that:

> 1. Pursuant to Section 36(4) of the Status of Children Act 1987, that the application pursuant to Section 35 of the said Act made in these proceedings be heard otherwise than in public.
>
> 2. Pursuant to Section 45 of the Court (Supplemental Provisions) Act 1961 that such other applications as are made in these proceedings be heard otherwise than in public.

Notwithstanding such directions, the Court on the application of the Sunday Times, the Irish Times and Independent Newspapers directs and permits that the said newspapers be entitled to attend at and report upon these proceedings subject to the following conditions:

> 1. That each newspaper shall designate a reporter who shall attend at and report upon the proceedings.
>
> 2. That the identity of the Applicant shall not be disclosed and that no matter which would tend to so identify them shall be disclosed.
>
> 3. That the evidence of the Third and Fourth-Named Applicants and the notice party shall be given in private and such evidence shall not be disclosed.
>
> 4. That redacted copies of the transcript of the evidence given to date in these proceedings shall be made available to the designated reporters, such redactions to be in accordance with the directions of

the Court. The costs of the transcripts to be borne by the newspapers.

5. That the newspapers and the designated reporters comply with such further directions as may be made from time to time by the Court in regard to the reporting of the case.

6. That no contemporaneous social media reporting e.g. by Twitter shall be carried out by the designated reporters.