Neutral Citation: [2014] IEHC 152

THE HIGH COURT

FAMILY LAW

[2013 No. 52 M]

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964AND IN THE MATTER OF A.R.K. (AN INFANT)

BETWEEN

F

Applicant

AND

G

Respondent

JUDGMENT of Mr. Justice Keane delivered on the 15th day of January 2014

Introduction

1. In these proceedings, which were commenced by Special Summons issued on the 4th October 2013, the applicant seeks two specific reliefs. The first is an order or orders pursuant to section 11 of the Guardianship of Infants Act 1964 ("the 1964 Act"), mirroring certain orders made by the Superior Court of California in the United States of America ("the California Court") on the 3rd July 2013 in litigation between the same parties. The second is an order pursuant to section 6A of the Guardianship of Infants Act 1964 appointing the respondent as guardian of the parties' child. The respondent opposes the grant of any relief.

2. In essence, the applicant presents two broad issues for determination. The first is whether this court has the jurisdiction to make a "mirror order" as envisaged by the applicant. The second, which arises only if the Court answers the first question in the affirmative, is whether such an order can and should be made in the particular circumstances of the present case.

Background

3. With one exception, which will be specifically addressed later in this judgment, the parties are broadly in agreement concerning the facts that are relevant for the purposes of the proceedings before this Court. Those facts are as follows.

4. The parties are the biological parents of a male child born in Massachusetts on the 7th April 2011.

5. The applicant is a dual citizen of the U.S.A. and of Ireland. The respondent is a U.S. citizen. Both parties are well educated and well travelled. They met in the United States in 1998 and started a romantic relationship. Since then, they have travelled extensively and have lived for significant periods in Ireland, in Montenegro and in two different parts of the United States.

6. The parties have never been married. Their personal relationship ended shortly after the birth of their child. It appears to be common case that the parties' parenting relationship is now a high-conflict one.

The California proceedings

7. The Superior Court of the State of California in the United States made a decision and order on the 3rd July 2013 in proceedings between the parties that had commenced on the 1st March 2012.

8. The respondent commenced those proceedings by seeking an order acknowledging his parental relationship with the child, as well as orders granting him sole legal and physical custody, with supervised visitation access for the applicant. The applicant sought, unsuccessfully, to contest the jurisdiction of the Californian Court, but also requested that it grant a Domestic Violence Protection Order and various associated reliefs.

9. Most significantly for the purpose of the present proceedings, the applicant filed a request for an order to permit her to move with the parties' child to Ireland or Montenegro. It would seem that, under the law of the State of California, proceedings in which such orders are sought are described as "move-away" proceedings, although in this jurisdiction they would more usually be termed "relocation" proceedings. The foregoing observation is made solely for the purpose of clarity, since, as far as this Court is aware, nothing turns on that difference in nomenclature.

10. In the course of the California proceedings, the parties requested that a child custody evaluation be carried out and the California Court so ordered, holding that this was in the child's best interests by reference to the matters in issue between the parties. Dr. A conducted the evaluation. The applicant subsequently retained her own expert, Dr.B. Each of those experts gave evidence and was examined by both parties in those proceedings.

11. As a formal or evidential matter the California Court found that the respondent is the child's father. That court next determined that the United States is the child's state of habitual residence, as that term is defined not only in the Hague Convention on the Civil Aspects of Child Abduction, but also in the U.S. legislation implementing that Convention and, most interestingly, in the implementing legislation in this State, *i.e.* the Child Abduction and Enforcement of Custody Orders Act 1991.

12. The California Court found it to be in the child's best interests that the parties have joint legal custody of him (including the joint right to determine the child's country of habitual residence) but that, for the time being at least, the applicant should have sole physical custody, subject to visitation rights that permit the respondent to maintain frequent and continuing contact.

13. In the course of the California proceedings, it appears that the applicant narrowed her move-away application to one that she be

permitted to bring the child to live primarily in Ireland. The applicant seeks to do so on the basis that her relationship with the respondent has ended and she wishes to return to live with her family, to avail of their support and to care for her mother, who, sadly, is terminally ill. The California Court found as a fact that those constitute good faith reasons for the applicant's request to relocate to Ireland with the parties' child.

14. The California Court concluded that it is in the child's best interests to move to Ireland with the applicant.

15. The California Court made a number of orders in relation to the respondent's visitation rights with the child in Ireland, which orders are expressed to focus on the child's right to maintain a relationship with the respondent. Those orders relate to visitation by means of electronic communication, as well as to the nature, frequency and financing of physical visits by the respondent to the child in Ireland, and by the child to the respondent in California. The relevant schedule covers the first year following the finalisation of the court's order and is to be continued by default thereafter, unless modified by the written agreement of the parties or further order of the court.

16. It would appear that, on the authority of a decision of the Court of Appeal of the State of California (*In re Marriage of Condon* (1998) 62 Cal. App. 4th 533), the California Court was required to address, among other matters, the jurisdictional problem whereby "California court orders governing child custody lack any enforceability in many foreign jurisdictions and lack guaranteed enforceability even in those which subscribe to the Hague Convention on the Civil Aspects of International Child Abduction" (at p. 547).

17. The solution to that problem, which the California Court is required to apply by the California Court of Appeal in *Condon* (at p. 547-8), is that:

> "[B]efore permitting any relocation which purports to maintain custody and visitation rights in the non-moving parent, the trial court should take steps to insure its orders to that effect will remain enforceable throughout the minority of the affected children. Unless the law of the country where the children are to move guarantees enforceability of custody and visitation orders issued by American courts, and there may be no such country, the court will be required to use its ingenuity to ensure the moving parent adheres to its orders and does not seek to invalidate or modify them in a foreign court."

18. Pursuant to the duty imposed on it by the California Court of Appeal in *Condon*, the California Court, in making orders as already described above, went on to order as follows (in that part of the order most relevant to the present application):

> "4. Mother is awarded sole physical custody of [the child]. Mother may travel to Ireland with [the child] subject to the conditions set forth above that are incorporated herein and reiterated in part as follows:
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> …
>
> b. Mother shall register this order with the appropriate authorities in Ireland under the Hague Convention and, if appropriate, the United States. Proof of this registration is required prior to Mother being allowed to travel to Ireland with [the child]. The requirement must be made annually with proof to this court and to father.
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> c. Mother shall file this order in the appropriate Court in Ireland as a "mirror" order otherwise, if such a filing is permissible in Ireland. If a "mirror order" or "equivalent order" is not able to be filed, then Mother shall seek to have an order filed in an Irish court that specifies that only California has jurisdiction to modify this order, that Ireland only has jurisdiction to enforce this order, and that [the child] is a citizen of the United States and Ireland and is a habitual resident of the State of California and the United States of America. Proof of this filing or a certified ruling from a Court in Ireland that such filing is not permitted under the law of Ireland, must be filed with this Court prior to mother being allowed to travel to Ireland with [the child].
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> …
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> e. Mother will retain legal counsel in Ireland to assist Father in obtaining a legal guardianship for [the child] pursuant to the Guardianship of Infants Act as discussed above. If Father fails to cooperate as necessary, this requirement that Mother assist Father in obtaining guardianship will be deemed waived. Mother will be required to consent to legal guardianship. This requirement shall be accomplished within the first six months following this order being deemed final."

19. On the 5th September 2013, at the conclusion of a further hearing involving lengthy oral argument, the California Court modified its order to no longer require registration of its order with the appropriate authorities in Ireland, having correctly concluded that no such process exists in this jurisdiction. As part of the same order, the California Court refused the respondent's application for a stay on its judgment and order pending appeal.

20. It is common case between the parties that the respondent has filed an appeal against the decision of the California Court. There is disagreement between them concerning how long it might take for that appeal to be heard and determined. The applicant is advised that it might take upwards of two years. The respondent avers that the appeal will be determined before the end of 2014.

The present proceedings

21. On the 2nd October 2013 in this Court, Hogan J. gave the applicant the necessary leave to issue the present proceedings against the respondent, and liberty to serve them upon him together with a copy of the Order granting leave.

22. As already noted above, the applicant then commenced these proceedings by Special Summons issued on the 4th October 2013, seeking the specific reliefs already described. The Special Summons is grounded on an affidavit of the applicant sworn on the 27th September 2013, to which, amongst other documents, the California Court judgment and orders already discussed are exhibited.

23. A Notice of Motion issued on the 10th October 2013, grounded on an affidavit of the applicant's solicitor sworn on the same date, asserting grounds of urgency in connection with the application for "mirror" orders under section 11 of the Guardianship of Infants Act 1964. The applicant swore a supplemental affidavit on the 17th October 2013 invoking her mother's terminal illness as constituting a particular ground of urgency.

24. The respondent swore a replying affidavit in California on the 6th November 2013, which affidavit was filed on his behalf by his solicitors on the 11th November 2011. In that affidavit, the respondent makes clear that he has entered an Appearance in these proceedings for the purpose of contesting the jurisdiction of this Court to entertain, or make any Order in, them, and for the purpose

of taking issue with various averments in the affidavits sworn by the applicant, including the applicant's contention that the matter is urgent.

25. The parties having joined issue, the Court scheduled the proceedings for trial on the 14th November 2013 and the matter was heard in the course of a lengthy sitting on that date. In deference to the number of issues raised - and the wide-ranging submissions made - by Counsel on behalf of each of the parties, the Court reserved its decision at the conclusion of that hearing.

The positions adopted by the parties

26. The applicant's position is simply stated. It is that she wishes to do, and believes that she has done, everything within her power to comply with the order of the California Court. The applicant submits that this Court can, and should, make "mirror" orders reflecting, as closely as possible, the relevant operative parts of that order. In addition, the applicant contends that this Court can, and should, receive the appropriate undertaking (or undertakings) from her that she will comply with the relevant parts of the order of the California Court (thereby making those parts of that order enforceable in this jurisdiction). The applicant submits that she has taken all reasonable steps to assist the respondent in securing legal guardianship of the child in Ireland. Specifically, the applicant furnished the respondent with the form of statutory declaration that he is required to make in order to become the child's guardian by operation of the provisions of s. 2(4) of the 1964 Act. In light of his failure, neglect or refusal to execute that statutory declaration, the applicant has purported to bring an application before the Court to have the respondent appointed the child's guardian by the Court on the alternative basis provided by s. 6A of the 1964 Act.

27. The respondent's position was set out with directness in the course of legal argument. It is that he does not believe that it is in the child's best interests to relocate to Ireland with the applicant. He has lodged an appeal against the decision of the California Court permitting that relocation, which appeal is currently pending before the California Court of Appeal. The respondent does not believe that the custody and visitation rights concerning the parties' child that the Superior Court has required the applicant to seek to secure on his behalf in this jurisdiction are of any benefit to him. The respondent has averred that "I do not see a need for me to execute a statutory declaration in relation to guardianship which governs guardianship within the Irish jurisdiction as I have full parental rights by operation of the law in the State of California where [the child] continues to reside." Needless to say, by reference to the position he has adopted, the respondent has not himself applied to this Court to be appointed the child's guardian.

28. The respondent submits that the Court should refuse the relief sought on a number of grounds that may be shortly summarised as follows:

> (a) Any jurisdiction to make a "mirror" order that there might once have been, either at common law or in exercise of the power conferred under section 11 of the 1964 Act, has been entirely displaced by the commencement of the provisions of the Protection of Children (Hague Convention) Act 2000 ("the 2000 Act"), because the United States of America is not (yet) a contracting state to the 1996 Hague Convention on Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children ("the Hague Convention on the Protection of Children"), which is given the force of law in the State by the 2000 Act, and because – the respondent submits -the 2000 Act expressly excludes and extinguishes any other jurisdictional basis upon which recognition, enforcement and co-operation in matters of parental responsibility or the protection of children could previously have been ordered by the courts in this State.
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> (b) If such a jurisdiction does exist, the Court should be circumspect in permitting it to be invoked, and should exercise it only sparingly (and not at all if the child concerned is outside the jurisdiction and connected only tenuously to it).
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> (c) The Court cannot and should not assume jurisdiction if the evidence shows that the applicant acted in breach of the parental rights of the respondent in obtaining Irish citizenship for the child, or in applying for an Irish passport for the child, or if the applicant engaged in deception of the Irish authorities in either regard.
>
> (d) The Court cannot make a "mirror" order under section 11 of the 1964 Act, without first conducting what is described on behalf of the respondent as "a full welfare hearing".
>
> (e) The Court should not exercise its discretion to make a mirror order (or orders), even assuming that it has the jurisdiction to do so, because of the risk of inconsistent orders between the courts of this jurisdiction and those of the State of California in the particular circumstances of the present case.
>
> (f) The Court should not exercise its discretion to make any such order, even assuming it has jurisdiction to do so, because it would be contrary to public policy in circumstances where, the respondent contends, the Superior Court seeks to oust the jurisdiction of this Court.

29. In the context of the foregoing arguments (although without prejudice to any of them), the respondent submits that, were this Court to find that it has jurisdiction under section 11 of the 1964 Act to make orders of the kind the applicant seeks, the respondent would wish to invoke the same jurisdiction to request the Court to adjudicate from scratch on all issues concerning custody of, and access to, the child and on the potential relocation of the child (back) to California with the respondent.

Council Regulation (EC) No 2201/2003

30. Within the European Union, Council Regulation (EC) No 2201/2003 of November 27, 2003 (popularly referred to as "Brussels II *bis*"), governs questions of jurisdiction and the recognition and enforcement of judgments in matters of parental responsibility. Article 8 establishes the general principle that jurisdiction lies in the courts of the Member State in which the child concerned is habitually resident. Articles 9 to 13 set out certain qualifications upon, and exceptions to, that principle, none of which are relevant on the facts of this case. Article 14 deals with the question of 'residual jurisdiction', stating:

> "Where no court of a Member State has jurisdiction pursuant to Articles 8 to 13, jurisdiction shall be determined, in each Member State, by the laws of that State."

31. In this case, there is no suggestion that the court of any Member State has jurisdiction pursuant to any of the relevant articles of Brussels II *bis*. Accordingly, Article 14 of Brussels II *bis* requires that jurisdiction must be determined by reference to the laws of Ireland.

The 2000 Act

32. The respondent contends that the commencement of the Protection of Children (Hague Convention) Act 2000 ("the 2000 Act") on the 1st day of January 2011 effectively ousted any jurisdiction to make "mirror" orders that this Court might have asserted prior to

that event.

33. The purpose of the 2000 Act was to give the force of law within the State to the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children of the 19th day of October 1996 ("the 1996 Convention"). Ireland signed the 1996 Convention on the 1st April 2003 and, ultimately, ratified it on the 30th September 2010. The United States of America signed the 1996 Convention on the 22nd October 2010 but has yet to ratify it.

34. The respondent points to section 1 of the 2000 Act which defines "contracting state" to mean "a state…in respect of which the [1996] Convention has entered into force…." Article 61 of the 1996 Convention provides that it shall enter into force "for each State ratifying, accepting or approving it subsequently, on the first day of the month following the expiration of three months after the deposit of its instrument of ratification, acceptance, approval or accession." Under section 15 of the 2000 Act, the Minister for Foreign Affairs is empowered to declare by order that, in accordance with Article 61 of the 1996 Convention, it will enter into force for a specified state on a specified date. It is common case that no such order has been made in respect of the United States of America and that, in consequence, the U.S.A. is not a contracting state for the purposes of the 2000 Act.

35. The respondent argues that, in giving effect to the recognition and enforcement provisions of the 1996 Convention, the 2000 Act establishes an express and complete delineation of the Court's jurisdiction in that regard, representing the conscious choices of the legislature in the enactment of that legislation. The respondent contends that the exercise of any analogous jurisdiction in respect of the recognition or enforcement of an order of a court in a non-contracting state is, therefore, "expressly excluded" by the terms of the 2000 Act.

36. In order to address that submission, it is necessary to consider, first, the proper construction of both the 2000 Act and the 1996 Convention, and second, the nature of the jurisdiction that the applicant is seeking to invoke.

37. At the core of the 2000 Act is section 2, which provides that, subject to the provisions of that Act, the 1996 Convention is to have the force of law in the State and judicial notice is to be taken of it.

38. Article 1 of the 1996 Convention lists among its objectives those of determining the state whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child, and of providing for the recognition and enforcement of such measures of protection in all contracting states. Article 3 provides that the measures concerned may deal in particular with, amongst other matters, "rights of custody, including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence, as well as rights of access including the right to take a child for a limited period of time to a place other than the child's habitual residence."

39. Significantly, section 12 of the 2000 Act provides (in relevant part) that:

> "Nothing in this Act shall affect-
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> …
>
> (b) any jurisdiction-
>
> > (i) … of a court to take measures directed to the protection of the person or property of a child who is not habitually resident in a contracting state, or
> >
> > (ii) of a court to order the recognition, enforcement or non-recognition of measures which are directed to the protection of the person or property of a child and which have been taken by the authorities of a non-contracting state."

40. It follows that, far from amounting to a complete delineation of the relevant jurisdiction in respect of rights of custody and access (as exclusively that established in respect of a contracting state under the 1996 Convention), the 2000 Act expressly preserves any separate jurisdiction of the court there may be in relation both to a child who is not habitually resident in a contracting state and in relation to the recognition and enforcement of measures that have been taken by the authorities of a non-contracting state in respect of a child. It is, therefore, this express saver in respect of any such separate jurisdiction there may be that represents a conscious choice by the legislature and that choice is, as might be expected, to preserve rather than extinguish it.

41. Even if the 2000 Act did not preserve that separate and additional jurisdiction in express terms, it would not be possible to accept the respondent's argument that certain jurisprudence of the Supreme Court impels the conclusion that, by necessary implication, no such jurisdiction can have survived the commencement of that Act. In advancing that argument, the respondent relies on the decisions of the Supreme Court in *G. McG. V. D.W. (No. 2)(Joinder of the Attorney General)* [2000] 4 I.R. 1 and *Mavior v Zerko Limited* [2013] IESC 15.

42. The former case concerned what was, in effect, an application, pursuant to section 29(1)(d) or (e) of the Family Law Act 1995 ("the 1995 Act"), for the legal recognition within the State of a foreign divorce. In granting the relief sought, the High Court developed the existing common law in concluding that it was lawful to recognise foreign divorces based on residence in a foreign jurisdiction, as well as those based on domicile there. The High Court accepted that the law of divorce in the State had dramatically altered in light of the passing by referendum of the Fifteenth Amendment to the Constitution and the subsequent enactment of the Family Law (Divorce) Act 1996 ("the 1996 Act"), creating for the first time in the history of the State a divorce jurisdiction both under the new Article 41.3.2° of the Constitution and under the 1996 Act.

43. The Attorney General, who did not learn of the case until after judgment was delivered and a final order had been made, sought to be joined in exercise of the inherent jurisdiction of the High Court, in order to enable him to bring an appeal to the Supreme Court to address what was, on any view, a legal issue of some significance. That application was refused by the High Court and the Attorney General appealed against that refusal to the Supreme Court.

44. However, as the Supreme Court pointed out (*per* Murray J, as he then was, at p. 27 of the report) the provisions of section 29 of the 1995 Act comprehensively address the potential role of the Attorney General in proceedings under that section:

> "[The relevant part of section 29] had, *inter alia*, the following effects:-

(a) It laid down the circumstances and means by which the Attorney General could become a party in any case under section 29.

(b) It did not make it mandatory that he be joined in all or in any type of such case and expressly excluded such a mandatory power (section 29(6)).

(c) It did not make it mandatory that the Attorney General be given notice in all or any type of application.

(d) It limited the powers of the court to giving notice to the Attorney General or to requiring him to argue a specific point of law (even if not a party to the proceedings).

(e) It provided for the eventuality in all cases under s. 29 of the Attorney General not being a party."

45. It was specifically in that context that Murray J concluded (at pp. 27-8):

> "It seems to me clear that the foregoing represent conscious choices of the Oireachtas [the houses of the national parliament] in the enactment of the legislation in question.
>
> They are express and complete providing for, on the hand the joinder of the Attorney General in certain circumstances and providing for the consequences of his non-joinder in all circumstances.
>
> Having regard to the foregoing features of this case, I am of the view that neither the High Court nor this court can attribute to itself some inherent jurisdiction going beyond the scope of that conferred expressly on the High Court by the Oireachtas in that Act."

46. The position in this case is quite different. The applicant here does not invite the court to identify and apply an inherent jurisdiction to make a "mirror" order or "mirror" orders. As will be considered in greater detail below, the applicant seeks an order or orders under section 11 of the 1964 Act or under the existing common law. Nor is this a situation where an opportunity to invoke an existing jurisdiction was lost (before the Court's inherent jurisdiction was invoked), since it is common case that the jurisdiction conferred by the 2000 Act extends only to measures taken by the judicial or administrative authorities of contracting states and the United States of America is not yet a contracting state.

47. Moreover, it does not seem to me to follow that a specific legislative measure designed to give the force of law in this State to a Convention governing questions of jurisdiction and enforcement in a specific field of private international law between contracting states must be construed as repealing, *sub silentio*, any and all pre-existing jurisdictional principles in that field between this State and a non-contracting state, whether by reference to the principle *expressio unius est exclusio alterius* or any other principle. In my view, the *expressio unius* principle, in so far as it is pertinent at all to the legislation at issue, goes no further than to require that the jurisdictional principles it sets out in respect of the matters covered by the Convention apply to any relevant jurisdictional issue between contracting states to the exclusion of the application of any further or other jurisdictional principle *as between those states*. It does not go so far as to extinguish the established jurisdictional principles that hitherto applied between this State (as a contracting state) and a non-contracting state. Those jurisdictional principles continue to apply to such cases.

48. The second decision upon which the respondent relies in advancing his argument on this point is that of the Supreme Court in the case of *Mavior v Zerko Limited* [2013] IESC 15. That case concerned an appeal against a refusal by the High Court to order that the plaintiff, an unlimited company, provide security for the costs of its action against the defendant company for money alleged to be due to it for building works it claimed to have carried out. Since the relevant section of the Companies Acts was limited in its terms to the provision of security by limited companies (unlike the plaintiff), and since the relevant rule of court does not extend to such applications against natural or legal persons resident within the European Union (such as the plaintiff), the defendant sought to invoke an inherent jurisdiction of the Court to order the plaintiff company to provide security.

49. Accordingly, what was at issue in that case also was an attempt to invoke the inherent jurisdiction of the Court in the absence of any established legislative or common law jurisdiction to make the order sought. As has already been noted, that is not the position in the present case, where the applicant invokes what she claims is an established legislative and common law jurisdiction to make "mirror" orders in appropriate circumstances.

50. In support of his argument, the respondent seeks to rely on that portion of the unanimous judgment of the Supreme Court in *Mavior* (per Clarke J, Denham CJ and McMenamin J concurring) that cites with approval the relevant passages from the judgment of Murray J in *G. McG.* and elaborates upon them in the following terms:

> "It seems to me that what Murray J. cautioned against in the passages cited was the creation of parallel jurisdictions for resolving much the same area of controversy, founded on, on the one hand, existing law, and, on the other hand, an asserted inherent jurisdiction. As Murray J. pointed out, to attempt to invoke an inherent jurisdiction of the courts so as to go beyond [the] delineation specified, in a constitutionally permissible way, in a statute, would be for the courts to trespass on the legislative role of the Oireachtas. If, in a constitutionally permissible way, the Oireachtas have defined the limits of a particular jurisdiction then it is not for the courts to extend those limits by invoking a vague "inherent jurisdiction".

51. In so far as the jurisdiction of this Court under the 2000 Act in respect of a contracting state, on the one hand, and that of this Court under statute or the common law, or both, in relation to a non-contracting state, on the other hand, can be described as "parallel jurisdictions", it is certainly not the position that they are capable of applying to the same area of controversy in the same case – unlike the parallel "inherent jurisdiction" unsuccessfully invoked in both *D. McG. and Mavior.* The former jurisdiction applies only to controversies between contracting states and the latter solely to controversies where the other state concerned is a non-contracting state.

52. It seems to me that the respondent's argument is based upon the proposition that the creation and implementation of a specific statutory regime for contracting states under the 2000 Act not only supplanted any pre-existing jurisdictional rules that applied between such states (which it plainly did), but also, by necessary implication, extinguished any and all pre-existing jurisdictional rules as applied by this State to non-contracting states (which, in my view, it plainly did not). It seems to me that the latter proposition is a *non sequitur*, and I cannot find anything in the two decisions of the Supreme Court just discussed to support it.

The child's citizenship

53. It is common case that the child of the parties is both a U.S. and an Irish citizen, although there is an issue, addressed *infra*, about the circumstances in which the latter citizenship was obtained.

54. *C.M. v. Delagación de Malaga* [1999] 2 I.R. 363 was a case involving an application for declaratory relief by an Irish citizen child and her Irish citizen mother that the former was being wrongly retained by the defendant Spanish authorities, in circumstances where the child had been born in Spain and handed into the care of those authorities by the mother while she was resident for a number of months in that jurisdiction. The proceedings were brought under the provisions of the Child Abduction and Enforcement of Custody Orders Act 1991 ("the 1991 Act"), which incorporates the provisions of the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the 1980 Hague Convention") into Irish domestic law. The Spanish authorities entered an appearance in the proceedings solely for the purpose of contesting jurisdiction. In the context of that fundamental jurisdictional contest, the High Court found as a fact that the child, who had never been resident in the State, could not establish an habitual residence in this jurisdiction. McGuinness J went on to conclude that it would be inappropriate for an Irish court to assume jurisdiction under the 1991 Act in those circumstances.

55. Having resolved the jurisdictional conflict in relation to the matter of custody in accordance with the rules prescribed under the 1980 Hague Convention, the High Court was also required to consider its jurisdiction in respect of a number of related declarations and reliefs sought by the plaintiff, which it proceeded to do "by reference to the established principles of private international law and the commentaries and case law on those principles." McGuiness J identified two questions as follows (at p. 382 of the report):

> "The first question is whether this Court has jurisdiction to embark on a consideration of the rights and welfare of this child, and to make orders in that regard. Senior Counsel for the defendants concedes that the court has jurisdiction to protect the rights and welfare of any child who is an Irish citizen. In this he is clearly correct. The first plaintiff is an Irish citizen; both her parents are Irish citizens domiciled and resident in Ireland. Despite the fact that I have held that the first plaintiff is habitually resident in Spain, there is no doubt that this Court could assume jurisdiction in her case.
>
> The second question is, however, whether it is appropriate or proper in the circumstances for this court to assume jurisdiction."

56. In considering the second question McGuinness J expressly noted the discussion of the jurisdiction of the Irish courts in regard to children in Professor Binchy's seminal work *Irish Conflicts of Law* (Dublin, 1988), which summarised the position as follows (at p. 324):

> "The fact that the child is an Irish national, regardless of where he or she may be living or present at the time of the proceedings, appears to be a sufficient ground for exercising jurisdiction although it is reasonable that the Irish courts should do so with circumspection."

57. Having considered a range of authorities on the second question, and having accepted that the jurisdiction of this Court in respect of an Irish citizen child must be exercised with caution where the child is abroad and its rights and welfare are *prima facie* subject to the jurisdiction of a foreign court or authority, McGuinness J concluded that it would be inappropriate to assume jurisdiction on the particular facts of that case.

Allegation of Deceit or Fraud

58. I come now to the one significant controversy of fact between the parties for the purpose of the present application. In his replying affidavit sworn on the 6th November 2013, the respondent expresses the belief that the applicant obtained Irish citizenship and an Irish passport on behalf of the child through deceit or fraud and contends that, if that was indeed so, the Court as a matter of public policy should decline to exercise any jurisdiction in relation to the child.

59. The applicant has exhibited to her grounding affidavit, sworn on the 27th September 2013, a copy of the entry made in the Foreign Births Register at the Department of Foreign Affairs in Dublin on the 23rd January 2012 in respect of the parties' child. The applicant has also exhibited to that affidavit a copy of the identification page of the child's passport, which records that the passport issued on the 28th February 2012.

60. In his replying affidavit, the respondent avers that he did not agree to the child becoming an Irish citizen or obtaining an Irish passport and that the necessary steps to register the child's birth and to obtain an Irish passport on his behalf were, therefore, taken without his knowledge or consent.

61. As the California Court noted in its judgment and order of the 3rd July 2013 and as appears to be common case, the applicant is herself a dual citizen of Ireland and the U.S.A., having been born in Ohio to parents who were citizens of Ireland, with whom she moved back to Ireland when she was one year old. This, of course, means that the child of the parties is a person born outside the island of Ireland whose citizenship derives from an Irish citizen parent also born outside the island of Ireland.

62. Section 7 of the Irish Nationality and Citizenship Act 1956, as amended ("the 1956 Act"), provides that Irish citizenship by descent is not conferred upon a person born outside the island of Ireland whose citizenship derives from an Irish citizen parent also born outside the island of Ireland, unless that person's birth is registered under section 27 of that Act. Section 27(2) of the 1956 Act envisages the registration of such a birth by a "person" singular. The regulations in force under the 1956 Act in January 2012 were the Foreign Births Regulations 1956, as amended. They also employ the third person singular in referring to "the person registering the birth".

63. It follows that there is nothing to suggest that there was any fraud or deceit upon the Department of Foreign Affairs in the registration of the child's birth, even if the respondent's allegation that he was not informed of that registration and did not consent to it is found to be true, since there is no requirement that any such birth be registered with the consent of both parents, much less any evidence that the applicant falsely represented that the consent of both parents to such registration was forthcoming. Accordingly, I can find no basis to conclude that it would be contrary to the public policy of the State to recognise a claim of jurisdiction based on the child's Irish citizenship.

64. Insofar as it is suggested that there was some fraud or deceit in the manner in which the applicant subsequently obtained an Irish passport on behalf of the child, it is difficult to see how that is capable of going to the question of jurisdiction (based as it is upon the child's Irish citizenship, rather than upon the child's possession of an Irish passport). Even if it were capable of doing so, again the Court can see no evidence of any fraud or deceit upon the Department of Foreign Affairs which issued the passport. In his replying affidavit, the respondent avers that an Irish passport can only be issued with the consent of both parents, but immediately goes on to concede that there is a form of affidavit required to be sworn for the purpose of a passport application on behalf of a child by a father or mother who claims to be the sole guardian of that child. That requirement is stated in the explanatory note attached to the

application form to be necessary to comply with the terms of the Status of Children Act 1987.

65. Section 6(4) of the Guardianship of Infants Act 1964, as substituted by section 11 of the Status of Children Act 1987, provides that, where the mother of child has not married the child's father, she, while living, shall alone be the guardian of the child unless the father has, with the consent of the mother, made the necessary statutory declaration in accordance with the Act, or has been appointed guardian having made the necessary court application, or has been otherwise appointed guardian in accordance with the 1964 Act. Since there is no suggestion that the respondent has ever done any of those things (indeed, he himself avers that he has turned his face against making the necessary statutory declaration), it seems clear that the applicant was the child's sole guardian as a matter of Irish law at the time that she applied for a passport on the child's behalf in January or February 2012. Accordingly, the Court is not aware of any basis upon which it can be argued, much less established, that the applicant obtained an Irish passport for the child by fraud or deceit.

66. It may be that the gravamen of the respondent's complaint in this regard is the quite different one that the registration of the child's birth and the procurement of a passport for the child amounted to some form of fraud or deceit upon the respondent himself, in circumstances where he claims that those things were done without his consent, against his wishes, and in breach of the his entitlement to "equal parental responsibility" as a matter (the Court must assume) of the law of the State of California. For the purpose of the present proceedings, it is only necessary to observe that the resolution of any such controversy cannot go to the validity of the child's Irish citizenship or to the validity of the child's claim to an Irish passport, whatever its significance may be under the law of the State of California.

"Mirror" orders.

67. The statutory basis of the applicant's claim for "mirror" orders in these proceedings is that provided by section 11 of the Guardianship of Infants Act 1964, as amended ("the 1964 Act"). Section 11(1) provides that:

> "Any person being a guardian of a child may apply to the court for its direction on any question affecting the welfare of the child and the court may make such order as it thinks proper."

68. Both jurisdictionally and substantively, the key provision of the 1964 Act is section 3, which provides as follows:

> "Where in any proceedings before any court the custody, guardianship or upbringing of a child…is in question, the court, in deciding that question, shall regard the welfare of the child as the first and paramount consideration."

69. On a jurisdictional basis, Professor Binchy has noted (*op. cit. supra,* p. 323) that the scope of that section is very wide:

> "It applies not only in Irish cases involving no foreign element but also in cases where one or both parties is of foreign nationality, domicile or residence. It appears clear that section 3 will apply even where a foreign court has already made a guardianship or custody order."

70. On a substantive basis, the requirement that the first and paramount consideration of any court in proceedings must be the welfare of the child - often referred to as "the best interests test" - is both a constitutional mandate (*per* O'Flaherty J in *Southern Health Board v. C.H.* [1996] 2 I.L.R.M. 142) and a reflection of Ireland's international law obligations under numerous treaties and conventions, perhaps most notably the U.N. Convention on the Rights of the Child 1989.

71. While the applicant has drawn to the Court's attention several judgments of the High Court in which "mirror" orders have been referred to in various different contexts, Counsel cannot point to, and the Court has been unable to uncover, any authority in this jurisdiction defining the nature and scope of such an order or the criteria by reference to which an application for one should be considered.

72. I accept the submission made on behalf of the respondent that those cases dealing with applications for recognition and enforcement of orders made pursuant to particular international law instruments such as the European Convention on Decisions concerning Custody of Children and on Restoration of Custody of Children ("the Luxembourg Convention"), the 1980 Hague Convention, or Brussels II *bis* are of limited assistance, since the recognition and enforcement of the foreign orders concerned are primarily governed by the terms of the those instruments, which have the force of law within the State.

73. It is, though, pertinent to consider that, in a number of decisions, the High Court has plainly envisaged the making of mirror orders by foreign courts to reflect orders made (or which could be made) by this Court in relocation cases. For example, in *P.C. v P.W.* [2008] IEHC 469, Abbott J granted an application by a father to relocate with the parties' two children to Hong Kong subject*, inter alia*, to the father's undertaking to "apply for a mirror order of the appropriate court in Hong Kong; such mirror order to have like effect as this order." Similarly, in *U.V. v. V.U.* [2011] IEHC 519, McMenamin J refused an application by a mother to relocate with the parties' children to Spain on a number of different grounds, in respect of one of which he stated (at para. 88): "Importantly, also, I note that no proposals for mirror orders have been put in place in Spain, nor is there any evidence as to whether such could be obtained, although doubtless they could."

74. Of most direct relevance are the general legal principles governing the recognition or enforcement of foreign custody orders as a matter of private international law. The Court was referred to the common law rule set out in *Dicey, Morris and Collins on the Conflict of Laws* (London, 15th ed., 2012) to the effect that a custody order made by a court to which Brussels II *bis* does not apply does not prevent a court from making such orders as, having regard to the child's welfare, it thinks fit, and to the commentary on that rule set out at paragraphs 19-093 to 19-095 thereof.

75. That commentary suggests that the refusal of the English courts to consider themselves bound by foreign custody orders is prompted by two considerations. The first is that a custody order, by its nature, is not final and is at all times subject to review by the court that made it. The second is that in England, as well as in Ireland, by statute the welfare of the child is the first and paramount consideration. The authors acknowledge that this position is in contrast to the developing trend in international law whereby an increasing number of instruments provide for the recognition of foreign custody and access orders in specified circumstances.

76. Paragraph 19-095 of the text just cited summarises the common law principles derived from the relevant jurisprudence in the following way:

> "[The custody order of a foreign court] deserves grave consideration but the weight to be given to it in England must depend on the circumstances of the case. An order made very recently, no relevant change of circumstances being

alleged, will carry great weight. Its persuasive effect is diminished by the passage of time and by a significant change in circumstances, for example the removal of the child to another country or the supervening illness of one of the claimants. The status of the foreign court, and the nature of the proceedings in and the legal approach taken by the court, may all be taken into account. The effect of the foreign order will be at its weakest when it was made many years ago and has since been modified by consent and the child has nearly attained his majority and so can decide for himself with which parent he wishes to live."

77. Those principles are, in large part, drawn from two particular decisions: that of the Judicial Committee of the Privy Council of the U.K. in *McKee v. McKee* [1951] 1 A.C. 353 and that of the New Zealand Supreme Court in *C. v. C.* [1973] 1 NZLR 129. Neither case involved an application for anything analogous to a "mirror" order, but rather each concerned a custody dispute against the background of an existing custody order of a foreign court.

78. In *McKee*, there was in existence a valid Californian court order giving the custody of a child to her mother, which order had been evaded by the father in removing the child to Ontario, Canada. Both parents and the child were U.S. citizens. The Privy Council held, in essence, that all other interests, including the existence of a valid order of a foreign court, must yield to the paramount consideration of the welfare and happiness of the infant, reversing the decision of the Canadian Supreme Court that the child be returned to the custody of its mother and reinstating that of the Ontario Court of Appeal, which had affirmed the first instance decision that the father should retain custody of the child in the State of Ontario. It is notable that, in reaching its decision, the Privy Council found that, in the period prior to the judgment of the court of Ontario, "the facts, which, as appeared on the face of the California order, had influenced that court had substantially changed." In giving judgment for the court, Lord Simonds stated (at p. 364):

> "Once it is conceded that the court of Ontario had jurisdiction to entertain the question of custody and that it need not blindly follow an order made by a foreign court, the consequence cannot be escaped that it must form an independent judgment on the question, though in doing so it will give proper weight to the foreign judgment. What is the proper weight will depend on the circumstances of each case. It may be that, if the matter comes before the court of Ontario within a very short time of the foreign judgment and there is no new circumstance to be considered, the weight may be so great that such an order as the Supreme Court made in this case would be justified. But if so, it would not be because the court of Ontario, having assumed jurisdiction, then abdicated it, but because in the exercise of its jurisdiction it determined what was for the benefit of the infant."

79. In *C v C*, a Canadian court had made an order granting custody of a child to the mother where the parents' marriage had broken up. The father brought the child to New Zealand and applied for an order granting him custody of the child there. In an *ex tempore* decision, Speight J acknowledged that the court had to consider the case by reference to the welfare of the child as the primary concern. Having done so, and before ultimately ruling that the child should be returned to the custody of the mother, he continued (at p. 130-1):

> "I think the existence of the Canadian order, however, is also of some considerable relevance. There are two other factors. In the first place the existence of such an order is by no means irrelevant. There is, of course, the New Zealand Court of Appeal decision in *Re B (Infants)* [1971] NZLR 143, the effect of which is that there is no automatic enforcement of foreign orders and that the proper course is to do as I have just done, namely to consider the matter on its merits. Other things being equal, however, it is desirable in my view that orders of foreign Courts should be given some weight in circumstances such as the present. We are interested in a conflict of evidence as to the conduct of the parties towards the child. The applicant makes allegations against the respondent of bad treatment of the child in Canada, but by his action in brining the child to New Zealand, he has largely prevented her from putting her Canadian evidence before this Court in its most effective form. Consequently, the findings of the foreign court which considered the same matters on a prior occasion should be given some weight greater or less depending, among other things, on the status of the Court, the type of hearing, whether it was a full one or a mere formality, and the similarity or otherwise of the laws of the country in question."

80. I accept that the foregoing principles represent the common law in this jurisdiction also. Moreover, it seems to me to follow from a consideration of the cases just discussed that what the respondent describes as a "full welfare hearing" is not required in every case.

81. Before concluding the present summary of the applicable common law principles, it is necessary to consider two more recent English decisions that specifically deal with the jurisdiction to make "mirror" orders.

82. In *S.W. v. C.W.* [2011] EWCA Civ 703, the Court of Appeal of England and Wales had to consider the validity of what was, in effect, an order of the High Court substantially varying a "mirror" order previously made by that court. The case concerned the child of an English father and Colombian mother. Although the child had British citizenship derived from his father, he had lived all his life in Malaysia. In consequence of the dissolution of his parents' marriage, a Malaysian court had made a terse order awarding care, custody and control of the child to the father and granting visitation rights to the child's mother "at reasonable times". The father sought to obtain a British passport for his son and was informed by the UK High Commission in Kuala Lumpur that it would require an order from a British Court in order to validate that application. Accordingly, he applied in England for, and was granted ex parte, an equally brief "mirror" order, made subject to a requirement that service of that order be effected on the mother forthwith, and also subject to the grant of permission to either party to apply to vary that order. A few months later, the mother (who, it appears, was then resident in the U.K.) applied for a substantial variation of that order at which point the father's Malaysian solicitors challenged the jurisdiction of the court. The father was not present or represented at the eventual hearing and, in the words of the Court of Appeal, "in his absence a strong order resulted" in favour of the applicant mother. The father appealed and his appeal was upheld by the Court of Appeal on jurisdictional grounds of little relevance to the issues before this Court in light of the quite different jurisdictional position in Irish law as reflected in the judgment of McGuinness J in *C.M. v. Delagación de Malaga*, already discussed above.

83. However, the judgment of Thorpe LJ does contain the following illuminating discussion on the nature of a "mirror' order, the rationale underpinning the concept, and, perhaps surprisingly, the lack of any clear jurisdiction to make one:

> "46.
>
> ….
>
> One of the imperatives of international family law is to ensure that there is only one jurisdiction, amongst a number of possible candidates, to exercise discretionary power at any one time. Obviously, comity demands resolute restraint to

avoid conflict between states. This is the realistic aim of Conventions and Regulations in this field.

47. Another realistic aim is to provide protective measures to safeguard children in transit from one jurisdiction to another or to ensure their return at the conclusion of a planned visit.

48. Protective measures take the form of undertakings, mirror orders and safe harbour orders. As yet there is no accepted international, let alone universal, mechanism to achieve protective measures. Even amongst common law jurisdictions there is no common coin.

49. In many ways the power to make mirror orders is the most effective way of achieving protective measures. What the court in the jurisdiction of the child's habitual residence has ordered is replicated in the jurisdiction transiently involved in order to ensure that the parents are equally bound in each State.

50. The mirror order is precisely what it suggests, an order that precisely reflects the protection ordered in the primary jurisdiction. The order in the jurisdiction transiently involved is ancillary or auxiliary in character.

51. This categorisation is well established in our case law. In *F v F ((minors)(custody): Foreign Order)* [1989] Fam 1, Booth J. directed that no access should take place in France until a mirror order was made in that jurisdiction. There are innumerable other examples of the use of mirror orders both in this jurisdiction and in other jurisdictions, most but not all States party to the 1980 Hague Abduction Convention. By way of further example I cite the case of *Re HB* [1998] 1 FLR 422.

52. However, this appeal also illustrates the practical difficulty of a requirement in State A for a mirror order in State B which, for jurisdictional or other reasons, then declares itself unable to comply.

53. Undoubtedly the controlled movement of children across international frontiers would be a good deal safer and easier if, say, the jurisdiction of the common law world or the jurisdictions operating the 1980 Hague Convention, put in place powers to enable mirror orders to be made in response to appropriate requests.

54. It has long been perceived by specialist judges and practitioners that in England and Wales there is no clear jurisdiction to make a mirror order in response to an appropriate request. As a matter of history the international Family Law Committee has repeatedly drawn attention to this deficit and requested an enabling section in a related statute."

84. Thorpe L.J. went on to consider the earlier decision of Singer J. in the Family Division of the High Court in the case of *Re P (A Child: Mirror Orders)* [2000] 1 FLR 435. That was a case in which, as Thorpe LJ noted in *S.W v. C.W.,* there was considerable pressure on the judge to find jurisdiction in the following circumstances. A Californian court had refused the application of an Iranian national father, resident in the United Kingdom, for the return of the parties' child to the UK under the Hague Convention, but instead made an order regulating rights of visitation in England by the child to the father. That order expressly required a mirror order to be entered in the Family Division of the High Court in England. Both parties were consenting to an order in those terms and the first proposed visit was imminent. As Singer J. put matters (at p. 437):

> "The primary question which I have had to consider in this case is whether the making of an order such as I am asked to make is consistent with this court's powers and jurisdiction. I should say that by today the terms of the order that the English court is invited to make are agreed between the parties. Because at first blush it seemed to me that there were significant arguments for the proposition that jurisdiction was, at best, questionable, I invited through the Official Solicitor the instruction of counsel to act as amicus. I am very grateful to the Official Solicitor and to Mr. Henry Setright for taking up this challenge overnight."

85. Singer J. went on to describe – as I have done above in relation to a number of Irish cases – a number of English cases in which the English courts had, where a move abroad was in contemplation, required the parties to seek mirror orders in the foreign jurisdiction concerned. Singer J. later observed (at p. 441):

> "I therefore have no difficulty at all in concluding as a matter of common sense, of comity and indeed, may I say of public policy, the High Court should have the ability to make orders such as this: that is to say orders of the sort which English judges have frequently, in past years, invited other judges to make."

86. I can find nothing to argue with in the foregoing analysis of the Court of Appeal or of the Family Division of the English High Court. However, in subsequently describing the formulation that was being advanced on behalf of the Official Solicitor as the basis for the court's jurisdiction to actually make a mirror order, Singer J. then continued (at pp. 441-2):

> "When [the Court] makes a mirror order…the judge does not consider the welfare of the child. He takes the order of the foreign court as read. Thus I can frankly say that I have not for a moment considered whether I would have provided this contact or a different contact, and indeed I have not investigated the merits, nor been shown any material beyond the order of the American court."

87. Returning to the judgment of Thorpe LJ in the Court of Appeal in *S.W. v. C.W.*, having considered the passages from the earlier decision of Singer J. to which reference has just been made, the court went on to observe:

> "62. For the purpose of this appeal what is valuable is Singer J's recorded analysis of the essential character of a mirror order. I would adopt all that he said on that point which is fundamental to the disposal of the present appeal.
>
> 63. There is not the smallest possibility of doubting the nature of the order made by Moylan J. He did not investigate the merits of the Malaysian order. Still less did he exercise any discretion. He simply acceded to a very clear request for a mirror order, despite the fact that the stated necessity was unconventional and questionable. It was nothing to do with protective measures for the child in any direct sense. The stated requirement was more administrative. That consideration only emphasises the inevitable conclusion that Moylan J was certainly not considering the welfare of the child in acceding to a request the need for which might have been questioned and the procedural presentation of which was inept."

88. I am unable to reconcile the suggestion, on the one hand, that there exists at common law a jurisdiction to make "mirror" orders entirely without reference to the welfare of the child concerned with, on the other hand, the constitutional and statutory mandate in this jurisdiction that the first and paramount consideration of any court in proceedings before it under the 1964 Act must be the

welfare of the child. Accordingly, while the two English decisions just described are very helpful in assaying a definition of what is meant by a "mirror" order and in pointing out the problems posed by the absence of any clear statutory or common law jurisdiction to make one in England and Wales, in my view they do not assist in identifying the appropriate criteria that this Court should apply in considering an application for relief pursuant to the terms of section 11 of the 1964 Act.

89. There are two final points that require to be considered in my estimation. The first is that, since the judgment of Carroll J. in *M.D. v. G.D.* [1992] F.L.J. 34, there has been an acceptance that the court is concerned at least as much with the right of the child to access to his parent(s), as with the parent(s) right of access to the child, in light of the overarching consideration of the welfare of the child.

90. The second closely related point is that, in considering what orders may be appropriate in support of the proposed relocation of a child in the jurisdiction, considerable assistance may be gleaned from the jurisprudence governing applications for relocation in another jurisdiction. I have in mind, in particular, the various criteria identified by the High Court (per McMenamin J) in the case of *U.V. v. V.U.* [2011] IEHC 519, namely, those identified by Butler Sloss P in the English Court of Appeal decision in *Payne v. Payne* [2001] Fam 473; the family life rights of the parents and of the child under Article 8 of the European Convention on Human Rights ("the ECHR"), that of the greatest significance being "the welfare of the child"; and the right of the child separated from one parent to maintain personal relations and direct contact with both parents as recognised in the March 2010 Washington Declaration on International Family Relocation of the International Judicial Conference on Cross Border Family Relocation and adverted to in the judgment of Wilson LJ in the English Court of Appeal case of *H (A Child)* [2010] EWCA Civ 50. All of these provisions militate in favour of making whatever orders are necessary for the welfare of the child in this case in the context of his proposed relocation within the State.

Conclusion
91. The conclusions that I have reached on the legal and factual issues presented in this case are set out in the paragraphs that follow.

92. I find as a fact, not least because it is common case between the parties, that the child is at present habitually resident in the United States of America. In consequence, Article 14 of Brussels II *bis* requires that jurisdiction in this case must be determined by reference to the laws of Ireland.

93. Section 12 of the 2000 Act expressly preserves any jurisdiction of the court to take measures directed to the protection of a child who is not habitually resident in a contracting state, and any jurisdiction of the court to order the recognition, enforcement or non-recognition of measures which are directed to the protection of a child and which have been taken by the authorities of a non-contracting state. Even if that express provision did not apply, there is nothing in the 2000 Act to suggest, much less establish, that any jurisdictional rules that hitherto applied between this State (as a contracting state) and a non-contracting state have been extinguished or repealed by necessary implication through the commencement of that Act. Those jurisdictional rules continue to apply to such cases.

94. The Court has jurisdiction to protect the rights and welfare of any child who is an Irish citizen (and who is not habitually resident in a contracting state to the 1996 Convention or a Member State under Brussels II *bis*), such as the child in this case, regardless of where he or she may be living or present at the time of the proceedings, although it is reasonable to do so only with caution or circumspection.

95. I have concluded that it is appropriate to exercise that jurisdiction in this case. It is true that the child in this case was born in the United States and is habitually resident there. It is also true that customary *'forum conveniens'* principles would indicate that evidence in relation to the child's welfare is likely to be more readily available to the California Court. However, it is equally true that the California Court has made an order, based on an extensive and closely reasoned judgment, that it is in the child's best interests to relocate with its mother to this jurisdiction. In contrast to the position in *C.M. v. Delagación de Malaga*, the California Court has itself directed that the jurisdiction of this Court should be invoked, insofar as that is possible, in aid of that relocation order. In those circumstances, there is little or no risk of inconsistent orders being made in relation to the child in the two jurisdictions involved. Shortly put, in this case the Court is being asked to exercise a jurisdiction in support of, rather than in opposition to, the jurisdiction claimed by the court in the other jurisdiction concerned with the child's welfare. For that reason, the Court rejects the respondent's submission that no order should be made because of the risk of inconsistent orders between the courts of this jurisdiction and those of the State of California in the particular circumstances of the present case

96. There is no evidence before the Court of any fraud on the part of the applicant in relation to the manner in which Irish citizenship was conferred on the child or in the manner in which an Irish passport was obtained for him, such as would warrant the Court in concluding that it is contrary to public policy to exercise jurisdiction in relation to the welfare of the child based upon his Irish citizenship.

97. In considering an application for "mirror orders", in the guise of an application for a direction (or directions) on a question affecting the welfare of a child, pursuant to the provisions of section 11 of the 1964 Act, the Court is constitutionally and statutorily mandated to have regard to the welfare of the child as the first and paramount consideration, and that principle applies not only in Irish cases involving no foreign element but also in cases where one or both parties is of foreign nationality, domicile or residence, and even in cases where a foreign court has already made a guardianship or custody order.

98. The nature and scope of the jurisdiction to make "mirror" orders, pursuant to the terms of section 11 of the 1964 Act, falls to be considered by reference to first principles in the absence of any directly applicable governing authority. Of most obvious and direct relevance are the general legal principles governing the recognition or enforcement of foreign custody orders as a matter of private international law. The fundamental principle in that regard is that the existence of a custody order made by a court to which neither Brussels II *bis* nor any other international law instrument recognised by the law of the State applies does not prevent a court in this jurisdiction from making such orders in this jurisdiction as, having regard to the child's welfare, it thinks fit.

99. Subject to that general rule, a number of factors are relevant to the exercise of the Courts discretion in that regard. Those factors include the following:

> (a) The custody order of a foreign court deserves grave consideration but the weight to be given to it must depend on the circumstances of the case.
>
> (b) An order made very recently, no relevant change of circumstances being alleged, will carry great weight. Its persuasive effect is diminished by the passage of time and by a significant change in circumstances, for example the removal of the child to another country or the supervening illness of one of the claimants.

(c) The status of the foreign court, and the nature of the proceedings in and the legal approach taken by the court, may all be taken into account. The effect of the foreign order will be at its weakest when it was made many years ago and has since been modified by consent and the child has nearly attained his majority and so can decide for himself with which parent he wishes to live.

100. In this case, the order of the Californian Court is entitled to grave consideration. It has been made comparatively recently. The extensive and closely reasoned judgment of the court was given, and its original order made, on the 3rd July 2013, and an amended order was minuted on the 5th September 2013. A full contested hearing preceded the judgment. It is evident that the relevant laws of the two jurisdictions are fundamentally similar in that the judgment and analysis of the California Court is clearly directed towards the ascertainment and protection of the best interests of the child. While it may be true that the relevant law of the State of California requires the application of a presumption or presumptions that have no place in the equivalent jurisprudence of this State, I do not believe that the relevant distinction detracts in any significant way from the weight to be attributed to the judgment and orders of the California Court in this case. There is no evidence before the Court of any significant change of circumstances during the intervening period, except of course that the child is now a number of months older. The child is still of tender years and there is no suggestion that he is in a position to make his own meaningful decision about where he wishes to reside. The Court has before it in evidence the comprehensive judgment and orders already described and a copy of the child custody evaluation report of Dr. Nicholas Dogris, PhD, to whose appointment as evaluator both parties had agreed.

101. While it is perfectly clear that the court must form an independent judgment on what is required to protect the welfare of the child, and that it must not blindly follow an order made by a foreign court, it is appropriate to give weight to a foreign judgment and order, as well as to the other evidence before this Court. The present application comes before this Court within a very short time of the foreign judgment and, as there is no significant new circumstance to be considered, I accord very substantial weight to the judgment and orders of the California Court, and I conclude that, insofar as the jurisdiction of this Court under section 11 of the 1965 Act permits them to be made, orders broadly equivalent to those made by the California Court should be made in the best interests of the child in this case to protect the custody, access and visitation rights of the respondent as the child's father in the event of the child's relocation in the State. I prefer to use the term "equivalent" order rather than the term "mirror" order, as it seems to me that the latter carries overtones suggesting the mechanical transcription (or blind application) of the terms of the foreign court order, which is not the exercise upon which the Court has been engaged in this case.

102. The Court requires to be further addressed by the parties on the terms of the appropriate order under section 11 of the 1964 Act in light of the Court's conclusions, and on the discrete question of whether it is appropriate or lawful for the Court to receive the undertaking offered by the applicant in the circumstances of this case.

103. Finally, the Court cannot accede to the applicant's claim for an order appointing the respondent as the child's guardian under section 6A of the 1964 Act, an order to that effect being the second relief sought by the applicant in her Special Summons. In my view no such application on the part of a mother, such as the applicant, can succeed. That is because the section concerned only permits an application to be made by a father, such as the respondent. By reference to the position that the respondent has openly adopted in these proceedings, it is clear that the respondent does not propose to make any such application.