Neutral citation Number [2006] IEHC 278

THE HIGH COURT

BETWEEN

N & ANOR.

APPLICANT

AND
HSE & ORS.

RESPONDENT

Judgment of Mr Justice MacMenamin delivered on the 23rd day of June, 2006

1. In February, 2006 counsel for the first named applicant applied *ex parte* to the High Court (O'Higgins J) for an inquiry pursuant to Article 40.4.2 of the Constitution of Ireland requiring the respondents herein to certify in writing the grounds for the detention of Ann the minor named in the title hereof. Counsel for the second applicant, the wife of Brian was present in court and Catherine was named as a notice party to the proceedings, although subsequently joined as a second applicant.

2. (For the purpose of clarity in delivering this judgment in public and to protect the identity of the child and the parties, those involved have been given fictional names or are referred to by initials).

3. The applicants (hereinafter Brian and Catherine, or 'the Byrnes', are the birth parents of Ann born in July, 2004. Since November of that year Ann has been in the care of the second and third named respondents herein for the purpose of adoption by them. Up to January, 2006, the applicants were unmarried and Ann's name at birth was registered as Ann C. Six weeks prior to the initiation of these proceedings the applicants were married in January, 2006. As members of a family so constituted they now seek custody of Ann, (whose name was re-registered as Ann Byrne pursuant to their rights under Article 41 and 42 of the Constitution of Ireland. They assert that there is no lawful basis for Ann to remain in the custody of the second and third named respondents (who for convenience I will refer to as the "Doyles" as counsel did during the course of the proceeding, and may also refer to them as David and Eileen in order to avoid any confusion).

4. Pursuant to order of this court the second and third named respondents certified their grounds for detention of Ann. The first named respondent ('the HSE') did not file a certificate justifying the detention for reasons set out later. An Bord Uchtála the Adoption Board were named as a notice party but participated only insofar as related to their direct interest in the issue.

Prior to the Trial

5. Prior to describing the events giving rise to these proceedings it is necessary to deal with the way in which the issues were approached by the parties. The position of the Byrnes who are the applicants is relatively straightforward. Although on a slightly differing factual basis, they each as her birth parents claim entitlement to the custody of Ann. The Doyles deny this as a matter of law.

6. The situation of the first named respondent is more complex. It operates an adoption agency, which became involved in the arrangements for the adoption of Ann. When these proceedings were brought counsel for the HSE appeared on the return date and dates subsequent, as it considered certain duties devolved upon it to provide for the best interests of children in their functional area in the circumstances of an adoption. Counsel indicated to O'Higgins J that they would seek reports relating to the welfare of the child. These reports were to be obtained from a social worker and also a psychologist with particular expertise in the issues of attachment and bonding of children to adults. The HSE obtained the report of a social worker Ms G who is actually employed by that respondent. She interviewed the Byrnes and the Doyles. Arrangements were also put in place for the applicants to attend a psychologist Dr Gerard McDonald a Clinical Psychologist with the Department of Clinical Psychology in the Newry and Mourne Health and Social Services Trust. For reasons given to the court, the applicants did not attend the meetings arranged with Dr McDonald.

7. On the second day of the hearing Mr John Rogers Senior Counsel representing the first named respondent indicated that his client had taken the view that the child should be returned to the birth parents. This was on legal advice and on the basis of the report which was available to them from Ms G the Social Worker. However matters were rendered more complex procedurally by the fact that an employee of the HSE, Mr F a Senior Social Worker had dealt with the adoption procedure. His views regarding the welfare of Ann were contrary to those of Ms G. His conclusion was that the child should be allowed to remain with the Doyles and that her best interests lay there. Consequently the first named respondent was constrained to participate in the proceedings, by on the one hand advancing the recommendation made by Ms G, but also by seeking to vindicate the procedures adopted by Mr F in the course of the lengthy interaction between the Byrnes and the Health Service Executive.

8. The first and second named applicants were separately represented. Prior to their marriage they had previously taken legal advice. Senior counsel for Brian, Ms Dervla Browne SC indicated that on the facts the interest of her client might differ from those of his wife. This was in relation to rights which as a single father he sought to assert with regard to the adoption procedure prior to the marriage.

9. Ultimately the procedure adopted in this inquiry was premised on permitting each of the parties to advance their respective cases, and also where necessary to vindicate their position if necessary by cross-examination, and examination-in-chief.

10. For many reasons, it is unfortunate that no opportunity for seeking further directions from the court took place prior to the commencement of the hearing.

11. The sole form of proceeding before the court was pursuant to Article 40.4.2. No proceeding was brought on although the first, and also the second and third named respondents have initiated proceedings to have Ann made a ward of court. This of course is a separate matter. I last week, on an interim basis, made a wardship order.

12. The hearing also differed from a claim pursuant to s. 3 of the Adoption Act 1974 in that the Doyles and the Byrnes had become acquainted in making arrangements for what was termed an "open" adoption. Therefore it was unnecessary for the proceedings to be phased in order to protect anonymity.

The Present Custody of Ann

13. The evidence establishes that since November, 2004 Ann has been in the custody of the Doyles pursuant to an arrangement whereby she was to be adopted. The Doyles are in their thirties and have no children. It is not disputed that Ann is living in a close, warm and supportive "family unit" for the last 18 months, having being placed with those respondents at the age of four months after a period of short term foster care.

14. Ann is described by all the professional witnesses who have seen her as a determined, bright, alert, friendly and affectionate child who sees the Doyles as her parents. It is not contested that they have been unstinting in their affection and their efforts to provide for her. The child is living in suitable accommodation. She attends a crèche three times a week and plays there with other children. She is friendly with two children who live close by, one of whom is very close in age to her. Also nearby are two children who she regards as her cousins. Also close by is Eileen's mother who Ann regards as her grandmother.

15. Ann identifies David and Eileen as her mother and father. The evidence is that she is bonded and attached to the Doyles to a very high degree. She is a contented and happy child albeit wary of strangers and showing anxiety when in their company. She is advanced for her age in terms of physical, emotional, cognitive, social and language development. Ann is well looked after physically. Her speech is clear and now developed to three to four word sentences which is seen as advanced for her age. Her cognition in terms of recognition and making sense of events and observation is good which is indicative of significant intellectual ability. The evidence is that she is well adjusted to the environment in which she lives. She was baptised in the Roman Catholic faith in December, 2004, a ceremony which was attended by members of the Doyle family and their friends and relatives.

16. One factor which may have contributed to Ann's well being is that the third named respondent, Eileen, took 11 months off work so as to be available full time to assist in the bonding and attachment process. For this she took adoptive leave. Thereafter she returned to work on a three day basis. Eileen, who testified, is working. David is a [occupation deleted]. He has testified one of the advantages of his position is that he can spend substantial periods of time with her.

17. Ann was introduced to a crèche near her home at the age of 13 months. It took a significant time for her to settle there. It was necessary for Eileen to bring her down for an hour every day and thereafter spend time with her. In her absence she showed distress though she could be distracted in time. The process of adaptation to the crèche took approximately four to five weeks. The evidence is that when not at work Eileen brings Ann swimming, to playgrounds, or adventure parks. As indicated she has a friend who lives nearby who has one child very close in age to Ann and another aged four. Ann and her near contemporary are close friends. The other two children living nearby, are aged three and just one year. She sees them nearly every day as well as the other children who attend the crèche where she is in a class varying in size between 10 and 15 children.

18. The ultimate, indeed the only question for determination in these proceedings is whether Ann is lawfully in the custody of the Doyles. If such custody is lawful she may remain there. If not, she must be transferred to the custody of her birth parents now constituted a family under the Constitution who submit that they are entitled as of right to her custody.

The Applicants
19. The first named applicant Brian was born in May, 1982.

20. Having attended secondary education he commenced an academic course. His academic career was a normal one. After Ann's birth he commenced employment in November 2004. As much of his work there was computer-based, he could engage in employment on a 'remote' basis. He worked for that firm until January 2006 when he obtained alternative employment.

21. The second named applicant Catherine was born in July, 1981. Having attended school locally, she also attended university. She is currently working.

The Circumstances of Ann's Birth and her Placement for Adoption
22. The two applicants met in March 2002 when they were both students. Their relationship flourished and one year later they commenced living together, sharing a house with a mutual friend. Catherine found out that she was pregnant at the end of October 2003. The couple dealt with the issue together. They were understandably concerned about disappointing their parents' expectations were they to find out about the pregnancy. They had considered the question of termination of pregnancy but decided not to pursue that course of action.

23. Brian also did not wish to tell his parents of Catherine's pregnancy because they had undergone a number of personal problems at home in the previous year. Catherine was concerned regarding the attitude of her parents, were they to discover that she was pregnant. They both dealt with their examinations which took place in Christmas and April 2004. At this time they attended H a medical social worker. During these and other counselling sessions the applicants considered and ultimately decided on the option of adoption as contrasted to other courses of action which will be discussed later.

24. Brian was present at the pregnancy. Both parties were extremely happy during the period up to the birth. In April, 2004 H the Medical Social Worker in the hospital referred the applicants to the Health Service Executive for the purposes of adoption. They were allocated to F a Senior Social Worker in the Long Term Team of the HSE. A meeting took place in June, 2004 with the applicants, F and H. There the question of adoption was discussed and planned. On 7 July, 2004 Ann was born in hospital. The following day, the parents agreed to pre-adoptive foster care and counselling and were introduced to I the foster carer. In July, 2004 the parents took Ann from the hospital for an overnight visit when they stayed with Brian's sister. The following day, Ann was admitted to foster care with I. Ten days later the applicants attended Mr F for the first formal counselling session.

The Applicants Relationship with Mr F
25. The interaction between the applicants and Mr F is one of the critical factors which arises here. He is a Senior Social Work Practitioner employed by the first named respondent. He had been four years in that position. He previously worked for eight years as a social worker with the predecessor in title of the first named respondent. He had ten years prior experience as a Social Worker. He dealt with a number of adoption cases between 1975 and 1985, and also a number of such cases under the aegis of the Health Board. Over the 12 years prior to these proceedings he worked with five adoptions through to completion. In total he had worked with approximately 20 adoption cases or cases with an adoption aspect over that 12 year period.

26. An essential point of reference in the evidence in this case are the notes made by Mr F during and after the meetings with the applicants. He described his procedure in making the notes which comprise in all in excess of some 40 pages. In the course of their direct testimony the Byrnes indicated that they disagreed with a number of the entries in Mr F's notes. These issues related to views imputed to them in the year 2004, information and advice given to them on adoption procedure, a series of meetings in 2004 and 2005, later the question of access to Ann and events subsequent to September, 2005 when Catherine withdrew her consent to Ann's adoption. The points in particular where exception was taken to Mr F’s notes were areas which appear particularly relevant to the issues now addressed by the applicants.

27. In other areas it was accepted that they were generally accurate. There was particular dispute with regard to a meeting in April, 2005. It has not been suggested that the notes were altered or had in any way been the subject of retrospective amendment. The internal evidence appears consistent with their having been written at, or immediately after the meetings which took place. The notes

are detailed; at no point has there been adduced any extrinsic evidence demonstrating that the contents of the notes were fundamentally inaccurate. The evidence shows Mr F took care with regard to the preparation of documents such as a submission made to a "Matching Panel" for the purposes of identifying children proposed for adoption and appropriate and suitable adopters. The notes themselves appear internally consistent both as regards the sequence of events and their relationship with events described. I regard Mr F as a credible witness with a generally accurate recollection of the events.

28. The applicants first meeting with Mr F was in June, 2004, prior to the birth of Ann. Thereafter he met them when he went to the Hospital in July, 2004, the day after Ann's birth. On that occasion he met with the parents and the pre-adoption foster carer I. They made arrangements for the pre-adoptive foster care of Ann. Ann was then placed in the foster care with Ms I. Mr F thereafter met the parents on two occasions in July, on two occasions in August and on three occasions in September 2004, this was in order to progress the adoption procedure.

29. His testimony and notes reflect the purpose of these meetings. It was to counsel Brian and Catherine, and in particular the second named applicant Catherine. During the period up to placement for adoption the parents visited Ann on a regular basis and had two overnight access visits with her. Mr F commented that the extent to which they made arrangements to see and keep in contact with Ann was unique in his experience. He also considered that the father's degree of involvement was unusual among all the birth fathers that he had dealt with as a social worker.

30. The applicants themselves have had education to third level. In their evidence they demonstrated that they were intelligent and had a clear understanding of many of the legal, psychological and social work aspects of the case.

31. I would not wish that any of the descriptions of events, that must be made, should detract from the fact that these two young people were trying in a deeply confusing situation to do their utmost to make truly difficult decisions at a stressful time for them. The brave and generous decision that they ultimately took to place Ann for adoption was a heartbreaking one, so too is their situation now. I consider that throughout they have acted with great dignity and composure. At all stages they have acted in accordance with how they perceive Ann's best interests. It was not their fault that they were placed in a situation which in many ways was invidious and in many ways isolated. I am satisfied that they have done their absolute best to tell the truth and to describe what occurred to the best of their recollection. If in the course of this judgment I express a preference for the evidence of one party over another it is because I consider that such evidence should be preferred because of clearer recollection, rather than any question of persons telling untruths.

32. Brian testified that during the counselling sessions which took place with F in August, 2004 he had no recollection of the word "guardianship" or anything of that nature being discussed. He stated that he thought that he did not have any rights as the father of the child. This was his clear understanding. He said that he had a specific recollection of speaking to friends at home and saying that men had no rights.

33. The evidence of Mr F, supported by the notes suggests otherwise. His testimony is that in August, 2004, he specifically advised both Brian and Catherine in relation to their individual rights. He advised Brian in relation to his rights to be registered as a guardian of the child. The notes made then reflect that this was done on more than one occasion and that Brian did not wish to be so registered. Mr F recorded also that the parents had been supplied with a quantity of documentation setting out pre-adoptive procedures. This material includes specific provisions setting out the rights of a natural father. Brian states that he has no recollection of reading these or being aware of this documentation. However the evidence is that Mr F gave this documentation to Catherine who brought it home. Brian denies that he ever read this material, even up to the time of his cross-examination.

34. However for the purposes of initiating the adoption proceedings in September, 2004, he signed an acknowledgment. This recited that he was aware that the adoption process had been commenced and that prior to the making of a final order he did not wish to be heard by An Bord Uchtála. While Brian had said he had not read the documentation relating to adoption procedures I consider that it is less likely that he signed the acknowledgment without being aware of its significance. Mr F's notes imply that he was told that the couple both read the documentation. The evidence of Brian was that his role was to assist Catherine and that he would support her in whatever decision she chose to make.

35. I consider that this was the primary consideration in his mind. While Brian now says he had doubts in relation to the pursuance of the adoption I do not think the evidence establishes that he expressed doubts or that he made protest at the time we are dealing with. I do not consider that the evidence indicates that at any point up to the ultimate decision of Catherine to withdraw her consent in September, 2005, the interests or views of the two applicants diverged beyond what would be entirely normal and to be expected for two young people faced with such a difficult situation both as regards their own future and that of Ann.

36. Contrary to a private personal agreement made with Catherine, Brian informed his parents about the birth of Ann during August of 2004. He did not tell Catherine of his intention to do so for fear that she would prevent him. His family were shocked by the news. His mother made a number of offers of support to the couple and Ann, which were afterwards apparently retracted. The first named applicant stated that he wanted his parents to go and see Ann, which they did while she was in foster care. He said "I honestly again thought that they would take her and say look Brian she is a Byrne we don't do this." I do not think such evidence is entirely consistent with Brian's stated belief that he had no rights in the child. While no separate counselling was given to him, there is no contemporaneous objective evidence that he had any intention other than to abandon the choice of adoption or that he had second thoughts on the issue. Indeed it appears the opposite was the case then.

37. Brian describes his role in the adoption as being a supportive one. He accepted that he signed the form indicating that he did not wish to be heard by the Adoption Board. He testified that he did not remember why he decided to do so. I find some difficulty with this. I think the more probable inference is that he did so because he wished to support the decision of Catherine to place Ann for adoption. Mr F's notes, which I accept are generally accurate, on more than one occasion mention the question of guardianship being discussed. In the circumstances therefore I think Brian's evidence may lack weight on the question of his having been opposed to the adoption from the start.

38. Mr F began the preparation of what are termed Adoption Profiles for the Matching Panel of the Regional Adoption Committee. This is a document of some 14 pages. It sets out an outline of the meetings, a description of the applicants, their wishes regarding adoption and their discussions with Mr F. The contents of these profiles had an input from Brian and Catherine. I considered a number of the drafts prepared of this document. I think it is clear that both Brian and Catherine separately and individually had such an input. The final draft reflects the role played by each of them. It is clear too that the couple carefully read these documents in their totality in draft form, as they contain amendments in their own handwritings to the texts. The documents contain information regarding the family backgrounds, the history of their relationship, their decision to place Ann for adoption and their views with regard to the course of action which was being proposed. The amendments made by Brian and Catherine amend, or fill in blank spaces left by Mr F.

39. In the course of drafting this document Mr F had inserted a statement indicating his concern regarding the stance being adopted by the applicants. He said he was concerned that on the one hand they had chosen adoption because they were unmarried and felt Ann should have two parents. On the other, they felt they might continue with their relationship. This perplexed him in the light of the fact that one of their primary motivations in having Ann placed for adoption was that she should grow up in a family with two parents. He wrote: "This overriding reservation and contradiction causes me consternation and reservation in supporting them in their decision to place Ann for adoption despite their consistency of opinions."

40. This caveat which appears in an earlier draft was deleted from the ultimate text submitted to the panel. I am satisfied that this deletion was made by Mr F, as he so testified, at the suggestion of Brian and Catherine. Such a statement, had it remained might perhaps have halted Ann's placement for adoption. This passage was interlineated. It is hard to imagine why Mr F would wish himself to delete this passage. He said that of the two he considered that Brian then had a clearer view that adoption was a logical and positive solution in the circumstances. He found his degree of commitment unusual, and noted this at the time.

41. The court must next consider the nature and quality of the advice which was given to the couple regarding their rights. They had a right to alter the fostering arrangements at any time prior to the signature of the document known as Form 10, which is the placement for adoption. The pre-adoptive placement with I was consented to by Catherine in July, 2004, when she signed a document entitled, "Voluntary Care Agreement Admission to Care". I am satisfied that during the duration of this placement Catherine was informed that she could change her mind and resume caring for Ann. I consider that the evidence also establishes that she was in fact encouraged she could do so by Mr F during the course of counselling that ran from July to September, 2004, contrary to what was later asserted in evidence. I do not think that the evidence establishes that Mr F failed to "challenge" them on their decision in relation to adoption.

42. Mr F's notes indicate that it was made clear to Brian and Catherine that once the consent to adoption was signed and Ann was placed with the adopters this would initiate the adoption process, and therefore that Catherine's signature of the Form 10 Consent was a matter of gravity.

43. In September, 2004, a counselling session with the applicants took place. It had been intended to sign the Form 10 at that point, but by then Catherine had also informed her parents of Ann's birth and arranged for them to visit the child. The visits paid by Ann's grandparents did not result in any alteration of the parents' views. In September, 2004 Mr F had a further meeting and discussion when the Form 10 Consent was considered together with the outline report and also the wishes of the birth parents. In September, 2004 C signed the Form 10 itself. Brian signed the separate document known as the "Acknowledgment" by the birth father, whereby he indicated that the Adoption Board might proceed to make a final order without hearing from him. In September, 2004 the question of the adoption was considered by the Regional Adoption Panel. This is a group of health professionals whose function it is to match children proposed for adoption with candidate adoptive parents. That panel identified the Doyles as being the more suitable of two sets of prospective adopters. Later in the course of that discussion, Mr F recognised the Doyles from their description. There is no evidence to establish that Mr F acted in any way improperly in the identification of the Doyles as suitable adopters. Moreover there is no substantive evidence that Mr F's knowledge or acquaintance with the Doyles went any further than contacts which he had with Mrs Doyle (otherwise Eileen) during the course of meetings which they had both to attend from time to time.

44. Once the Doyles had been identified, arrangements were put in place for an introductory visit between the birth parents and the prospective adopters. This took place in October, 2004. Present were the applicants and the respondents, together with J (in charge of the Adoption Section of the first named respondent) and F. This went well. Brian and Catherine agreed that the Doyles were entirely appropriate adopters. They corresponded with, and fulfilled each of the requirements that they had as to their interests in education, support and outdoor activities, Roman Catholic religious beliefs, the location of their house and their preparedness to engage in an "open adoption", that is one in which the birth parents could have occasional access to the child to be so placed. In November, 2004, the Doyles first met Ann at I's house where she was in foster care. The introductory programme went successfully and in November Ann moved to the Doyles house on prospective adoptive placement.

45. It is necessary to consider in some further detail the evidence as to the advice given to Brian and Catherine regarding the process in which they were engaged and also their understanding of it with particular regard to the documents they signed.

The Applicants Understanding of the Procedure

46. I consider that the evidence establishes that Mr F explained the nature and gravity of the transaction in which they were engaged in the signing of the Form 10 document. The process of furnishing this advice is recorded in his notes and was reflected in his testimony. There is the extrinsic evidence as to the nature of the applicants participation in the preparation of the documents for the matching panel in the form of the decision of Mr F's caveat. The evidence shows Brian and Catherine's desire to have Ann adopted and to reduce any suggestion that they were ambivalent in their thinking. The Form 10 itself recites that when an adoption order is made, the birth parent will lose all parental rights and be freed from all parental duties, and that such rights and duties will be transferred permanently to the adopters: the child thereafter to be regarded as their child as if born to them in marriage. The Form 1 sets out the cessation of any financial obligation to the natural father. It describes the circumstances under which an adoption order will be made and the role of the natural father if he remains unmarried to the mother, or if he marries the mother subsequently. It recites that the natural father's consent to the making of the adoption order is required where he has been appointed a guardian of the child or has been granted the child's custody. It deals with the possibility of the dispensation with consent in the case that a person who has consented to the placing of the child fails, neglects or refuses to give consent to the making of a final adoption order or withdraws a consent already given. It states that the High Court, if it is satisfied that it is in the best interests of the child so to do, may make an order under s. 3 of the Adoption Act 1974 giving custody of the child to the prospective adopters, and authorising An Bord Uchtála to dispense with such consent to the making of an adoption order in their favour.

47. The form states that if, after the child has been placed with prospective adopters and before the making of the adoption order, the birth parents change their mind and wish to reclaim their child they should contact the adoption society *without delay* (emphasis added). It adds that if the prospective adopters decline to give up the child it is open to the birth parents to institute proceedings to have custody of the child restored and also counsels the advisability of consulting a solicitor as a court case may result.

48. Brian and Catherine themselves are both intelligent persons educated up to third level. There is no evidence to suggest that they acted under duress. They informed Ms G Social Worker assigned by the HSE that neither felt they were pressurised into adoption. This is recorded in Ms G's notes of her interview with them in April, 2005. Moreover once Ann was placed in the custody of the Doyles, they ceased visitation or access to her. The only contact with the Doyles or Ann was indirectly though correspondence at Christmas 2004.

49. One issue in the applicants evidence was the contention that Mr F had informed them that they could simply and without qualification or consequence regain custody of the child at any time up to the making of the final adoption order. In this context there

arises the question of their understanding of the issue of attachment and bonding. Both Brian and Catherine had asked that the prospective adoptive mother should take time off work in order that Ann would become used to her. While they may not have had as complete an understanding of the issues of attachment and bonding as they acquired thereafter, I think the evidence establishes that they were aware then that important emotional and psychological links between Ann and the Doyles would be formed and enhanced from her placement for adoption onwards. This knowledge was reflected by Catherine in the course of her evidence when she described the particular emotional link or bond with her own younger brother because she had been involved in bringing him up.

50. Brian said in evidence that she understood there would be a period of approximately a year, at the end of which the final adoption order would be made. During that one year period she would probably be entitled to reclaim Ann. The Byrnes are both intelligent young people, but both as a matter of evidence and common sense I do not think that they believed that the issue of a child's development of emotional links over a one year period could remain "in abeyance". It may well be that they did not fully direct their minds to this issue then. The extent of their knowledge of this highly important issue will be dealt with in the consideration of the expert evidence.

Events up to September, 2005
51. Between the placement and Christmas 2004 a number of contacts took place between the applicants and Mr F. Brian testified that Catherine found it difficult to reconcile herself with the decision to place for adoption. Such a reaction was and is understandable, but there is no other evidence that up to Christmas 2004 the completely natural regrets felt by the Byrnes at placing Ann for adoption had supplanted their views of the correctness of their decision. Brian testified that before Christmas 2004 he telephoned Mr. F and said that he was having serious reservations. He said that Mr F said that this was normal and he was reassured as a result of that. However if the parents had expressed a real desire then to reconsider their decision, I think it is improbable that Mr F would not have recorded it and taken action. In fact the quotation in Mr F's notes of December is that Brian had found work in a large firm in another locality and that the second named applicant, Catherine, had also found employment and that Brian said that they "can now get on with their lives".

52. At Christmas 2004 Catherine sent a card to the Doyles. It stated: "Hope you have a wonderful Christmas + New Year. This will be the start of your many joyful + happy years together. Know that you are in our thoughts and prayers every day. Lots of love and kisses to Ann. From Catherine and Brian".

53. The accompanying letter stated in part: "... I am so happy that you have our little bundle for Christmas because having children around creates a whole new excitement. … Well you have another year at least until that happens! I hope Ann's christening went well. Its hard for Brian and myself not to think of Ann every minute of every day but we felt much better after meeting you both. It was a weight off our shoulders that you are so perfect -- a future version of Brian and myself (not meaning to be offensive!). We were very relieved and happy for you both that you were getting such a perfect + beautiful baby -- God I am so proud and boastful of her and you should hear Brian! I rang K "(a Social Worker concerned with the adoption process)" to thank her and hear how she was. Hope to exchange photos in the New Year with you ... Brian wanted to write a few words but unfortunately he is counties away from me. Hope Christmas goes well. Love Catherine + Brian".

54. Brian says that he had discussions over Christmas with his own family at home. At that time they expressed some concern as to whether the right course of action had been adopted. However no action was taken then on foot of any such discussion.

Events leading up to the meeting of April, 2005
55. The next point of reference must be February, 2005 when the Adoption Board contacted Mr F to inform him that the original part of the Form 10 which had been signed by Catherine had not been sent in to them with the adoption forms. It appears that what actually occurred is that Mr F retained two Xerox copies of that part of the document signed by Catherine but permitted her to take the original which contained her signature. Arrangements therefore had to be put in place for the signing of a duplicate.

56. Mr F had difficulty in contacting Catherine. For that purpose he contacted Brian whose telephone number he retained. A meeting was arranged which ultimately took place in April, 2005 between the couple and Mr F. The reason for this meeting, at least so far Mr F thought, was to allow Catherine to sign the duplicate form. But the parents testified however that by that point they already wished to change their minds in relation to the adoption. Brian stated in evidence that he understood that they were going to attend that meeting for the purposes of telling Mr. F that they had changed their mind.

57. However he accepted that neither of them actually said this. He said that he felt that neither of them got a chance to do so. He denied that Mr. F went through the Form 10 procedure again. The Byrnes testified that they asked what would happen with the adoption were the Form 10 not signed, and whether this would halt the adoption procedure. They say that they were assured this was purely procedural. But this view is not reflected in Mr F's notes or his testimony. As a matter of probability for reasons described later I think that the weight of the evidence is that the contents of the form were again explained to Brian and Catherine. But in fact the transaction was unusual. Catherine not only had to sign a duplicate Form 10 which reflected the contents of the original of September, 2004, she also had to sign a covering letter which recited the nature of the transaction and explicitly stated why this was necessary.

58. In these circumstances it cannot be said that what took place was merely a procedural formula. The very unusual nature of the transaction itself would contradict this. Brian and Catherine contend that in some way Mr F by his conduct prevented them from stating what was truly on their minds. I do not think that this is so. For purely prudential reasons, if it had been clearly intimated to Mr F that there was some very fundamental doubt on the part of the Byrnes I think it is far more probable that it is something that he would have specifically recorded. Furthermore the expression of such reservations should have required action both by arranging immediate counselling, or to consider the halting of the procedure.

59. In fact Catherine had attended counselling prior to the meeting with Mr F. This was in order to discuss her doubts and second thoughts. This was known to Mr F who had discussions with the counselor prior to the meeting. However the concerns and doubts felt by Brian and Catherine had not by then crystallised into any firm decision. None was expressed. Instead matters proceeded and the duplicate Form 10 was submitted to the Adoption Board. Brian and Catherine state that Mr F told them during the course of this meeting that he had seen Ann out walking with the Doyles and that they looked incredibly happy, that everyone was getting on extremely well and that Ann had bonded and taken very well to the Doyles. Mr F denies that he said this. It may be perhaps that there was a misunderstanding between the applicants and the respondents.

60. At the end of the meeting Mr F produced the duplicate Form 10 and Brian says that he put it to Mr F whether or not signing the forms would stop the process, to which he replied that this was merely a repetition of the procedure whereby Catherine had signed the Form 10 in September, 2004. He added that he continued to believe that they could change their minds relating to the placement at any time up to the final adoption order although he said that Mr F informed them that, while legally they were entitled to do so, it

would be "morally wrong" presumably, he inferred, by disappointing the Doyles' hope. While I do not think that this phraseology was appropriate, I do not think that at any time it fundamentally altered the Byrnes approach as is indicated by their actions.

61. It is difficult to reconstruct what precisely took place at the meeting. One can only draw inferences from what actually is recorded, and the testimony of what occurred thereafter. The duplicate Form 10 was signed. So too was the letter explaining what was being done. Whatever concerns or reservations Brian and Catherine might have felt did not prevent Catherine from signing the form then. Nor did what transpired at the meeting cause the couple to take any subsequent formal action such as writing a letter to stop the adoption from proceeding. It is not possible to resolve the question as to what precisely was said regarding any alleged encounter between Mr F and the Doyles or whether there was some misunderstanding. Mr F and the Doyles actually live a very considerable distance apart, the evidence shows. However the image appears to have fixed in Catherine's memory and for some reason ultimately to have been a source of distrust, from which she inferred that Mr F was in some way more friendly with the Doyles than actually was so.

62. However Catherine's doubts even then must have been truly significant. This is reflected in her attendance at the Centre in [venue deleted], the discussions thereafter and in the notes made by Mr F of the meeting of April, 2005, to which reference is made later, especially the phrase that she had "returned" to her decision to proceed with the adoption.

63. The couple wished to see Ann. Brian says that he asked F whether there would be any chance of seeing Ann sooner than the arranged date which would be in or about her first birthday. He testified that he was informed that it was a condition "that unless Catherine signed the final consent they would not be allowed to see Ann". This evidence is not fully reconcilable with that of Catherine who did not say directly that she thought that the signature of the final consent was a prior condition to access. Brian said that in April 2004 the couple were advised to get independent counselling and that Mr F considered he was too involved or thought he might be biased. It was for that reason that he had recommended that Catherine should see a counselor. Mr F did not accept this account. It is difficult to resolve the conflict in evidence here. But three weeks later in May, 2005 Brian contacted Mr F and indicated that they wished to continue with the adoption and would sign the final consent form at the end of June.

64. In assessing the clarity of Brian's memory, it is relevant to consider the affidavit sworn by him for the purposes of initiating this inquiry. In the course of that affidavit he stated: "… Although I had expressed my wish that Ann would not be placed for adoption, at all times it was made clear to me that the decision was solely that of the mother. At no time was my consent sought to the placement".

65. He also said: "... I also realised that as I had no say in the adoptive process there was little to be gained in continuing to register my protests about what was happening".

66. These statements were inaccurate and acknowledged by him to be so subsequently. Brian also said in that affidavit that in or about October 2004 Ann was introduced to her prospective adoptive parents and that he continued in his relationship with Catherine and that: "we saw our baby on regular occasions between October 2004 and July 2005". This was also incorrect. In the next sentence he added: "Catherine went to counselling and she finally began to accept that even if our relationship did not work out that she could still care for Ann". This would not appear to accord with the sequence of events deposed to by Brian and Catherine where (to anticipate) ultimately in August 2005 they made a commitment to each other and on foot of *that* commitment decided to seek to reclaim Ann.

67. In the same affidavit Brian said: "At all times we had been led to believe that the placement was solely the first step in the adoption process. Mr. F told us that Catherine could change her mind at any stage and seek the return of the child. Although it was stated that Catherine might have to go to court to seek the return, our impression was this would be a matter of form. Certainly at no stage did I realise that Catherine's actions in September 2004 would be difficult to reverse. However when Catherine told F in May 2005 that she wanted Ann returned to her care we were told that there was no chance that this would happen and that no *natural* parent (emphasis added) ever succeeded in court. We were also told that the adoptive parents would only let us see Ann again after Catherine signed the final consent."

68. The evidence did not show that any conversation took place in May 2005. Brian and Catherine themselves did not give this evidence in oral testimony. Nor did Mr F give such evidence. It does not accord with other evidence tendered by the witnesses.

69. As a matter of fairness Brian did swear a corrective and supplemental affidavit. This was sworn in May, 2006 six weeks after Mr F had sworn his affidavit in March and a short time before the hearing commenced. Brian in evidence explained the errors in the former affidavit on the basis that it had been sworn in haste whilst on his way to work and in circumstances where he had not the opportunity to read it carefully. However the court was not furnished with any further explanation as to how this factually incorrect material came to be in the affidavit of February, 2006. Moreover as was pointed out in cross-examination not all of the inconsistencies between Brian's affidavit and his oral testimony were dealt with or corrected in the affidavit of May, 2006 at which time, presumably, an exchange of other relevant documentation had taken place.

70. Returning to the narrative, in early July 2005 preparation was made for the signing of the final consent form (Form 4A) and to this end Mr F arranged for Brian and Catherine to attend at the Courthouse in [venue deleted], in which town the second named applicant Catherine was then working. He also arranged for a witness (Ms L of Social Services who was also a Cura counselor and also designated as counselor for An Bord Uchtála). Also to attend was a Commissioner for Oaths. It is important to recollect in this context that when Brian and Catherine met the Doyles they requested that they would have the opportunity to have continuing future contact with Ann. This was made clear to the respondents and they were prepared to comply with this on an annual basis and for Ann to grow up knowing who her birth parents were. The intention was also to give the prospective adopters an opportunity to share her development with the birth parents in order to answer questions about Ann's development in terms of family history or family health.

71. It is agreed when the birth parents and the adopters met that the first visit would be scheduled in or about the time of Ann's birthday in the following year, that is in or after July, 2005. The visit was scheduled but the precise date had not been set. The signing of the final consent was therefore within a week of Ann's first birthday. Mr F stated that prior to meeting in July he had said to the applicants that arrangements would be made for them to meet Ann. This was not conditional on their signature of the final consent form. In fact it was a pre-arranged meeting. While Brian and Catherine felt that seeing Ann once a year was insufficient, the actual principle whether or not the applicants would have access to Ann was a matter already agreed.

72. Brian and Catherine say that their view of the signature on the final consent form was entirely different. They contend that Catherine signed the final consent form in order that they could "see Ann". They testified that on attending the Courthouse Catherine went into a separate room with Ms. L, while Brian and Mr F remained outside. Catherine says that she remarked to Ms. L that she was

only signing the final consent in order that she could see the child. She said that Ms L then left the room, came out and had a discussion with Mr F about what had been said, and thereafter came back into the room presumably having checked the situation. The procedure then was completed.

73. Mr F does not accept that any such incident occurred. Whether Ms L left the room or had a discussion with Mr F cannot be established as a matter of certainty. However, by inference, a situation whereby a birth mother felt constrained to sign a consent to a final adoption in order to see her child, must and would as a matter of probability be seen as a matter of deep concern. It might be thought that it would be unlikely that a person designated by the Adoption Board, and also a counselor by profession and calling would allow a signature to go ahead in such circumstances.

74. Mr F denies emphatically that there was any such pressure. No other evidence has been called on this issue other than Brian and Catherine themselves. Ms L was not called in order to demonstrate that Catherine made any such remark to Ms L, or whether Ms L had a conversation with Mr F thereafter in order to ascertain whether access would take place. The first issue is obviously of concern to the applicants. The second issue just mentioned is a more general comment. I am not satisfied that it has been demonstrated as a matter of probability that this occurrence took place in the way alleged. Mr F describing what occurred said that he explained to B that it was unnecessary for him to sign the form again in light of the fact that he had not sought guardianship rights.

75. But the question of access had been a live issue for discussion. As the conflicting evidence shows it was by no means a simple one. In April, 2005 a letter admitted in evidence suggests that Ms K of the adoption agency (who did not testify) contacted Mr F to say that she did not feel that a visit should take place before the adoption order was finalised, but that such order could take months to be completed, that is as late as September or October, 2005. Mr F testified that he explained that the Doyles had agreed to a school summer holiday visit (it will be remembered that Ann's birthday was in July) and that Catherine would expect this to be honoured in good faith. At that time he recorded: "the couple have questions and doubts but have not expressed intention of resuming care which is unlikely in view of their consistency. K will ask Eileen and David if they are willing to meet".

76. Mr F's memorandum of July, 2005 records the meeting. This is a portion of the memorandum: "... Catherine met with L who went through the final consents and affidavit – L agreed Catherine understood what she was signing. Brian is also in agreement although finds it hard and still has lots of "if only" rather than "what if". Catherine dealt with it in a business like way, as always contained -- somewhat reflective but acknowledging her decision that she had returned to -- that she is doing the right thing for Ann. The final consent to adoption Form 4A and affidavits signed by Catherine".

77. Some assistance with regard to the Byrnes mixed emotions and confusion over the period of April to July 2005 can also be gleaned from Mr F's earlier memorandum of the meeting of April. This read: "Catherine finds it hard to get time off, doesn't like her job, having a hard time of late, feeling mixed up, questioning her decision, went to L for a second opinion. L agreed her original decisions were well thought out and put Ann first - still uncertainty about Brian but spends a lot of time with him and his family most weekends - getting on much better - getting used to his mother but couldn't live there -- glad she never agreed to that. Thinks of Ann every day - reassured it was normal and understandable to have questions and second thoughts but reminded her of her consistency for the months of counselling and the months of pregnancy before that - after ten months and having gone seven months seeing her and agreeing to her placement it was understandable that this was a difficult time (sic). Brian has job options at this stage -- he is undecided. Explained again the need to resign the duplicate Form 10 to replace the original agreeing to Ann being placed with prospective adopters. Catherine signed the form. She would like to see her if at all possible as agreed at the meeting with Eileen and David last October -- this coming summer -- agreed to let K know".

78. However by July, 2005 Mr F recorded a telephone call from Brian: "Both he and Catherine are relieved that they have made their final decision and can now get on with their lives. They have photos and cards they would like to pass on to Ann from their respective families. Brian wanted to know if his family could ever see her or would it always only be Catherine and himself. He says both would like to have her more than once a year -- could the adopters be asked their views -- they would like to see her soon and again would like Ann's adopters to know this -- agreed to discuss this with J and K (social work professionals dealing with the adoption) who would then discuss it with Eileen and David".

79. I consider that these records demonstrate the direction of the discussions which took place in the period from April to July 2005. While Brian and Catherine dispute the first part of this memorandum of July, 2005 both accepted in evidence that other parts represented probably what had occurred at the time. It is difficult to think how Mr F could correctly place certain matters factually and sequentially and yet for other issues which relate to the state of the applicants mind to be incorrectly recorded unless Mr F completely misunderstood what was said to him, and this in fairness was the point made by the applicants. Brian and Catherine found very considerable difficulty in explaining why Mr F's records would be wrong on issues which are inconsistent with their case, but generally correct and accurate in relation to the other matters which are noted. They say that Mr F did not sufficiently heed their concerns. They do not agree with any entry which suggests acceptance on their part that the procedure could continue. Yet no satisfactory explanation has been furnished as to why Mr F would make such inaccurate records of what had occurred. It was not alleged that Mr F had in any way “revisited” the notes with the benefit of hindsight.

80. Brian and Catherine, I am sure, at many times had second thoughts over the period April to July 2005 on the issue of adoption. But those second thoughts never crystallised then into a concrete decision to seek to regain custody of Ann. No concerns or reservations were put in writing despite their being invited to do so. It is difficult to reconcile a discussion (which I accept occurred) between Brian and Mr. F regarding the passing over of photographs or arrangements for the future and more flexible access, with a latent or formulated intention to withdraw consent, halt the adoption process, or to regain custody of Ann. While, with hindsight, Brian and Catherine contend that they sought to express a different viewpoint to Mr F, I am not satisfied that that was so at the time. For the reasons outlined earlier regarding clarity of recollection I prefer the evidence of Mr. F on these questions.

81. The evidence does establish however that the issue of access and visitation rights was one which was a cause of particular concern. In retrospect it shows the applicants profoundly conflicted feelings at the time. They raised the matter with Mr F. They wanted an access regime allowing far more flexibility. There is no evidence that Mr F was unsympathetic. Nor, it appears, were the Doyles. The matter was discussed in correspondence from Mr. F to the applicants in July, 2005. A discussion took place between Brian and Mr. F. It was put to the Doyles that they might increase the access to twice a year. The Doyles agreed in principle to access on such a basis, but with the wish that they would see how the first visit would proceed in August, 2005. It cannot be said that the stance adopted by any of the parties was unreasonable.

82. By inference however, it appears that a concern that access should be relatively limited emanated from Ms. K the adoption social worker who did not testify. It seems her concern was based on a desire to ensure that Ann became more settled prior to any increase in access.

83. Ultimately, access to Ann was arranged for August. However unfortunately this arrangement did not occur without friction. Prior to seeing Ann a heated discussion took place between Brian, Mr F and Ms K with regard to what the first named applicant regarded as an excessively rigid and intrusive approach to the question of access. In particular Brian took exception to the presence of social workers during the visit and to rigidity in making arrangements which he would have preferred should have been made face to face between themselves and the Doyles. At one stage Catherine left the discussion in tears. She returned after a while and discussed the matter with Brian and said that their priority should be Ann. The actual visit, including the contact between the applicants and the Doyles went well. The Doyles were not aware of the problems that had occurred earlier.

84. The following day in August, Mr F's notes record an entry of a telephone call from Brian indicating that he was pleased with the meeting with Ann and with the second and third named respondents, and somewhat apologetic about his earlier manner. He said he was annoyed with Ms. K having set down ground rules. He still hoped for a less formal contact and felt that the second and third named respondents probably would agree.

The Revocation of Consent

85. What occurred at this access visit may well have been one of the precipitating factors in the difficult decisions which were made soon afterwards by the applicants; that is the Byrnes. After the access visit they went on holidays. They discussed issues which had been ongoing between themselves for some months. They decided that they would commit themselves to each other and they would seek the return of Ann to their custody. While these decisions appear to have been made in the month of August, they did not result in an immediate letter or formal communication. Catherine says that she drafted two letters, one to the Adoption Board withdrawing her consent to Ann's adoption, and the second to the Doyles explaining her decision. However the letter to the Adoption Board was not sent until September, 2005. In it while acknowledging that the Doyles had been wonderful parents she wrote that her doubts and unhappiness with the situation had not subsided. She said that she wished for the adoption order to be reversed and to resume full care and custody of Ann in what she termed "the best interests of Ann and myself".

86. Brian and Catherine said that they were informed by Mr F that at any time up to the making of the final order by the Adoption Board they would be entitled to halt the process. They indicated that on a number of occasions Mr F told them that while they had this legal right, to exercise it would be "morally wrong". By this they say reference was being made to the hurt which would be caused to the Doyles. The applicants contend that at no stage up to October, 2005 did they realise that the respondents, that is the Doyles, might themselves be in a position to make a claim for Ann's custody. They testified that their understanding was that at any time up to the final order by the Adoption Board, they could make their claim for return of custody as of right. They add that it was only in a series of meetings commencing in early October, 2005, that they understood that the Doyles, too, might make a claim for Ann's custody.

87. The forms originally signed in September, 2004 clearly indicated the possibility of a claim being made by the adoptive parents, were the birth mother to withdraw consent. The birth mother is specifically advised that if she alters her view with regard to the question of adoption, she should contact the Adoption Board without delay. Mr F has testified that they were counselled and informed in relation to the consequences of their decision to place Ann for adoption. One can only conclude that the more probable version of events is that it was only at the time that Brian and Catherine decided to reclaim custody of Ann that they directed their minds fully to these issues. It is noteworthy that the second named applicant testified that the making of the final order by the Adoption Board was likely to be made at a time approximately one year after the initiation of the process. The sending of the letter in September, 2004 is consistent with this view.

88. But it was unfortunately dependent on an understandable but somewhat simple view of the rights of the natural mother. This view might be simplistic. I think that the evidence shows there was perhaps a lack of appreciation of the formation of emotional links and bonds which were taking place between Ann and the intended adoptive parents, or to Ann's own emotional development in an evolution which had not stopped in the interim. It is also difficult to avoid the conclusion that Brian's testimony and recollection has very understandably been influenced by a combination of efflux of time, equally understandable confusion regarding their states of mind at the time, and perhaps an effort to understand, to rationalise, and interpret the events of this two year period in the light of their ultimate decision to reclaim Ann and initiate these proceedings.

89. The applicants say that over the summer of 2005, they had discussions with a number of health professionals including a psychiatrist, counselors and social workers in regard to the question of adoption and possibly reclaiming Ann's custody. They say they became more and more persuaded that the correct place for a child was with its birth parents. Brian stated that a number of media broadcasts on the question of foreign adoptions had an effect on his mind. Catherine did reading on the subject. In particular she was referred to a work entitled "A Child's Journey Through Placement" by Vera I. Fahlberg MD first published in 1991. The second named applicant's copy, (that is Catherine's copy) of this book has been handed into court and contains underlined sections dealing with the issues of attachment and bonding, particularly with regard to children of Ann's age. The book also contains marked portions referring to "the grief process", (identified by another learned authority), that well attached children go through when they are separated from care givers to whom they are attached. (J. Bowlby, Attachment and Loss, Volumes I, II, III, New York, Basic Books 1970, 1973 and 1980 respectively).

90. Fahlberg, a recognised authority, identifies recommended courses of action for carers in the formation of new attachments and the effect of the severance of bonds of emotion and dependence on young children and its potential consequences. One can conclude that it was then that Brian and Catherine may have begun more fully to direct their minds to the logical consequences of the decision they had made to place Ann for adoption (as opposed to fosterage, as had been the situation with Ms. I). One can conclude also that it was then they ascertained that to reclaim her they would also have to address the fundamental issues that arose as a consequence of the elapse of time which had occurred since Ann had been placed for adoption. At this point they were still single people. While they had made a commitment they had no immediate plans to marry. Ann was by then one year and two months old having been in the care and custody of the Doyles since November, 2004.

91. In September, 2005 Catherine telephoned Mr F. It is clear that here they were at cross purposes. When she informed Mr F that she had written a letter to the Adoption Board, he inferred that this was a letter to Ann in contemplation of the adoption going ahead. However this was by no means her intention. Later Mr F received a telephone call from Ms J stating that the Adoption Board had written to her and forwarding a letter from the second named applicant seeking to withdraw her consent to the adoption.

92. Later the same day there were two telephone calls. The first was from Brian who said that he was aware that Catherine was reconsidering; and the second from Catherine saying she had changed her mind, that she had never been comfortable with her decision, but that she could not bring herself to say this although she thought that she had explained it to Mr F earlier.

Meetings and Letters in October/November 2005

93. A meeting took place October, 2005 where Catherine is recorded as relating to Mr F that she had been in turmoil for over a year

on the question, saying one thing and meaning another. She said that the past year had changed her and made her listen to others as to what was right for her. She had spoken with a counselor who was a friend of Brian's mother who had convinced her of her ability to make her relationship with Brian work and her ability to care for Ann. The note states: "She now believes children can adapt to change as carer and parents can learn skills. She maintains her relationship with Brian is stronger than ever even though they work on opposite sides of the country..."

94. It also stated: "... She knows Eileen and David will be upset -- but believes they can always adopt again, whereas she feels she will have to live with her decision for the "rest of her life". She believes her original decision was based on uncertainties plus fears of failure or failing to provide a good start in life for Ann, but now they can provide it -- both have earning potential and realise they can find skilled jobs and they are still together."

95. Mr F is recorded as expressing his doubts and reservations in the context of what he perceived as the continuing uncertainty regarding her future with the first named applicant. They were still not living as a couple. He was concerned about influences in the second named applicant's life from the Byrne family, including a friend of Brian's mother, a retired addiction counselor. He raised again Catherine's original reasons for concealment of the birth, opting for adoption and the views of her family. Her family had been largely excluded from the process. He also raised the difference of personalities between the birth parents and the prospective adopters, together with Ann's ability to cope with these differences, should she resume custody. Mr F said that he asked what would happen if Ann did not settle and if the new projected arrangement did not work, or if Brian were to opt in favour of his careers and ambitions. He felt that the second named applicant had not fully considered these issues and should discuss them with somebody objective yet again. He noted: "Brian joined us at the end of the meeting saying he supported Catherine and they could make it work this time -- went over my reservations -- explained the adoptive parents had the right to challenge such a change of intention and the Health Board's obligation was to continue to provide for the child's best interest."

96. Catherine, who participated in all of the meeting in October, describes the event somewhat differently. She states that she outlined her reasons for her change of mind and that everything had changed. She described Mr F asking her to visualise what would happen in terms of what would occur to Ann or what would happen to the Doyles. She stated that she could not understand "for the life of me why he is acting or saying stuff, saying what he was saying to me. Because after the counselling sessions I would be very upset and I would go off to my bedroom and I would cry and if Brian was not there I would ring him or I would get someone to ring me to talk over what he had said to me. They were very kind and comforting and they were saying "well this is just, he is just testing you. He is making sure that you are making the right decision"." The second named applicant relates to Mr F stating that Ann would be "traumatised" or that the child would reject her. Catherine said that Mr F indicated that her ability to parent might be affected by her own relationship with her mother and the fact that she had felt unable to tell her about the pregnancy. They discussed Brian's work. At that time she was working. Brian was considering a number of different career options including taking up employment in another part of the country, a possibility he ultimately decided against in November, 2005. At the same time Brian was also looking for work in other areas.

97. This meeting was one of a number which occurred in October and November 2005. Some of the discussions took place, at Catherine's choice, in Mr F' car or in a hotel. This arrangement was convenient because the meetings could occur straight after work. They lasted for periods of up to two hours. The question of obtaining counselling from another source was discussed. To that end they attended Mr M, a counselor. Mr M testified that he met them during the period of October and November 2005. He formed the view that the applicants were both intelligent people who had no impediment in their capacity to act as parents. It should be placed on record that this view was borne out by other evidence in general in the case and that the applicants' capacity as parents is not fundamentally in issue, although of course issues have arisen during the course of the relationship between the parties which have some relevance to the point.

98. In the meetings they discussed the possibility of the Doyles going to court and seeking an order dispensing with the consent of the natural mother. Brian was insistent in his evidence that this was a matter which he had discussed with Mr F on a number of occasions before and that he asked what if they had changed their minds and that he was given to understand that there would be "more or less no court proceedings" unless they had been shown to be very unfit parents.

99. The question of further counselling was also raised. C formed the view that the Health Service Executive was, "stalling" the process. She stated that, in frustration, she wrote a letter in November, 2005 on the advice of Catherine's sister who had qualified as a social worker. In the course of that typewritten letter addressed to Mr F, she said that she would like to have Ann officially back on a specified date in early December. She wrote: "I recognise that this is a very frustrating and stressful time for David and Eileen and that my decision would be very difficult on them both. However I am making this decision in the best interests of Ann and myself and I feel that it is important that a date is now set for her return to my care".

100. She sought details of Ann's daily and nightly routine and her likes and dislikes in order to ease the changeover.

101. This letter of November in common with the letters of September, and one succeeding in November, all refer to the question of custody of Ann in terms of Catherine. They did not then refer to the applicants having any question of marriage.

102. During these meetings there were a number of issues raised. One was further counselling. It was suggested that Catherine should see another named counselor psychologist. In evidence she said that a question of cost arose, which was a matter of concern to her and she suggested that it was proposed that she should pay for this counselling herself because of the decision which she had taken with regard to reclaiming custody of Ann. I am satisfied that this was a misunderstanding and that the concern in relation to payment arose otherwise. This may have been because of a worry on the part of the Adoption Board and/or the HSE that by paying for such advice and counselling there might be a perceived conflict of interest.

103. The psychologist was unavailable. Catherine was concerned about the elapse of time. She wondered whether another counselor could be found. She met with a priest to discuss her decision who advised her that she should care for her child, but should try not to hurt anyone in the process. Mr F's notes record her stating that she was aware that she was hurting Eileen and David, but felt that she was hurt every day and needed to put herself first for a change. Mr F is recorded as advising her that she needed to put Ann first and to take into account her feelings, views and wishes. Catherine said she believed it was Ann's birthright to be with her parents. Mr F in turn discussed Ann's feelings towards her carers, who Catherine had a role in selecting, and agreeing they care for her daughter and adopt her. They discussed the question of causing Ann distress and unhappiness by separating her from her carers, as well as the consequences if she were not to bond with her natural mother or if the second named applicant were to be left as a single parent. The question of litigation came up and the need for adequate preparation for this.

104. At a further meeting in November, 2005 Catherine explained that she had written her letter of November 2005 in order to galvanise the Health Board into action, as she considered that they were stalling the issues of her resuming care, and also because of

her concern that the Doyles were being unreasonable and obstructive in using legal means as a method of intimidating her because she had no permanent home, no means, and no identified home where she could care for Ann. She thought that counselling was a ploy to put her and Brian to expense and to delay Ann's return. She said that Brian's mother had taken advice from a psychiatrist who had said "of course children of a year can adjust to new carers" and that "children are better off with their own natural families rather than with carers". She also said she did not trust the Doyles and their commitment to open adoption, as Mr F's records. She had spoken with Ms. I. The foster mother, the Ds had promised that they would keep in touch with her and they had not. (In fact, it appears this was on the advice of an adoption social worker). At this point Catherine was anxious to commence re-introduction visits twice weekly and to have Ann back in her custody within a month. Mr F raised the legal rights of the adopters to bring the matter to court and the duty of the Health Board to ensure the child's best interests. He urged Catherine to avoid deadlines lest the Doyles feel constrained to initiate legal proceedings.

105. At a meeting with both applicants in November, Brian is recorded as stating that he had never wanted adoption for Ann and went along with the second named applicant because he thought that was what she wanted. Both felt that they had let their families down and were torn about placing the child for adoption, that they had been together for the best part of two years before Ann was born, and wanted the best for her. They wished that longer foster care had been an option until they got their jobs or a place to live, and would have done it differently if they could put the clock back. They stated on that occasion that they felt pressurised by the Health Service Executive to go for adoption as the best course for Ann. They added that they did not see that they were supported in the decision they consistently expressed to Ms. H, Mr. F and Ms. J. They state that they did not feel that they had had a say. They did not want the procedure organised by Ms. K or any social worker. They now just wanted to have Ann back and get on with their lives.

106. When Mr F asked why they had not expressed these views a year or more ago they said that they felt that they were doing the right thing at the time (and are so recorded) and now felt it was all different. Mr F said the applicants were working on opposite sides of the country and were still not together as a couple and seemed influenced by Brian's family in particular. They responded that it was their decision now and Brian's family supported them in it. Brian is recorded as stating that he felt the Health Service Executive would go against them in court. Mr F said that he supported their original view to place Ann for adoption and if asked this would be his view. Brian and Catherine had by this point taken legal advice. Mr F is recorded as stating that with regard to the potential outcome, this would depend on the views of the court and whether the judge saw things from the point of view of the family and the Constitution, agreements made and signed, or the interests of the child.

107. Catherine afterwards wrote and signed a letter retracting her earlier letter of November and seeking a phased re-introduction to Ann over a longer period. Ultimately it was decided that mediation would take place between the parties which was arranged and took place early in 2006.

108. I consider that in general Mr F acted appropriately as a senior and long-qualified social worker. But it is only fair to point out that his position as of October and November, 2005 was an invidious one. As a social worker it was his obligation also to have Anne’s best interests in the forefront of his mind. One of the issues which had clearly emerged by this point was the fact of Ann's attachment and bonding, an issue which Mr F had discussed with a psychologist independently of his interaction with the applicants. The ultimate logic of Mr F's situation was that he found himself a social worker to Brian and Catherine, and, to a degree, to David and Eileen as well as having to deal with Ann's best interests. I think that these concerns may have resulted in Mr F expressing in rather stark and emotive terms the effect of the applicants' decision to reclaim custody of Ann on the Doyles. While there is a conflict of evidence as to whether or not Mr F at one meeting used words to the effect "what would happen if the Doyles jumped off a bridge?" it should be sufficient to say, that while understanding the anxieties and concerns of all parties, the utilisation of such terminology would be very inappropriate in such a context. While it must be a concern, the evidence does not establish that Mr F's advice at any time had the effect of overbearing the wishes of the Byrnes or the intentions which they had regarding their own actions.

109. By mid-November, 2005 both the Doyles (earlier) and the applicants (separately and more latterly) had obtained legal advice. For Brian and Catherine the question of legal costs was of great significance, having regard to their situation.

Events Up to the Initiation of Proceedings

110. At this time the applicants received legal advice that their legal position would be enhanced if they were married, thereby constituting themselves as a family under the Constitution.

111. Thereafter, Brian began to consider the arrangements for marriage.

112. In December, 2005, Catherine wrote a formal letter to the Adoption Board referring back to her letter written in September, 2005 indicating her intention to regain full custody of their daughter and now seeking for re-introduction to Ann to begin. If this was not possible she sought to know the justification and reasons behind this as the Doyles had not taken any legal action to that point.

113. From mid-November onwards Mr F had no further contact with the applicants save by letter. He was then unaware of any intention on their part to get married. He became aware of this only in February, 2006, after the initiation of the proceedings.

114. In December, 2005 Mr F wrote a formal letter reciting the sequence of events, the stance of both Brian and Catherine and the Doyles, and stating that pending the outcome of any court proceedings it was the view of the Health Service Executive that it was in Ann's best interests for the status quo to remain, that is for her to remain with her carers with whom she had a secure and comfortable relationship and who had committed themselves for her future care. In this letter the HSE, through Mr F, added that it would be reluctant to take any steps which might pre-empt High Court proceedings, especially in the nature of any re-introduction procedures. The HSE indicated that any re-introduction could only take place in the context of a consent from the Doyles if they were not taking High Court proceedings or if such proceedings were instituted then in the context of those proceedings or in accordance with the direction of the court.

115. In the course of this letter Mr F stated: "In taking this view, under legal advisement, the HSE is not taking sides with one couple or the other, but representing Ann's continuing best interest in the light of possible future High Court proceedings. Her care arrangements remain of the highest standards hoped for, and her ongoing relationship with Eileen and David remains secure and comfortable and in accordance with your original wishes for her care which this Dept. supported and helped obtain from her."

116. It may be remarked parenthetically that the grounding affidavit sworn by Brian for the purposes of this Inquiry also gives a less full account of these events. While again (to some extent) corrected by a supplementary affidavit sworn in May, 2006, and supplemented by the second named applicant's affidavit of April, 2006 the picture presented is by no means as complete as that in Mr F's affidavit based, as it was, on his notes. In his affidavit Brian said that, by way of letter dated November, 2005, "Catherine informed Mr F, social worker with Community Care Services, that she wished to have Ann returned to her care. The Adoption Board

replied to her by way of a letter dated November, 2005. In December, 2005 she wrote to the Adoption Board and again stated that she intended to regain full custody of Ann and asked that she be re-introduced to her. The Adoption Board replied by way of a letter dated December, 2005".

117. Having referred to these letters, Brian stated: "I say that I have had no response from the Health Service Executive regarding the request for the return of my child". This averment omits any discussion of the meeting which took place between Mr F and the second named applicant in November, 2005. No reference is made to Catherine's subsequent letter of November, 2005 withdrawing her insistence on a deadline. The meetings took place between October and November between themselves and Mr F are referred to, at most, by implication. Nor is there any reference to the letter from the Health Service Executive fully setting out its position in December.

The Byrnes' Wedding

118. It is now necessary to deal with the facts relating to the Byrnes' wedding. In Brian's affidavit he said that they were eventually married in January, 2006 (stated in error to be a different date of that month). The applicants say that they first agreed to get married towards the end of November or early December. In early December Catherine signed a document whereby Brian assumed guardianship rights in Ann. In evidence Catherine denied that at the time she had assigned guardianship rights to the first named applicant she had decided to get married. However six days later, in December, 2005, Brian made a telephone call to the District Registrar's Office for Births, Deaths, Marriages and Civil Partnerships for [area deleted]. Later that day, two completed marriage notice application forms were submitted to that office by fax. The Registrar, indicated that in that jurisdiction it is necessary that 14 days' notice only is given before a marriage can take place. The first available and possible date was therefore later in December. Once the application forms had been submitted Brian telephoned again in order to ensure that these had been received.

119. It was intended that the wedding should be attended by the two participants and two witnesses only. The time set for the ceremony was 10:30 am. The Byrnes were informed that they should bring a copy of their passports with them, or their birth certificates. The Registrar testified that he heard nothing more from the Byrnes until the morning of the proposed date for the marriage in December when Brian telephoned the office and indicated that he wanted to postpone the wedding and asked for an alternative date. The Registrar stated that the first available opportunity was in early January in the New Year, which Brian accepted, although this was not the only date available, there were other dates later in the year. The telephone call took place within 30 minutes of the time which had been set for the wedding.

120. The Registrar stated that he received no explanation for the applicants' failure to attend.

121. The couple had however previously made enquires about getting married in Ireland. It appears that Brian spoke to Catherine about dates. The Byrnes testify they indicated to a small number of friends that they intended to get married in late November or early December. Catherine stated that at the time that the projected date of her marriage was fixed, Brian may not have known that she intended to attend another wedding on the previous day in December, which was to take place nearby. She stated: "Brian might not have known. Well he might have known, *but he forgets things very easily* (emphasis added)" When asked why no step had been taken prior to December to cancel the wedding she indicated that she left such things up to Brian. It was arranged that the wedding should take place in early January. The reason for this was that she wished for a friend of hers to be in attendance at the wedding. That friend was unable to be there and consequently the marriage was again postponed until a later date in January, 2006. On this, the second occasion, the marriage was cancelled 20 minutes after the due time of 10:30.

122. On the day of the wedding January, while the couple had been informed that they should have two witnesses over the age of 16 years in attendance, they arrived alone. The Byrnes state that no friends or family members were at the actual wedding. Brian's family were in present in the locality but actually did not witness the ceremony itself. Instead it was necessary for the couple to ask two witnesses who were total strangers to witness the ceremony. Catherine added that while she wanted her friend to be with her on the day, she did not want her to be at the ceremony. The applicants state that for reasons of economy there was no engagement ring or wedding ring. They took no photographs after the ceremony. Brian's parents were present in the locality on that day but they were requested not to attend the wedding ceremony. Afterwards they simply went out to dinner.

123. No member of the Catherine’s family at all was present at the wedding or in the locality on the day of the ceremony. The evidence is that, even as of the date of this hearing, the second named applicant's younger siblings (that is Catherine's younger siblings) are unaware of Ann's existence.

124. It is difficult to reconcile these facts with the evidence by Brian that one of the reasons that the venue was chosen was that Catherine was from that place herself, as were her parents. When asked why the ceremony was performed there he said in order for it to be done as quickly as possible and also to get Ann back as soon as possible. Catherine said that the real reason for the speed of the marriage was that they could get Ann back, although this was not the sole reason, it being their intention to get married ultimately in any case.

125. Neither Brian's parents nor any of his family members testified in these proceedings. Nor did any of the second named applicant's, Catherine's family testify.

126. In February, 2006 a process of mediation ultimately took place although it had previously been anticipated that this would take place in January. By this stage, and even as of November 2005, the Byrnes considered that Mr. F and Ms. J, the person in charge of the adoption process with the HSE, were "biased" against them. They were concerned at the elapse of time and the fact that counselling had not been arranged before Christmas. They were concerned too, at the delay in mediation in January. These views and concerns were reflected not only in remarks to Mr F but also in communications which had previously taken place between the second named applicant and the Adoption Board by telephone.

127. In an Adoption Board memorandum admitted in evidence, in a telephone call of November, 2005, Catherine apparently expressed the view that both Ms. J and Mr. F were biased against her. She expressed concern regarding delays in the mediation process and in her inability to see Ann. In the course of the conversation with a social worker employed by the Adoption Board, Ms Grainne O'Malley, she is recorded as saying: "She would like re-introduction on a weekly basis and she would like to feel if it doesn't work out that the child would remain a couple." (sic) This is obviously unclear. The social worker is recorded as explaining "that such a process would be difficult for the couple with whom the child had bonded and would be fraught with tension". She wondered whether the second named applicant had considered the possibility of a more open adoption. Catherine described the adoption as open already but was definitely more keen on having the child back if she could possibly manage this and if the child was happy and could adjust to the changes. She stated that she felt she had made the right decision at the time she placed the child but that it was now a wrong decision. The birth parents had wanted to go travelling but now did not want this any more. This was said in the memorandum or record kept by the Adoption Board.

128. Regrettably the mediation process was unsuccessful. The stance of the parties was irreconcilable. On the one hand, the Doyles felt that the Byrnes underestimated the effect of the attachment and bond which had been formed between themselves and Ann. On the other, the Byrnes were anxious to demonstrate that they too could now form a bond and proposed a number of ways in which they suggested this could be done, whether by visiting the Doyles' home or the crèche in which she visited in company with the woman referred to as "Ann's auntie", that is the third named respondent's sister who lives close by to the Doyles' home.

129. It was suggested in cross-examination that, at one stage, the Byrnes proposed that if they had custody of Ann and if they were unable to establish attachment that she would be returned to the Doyles. They, however, denied that this was their understanding at all of the exchange and contend that their proposal with regard to attachment and bonding was posited on such links being formed either in the crèche or some other venue if it could not be in the Doyles' home. It is not possible to make a finding on this issue owing to the conflict of evidence and the absence of the mediator who was not in court to testify.

The Present Relationship Between the Parties

130. The present relationship between the parties must now be considered. There are a number of factors at play here. In the first place one cannot simply ignore the sheer impact of these proceedings which took place over a period of some twenty days. The proceedings were exceedingly stressful for the parties. Some parts of the evidence, especially those recording statements made either in counselling, mediation or social work assessment were expressed in an extremely blunt way. Some instances of these have been identified earlier, including questions as to the parties' fitness or capacity to care for Ann.

131. From as far back as April, 2005 there appears to have been some element of distrust felt by the Byrnes towards Mr. F, particularly in the light of his alleged description of having seen the Doyles out walking. This seems to have put a suspicion in Catherine's mind that there was more to the relationship between Mr. F and the Doyles than he had represented. There is no actual evidence that this was so. There is the fact also that the Byrnes perceived that there was a link between the signing of the final consent and access to Ann. The Byrnes considered that the Doyles were being unhelpful on the question of access.

132. Brian instanced the fact that the Doyles had not stayed in contact with Ms. I, the foster carer. They met Ms. I subsequently:

133. The Byrnes consider that they have been ill served by the Health Service Executive and by the social workers involved in the adoption. Both indicated that they felt they had not been "challenged enough" on their decision to place Ann for adoption as opposed to retaining her in their custody. It is evident too, that there is distrust of the HSE on the basis of a view that matters were delayed or deferred when the consent was revoked and the issue of reclaiming custody was mooted from September, 2005 onwards, although there was no distrust of Ms G. The Byrnes feel that they had been inappropriately advised as to the legal situation by Mr. F. While there is a conflict of evidence on what transpired with the mediation sessions, it is common case that they did not enhance the position at all, unfortunately, and that the parties remain entirely at odds as to Ann's best interests.

134. The Doyles considered that they had been ill served by being told of the Byrnes' marriage only at the end of the mediation session, although Brian has indicated that he informed the mediator who in turn told him that he should tell the Doyles and this was the first available opportunity. The Byrnes consider that F was unreceptive and inattentive to their feelings and their divided feelings about the adoption at Christmas 2004, in February, 2005, in the conversations between Brian and F on the telephone, at the meeting in April, 2005, and thereafter in relation to the transaction relating to the signing of the final consent, and also access, advice on and in relation to their rights should be they change their mind regarding the question of adoption.

135. The causes of distrust in the case are not one-sided. The Doyles through their legal advisers retained the services of a private investigator. It would appear that the purpose of this was to ascertain whether or not the Byrnes were truly living together as man and wife. It was by this means, apparently, that the Doyles became fully aware of the circumstances of the Byrnes' marriage. When cross-examined on this issue Mrs Doyle (otherwise Eileen) at first did not tell the truth and denied that a private investigator had been retained, although the following day, while still a witness, she accepted that she had told an untruth and apologised.

136. Finally there is the evidence of the Byrnes in relation to the situation that would obtain vis-à-vis the Doyles, and the evidence of the Doyles on the situation in the event that they were to succeed in regaining custody. Brian testified that he would be happy to see the Doyles retaining a relatively close link with Ann and playing a part in her life. He even went so far as to suggest they might be her godparents. This suggestion was not shared by Catherine. Both applicants testified that they would envisage that the Doyles should continue to play a role in Ann's life. However, this should be contrasted with their statements to Ms. G, the social worker retained by the first named respondent. "Both advised that they would want David and Eileen to 'move on' as they were clearly good parents and they would want them to have this opportunity. They advised that in the long term they do not believe that ongoing contact with Ann would be good for either them or Ann. They gave the example that if they were still seeing each other every month in ten years time they did not think this would be healthy. As regards general contact they would get advise as they simply didn't know what would be best."

137. When cross-examined on this, the second named applicant explained that statement as indicating that she did not mean that the Doyles should move on from Ann, but that they should move on with their lives and that if they did plan to have other children then she hoped that this would not affect that plan.

138. The difficulty of the situation is demonstrated by the fact that Catherine, on foot of her consideration of the issues of attachment and bonding, said that she saw the process of re-establishing the link as having three phases. The first would be of three months' duration, which she thought would be adequate. During this re-introduction period Ann would not be in their sole custody. However, at the end of that period, it would appear her view is that contact should be reduced. She was asked:

> " Q. And I think you accept from previous questions that you don't believe that Ann would have attached to you and Brian in three months' time?
>
> A. I don't expect her to be fully attached to myself and Brian in three months.
>
> Q. Therefore by definition in what you are saying you believe there will be a period of time during which she would not be fully attached to anybody?
>
> A. She will -- she will always have an attachment to the Doyles and that will never be broken.
>
> Q. Isn't that the whole point of the exercise to break the attachment with them?

A. It is to extend the attachment or to begin a new attachment.

Q. Yes but after three months, from what you are telling us, Ann would have very little contact with them, she wouldn't be attached to you or to Brian?

A. She wouldn't be fully attached."

139. She was asked whether Ann would be in a situation that she would have no full attachment to anybody. She disagreed, and said while always attached to the Doyles, Ann would be forming an attachment with the Byrnes and that such attachment would only get stronger. When asked whether or not Ann might never become fully attached to the Byrnes she anticipated this as a "slim possibility" but testified that there are means to help the attachment with the assistance of social work professionals such as play therapy.

140. Catherine considered that the conduct of the Doyles had caused her upset by the retaining of the private investigator, by saying that the Byrnes did not have an insight into Ann's life and saying that they were unprepared for parenting her. She added that she considered also that the Doyles had done something to upset Ann by refusing her the chance to grow up with her birth parents. She said that will cause upset to Ann. To this she added however that she accepted that the Doyles had done the Byrnes an enormous service and that everything they had done was with Ann's best interests in mind. She accepted that in order for any re-introduction to take place it would be necessary for both sides to be committed to such re-introductions and to take part in them in a real sense.

141. She was then asked:

"Q. Do you accept it could cause Ann significant damage if introductions took place in a way where one party was not committed to it and Ann in some way picked that up?"

A. Significant damage no.

Q. Perhaps you would accept damage?

A. I would accept a risk of damage."

142. Later the second named applicant, Catherine, was asked whether she would accept the proposition that the Doyles were the only family who Ann knew. She agreed. When asked what would be the position if the Doyles were unable to properly engage in a handover of custody the witness responded that she would have to know in what way they could not cooperate: "If they just say that they can't and they haven't even tried, well then does that mean leaving Ann where she is, with parents that can't make a decision for her, to look out for her best interests? Perhaps further down the line they will have to make a hard decision for Ann."

143. Having considered the evidence of the parties it is now necessary to consider the expert and social work evidence which has been adduced.

Psychological and Psychiatrist Testimony

144. Professor Dorothea Iwaniec is a emeritus Professor of Social Work at Queens University Belfast. Her extensive curriculum vitae shows she has qualifications to doctoral level in developmental psychology, and teaching and social work as well as extensive clinical and research experience of nearly 40 years in child and family work. She has published extensively on emotional abuse and neglect, failure to thrive in children and parenting of children. She was retained by the Doyles to furnish a report to the court on Ann's general developmental attainments, the quality of parenting she has received to date, and to comment on consequences of discontinuity of attachment that might occur if Ann was separated from her attachment figures.

145. The witness carried out an interview with David and Eileen wherein she observed the interaction between Ann and those respondents, an appraisal of her psycho social and physical development, and an assessment of the attachment between Ann and David and Eileen. This interview was carried out in April, 2006. That witness however did not engage in any interviewing process with the applicants, the Byrnes.

146. The witness described David and Eileen and Ann as being a very close, warm and supportive "family unit" who discharged their parental rights in a well informed, loving and caring manner. She stated that Ann related and interacted with them in a secure way. David and Eileen responded to her needs and behaviour in the appropriate parental fashion. The witness considered that the respondents were well functioning, committed to Ann and with a well established emotional bond between all three. She considered that the couple provided a high quality of care in meeting her developmental needs.

147. David and Eileen had visited Ann while she was in the foster home in order to get acquainted with her routines and to talk to the foster parents so as to be familiar with her likes and dislikes. Ann was described as a child of routine and predictable events which appear to make her feel confident and relaxed. She is also described as very determined, bright and alert and friendly, as well as being affectionate.

148. The central part of the witness' evidence related to attachment behaviour in an area where she testified considerable advances have taken place in thinking and analysis over the last 30 years.

149. Attachment of children to parents is seen as the most fundamental requirement of emotional development. In order to survive, children must attach themselves to a person who will respond to their needs and who will protect them when in danger and will provide safety, acceptance, reassurance, and comfort. The witness described the need for attachment as being genetic/biological and to have survival values. She stated that children are born with an inborn predisposition to rely on, and receive appropriate care and emotional attention in order to assist them to grow and develop in a secure environment.

150. She described attachment behaviour as beginning to develop at about six to seven months and being established at one year to 14 months. She stated that the very reason why it is important to place children whenever possible for adoption in the first six months to a year is that they are thereafter able to build secure uninterrupted attachment to a new family which would give them a good start and a sense of security and belonging for life. She testified that disruption of primary attachment can be extremely painful and damaging to the child's emotional development and can lead to serious emotional and behavioural problems.

151. Attachment behaviour is developed because of the dependency of small children on the availability of parents. This relationship of reliance gives rise to reliance on those parent figures to provide for the child's needs. Under these circumstances the child would

accumulate positive experiences and store them in memory, and thus will develop a belief that the parent figures are there to help them when help is needed. Thus a child develops secure attachments to such parent figures. The absence of response to such needs may develop attachment to parents which is insecure resulting in the creation of anxiety.

152. The witness identified three types of insecure attachment. The first results as a sequence of inconsistent care, giving the result of neglectful or disorganised parenting. This results in apprehension, confusion, and withdrawal on the part of the child, together with developmental retardation, poor socialisation and low self esteem and confidence. The second results from hostile or rejective behaviour on the part of parents. The children of such relationships show unselective attachment, may treat parents and strangers alike, are over-friendly with strangers, show poor concentration and tend to be disruptive, attention seeking, developmentally delayed, and have difficulties in building relationships with peers. They are aggressive and lack empathy with others as well as showing low self esteem. The third is shown in high risk children as a result of abuse. Parents of such children are unpredictable and frightening in their conduct. Children of such an attachment style are confused, anxious, show undirected expressions of fear and distress, disorientation, disorganised behaviour and apprehension in accordance with others.

153. By contrast, secure attachment style is the consequence of consistent and persistent responsiveness to children's signals of distress. Such correspondence with an appropriate parenting model results in children who are securely attached, show self confidence, high self esteem, good developmental attainments, are social leaders, are emphatic to others, trustful and skilful in interaction.

154. The attachment between Ann and David and Eileen was described as being particularly strong, secure, stable and well-established. This was demonstrated by the child's behaviour and interaction with her prospective adoptive parents and their mutual relationship. This attachment exists to an extremely high degree. She considered that the Doyles had built a strong emotional bond with Ann. The disruption of a well established sense of security and emotional belonging could have a serious effect on Ann's well being and could lead to emotional and behavioural problems. She considered that it was not in Ann's best interest to destroy this well-established security and emotional stability in order to meet what she termed as "the sudden needs of her natural parents and their families". The witness described the needs of Ann as being essential in the circumstances of the case by contrast to the needs of her natural parents who to her are strangers. She considered that Ann had reached a stage and age in her development where a change of care givers, environment and established child rearing pattern could have a devastating effect upon her. Though she had no doubt that her natural parents and their families would have tried to do their best, she considered it would be a risky move and a potentially dangerous one on which to embark.

155. The witness testified that particularly since the 1980s there had been developments in the nature, style, importance, monitoring and measurement of attachment. As distinct from the position 25 to 30 years ago, it is now possible to measure attachment in adults because it is important to know what are the capability or styles of attachment in adults which will thereby be transferred into the attachment of the child. Parents who are securely attached and who have secure attachment as adults will be more capable of enhancing secure attachment to their children. This area is described by the witness as being "completely new".

156. The second aspect, also new, is the way in which attachment may be measured. Protocols have been established to substantiate or measure attachment, both in childhood and adolescence by what it is called normative data. The witness carried out an empirical, "longitudinal" investigation to follow up such children for 25 years. She testified that in more modern research, experts laid particular emphasis on the issue of quality of attachment and its reciprocal effects on the child. She rated the quality of attachment between the Doyles and Ann in the highest possible category on the basis of what is know as the "Folgey Protocol" devised by an internationally known psychologist. The witness testified that at the child's particular age group, that is between 18 months to two years, they begin to develop their own identity, personality, and will and can be challenging. She described the child as being temperamentally quite a handful and wanted things done her own way although a child of good temperament and well developed.

157. The witness indicated that moving or transferring custody of a child prior to the age of six months may not be too disruptive to a child. By that point attachment has not commenced. From seven months onwards however she testified that one can perceive totally different behaviour and responsiveness from children to care givers. The witness described a number of indicators which were used by observers in order to demonstrate or establish such behaviour such as eye contact, conduct with strangers and differentiation between known and unknown persons. Within the first 14 months a child will have developed attachment. By the age of two years such attachment will be very strongly developed. This attachment is not just familiarity with the care giver but forms part of their emotional identity and sense of security. If that kind of security is disrupted then it is risky to the child's emotional welfare. A break in continuity may give rise to a discontinuity of trust and what she described as enormous emotional problems. The witness stated that "some children recover from it, but some children never do". She added that much depended on how things were handled and whether the new carers had the capacity as opposed to the will to be able to bring about the change. With regard to the natural parents the witness testified that one must draw a contrast between the child's present position and that which might arise if her custody was transferred to the applicants. The empirical evidence is to be contrasted with the hypothetical in the case of the Byrnes. The degree of attachment between Ann and the Doyles renders a move much more difficult. While an adult is capable of rationalisation and analysis a child of two years cannot do this because they have not yet developed the cognitive and intellectual abilities to carry out such a process of analysis. She stated that generally a move of this type with a child of this age is, "a very risky thing to do".

158. The witness referred to studies with adoption and fostering which demonstrated that children moved at times to different homes and had found it difficult to attach themselves or to engage in new attachment behaviour to new care givers. Having regard to the fragility of very young children there is vulnerability. She stated that if there is disruption or discontinuity then transfer might proceed in a good way but quite often would not.

159. The witness particularly identified one critical factor: that is the circumstances of any move. She stated that such a move must be by a step by step approach. It should be slow and there should be no moving on rapidly to the next stage. Sometimes such a process can take a long time, dependent on the personality and temperament of the child. Emergency moves of the type which sometimes arise in social work *very often* produce emotional disturbances and/or psychosomatic disorder in the child (emphasis added). The duration of such disturbance may depend to a degree on the temperament of the child. She testified: "In many instances, and in majority instances and we really have a lot of empirical evidence for that, the consequences will follow them through their lifetime. That is they will have difficulties in forming relationships in adolescence, forming romantic relationships in adolescence, they will show a lot of antisocial behaviour, aggression, lack of empathy to others, inability to maintain their relationships or even social contact. In adult life they tend to have marital problems, marital breakdowns, family violence, all kinds of disruption, emotional disruption as far as interpersonal relationships are concerned". Such changes are more likely to occur in the event of a summary or immediate move (emphasis added). The witness testified that even in the case of a gradual move such consequences may gradually arise.

160. A further factor is the quality of care which is given to the child on transfer of custody. One issue which arises is the factor identified as "emotional availability", that is the capacity to demonstrate emotional care. Another is the style of parenting in that the child who has formed an attachment is familiar with a particular style of parenting. An alteration in custody may give rise to confusion because the new care givers adopt a different style of parenting. This is somewhat accentuated in the case of a two year old child who does not have cognitive abilities to make sense out of the situation.

161. An additional issue to be considered is that of motivation. Professor Iwaniec acknowledged that the natural parents were, on the basis of the information furnished in other reports, motivated. However she considered that in the instant case it is necessary to contrast the concrete reality of the present custody as compared to the hypothesis as to the care which may be given were the child to be transferred to the natural parents. One factor which may be of assistance in relation to parental capacity is the carrying out of psychometric tests which identify a number of personality factors relevant to this process. A further process which may be adopted is the construction of a personality profile. The witness contrasted the personality profiling tests which Dr McDonald had intended to carry out as compared to a checklist identified by Dr Vera Fahlberg used by Ms G the Social Worker retained by the HSE. The psychometric tests have the advantage of being specific and being cable of being validated. Other tests which may be used are more in the nature of checklists and guidelines.

162. In cross-examination Dr Iwaniec stated that while she agreed with the arguments advanced by Dr Nollaig Byrne the Consultant Psychiatrist called by the applicants as to the circumstances in which a transfer could be made, she did not agree with her conclusions. She accepted that if such a process was well handled the chances of risk reduce. However in order to bring this about there must be two sets of parties who are engaged in the process. She accepted that if Ann were to remain in the custody of the Doyles there would be complexity in her life, and the role of her birth parents would continue. The effect of such complexity would depend on the adults. Such complexity would manifest at various stages of the child's upbringing. She considered that David and Eileen were devoted to each other and to the child. It was her view that the respondents could distinguish between their interests and that of Ann. She accepted that they could possibly make sacrifices to Ann, however she did not know if they could deal with a process of phased transfer which might be carried out were an order to be made.

163. The witness testified that if the process was not done on the basis of cooperation and sensitively she could assure the court that the child *would* suffer (emphasis added). With regard to any transfer to the applicants she stated that no one could make a statement that this *would* certainly succeed. She considered that there may be a sporting chance of such a success were it carried out sensitively. While the natural parents were motivated this was not a predictive factor. The witness drew a distinction between the desire to do one's best by taking up the care of the child on the one hand and aspiration on the other.

164. The witness indicated that she differed from Ms G a Social Worker retained by the HSE as to the steps which will be necessary in order to carry out such a transfer. She considered that Ms G minimised these steps. There had been two contact sessions which took place between the applicants and Ann in April, 2006. While Ms G pointed out that the applicants showed an ability to engage with Ann in an appropriate manner Professor Iwaniec stated that events which took place in the second session wherein Ann was unresponsive to the applicants and remained close to the third named respondent demonstrated the difficulties which were already beginning to emerge. She considered that the Doyles would have considerable difficulty in cooperating even if they wanted to, by reason of the emotional adjustments which would be necessary to be carried out. I have considered the evidence of Professor Iwaniec first because the onus of justifying the detention falls on the second and third named respondents.

165. Mr Gerry McDonald is a Consultant Clinical Psychologist attached to the Department of Clinical Psychology at Daisy Hill Hospital, Newry. He is employed by the Newry and Mourne Health and Social Services Trust. He received a letter of instructions from the HSE's solicitors in April, 2006 saying that an assessment had been requested relating to the effects of potential changes in the custodial arrangements of the child in terms of attachment issues. He outlined a background history. He added that in the compilation of his report which was to be carried out, it had been intended to undertake psychological evaluation of the Byrnes. Issues of concern relating to attachment are linked to the intrinsic characteristics of the adult who wish to undertake primary care of the child. He testified that he offered two appointments to the natural parents for the purpose of carrying out assessment but they did not avail of these.

166. On the second last day of the hearing Catherine said she would attend such testing if necessary. No explanation was offered for this change of stance. Dr McDonald testified that the psychological evaluation of the applicants would be a core requirement in addressing any issue of attachment in relation to the carer child relationship. He said that attachment theory had been established by Bowlby between the years 1969 and 1980 and further developed by researchers such as Ainsworth between the years 1969 and 1985 and Fonaghy in 1999. Such developments give emphasis to the importance of the formation of early relationships which is a pre-condition of normal development.

167. The attachment behaviours of the human child are reciprocated by adult behaviour which in turn strengthen the conduct of the infant towards the adult. The activation of attachment depends on a range of environmental signals which result in the subjective experience of security or insecurity. The experience of security is the goal of the attachment system which is the first and foremost regulator of emotional experience. He testified that childhood developmental literature provides compelling evidence of over-arching themes associated with protective and risk factors to a child's well being. No variable has more far reaching effects on a child's health and well being than a child's experiences within the primary care process. Attachment is the most important process in early childhood. It constitutes the strong emotional bond which is a secure base upon which other relationships may develop. There is a direct link between childhood attachment patterns, adult attachment styles and functioning in life generally.

168. The witness identified various well recognised categories of attachment quality, dealt with by Professor Iwaniec. He stated that, having regard to the documentation with which he had been furnished, it was difficult to elicit evidence of the applicants core personality organisation. Research findings are clear that young children are capable of developing a healthy attachment to anyone as long as that person can respond to and provide for the child's physical and emotional security and provided there is consistency and continuity. By ten to 12 months virtually all infants formed a specific preferential relationship with primary carers who are central in the regulation of emotion. Emphasis should be given that young children are not resilient, but are fragile; it is now accepted that a very young child's emotional environment will influence the neuro-biology that is the basis of the mind.

169. From the child's point of view the most vital part of the surrounding world is the emotional connection with their care giver. In most families the very young child forms bonds with parents on arrival. In a significant minority of families, often where parents themselves received inadequate care, there may be stresses that adversely influenced the care-giving relationship and directly impact on the child's developmental pathway. The emotional relationship that develops between a child and his primary carers is the important aspect of child development.

170. The witness stated that symptoms of attachment disorder can range from mild to severe mal adaptations in core areas of

development. While causes of attachment disorder are diverse, a common thread is the lack of continuity and stability within a child's domain and the limitations or absence of emotional responsiveness from primary carers. Children exposed to a variety of adverse experiences can suffer long term damage or negative psychological outcomes. A child who has been emotionally neglected or abandoned early in life would exhibit attachment problems that are persistently resistant to any replacement experiences, including therapy. It was difficult to elicit evidence relating to the applicants emotional closeness to the child.

171. While such matters must be speculative it may have been that the birth parents were ill prepared for parenthood resulting in a detached coping style relating to the child's care following the birth event. There may also be evidence of a grief reaction on the part of the natural mother. While recognising the complexities of the case Dr McDonald stated that psychological evaluation of the biological parents should be undertaken to ascertain whether there were factors in their personalities which might impact on the developing child, to ascertain the source and strength of their motivational intent to care for the child, and their confidence to initiate and sustain an appropriate parenting regime. He pointed out that risk factors associated with negative or detrimental early experiences can have a pervasive impact within a child's development which may have long term emotional or psychological impact.

172. The witness testified that the removal of any child in normal circumstances is fraught with difficulty. After the age of one year the child has a clear view of its preferential adults and also an identification of the emotional style in which it is growing up. If the transfer must be made then it should be graded and pre-planned. A transfer in the context of this case would require maturity and professional advice to the primary carers for a period of one year afterwards which should be neither monitoring nor punitive in nature.

173. Dr McDonald, who was called by the HSE, stated that he had several phone conversations with Ms G. It should be emphasised that while he was called by the HSE, this is more in the nature of his being tendered as a witness and Mr Rogers lead him through the issues which arose in his report, and he was thereafter cross-examined by the other parties. Dr McDonald stated that there appeared to be some confusion as to the role of himself and Ms G regarding process in which they are engaged.

174. With regard to the traumatic change, he said, a child of 18 months will undergo periods first of protest, followed by despair, and then denial if the transfer is not carried out in an appropriate manner. Each of these three stages may give rise to detrimental effects in the child's emotional development. He agreed with Professor Iwaniec's evidence that a summary move "*would be more likely to cause damage to the child*". (Emphasis added). Such an immediate move would lead to emotional distress as a matter of certainty. Any such move of a child should be pre-planned and graded. A further factor may be the temperament of the child itself and its degree of assertiveness.

175. Dr McDonald stated that Ms G did not seek any guidance from him on attachment issues. As a general proposition he considered that moving a child at 22 months who has a secure attachment to a parent figure would be an exercise fraught with some danger, the consequence of which might include emotional distress, insecurity and turbulence within the child's life domain. A child of 18 months who losses a primary carer will go through a definite sequence of emotional reactions. This proceeds from protest which may last from either hours or days; despair involving withdrawal; and denial where the child is not given an appropriate attachment figure who will deny the need for any type of caring. At the most extreme end of the spectrum such a child will transfer affection to objects or things as opposed to people. Dr McDonald considered that the participation of the Doyles in a phased transfer might be impossible from an emotional standpoint although all parties, he said, are obliged to follow court directions.

176. Dr McDonald expressed his reservations that the Social Worker retained to carry out the assessment on behalf of the HSE did not appear to have any prior experience of adoption type cases.

177. It is now necessary to consider the evidence of Dr Nollaig Byrne. The sequence of consideration of the evidence has been in the sequence of onus of proof, which lies upon the respondents - that is the second and third named respondents - thereafter the HSE psychologist's evidence, and thereafter that of Dr Nollaig Byrne.

178. Dr Nollaig Byrne is a Consultant in the Department of Child and Family Psychiatry in the Mater Misericordes Hospital at University College Dublin. She was appointed to her post in 1989 and is Clinical Director of the Mater service. The remit of the service in which Dr Byrne works is to look after the mental health needs of adolescent children with their parents up to the age of 16 years in North City and North Dublin. She had given evidence previously in two adoption cases and in several child protection cases. The circumstances of her retainer in the instant case were unusual, although I am entirely satisfied were in no way *mala fides*. In the month of March 2006 the witness was contacted by telephone by counsel and asked whether she would be available to do an assessment before the court in what she termed a situation of adoption. She did not receive any written instructions but received ad number of communications by telephone. Ultimately she received a letter from the solicitors for the first named applicant confirming appointment dates with the applicants in March.

179. The witness testified that in a further telephone call she was informed that the Health Board was obtaining an independent assessment and that the applicants would be having contact with A during assessment and also that the second and third named respondents had applied under the Adoption Act of 1988 for Ann's custody. (Such proceedings were not before the court).

180. Dr Byrne was asked whether she wished to meet all the parties and she explained that she did not think this would be appropriate, especially in view of the fact that the HSE was having its own independent assessment. On these grounds she did not think it would be appropriate for her to carry out such an assessment as well. At the time Dr Byrne met the Byrnes she had not sought any of the papers in the case, nor had she obtained any. She accepted that it would have been helpful to her to have obtained the documentation from the Health Service Executive, including the notes made in relation to the interaction between Health Service Executive professionals and the applicants during the placement for adoption procedures. Prior to testifying however she had access to the report furnished by Professor Iwaniec, Dr McDonald and G to which reference will be made below.

181. The witness described her role as being to meet the Byrnes, develop an understanding of their situation, how they came to make the decision that they later regretted, and their current psychological and emotional disposition to being parents. She conducted enquiries in relation to all the issues in their personal and family lives, and relationship with the professionals which she considered pertinent to the issue. She identified in particular the various serious concerns about the application that was being made, and how that would impact on the child's attachment status. Thus she saw her role in giving an opinion as being somewhat circumscribed with regard to a series of connected questions. She did not consider that she was being asked to furnish a comprehensive assessment of all the parties involved. Thus her position is in analogous with Professor Iwaniec. She was also aware that Dr McDonald had been retained although she was not sure exactly who had retained him.

182. In cross-examination she considered that the role of Dr McDonald *could only be helpful* to the situation (emphasis added).

183. The witness stated that she relied on the applicants account for the accuracy of her information. She was asked in cross-

examination whether she would accept the proposition that the reliability of the conclusion she reach was dependent upon the reliability of the information which she had been given. She replied that Mr F the Senior Social Worker employed by the first named respondent to deal with the adoption procedure was central to the issue, and if he delineated in what way the applicants approached the matter then he was in a much better position to state that the conclusions that she reached were wrong. She said "he was there, I wasn't and I am giving the account they gave me now. So it is F's opinion that is central to that question. He is the one who worked with the couple, who tried to support them in all sorts of ways and did what he thought was right in the way that they supported them and was available to them, as I understand it, in (sic) a very frequent basis".

184. Dr Byrne accepted that there were a number of areas where it would have been preferable if she had been able to carry out additional enquires, such as the circumstances of the applicants wedding in January, 2006, insofar as it related to their commitment and their preparation for it. Having been present in court for the evidence relating to the applicants marriage she stated that it was an unfortunate omission on her part not to have asked in more detail about the circumstances of the marriage and as to why the families of each of the applicants had not been involved. This would be important in terms of their future family social and supportive network. She considered that this was of particular importance in view of the fact that attachment is a family based event.

185. Reverting to her interview with the applicants the witness said that the pregnancy in question occurred in the early stages of the relationship before the couple had considered a long term commitment to each other. They were financially dependent on parents who expected them to undertake careers as a conclusion to the years which had been spent in college. Catherine adopted a position that Dr Byrne described as psychologically negating the event until after her final exams, while Brian, she said, remained a "bystander".

186. They described to Dr Byrne that in the last month of the pregnancy they undertook a period of preparation, imagining the baby and buying small items of baby clothing in the way that prospective parents typically do. She described the circumstances of the birth at which the first named applicant was present and the early nurturing of the child by the second named applicant. She stated that the Byrnes proceeded with the decision for Ann to be adopted on the grounds that a stable parental context was in her best interests. The birth mother in particular, although she received acceptance from her parents, did not wish to bring up Ann as a single parent. It appeared to the witness that both applicants were influenced by what may be termed cautionary predictions of poor long term outcome for young relationships. The witness stated that it is clear that this did emerge later in their joint concern and anxiety for Ann's welfare. Eventually she said it was the prospect of the finality of the decision for adoption which challenged them to claim their capacity to establish a marital bond and to assume parent roles.

187. Dr Byrne added in her report: "... however they did not have an adequate understanding of the manner in which early care giving shapes the attachment of infant and primary care giver in a constitutive and formative way". They described that they allowed the situation "to drift" in the knowledge that Ann was receiving good care from "substitute" parents. For them, the deferred adulthood specific to the dependency of college years extended also to their roles as potential parents. She add: "Here they were over reliant on the legal status of the adoption process as commencing at the signing of the final agreement at the expense of its emotional import for the parties involved".

188. When the extended dependent period of student life ended and as Catherine became less subject to her concern for parental approval and the reputation of her family Dr Byrne commented that a capacity for independent decision making in regard to their personal lives emerged. She stated that they now demonstrate good coping skills in a situation of considerable conflict and uncertain outcome and have sustained, emotionally, a joint commitment to their future parenthood for Ann. She said that while the initial reluctance to assume parenthood arose in a context of a specific dependency, they now demonstrate a total commitment and desire to place Ann as the centre of their lives. She added that there is no evidence of any psychological impairment which might contradict or undermine this commitment. This evidence is uncontradicted.

189. As Ann approaches her second birthday it is likely that she was now able to recognise and name her adopted parents, and other care givers, familiar adults and perhaps some children. She was also able to make and express gestures of affection and to seek comfort from her care givers who had responded to her in a predictable and supportive manner. She stated: "the loss of this emotional environment, particularly if abrupt, would cause her considerable distress. This would be transient as her new parents have the parental capacity to understand and be attuned to her distress, to support her developmental competencies and to appreciate the essential role played by the adoptive parents in her first two years of life". She added: "in this transition they will require professional support". The prediction of an enduring impairment on the child would only develop in the context of pre-existing vulnerability and the emotional unpreparedness of the new parents for the task. This did not apply in this situation.

190. On the basis of her information Dr Byrne considered that both the Byrnes had grown in families with stable parental relationships and with sibling relationships. She considered that they are both articulate, well educated caring young people with a sense of duty in their lives. They have been mutually supportive to each other throughout the period and do not describe episodes of rejection or separation or quarrels of mutual blame. They have sustained their intention and commitment as future parents in what was described as a focused and emotionally engaged way.

191. On the basis of her findings she recommended that the first respondent should undertake the reunification of Ann with her birth parents using best practice guidelines reflecting the needs of the child, her birth parents, and previous carers, which process should be carried out in consultation with practitioners who specialise in parent child attachment work as a core component of this process of reunification.

192. Dr Byrne did not accept that attachment theory was in its infancy in the early 1980s. She stated that Dr John Bowlby began his work in the 1960s and published two influential works on that issue. However further research was carried out in the late 1970s and early 1980s, particularly by Dr Mary Ainsworth, which has led to a revision of these earlier ideas on the basis of every day experience and practice. The work of Dr Vera Fahlberg has also been influential since the 1980s, especially in dealing with the issue of how to deal with children who are threatened with experiencing disrupted attachments.

193. Dr Byrne dealt with the question of the Byrnes disclosure to their parents with regard to the pregnancy. She was told that Brian had the expectation that his parents would assist or help after the birth of the child. She considered that if he thought that if his parents would have helped himself and Catherine to make a decision. She formed the view that Brian's parents had a lot of concerns about what was going to happen with their only son in the situation which had arisen, as a result of which he received a lot of confusing advice. Catherine's parents responded without prejudice which surprised her (that is referring to Catherine herself) but they did not respond with support. This created difficulties for her as she is the kind of person who would have needed that kind of support if she wished to retain custody of the child. As a consequence Dr Byrne considered there was an absence of support from the applicants parents.

194. Dr Byrne dealt with the interaction of the applicants with Mr F the Social Worker who dealt with the adoption procedure. She considered that Brian's expectation was that some "strong person" would tell him the right thing to do. However she considered the situation was different for the second named applicant. Brian described Mr F as confusing him. Ultimately however the position and choice was left open with himself. The first named applicant, Brian, appears to have concluded that Mr F was confusing, and in the end was unhelpful, although he had been supportive in the beginning. The witness commented that the confusion in the mind of the Byrnes reflected what she saw as their lack of capacity at the time to take an independent decision or stand outside their position in which they found themselves so as to make the decision their own.

195. Dr Byrne did not discuss the issue of open adoption with the applicants. The history given to Dr Byrne was that in April 2005 Catherine spoke by telephone to F and said she was upset, worried and wanted to reconsider her decision. While Dr Byrne was uncertain as to what happened on the telephone call or how it was reported, she surmised that Mr F concluded that doubts of this kind were part of the process of letting go. Mr F asked Catherine to put her views in writing. She did not write a letter but asked to see Ann for her birthday which was in July. The account given to Dr Byrne was that in order to get agreement to see her for her birthday the applicants had to sign a document which they did so they could see her. This caused them upset. Catherine was upset with her meeting with the adoption social worker because she realised that the adoption process would restrict her involvement with Ann. The adoption social worker had said that the restriction would be that they would see Ann in a supervised context for two hours per annum. As a consequence they wrote a formal letter in August 2005 (ultimately sent in September) and awaited a response from F.

196. Dr Byrne commented that the applicants did not appear to understand the importance of time in an infant's life in terms of the attachment process and the identification of primary carers.

197. Although the pregnancy was unplanned Dr Byrne was of the view that while young, because of their intelligence and education the applicants were adequately prepared to be parents. She considered that the applicants were very committed to each other and to a family formed with the intention of having more children.

198. The witness considered that while the Byrnes wanted to keep the baby in mind and see the child as often as possible, they did not understand that Ann would begin to prefer others to them except, she felt, at the point when they handed over the baby to David and Eileen in November 2004. She thought that the applicants had the idea that a baby has no way of recording the care given, even at a young age, and that the applicants did not understand that there were developmental issues for a very young child in the way that the adoptive mother would have. She stated that they thought as long as the baby was getting a good substitute it could be transferred to them easily.

199. When asked to consider the Byrnes' attitude to a transfer of the child to them she stated that she appreciated that they wanted to do it but they knew that there would be terrible difficulties.

200. When considering the question of transfer of the child, the witness stated that it is very difficult to consider imposing distress on a 22 month old infant whose preferential carers are the second and third named respondents, who she considered were well positioned to give her everything she needed in term of her upbringing.

201. She considered that there is considerable evidence that if well supported the child will have the resilience to cope with it. The birth parents had the capacity and preparation and motivation to create a supportive context for her, and with professional help to understand and respond to the distress which would arise from the transfer. She added that in this they would require the support of the Doyles. She said: "so I think what we say is that, this distress *may not* have enduring negative sequela if its done in the way that professional opinion regards how such a transition might be made. If she returned to her parents what has happened, birth parents, what has happened in her life will always be a marker in her history as to what happened in her early life, and if handled well this marker will sustain a resilience or it could be a marker for some negative developmental problems, including adult depression" (emphasis added).

202. The importance and significance of disrupted early life attachment for future assessment is at the forefront of the enquiries of clinicians such as herself.

203. She added: "... so the question is; will the child be able to make subsequent attachments? Like, transfer of care happens unfortunately all of the time, because of difficult situations. But when we think of this child, we think what if my child at two left me and went to somebody else and its unimaginable, you know, its unimaginable that we think that a child would become as attached to that other person as to us, yet we know it happens in our families, it happens in our work all of the time, and that transfer of care has to take place due to illness, death or failure to be able to be a parent. And therefore it is about how to support that in a way that the child will have a good adjustment and there is evidence that shows if the situation is handled well that children do manage that well".

204. The witness stated that in the event of an order for transfer being made the cooperation of David and Eileen would be essential. With regard to the vision of the applicants and the second and third named respondents she considered the former living in a state of hope and the latter in a position of fear "the worst thing that could happen to them". One issue identified by Dr Byrne as raising difficulties should the child remain with David and Eileen might be a question of complexities in her future life.

205. When asked what abilities the Byrnes would need, she stated that the core competence that a parent must have is to understand that the distress suffered by a child on transfer is the expression of some need at that time and that is the parent that must struggle to understand what that need is and to respond to it. If a parent does not have the ability to do that or ignores it, or thinks it trivial or inconsequential then there is a problem. She stated that the child is now almost two years old. The Byrnes have not had the opportunity of taking care of that child from birth and learning over a period of two years how to respond to the child. The child would have a whole repertoire of responses and demands with which they are unfamiliar.

206. Dr Byrne accepted that the reports that the court had received from Dr McDonald and Professor Iwaniec were both very helpful in that they describe the concern which arises in relation to the attachment issue in a very clear way sustained by reference. She stated that she would have no disagreement at all with the reports on this issue. However she added that herself, Dr McDonald and Professor Iwaniec and Ms G were all "talking about the irreplaceability of the initial attachment of the child to the Doyles".

207. Dr Byrne conceded that she had to rely on her report on what the applicants told her retrospectively about their experience, which she recorded as accurately as she could. Having described the position of the second and third named respondents as being, "unimaginable" in the event that they were directed to part with the child she accepted that it was even more unimaginable from the prospective of Ann herself. From her stance her present situation is a secure world she has known, the place she has lived, the faces

she recognises. She stated that is going to be changed, all changed for her. For this reason she stated that the change has to be attenuated rather than abruptly achieved.

208. Dr Byrne agreed with the experience earlier described from Dr McDonald regarding the stages of loss experienced by a young child and the consequences. It was difficult for her to estimate how long the three phases of anxiety, that is protest, despair, and detachment would last. With regard to protest that if it was not resolved by three months then there are serious difficulties. Such a period is an enormous time in an infant's life and if there was protest every day and the child was not settling then that would be extremely serious. However if the level of protest was decreasing albeit with residues by three months then such would be a good outcome.

209. If the child were to cry for more than a week, then that too would be a very serious situation. Were the child to go into the despair phase such a situation is often not recognised because the child has apparently adjusted. However the factual position may be that the child has lost the ability to attach or to look to adults for care and comfort as a result of which it becomes part of the core personality of the child: such a development may be for life.

210. The witness accepted that the two primary factors which may influence the individual reactions to loss are the strength of the relationship being broken and the abruptness of the situation.

211. Having considered the context of the child, the witness stated that in the event of a transfer taking place the child would definitely suffer hurt. She was unable to state whether the child would suffer enduring damage although such an issue would be closely connected with whether the child went through the grieving process and successfully formed an attachment with others.

212. The witness was then asked whether in the event of a *summary* transfer of the child she would inevitably suffer considerable damage in such circumstances. She answered "yes". When asked whether this would be considerable and lasting damage she stated that she felt she must say yes but could not predict. When asked in the event of a summary transfer if she considered that there was a high risk of permanent and significant damage she stated that she was absolutely opposed to the summary return of the child and that her recommendation was posited on the Doyles' cooperation with the changeover which may arise from their finding it too painful or too difficult to cooperate, in which circumstance the applicants should reconsider their understanding of the best welfare of Ann.

213. This evidence from the applicants own witness is I think of real importance.

214. When she was asked if the respondents found it too painful and too upsetting so that they were unable to cooperate would she be in favour of the handover of the child she responded: "*I would say that that was a very high risk of the best interests of the child not being met*" (emphasis added). The witness accepted that there appeared to be some difficulties in the relationship of the second named applicant with her mother in that she was more comfortable in discussing issues of this type with her father and was worried about letting her mother down.

215. The witness accepted that her view that the long term interests of the child lay with birth parents was moderated by the issue as to the Doyles' cooperation or the absence of it. Her view is that the reason they would not cooperate is because of their belief that the child's best interests would not be served by a transfer. If they were reassured that this was a committed couple who knew how to love and take care of the child then that would enormously reduce their pain and anxiety. However they have not had that reassurance yet. What was available in the notes is material which might make them worry that there was evidence that the applicants were not prepared parents. The Doctor stated of the Doyles: "they want to see evidence, they have no evidence at the moment and all they will see if the transition takes place is the child's distress at leaving them so they will need a lot of time".

The Social Work Evidence

216. It is now necessary to consider the evidence of Ms G. She holds a degree in Social Studies and a national qualification in social work. She is a Duty Social Worker. She described being requested to conduct an independent assessment with regard to the best interests of Ann. She stated clearly at the outset of the assessment that she had no prior experience in the area of adoption and that this was made clear to all parties and their legal representatives at the start of the assessment. As a Duty Social Worker her job involves frequent placing of children in care and also involvement in fostering arrangements. She stated that she considered it her function to carry out a report as to what she considered was in the best interests of the child on an independent basis.

217. It is clear that the original basis upon which the HSE intended to provide evidence to the court was to combine a report from a social worker and a psychologist experienced in the area of attachment and bonding, or alternatively to furnish them separately. It was precisely for that purpose that Dr McDonald was retained. However Ms G did not consider it necessary, or within her remit, to liaise closely with Dr McDonald. Her report was to be independent. While there were some telephone contacts between Ms G and Dr McDonald that was all. I remain puzzled by the question as to how it was envisaged this process would be carried out in the absence of such cooperation and liaison between Ms G and Dr McDonald.

218. Brian and Catherine made themselves available for interview with Ms G on five separate dates. These interviews took place at various locations.

219. It should be pointed out that Catherine did not inform Ms G that she was working. In fact she stated to her that she had ceased work, whereas in fact she was still in employment. What was stated to Ms G was untrue, based on the applicants concern that her being in work might be a prejudicial factor.

220. The witness assessed the Byrnes using two assessment tools known as a Social Network Questionnaire and a Social Provision Scale. The former measures sources and quality of support. The latter is stated to provide measures of support in six categories.

221. The questionnaire which was used for this purpose is frankly confusing. I do not think that the results or the weightings which the applicants, that is the Byrnes, have given to their various relations in the course of the questionnaire would be either accurate or fair to themselves. To take one example, it does not appear that the two applicants, who are after all spouses, ascribed the highest level of support to each other. Ms G says that the analysis of the completed questionnaires indicate a high level of support in all domains. An examination of the answers to the questionnaire itself might in fact have demonstrated inconsistencies in the responses and might well have raised questions in Ms G's mind had she checked these responses.

222. For the purposes of these interviews Ms G had been given Mr F's notes. They represent the ongoing record of the interaction of the social work professional with the applicants during the material times. While a two hour discussion took place between Miss G and Mr F, no significant discussion took place between them in relation to what the applicants themselves alleged took place between

themselves and Mr F.

223. The matter is rather puzzling, and made more so from the remark made by Ms G where the Byrnes made criticisms of Mr F, that she understood from Mr F that he did not accept what was stated as an accurate account of his involvement with the applicants. However her report does not refer to what Mr F had recorded.

224. The reference, one to Mr F's and the other social work records, is to an entry on one single date in support of the account of the applicants. There were many other entries which, it might be thought, might possibly have been put, even briefly, to the Byrnes in order to ascertain firstly whether they agreed with such entries and secondly, if they did not, what they said had actually occurred. As Dr Nollaig Byrne pointed out, with reference to herself, Mr F was present, she was not. With reference to the meetings with Mr. F, Ms G states the applicants "shared that these sessions made them more confused". Brian described his "head spinning" and having headaches with so much confusion. In respect of these sessions the applicants felt Mr F didn't "challenge" them enough on adoption, and felt if they had been "pushed" they would have taken Ann home.

225. Ms G's comment was: "Obviously the pre-adoptive counselling process is, by virtue of its purpose, emotional and difficult and this reflects the magnitude of the decision being contemplated".

226. Ms G quotes the applicants as stating "that the consent forms were signed as this was "just something that had to be done, "another step"". Over the course of her assessment she said Brian, particularly, presented as annoyed regarding how the process was handled. He had been adamant that at each stage he checked with Mr F if this would be final, could they still change their minds, and received reassurances that they could, and while they may have to go to court this was more a "matter of form". Ms G states that she understood from Mr F that he did not accept that this was an accurate account of his involvement with the applicants.

227. The Byrnes stated to Ms G that the reasons for placing Ann for adoption were essentially selfish and that they wanted to give Ann everything which they felt they would be unable to provide for themselves due to their circumstances. I should state that I do not share the view that the decision to place Ann for adoption was a selfish one.

228. Returning to Ms G, they considered that they were both immature and naive and didn't know better. They were initially fearful of their parents' reactions which was a big factor in considering adoption as an option. Catherine also said that they wished Ann to be raised by two parents and that this was an important factor in considering adoption as an option. However, she stated, they were now more mature, realised that some of the things that they thought were necessary are not and that their reasons for choosing adoption are not valid now. Ms G considered that the applicants demonstrated an adequate understanding of parenting and an appropriate awareness of children's needs.

229. The Byrnes both acknowledged that should Ann be returned to their care, this would be difficult for her and would involve a period of loss and grief. The applicants considered that this could be dealt with by focusing on the "positives", for example, ensuring that Ann saw the house as being a "fun place" to be in with two people with whom she could have fun. Ms G stated that "there was a certain reluctance to examine the negative consequences of such a move". However the Byrnes clearly recognised the importance of the Doyles for Ann, identifying them without hesitation as the most important people in Ann's life. The applicants envisaged that the re-introduction of Ann into their lives could be done on a gradual and phased basis, firstly by visits to the Doyles' house, establishing her routine, likes and dislikes, and also by transferring as much familiarity as possible by way of toys and cot to their home. The Byrnes stated that they would see the time frame for such a move being over a four to six week period. Ms G considered this might not be sufficient although the applicants would welcome professional involvement.

230. Ms G stated that as there was no contact between the Byrnes and Ann she put in place such contact for the purpose of ensuring a balanced and equitable assessment in both families. Two contact sessions took place in April. A further session planned for late April was cancelled by Ms G as Ann had refused to separate from Eileen during the preceding session and had become distressed.

231. However she considered that the Byrnes had the ability through both observations to engage in an appropriate manner. She considered that Brian was more forceful in trying to engage with Ann at the end of the second session, asked Ann for a kiss before she left, to which she made no response, and had her arm wrapped around Eileen. Ms G commented Brian proceeded to give her a kiss. A more sensitive response in the circumstances may have been to "blow" her a case or wave "bye bye".

232. When Ms G was asked about the difficulties which occurred on the second encounter between the Byrnes and Ann, and whether that was significant in terms of predicting an outcome in the event of her custody being transferred to the applicants, she responded not and the purpose of the contact sessions was just to observe the interaction. She did not see it as being any more significant than that, or being part of a re-introduction plan. This was not a view shared by Professor Iwaniec.

233. Turning to the Doyles (having taken details of their family history and Ann's placement) Ms G stated that the respondents indicated a thorough understanding of children's needs ensuring that Ann had sufficient toys, books, bricks and colours and sufficient affection and physical contact. She reported the second and third named respondents as stating that the child required stability, security and consistency. The Doyles demonstrated a clear understanding of Ann's needs with regard to establishing her identity as an adopted child, incorporating her birth family history into her life and ensuring that the child had an appropriate sense of self and dealing with any sense of loss or abandonment. The Doyles repeatedly spoke about being open to the Byrnes involvement in Ann's life and not denying Ann her identity or birth family. The Doyles had given thought as to how they would tell Ann about being adopted and stated that this would be a gradual process. Additionally the respondents demonstrated appreciation of what was seen as an important issue, that is the protection of Ann's life story so far that is by preserving access to her own history, and ensuring that there should be a life story book for the child. Ms G had no criticisms to make with regard to the Doyles' parenting of Ann.

234. She concluded that both applicants and respondents had the capacity to meet Ann's needs. She acknowledged that this was more evident in the case of the Doyles as they could actually demonstrate having met Ann's needs over a period of time and had real experience of parenting her. The applicants were confined to the theory of meeting her heeds. However nothing arose in the course of the assessment which would preclude them from meeting Ann's basic care needs.

235. Having come to the conclusion that both families could equally meet Ann's needs Ms G next sought to determine "the costs and benefits" of Ann remaining with the Doyles as opposed to moving to live with the Byrnes. She too referred to Fahlberg as indicating that the primary tasks to be accomplished at Ann's age i.e. between 12 and 36 months was for her to separate psychologically from her primary care and begin to develop a sense of self. This stage may be accompanied by a sense of increasing autonomy. Between 18 and 24 months the child learns to carry an imagine of his/her loved ones in the mind's eye; from this time onwards the parents and care givers no longer have to be in the room for a child to know that they exist. Ms G stated, "this will help them tolerate separation from primary carers".

236. She said that children are particularly sensitive to separation from their primary carers between the ages of six months and four years. Separation interferes with the development of a healthy balance between dependency and autonomy. If they do not trust that adults will be there when needed, some children will insist on constantly keeping adults "on side" by demanding and may be afraid to show autonomy. Other children may become excessively autonomous. Separation of primary carers may lead to regression in terms of recently acquired skills. Ms G described the grief process which has been referred to earlier.

237. With regard to the minimisation of trauma in moving children she referred to Fahlberg offering two central premises: first that planned transitions are less harmful to children than abrupt moves; and second the need for support for the emotions of everyone involved in the transition. She stated that the need for preparation by adequate pre-placement is imperative.

238. Having considered the matter and referred to her day to day experience as a social worker dealing with children in need she stated that in reaching her conclusion she could not but have regard to two of the fundamental principles underlying the Child Care Act 1991; namely that the welfare of the child was the first and paramount consideration; and that generally it is in the best interests of the child to be brought up in his own family. On those two premises Ms G considered that Ann's best interests would be served by a return to her birth parents. She accepted that Ann would experience some degree of distress. However she added moving a child at this age was not unique or uncommon and can be seen in adoption, fostering and generic social work practice. Her condition was based on her apprehension of Ann's long term welfare needs.

239. It is difficult to avoid the conclusion that Ms G's recommendations were very much guided by strict parameters which she had laid down in her report and in her testimony. This is evident from her own definition of her role. It is evident from the absence of full contact with Dr McDonald which resulted in the absence of an overall composite view encompassing the question of bonding and attachment from the HSE witnesses. Ms G herself accepted that bonding and attachment was central to the issue of the welfare of the child. She accepted she had no expertise in that area. When questioned as to what would be the consequence if the Doyles were unwilling or unable to countenance the transfer or unable to emotionally engage in the process, she responded simply, more than once, that this would be regrettable because it would not be in the interests of Ann.

240. I would wish to state I do not blame anyone personally for the way in which the evidence evolved in this case. If I am seen as making comments that is not to be seen attributing blame, and I do not wish to make any imputation as to the professionalism or objectivity of any witness.

241. One turns to the views of Mr F on the question of Ann's best interest. One must of course have regard to the caveat regarding his involvement throughout the issues in question. Therefore consideration must be given as to the weight that is given to that evidence, although I do not think it should be dismissed. His view was at the time the parents made their original decision to place Ann for adoption such a course of action was in her best interests. He informed the applicants in November 2005 that this remained his view and also at the start of these proceedings and having heard the evidence. As a social worker his view was and remained that Ann's continuing care needs would best be met by the Doyles who have been her parents, parent figures, and had been for a year at the point when Catherine sought the child's return. The main factor in his view was the parents original wishes, and their consistency in expressing that wish as being what they wanted for Ann. They had stated what they desired was for Ann to have consistency, security and stability which at that point they were not in a position to offer her.

242. He was influenced too by the fact that the applicants had not sought a care arrangement or fosterage. They had asked for adoption, wherein permanent care was provided for another family. With regard to Ann's medium and long term interests, his view was influenced by the uncertainty now being raised in terms of a possible phased re-introduction and the possible negative consequences. It was clear that transfer would be distressing for Ann and whether she would ever get over that distress or come to terms with it and whether Catherine would be able to cope with that distress and her guilt in placing Ann were uncertain factors.

243. His view was that putting Ann into such a situation like that had a strong chance of failing and that placing Ann with her natural parents would be more harmful to Ann and might cause her damage. He considered that there would be considerable difficulty for the natural parents in bonding with Ann or re-attaching with her not having had any attachment over the past two years. He was pessimistic as to the chances of achieving a re-attachment or bonding between Ann and her natural parents. His reasons for saying this were firstly, that this would be Ann's second re-attachment after she moved on from Ms. I, or perhaps her third re-attachment taking into account her links in the hospital with her birth mother. Her present age was a particularly difficult time to work towards placing a child with new people, even in a planned way, even if it had been intended from the beginning. Even if, for some other reason, the attachments and bonds between the child and its natural parents had been broken, the re-attachment process after a two year break would be extremely difficult and would require the cooperation of the Doyles which would be extremely difficult, although he did not consider that they intentionally would be obstructive. With regard to his interview with Ms G, Mr F said that he had picked his words carefully in that he did not want to overly influence her, or want her report to be a reflection of what he thought was right. He himself considered Ms G's report was fair, impartial and comprehensive. He considered that a summary return without the cooperation of the Doyles would cause real damage to Ann as a matter of certainty rather than probability and would affect her emotional adjustment to growing up and leave her a damaged person.

Consideration of the Evidence

244. In assessing the evidence it is unnecessary to rehearse material already set out.

245. Of the expert and social work witnesses only Professor Iwaniec and Ms Sharon Campbell had the opportunity of meeting Ann and observing her interaction with the Doyles. Of these two witnesses on the issue of assessment of attachment and bonding I prefer the evidence of Professor Iwaniec by virtue of her particular expertise in this area which was seen as the most fundamental requirement of emotional development in children.

246. When Dr Byrne's testimony is put together with that of Professor Iwaniec that overall testimony acquires a fuller context. Taken together I consider that the effect of this evidence is that, in the event of an abrupt transfer, or one effected without cooperation, or in circumstances where cooperation is likely to breakdown, there is a probability that Ann will sustain psychological or emotional damage. This must be seen in the light of many factors which regrettably demonstrate the breakdown in trust that has occurred between the parties and which is through much of the evidence.

247. For the reasons outlined earlier in Ms G's report, in the absence of Dr McDonald's tests one cannot arrive at a fully integrated view. It is obvious that as a general principle, as a matter of law and as a matter of constitutional principle children should be in the care of their natural parents. But as accepted by the expert witnesses the issue of bonding and attachment is fundamental to this case. So too is the context in which any transfer might take place. Ms G accepts that she has no expertise in psychology or in the issue of attachment. The evidence of Mr F based as it is on his experience is worthy of consideration.

248. A further issue in assessing the evidence was the extent to which Professor Iwaniec and Dr Byrne actually agreed on the principles applicable. No suggestion was made that the evidence of either witness fell outside the mainstream of psychiatry or psychology. It is clear that Professor Iwaniec has a particular expertise in the area. The manner of the testimony in both examination and cross-examination showed this. Dr Byrne weighed her answers extremely carefully, especially in relation to the issue of the transfer of Ann and the circumstances in which that might take place.

249. The evidence in these issues is corroborated by Dr McDonald. In the absence of cooperation and trust a successful phased transfer already defined as "risky" can only be seen as raising as a matter of probability the risk of long term damage at the time of any transfer and in its aftermath.

250. Dr Antoinette Dalton a Consultant Psychiatrist having been contacted by the applicants in May, 2006 testified as to the advice she had given the Byrnes as to how they might help Ann were custody to be transferred to them. This was the premise of her testimony and the nature of her report. While she was invited in cross-examination to testify on the boarder realm of the transfer of children in care, I do not consider the case histories in which she was involved are comparable to this case. On the basis of any conflict I prefer the evidence of Professor Iwaniec and Dr McDonald, and indeed Dr Byrne based on their expert knowledge and expertise on the issues of disruption in continuity on child care and its effect on young children.

251. This is not to ignore the risk, which must not be ignored, that for bona fide reasons the Doyles may be unable to cooperate in a transfer process. But in no circumstances could a court countenance a "veto", based either on bona fide reasons or otherwise, when issues of this type are at stake.

252. All these factors must be seen in the light of the evidence relating to the degree of trust between the Byrnes, the HSE and the Doyles. When one takes the expert evidence together with the absence of trust and cooperation, the question must arise as to whether a very short term phased transfer of the type (which is the only way in which Ann's emotional development might be protected) can now take place.

253. In these circumstances, and having regard to the fact, I consider that the evidence goes significantly further than that adduced in two cases; *Re J* [1966] IR 295 and in R*e JH (An Infant)* [1983] IR 375. Developments have taken place in psychology which have considerably advanced the knowledge now available as to attachment, bonding, style of parenting and with regard to the effect of the transfer of care and custody of children, particularly in circumstances where such transfer may be abrupt or which breakdown because of distrust.

254. There flows another consequence from the fact of the applicants deferred withdrawal of consent until what was, within their framework of estimation, a late time. In April 2005, despite the recommendations of Mr F, the Byrnes did not put their concerns in writing. Indeed at all stages up to the sending of the letter in September 2005, I consider they appear to have given the impression to health and social work professionals that the process for adoption was proceeding. Their inability, or it should more accurately be said their difficulty, in addressing this issue squarely then, and if necessary in writing, seems attributable to the fact that they themselves had not made a final decision as to their own mutual future. Only when that had been done, in mid to late August, was the decision made to seek back Ann's custody. Thereafter the process was further deferred. While the applicants may have perceived that the first named respondents were engaging in a ploy to forestall their endeavours, the evidence does not establish this. Undoubtedly there was elapse of time. But this must be seen in the light of the decision of the second named applicant in November, 2005 to withdraw the deadline which she had fixed of a specified date in early December, 2005. It must also be seen in the light of the additional steps which the applicants themselves embarked on, having taken legal advice in having the first named applicant registered as guardian of the child, in re-registering her birth name, and in their marriage in January, 2006.

255. Matters were deferred until the initiation of proceedings by way of an Inquiry under Article 40.4.2 on 17 February, 2006 a form of procedure, which it may be thought is unusually inflexible and which permits the court only to make orders either as to the legality of the custody of the child or the absence thereof. An application by way of Article 40.4.2 does not permit any other order. Thus in the event of an order being made absolute, the present custody of Ann would ipso facto become unlawful.

256. I do not wish to leave the consideration of the evidence, sometimes confused and conflicting, without a real and lingering concern that the Byrnes were two young and vulnerable persons trying, in some isolation, to cope with a very human and difficult situation. They were not to blame for what happened. No one was. But the fact remains that these two young people found themselves in a position where their hearts and their heads were in conflict and where support was need from every source. I do not think that they received the support they needed.

257. I add in making the remark that I have, in relation to the absence of support for Brian and Catherine, I do not mean that remark to be seen as a reflection on any professional who is involved in this case. Such a situation appears to me to be one where procedurally or structurally such support should be available on an organised basis.

The Law

258. Article 41 of Bunreacht na hEireann "recognises the family as the natural and primary unit group of society" and further guarantees "to protect the family in its Constitution and authority". The rights guaranteed by Article 41 are recognised as belonging not to the individual members of the family but to the family unit as a whole. The rights herein in the institution of the family itself as distinct from the personal rights which each individual member of a family may enjoy by a virtue of membership of that family.

259. This Article establishes a private realm of family life which the State may enter only in exceptional circumstances which are identified in Article 42.5 of the Constitution. Article 42 itself provides: "1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual physical and social education of their children."

260. Proceeding to 5 it provides: "5. In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children the State, as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard to the natural and imprescriptible rights of the child".

261. The provisions of the Constitution provide for the family unit, and its autonomy over and above the individual members of the family itself. Save in exceptional circumstances or where there is a failure of duty the individual rights of the constituent members of the family are determined by the family as an entity. While Article 42 may be seen as dealing with the right to education it in fact speaks more directly to the rights of the family, it is presumed, and forms an addendum to Article 41, dealing as it does with education in the wider sense. The reference to education contained in that Article alludes to the upbringing of the child which it holds not only to be a right, but a duty of the parents. The Article thereby reinforces the decision making autonomy of the family which

assigns a strong priority to the parental autonomy on the basis of a constitutional presumption.

262. Article 42.5 of the Constitution is of particular relevance to this case addressing as it does the question of failure of duty by parents towards their children and the consequence, where as has been pointed out, the State as a "fall back" must augment as guardian of the common good the place of the parents having regard to the natural and imprescriptible rights of the child.

263. Taken together Articles 41 and 42 of the Constitution render the rights of married parents in relation to their children "inalienable". Article 41 alludes to the inalienable and imprescriptible rights of the family. The latter Article refers to the rights and duties of married parents. There is a constitutional presumption that the rights of children are to be found within the family. Only if the circumstances are, "exceptional" or if there is a failure of duty can the inalienable rights of the parents identified in the Constitution be supplanted.

264. While s. 3 of The Guardianship of Infants Act 1964 states that a court must have regard to the welfare of the child as "the first and paramount consideration", the legal authorities which speak to constitutional rights have determined that the welfare of a child must, unless there are exceptional circumstances or failure of duty be considered to be served about its remaining part of the family. This is constitutionally mandated by the status of the family demonstrated in Article 41.3 of the Constitution and the requirement that the family be protected from attack.

265. The right to welfare of the child is also to be found within the framework of the confines of the Constitution. It has been discussed in particular in the case of *North Western Health Board -v- HW and CW* [2001] 3 IR 635 to be considered below.

267. Prior to a consideration of the *North Western Health Board* case it is appropriate to trace the development of certain personal unenumerated rights of the child under Articles 40 and 42 of the Constitution.

268. In the case of *G -v- An Bord Uchtála* [1980] IR 32 at (p 44) Finlay P. in the High Court held that the child "has a constitutional right to bodily integrity and has an unenumerated right to an opportunity to be reared with due regard to her religious moral intellectual physical and social welfare." O'Higgins CJ in the Supreme Court dealt with the issue in this way (at p 69): "The child also has rights ... (he or she) has the right to be fed and to live to be reared and educated, to have the opportunity of working and of realising his or her full personality and dignity as a human being. These rights of the child (and others which I have not enumerated) must equally be protected and vindicated by the State. In exceptional cases the State under the provisions of Article 42.5 of the Constitution is given the duty, as guardian of the common good, to provide for a child born into a family where the parents fail in their duty towards that child for physical or moral reasons. In the same way, in special circumstances, the State may have an equal obligation in relation to a child born outside the marriage to protect that child, even against its mother, or if her natural rights are used in such a way as to endanger the health or life of the child or to deprive him of his rights".

269. Walsh J in the same cased observed: "There is nothing in the Constitution to indicate that in cases of conflict the rights of the parents are always to be given primacy." (p 78). He considered the rights of children further having dealt with the question of right to life: "The child's natural rights spring primarily from the natural right of every individual to life, to be reared and educated, to liberty, to work, to rest and recreation, to the practice of religion, and to follow his or her conscience ... it lies not in the power of the parent who has the primary natural rights and duties in respect of the child to exercise them in such a way as intentionally or by neglect to endanger the health or life of the child or to terminate its existence. The child's natural right to life and all that flows from that right are independent of any right of the parent as such".

270. In *OG -v- The Eastern Health Board* [1998] 1 ILRM 241 at 262 Denham J stated that the child had "the right to be reared with due regard to his religious, moral, intellectual, physical and social welfare; to be fed, accommodated and educated; to suitable care and treatment; to have the opportunity of working and of realising his personality and dignity as a human being".

271. The issue was considered again in the case of the *North Western Health Board -v- HW and CW* [2001] 3 IR 622. In that case Denham J stated: "The question is whether the defendants, while exercising their responsibility and duty to P (the child the subject matter of the proceedings) under the Constitution (Article 41) failed in their duty to him, so that his constitutional rights (including the right to life and bodily integrity) were or are likely to be infringed. In analysing this (the child's rights) to and in his family are a factor. Consideration has to be given as to whether the State (whether it be a Health Board or other institution of the State) as guardian of the common good should by appropriate means endeavour to supply the place of the parents to ensure that the welfare of the child is the paramount consideration, but always with due regard to the natural and imprescriptible rights of the child, including his rights in and to his family". Having considered the matter in issue in that case (the administration of the PKU test) that judge added: "It is only in exceptional circumstances that courts have intervened to protect the child to vindicate the child's constitutional rights. The court will only intervene, and make an order contrary to the parents decisions, and consent to procedures for the child in exceptional circumstances".

272. In the same case Hardiman J stated: "Article 42.5 is in the nature of a default provision. Under its terms a State may in exceptional circumstances, upon a failure of a parental duty for physical or moral reasons become a default parent. The sub-article does not constitute the State as an entity with general parental powers..."

273. Continuing he said: "I do not view a conscientious disagreement with the public health authorities as constituting either a failure in duty or in exceptional cases justifying State intervention" (p 577).

274. Murray J (as he then was) stated: "It will be impossible and undesirable to seek to define in one neat rule or formula all the circumstances in which the State might intervene in the interest of the child against the express wishes of the parent. It seems however to me that there must be some immediate and fundamental threat to the capacity of the child to continue to function as a human person, physically, morally or socially, deriving from an exceptional dereliction of duty on the part of the parents to justify such an intervention". (p 740 -- 741).

275. Murphy J observed: "In my view the subsidiary and supplemental powers of the State in relation to the welfare of the child arise only where either the general conduct or circumstances of the parent is such as to constitute a virtual abdication of their responsibilities or alternatively the disastrous consequences of a particular parental decision are so immediate or inevitable as to demand intervention and perhaps call into question either the basic competence or devotion of the parents" (at p 733).

276. Keane CJ. (who was in the minority) stated: "I do not accept the submission advanced on behalf of the defendants that because of the particular provisions of the Constitution upholding the authority and Constitution of the family, the court, in a case such as this, is obliged to uphold the wishes of the parents, however irrational they may be, to prevail over the best interests of (the child), which must be the paramount concern of the court under the Constitution and the law. Far from giving effect to the value enshrined

in Article 42, such an approach would greatly endanger his right so far as human endeavour can secure it, to a healthy and happy life and would be a violation of those individual rights to which he is entitled as a member of the family in which the courts are obliged to uphold" (p 705 -- 706).

277. The rights of a child are to have his or her needs provided for by his or her parents and a corresponding right and duty of in a parent or parents is to provide for those needs. In *The Adoption (No. 2) Bill 1987* [1989] IR 656 at 663 Finlay CJ stated: "The court rejects the submission that the nature of the family as a unit group possessing inalienable and imprescriptible rights, makes it constitutionally impermissible for a statute to restore to any member of an individual family constitutional rights of which he has been deprived by a method which disturbs or alters the constitution of that family. If that method is necessary to achieve that purpose, the guarantees afforded to the institution of the family by the Constitution, with their consequent benefit to the children of a family, should not be construed so that upon the failure of that benefit it cannot be replaced where the circumstances demand it, by the incorporation of the child into an alternative family".

278. He added: "The court accepts the submission made on behalf of the Attorney General that the right and duty of the State to intervene upon the failure of parents to discharge their duty to a child can be considered under both Article 42, s. 5 and Article 40 s. 3. By the express provisions of Article 42, s. 5, the State in endeavouring to supply the place of the parents is obliged to have due regard to the natural and imprescriptible rights of the child. Any action by the State pursuant to Article 40 s. 3 endeavouring to vindicate the personal rights of the child, would, the court is satisfied, be subject to a similar limitation. It is therefore necessary in the light of the conclusions already set out to examine the bill and in particular s. 3 thereof in accordance with the principles of construction set out at the commencement of this judgment so as to ascertain whether these provisions display a due regard for the natural and imprescriptible rights of the child".

279. This recital of principle was specifically upheld by the various members of the Supreme Court in the North Western Health Board case, all of whom endorsed that relevant passage from the earlier judgment.

280. There is a constitutional presumption that the needs of a child are to be met and its welfare secured within its family. The facts of this case resemble in outline two earlier authorities. The first must be accorded the respect due to a Divisional Court of the High Court. It was in *Re J* [1966] IR 295; the second is in *Re JH (An Infant)* [1985] IR 375. In both, the birth parents of children who subsequently married successfully relied on the provisions of Article 41 and 42 of the Constitution in regaining custody of a child placed for adoption.

281. It seems to me that these authorities are distinguishable from the instant case for the following reasons.

> 1. The evidence in the earlier authorities did not establish the probability of a risk of harm or psychological damage such as gave rise to the consideration of the rights of the child. Here the evidence establishes such probability having regard to the circumstances.
>
> 2. The evidence herein establishes bonding and attachment to a very high degree.
>
> 3. The decisions pre-date the decisions of the Supreme Court in *The Adoption (No. 2) Bill 1987*, *DG -v- The Eastern Health Board* [1998] ILRM 241 and *The North Western Health Board -v- HW* which identifies constitutional rights held by children including the right to have their welfare determined having due regard for the natural and imprescriptible rights of the child, including the right to be educated by the family and to be provided by its parents with religious, moral, intellectual, physical and social education (*FN and EB -v- CO*) [2004] IR 311 at 323, Finlay Geoghegan J).
>
> 4. The right to have its welfare determined has been determined as occupying a high position in the hierarchy of unenumerated constitutional rights.
>
> 5. The evidence in both cases did not establish failure of duty or compelling reasons.

282. In his judgment *Re JH* [1985] IR 375 at p 395 Finlay CJ stated, speaking of s. 3 of the Guardianship of Infants Act 1964: "I would therefore accept the contention that in this case s. 3 of the Act of 1964 must be construed as involving a constitutional presumption that the welfare of the child, which was defined in s. 2 of the Act in terms identical to those contained in Article 42, s. 1, is to be found within the family, *unless the court is satisfied on the evidence that there are compelling reasons why this cannot be achieved, or unless the Court is satisfied that the evidence establishes an exceptional case where the parents have failed to provide education for the child and to continue to fail to provide education for the child for moral or physical reasons*".

283. He added: "This interpretation of the provisions of the Act of 1964 gains support from the decision of the High Court in *Re J An Infant* [1966] IR 295 and in particular from the judgment of Mr Justice Henchy then a judge of the High Court where at p 308 he stated: "Having regard to the inalienable right and duty of parents to provide for the education of their children and their right in appropriate cases to obtain custody of the children for that purpose, I consider that s. 3 must be interpreted in one or other of the following ways: first by regarding it as unconstitutional, or, secondly, by reading it in conjunction with Articles 41 and 42 as stating in effect that the welfare of the infant in the present case coincides with the parents rights to custody".

284. Continuing that the judge said: "It also finds support from the conclusions of Ellis J in *W -v- W* (Unreported, High Court, 21 April, 1980)."

285. In *G -v- An Bord Uchtála* [1980] IR 32 Mr Justice Walsh dealing with the provisions of s. 3 of the Act of 1964, stated at p 76: "The word "paramount" by itself is not in any means an indication of exclusivity; no doubt if the Oireachtas had intended the welfare of the child to be the sole consideration it would have said so. The use of the word, "paramount", certainly indicates that the welfare of the child is to be the superior or the most important consideration *insofar as it can be, having regard to the law or the provisions of the Constitution applicable to any given case*" (emphasis supplied)".

286. In concurring with this judgment in general constitutional rights and in no way confined to the statute in question it is significant that McCarthy J, concurring, clearly saw that the test outlined by Finlay CJ is one of two possible alternatives; compelling reasons being one, or an exceptional case of failure to provide education on a continuing basis for moral or physical reasons the other.

287. Only upon the fulfilment of either of the two alternatives, or both, by clear evidence, may the constitutional presumption be rebutted. In the absence of such compelling reasons, or such failure, the parents are entitled to the custody of their child as against the State as outlined by the judgments of Henchy J and Teevan J in the case of *Re J* [1966] IR 295.

288. The statutory provisions must be interpreted as reflecting the constitutional position thus set out. A guardian or guardians of a child are entitled to the custody of that child and further may seek the restoration of custody against a third party under s. 10(2)(a) of the Guardianship of Infants Act 1964 as amended. However such a statutory right is not absolute, in that there are specific provisions, it is submitted on behalf of the second and third respondents, which may delimit the right to obtain such a restoration of custody. Such provisions are s. 14 and s. 16 of the Guardianship of Infants Act 1964 as amended. By virtue of s. 14 of that act it is provided:

> "Where a parent of a child applies to the court for an order for the production of the child and the court is of opinion that the parent has abandoned or deserted the child or that he has otherwise so conducted himself that the court should refuse to enforce his right to the custody of the child the court may in its discretion decline to make the order".

289. By s. 16 it is provided: "Where a person has.

> (a) abandoned or deserted a child, or.
>
> (b) allowed a child to be brought up by another person at that person's expense, or to be provided with the assistance by a health authority under s. 55 of the Health Act 1953 or to be maintained in the care of a Health Board under s. 4 of the Child Care Act 1991, for such a length of time under such circumstances as to satisfy the court that the parent was unmindful of his parental duties.
>
> (c) the court shall not make an order for the delivery of the child to the parent unless the parent has satisfied the court that he is a fit person to have the custody of the child".

290. In *Northern Area Health Board -v- An Bord Uchtála* [2002] 4 IR at 252 McGuinness J speaking for an unanimous Supreme Court (McGuinness, Hardiman and Geoghegan JJ) stated in relation to these two sections: "These sections which were not drawn to the attention of the court in argument clearly mirror the constitutional provisions of Article 42.5. They refer both to married and unmarried parents. While these sections refer to custody rather than adoption, they are largely similar in intent to the criteria laid down in the (Adoption) Act of 1988. In my view therefore the rights conferred by the Guardianship of Infants Act 1964, do not alter or add to the rights already possessed by the notice party under Article 40.3 as mother of her child ..."

291. As was observed by Finlay Geoghegan J in *RC -v- IS* [2003] 4 IR 431 at p 439 the custody of a child essentially means the right to physical and control of that child.

The Tests Having Regard to the Constitutional Presumption
292. It is now necessary to consider the alternate tests of compelling reasons or failure of duty, at all times having regard to the constitutional presumption.

293. The first of these must be construed having regard to the decision in *Re JH* itself, but also the decision of the Supreme Court in *the Adoption (No. 2) Bill 1987*; *DG -v- The Eastern Health Board* [1998] 1 ILRM 241 and the *North Western Health Board -v- HW* (already cited).

294. On consideration of these judgments it is clear that the fundamental principle it that while a child has a right to its family, it also has personal rights which are entitled to protection under Article 40.3 of the Constitution. These rights are identified by Finlay CJ in the *Adoption Board (No. 2) Bill* case at p 662 and 663 where he refers to the "parental duty to cater for the other personal rights of the child"; by Hamilton CJ in *DG -v- The Eastern Health Board* [1997] 3 IR 511 at p 523 and by Keane CJ at p 690; Denham J at p 719, Murphy J at p 730, Murray J at p 739 and considered very much within the context of Article 42.5 by Hardiman J at p 756. The last citations being in the *North Western Health Board* case.

295. In the consideration of this authority it is important to consider the evidential circumstances in which the rights and duties identified arose. The circumstances are fully described by Keane CJ in the course of his minority judgment. A number of considerations are relevant. The first of these is that at all times material to that case the first and second named defendants who were the parents of child were married to each other. They had five children. Following their refusal to permit their fourth child, a girl, to be submitted to the PKU test the plaintiff applied for and obtained an order under the provisions of the Child Care Act 1991, the effect of which was to enable that plaintiff (the Health Board) to carry out the test notwithstanding the refusal of the defendants to consent to it. The defendants appealed from that decision but eventually withdrew their appeal and the test was carried out.

296. On the same day the District Court made a similar order in respect of another child which was subsequently reversed by the Circuit Court. In those circumstances the plaintiff was advised not to proceed by way of an application under the Act of 1991 in the case of persons such as the defendants who withheld their consent to the test being applied to their children. The issue was joined by the transmission of a letter of 5 May, 2000 whereby the plaintiff wrote to the defendants stating that it had been instructed that they had refused to have the PKU test carried out on their youngest son Paul. The Health Board asserted that its general function with regard to care and protection of children within its area permitted its entitlement to have the PKU test carried out and for that matter to be determined by the courts. It is not in dispute that the family in question had at all material times been caring parents who had retained continuous custody of their child thereby constituting a family unit. It is within that factual framework that the North Western Health Board case was determined, based as it was on the reciprocal bonds between parents and child and in the context of, as Hardiman J termed it, a family at all times "exercising its authority". As such, and in contrast to the situation here, when the family was constituted on 9 January, 2006 and not before that date.

297. Murray J (as he then was) identified where the issue of rights of children might arise at p 738 of the judgment.

Rights of Children
298. "That is not to say that the authority of parents is absolute or that they are immune from State intervention in all circumstances when exercising that authority."

299. Walsh J, in the passage immediately following the citation from his judgment above in *McGee -v- Attorney General* [1974] IR 284 stated at p 310: "However at the same time it is true as the Constitution acknowledges and claims that the State is the guardian of the common good and that the individual, as the member of society, and the family as a unit of society, have duties and obligations to consider the respect of the common good of that society ... the power of the State to act for the protection of the common good or to decide what are the exigencies of the common good is not one which is peculiarly reserved for the legislative organ of government, in that the decision of the legislative organ is not absolute and is subject to and capable of being reviewed by the Courts. In concrete terms that means that the legislature is not free to encroach unjustifiably upon the fundamental rights of

individuals or of the family in the name of the common good, or by act or omission to abandon or neglect the common good or the protection or enforcement of the rights of individual citizens".

300. That judge then cited the passage from O'Higgins CJ in *G -v- An Bord Uchtála* [1980] IR 32 at p 55 - 56 and of the Court in the Adoption (No 2) Bill 1987 [1989] IR 656 at 633. At p 740 of the judgment Murray J went on to warn as to the consequences which might arise were the State to be empowered to engage in "a sort of micro-management of the family" or of parents "with unorthodox or unpopular views or lifestyles, who for that reason alone *might find themselves subject to intervention by the State or one of the agencies of the State.*"

301. He added: "Similar consequences could flow where a parental decision was simply considered unwise". Thus to justify a state intervention there must be something exceptional arising from a failure of duty as stated by the court in the Adoption No. 2 Bill case.

302. Denham J in the same case stated at p 719 of the judgment: "Article 42.5 envisages in exceptional cases, where parents fail in their duty to the child, that the State as guardian of the common good shall by appropriate means endeavour to supply the place of the parents but this is subject to the rights of the child. It is clear that under Article 42.5 the State is the default parent and not the super parent. The Constitution clearly envisages the common good requiring the State to take the place of parents only where they for physical or moral reasons fail in their duty towards their children. On taking this approach due regard must be begin to the rights of the child to its family. However the child at all times retains his or her personal rights also."

303. Continuing the quotation Denham J states: "In *FN -v- The Minister for Education* [1995] 1 IR 409 the rights of the child were analysed."

304. The High Court (Geoghegan J) at p 415 and 416 stated: "In *G -v- An Bord Uchtála* the constitutional rights of a child were considered in both the High Court and the Supreme Court. In the course of his judgment in the High Court which was upheld by the Supreme Court Finlay P at p 44 having upheld the right of a parent to the custody and control of the upbringing of a daughter went onto observe as follows: "In my view her daughter likewise has a constitutional right to bodily integrity and has an unenumerated right to an opportunity to be reared with due regard to her religious, moral, intellectual, physical and social welfare. The State having regard to the provisions of Article 40 s. 3 subs 1 of the Constitution must by its law defend and vindicate these rights as far as is practicable".

305. O'Higgins CJ in the Supreme Court pointed out that a child having being born has the right to be fed and to live, to be reared and educated and to have the opportunity of working and realising her or her full personality and dignity as a human being and these rights must equally be protected and vindicated by the State. While normally these duties would be carried out by the parents, in special circumstances the State takes on the obligation. Walsh and Henchy JJ make similar observations. The vindication by the State of a child's constitutional rights has been further elaborated upon by the Supreme Court in the *Adoption (No. 2) Bill 1987* [1989] IR 656 and *MF -v- Superintendent Ballymun Garda Station* [1991] IR 189 ..."

306. Keane CJ spoke to similar effect at p 690 of the judgment and added that the court had an inherent jurisdiction to protect such rights which was not dependent on any statutory provision, although circumstances in which jurisdiction should be invoked will be unusual and perhaps even exceptional.

307. The constitutional right of the child to welfare occupies a high place in the hierarchy of unenumerated rights as the Supreme Court has accepted that the child not only has a constitutional right to have such welfare protected but that such right should take precedence over another constitutional right that is the right to liberty (per Hamilton CJ) in *DG -v- The Eastern Health Board* [1997] 3 IR 511 at p 524.

308. It has also been held but on different facts relating to much older children that one of the personal rights of a child pursuant to Article 40.3 is to have decisions in relation to custody or guardianship taken in the interests of his or her welfare (see Finlay Geoghegan J in *FN and EB -v- CO* [2004] 4 IR 305 at p 323).

309. However this court must have regard to the distinct facts of that case, involving as it did children aged 14 and 13 years and also the fact that as Finlay Geoghegan J was careful to point out that the right in question required the court in considering the child's welfare to have due regard for the natural and imprescriptible rights of child, including the rights to be educated by the family and to be provided by its parents with religious, moral, intellectual, physical and social education.

310. The constitutional presumption is that a child's personal rights will be protected and vindicated by living within his or her family. This Court must now consider what is the situation if the evidence in a particular case establishes that this is not so and whether in such a case the necessity to vindicate the personal rights of a child is a compelling reason why the child should not be brought up within the family. Considering this issue it is necessary to revert to the *North Western Health Board* case in order to ascertain whether the test should involve a balance between personal and family rights. In assessing one most first be careful to guard against the identification of a balance of rights, where in fact the nature of the rights involved do not permit such a process. A further factor which must be borne in mind is that whether even if the existence of a balancing exercise is permitted, it should nonetheless be carried out with the scales significantly weighted having regard to the existence of a constitutional presumption.

311. It is clear that Keane CJ at p 690 of the judgment envisages that such balance is permissible by the juxtaposition of Article 42.5 with the child's unenumerated rights which are outlined therein and also by reference to the courts inherent jurisdiction to protect such rights. To the passage cited earlier he added: "It is not the law however that the courts are powerless to protect those rights in cases where for whatever reason they cannot be afforded that protection by the other organs of the State or where - as here - it is said that they are not being upheld by the parents. This principle emerges clearly from the decision of the High Court in *FN -v- The Minister for Education* [1995] 1 IR 409 and of this court in *DG -v- Eastern Health Board* [1997] 3 IR 511".

312. Denham J too, considered that a balance might be struck where, having cited Article 42.5 she stated (at p 727): "The question is whether the defendants while exercising their responsibility and duty to (the child) under the Constitution (Article 41), failed in their duty to him, so that his constitutional rights (including the right to life and to bodily integrity) were or are likely to be infringed. In analysing this, Paul's rights to and in his family is a factor. Consideration has to be given as to whether the State (whether it be a health board or other institution of the State) as guardian of the common good should by appropriate means endeavour to supply the place of the parents to ensure that the welfare of the child is a paramount consideration, but always with due regard to the natural and imprescriptible rights of the child including his rights in and to his family".

313. Murphy J also at p 730 and 731 envisaged a balancing exercise. In an important passage Murray J states, at p 738 of the same judgment prior to his consideration of the rights of children (already referred to): "I think it is well established in our case law that the

authority and autonomy explicitly recognised by the Constitution as residing in the family as an institution in our society means that the parents of children have primary responsibility for the upbringing and welfare generally of their children. When exercising their authority in that regard they take precedence over the State and its institutions. In this respect I agree with the observation of the Chief Justice that the family is endowed with an authority which the Constitution recognises as being superior even to the authority of the State itself".

314. Hardiman J at p 755 of the same judgment dealt with the constitutional presumption in this way: "I believe that in such cases, even more obviously than in custody cases where there is a statutory framework, a presumption exists that the welfare of the child is to be found *in the family exercising its authority as such* (emphasis added). If this presumption applies in the construction of the statute which makes no express reference to the authority of the family, it must a fortiori apply where the contest is between the parents of the child and a stranger, in this case a statutory body, outside any statutory framework."

315. Continuing he said: "This seems to follow from the exceptionally strongly worded provisions of Article 41 and 42 of the Constitution and from the rights of the child thereunder. I would respectfully adopt the statement of those rights set out at p 394 of the judgment of Finlay CJ in *Re JH* [1985] IR 375 as follows:

> "(a) to belong to a unit group possessing inalienable and imprescriptible rights antecedent and superior to all positive law (Article 41 s. 1).
>
> (b) to protection by the State of the family to which it belongs (Article 41 s. 2) and (c) to be educated by the family and to be provided by its parents with religious, moral, intellectual, physical and social education (Article 42 s. 1)".

316. Continuing, that judge stated: "Where, as in this case the parents are conceded to be, "careful and responsible" it seems to me that this presumption is a powerful factor. I would respectfully follow the statement of Finlay CJ immediately following that last quoted as to the circumstances in which their role might be supplanted. The State cannot supplant the role of the parents in providing for the infant the right to be educated conferred on it by Article 42 s. 1 except in exceptional cases arising from the failure for moral or physical reasons on the part of the parents to provide that education (Article 42 s. 5)."

317. "The presumption to which I have referred is not of course a presumption that the parents are always correct in their decisions according to some objective criterion. It is a presumption that where the constitutional family exists and is *discharging its functions as such* and the parents *have not for physical or moral reasons failed in their duty towards their children*, (emphasis added) their decision should not be overridden by the State, or in particular by the courts in the absence of a jurisdiction conferred by statute."

318. "Where there is at least a statutory jurisdiction the presumption will colour its exercise and may preclude it. The presumption is not of course conclusive and might be open to displacement by countervailing constitutional considerations as perhaps in the case of an immediate threat to life".

319. It might be observed parenthetically that in a quite different context Fennelly J speaking for the Supreme Court in *Cirpaci -v- The Minister for Justice Equality and Law Reform* 20 June, 2005 unreported, spoke in the context of that immigration case that it was legitimate for the Minister to "have regard to the duration of the marriage relationship when weighing in the balance the family rights in question". Such matters should be considered having regard to the facts of each case and the length of the relationship subject to the proviso that the right of a citizen abroad to return with his spouse was not entirely absolute. However he concluded, that it was legitimate for the Minister in the consideration of the revocation of a deportation order to have regard to the length of time which the parties to a marriage have lived together as a family unit.

320. In *the Adoption No. 2 Bill 1987* case the Supreme Court specifically rejected the proposition that the inalienable and imprescriptible rights of the family make it constitutionally impermissible for a statute to restore to any member of a family constitutional rights of which he has been deprived by a method which alters or disturbs the constitution of the family if the method is necessary to achieve that purpose (at p 663).

321. Having regard to the principles outlined I consider that such a balance may be exercised, but only when weighed in accordance with the constitutional presumption which must necessarily arise having regard to the provisions of Article 41 and 42 of the Constitution. Having regard to the observations of the Supreme Court on this issue of "threshold for State intervention" I do not think that these scales, which of necessity must be balanced in a particular way, can be re-calibrated. A further factor which must be borne in mind is that in the one organ of the State enjoined the first named respondent does not retain custody of the child who is in the custody of the second and third named respondents (see *The State Hullly -v- Hynes* (1966) 100 ILTR).

322. Wherein the Supreme Court deemed continuity of identity between the person in whose custody the detainee was at the time of the complaint and the identity of the custodian at the time of the inquiry. It is to be borne in mind that this is the first named respondent, but in the circumstances described earlier that respondent contends that the child should be returned to the applicants as a matter of law. But it was through the agency of that State organ that Ann was placed with the Doyles.

323. The evidence upon which the Court as an organ of the State may act in the application of the tests as outlined may be either or indeed both of the aspects of the test identified by Finlay CJ in *JH*. Whether there are compelling reasons or a failure of duty is as a matter of fact to be determined in these proceedings in accordance with law, and more fundamentally, whether such evidence may give rise to a situation where the constitutional presumption is rebutted.

324. The court must now further consider whether there is a failure of duty. The constitutional presumption must inform the interpretation of the evidence, and not the converse, lest the effect of the Article be negated. Failure of duty pursuant to Article 42.5 must also be construed in the light of two subsequent decisions, firstly the *Adoption No. 2 Bill 1987* (already cited) and second the *Northern Area Health Board -v- An Bord Uchtála* [2004] 4 IR 252. In the former the Supreme Court recognised that a failure of duty pursuant to Article 42.5 extended not only to a failure to educate but also to meet the other personal rights of the child. As Finlay CJ stated at p 663 of the judgment: "Article 42 s. 5 of the Constitution, should not in the view of the court, be construed as being confined, in its reference to the duty of parents towards their children, to the duty of providing education for them. In the exceptional cases envisaged by that section where a failure of duty has occurred, the State by appropriate means shall endeavour to supply the place of the parents. This must necessarily involve supplying not only the parental duty to educate but also the parental duty to cater for the other personal rights of the child".

325. McGuinness J stated at p 270 of the judgment *in Northern Area Health Board*:

> "It was argued on behalf of the notice party that this conclusion was in error principally because it did not take into

> account the notice party's access to her child and her exercise of her rights in this regard. It must be borne in mind that the sub-clause speaks of the performance of parental duties rather than the exercise of parental rights. In my view counsel for the applicants is correct in her submission that what is meant by parental duties is the normal day to day care of the child. In *G -v- An Bord Uchtála* [1989] IR 32 O'Higgins CJ at p 55 spoke of the relationship between the mother and her child thus: "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 T*he State (Nicolaou) -v- An Bord Uchtála* [1966] IR 567. 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. How far and to what extent it survives as the child grows up is not a matter of concern in the present case".

326. McGuinness J continued: While the Chief Justice is here speaking of its rights his picture of the parental role is clearly one of actual physical care and protection. Walsh J in the same case (at p 67 -- 68) spoke of the relationship between the mother in that case and her child:

327. "The mother and her illegitimate child are human beings and each have the fundamental rights of every human being and the fundamental rights which spring from the relationship to each other. These are natural rights. It has already been decided by this court in *Nicolaou's* case that among the mother's natural rights is the right to the custody and care of her child. The rights also have their corresponding obligations or duties. The fact that a child is born out of lawful wedlock is a natural fact. Such a child is just as entitled to be supported and reared by its parent or parents who are the ones responsible for its birth, as a child born in lawful wedlock. One of the duties of a parent or parents be they married or not, is to provide as best the parent or parents can for the welfare of the child and to ward off dangers to the health of the child".

328. Again Walsh J is clearly speaking of the actual day to day upbringing of the "child". While in that case the court was considering a failure of duty pursuant to s. 3 of the Adoption Act 1988 the Supreme Court had already accepted in the Adoption (No. 2) Bill 1987 that the terms of Article 42.5 are reflected in many of the provisions of s. 3 as pointed out by Finlay CJ at p 662 of the judgment.

329. *Northern Area Health Board* also establishes that in the context of adoption failure to provide for the day to day needs of the child constituted a failure of duty even though there was nothing blameworthy or culpable in the actions of the parent or parents. McGuinness J observed (at p 271):

> "In the instant case the trial judge had before him ample evidence to establish that on account of her disability the notice party had been unable to fulfil her parental role not alone for the required 12 month period but for the entire of J's life. He stressed that this inability was not blameworthy; it was from what is described in both the statute and Article 42.5 as "physical reasons", I would concur with the trial judge in this case in holding that "physical reasons" must include both physical and mental disability".

330. It has been held by Finlay Geoghegan J in *FN and EB -v- CO* [2004] 4 IR 311 at p 323 that the concept of failure of parental duty is sufficiently wide to encompass a failure brought about even by the death of a spouse. This arose in an application to appoint a new guardian pursuant to s. 8 of the Guardianship of Infants Act 1964 following the death of a parent. The parent or parents who are parents of a non-marital child have a duty to provide for his or her welfare as pointed out by Walsh J in *G -v- An Bord Uchtála* earlier.

331. Insofar as it was contended on behalf of the second and third named respondents that in the light of the expanded view of failure of duty contained in these cases a failure by parent or parents to provide for the needs of a child by reason of his or her placement for adoption must now be viewed as a failure of duty simpliciter I reject this submission. In the first place it is contrary to the approach adopted by the divisional court in a case where the outline facts (but not the evidence) was very similar to those here, *Re J* [1966] IR 295. Again on similar outline facts but dissimilar evidence, it is also contrary to the view adopted by Lynch J in *Re JH (An Infant)* [1985] IR 375. However when combined with other cogent material there may be sufficient evidence, even having regard to the constitutional presumption, to demonstrate that there has been such a failure.

332. The question which must be considered is whether, having regard to presumption, the applicants by reason of their physical or moral circumstances failed in their duty to provide for the needs of the child which failure must exclude the possibility for reasons completely outside the parent's control. If then, the evidence clearly demonstrates that there has been a failure of duty to provide for the needs of the child then the effect of the presumption that the child's welfare is to be found in the family may cease to obtain. It will be recollected that in *the North Western Health Board -v- HW* Hardiman J at p 755 described the presumption as applying:

> "... where the constitutional family *exists and is discharging its functions as such* (emphasis added) and the parents have not for physical or moral reasons failed in their duty towards their children..."

333. It is not in dispute that the applicants placed Ann in the care of the second and third named respondents from the age of four months to the age of 15 months without making any request for her return. During that time the second and third named respondents provided for all her needs. The issue is not whether the applicants' desired to contribute to Ann's upkeep. What must be applied here is an objective test as to whether or not in fact the applicants made any contribution to her needs. I do not think the waiver of children's allowance does not come within that rubric. The second and third named respondents continued to provide for Ann's care and upkeep up to the time of this hearing. The placement of Ann for adoption was not brought about by any circumstance which would deprive the applicants of freewill. Nor was it brought about by poverty. Undoubtedly to take care of Ann would have provided very considerable difficulties for them. But such a step was by no means impossible. The basis for her decision was set out in the report of Mr F to the matching panel a document to which they contributed. The evidence demonstrates that the applicants decided not to provide for their daughter in the sense of caring for her day to day needs in circumstances where it was open to them to do so albeit with difficulty.

334. I do not consider that the placement of Ann for adoption, and the cessation of the parental duties which thereby took place was either culpable or blameworthy. I have already pointed out my view to the contrary in the instant case. In my view what was done was both a brave and generous gesture. It was done with Ann's best interests at heart. However, it is *one* factor to which the court may have regard in the assessment as to whether or not there has been a failure of duty.

335. It is now necessary to turn to other aspects of the evidence, in particular that of the expert psychologists and psychiatrists. It has been clearly established that the attachment and bonding which exists between Ann and the Doyles exists to a very high, indeed unusual degree. She regards the Doyles as her parents and their family as hers. It is an inevitable consequence of the placement for adoption that Ann does not see the applicants as her parents, but as strangers, although she has met them on two occasions. Any immediate removal of Ann from the care of the second and third named respondents would in the circumstances obtain, as a matter of probability seen in the context of the evidence cause her significant damage. This inference emerges from the evidence of Dr

Nollaig Byrne who testified on behalf of the applicants as it does from Dr McDonald and Professor Iwaniec. The possibility of damage to Ann is even countenanced by the second named applicant herself in her testimony although she considered such possibility 'slim'. That evidence also envisaged a situation where there was a risk that for a period in any phased re-introduction Ann would not be attached to any person who would have day to day access to her. The evidence is that a phased, controlled and planned re-introduction would reduce the risk of emotional and psychological damage to Ann.

336. I consider the evidence of Professor Iwaniec must carry considerable weight because of her particular expertise on issues of attachment and bonding; however her assessment was confined to the level of attachment between Ann and the second and third named respondents and to the general principles applicable when the attachment of a child almost two years to his or her carers was disrupted.

337. Dr McDonald also has particular expertise in this area. He was willing to carry out a comprehensive assessment with regard to attachment issues but was prevented from doing so since the applicants did not attend for the purposes of such an assessment. While it may well be thought that a lengthy course in psychometric assessment would be rigorous, and perhaps too much so, this was not the reason for the applicants absence. Instead, as was clearly explained by the second named applicant the reason was based on the fact that the applicants had arranged for Dr Nollaig Byrne to carry out the assessment and also the decision was taken in consultation with her legal team.

338. The court is unable to avoid the conclusion that the effect of this was to create a situation where there was a discontinuity in the evidence. It must of course be added that this discontinuity should be seen from both sides of the case, and Professor Iwaniec also was in a position where she had assessed the second and third named respondents and Ann, but was not in the position of having been able to assess the Byrnes.

339. It is difficult to avoid the conclusion that this decision had an effect on the role played by the first named respondent in this case. In the absence of evidence on attachment its stance was predicted on the evidence which was available. While I am conscious that in the applications before O'Higgins J the parties were permitted to opt as to whether or not they attended these assessments, one cannot be blind to the effect of that choice as exercised. It must also be seen in the context of the applicants own study of the question of attachment in detail in the month of September 2005. It was the applicants own expert, Dr Byrne, who stated that she felt Dr McDonald's involvement in the case could only be good and helpful. Having regard to this view the decision which was not predicated upon any advice of Dr Nollaig Byrne must be of concern when one of the issues to be considered in the case is the welfare of a young child. In the absence of such a complete picture this court must perforce access the evidence as a whole.

340. There is a further factor which also emerges from the evidence. It is the distrust which now most unfortunately exists between the applicants and the first named respondent, and the second and third named respondents. With regard to the first named respondent, the Health Service Executive, the applicants say there was bias on the part of Mr F and Ms J in their approach to the case. They consider that the first named respondent "stalled" the question of return. They thought that the question of counselling was a ploy in order to stall matters further. They felt that they were ill served by Mr F who did not sufficiently challenge them on the question of retaining Ann. This is not actually borne out by the evidence objectively. It is difficult to avoid the conclusion that these views are explicable by human nature.

341. There is also distrust between the applicants and the second and third named respondents. They say that they did not fulfil a promise to I the foster parent, although this was not established on the evidence. They were concerned that the Doyles did not facilitate access to Ann in summer of 2005. They are affected (rightly) by the retainer of a private investigator. One cannot ignore how this issue was dealt with in evidence although remedied thereafter. It has been specifically put to the Doyles that if they are not in a position to facilitate or cooperate in Ann's transfer then they are unfit to be her carers. While this assertion may have emanated from Ms G it was one which was supported elsewhere in evidence. I do not think that the position of prospective adoptive parents is analogous to that of foster carers. I consider that Ms G's evidence to this effect may have been more a propos if the position of the second and third named respondents had been foster parents who wrongly refused to return children placed in their care, on that basis, to their natural parents. It is impossible to ignore the evidence regarding the forthright views that were expressed in mediation and in the course of these proceedings.

342. Having regard to the evidence I consider that there has been established a failure of duty sufficient to rebut the constitutional presumption by reason of these present factors *taken together*: there is also then the placement of Ann for adoption, the re-affirmation by signature of the Form 10 in April, 2005 (in the circumstances outlined), the signature of the final adoption form in July, 2005 and the evidence (which I accept) surrounding the access which took place in August and its intermediate aftermath. While these factors together may not constitute acquiescence or waiver on the reliefs sought they are nonetheless important. In her letter of October, 2005 the second named applicant stated that she had placed matters "on the long finger" by which she meant she deferred the revocation of consent to the adoption until September, 2005. The reasons for that were completely understandable.

343. Further, while the applicants may not always have held the knowledge which they now have in relation to the issues of attachment, they did have some common sense information reflected in their desire that the third named respondent should not work for a one year period -- that was their desire that Ann should settle and establish strong links with the persons who were intended to be her adoptive parents. These were issues which were in the applicants' minds at the time of Ann's placement for adoption. It was an issue of sufficient importance for them to raise it in the course of their discussion which took place in an atmosphere of goodwill with regard to Ann's future. These provided the context in which Ann’s bonding and attachment took place.

344. It is the tragedy of this case that the atmosphere of goodwill which there was for Ann, and the priority which all parties had for her best interests has ended in this situation. However having regard to these factors *taken together* the court concludes that there was a failure of duty as defined.

345. Matters cannot be seen in isolation from the other aspect of the test: compelling reasons. On the evidence of any process of re-introduction would have to be careful phased and reliant on the cooperation of all those engaged in the process, and no party is entitled to exercise a veto.

346. But the situation of distrust which now presently exists and the relationship between the parties, including the first named respondent, is such that it is difficult to conclude that any immediate successful phased re-introduction can take place in the short term. In so finding I am taking into account the evidence of Dr Antoinette Dalton who give evidence relating to the support and advice which would be available to the applicants in the event of Ann's custody being transferred to them. Dr Dalton did not have the opportunity of assessing Ann or the Doyles. She apparently had one 45 minute discussion with the applicants. While she was able to refer to a number of case histories of children where transfers had taken place, I do not think that they are comparable.

347. The court concludes that as a matter of probability the present position of mistrust, which I emphasise now renders the possibility of an immediate, appropriate, phased re-introduction permitting Ann's attachment to the applicants, as highly unlikely. In the circumstances the evidence leads to the conclusion that any process of transfer would necessarily be either precipitate; or (albeit phased) take place in the absence of the trust and cooperation which is necessary to ensure that no damage would occur to Ann. On the evidence, which is presently available, the court concludes that as a matter of probability, having regard to the circumstances, Ann would thereby sustain emotional damage with the effects which have been outlined in evidence.

348. There are also other balancing factors which must be taken into account in the assessment of Ann's rights, interests and welfare. If she is to remain with the Doyles one must have regard to the evidence from Dr Nollaig Byrne, and from the applicants with regard to Ann's future both in the medium and long term. Dr Byrne considered that a significant factor would be that Ann's future would be "complex" were she to remain in the care and custody of the Doyles. By this she was referring to the fact that while Ann was in attendance at school her surname would be different from that of her parents. Her parents as guardians of the child will be entitled to an input into her education. Clearly they would wish to be involved at all relevant stages of Ann's development and at the milestone dates as she grows up. Clearly these are factors which must be considered not only as theoretical issues but as concrete realities as Ann grows older. The court cannot ignore either that Ann may have questions with regard to her identity. Nor can the very issue of the absence of trust between the Doyles and the Byrnes (which has been adverted to above) at present be ignored in this context.

349. But in the assessment of these issues the court must identify those issues which are proximate and probable, and which arise directly in these proceedings and weigh them against issues which may arise in the medium and long term. In the consideration of this case I conclude that what must be dealt with now is the question of the lawfulness of Ann's custody and the questions which immediately bear on any alteration of that custody. One cannot but revert to the evidence of Dr Byrne who was asked whether in the event of a summary transfer she considered that there was a high risk of permanent and significant damage. She stated she was absolutely opposed to the summary return of the child and that her recommendation was posited on the respondents cooperation with the changeover. She said that circumstances might arise from the Doyles finding it too painful or too difficult to cooperate, in which circumstances the applicants should reconsider the understanding of the best interests of Ann. When she was asked if the respondents found it too painful and too upsetting so that they were unable to cooperate would she be in favour of the handover of the child she responded that there was a very high risk of the best interests of the child not being met.

The Case Advanced by the First Named Applicant
350. It is necessary to consider the separate case advanced by the first named applicant. This was asserted on the basis of divergences in the legal position and status of the first named applicant from that of the second named applicant and derived from his position as the birth father of Ann. In the first place the court must consider whether, on the evidence as found the first named applicant has established *locus standi*, this should be established in accordance with the principles outlined in *Cahill -v- Sutton* [1980] IR 269.

351. The following factors are relevant. First, the contemporaneous notes of Mr F indicate that the applicant was appraised of his rights to be named as a guardian of the child prior to the adoption and well prior to the signature of the Form 10 which permitted placement of Ann.

352. Second, there is no indication on the evidence that the applicant's view at that time was to take any course other than supporting the second named applicant in her decision. Indeed matters go further than that, in that the evidence establishes that the first named applicant was an active participant in the adoption process was clear in his views, and in fact by comparison to Catherine was more prepared to take the initiative with regard to the option chosen. This is reflected in his contribution to the submission for the placement committee and Mr F's notes. Prior to the placement of Ann for adoption there is no point in the extrinsic evidence other than the applicants own statement, that his views were in any way different from those of the second named applicant Catherine.

353. Third, in the event of any dispute between the evidence of the Brian on this issue and that of Mr F, I prefer the evidence of Mr F on the basis of his more clear recollection and whose notes were contemporaneous.

354. Fourth, even after the placement for adoption there is no evidence objectively which indicates that the first named applicant at any point was taking a position which materially diverged from that of the second named applicant. It may undoubtedly be inferred that at varying times up to September both Brian and Catherine experienced different emotions and concerns with regard to the steps that they had taken. This is completely understandable and predictable for young people in what I have already described as an incredibly difficult situation. But nowhere does there appear to be objective evidence to indicate that Brian's views were different to such a degree that the interests and rights of the two applicants diverged.

355. In placing Ann for adoption both applicants entered into an arrangement whereby they would refrain from contact save in accordance with the arrangements made. This was a deliberate decision made by each of the parents, it was a generous and brave one, as I have already said. The decision was made by both named applicants. The applicant was advised of his rights to become guardian to the child prior to the signature of the second named applicant to the Form 10 and on a number of other occasions he refused that opportunity. Had he availed of the option open to him then his consent to the placement and final consent would have arisen as is provided for in law. I do not consider that it is open to the first named applicant on the facts to assert a denial of rights in circumstances where the evidence in no way establishes that he wished at the time to avail of them and where in fact he refrained from doing so as a deliberate and conscious choice.

356. While at the outset of the case it was asserted on behalf of Brian that his interest diverged from those of Catherine and that different considerations as to his rights may have arisen the court has not been furnished with evidence with provides a basis for this.

Decision on Constitutional Issue
357. The court concludes that failure of duty and compelling reasons have been established. By reason of the consideration of the case, and on the evidence I conclude that Ann acquired the right to have her welfare and rights under the Constitution determined in accordance with her best interests, even having regard to the constitution presumption and on such evidence her best interests lie now in remaining in the custody of the Doyles.

Statutory Defences
358. It remains then to consider the statutory basis of the defence of the second and third named respondents which must be seen as supplementary to the essentially constitutional grounds which have already been considered.

359. No application was made to this court by the applicants pursuant to s. 11 of the Guardianship of Infants Act 1964 regarding the welfare, custody or right of access to the child, although it might well be thought that an application of that type might have been

more appropriate to the circumstances, and allowed for an earlier identification of the issues.

360. The provisions of s. 14 of the Guardianship of Infants Act 1964 have already been cited. One troubling word is 'abandoned'. While the term abandonment has an ordinary connotation this is not the only meaning. As was pointed out by Denham J in *Southern Area Health Board -v- An Bord Uchtála* [2000] 1 IR:

361. "It is understandable that the words "abandonment" in its ordinary meaning would distress parents. The Concise Oxford Dictionary defines "abandon" as:

> "1. Give up completely or before completion (abandoned hope; abandoned in the game).
>
> 2.(a) forsake or desert (a person or post of responsibility).
>
> (b) leave or desert (a motor vehicle or ship ...)
>
> 3. (a) give up another's control or mercy.
>
> (b) ..."

And "abandoned" is defined as:

> "1. (a) (of a person ...) deserted forsaken (an abandoned child) ..."
>
> Thus it realises imagines of deserting or forsaking a child. However in s.3 (1)(c) the word "abandonment" is used as a special legal term".

362. The section does not require that there be an intention to abandon. While there may well be cases under s. 3 (of the Adoption Act 1988) where there is simple abandonment of a child and an intention to abandon a child, these are not only the circumstances where s. 3 may be applied. The legal term "abandon" can be used also where, by their actions, parents have failed in their duty so as to enable a court to conclude that their failure constitutes an abandonment of parental rights. The parents in this case did not abandon (the child) in a sense of deserting him physically in a place but that does not preclude the operation of the section. The word "abandon" has a special legal meaning, a special approach to the term "abandon" and consequently "abandonment" may be seen in the wards of Walsh J in *G -v- An Bord Uchtála* [1980] IR 32 at p 79 where he stated:

> "Article 42 s. 5 of the Constitution speaks of the case where parents fail in their duty towards their children for physical or moral reasons; it provides that the State as guardian of the common good by appropriate means shall endeavour to supply the place of the parents, but "always with due regard for the natural and imprescriptible rights of the child". Under that section that State may very well by legislation provide for the failure of the parents, in appropriate cases it may very well extend the law beyond the simple provision for a change of custody. A parent may for physical or moral reasons decide to abandon his position as a parent or he or she may be deemed to have abandoned the position; a failure in parental duty may itself be evidence of such an abandonment".

363. In the *Northern Area Health Board -v- An Bord Uchtála* McGuinness J found that abandonment in the context of adoption had "a special legal meaning" which was not equivalent to deserting or forsaking a child. In the latter case the notice party had totally given over the responsibility of raising her child to the second and third named applicants and was quite specifically happy that the child should remain in their care on a permanent basis.

364. The term abandonment therefore may be seen in its special legal context as well as in the more general sense. This principle is as applicable in the context of the harmonious interpretation of the Guardianship of Infants Act 1964 to the legislation embodied and constitutionally approved in the Adoption Act 1988.

365. In its special statutory meaning abandonment need not be permanent. Indeed s. 14 envisages a situation where a parent applies to the court for the production of the child in the context of resuming custody. Having regard to the particular facts in this case which were not confined to the placement of the child for adoption but also to those other combined factors which have been identified earlier in the context of failure of duty I consider that they constitute "abandonment" within the meaning of s. 14 of the Act. Alternatively I am satisfied that those factors which have been identified earlier represent conduct such that the court should refuse to enforce the right to custody of the child exercising its discretion.

366. The views expressed by Finlay P in the case of *PM and Another -v- JM*. The High Court 27 November, 1984 must therefore be interpreted in the light of the views expressed by Denham J and McGuinness J subsequently.

367. Different considerations arise however in the context of the interpretation of s. 16 of the Act already cited earlier.

368. The term "unmindful" is not in my view susceptible to interpretation by a special meaning save by resort to an obsolete definition. It connotes carelessness or heedlessness. It does not in its present-sense permit of an interpretation equivalent to the term "disregard". Thus it cannot be said that the Bs were in the context of this case "unmindful" of their duties.

An Inquiry Under Article 40.4

369. There remains one other observation which appertains to the framework of this application. The application arises pursuant to Article 40.4.2 of the Constitution. As was pointed out by Finlay CJ in the case of *Re D* [1987] IR 449 at 457 in the consideration of such an application the court may reach only a single decision as to whether the detention is or is not in accordance with law. No order may be made to allow for supervision or monitoring of the person concerned even if that person has a want of capacity (see Finlay CJ at p 457). Theses issues do however arise in the context of wardship proceedings.

370. Furthermore as was pointed out by Finlay CJ in *Sheehan -v- Reilly* [1993] 2 IR 81 at p 92 an application under Article 40.4.2 cannot be converted into some other form of application. As was pointed out by Finlay P in *Cahill -v- The Governor of Military Detention Barracks Curragh Camp* [1980] ILRM 191 at p 201 an order of release from custody is immediate. This unique and immediate nature of the remedy is emphasised by the fact that there can be no stay on the order nor conditions be attached to it. These propositions were established in *The State (Trimbole) -v- Governor of Mountjoy Prison* [1985] IR 550 at p 567 and at 568 as to the

issue of a stay, and in Re D [1987] IR 449 at 457 as to conditions. This is a factor to which the court must have a regard, especially the fact that it is not possible to place a stay on such an order.

371. While the court has been made aware of the initiation of wardship proceedings the issue which may arise in the course of such proceedings are distinct from those which arise in an application under Article 40.

372. The issues which have led to the court making its decision as to the lawfulness of Ann's custody have been recited. It might be thought inappropriate if the form of the remedy now sought to be invoked were to be the dictating element in the outcome of a case of such importance to the welfare of a child. It is nonetheless, in the context of the evidence, an issue which cannot be ignored.

373. The court will hold that the respondents have justified the custody of Ann under the Constitution of Ireland as a matter of law. The court will decline to make absolute the conditional order. I will hear counsels' submissions on any issue that may arise on foot of this finding.

374. I very much regret that the court does not have the power to make any other decision in the circumstances of this case which would have the effect of allowing some "middle ground" to be identified. Unfortunately, it does not seem to me that middle ground can be established at this point.