THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2018] IECA 4

Appeal Number [2017/472]

Peart J.
Birmingham J.
Whelan J.

IN THE MATTER OF ARTICLE 41 OF THE CONSTITUTION,

AND IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT, 1964, AS AMENDED,

AND IN THE MATTER OF THE INHERENT JURISDICTION OF THE HIGH COURT,

AND IN THE MATTER OF THE ENFORCEMENT OF AN ORDER MADE BY THE FAMILY COURTS STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS KENT, SC,

AND IN THE MATTER OF E.M., A CHILD

BETWEEN/

P.M.

PLAINTIFF/ RESPONDENT

- AND -

V.H.

DEFENDANT/APPELLANT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 24th day of January 2018

1. The above entitled proceedings were commenced by plenary summons on 26th May, 2017 by the plaintiff/respondent (hereinafter "the father"). He seeks an order recognising and enforcing orders of the Kent County Family Court, Rhode Island, United States of America, made by Mr. Justice Stephen J. Capineri on 24th August, 2016 granting the father placement (day to day care) of the minor E. and directing her to return forthwith from this State to Rhode Island. The said orders granted custody, care and control of the minor child of the parties to the father.

2. On 7th July, 2017 the defendant/appellant (hereinafter "the mother") caused a notice of motion to be issued seeking certain interlocutory orders including an order prohibiting the removal of E. from this jurisdiction pending the determination of the above entitled proceedings. The motion also sought an order pursuant to O. 25, r. 2 or, in the alternative, pursuant to O. 34, r. 2 of the said Rules of the Superior Courts to determine two questions of law by way of preliminary issue; (i) whether the Courts of Ireland have exclusive jurisdiction and (ii) whether the High Court had any jurisdiction, in relation to all issues of parental responsibility concerning the minor.

3. The said preliminary issues came on for hearing in the High Court on 27th July, 2017. At the conclusion of the hearing, judgment was reserved. In her judgment delivered on 1st September 2017, which is considered further below, Reynolds J. rejected the mother's arguments on both issues. This is the mother's appeal from the determinations of the High Court.

The relevant background facts

4. The mother is Irish born. The father is a US citizen of EU origin. The parties were married in August, 1996 in Ireland. Thereafter they went to reside in the United States. There are three children of the marriage namely a son P., born April, 1999 who is now aged 18, C. the older daughter born November, 2000 now aged 17 and E., the subject matter of the within proceedings, born September, 2004 now aged 13 years and four months. At all material times throughout the marriage the parties resided in the United States latterally in the State of Rhode Island. In the year 2006 the relationship between the parties broke down and in October, 2008 the Rhode Island Family Court granted a final decree of divorce together with ancillary orders including that the parties have joint custody of the three minor children with physical placement of them with the mother. The court approved an agreement between the parties that the mother would return to reside in Ireland with the three minor children on or after 1st January, 2009 upon satisfaction of specific conditions concerning future visitation and access for the father in Ireland and the United States.

5. Clause 15 of the October 2008 final judgment of the Rhode Island family court provided:-

> "The above entitled matter shall remain under the jurisdiction of the PKPA [Parental Kidnapping Prevention Act] and UCJEA [Uniform Child Custody and Jurisdiction Act] and that of the Rhode Island Family Court and shall be reviewed by the Court within 30 days of this date or at such other times as designated by the Court."

6. It is common case that the mother and three minor children relocated to Ireland in January, 2009. At that time the older children were nine and a half and eight respectively and the minor E. was four years and four months old. The father, a medical doctor, continued to live and work in Rhode Island. E. has at all material times from the month of January, 2009 been habitually resident within the jurisdiction of the courts of this State. The ancillary orders of the Rhode Island Court made on 28th October, 2008 included a provision granting the father visitation to the children for at least 50 percent of the Christmas and Easter school breaks in Ireland each year and access in the United States to be exercised in Rhode Island for two weeks each summer.

7. It would appear that these arrangements operated reasonably well in the early years until 2014. The mother resided in a rural town

in Ireland near an airport and found employment. The children attended school in Ireland. However, around 2014, relations between the mother and son became fraught. In April, 2014 having been contacted by school management concerning the welfare of P., the oldest child of the parties who was then aged 15, the Child and Family Agency became involved in monitoring welfare concerns.

Summer 2014

8. When the children, then aged 15, 13 and 9, respectively, travelled to Rhode Island in July, 2014 for scheduled summer access with the father, he reactivated the 2008 proceedings and issued an ex parte motion in Rhode Island Family Court on 7th July, 2014 seeking to modify the custody and placement orders in respect of the three children previously made by the Rhode Island Family Court in the context of granting the final decree of divorce on 28th October, 2008. In particular, he sought, in his ex parte application, custody and placement of the three children on the grounds of a material change of circumstances. By order made on 9th July, 2014 ex parte, Ms. Justice Lanni granted custody and placement of the three minor children to the father and directed that they remain under his care, custody and control in Rhode Island until further order of that court. The matter was set down for hearing on 29th July, 2014.

9. When she discovered the existence of the said orders, the mother issued an emergency motion to vacate the ex parte orders and her application was heard before Judge Lanni on 17th July, 2014 in the Rhode Island Family Court. The issues raised by the mother in that application included the alleged lack of jurisdiction of the Rhode Island courts to determine issues of welfare. The Rhode Island Family Court heard the application on 17th July, 2014 and conferred with the child protection services in Ireland.

10. At the conclusion of the hearing the mother secured an order vacating the ex parte order obtained by the father on 9th July, 2014 on the following ground:-

> "As the Court does not believe that an emergency order is warranted in order to protect the children."

A full hearing was scheduled for 12th and 15th September regarding the future custody of the two older children.

11. The Rhode Island Court directed that the prior court order of 28th October, 2008 in relation to custody, placement and visitation be reinstated notwithstanding the father's objections. Accordingly it is clear that in 2014 the mother had not voluntarily submitted herself to the jurisdiction of the Courts of Rhode Island but did so under compulsion for the purposes of reinstating the ancillary orders with regard to care and custody made by the said court on 28th October, 2008 in the divorce proceedings and on foot of which she had relocated to Ireland in 2009 with the three minor children.

12. This state of affairs is acknowledged on the face of the 2014 order itself where at Clause 11 it provides:-

> "The provisions of this order shall not be considered a waiver by either party of any jurisdictional issues raised by them."

13. The order of the 17th July, 2014 also provided that the father would forthwith book return flights to Ireland for the mother and the minor child E. with travel to take place on Friday, 18th July, 2014 or as soon as the reservations could be made. It does appear clear that the mother's involvement with the courts in Rhode Island was precipitated by the ex parte orders procured by the father concerning the children. The proceedings heard on 12th September and 15th September, 2014 concerned primarily the two older children of the parties since the minor daughter the subject of these proceedings, E., had returned to Ireland on Friday, 18th July, 2014. Thus E. continued her habitual residence in this jurisdiction under the care and control of the mother.

14. Once back in Ireland, the mother instituted proceedings pursuant to the Child Abduction and Enforcement of Custody Orders Act 1991 (Record number 2014 No. 12 HLC) on 31st July, 2014. The matter came on for hearing on 3rd and 4th September, 2014. On 9th September, Baker J. made an order granting a temporary stay on the child abduction proceedings pending determination of the then pending proceedings before the Family Court in Rhode Island. At that time, the minor son P., then aged 15 and a half years, remained in the United States. He never returned to reside in this jurisdiction or to the care and control of the mother. The daughter C., then aged 13 years and nine months, returned to this jurisdiction and to the care of her mother on 21st August, 2014.

Judgment of Baker J.

15. In the course of her judgment delivered on 9th September, 2014 Baker J. considered the then pending Rhode Island proceedings and stated at paragraph 16 of her Judgment :-

"It seems to me that what the court intends hearing on 12th and 15th September, 2014 is the preliminary question of whether the court in Rhode Island has jurisdiction to hear an application in regard to these children. It is in that context that the application for a stay comes before me."

16. She continues at paragraph 21:-

> "There is, at present, no unlawful retention of the children, and insofar as there might have been an unlawful retention of the children, that matter was dealt with by the Court of Rhode Island to the satisfaction of the mother."

At para 28 she states:-

> "It is only if the Court of Rhode Island does accept jurisdiction that the issue will properly arise before this Court as to whether this Court should try the case. It is only at that stage that the Court may be asked to grant a stay on the basis that a more convenient forum has seisin of the case and that that forum is competent to determine the matter."

At para. 29 she opines:-

> "It is only if the Rhode Island Court accepts that it has jurisdiction, that there is a genuine or real jurisdictional dispute which will or may come to be heard in Ireland."

She proceeded to grant a stay to the father concluding, at para. 39, that:-

> "Only after that matter has been determined can the Court in Ireland properly know whether there is a genuine and extant dispute between competing jurisdictions. The Court expresses no view as to whether this Court has a jurisdiction to stay the proceedings pending a determination of the substantive case."

2015

17. The relationship between the daughter C. and the mother disintegrated. C. ceased to reside with the mother in late December 2014. In February, 2015, the father filed a motion in the Family Court, State of Rhode Island, within the 2008 family law proceedings seeking to modify the custody and placement of the daughter, C., then aged 14 years and 3 months. The Family Court of Rhode Island in the first instance declined to make orders on grounds of forum non conveniens. That application was confined to issues surrounding the older daughter of the parties, C. alone and no application was made concerning E. who is the subject matter of the current proceedings.

18. The Supreme Court of Rhode Island on 29th January, 2015 reversed the decision on jurisdiction and ordered that the case be remitted back to the family court of that state for the limited purpose of conducting a hearing on the father's emergency application to modify custody and placement concerning the daughter C.

19. Meanwhile, by January of 2015 the Child and Family Agency had filed an application for an interim care order in this jurisdiction which was scheduled for a hearing before the District Court in Ireland on 12th March, 2015 seeking to bring the daughter C. into the care of the Child and Family Agency because of concerns regarding her welfare whilst in the care of the mother. The Rhode Island Family Court, after engagement with the Child and Family Agency, modified the custody and placement of the daughter C. placing her in the custody of her father. Accordingly, with effect from in or about the month of April, 2015, the daughter C. ceased to reside in Ireland and went to live permanently with her father in Rhode Island in accordance with the order of the family court there.

2016

20. In the summer of 2016, the father once more re-entered the family law proceedings before the courts in Rhode Island seeking, inter alia, custody and placement of E. so that she would reside with him and her two older siblings in Rhode Island. It would appear that a trigger for the re-entry of these proceedings was an e-mail purported to have been sent by the minor E. in December, 2015 to her father stating that she never wanted to go to America again and did not want to Skype or communicate with her father again. The father and mother were legally represented at the welfare-based custody hearing which took place before Capineri J. at Kent County Family Court culminating in a judgment delivered on 24th August, 2016. It is clear from the judgment that the mother did not contest the placement of the older children P. and C. with the father but vigorously contested the placement of the younger child E. in his care. A guardian ad litem was appointed in respect of the interests of E.

21. The Rhode Island Family Court commissioned a comprehensive family evaluation and the mother fully engaged with the process. Assessments and interviews took place during June and July. Between the 8th June, 2016 and the 13th July, 2016 the father and mother were psychologically evaluated. Detailed psychological assessment of the minor E. took place on the 7th, 11th, 12th, 13th and 19th July, 2016 for the purpose of determining her best interests. The report concluded that the best interests of the minor warranted that she should reside in Rhode Island with her father and siblings.

22. The Rhode Island family judge, after reviewing the evidence, concluded that the father was in a position to provide a stable, safe and secure environment for all three children and that it was in the best interests of the minor that she be placed in the custody of her father and reside in the United States with him. He made orders directing that the father be granted placement of E. and that she be returned forthwith from Ireland to the United States. In particular, the mother was ordered to have E. at a named Irish airport on 27th August, 2016 for her flight to the United States. The mother was awarded all reasonable rights of visitation.

23. The mother did not comply with the said orders. She filed an appeal requesting the Supreme Court in Rhode Island to place a stay on the orders. That application was refused on 27th September, 2016. It would appear that from that time all contact between the minor and her father and two older siblings, ceased. The matter came again before the family court of Rhode Island on 16th December, 2016 and the father and mother were legally represented when the father was granted sole custody of all three children and the court ordered that the father alone be permitted to make application and obtain passports for the minor children.

24. The mother's substantive appeal to the Rhode Island Supreme Court was dismissed on 15th June, 2017 "because she continues to be in wilful contempt of the Family court's orders pertaining to minor child E."

2017

25. On 17th January, 2017 a warrant for the arrest of the mother issued in the State of Rhode Island by reason of her failure to comply with the Rhode Island family court orders. It appears the father may have experienced difficulty in tracing the whereabouts of the mother and E.

26. Ultimately, on 26th May, 2017, the within proceedings were instituted by plenary summons invoking Article 41 of the Constitution and seeking, inter alia:-

> "An order recognising and enforcing the order of the Kent County Family Court, Rhode Island (…) made on the 24th August 2016 and the 16th December 2016 by Mr. Justice Stephen J. Capineri"

The father also sought such further and other orders to enable him to bring the minor to the United States.

Preliminary Issues

27. The High Court, on the application of the mother, in July 2017 fixed two preliminary issues for determination as follows:-

> (i) whether the Courts of Ireland have exclusive jurisdiction where a child is habitually resident in this State in relation to all issues of parental responsibility, and
>
> (ii) whether the High Court had jurisdiction to hear and determine the father's claim in the within proceedings.

28. The preliminary issues came on for hearing in the High Court on 27th July, 2017.

Submissions on behalf of mother in the High Court

29. It was contended on behalf of the mother that the Irish courts have exclusive jurisdiction in relation to the minor E. by virtue of Article 8 of Council Regulation EC 2001/2003 (hereinafter "Brussels II *bis* Regulation"). It was argued that the Irish courts could not waive this jurisdiction in favour of the courts of any other state and, accordingly, could not recognise or enforce orders of a foreign jurisdiction made in respect of the minor E. The decision of *O'K. v. A.* [2008] 4 I.R. 801 (High Court) and *F. v. G.* [2014] 1 I.R. 417 (High Court) were relied on by her in support of a contention that the Irish courts have exclusive jurisdiction which they are obliged to accept in respect of matters of parental responsibility where a child, such as E., is habitually resident in this jurisdiction.

30. It was secondly contended on behalf of the mother that the High Court had no original jurisdiction in proceedings brought

pursuant to Part II of the Guardianship of Infants Act 1964. It was argued that the High Court decision in *R. v. R.* [1984] 1 I.R. 296 did not represent a correct statement of the law and further that it was inconsistent with the later decision in *Tormey v. Ireland* [1985] I.R. 289 where the Supreme Court had held that Art. 34.3.1 of the Constitution did not preclude the Oireachtas from terminating the jurisdiction of the High Court to hear a criminal case transferred from the Circuit Court on foot of the repeal by the Courts Act 1981 of the provisions of s. 6 of the Courts Act 1964. It was posited on behalf of the mother that, insofar as the decision in R. v. R. aforesaid suggests that the Oireachtas could not confer exclusive jurisdiction on the lower courts to the exclusion of the High Court, it had been implicitly overruled by the *Tormey* decision.

31. Counsel for the mother accepted that O. 70A of the Rules of the Superior Courts which deals with family law proceedings provides in rule 1(e) that "family law proceedings" shall include:-

> "any proceeding pursuant to the Guardianship of Infants Act 1964, … which has been instituted and maintained in the High Court pursuant to Art. 34.3.1 of the Constitution."

However, it was argued on behalf of the mother that since the Guardianship of Infants Act, 1964, as amended, confers exclusive jurisdiction on the District Court and Circuit Court same could not be amended by secondary legislation such as the Superior Court Rules.

Submissions on behalf of father in High Court
32. The arguments advanced on behalf of the father in the High Court included the submission that the mother was estopped from raising or relying on the exclusive jurisdiction of the courts of Ireland in circumstances where she had fully participated in the proceedings before the Rhode Island Family Courts including contesting jurisdiction there.

It was argued that the mother's sole reason in seeking to now resile from the foreign jurisdiction was because she was unhappy with the outcome of the proceedings and the decisions of the Rhode Island courts. It was further argued that it would not be appropriate in light of the principles of comity to permit the mother to misuse jurisdictional arguments. It was contended that the processes before the Rhode Island court included a comprehensive welfare hearing regarding the minor E. which included extensive reports concerning her welfare equivalent to a social report in this jurisdiction as may be furnished on any question affecting the welfare of a minor pursuant to s. 47 of the Family Law Act 1995, as amended.

33. Counsel for the father posited that the decisions of the High Court in *O'K. v. A.* [2008] 4 I.R. 801 and *F. v. G.* [2014] 1 I.R. 417 were distinguishable in material respects from the facts of the instant case. Significantly, it was acknowledged that the High Court, in an application such as this, must form an independent judgment on what is required to protect the welfare of a child and not "blindly follow the order made by a foreign court".

34. It was argued on behalf of the father that it was material that in previous proceedings the mother had canvassed the issue of jurisdiction before the Irish courts in 2014 and Baker J. in the High Court had delivered a judgment which had not been appealed by the mother. Subsequently, in 2015, the issue of jurisdiction and *forum conveniens* were then decided by the Rhode Island Supreme Court on appeal in which jurisdictional contests the mother had fully participated and was represented. It was further asserted that in the special summons proceedings instituted by the mother before the High Court on 31st July, 2014 concerning all three minor children of the parties had expressly invoked the provisions of the Guardianship of Infants Act, 1964 and sought orders pursuant to that Act.

35. With regard to the second preliminary issue being the contention that the High Court does not have original jurisdiction in relation to the Guardianship of Infants Act 1964, it was argued that the perceived conflict between the decisions in *R v. R* and *Tormey v Ireland* referred to above arose from an apparent anomaly which had subsequently been clarified by S I 469 /2015 and the Rules of the Superior Courts (O. 70A) 2015 which became operative on 23rd November, 2015.

36. It was also asserted on behalf of the father that the within proceedings, having been instituted by plenary summons pursuant to Art. 34.3.1, were not being pursued solely pursuant to the Guardianship of Infants Act 1964. In particular, it was emphasised that the principle of the comity of courts had been invoked. Further, the recognition and enforcement of foreign court orders were at issue and accordingly the inherent jurisdiction of the High Court had been validly invoked. It was asserted that, having regard to the comity of courts, the proper forum for the consideration of the merits of this welfare dispute was the Rhode Island family courts to the jurisdiction of which the mother had fully submitted.

Judgment of the High Court
37. Judgment was reserved. In a written judgment delivered 1st September 2017 the learned judge refused both reliefs sought. She found the facts in *O.K. v. A.* [2008] 4 I.R. 801 distinguishable from the instant case since the mother had fully participated and was legally represented in proceedings before the Rhode Island family courts where all the issues were contested including jurisdiction and where the proceedings had concluded.

38. The trial judge noted that the mother had previously invoked the issue of jurisdiction in proceedings before the High Court culminating in the judgment of Baker J. delivered on 9th December, 2014 in *D.F. v. E.M.* [2014] IEHC 510. She noted that the mother had not appealed the order of Baker J. staying the proceedings in the Irish courts pending determination of issues before the Courts of Rhode Island and Providence Plantations. Hence the issue of jurisdiction came to be decided ultimately by the Rhode Island Supreme Court on appeal in which proceedings the mother fully engaged and was legally represented. Accordingly, the trial judge was satisfied that the mother was estopped from raising this issue again in the context of the within proceedings.

39. With regard to the second preliminary issue as to whether the High Court had original jurisdiction to consider proceedings brought pursuant to Part II of the Guardianship of Infants Act 1964 on the facts and pleadings in this case, the trial judge noted that the mother in her 2014 proceedings had specifically invoked the provisions of the Guardianship of Infants Act 1964 in the High Court.

40. In this regard the trial judge at para.23 of her judgment concluded as follows;" It is patently clear that in the earlier proceedings brought before this Court, as referred to above, the Defendant sought to invoke the provisions of the Guardianship of Infants Act, 1964 and sought relief pursuant to same despite the claim now being made on her behalf that the High Court does not have jurisdiction relating to the 1964 Act. The defendant's position of approbation and reprobation in the context of the within proceedings is simply unsustainable."

41. The court proceeded to reject the mother's contentions in relation to both preliminary issues concluding that:-

> "The relief claimed by the defendant seeks to undermine the principles of cooperation between courts and would be tantamount to a complete failure of the principles of comity of courts."

The Appeal
42. The mother appeals the decision of 1st September, 2017 together with the orders perfected on 4th October, 2017 aforesaid relying on eleven separate grounds briefly outlined hereinafter:

> a. That the High Court erred in failing to determine whether the courts of Ireland have jurisdiction to recognise and enforce the order of the Family Court of Rhode Island not being a member state of the EU or a party to the 1996 Hague Convention on Jurisdiction, applicable law, recognition, enforcement of cooperation in respect of parental responsibility and measures for the protection of children in circumstances where the child at issue was at all material times habitually resident within the jurisdiction of Ireland.
>
> b. That the High Court erred in failing to hold that the courts of Ireland had no jurisdiction to recognise or enforce an order of the Family Courts of Rhode Island when such order was made in respect of a child habitually resident in this jurisdiction.
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> c. That the High Court erred in failing to determine that the courts of Ireland had exclusive jurisdiction in respect of issues pertaining to the welfare of the child having regard to Art. 8 of Council Regulation EC 2001/2003.
>
> d. That the High Court failed to give proper consideration to Art. 42A.4.1 of the Constitution of Ireland and in particular failed to give any proper weight to the need to consider the best interests of the child the subject matter of the proceedings as the paramount consideration.
>
> e. That the trial judge erred in holding that the principle of estoppel applied to the issues as to jurisdiction being raised on behalf of the mother or that estoppel could arise in relation to jurisdiction conferred or determined by Counsel Regulation EC 2001/2003 such as to oust same or that estoppel could arise in proceedings which require the Court to consider the best interests of the child as the paramount consideration.
>
> f. The mother appealed against the determination that the High Court retained original jurisdiction in proceedings brought pursuant to the Guardianship of Infants Act 1964 as amended. She also appealed the order directing her to pay costs to the father.

43. This Court had the benefit of detailed submissions both written and oral on behalf of both parties in respect of both issues. The court was also provided with copies of the written submissions that were before the High Court.

Hearing of the appeal
44. On behalf of the mother, an order was sought setting aside the order of the High Court and remitting the matter back to the High Court for a fresh determination of the substantive jurisdictional issue raised on behalf of the mother. Such an approach would add very considerably to the delays and costs in the within proceedings which pertained to the welfare of a minor. It was acknowledged that as a matter of law the courts of Rhode Island maintain continuing jurisdiction in respect of minors the subject matter of ancillary orders made in that state in divorce proceedings notwithstanding that such a minor subsequently ceases to be habitually resident within the jurisdiction of that State.

45. It was argued that the provisions of Rhode Island law potentially conflict with the applicable laws in this jurisdiction including Brussels II *bis* and domestic legislation. It was contended that the effect of the decision of the High Court was to preclude the mother from raising the argument that the Irish courts had exclusive jurisdiction to deal with all issues pertaining to the minor E. by virtue of the Brussels II *bis* Regulation, Art. 8.

46. It was further contended that the effect of the decision of the High Court was to divest the courts of this jurisdiction of their full and original jurisdiction to reach all decisions pertaining to parental responsibility of the minor E. who is habitually resident here and to effectively cede that jurisdiction to the courts of a state where the minor was not habitually resident at the time the courts of Rhode Island made the orders in August 2016. Further she was not habitually resident there at the time these proceedings were instituted seeking recognition and enforcement of the Rhode Island orders.

47. With regard to the second preliminary issue contending that the High Court did not have jurisdiction to determine standalone proceedings pursuant to Part II of the Guardianship of Infants Act of 1964 since the coming into operation of s. 15(1)(a) of the Courts Act 1981 it was contended on behalf of the mother that the decision of the High Court effectively precluding the appellant from raising this issue had the effect of vesting the High Court with statutory jurisdiction under the Guardianship of Infants Act, as amended, which, it was argued, it does not have.

48. The principles of estoppel were argued at length including the line of authorities from Gaffney v. Gaffney [1975] I.R. 133 it being asserted that the doctrine of estoppel did not operate to prevent the mother from making submissions in support of a particular interpretation of s15 of the Courts Act 1981 and in particular that jurisdiction to determine standalone proceedings pursuant to Part II of the Guardianship of Infants Act of 1964 is confined to the District and Circuit Courts alone.

49. It was suggested on behalf of the mother that even if an estoppel can operate in law in relation to the jurisdiction of the Rhode Island and Irish courts it cannot apply in proceedings where the provisions of Art. 42A.4 of the Constitution are engaged, in particular in light of the amendments effected to the Guardianship of Infants Act 1964 by s. 45 of the Children and Family Relationships Act 2015. The latter expressly provide that in any proceedings before any court where guardianship, custody or upbringing of a child is in question the court in deciding that question is required to regard the best interests of the child as the paramount consideration.

Arguments on behalf of the father before this Court
50. Significant concerns were articulated regarding delays including the delays attendant on the prosecution of preliminary issues on behalf of the mother, the process regarding pursuing the two preliminary issues and the inevitable delay surrounding the appeal to this Court. It was asserted that initially the mother had contended that the import of the first preliminary issue was that the Irish High Court had in fact no jurisdiction to recognise or enforce the Rhode Island court orders by reason that the minor E. is habitually resident in this jurisdiction.

51. Concerns were raised that the mother by this preliminary application has sought to thwart the proceedings progressing. It was denied that the High Court decision prevented the mother from arguing that the Irish courts have exclusive jurisdiction to hear and determine issues concerning the welfare of the minor. It was further reiterated that this court should have regard to the fact that the

father has at all material times recognised:-

(a) that E. is habitually resident in Ireland.

(b) that it is a matter for the Irish courts to recognise and enforce the Rhode Island orders and that this is the reason he has submitted them to the jurisdiction of the High Court for enforcement.

(c) that the father acknowledges that the relief being sought could potentially be refused.

(d) that the High Court may direct certain matters be undertaken prior to making a decision in regard to the issues before it.

(e) The father has placed himself in the Court's hands.

52. It was strenuously argued that at no time has the father sought to divest the Irish High Court of its jurisdiction. It was acknowledged that the process is not a rubberstamping exercise and it was stated that:-

"The Irish court's jurisdiction has been invoked by the plaintiff/respondent. The Irish courts have the final word as to whether these orders are recognisable and/or enforceable and, on such conditions as the courts may think fit."

53. Addressing the jurisprudence, Mr. O'Riordan S.C. for the father accepted that the High Court must form an independent judgment as to what measures are now required to protect the welfare of E. and would not be required to "blindly follow the order made by a foreign court". He in particular accepted the decision of the High Court in *F. v. G.* [2014] 1 I.R.

54. It was contended on behalf of the father that both issues were correctly determined by the learned High Court judge applying the doctrine of estoppel. In particular, the conduct of the mother in choosing to fully participate in and be represented before the Family Courts of Rhode Island including contesting jurisdiction there and having the matter ultimately determined by the Supreme Court of the State of Rhode Island was submitted to be a matter of relevance.

55. It was vigorously argued that the mother should not be permitted to misuse jurisdictional arguments to delay and impede recognition and enforcement of the Rhode Island family court orders. To allow this would in effect undermine the principle of cooperation between the courts. The conduct of the mother in allegedly disrupting contact between the father and E. was also referenced.

56. Emphasis was laid on the fact that the mother had not appealed the decision of the High Court made by Baker J. in 2014 *D.F. v. E.M.* [2014] IEHC 510. It was reiterated on behalf of the father that any doubts about the jurisdiction of the High Court to entertain standalone proceedings invoking the Guardianship of Infants Act of 1964 was clarified by S.I. 469 of 2015 being the Rules of the Superior Courts (O. 70A) 2015 which became operative on 23rd November, 2015.

The Law

Judicial Comity

57. In any case with a foreign element concerning a child the jurisdictional aspect must be addressed and disposed of first by the court. Irish family law is now part of a much wider system of international family justice exemplified by such instruments as the 1980 Hague Convention on International Child Abduction 1980, the Hague Convention of 19th October, 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, more commonly known as "The Child Protection Convention" , the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children (known as "the Luxembourg Convention") as well as Council Regulation EC No. 2201/2003 which is variously described in text books and relevant case law as BII *bis*, Brussels II revised, Brussels IIa or BIIR (hereinafter "BII *bis*").

58. In an application for the recognition or enforcement of foreign orders concerning the welfare of a child who is habitually resident in this state and where such an application falls outside the provisions of any international convention or agreement, it is desirable that the court adopts an approach which is harmonious to the greatest extent possible with this state's child welfare and international comity obligations. From a domestic perspective, the court should have regard to the fundamental principles enshrined in the constitution including, as relevant, articles 40, 41, 42 and 42A. Further the approach to be adopted by the court should endeavour to ensure, as its first and paramount consideration, the effective vindication of the welfare and best interests of the child in question.

59. In the case of *F.N. and E.B. v. C.O.*, (Guardianship) [2004] 4 I.R. 311, High Court, Finlay Geoghegan J held that where decisions as to welfare were being made , a child of sufficient age and understanding had a procedural right protected by Article 40.3 of the Constitution to communicate their views and have same taken into account by a court making welfare decisions pursuant to s3 of the Guardianship of Infants Act, 1964, as amended.

60. Article 42A which was inserted into the Constitution by virtue of the thirty-first amendment expressly provides for the rights and protection of children as individuals.

Article 42A

61. "1. The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights."

2…

3…

4.1° Provision shall be made by law that in the resolution of all proceedings—

i. …

ii. concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child."

62. As a result of this constitutional amendment and consequent legislation including the Child and Family Relationships Act, 2015 there are constitutional and statutory obligations imposed on a court to consider the best interest of the child as the paramount consideration when making any decisions with regard to welfare. Additionally Article 42A of the Constitution confers on any child capable of forming her own views a right to have such views ascertained and accorded due weight in the decision-making exercise.

Private International Law

63. This welfare-centred approach accords with the current understanding in private international law of the powers and obligations of a court in any case concerning the welfare of a child which involves a trans-national dimension. When a foreign custody order is in existence and sought to be recognized and enforced before the Irish Courts are now required to take a broader and more child-centred approach to any such application and to make new and different orders if the best interests and welfare of the child in question so requires.

64. Dicey, Morris & Collins *"The Conflict of Laws"* 15th Edition Volume 2 acknowledges that a similar position also obtains in English domestic law;

"Rule 110- Subject to Rules 108 and 109 and the provisions of international conventions given effect by the Child Abduction and Custody Act 1985, a custody order made by a court of a State to which the Brussels IIa Regulation does not apply does not prevent an English court from making such orders in England as, having regard to the child's welfare, it thinks fit." 19R-092.

65. The commentary in Dicey, Morris & Collins (opus.cit.,) in relation to rule 110 provides "Where a foreign custody order is in existence, the courts, in recent times, have taken a much broader view of their power to make a new order, based on the "first and paramount consideration" of the welfare of the child…If , however, another person applies for a custody order in England and the English court has jurisdiction under Rule 101, it will not be prevented by the foreign custody order from making such order as, having regard to the welfare of the child, it thinks fit. This is true if the foreign court, in the view of the English Court, had jurisdiction to make the custody order, and a fortiori true if it had not." 19-093 *opus cit.*

66. The text continues at 19-094; "English law provided at a relatively early stage for the recognition of the decrees of foreign courts concerning the status of the parties , for example divorce decrees and adoption orders. The same is not true of foreign custody orders. In declining to be bound by foreign custody orders English courts are prompted by two considerations. The first is that a custody order by its nature is not final and is at all times subject to review by the court which made it. The second is that by statute the welfare of the child is the first and paramount consideration. This has been interpreted to apply not only to domestic English cases, but also to cases involving a previous custody order made by a foreign court."

67. In my view this reflects the correct judicial approach to child-welfare cases where a foreign order is sought to be enforced. It is necessitated by Article 42A of the Constitution and is an entitlement of the child irrespective of the stance adopted by the parties to the litigation.

Brussels II *bis*

68. Ireland is a fully participating partner in the European family of nations with shared common values and from a procedural perspective we are bound to recognise and enforce the principles enshrined in BII *bis* whenever the provisions of that Regulation are engaged.

69. If the provisions of BII *bis* apply, it governs the situation. It confers jurisdiction on the courts in this State even in circumstances where the residual jurisdictional rules that applied prior to the coming into operation of BII *bis* would not. It is only if the said Regulation does not apply at all that the comity of court rules come into play. Brussels II *bis* came into operation in this jurisdiction on 1st March, 2005 by virtue of S.I. No. 112/2005 – European Communities (Judgments in Matrimonial Matters and Matters of Parental Responsibility) Regulations, 2005. The said Regulation is directly applicable in Irish law. USA is not a regulation country.

70. The scope of BII *bis* is defined in Article 1. By virtue of Article 1.1(b) the Regulation applies to civil matters pertaining to:

"the attribution, exercise, delegation, restriction or termination of parental responsibility".

Article 1.2 provides a non-exhaustive list by way of example, confirming that the ambit of its scope includes:

"(a) rights of custody and rights of access;

(b) guardianship, curatorship and similar institutions;

(c) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child; ..."

Article 1.3 of the Brussels II bis Regulation contains a list of exclusions, none of which is relevant in the instant case.

Article 2 of the Regulation defines a number of terms, including:

"the term "judgment" shall mean a … judgment relating to parental responsibility pronounced by a court of a Member State, whatever the judgment may be called, including a decree, order or decision;"

"2.7 the term 'parental responsibility' shall mean all rights and duties relating to the person or the property of a child

which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect. The term shall include rights of custody and rights of access;"

"2.9 the term "rights of custody" shall include rights and duties relating to the care of the person of a child, and in particular the right to determine the child's place of residence."

Habitual Residence

71. The mother contends that the courts of Ireland have exclusive jurisdiction with respect to issues of parental responsibility involving the minor E. This contention is based on the fact that the minor is habitually resident in Ireland and hence, it is argued, by virtue of the provisions of BII bis the Irish courts alone have the right to make decisions concerning welfare, having regard to Art. 8 thereof.

Chapter II, Section 2 of the regulation addresses jurisdiction and articulates the jurisdictional scheme of the Regulation in relation to children: -

Art. 8 provides: "The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised."

72. Derogation from the general jurisdiction of Art. 8 of Brussels II bis is provided for in limited circumstances such as Art. 15 of the Regulation which is not engaged in the instant case.

73. Under Art. 8(1) the courts of the place where a child is habitually resident at the time the court is seised and has jurisdiction in matters of parental responsibility. The words "is seised" in Art. 8(1) must pertain to a specific date. In the instant case the relevant date, in my view, is when the father's plenary summons issued; 26th May, 2017. E was also habitually resident in this jurisdiction when the relevant orders were made in Rhode Island family court in 2016.

Does BII bis apply where orders have been made in a non-member state concerning a child habitually resident in Ireland?

74. In my view, the answer is yes in the instant case for the reasons set out hereafter; the jurisdiction granted by Article 8 to the courts in cases involving children habitually resident in this state is unequivocal. It is immaterial that the state wherein the orders sought to be enforced were obtained is not a party to the Regulation. Otherwise there would be a risk of an unwarranted and invidious disparity between the degree of protection and extent of access to the Irish courts afforded to some children habitually resident in the state compared to others - based solely on the fact that one holder of parental responsibility *vis-à-vis* the said child had secured an order relating to her from a non-regulation state. In my view, such an outcome was never intended by the framers of Brussels II *bis*.

75. Further, in my view, any such disparity of treatment would be impermissible under the Constitution Article 42A and the Child and Family Relationships Act,2015 as being inconsistent with the protection and vindication of the best interests of an habitually resident child such as E. I am fortified in this view by a small number of cases where aspects of this issue came for consideration before the UK Superior Courts including the Supreme Court see for example: In *Re I (A Child)* [2010] 1 A.C. 319 and *A v. A & Anor. (Children) (Habitual Residence)* [2013] UKSC 60 [2013] 3 W.L.R. 761.

76. Notwithstanding initial assumptions to the contrary, in recent years the UK Appellate Courts have considered that the regulation applies vis a viz orders obtained in a non-member state.

77. The UK Supreme Court decision in Re I (A Child) Contact Application: Jurisdiction) [2009] 3 W.L.R. 1299 concerned Article 12 of the Brussels II bis Regulation and a conflict of laws issue relating to a child who was habitually resident in Pakistan. Baroness Hale asks;

> "Can article 12 apply at all where the child is lawfully resident outside the European Union? In my view it clearly can. There is nothing in either article 12(1) or article 12(3) to limit jurisdiction to children who are resident within the EU. Jurisdiction in divorce, nullity and legal separation is governed by article 3 of the Regulation, which lists no less than seven different bases of jurisdiction. It is easy to think of cases in which a court in the EU will have jurisdiction under article 3 but one of the spouses and their children will be resident outside the EU. A court in England and Wales would have jurisdiction if the petitioning mother were living with the children in the USA and the respondent father were living in this country. A court in England and Wales would have jurisdiction if the petitioning father had lived here for at least a year and the respondent mother were living with the children in the USA. A court in England and Wales would have jurisdiction if the spouses were living here but their children were living in the USA. In some of these cases the spouses might well wish to accept the jurisdiction of the English court to decide matters relating to parental responsibility so that their children's future could be decided in the same jurisdiction as their status, property and finances."

78. Baroness Hale continued; "Professor Rauscher is quite clear that "the new rule not only applies to children residing in a member state which is not the forum state (as article 3 of Brussels II did) but also to children residing in non-member states" (Thomas Rauscher, "Parental Responsibility Cases under the new Council Regulation 'Brussels IIA'", The European Legal Forum, 1–2005, 37, 40). There is nothing to differentiate article 12(3) from article 12(1) in this respect.

> …This view of the matter is confirmed, if the "third state" which is referred to in article 12(4) means a "non-member state". The term "third state" occurs only twice in Brussels II Revised. Article 61 provides that:
>
> "As concerns the relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, this Regulation shall apply:
>
> (a) where the child concerned has his or her habitual residence on the territory of a member state;
>
> (b) as concerns the recognition and enforcement of a judgment given in a court of a member state on the territory of another member state, even if the child concerned has his or her habitual residence on the territory of a third state which is a contracting party to the Convention."

79. Of course in the instant case E is habitually resident in Ireland.

80. The UK Supreme Court in its judgment in *Re A. (children)* [2013] UKSC 60 had to consider the scope of the Brussels II *bis* Regulation. At para. 15 of her judgment Baroness Hale stated:

> "Article 1 of the Regulation defines its scope. By Article 1.1(b) it applies to civil matters relating to 'the attribution, exercised delegation, restriction or termination of parental responsibility."

She posed the question: Does the Regulation apply where there is a rival jurisdiction in a non-member state? She answered it thus;

> "30.The Regulation deals with jurisdiction, recognition and enforcement in matrimonial and parental responsibility matters. Chapter III, dealing with recognition and enforcement, expressly deals with the recognition in one member state of judgments given in another member state: see Article 21.1. But there is nothing in the various attributions of jurisdiction of Chapter II to limit these to cases in which the rival jurisdiction is another member state. Article 3 merely asserts that in matters relating to divorce, legal separation or marriage annulment 'jurisdiction shall lie with the courts of the member state' in relation to which the various bases of jurisdiction listed there apply. Article 8 similarly asserts that the courts of a member state 'shall have jurisdiction in matters of parental responsibility…' Furthermore, Article 12.4 deals with the case where the parties have accepted the jurisdiction of a member state but the child is habitually resident in a non-member state, thus clearly asserting jurisdiction as against the third country in question. Hence in Re I. (a child) (Contact Application: Jurisdiction), this Court held that Article 12 did apply in a case where the child was habitually resident in Pakistan. There is no reason to distinguish Article 12 from the other bases of jurisdiction in the Regulation."

81. The Court of Appeal in England and Wales considered the issue in; In Re H *(Children) (Reunite International Child Abduction Centre intervening)*[2014] EWCA Civ.1101 [2015] 1 W.L.R.86 a case concerning a family with Bangladesh connections, Jackson L.J. held:

> "39. There may be a natural inclination to think of Brussels IIR only where a matter is entirely concerned with European Union countries. We know from In re I (A Child) (Contact Application: Jurisdiction) (Centre for Family Law and Practice intervening) [2010] 1 AC 319 that it is not in fact limited in this way. The child there was habitually resident in Pakistan but the Supreme Court held that article 12 of Brussels IIR still applied.
>
> 40. In A v A [2014] AC 1, the order sought by the mother was (as it was here) an order for the return of the children to England. The Supreme Court held that such an order was an order relating to parental responsibility within article 1 of Brussels IIR and therefore within the scope of the Regulation and went on to hold, at para 33, that "the jurisdiction provisions of the Regulation do indeed apply regardless of whether there is an alternative jurisdiction in a non-member state".

Forum Non Conveniens

82. Notwithstanding that E. is habitually resident in this jurisdiction and the courts in this State have jurisdiction to make determinations with regard to all matters concerning her welfare as determined above , pursuant to Brussels II *bis* Regulation, the Constitution and the Guardianship of Infants Act, 1964 as amended, it is appropriate having regard to the submissions made on behalf of the father regarding the extensive involvement by the Rhode Island courts, to briefly consider the question of convenient forum. The primary relief being sought in the Plenary Summons is the recognition and enforcement of the Rhode Island Orders.

83. The Court, if requested to do so, approaches this issue based on the principles applicable in civil proceedings generally which is set out in *Spiliada Maritime Corp. v. Cansulex Ltd.*[1986]UKHL 10, [1987] AC 460 which have been endorsed in this jurisdiction in *Inter Metal Group Ltd. v. Worsdale Trading Ltd.*, [1998] 2 IR 1 and *McCarthy v. Pillay* [2003] 1 I.R 592. The Spiliada test is encapsulated by Bingham L.J. in the said judgment where he stated:

> "a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice."

84. Applying Spiliada to children cases creates certain potentially unsatisfactory complexities as was acknowledged in the jurisdiction of England & Wales in the case *H. v. H. (minors) (forum conveniens) (Nos. 1 and 2)* [1993] 1 FLR 958 where Waite J. (as he then was) stated:

> "The legal issues, complex enough in the commercial field, are further complicated in children cases by the necessity to reconcile the ordinary common law principles most recently stated by the House of Lords in *Spiliada Maritime Corporation v. Cansulex Ltd.* [1987] AC 40 and *Dampiere v. Dampiere* [1988] AC 92 with specific statutory provisions and the general requirement… making the child's welfare the paramount consideration."

85. Having regard to the *Spiliada* decision in regard to the principles governing the determination of *forum non conveniens* the onus rests on the father to demonstrate that the courts of Rhode Island represent a distinctly more appropriate forum for the resolution of all current welfare issues concerning E. I am satisfied that that case is not made out and that the courts in this State are more suited to make the necessary determinations as to best interests required at this time. That is derived from the fact that E. is habitually resident in this jurisdiction and has been for the past 8 years. It is further reinforced by Art. 42A, 4.1 and 2 of the Constitution.

86. In my view, the bright-line value embodied in the Brussels II *bis* Regulation and enshrined in the Constitution is that a minor habitually resident in this state is entitled to have issues concerning welfare and best interests determined in the Irish courts.

87. When, in a matter with which Brussels II *bis* is concerned, a court's jurisdiction has been validly invoked, it is generally not open to that court to deny a hearing on the grounds that another forum may be more appropriate. Provided that the Irish court has lawful jurisdiction to hear the case it must proceed with the hearing.

88. Brussels II *bis*, once engaged, as it is in the instant case, appears to foreclose the invocation of the *forum non conveniens* doctrine which allows a court at its discretion, to refuse to hear a case on the grounds that a hearing in the court of another state would be more appropriate. Pursuant to Brussels II *bis* however, it would appear that in a case involving the welfare of a habitually resident child, a court has no power to exercise its discretion to refuse jurisdiction, notwithstanding that another jurisdiction would in its view be a more appropriate venue for determination of the issues.

89. Hence on the facts of this case I am satisfied that the basic rule of Brussels II bis governing jurisdiction in children's cases is

engaged and the minor has a right to have issues of welfare determined in the courts of this jurisdiction.

Habitual Residence
90. The minor E. is entitled to the benefit of s. 3(1) of the Guardianship of Infants Act 1964 as substituted by the Children and Family Relationships Act 2015, s. 45, which provides:

> "3(1) Where, in any proceedings before any court, the—
>
> (a) guardianship, custody or upbringing of, or access to, a child…
>
> is in issue, the court, in deciding that question, shall regard the best interests of the child as the paramount consideration."
>
> (2) In proceedings to which subsection (1) applies, the court shall determine the best interests of the child concerned in accordance with Part V."

91. This provision became operative on 18th January, 2016 by virtue of Statutory Instrument No. 12 of 2016, Children and Family Relationships Act 2015 (Commencement of Certain Provisions) Order 2016, Art. 3(b) thereof.

92. Counsel for the father accepts that the United States is not a party to the Hague Convention of 19th October, 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, more commonly known as "The Child Protection Convention". He also concedes that since E. is not habitually resident within the jurisdiction of the courts of Rhode Island, the provisions of the Hague Convention 1980 on the civil aspects of international child abduction cannot be invoked by the father to secure the summary return of the minor to Rhode Island.

93. The cornerstone of jurisdiction in child-matters is habitual residence and that is demonstrable from the provisions of Brussels II bis. Even were the provisions of the Hague Convention on International Child Abduction engaged, and I am satisfied they are not (apart, possibly, from Article 18), it is clear from Art. 60 of the Brussels II bis Regulation that the latter would take precedence over the Hague Convention.

Relevance of Proceedings and decision regarding E in Rhode Island
94. There is no doubt but that very extensive enquiries have been carried out by the courts of the State of Rhode Island regarding this child's welfare up to July 2016. Detailed reports have been prepared, including by a psychologist in respect of this family. Further a guardian *ad litem* was appointed for the benefit of the minor. A wide array of relevant individuals was interviewed and material and information from this jurisdiction and from Rhode Island concerning her was considered in great detail. All this material together with the detailed and thorough judgments of the courts of Rhode Island will be available to the Irish courts and will no doubt substantially expedite the determination of all issues in regard to the welfare and interests of the minor in question.

95. Accordingly, on the issue of the recognition and enforcement of orders of the courts of Rhode Island in regard to the minor since the mother is expressly putting new issues of welfare in issue in her affidavit sworn 7th July 2017, and since the minor is habitually resident in this jurisdiction and was so at all material times including when the orders were made in the courts of Rhode Island an evaluation of the said orders and whether they now operate for the best interests of the welfare of the minor fall to be determined by the courts of this jurisdiction as the most convenient forum.

96. This is warranted having regard, inter alia, to the passage of time since the making of the orders in August 2016, the fact that E is now a teenager and has moved to secondary school. It is for the court now to be seised in this State of the substantive issues to consider any relevant changes in the respective circumstances of the parents and the impact of same on E and the urgent necessity to address the apparent severance of the child's relationship with her father and two older siblings in the U.S. for the purposes of rectifying any adverse impact that may have resulted to E's welfare.

97. Orders concerning custody, access and child welfare are always interlocutory in nature and are open to review and variation whenever it is demonstrated to a court of competent jurisdiction that the vindication of the best interests of a minor so requires.

Estoppel
98. The mother engaged with the courts of the State of Rhode Island in circumstances where an order ex parte was obtained by the father in July, 2014. She did take steps to challenge jurisdiction on a number of occasions and indeed it is clear from the judgment of Baker J. delivered on 9th September, 2014 that she was at that time engaging with the Rhode Island courts specifically for the purposes of challenging jurisdiction. The said proceedings were primarily precipitated by issues concerning the son of the parties, P. In 2015 she did challenge the jurisdiction of the courts of Rhode Island initially successfully which decision was reversed on appeal by that state's Supreme Court. The 2015 proceedings were precipitated primarily around issues concerning another daughter of the parties. She fully and actively engaged with the 2016 proceedings.

99. Estoppel has a very limited and diminishing role in child –welfare cases. It cannot usurp or undermine a constitutional guarantee which enures for the benefit of the minor. Neither can it operate to oust the jurisdiction of the Irish courts once Brussels II bis Regulation, Article 8 has been validly invoked.

100. Custody is not an award for good behaviour. No doubt the capacity and willingness of the mother to foster relations between the minor and her father and siblings will be evaluated as part of the overall welfare assessment at the substantive hearing in early course. On the facts of this case I am satisfied that the doctrine of estoppel by conduct does not arise. Estoppel speaks to the conduct of adults be they parent, guardian, relative or carer of a minor.

101. The new constitutional order brought about by the 31st Amendment to the Constitution and the Guardianship of Infants Act 1964 as amended by the Children and Family Relationships Act, 2015 places the welfare and best interests of the minor as paramount. It seeks to effect a paradigm shift away from recrimination and blame as between adults involved in a dispute regarding custody or access to a child save and except to the extent that such conduct is actually directly relevant to the welfare and best interests of the child in question. Accordingly, I am satisfied that on the facts of this case the doctrine of estoppel is not engaged.

Article 8 of the Regulation

102. In the instant case, the minor is habitually resident in this jurisdiction and has at all material times since January, 2009 been so resident. It is clear that the provisions of Article 8 of Brussels II *bis* Regulation are engaged. In light of the constitutional amendment referenced above and the relevant legislation and in particular the following factors:

> i. That almost a year and a half has elapsed since the assessment process was carried out in Rhode Island involving the minor.
>
> ii. There have been material changes in circumstances within the domestic arrangements that obtain in the State of Rhode Island and in particular that whilst the dominant consideration in the professionals involved in the assessment in June and July, 2016 was the unity of the three children it is clear that the oldest child, P., has ceased to reside with his father but has moved to the State of Indiana in pursuance of his education.
>
> iii. A document has come into existence, attributed to the minor which purports to express her wishes with regard to her future relationship with her father. It requires evaluation as to whether it reflects her current state of mind and if so why.
>
> iv. It is imperative that the courts of her habitual residence embark with all due expedition on an evaluation of all aspects pertaining to her welfare and including her wishes. Demonstrably, the Irish courts are best placed to carry out this evaluation in circumstances where she has now completed her primary education and has commenced her schooling at a new secondary school since late August, 2017.

103. Article 8 of the Brussels II Regulation when read with Article 17 imposes an obligation on the court seised of an application to examine its own jurisdiction as a first step within those proceedings. By virtue of Article 8(1) of the said Regulation the concept of habitual residence is now of crucial importance when seeking to determine which country has jurisdiction in relation to making determinations concerning the welfare of a child.

Conclusion – issue one

104. Accordingly, in answer to the first issue, the Courts of Ireland, the State of the minor's habitual residence, have full and primary jurisdiction to make determinations, after such inquiries as are deemed fit, with regard to all aspects of her best interests and welfare. The existence of foreign orders does not delimit or circumscribe that jurisdiction in any material respect.

Jurisdiction of the High Court

105. The second preliminary issue argued on behalf of the mother is that the High Court does not have jurisdiction to hear the substantive proceedings. She asserts that by reason of statutory devolution arising from s15 of the Courts Act 1981 the District and Circuit Courts have exclusive jurisdiction to hear and determine the substantive application.

106. In my view the following factors require to be taken into account;

> - These are plenary proceedings instituted by the father.
>
> - They are wide ranging in nature and extend substantially beyond the provisions of the Guardianship of Infants Act 1964, as amended.
>
> -In particular, the pleadings expressly invoke Art. 41 of the Constitution.
>
> - They also expressly invoke the inherent jurisdiction of the High Court
>
> - On the face of the pleadings an issue of transnational recognition and enforcement of a foreign court order is raised.
>
> - A central issue in this case is whether the habitually resident minor in question should move to reside in another jurisdiction having regard to her best interests and the protection of her welfare.
>
> - There are orders of the State of Rhode Island providing for her return to that jurisdiction forthwith.
>
> -The approaches of the Irish and Rhode Island courts to the best interests and welfare of a minor appear to be broadly similar.
>
> -Generally, in transnational cases involving children where time is of the essence and where delay can significantly and dramatically impact upon the operation of such orders, applications invoking the comity of courts and inherent jurisdiction have been invariably brought in the High Court for reasons of expedition.
>
> - A sufficiently wide array of discrete issues, ranging well beyond ss,5, 13 and 18 of the Guardianship of Infants Act 1964, as amended, is disclosed in the Plenary Summons and the affidavits sworn to date such that the statutory devolution of jurisdiction on a local and limited basis is not mandated in the instant case;-
>
> - The appellant asserts in her affidavit sworn 7th July 2017 that the Applicant ought to have sought leave of the High Court pursuant to s23 of the Family Law Act, 1995 as a prerequisite to invoking the jurisdiction of the High Court.
>
> -The fact that the father is the holder of a foreign order which on its face mandates the summary return of an Irish habitually resident child for her welfare to Rhode Island takes this case , by analogy, into the sphere of child abduction and in particular wrongful retention as that concept is defined in the Hague Convention. The order in question was obtained on notice and with active participation by both parents before the foreign court. As such therefore the institution and prosecution of the proceedings before the High Court was entirely warranted and appropriate.

107. Article 18 of the Hague Convention on International Child Abduction in its language envisages the national court making such an order even where for other reasons the summary return of a child to a requesting state cannot be achieved under the Hague Convention itself . In this respect Article 18 provides:

> "The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time"

When this State ratified the Hague Convention on International Child Abduction, the enabling legislation, the Child Abduction and Enforcement of Custody Orders Act, 1991 specifically provided that the court with exclusive jurisdiction for applications was the High Court. This reflected the urgency attendant on such applications and the seriousness with which this State treats issues of welfare of minors, particularly where there is a transnational dimension

108. In the case *Tormey v. Ireland* [1985] 1 IR 289, Henchy J. in the Supreme Court considered the effect of s. 31 of the Courts Act 1981 which abolished the right to apply to transfer a criminal matter from the District Court or Circuit Court to the Central Criminal Court. At p. 295, Henchy J. stated:

> "The question whether any particular statutory vesting of jurisdiction in the District Court or the Circuit Court, to the exclusion of the High Court, is constitutionally valid cannot be determined by reliance on the provisions of Article 36 of the Constitution. That Article, after referring to the judges of the Supreme Court and of the High court and the judges of all other Courts, provides that among the matters to be regulated in accordance with law shall be "the constitution and organization of the said Courts, the distribution of jurisdiction and business among the said Courts and judges, and all matters of procedure." While "the said Courts" must be taken in the context to comprehend courts - such as the District Court and the Circuit Court - established under Article 34, s. 2, subs. 1 as well as the Supreme Court and the High Court, the powers given by Article 36 to Parliament are made expressly "subject to the foregoing provisions of this Constitution relating to the Courts." Among those foregoing provisions are the provisions of Article 34. Article 36, therefore, cannot be operated or relied on in derogation of the provisions of Article 34. It is the latter provisions, and in particular Article 34, s. 3, subs. 1 that have to be construed and applied for the purpose of deciding the question argued in this case."

109. The learned judge continued:

> "The "full" original jurisdiction of the High Court, referred to in Article 34, s. 3, subs. 1, must be deemed to be full in the sense that all justiciable matters and questions (save those removed by the Constitution itself from the original jurisdiction of the High Court) shall be within the original jurisdiction of the High Court in one form or another. If, in exercise of its powers under Article 34, s. 3, subs. 4, Parliament commits certain matters or questions to the jurisdiction of the District Court or of the Circuit Court, the functions of hearing and determining those matters and questions may, expressly or by necessary implication, be given exclusively to those courts. But that does not mean that those matters and questions are put outside the original jurisdiction of the High court. The inter-relation of Article 34, s. 3, subs. 1 and Article 34, s. 3, subs. 4 has the effect that, while the District Court or the Circuit Court may be given sole jurisdiction to hear and determine a particular matter or question, the full original jurisdiction of the High Court can be invoked so as to ensure that justice will be done in that matter or question. In this context the original jurisdiction of the High Court is exercisable in one or other of two ways. If there has not been a statutory devolution of jurisdiction on a local and limited basis to a court such as the District Court or the Circuit Court, the High Court will hear and determine the matter or question, without any qualitative or quantitative limitation of jurisdiction. On the other hand, if there has been such a devolution on an exclusive basis, the High Court will not hear and determine the matter or question, but its full jurisdiction is there to be invoked - in proceedings such as habeas corpus, certiorari, prohibition, mandamus, quo warranto, injunction or a declaratory action - so as to ensure that the hearing and determination will be in accordance with law. Save to the extent required by the terms of the Constitution itself, no justiciable matter or question may be excluded from the range of the original jurisdiction of the High Court."

110. The practical consequence of the determination of the issue at Q. 1 above is that the recognition and enforcement of the orders made by the family court in the State of Rhode Island continues to be an issue for determination by the court of this state. In substance, what the father seeks is the recognition and enforcement of a foreign judgment and order.

111. Were the provisions of the Hague Convention on Child Abduction to be engaged such an application could only be brought in the High Court. Counsel for the father fairly acknowledges that the Convention is not engaged because the minor is habitually resident within the jurisdiction of the courts of this State. However I did not understand him at any time to suggest that the provisions of Article 18 of the Hague Convention on International Child Abduction did not apply to this case

112. It is clear from the grounding affidavit sworn by the father , its exhibits and the submissions made on his behalf that the case being made is that it is in the minor's best interests that the courts should order the return of E to Rhode Island for the purposes of vindicating her welfare rights.

Conclusion – issue two

113. Having regard to the rules of comity and the great respect to be extended to the orders of a foreign court made after such an extensive and comprehensive process of evaluation as is disclosed in the papers exhibited in the grounding affidavit before this Court it is appropriate in all the circumstances that the aspect which seeks recognition of the foreign orders be acknowledged as effectively the autonomous invocation of the inherent jurisdiction of the High Court notwithstanding that the said orders can only be recognised and enforced to the extent that the trial judge who determines the issues in this case may be satisfied that the said orders are in the best interests of the welfare of the minor in question. In all the circumstances it warrants that the matter remains before the High Court. This ground of appeal fails.

General Conclusions

114. Arising from the eleven grounds of appeal raised on behalf of the mother and the grounds of opposition advanced on behalf of the father I reach the following further conclusions:

> i. That the minor is habitually resident within the jurisdiction of the Courts of Ireland and was so resident at the time the within proceedings were issued on behalf of the father.
>
> ii. Accordingly, Article 8 of the Brussels II BIS Regulation is engaged and the courts of this jurisdiction have jurisdiction in regard to matters of parental responsibility pertaining to her.
>
> iii. The minor E. ceased to be habitually resident within the jurisdiction of the Courts of Rhode Island nine years ago, in the month of January, 2009.
>
> iv. The issue of jurisdiction in this particular case must be determined on the facts as disclosed in the proceedings and specific to these parties without regard to the following international provisions;

a. The Hague Convention on International Child Abduction cannot be invoked to seek a summary order for return of the minor to Rhode Island because the minor is not habitually resident within the jurisdiction of the Courts of Rhode Island.

b. The Hague Convention of 19th October, 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, more commonly known as the Child Protection Convention by reason that the United States has not yet ratified the said Convention;

v. The provision of the Regulation Brussels II bis governing jurisdiction in child welfare cases is engaged. As set out above, Art. 8(1) provides:

"The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised."

Jurisdiction of the Irish Courts

115. When confronted with an application pertaining to the welfare of a minor who is habitually resident in this jurisdiction the best interests of the child are paramount since the 2012 Constitutional Amendment Article 42A and coming into operation of s. 45 of the Children and Family Relationships Act 2015 on 18th January, 2016. Further, Part V of the Guardianship of Infants Act of 1964 which was inserted into the latter Act by s. 63 of the Children and Family Relationships Act of 2015 sets out some guidelines to assist a court in determining for the purposes of the 1964 what is in the best interests of a child.

116. That legislation and in particular s. 31(4) of the Guardianship of Infants Act as amended provides:

"For the purposes of this section, a parent's conduct may be considered to the extent that it is relevant to the child' s welfare and best interests only."

117. Estoppel should not in general be invoked to delimit any aspects of a court's consideration of issues of welfare.

118. The United States is not a party to the Brussels II bis Regulation. Notwithstanding that fact it is the case that the protections afforded in this State to the minor under the said Regulation are not in any way diluted where transnational issues arise concerning her welfare. The fact that orders pertaining to her welfare have been procured in a non regulation cannot trench upon or dilute her rights under the Brussels II bis Regulations.

119. .Insofar as it is contended on behalf of the mother that the Irish Courts have no jurisdiction to recognise and enforce the Rhode Island order pertaining to the minor by reason of her habitual residence being in this jurisdiction at the date of the institution of the proceedings seeking recognition and enforcement of the said order this is not strictly a correct proposition in law as clarified hereinafter.

120. A court in this State seised of the issue of welfare pertaining to a minor conducts the exercise of assessing welfare and best interests in accordance with the Constitution and the relevant legislation including the Guardianship of Infants Act 1964 as amended by the Children and Family Relationships Act 2015. The Irish court is not circumscribed or delimited in making its determination as to the best interests of the minor by virtue of the existence of an order of a foreign court which is sought to be recognised and enforced as embodying the best interests of the minor.

121. The criteria set out in s. 31(2) Part V of the Guardianship of Infants Act 1964 represents a non-exhaustive list of factors to be considered by a court considering the welfare of a child. The court can have regard to any other fact, matter or data of materiality in circumstances such as the present where the courts of Rhode Island, the family court and the Court have engaged with this family and made orders in reaching its determinations on welfare.

122. The constitutional order places the welfare and best interests of the child front and centre in the determinative process. In discharging its functions regarding ascertainment and determination of the welfare and best interests of the child the court must consider in detail all material it considers relevant pertaining to the issue including material that was before the court of another jurisdiction which recently considered welfare and made orders.

123. The said Rhode Island orders and the recognition and enforcement of same represents but one option among many from which after due and full consideration of all of the relevant evidence (including particularly in the case of a minor of the age of E. the views of the child insofar as they are independently ascertainable whether in accordance with s. 32 of the Guardianship of Infants Act or otherwise) the High Court in deciding the substantive issues will draw appropriate welfare conclusions.

124. The existence of an order pertaining to custody and welfare of a minor made by the courts of a state in respect of which, on the facts, no international instrument can be invoked to secure summary recognition and enforcement does not prevent or preclude a court of competent jurisdiction in this State from making a substantially similar order at the conclusion of a full welfare hearing provided it is satisfied having regard to all the relevant factors and circumstances that to do so is in the best interests of the minor and in question . When appropriate the court should do so with all suitable or appropriate modifications as may be considered necessary to vindicate her welfare. The decision of the U.K. Supreme Court In the matter of K L (A Child) 2013 UKSC 75 illustrates such an approach.

125. It is not necessary or appropriate at this time on the particular facts of this case to make a declaration as sought by the mother that the courts of Ireland have exclusive jurisdiction in relation to issues of parental responsibility pertaining to the minor E. In particular, significant concessions have been made on behalf of the father at the hearing of this appeal; including an acknowledgment that the relief he seeks could be refused. It was also accepted that the courts in this jurisdiction may direct certain steps and reports to be undertaken prior to deciding the issues.

126. It is a matter of some concern that there has been substantial delay in this jurisdiction in regard to determination of all issues pertaining to the welfare of the minor E. now aged 13 years and 4 months. The existence of ongoing litigation pertaining to her welfare in this jurisdiction and in the State of Rhode Island extending over a number of years is less than satisfactory and carries the risk of having a deleterious impact on the welfare of the minor in question.

127. It appears unlikely that the use of O. 25, r. 2 or O. 34, r. 2 of the said Rules of the Superior Courts to determine these two questions of law by way of preliminary issue ever had the remotest prospect of "substantially disposing of the whole action" as O.25

r.2 envisages. Neither could it be said to be "convenient" as that principle has been construed in Order 34 - namely that it will result in the shortening of the proceedings. In general, given the need for expedition in cases involving the welfare of any child , the use of preliminary applications to determine points of law in such cases should be avoided save in the most exceptional circumstances.

128. For these reasons I would allow the appeal to the extent set out above.