THE HIGH COURT

[2018 No. 106 SS]

IN THE MATTER OF SECTION 52 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961

BETWEEN

THE CHILD AND FAMILY AGENCY

APPLICANT

AND

L.B. AND M.L.

RESPONDENTS

JUDGMENT of Mr. Justice MacGrath delivered on the 12th day of July, 2018.

1. The applicant has applied to the District Court for an order under s. 18 of the Child Care Act 1991, as amended ("*the Act of 1991*"), that A.B., the child of the respondents, who was born on 22nd December, 2016, be made subject to an order committing her to the care of the applicant for two years. The application is opposed by legal representatives acting on behalf of the child's mother, the first respondent. Having considered the evidence and various reports submitted to him, District Judge O'Leary made an order that the child be placed in the care of the applicant for a period of six months from 22nd December, 2017, pending the determination of certain matters of law upon which he has sought the opinion of this Court by way of a consultative case stated pursuant to s. 52 of the Courts (Supplemental Provisions) Act 1961 dated 22nd December, 2017.

2. In the case stated the judge made the following findings of fact:-

> *"(i) There is a presumption that the child's welfare is best provided for by being parented by a biological parent;*
>
> *(ii) The first-named Respondent being the female parent in this case is a loving concerned conscientious mother who on such limited evidence as is before me cannot, due to mild intellectual disability among or in combination with other significant factors, provide adequate care for the child in the absence of either appropriate family support or an unascertained level of non-family support with basic care of the child;*
>
> *(iii) The second-named Respondent being the male parent in this case takes no part in the care of the child or in these proceedings, although a party to and notified of them;*
>
> *(iv) On such evidence as I have, appropriate family support is not available to the first-named Respondent,*
>
> *(v) The evidence before me was to the effect that the content and level of the non-family support necessary for and appropriate to a parent in such circumstances are unique to that parent;*
>
> *(vi) The cost of carrying out an assessment of the unique weaknesses and strengths of the parent or parents and the effect of their interaction on the parent's capacity in this case is uncertain but in any case is beyond the capacity of the parent in this case whose income is her Disability Allowance;*
>
> *(vii) The effect of the basic care of the child being provided by professional services on the emotional and other development of the child has not been ascertained and is very significant having regard to the constitutional rights of the child to an opportunity for full personal development."*

3. District Judge O'Leary stated that he was minded to make orders under s. 47 of the Act of 1991 in the terms contained in the questions framed by him, as follows:-

> *"Am I entitled to make orders under S.47 of the Child Care Act 1991 as amended directing the Child and Family Agency to:*
>
> > *1. Ascertain the cost of carrying out an appropriate assessment as to what services, if any, would be required and suffice to enable the first-named Respondent to parent the child to the maximum of her ability, having regard to her limitations and strengths and her rights as provided for by legislation, Bunreacht na hÉireann, and the European Convention on Human Rights, including in so far as her rights under the Convention are extended or defined by the International Convention on Rights of Persons with Disabilities;*
> >
> > *2. Carry out such an assessment;*
> >
> > *3. Provide such services as may be indicated by such an assessment, in the event that such assessment indicates that such services will enhance her capacity for parenting sufficiently to justify the provision of such services and that such parenting is in the interests of the child."*

4. The mother and her child were admitted to a parent and infant unit at the Bessborough Centre in January, 2017 when the child was three weeks old. The child's father was admitted at the same time but was later suspended as a result of threatening behaviour. The mother and child were discharged from Bessborough on 25th April, 2017 and an interim care order was made on 26th April, 2017. The discharge report recommended that the child be made the subject of a long term care order because, despite her best efforts, L.B. had not been able to demonstrate capacity to safely and consistently parent (a decision stated not to have been lightly made), and that if the child remained in the care of her mother she would not obtain a healthy psychosocial development and significant aspects of her care would be neglected or placed at risk.

5. At an early stage of the proceedings, the District Judge requested that a report be prepared by a psychologist pursuant to s. 27 of the Act of 1991. This section empowers the court to "*give such directions as it thinks proper to procure a report from such person as it may nominate on any question affecting the welfare of the child*". A psychologist prepared a report in which he accepted conclusions of an earlier report, known as "*the Bessborough report*", that L.B. did not have the capacity to provide a safe and appropriate level of parenting for her daughter such as to facilitate a reasonable emotional and physical developmental trajectory.

6. It is submitted on behalf of the applicant that the report obtained from the psychologist was made with the express purpose of identifying the supports, if any, which would be sufficient or necessary to allow the mother to parent her child on a full and part time basis. The applicant contends that the answer to the questions in the case stated should be that the Court is unable to answer them or alternatively that they should be answered in the negative. The respondent requests the Court to answer the questions in the affirmative.

Section 52 of the Courts (Supplemental Provisions) Act 1961
7. Section 52(1) of the Courts (Supplemental Provisions) Act 1961 ("*the Act of 1961*") provides:-

> *"A justice of the District Court shall, if requested by any person who has been heard in any proceedings whatsoever before him (other than proceedings relating to an indictable offence which is not being dealt with summarily by the court) unless he consider the request frivolous, and may (without request) refer any question of law arising in such proceedings to the High Court for determination."*

Section 47 of the Child Care Act 1991
8. Section 47 of the Act of 1991 provides:-

> *"Where a child is in the care of the Child and Family Agency, the District Court may, of its own motion or on the application of any person, give such directions and make such order on any question affecting the welfare of the child as it thinks proper and may vary or discharge any such direction or order."*

Article 42A of Bunreacht na hÉireann
9. The thirty-first amendment of the Constitution inserted Article 42A which provides:-

> *"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 1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.*
>
> *2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.*
>
> *3 Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.*
>
> *4 1° Provision shall be made by law that in the resolution of all proceedings–*
>
> > *i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or*
> >
> > *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."*

The applicant's case – the case stated procedure, jurisdiction and substantive issue
10. The applicant contends that both the existence and the application of a power under s. 47 requires, as a matter of fact, that the welfare of the child be directly engaged and that no evidence pertaining to the child and no facts in relation to the child's welfare have been found by the District Judge. It therefore follows that this Court cannot assess whether s. 47 "*arises in these proceedings*" pursuant to s. 52 of the Act of 1951. A necessary prerequisite to the stating of the consultative case is that the District Judge must hear evidence and make findings of fact based on that evidence. Those findings must be relevant to the point of law on which clarification is sought and should be clearly outlined and sufficiently identified in the case stated, to enable this Court to understand how, or whether, the question posed can be said to arise. These principles reflect the jurisprudence concerning case stated procedures and it is submitted that it is a procedure that should not be used to address questions which are general, hypothetical or moot. That this is so, even in respect of issues of statutory interpretation, it is submitted, is reflected in the decision of McMahon J. in *O'Neill v. Butler* [1979] I.L.R.M. 243, where he observed at p. 244:-

> *"The power of a District Justice under section 52 of the Courts (Supplemental Provisions) Act, 1961 is to refer to the High Court a question of law arising in proceedings before him by reference to the facts found by him. He cannot ask the High Court to define generally and without reference to particular facts the meaning of expressions used in a statute."*

11. In *Director of Public Prosecutions (Travers) v. Brennan* [1998] 4 I.R. 67, Lynch J., with whom Hamilton C.J. and Keane J. agreed, stated as follows at p. 70:-

> *"The proper procedure leading to the stating of a consultative case for the opinion of the Superior Courts is for the District Judge to hear all the evidence relevant to the point of law arising, to find the facts relevant to such point of law in the light of such evidence, then to state the case posing the questions appropriate to elucidate the point of law and finally, on receiving the answers to those questions to decide the matter before him on the basis of those answers."*

12. This was applied by Hedigan J. in *Director of Public Prosecutions (Tormley) v. Gillespie* [2011] IEHC 236. He held that because a question as formulated was a question of fact and not a question of law, the appropriate course of action was to refer the question back to the District Judge for his decision on the facts.

13. In *O'Shea v. West Wood Club Limited* [2015] IEHC 24 and in the context of an issue as to whether jurisdiction arose, O'Malley J. stated, at paras. 61 and 63:-

> *"61. The fact that a question in a case stated raises a jurisdictional issue does not mean that there is no requirement to set out the facts giving rise to the issue. There are many cases where the District Court has asked questions as to jurisdiction, but there is always a factual substratum explaining why the question has arisen. Indeed, the issue of jurisdiction often depends on the facts of a case.*
>
> *[…]*
>
> *63. It is not possible for this court to answer a question on a point of law without knowing whether it actually arises as an issue. To do so would be to engage in a moot."*

14. In this context, the applicant emphasises the wording of s. 47 of the Act of 1991, a provision applicable to questions "*affecting the welfare of the child*". It is submitted that it is not possible for this Court to answer whether s. 47 can be employed in a particular manner in this case in circumstances where the case stated does not make findings of fact that the welfare of the child is affected in a manner necessary to satisfy the condition precedent to any s. 47 issue arising. Fundamentally, it is submitted that the case stated does not identify any factual basis upon which the welfare of the child is affected for the purposes of satisfying the conditions precedent to s. 47; nor does it identify an adequate factual basis to allow the Court to consider whether and/or how the answer to the questions of law referred to will affect the welfare of the child. Counsel for the applicant, Mr. Dignam S.C., submits that the argument advanced by the applicant is not a technical one and that the Court is being asked to operate in a vacuum and to make findings of fact sufficient to permit it to engage jurisdiction in relation to the case stated.

15. The applicant also makes a secondary point that even if the Court has jurisdiction to answer the questions, they should be answered in the negative because, as framed, the emphasis of the questions is not on the *welfare of the child* but on the *rights of the mother*. It is argued that in all applications and procedures before the courts in respect of the child welfare issues, the jurisdiction is vested when matters of welfare, or interests, of a child are engaged and require to be clarified; or that steps require to be taken to direct the means by which those interests are furthered. The applicant argues that there is no finding contained in the case stated which places at the heart of the question that it is in the best interests of the welfare of the child that the particular issue be considered. It reiterates that it is a condition precedent to the existence and exercise of the power under s. 47 of the Act of 1991 that the issue under consideration must directly relate to the welfare of the child. Therefore, if the threshold requirement is satisfied, any order thus made must directly relate to the welfare of the child.

16. On parsing the wording of the case stated, the applicant contends that there are very few findings of fact and that in this regard, submits, that the closest the case stated comes to identifying the factual basis upon which the welfare of the child is engaged is finding number (vii):-

> *"The effect of the basic care of the child being provided by professional services on the emotional and other development of the child has not been ascertained and is very significant having regard to the constitutional rights of the child to an opportunity for full personal development."*

It is submitted that this cannot meet the requirements of s. 52 of the Act of 1961, because at the most basic level it is not a finding of fact at all. The applicant highlights that the court's finding in this respect "*was unascertained*" and that, at best, the District Judge had found that the evidence, which he considered, did not establish any facts in relation to the effects on the child's welfare. It is contended that it is impossible for the Court to assess whether s. 47 permits the making of directions where there are no findings of fact against which the legality of those directions might be assessed. Thus, there is no finding that the welfare of the child would, on the evidence in the proceedings, be adversely or positively affected by carrying out the assessment contemplated in question 1, or by a refusal or deferral of the making of a care order to allow this to be carried out.

17. Counsel accepts, nevertheless, that the jurisdiction of the courts under s. 47 is a very broad one. Thus, in *Eastern Health Board v. McDonnell* [1999] 1 I.R. 174, McCracken J. observed at p. 184:-

> *"Quite apart from the general provision, s. 47 of the Act gives an extremely wide jurisdiction to the District Court. Unlike s. 24, this is not limited to cases where there are proceedings before the court, but rather to situations where the child is already in the care of a health board. This jurisdiction may be exercised by the court on its own motion or on the application of any person, which of course would include the notice parties in this case. A somewhat farcical situation therefore, could arise if I declare that the respondent had no power to impose these directions, in that the notice parties could apply tomorrow under s. 47 to the respondent to make exactly the same directions. It is not credible that the respondent should not be entitled to impose directions when making the care order, but would be entitled to do so on a new application the next day.*
>
> *In my view s. 47 is an all embracing and wide ranging provision which is intended to entrust the ultimate care of a child who comes within the Act in the hands of the District Court. It should be noted that it is contained in part of the Act dealing with 'Children in the Care of Health Boards', and is not qualified in any way. I think the only reasonable interpretation of s. 47 is that it is intended to give the overall control of children in care to the District Court. This is not to say that the District Court should interfere in all day to day decisions made by a health board, but rather that whenever any matters of concern are brought to the attention of the District Court, which could reasonably be considered to adversely affect the welfare of the child, and only in such circumstances, should the District Court interfere. Having read the decision of the respondent in both the cases before me, I am quite satisfied that he had ample grounds upon which to intervene or impose conditions on the making of the care order, although that is not strictly the question before me."*

18. The wide nature of the powers enjoyed by the District Court under s. 47 was reiterated by McGuinness J. in the Supreme Court in *Western Health Board v. K.M.* [2002] 2 I.R. 493 at pp. 510 to 511:-

> *"I would therefore accept the submission of the respondent that the construction of the Act of 1991, as a whole, should be approached in a purposive manner and that the Act, as stated by Walsh J., should be construed as widely and*

liberally as fairly can be done.

This does not, of course, imply that s. 47 can be looked at apart from its context in the general framework of the Act, or that the widely drawn terms of the section means that the District Court is simply at large in the orders it may make pursuant to the section. Counsel for the respondent is correct in laying stress on the fact that the child in question remains in the care of the applicant pursuant to the order of the District Court made on the 22nd June, 1997. Both the applicant and the court must at all times bear that fact in mind when making any proposals for the future care of the child."

19. Significant reliance is also placed by the applicant on the decision of Hogan J. in J.*G. v. Judge Staunton* [2014] 1 I.R. 390, where, in the context of a judicial review application, he observed that the s. 47 order must relate directly to the welfare of the child. It is to be noted, however, that the issue in that case was whether obligations could be placed on *other parties* in the context of an application to the District Court for a supervision order under s. 19 of the Act of 1991. Hogan J. held that neither s. 19 nor s. 47 of the Act of 1991 empowered the District Court to impose personal obligations on third parties, such as directing that parents attend parental assessments or psychotherapy.

20. It is argued that the questions posed in the case stated, and in the orders contemplated, fail to have regard to the *welfare of this child as being paramount*. Reference is also made to Article 42A of the Constitution and s. 24 of the Act of 1991 which place at their heart, the welfare of the child as being the paramount consideration. This is not to suggest that the mother's interests are not a relevant factor for the Court to assess. The rights of the parents are specifically acknowledged in Article 42A of the Constitution and in s. 24 of the Act of 1991, but these provisions make it clear the rights and interests of the parent and child must be treated in a particular way, with the child's welfare being paramount, as a matter of law.

The respondent's case

21. The respondent submits that there is a fundamental presumption which arises under the provisions of Articles 42 and 42A of the Constitution, that it is in the best interests of the child to be raised by his or her parents and that it is only in exceptional circumstances that the child should be removed from the family and placed in the care of someone other than his or her parents.

22. In *K.A. v. HSE* [2012] 1 I.R. 794, O'Malley J. observed that in considering the interpretation of s. 3 of the Guardianship of Infants Act 1964, having regard to the provisions of Article 42 of the Constitution, the Act must be construed as involving a constitutional presumption that the welfare of the child 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 otherwise satisfied that the evidence established an exceptional case as envisaged by Article 42.5. Reliance in this regard is placed on the decisions of *In re J.H. (an infant)* [1985] I.R. 375, N*. v. Health Service Executive* [2006] 4 I.R. 374 and on the decision of Baker J. in *S. McG. & J.C. v. Child and Family Agency* [2015] IEHC 733, that because of the constitutional position of the mother, the welfare of the child must always be considered as intrinsically bound up with the relationship of that child to his or her mother. A court when considering questions of the best interests or welfare of the child, must also take into consideration the nexus of the relationship between mother and child, or, where relevant, the nexus created by the relevant family unit as understood in the Constitution.

23. Mr. Durcan S.C., on behalf of the respondent, argues that the coming into effect of Article 42A has not in any way displaced the presumption, rather, it has strengthened and enhanced the right of the child to the society of both of its parents. The presumption of the best interests of the child lies in the child's enjoying such society, something which has been made clear by Humphreys J. in *P.H. v. Child and Family Agency* [2016] IEHC 106.

24. It is also contended that even in exceptional cases where the court might intervene, when there is a failure of parental duty, the intervention by the State must be proportionate and be by proportionate means. As Costello J. stated in *Heaney v. Ireland* [1994] 3 I.R. 593 at p. 607 "*the test of proportionality … contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society*".

25. A child has a constitutional right to be reared by his or her parents and the parents have a constitutional right to so rear their child. It is thus submitted that orders granted pursuant to the Act of 1991 must be such as to interfere with those rights as little as possible. Such interference must only be where it is required to protect the best interests of the child. On the application of those principles, it follows that in determining an application pursuant to the provisions of the Act of 1991, the Court must investigate and explore whether there are options available which protect the interests of the child but at the same time allow the child to remain in the care of the parent. A clear example of such an approach is where the provision of additional supports may allow a parent to look after the child in a more satisfactory way than had previously been the case, thereby striking the correct balance. The doctrine of proportionality requires that a court can only make an order removing a child from the care of a parent if it is satisfied that there are no viable alternatives to the making of such an order. Any such order should be for the shortest period necessary to protect the child. This principle has particular force where the only or main difficulty in regard to the history of parenting arises by reason of an intellectual disability.

26. Counsel submits that the Court should not be overly critical or overanalyse the wording of the case stated, and that it is perfectly clear why the District Judge is looking for guidance; and also why he should be looking for it. The District Judge is seeking assistance in relation to the extent of his powers, rather than seeking a direction from the Court as to what he should do – the question is directed at whether the District Judge is *enabled,* rather than *obliged,* to take a particular course of action.

27. To this end, it is urged that this Court does have jurisdiction to answer the questions raised from both a technical perspective (pursuant to s. 52 of the Act of 1961 – *i.e*. in terms of the findings made and outlined in the case stated) and substantively (in the light of the provisions of the Act of 1991).

28. Mr. Durcan S.C. also submits that the findings of the District Judge are more than adequate to justify the questions posed. He relies on the decision in *DPP (Travers) v. Brennan* in this regard. The District Judge does not have to engage in a general fact finding exercise – he merely has to fact find relevant to the point of law at issue. The case stated in this case makes findings of fact and these facts are relevant to the questions to be answered. Therefore decisions in cases such as *O'Shea v. West Wood Club Limited* [2015] IEHC 24 and *O'Neill v. Butler* [1979] I.L.R.M. 243, may be distinguished on this basis.

29. While the childcare law framework in the United Kingdom, particularly that of England and Wales, is not on all fours with that which applies in this jurisdiction, nevertheless, the respondent maintains that certain legal authorities from that jurisdiction are of assistance. In *McG. v. Neath Port Talbot County Borough Council* [2010] EWCA Civ 821, a mother of three children who had a learning disability argued that prior to the making of care orders freeing the children for adoption orders, she should have been the subject of a special assessment in light of her learning disability. The absence of any such assessment precluded the making of a decision that

there was no real prospect that she could adequately care for the children. The Court of Appeal held that the orders sought by the local authority were a drastic step such as should be undertaken only when all avenues toward rehabilitation had reasonably been explored. The requirement of an expert appraisal as to whether, with appropriate help, the mother's parenting could be raised to an adequate level within a timeframe apt to the needs of the girls, was one of the grounds on which the Court of Appeal allowed the mother's appeal.

30. Further, in *A Local Authority v. G* [2017] EWSFC B94, His Honour Judge Dancey observed at paras. 29 to 30 that the local authority must demonstrate that "*nothing else will do*" before the court makes as draconian an order as placement for adoption. This authority is also cited in support of the proposition that where a parent has a learning disability, the court must make sure that the parent has not been disadvantaged simply because of such disability. The essential question is whether the parenting that can be offered is good enough if support is provided. Parents with learning disabilities should not be measured against parents without such disabilities and the court should be alive to the risk of direct and indirect discrimination. The court opined that courts should not focus so narrowly on the child's welfare that the needs of the parent, arising from their disability and impacting on their parenting capacity, are ignored.

31. Counsel argues that not alone is the District Judge empowered to ensure that the court's actions are proportionate, but by virtue of the provisions of Article 42A, the court must be satisfied that the actions are appropriate.

32. Further he relies on the decisions of the European Court of Human Rights which emphasise, in the context of childcare proceedings, the importance of family life and the involvement of parents in the decision making process as a whole. This is so having regard to the requirements of Article 8, in conjunction with Article 6 and 13 of the Convention. Reliance is placed on *Saviny v. Ukraine* (2010) 51 EHRR 33 as authority for the proposition that the European Court of Human Rights takes the view that it is inappropriate and inconsistent with the protection of Article 8 rights that the child should be removed from his or her parents, if the parental deficit can be addressed by less radical means than by the separation of the family, such as targeted financial assistance and social counselling.

33. Mr. Durcan S.C. reiterates that the court has wide powers under s. 47 of the Act of 1991 and relies on the decision of Baker J. in *V.Q. v. Judge Horgan* [2016] IEHC 631. This was an application for certiorari by way of judicial review to quash an order of the District Judge where she had declined to grant an order that the Child and Family Agency fund private orthodontic treatment in respect of a foster child of the applicant. Holding that the District Court had jurisdiction to make an order pursuant to s. 47 that the Child and Family Agency fund dental treatment for a child in care, Baker J. stated at para. 29:-

> *"Section 47 is 'couched in the widest possible terms', and a restrictive interpretation of the extent of that power is not justified in the scheme of the legislation. As Finnegan J. pointed out (in Western Health Board v. K.M. [2001] 1 I.R. 729), there is no qualification on the statutory power, and the section empowers the District Court to make directions and to do whatever it deems appropriate to achieve the policy of the Act as a whole."*

At para. 42, Baker J. noted that the court's jurisdiction under s. 47:-

> *"…is vested in matters of welfare, not such that only matters which adversely affect welfare come to be considered, but where the welfare or interest of a child are engaged and require to be clarified, or steps taken to direct the means by which these are to be furthered."*

34. Emphasis is also placed on decisions such as *Health Service Executive v. O.A.* [2013] 3 I.R. 287, where O'Malley J. accepted that in proceedings under the Act of 1991, the judge's function is different than in most other forms of litigation. He or she must adopt a more inquisitorial role and reach a conclusion based on the welfare of the child beyond all other considerations.

35. The respondent argues that the contemplated directions pursuant to s. 47 fall comfortably within the powers of the court pursuant to that section as interpreted in relevant case law. They do no more than discharge the obligations of the court to identify what course of action is in the best interests of the child and to direct that that course of action be implemented. A court hearing an application under the Act of 1991 not only has the power, but is obliged, to consider whether a less radical intervention than the removal of a child from the care of his or her parent can provide an adequate degree of protection for the child. The respondent reiterates that the mother who suffers from an intellectual disability should not be discriminated against by reason of such disability, nor should her child be discriminated against as a result of her mother's disability. Therefore, the examination, identification, and implementation of measures which will support the mother's ability to parent are necessary to ensure that she does not suffer from such discrimination.

36. Regarding the contents of the case stated, the respondent places reliance on *dicta* in *O'Shea v. West Wood Club Limited.* Having considered the authorities and concluding that the question of law must be one rising from the facts as found, nevertheless, O'Malley J. commented at para. 42, that "*[t]his is not to say that the High Court is not obliged to assist the District Court in so far as it can, having regard to the contents of the case stated*". I have also been referred to dicta of Charleton J. in *Director of Public Prosecutions v. Buckley* [2007] 3 I.R. 745. There, he considered that if he answered the question posed by the District Court without reference to the facts set out in the case stated, he might be in danger of misleading that court as to the appropriate law. Charleton J. in turn referred to the *dicta* of Finlay C.J. in the Supreme Court in *Dublin Corporation v. Ashley* [1986] I.R. 781, where he stated:-

> *"The purpose and effect of a consultative case stated by a Circuit Court judge to the Supreme Court is to enable him to obtain the advice and opinion of the Supreme Court so as to assist him in reaching a correct legal decision. Having regard to that purpose and the relationship which exists between the two courts, it would, in my view, be quite inappropriate for the Supreme Court, for any reason of procedure, to abstain from expressing a view on an issue of law which may determine the result of the case before the learned Circuit Court judge."*

Noting this passage from the judgment of Finlay C.J., Charleton J. concluded at p. 749:-

> *"It follows that for the purpose of assisting the District Court, this court must look at the whole of the case stated and give advice on the basis of what Laffoy J. in The National Authority for Safety and Health v. O'K Tools [1997] 1 I.R. 534 at p. 541 called:- 'the issue on which the District Court judge requires guidance'. Therefore, a question may be reformulated and an answer given in the light of the whole of the case stated provided this does not exceed the facts as found for this purpose by the District Judge."*

Decision

37. In truth, there is little difference between the parties as to the legal principles applicable regarding the jurisdictional or substantive issues which I must address. In essence the applicant maintains that the requisite minimal findings of fact are not stated in, or evident from, the case stated and that this Court should not imply or supplant its own view of whether what is proposed by the District Judge is in fact in the best interests of *this child*, where that has not been expressly found or stated as a finding of fact by him. On a more substantive basis, it submits that the manner in which the question is formulated does not place at its heart the best interests of the welfare of this child. The respondent, on the other hand, submits that this Court should not adopt an overly critical approach to the reading of the case stated and that I must have regard to and be aware of the constitutional and statutory presumptions which apply when approaching and interpreting the case stated.

38. It is true that a striking feature regarding the jurisdiction being exercised by the District Judge in the proceedings giving rise to the case stated is the presumptions which apply – being the presumption that the child's welfare is best provided for by being parented by a biological parent, and the corresponding interests of the parent. The case stated arises in the context of the exercise of particular statutory powers which the District Court enjoys pursuant to the provisions of the Act of 1991. The central emphasis of the power exercised by the court under this Act and amending legislation is that it be exercised in the best interests and welfare of the child.

39. On my reading of the case stated I am not satisfied that it could be reasonably concluded that the District Judge expressly found, or stated, that it was in the best interests of this child (either in her own right or in the context of a balancing exercise between the rights of all concerned and affording paramountcy to the child's interests and welfare) that the question requires to be answered. On my reading of the case stated, I conclude that the District Judge does not expressly refer to his having considered or found as a fact that the proposed course of action, being the ascertainment of the cost of carrying out an appropriate assessment, is in the best interests of this child, A.B.

40. I agree with the applicant that the case stated as so framed largely places the focus, in express terms, on the child's mother, rather than the child. In fact, the best interests of this child are not referred to in the case stated, save in the context of the generally stated presumption. I refer in this regard to para. 1(i) of the case stated. Reference should also be made to para. 1(vii) and to the District Judge's statement that certain matters have not been ascertained. It seems to me, therefore, that a question which I must address is whether it is reasonable for me to construe, conclude or imply that, read as a whole and against the backdrop of the applicable presumptions concerning the rights of the child and her mother, at the heart of the case stated is a necessary, but unexpressed, conclusion by the judge that the questions required to be answered are in the best interests of this child, either in her own right or as part of an exercise in balancing the rights of all concerned.

41. The requirements as to the necessary contents of a case stated have been outlined on many occasions – see *DPP (Travers) v. Brennan*, per Lynch J. referred to at para. 11 above and in *Mitchelstown Co-Operative Society Limited v. Commissioner for Valuation* [1989] I.R. 210. In the latter case, Blayney J. quoted Murphy L.J. in the Northern Ireland Court of Appeal in *Emerson v. Hearty & Morgan* [1946] N.I. 35 as follows:-

> *"The Case should set out clearly the Judge's findings of fact, and should also set out any inferences or conclusions of fact which he drew from those findings. The task of finding the facts and of drawing the proper inferences and conclusions of fact from the facts so found is the task of the Judge. It does not fall within the province of this Court. Accordingly, it is not legitimate by setting out the evidence in the Case Stated and omitting any findings of fact to attempt to pass the task of finding the facts on to the Court of Appeal."*

42. Nevertheless, it seems clear that the above must be viewed in the light of *dicta* of Finlay C.J. and Charleton J. referred to at para. 36 above, and that the Court should adopt a broad, helpful and purposive approach to the interpretation of the question being asked. But that does not mean that the fact-finding role of the District Judge is any the less crucial. Charleton J. made this clear in the passage quoted above where he stated in the ultimate sentence – "*provided this does not exceed the facts as found for this purpose by the District Judge*".

43. In an exchange with the Court, Mr. Dignam S.C. accepted that it could not be disputed that if the court believed that it was in the best interests of the child to obtain a report, that the District Judge would not be precluded from obtaining such a report, noting the express statutory provision contained in s. 27. Nevertheless, he submitted that despite the fact that Article 42A expressly provides that the interests of the child are served by being with the parents, it is still necessary for there to be a finding of fact in order for this Court to answer the question in a consultative case stated. It is submitted that it is not sufficient for the District Judge simply to employ a constitutional presumption to justify the obtaining of a report – otherwise it might be deemed to so apply in every case. Rather, there must be some basis for believing that a report is necessary or would be beneficial to the functioning of the court or to the parties in the case before it.

44. Regrettably, and not without some hesitation or reluctance, I have come to the conclusion that it is impermissible for me to conclude that the presumptions to which I have referred, should in some shape or fashion, be construed as findings of fact in this case. Although the respondent has quite correctly pointed out that the role and the rights of the mother are matters which must be taken into account, it seems to me that in order to engage the jurisdiction under s. 18, consideration must be given to the rights of the child, which have paramountcy, in the determination of any such issue and in the context of the question as stated.

45. To imply from the constitutional and statutory presumptions that there has necessarily been a finding of fact, albeit unexpressed, on a particular issue regarding the best interests of this child, would appear to me to go a step further than is permitted by the jurisdictional limitations placed on this Court by the provisions of s. 52 of the Act of 1961, as interpreted in both this court and the Supreme Court.

46. Regrettably, I must conclude that in the absence of a finding or findings of fact that it is in the best interests of this child, on the evidence considered, that the questions arise and should be answered, I am unable to answer the questions raised by the learned District Judge.