THE HIGH COURT

FAMILY LAW

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT, 1964 – 1997

IN THE MATTER OF THE CHILDREN AND FAMILT RELATIONSHIPS ACT 2015

IN THE MATTER OF THE STATUS OF CHILDREN ACT 1987

THE CHILDREN ACT 1997

AND

IN THE MATTER OF M.D. AND L.D., INFANTS

[2024] IEHC 652

RECORD NO:[REDACTED]

RECORD NO: [REDACTED]

BETWEEN:

A.K

APPLICANT

AND

N. D.

RESPONDENT

AND

M. R. D.

(suing by her next friend A. K. by Order of the Court)

AND

L. D. D.

(suing by his next friend A.K. by Order of the Court)

AND

THE ATTORNEY GENERAL

NOTICE PARTIES

Judgment of Ms. Justice Nuala Jackson delivered on the 21st day of June 2024.

INTRODUCTION

1. At the heart of this decision are two wonderful small children who deserve the very best start in life and the very best that our society can offer them as they progress through life. They undoubtedly have two parents who love them greatly but, unfortunately, sometimes loving the children is not enough and their wellbeing requires more from their parents and it is the shape and content of that 'more' which is challenging. It is that 'more' with which this judgment is concerned.

2. There are some background facts which must be stated at the outset:
   i. This is a review hearing and must be considered in light of the original decision and the findings therein. I have, additionally, had full regard for the additional evidence adduced in the context of this review hearing.
   ii. This hearing has had the benefit of psychological expertise and assessment. I am ever mindful of the evidential status of section 32 reports and of the evidence of the assessors who prepare them as propounded by the Supreme Court in **McD v L** [2009] IESC 81 but I must thank Dr Byrne Lynch for her most comprehensive report and for her commitment and diligence in preparing it having regard to the importance of stabilising arrangements for the children herein at the earliest possible opportunity.
   iii. I have been greatly and ably assisted by Counsel and their legal teams herein. This was a most challenging case and one in which it was essential for all involved to focus on the need for future relationships and the imperative of mutual respect in

that context. This challenge was met and I am firmly of the view that the presentations herein demonstrated the very best standards of respectful discourse in an adversarial process requiring balance and sensitivity coupled with essential robust interrogation of evidence. I am most grateful for the assistance thus received.

3. Unusually, I have decided to set out the orders I intend to make at the beginning of this judgment and thereafter to set out the evidence heard, the legal principles arising and the reasons for my decision. I do so because the focus of all involved herein must be firmly directed towards the practical imperative of making arrangements work. Therefore, these arrangements must be up front and central in this decision.

ORDERS BEING MADE

A. The Appellant and the Respondent will be joint guardians and joint custodians of the children. While each will have full guardianship rights, in keeping with what I consider to be the best interests of the children, I direct, pursuant to section 11(1) of the Guardianship of Infants Act, 1964 as amended ('the 1964 Act'), that the Appellant shall, in the first instance, be responsible on a day-to-day basis for all medical decision making relating to the children and that the Respondent shall, in the first instance, be responsible on a day to day basis for all educational decision making relating to the children. All other guardianship areas shall be for joint decision-making in the usual manner. In so dividing day-to-day decision-making, however, the following arrangements shall apply:

    I. the parent making the decision shall keep the other promptly informed of all such decisions;

II. the children shall attend a GP practice in Dublin for routine medical matters and in normal course, such GP practice to be selected by the parties jointly with liberty to apply in default of agreement. In the event that a medical issue arises when the children are in the care of their father, they may, of course, attend a GP practice in his locality, such GP practice to be selected by the parties jointly with liberty to apply in default of agreement;

III. the children shall attend pre-school/primary school in Dublin, such educational establishment to be selected by the parties jointly with liberty to apply in default of agreement;

IV. both parents may attend all medical and educational appointments and events and the decision-maker parent shall ensure that timely and adequate notice of same is given to the other parent. Respectful and positive discourse is essential if both are attending;

V. liberty to apply to the non-decision maker parent in the event of disagreement with the path of travel proposed, such application to be made to the Circuit Family Court.

B. The day to day arrangements for the children's care shall be as follows:

I. the children will reside with the Respondent on a three week cycle as follows:

- Week 1 – Friday between 4.30 pm and 5 pm the children to be collected by the Respondent from the Appellant (or from their care facility if arising) and returned to the Appellant by the Respondent at 6 pm on Sunday (6 pm on Monday if a bank holiday weekend);

- Week 2 – Friday between 4.30 pm and 5 pm the children to be delivered by the Appellant to the Respondent and collected by the Appellant from the Respondent at 6 pm on Sunday (6 pm on Monday if a bank holiday weekend);
- Week 3 – the children to spend the weekend with the Appellant.

- On Weeks 1 and 2, the Respondent to have a mid-week visit in Dublin from 3 pm to 6.30 pm. If the Respondent's work commitments do not facilitate this, two weeks' notice of non-attendance to be given by him to the Appellant.

- On Week 3, the Respondent to have the children from 3 pm on Tuesday to Wednesday morning at 10 am (during pre-school holidays this to be extended to 6 pm on Wednesday), the Respondent to collect and return the children to the Appellant (or their care facility if arising). Save where the collection or return is to a care facility, collections and returns should be to the home of the parent concerned with the travelling parent remaining in their car and the non-travelling parent promptly and unaccompanied coming to the car to collect the children. There is no need for third party involvements in such handovers which should be conducted courteously and respectfully. These arrangements are to apply to all handovers including those provided for below.

- Subject to the further arrangements set out below, the children shall otherwise reside with the Appellant.

II. During the summer months of June, July and August, each parent may designate one non-consecutive week each month (three separate weeks), with normal arrangements suspended on these weeks, the holiday week to extend from Friday at 4.30 pm to the following Friday at 4 pm and the children then to spend the full weekend to Monday morning at 10 am with the other parent. Normal arrangements should otherwise apply during the summer months. These arrangements will, obviously, require review when the children commence primary school due to the month of June not being a holiday period. Foreign holidays not to occur at least until the children have completed one year in pre-school but this may be reviewed at that time. Holiday periods to be in place by the 1st April each year (I understand that 2024 holidays have been agreed) with the Appellant having first option in odd years (commencing 2025) and the Respondent having first option in even years (commencing 2026).

C. At Christmas 2024, the Appellant to have the children from 6 pm on December 23rd to Christmas Day at 2pm with the children to be delivered to the Respondent by the Appellant at that time and returned to the Appellant by the Respondent on the 27th December at 6 pm, when normal arrangements will resume. This arrangement to alternate for Christmas 2025 including at to delivery and return and to continue to so alternate in successive years. Additionally, the Respondent shall have a further 24 hour period (over and above normal access) over the Christmas period (between the 27th December and the 7th January each year) to facilitate a family/entertainment event for

the children, this date to be at the option of the Respondent and notified no later than the prior 1st November each year.

D. Birthday celebrations to take place separately with each parent and birthdays not to interfere with normal arrangements save that the parent who does not have the children on their birthday will have a videocall of one hour's duration, 1 – 2 pm or 5 – 6 pm at the option of the parent who does not have the children.

E. Each party shall be responsible for the care and control of the children during the time spend with them.

F. The children's primary residence* shall be with the Appellant based only upon the factual reality that their time in her care is somewhat great than with the Respondent.

G. Parental facilitation assistance should be put in place as soon as possible and I so direct. In so doing, I adopt the *dictum* of Jordan J. in **K.P. v. L.P.** [2023] IEHC 772 at paragraph 98, parental facilitation to replace references to "family therapy" in the *dictum* concerned:

> *"98. The Court will direct that the family therapy continue. The Court expects the applicant and the respondent to engage constructively with the family therapist. The Court has already indicated that the family therapy is to be separate and apart from these Court proceedings save that the Court is entitled to know that the parties are attending family therapy and is entitled to know whether or not progress is being made. If there is non-attendance or a lack of progress then the Court may give further directions*."

In this regard, I am also mindful of the *dicta* of Allen J. in the Court of Appeal in the context of the appeal hearing of the above decision (which affirmed the decision of Jordan J.) [2024] IECA 63 at paragraphs 101 – 106 of his judgment.

H. All necessary steps should be taken as soon as possible to register the Respondent as the father of the children and to have their birth certificates amended to so record and I dispense with any and all consents of the Appellant to achieve this. I lift the *in camera* rule as required to enable such registration to take place.

I. I adopt and order the recommendations of Dr. Byrne Lynch at Recommendations 3 and 4 of her report of the 11th March 2024, at p. 42.

J. A review of the arrangements for the children should take place in January 2026 (arrangements should be put in place now to ensure that Dr. Byrne Lynch may diary this review at this time). Liberty to apply to this Court in the event that (a) an earlier review is needed due to a significant change in circumstances or significant difficulties arising or (b) Dr. Byrne Lynch is not available to carry out such review. If court application is required consequent upon such review, this should be to the Circuit Family Court. I am mindful that appeal entitlements should not be prejudiced by cases being retained by an appellate court beyond what the appeal properly and necessarily requires. In this regard, I would reference the decision of White J in **T v T** [2012] IEHC 588 in which it is stated:

> *"21. A discretion always rests with the court dealing with custody and access disputes pursuant to the Guardianship of Infants Act 1964, to retain seisin of a case for the purposes of reviewing orders already made, once it reserves its position by either granting liberty to apply, indicating that it will retain seisin*

or indicating that it will review certain matters or deal with certain matters in default of agreement.

22. Any court however in exercising its jurisdiction to consider an application to vary a custody or access order, at all times having the welfare of the child as its paramount consideration must be careful to ensure that fair procedures are followed, and the jurisdiction of the court is not abused.

23. Where possible a party dissatisfied by an order of substance, should have a right of appeal.

24. Discretion must rest with the court of final appeal, in this case the High Court on appeal from the Circuit Court, to accept jurisdiction to re-open matters it has recently decided."

However, there should not be a delay if such review requires court input. Therefore, I am remitting this matter to the Circuit Family Court list to fix dates for a review date to be fixed now (one day should suffice and a date in March/April 2026 would appear appropriate). Application to vacate this date to be made within 14 days of receipt of the review report if court intervention is not required. I am sure early release of the date with allow for its reallocation to other important business by the Circuit Family Court. In the event that earlier review is required, priority should be sought in the Circuit Family Court.

4. Unusually also, I wish to address the families of both parties, the family (singular) of the children. I lift the *in camera* rule for this portion of my decision to be released to such family members. The Appellant and the Respondent embarked on a journey of

bringing children into the world and the children now require the love and support of both parents and of wider family members. Opinions may vary in relation to the circumstances of this arrangement and as to the desirability of same. Relationships between family members may be challenging. However, there are now two small people who need the support of everyone in their "village" and their wellbeing is not advanced by acrimony towards either of their parents, both of whom love the children and both of whom will bring different perspectives and ideologies to their lives. The children are coming to an age where acrimony and negative attitudes will be evident to them and will be matters of which they are aware and most conscious. This will cause them uncertainty, instability, disruption, and distress in their lives which they emphatically do not deserve. Therefore, positive support of both their parents is of critical importance.

EVIDENCE

Dr. Byrne Lynch

5. A most comprehensive report was prepared in this matter. Interviews were carried out with both of the parents and the children were observed in the homes of each. There was input from the Respondent's spouse. Psychometric assessment involving Personality Assessment Inventories was completed by both parties. The report of the previous Court appointed assessor was reviewed together with Tusla notes, HSE correspondence, certain third party statements and numerous text messages. My previous judgment was also considered by the assessor. Dr. Byrne Lynch was appointed to carry out a section 32(1)(a) assessment by me, by Order, and this was an Order made in very specific terms being that it would include specifically an assessment of the parenting capacity and domestic circumstances of each of the

parties, an assessment of whether the infant children were reaching their developmental milestones and any other issues of concern, welfare and/or developmental, regarding the children.

6. I am satisfied that the report provided to the Court fully addressed these issues. The report itself detailed the backgrounds of the parties, the background to the relationship between the parties from the perspective of both of them and, most importantly, the parenting capacities of the parties and the specific circumstances and needs of the children. As this is a review hearing, it is the events of more recent times and the current requirements and challenges of the children which are of greatest concern to me. Much of the history of this matter was considered in my original judgment herein. I agree with the assessor that the parents herein embarked on a path to parenthood without any clear agreement regarding the parameters of their relationship and their future roles as parents. I was particularly struck by the testimony of the Appellant where she, I believe entirely accurately, reflected that this was because neither had any real expectation that the path being pursued would result in success. There is no doubt that the relationship between the parties deteriorated in the context of a difficult pregnancy, the care challenges involved in caring for two small children and a breakdown of trust. In all of this, however, sight must not be lost of the fact that the actions of the Appellant and, in particular her attitude to this litigation, resulted in the children being entirely deprived of contact with their father for a period of almost two years. Dr. Byrne Lynch's report provided me with a very comprehensive background to the parties and the issues arising in these proceedings and to a significant extent her factual conclusions corresponded with my own, arrived at on the basis of the evidence heard by me at the first hearing and at this hearing.

7. The evidence heard by me supported the accuracy of the findings at paragraphs 6 to 9 (pages 39 – 40) of the report of Dr. Byrne Lynch.
8. The evidence before me demonstrated that there may have been a lack of support and a sense of isolation experienced by the Appellant as a first time mother, facing the challenge of multiple births in the context of a complicated pregnancy. In this context, I was pleased to hear the evidence of Ms. Walsh demonstrating the available community support and that the Appellant had availed of same.
9. Dr. Byrne Lynch was cross-examined by both Counsel in relation to her report. She stressed that her focus was on observation of the children and the assessment of parenting capacity of both parents. She described the Appellant as feeling "embattled" while being clear in her evidence that she had seen no evidence of neglect of the children by the Appellant and this was Tusla's finding also. She referenced the Appellant's positive engagement with stimulating the children. She had no concerns regarding the accommodation provided by the Appellant or her care standards vis a vis the children. On the issue of parenting capacity, Dr. Byrne Lynch indicated that each parent had strengths and weaknesses. She indicated that the Respondent was inclined to pronounce on child development on the basis of little knowledge and that he was "righteous in his indignation" relating to his perceptions of shortcomings on the part of the Appellant. The Respondent was described as controlling and lacking insight and these elements appeared to morph together into criticism of the Appellant. Dr. Byrne Lynch opined that the Respondent's criticism of the Appellant had not abated and that there was resentment on the part of his spouse which presented as negative and defensive. The evidence was that the children were well cared for by the Respondent and, importantly, that the Appellant accepted and

acknowledged that this was the position. The arrangement currently in place providing for car park handovers was not appropriate in the view of the expert but rather the handovers should be at the parties' respective homes. Dr. Byrne Lynch was positive about the extent of the journey of acceptance which the Appellant had travelled, a view which I cannot fully endorse on the totality of the evidence herein. In summary, the Respondent and the Appellant would not appear to have any significant or relevant parenting deficit in the context of their relationships with the children. Regrettably, there would appear to be very significant deficits remaining in the context of co-parenting.

Evidence of the parties

10. Both parties gave evidence before me and were cross-examined. There are certain factual circumstances which I consider to be of particular importance:

(i) The children were born prematurely and consequential developmental issues arise, particularly in relation to one of them. It is vitally important that all such issues be fully and comprehensively addressed in relation to both children in order that they receive all medical and psychological interventions required to best assist them. It is clear from the evidence before me that the Appellant is less proactive and less accepting of these challenges than is the Respondent. This is not a criticism. It is not unusual that parents are reticent in this regard and may be unwilling to accept diagnoses or fears of additional needs. However, on the evidence before me, it is clear that the Respondent has been most assiduous in this regard. It is important that he be mindful that the Appellant may need a less robust approach and that this does not make her a bad parent. Likewise, the Appellant must accept that the Respondent's approach

is aimed at maximising progress towards positive outcomes and accessing the best range of available services for the benefit of the children.

(ii) The evidence before me supports Dr. Byrne Lynch's view that the Appellant is strong-minded, enthusiastic, driven and head strong. Without these strengths, it is arguable that the children would not have been conceived and born. However, these characteristics have operated to the disadvantage of the children also, in particular in the context of the long period of exclusion of the Respondent from their lives. While the Appellant has travelled a considerable journey in recent times, in a positive direction, the Respondent argues that this is not genuine and that she remains opposed to truly acknowledging his parental role. On the totality of the evidence before me, I believe that this argument has substance. I was most disappointed by the implacable opposition to registering the Respondent's paternity of the children in circumstances in which she has now acknowledged that he is the children's father, in which it is amply clear that the Respondent's involvement in the children's lives will continue (and she asserted to me and to the assessor that she wished for this) and in circumstances in which the evidence demonstrates that he has brought nothing but positive progress to the children's lives since his involvement resumed in December 2023. While I find from the evidence that the Respondent is a more introverted person and I believe that he has found himself in the midst of most robust and trenchant opposition towards the Appellant by third parties, there are also most concerning instances of headstrong behaviour on his part also. The situation of intransigence in relation to the name by which one of the children was to be called is most concerning. I understand that an agreement in relation to such name has now been reached and therefore I will refrain from re-opening that

matter but the position adopted could, at best, only be described as unfortunate and more directed at getting his own way than in ease of the child concerned. I also have significant concerns (and I have had these from the time of the initial hearing herein) about the stance of superiority in terms of parenting ability displayed by the Respondent. There is no single recipe for parenthood. There are various styles and ideologies of parenting. Different does not mean bad. Dr. Byrne Lynch expressed concern about the continual criticism levelled at the Appellant and I share this concern. I can only hope that Dr. Byrne Lynch's finding, which I believe the evidence establishes, that there is no parental deficit in either party to be reassuring and will assist in a diminution if not elimination of this stance of criticism.

(iii) Despite my concerns as expressed above, I believe that there has been improved insight and acceptance on the part of the Appellant that the Respondent will and should have a future role in the children's lives. There is a long road yet to travel in this regard undoubtedly. I believe that there has been less progress in terms of the negativity of the Respondent towards the Appellant. However, the expert has opined that the children have attachments to both parents and present as secure in their care.

(iv) Dr. Byrne Lynch was cross-examined on her recommendation of primary care being given to the Appellant. Her response to this was that the Appellant was the mother of the children and that, based upon her assessment, there was no maternal deficit and therefore there was no reason to change from the primary care role that she has had in the children's lives from the time of their birth. I have to confess that I do not see gender or a primary care role derived from an

exclusion of the other parent to be compelling reasons to continue this previous situation.

THE LAW

Guardianship

11. Article 42A of Bunreacht na hÉireann, introduced by amendment in 2015, states:

"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."

12. The within proceedings concern "the guardianship or custody of, or access to" children and, in consequence, are subject to the mandate that the best interests of the child shall be the paramount consideration. The breadth of the term "concerning" meaning "on the subject of or in connection with"[1] should be acknowledged. The term "guardianship" is not constitutionally or statutorily defined but section 10 of the 1964 Act states:

> *10.—(1) Every guardian under this Act shall be a guardian of the person and of the estate of the infant unless, in the case of a guardian appointed by deed, will or order of the court, the terms of his appointment otherwise provide.*
>
> *(2) Subject to the terms of any such deed, will or order, a guardian under this Act—*
>
> *(a) as guardian of the person, shall, as against every person not being, jointly with him, a guardian of the person, be entitled to the custody of the infant and shall be entitled to take proceedings for the restoration of his custody of the infant against any person who wrongfully takes away or detains the infant and for the recovery, for the benefit of the infant, of damages for any injury to or trespass against the person of the infant;*

[1] Oxford Languages

(b) as guardian of the estate, shall be entitled to the possession and control of all property, real and personal, of the infant and shall manage all such property and receive the rents and profits on behalf and for the benefit of the infant until the infant attains the age of twenty-one years or during any shorter period for which he has been appointed guardian and may take such proceedings in relation thereto as may by law be brought by any guardian of the estate of an infant.

(3) The provisions of this section are without prejudice to the provisions of any other enactment or to any other powers or duties conferred or imposed by law on parents, guardians or trustees of the property of infants.

13. However, section 3 of the Guardianship of Infants Act, 1964 as amended ('the 1964 Act') is very clear that in any court proceedings relating to these matters, the court *"shall regard the best interests of the child as the paramount consideration"*. Therefore, all of the issues with which I am concerned and which I have to determine are subject to this test.

14. Shannon "Child and Family Law" (3rd Ed.)(2020) is instructive in relation to the meanings of this term. At paragraphs 12-80 and 12.81 the author states:

"12-80 Guardianship is a concept often confused with custody. In fact, it is not necessary that the guardian of a child be also its custodian and day-to-day caregiver. Guardianship is altogether a more global responsibility. The concept of guardianship relates not to the specific matters of a child's daily life,

but to its overall welfare and upbringing. Guardianship, in other words, concerns matters of overriding seminal importance to a child's upbringing, for example, where he or she is educated, according to which religious belief he or she is to be reared, and whether the child should undergo serious medical treatment.

12.81 Guardianship should not be seen solely as a right. It entails both rights and duties, in particular the duty to ensure that a child is properly cared for and that decisions relating to the child are made with his or her best interests at heart."

15. Part II of the 1964 Act is entitled "Guardianship" and sets out the applicable statutory jurisdictional rules and also the now myriad of circumstances in which guardianship pursuant to statute may potentially arise. While the 1964 Act, at section 6(1)(a) thereof, provides for the joint guardianship of married parents and section 6(4) provides for the guardianship of a birth mother (being a sole guardian so long as there are no other guardians under the 1964 Act), the guardianship arising in these instances has a constitutional basis, outside of the legislation. It has been clearly established since **Re Tilson Infants** [1951] IR 1 that married parents are joint guardians of their children:

"In my opinion the true principle under our Constitution is this. The parents—father and mother—have a joint power and duty in respect of the religious education of their children. If they together make a decision and put it into practice it is not in the power of the father—nor is it in the power of the mother—to revoke such decision against the will of the other party." (Murnaghan J.)

The position of the unmarried mother has historically been more complex. It has been clearly established since **G v. An Bord Úchtála** [1980] I.R. 32 that a mother who is unmarried to the father of her child is the sole guardian of that child from the moment of its birth. The former situation derives from Article 42 of Bunreacht na hÉireann and latter from Article 40.3 of Bunreacht na hÉireann.

16. The provisions of Section 6 of the 1964 Act, as they relate to married parents and single mothers, are declaratory in nature, requiring no court application or order. In the present case, therefore, the Appellant is a guardian of the children and has been such from the time of their birth. The Respondent, now having been acknowledged to be the genetic father of the children, sought in these proceedings to be appointed a guardian under section 6A of the 1964 Act and an interim order has been made in this regard. An interesting issue arises in this context. It has been accepted by the representatives of both parties herein that a person who is appointed a guardian under the 1964 Act may be so appointed on terms. Section 10(1) of the 1964 Act provides:

> ***"10.**—(1) Every guardian under this Act shall be a guardian of the person and of the estate of the infant unless, in the case of a guardian appointed by deed, will or order of the court, the terms of his appointment otherwise provide."*

17. But what is the position in relation to a guardian who has not been appointed by deed, will or order of the court? Is it permissible for a Court to impose terms or limitations on guardianship of the Appellant where her guardianship status is constitutionally derived and the statutory references to her guardianship status are essentially declaratory in nature and so declared in mandatory terms?

18. Based upon the evidence before me, I have formed the view that the best interests of the children in this case demand that both of their parents should be guardians and that they should act jointly in this capacity. However, it is also amply clear from the evidence that, at present, the dysfunctionality of their relationship is such that agreement between them is well-nigh impossible and I must deal with this reality, all the while hoping that this is a situation which will not pertain into the future. I have formed the view that it would very much be in the best interests of these children if certain guardianship responsibilities were "siloed" in the short-medium term with each of the parents taking responsibility for certain aspects of the children's wellbeing and welfare. Indeed, it is my very considered view that each of the parents has particular aptitudes in this regard. Is it permissible for me to appoint the Respondent a guardian, to act jointly with the Appellant, while at the same time directing that certain of the guardians responsibilities be carried out solely by one or other of them? As stated above, there would appear to be no curtailment in this regard vis a vis the Respondent, having regard to section 10(1) of the 1964 Act. What is the position as regards the Appellant?

19. This was discussed by the Supreme Court in **COS and TB v. Judge Doyle** [2013] IESC 60. Here an unmarried mother and consequent guardian of her child objected to medical treatment (vaccination) in circumstances in which the father of the child, a guardian appointed under section 6A of the 1964 Act, was supportive of such treatment. An order permitting the treatment concerned to take place having been made by the District Court and affirmed on appeal by the Circuit Family Court, the mother challenged the jurisdiction of the latter court to make such an Order, having

regard to her constitutionally derived status. Rejecting the arguments of the mother, the Supreme Court (McMenamin J.) first considered the constitutional position of the applicant:

> *"Can the mother avail of the rights vested in the family, as recognised in the Constitution? In McD. v L. [2010] 2 I.R. 199, this Court reaffirmed that the concept of the "family", as recognised in the Constitution, did not encompass the relationship between a mother and a father when they are not, and never were married. In her judgment, Denham J., as she then was, summarised the case law on this issue:*
>
> *"Throughout our case law the family is defined as the family based on marriage. In The State (Nicolaou) v. An Bord Uchtála [1966] I.R. 567 Henchy J. stated at p. 622:"For the State to award equal constitutional protection to the family founded on marriage and the 'family' founded on an extra-marital union would in effect be a disregard of the pledge which the State gives in Article 41.3.1 to guard with special care the institution of marriage." Walsh J. stated at p. 643 that:"It is quite clear ... that the family referred to in [Article 41] is the family which is founded on the institution of marriage and, in the context of the Article, marriage means valid marriage under the law for the time being in force in the State ..." .... Therefore, arising from the terms of the Constitution, "family" means a family based on marriage, the marriage of a man and a woman."*

The Court then went on to consider the position of the family not based on marriage:

> *"24. By contrast, the issue here is one between two unmarried guardians, not one between the State, on the one hand, and a constitutional family, on the other. For the District Court, or on appeal the Circuit Court to have a role in a dispute*

of this nature, it is not necessary to show a failure of parental duty. It is true that Article 42.5 of the Constitution provides: "In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shal endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child." But there is no evidence of any failure of duty here as properly understood. The State is not endeavouring to supply the place of the parents. A failure of duty in the sense envisaged under Article 42.5 would necessitate an abandonment of normal parental duties (see N. v HSE [2006] 4 I.R. 374). This is not the position here. There is a clear distinction between an abandonment of parental duty on the one hand, and a dispute between legal guardians as to how their duties are to be exercised.

25. Section 11(1) of the Act specifically provides that an application may be made by a guardian having regard to any issue pertaining to the child's welfare. The matter in issue undoubtedly relates to T.B.'s "physical" welfare (see the definition of welfare as cited earlier). The operation of s. 11(1) does not proceed on the basis that there has necessarily been any failure of parental duty. By virtue of the recognition contained in s. 6(4) of the 1964 Act, the mother is T.B.'s guardian. By virtue of the District Court order of 2007, the father is T.B.'s guardian.

26. It is true that a previous judgment of this court affirms that a father of a non-marital child does not enjoy the same constitutionally derived right as the mother (see J.K. v V.W., cited above). It is important to emphasise, however, the extent of the court's finding in that case. It is, simply, that a non-marital father does not, ipso facto, by virtue of his paternal status alone enjoy a constitutional

right to guardianship. However, once the father is appointed a guardian, the position substantially alters."

The Court then considered the respective positions of the parents concerned in the context of guardianship:

*"**Application under s. 11(1) of the Guardianship of Infants Act 1964, as amended 33.***

Pursuant to s. 11(1) of the Act, therefore, a guardian may apply to the court for its direction on "any question affecting the welfare of an infant" (emphasis added). The very purpose of the Act is that any legal guardian may apply to the court for a determination of an issue regarding the child's welfare. This applies whether the guardian is a marital or non-marital parent, or some other person so appointed. There is no indication in the terms of the statute, or anywhere else, that, by virtue of the provenance of their rights, the scales are to be weighed in favour of one guardian over another. But what is unavoidably true, is that, as the Act of 1964 provides, the welfare principle and its consequences are paramount.

34. It follows that, in applying that welfare principle, the respondent did not err. She acted in accordance with s. 3 of the 1964 Act. There was no duty upon her to so balance the scales as to place the position of the mother at some higher point on the scale in her decision. The duty which devolved upon the Circuit Court judge here, and upon al courts, was to act in accordance with law. It is not the function of this Court on an appeal of this type to express any view on the merits of the case the mother sought to make.

35. Instead arguably, if the logic of the mother's case were to be followed to its conclusion, it would have the consequence that courts, as an organ of the State, would have no constitutional entitlement to determine this issue or other issues by virtue of the mother's constitutional status. Insofar as any submission was made to this effect, I reject the argument that a court, as an organ of the state, must give way, or yield, to the wishes or rights of one guardian over another, no matter what the provenance of the rights sought to be claimed. In the administration of justice, a duty vested by the Constitution, the courts are endowed with the duty of determining issues which arise between guardians, be they married or unmarried parents."

It is amply clear from the authorities that section 11(1) of the 1964 Act confers a broad jurisdiction but not an infinite one. The scope of this section was further analysed in some detail and its limitations were identified, albeit in a very different context (whether or not there was jurisdiction to exclude a parent from a property to be derived from this section), by Hogan J. in **NK v SK** [2017] IECA 1 where the learned Judge stated:

"53. Whether the High Court had jurisdiction to exclude a spouse from the family home under the 1964 Act 53.

I next turn to the question of whether the High Court had jurisdiction under s. 11(1) of the 1964 Act to make an order excluding the husband from the family home. It is important to state at the outset that there is, of course, a jurisdiction to exclude a spouse from a family home under the terms of the Domestic Violence Act 1996 (as amended)("the 1996 Act"). There is also a jurisdiction under the Judicial Separation and Family Law Reform Act 1989, the Family Law Act 1995 ("the 1995 Act") and Family Law (Divorce) Act 1996 to make

property transfer orders which may require the transfer or sale of the family home consequential upon judicial separation or divorce.

54. In addition, s. 10(1) and s. 10(2) of the 1995 Act (as amended) enables the court to make an order consequent upon a decree of judicial separation or at any time thereafter excluding one spouse from the family home: "(1) On granting a decree of judicial separation or at any time thereafter, the court, on application to it in that behalf by either of the spouses concerned or by a person on behalf of a dependant member of the family, may, during the lifetime of the other spouse or, as the case may be, the spouse concerned, make one or more of the following orders:(a) an order:(i) providing for the conferral on one spouse either for life or for such other period (whether definite or contingent) as the court may specify the right to occupy the family home to the exclusion of the other spouse, or (i) direct the sale of the family home subject to such conditions (if any) as the court considers proper and providing for the disposal of the proceeds of the sale between the spouses and any other person having an interest therein …… (2) The court, in exercising its jurisdiction under subsection (1) (a), sha l have regard to the welfare of the spouses and any dependent member of the family and, in particular, shal take into consideration:(a) that, where a decree of judicial separation is granted, it is not possible for the spouses concerned to continue to reside together, and (b) that proper and secure accommodation should, where practicable, be provided for a spouse who is wholly or mainly dependent on the other spouse and for any dependent member of the family."

55. It must be stressed that the present appeal does not, however, concern either of these general jurisdictions which expressly provide for the power to exclude a spouse from a family home. The question rather is whether a spouse may be excluded from a family home under the general provisions of s. 11(1) of the 1964 Act regarding the welfare of H. for reasons other than domestic violence (or the threat of such) or a property transfer or adjustment order following a decree of judicial separation or divorce.

The Court continued:

76…. If the Oireachtas had intended that the s. 11(1) jurisdiction could be invoked so as to affect the constitutional and other legal rights of third parties in such an immediate and potentially far-reaching fashion – such as, in this instance, by excluding the father from the family home in the absence of any judicial finding that he posed a threat to the safety of the children – then, in the light of the principles previously articulated by the Supreme Court in Gaffney and Murphy v. Greene and by Hardiman J. in O'Brien, clear words to this effect would have been required for this purpose. These words are simply not present in s. 11(1) of the 1964 Act.

Whether such a jurisdiction can be said to derive from the provisions of Article 42A.4

77. It is next necessary to consider whether such a jurisdiction can be said to derive from the provisions of Article 42A.4 of the Constitution. This provides:

"4. 1 Provision shall be made by law that in the resolution of al 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) (ii) concerning the adoption, guardianship or custody of, or access to, any child, the best interests of the child sha l be the paramount consideration."

78. The Children and Family Relationships Act 2015 ("the 2015 Act") may be said to represent the effectuation of the constitutional duty resting on the Oireachtas to give effect to the requirements of Article 42A.4.ii by making significant amendments to the 1964 Act for this purpose. Section 3(1) of the 1964 Act (as inserted by s. 45 of the 2015 Act) provides that in deciding al questions of "guardianship, custody and upbringing" the court shall "regard the best interests of the child as the paramount consideration."

79. Section 31(1) of the 1964 Act (as inserted by s. 63 of the 2015 Act) requires the court to have regard to "al of the factors or circumstances that it regards as relevant to the child concerned and his or her family." Section 31(2) then enumerates a lengthy list of factors and circumstances, including "the benefit to the child of having a meaningful relationship with each of his or her parents… and, except where such conduct is not in the child's best interests, of having sufficient contact with them to maintain such relationships." Section 31(4) then provides that for the purpose of the section, "a parent's conduct may be considered to the extent that it is relevant to the child's welfare and best interests only."

80. It might also be observed in passing that s. 31(1)(b) also provides that the "views of the child concerned that are ascertainable (whether in accordance with s. 32 or otherwise)" may constitute a relevant factor for this purpose. Section 32(1)(b) allows the Court to appoint an expert (such as Dr. Curtin) to determine and convey the views of the child. While Dr. Curtin certainly spoke with H. at some length in May 2015 and prepared two very helpful reports for the Court, it is not obvious to me that H. was afforded any opportunity to express a view on the proposed course of action which the High Court ultimately adopted. One can understand why the Court might not have wished to place H, in the unenviable position of being effectively forced to choose as between his parents. Nevertheless, given that the decision which was taken was done in furtherance of the best interests of the child as reflected in Article 42A.4 – and not, as I again must stress, by reason of any finding of actual or potential domestic violence under the 1996 Act it would, I think, have been helpful if the High Court had expressly identified some of the statutory criteria which impelled it to make this decision and, specifically, why in the case of a 15/16 year old his particular views regarding the potential exclusion of his father from the family home were not ascertained.

81. The basic point remains, however, that despite the breadth of generality of Article 42A.4 and the corresponding legislation designed to give it effect (i.e., the 1964 Act, as amended by the 2015 Act), there is nothing in the 1964 Act which sanctions the exclusion of a parent from the family home on the general ground that the child's best interests so require where this is divorced from any finding of any actual or potential misconduct on the part of that parent. One may put this another way by saying yet again that if the Oireachtas had intended

that the courts could take this step by the making of an order under s. 11 of the 1964 Act, clear and express words to this effect would have been necessary.

82. In these circumstances it is unnecessary to decide whether legislation which sought to give effect to the best interests provisions of Article 42A.4 could sanction the exclusion of a spouse from the family home in the absence of any finding of parental misconduct or future threat to the safety or welfare of the other spouse and children. It is sufficient to say that, once again, there is nothing in the 1964 Act (as amended by the 2015 Act) which admits of the making of an order of this far reaching kind.

83. It follows, therefore, that the order which was made by O'Hanlon J. excluding the father from the family home based solely on the general words of s. 11(1) of the 1964 Act and absent any finding of actual parental misconduct or future threat to the safety or welfare of the wife and children was one which was made without jurisdiction. The order must accordingly be set aside."

20. I find that this case is entirely distinguishable from the **K** decision. The Court of Appeal was therein concerned with section 11(1) of the 1964 Act being interpreted in such a broad manner as enabled the exclusion of a person from their home, a hugely significant interference with the rights of that person which the legislature has determined should only arise in very specific circumstances. This case, in my view, comes within a circumstance which Hogan J. envisaged could come within the section 11(1) jurisdiction being directly relating to the children and their welfare:

"73. But while all of these cases stress in their own way the wide breadth of the s. 11(1) jurisdiction, they nonetheless <u>all directly concern the welfare of children in the sense of doing something to or directly in respect of the child</u>,

such as providing a money sum (MY); child custody and care (CH) or the administration of a medical procedure (COS and TB). None of these cases concern the yielding up by a third party of vested rights to the general aim of the child's welfare." (underlining added)

21. As clearly indicated by McMenamin J. in **COS and TB v. Judge Doyle**, the present case is a situation where the guardianship rights of the Appellant, regardless of provenance, cannot impede the court's entitlement to protect the constitutional entitlement of the children to have their best interests protected and considered paramount and I will made directions pursuant to section 11(1) of the 1964 Act accordingly providing for certain welfare decisions to be made by the Respondent in the first instance and some by the Appellant in the first instance as set out in the Orders previously set out herein.
22. It is undoubtedly the case that constitutional rights are engaged in this regard but there are constitutional rights vested in the mother (guardianship) and in the children (that their welfare be a paramount consideration). The hierarchy of rights is discussed in "Kelly: The Irish Constitution", (5th Ed.) at paragraphs 1.1.37 – 1.1.42 and, having regard, in particular, to paragraph 1.1.41 and the dictum therein from Kenny J. in **The People v. Shaw** [1982] IR 1 at p. 63 and the dicta of McMenamin J. recited above, in my view, dictate that the children's welfare must be my paramount concern.

'JOINT CUSTODY' AND 'PRIMARY CARE AND CONTROL'

23. Access, custody and joint custody are all terms found in the 1964 Act as amended, the former two terms being used in the Act as originally introduced while the last was given legislative recognition by section 9 of the Children Act, 1997 ('the 1997 Act')

although part of common parlance in private child arrangements cases prior thereto. As was submitted by the Appellant herein, I believe correctly, the provisions of section 10(2) of the 1964 Act, which confer an entitlement to custody of a child upon a guardian of that child, support the view that joint guardians should be joint custodians absent contrary welfare considerations.

24. "Custody" has been defined as *"the right to physical care and control"* (Shatter, A.; Family Law, (4th Ed) page 532). Shannon, at paragraph 12-126, states:

> *"Whereas guardianship is concerned with the enduring, global interests of the child, custody comprises the right and duty of a parent to exercise, on a day-to-day basis, the physical care of and control over a child."*

Similarly, the definition of "custody" as relating to day to day care and control is supported in the judgments of **E.P. v. C.P.** (Unreported, High Court, McGuinness J., 22 November 1998) and **R.C. v. I.S.** [2003] 4 I.R. 431 (Finlay Geoghegan J.).

25. "Access" has been defined as follows by Shannon at paragraph 12-160:

> *"Access may conveniently be described as a right and duty of visitation, allowing the person with access to visit and communicate with a child on a temporary basis. Access should not be confused with joint custody; the latter confers a right and duty, albeit shared, to the care of a child. By contrast, the care-giving functions involved in access rights are merely incidental, and it is clear that the parent in question is neither obliged nor entitled to usurp the role of the primary caregiver."*

26. So what does joint custody add to the traditional terms of custody and access? There are some indications in caselaw that joint custody was considered to be a concept to be used only in circumstances of shared (equal) care arrangements. Shannon states at paragraph 12.135:

> *"Joint custody involves a child residing with each parent for a stipulated period of time, for example, spending weekdays with the mother and weekends with the father. It does not automatically equate to an equal time-sharing position, although sometimes this can occur. In B. v. B [1975] IR 54, for instance, O Dalaigh CJ appeared to suggest that joint custody was a desirable option in certain cases, suggesting that the unity of the children in this instance would be best served "by allowing them to reside for half the year with one parent, and the other half with the other"."*

27. Of course, the **B v B** decision long pre-dated the legislative amendment placing joint custody on a statutory footing. It is, I believe, fair to say that in more recent times, this term emerged from the perception, most likely real, that a custodial parent had a superior parental role to a parent with access only. Section 11(1) of the 1964 Act somewhat supports this view where it speaks of *"custody of the child"* and *"right of access to the child of each of his or her parents"*. The aim of joint custody was to eliminate this perceived hierarchy, with equal parenting status being recognised and afforded to both parents. If custody "*comprises the right and duty of a parent to exercise, on a day-to-day basis the physical care of and control over a child"* (Shannon; paragraph 12-126), it would appear to be illogical that, following an order

of joint custody, one of such custodians would be appointed "primary carer" or decreed to have "primary care and control".

28. Following on from such joint custody order, it would appear logical and, by virtue of statutory silence in this regard, it is to be assumed that there would simply be a child arrangements schedule which the joint custodians would implement. However, over time, the concept of "primary care and control" emerged with one of the joint custodians being the primary carer and the other joint custodian being, presumably, the secondary carer. With this the perceptions of inequality re-emerged. It must be stated at the outset that there is no statutory basis for primary care or primary care and control. Indeed, it is difficult to see what these terms mean as each of the joint custodians have responsibility for the care and control of the child/children while in their custody. It would appear that the term is used with a view to recognising the parent with whom a child spends most time and, in this context, it would appear more appropriate to refer to "primary residence" which relates to the residential arrangements of the child rather than to "primary care and control" which relates to the parenting role of the respective parents who have been ordered to have legislatively ordained joint custody.

29. I received most useful submissions from both parties on the issue of whether joint custody was appropriate on the facts of this case and, if so, whether one of them and, if so, which, should have primary care and control? In the present case, there are two loving, committed and capable parents. It is appropriate that the children should spend significant periods of them with them both and there is no evidence such as would support any suggestion that, when the children are with each parent, that parent

should not have care and control of them. There is acrimony between these parties but this does not necessarily contra-indicate in relation to joint custody. In this regard, I would refer to **D.F. O'S v. C.A.** (Unreported, High Court, McGuinness J., 20 April 1999) where acrimony was not seen has a prohibitor of joint custody but rather the learned Judge expressed the hope that the conferral of joint responsibility would encourage them to *"put their antagonisms behind them."* I am of the view that such sentiments are applicable here also. It is my view that, given that it is imperative for the welfare of these two small children that their parents receive every possible assistance in their parental endeavours, it is vital that the equal roles and the equal responsibilities of each be highlighted. Realism prophesises that the path ahead will be a difficult one but this will not be assisted by perceptions of superiority. Therefore, I have decided that joint custody is appropriate.

30. While I accept that the terms "primary care and control" with consequent "access" orders to the other parent are referenced in many decisions (and I make no determination that such a descriptive term may not sometimes be appropriate), it is my view in this instance that, as custody confers care and control, joint custody confers care and control upon each parent for such times as the child is being cared for by them.

31. I am of the view that in the context of medical or educational catchment areas, social welfare and other social entitlements, if a child primarily resides with a particular parent (in the sense that the spend a greater amount of time at the home of that parent), it may be appropriate to express this factual position. I do so in the present case. Based upon the schedule of arrangements, the children will have their primary residence* with the Appellant.

APPLICATION OF SECTION 31(2) PRINCIPLES

(a) It is, in my view, imperative that the children have an ongoing relationship with both parents and there are no contra-indicators in this case. Both parents are capable, loving and devoted parents. They are very different personalities and this difference can have a positive impact on the children's lives provided such differences are not used to criticise or diminish one another. Both parents have a long way to travel in terms of advancing genuine respect for the positions of each other. Facilitation between them by an experienced professional may assist this. Each must take care that the positive relationship which the children have and continue to grow with both parents is not damaged by the actions of either of them. I find that the Appellant and the Respondent have each particular strengths which will benefit the children. I am of the view that the proactivity of the Respondent in relation to developmental issues is positive and to be welcomed and embraced but he must always be mindful of the sensitivities involved and that the Appellant's views are worthy of consideration and, most importantly, of respect, also.

(b) The views of the children are not directly ascertainable given their tender years. However, I am mindful of Dr. Byrne Lynch's finding that the children have attachments with each of them. While she described the attachment between the children and their mother as "strong", it seems to me that the relationship between the children and the Respondent must still be somewhat embryonic in nature given that he has only resumed a role in their lives over a number of months. Insofar as the wishes of small children can only be ascertained by their reactions to those around them, these children appear to be demonstrating a wish to have both parents amply in their lives.

(c) I have had regard to the physical, psychological and emotional needs of the children, particularly having regard to developmental issues which arise. I have been assisted by the expert assessment and opinions of Dr. Byrne Lynch in this regard.

(d) In my first judgment herein, I determined that it was important on the evidence before me that the relationship between the children and their father be revived, preserved and strengthened. Revival has now occurred and the evidence demonstrates that this has been positive for the children. The preservation and strengthening of this relationship must continue. So also, their relationship with their mother must be nurtured and supported. Wider family relationships are important but these must not be permitted to destabilize the primarily important bonds between parents and children.

(e) I re-iterate the findings in my first decision herein in this regard.

(f) Both parents have much to offer in this regard. In the short-term, it would appear that there are likely to be many disagreements in this regard. The approaches of the parents are very different, in particular in relation to medical/psychological needs of the children. There are issues relating to developmental delays which require to be addressed and require to be addressed without delay. The Respondent has been most proactive in this regard since re-entering the children's lives. I believe that appropriate interventions are a matter of urgency and a matter of the utmost importance and it is for this reason that I have found that the best interests of the children's welfare demand that the Respondent deal with these matters for the moment. Likewise, the Appellant is an educationalist and the children will have their primary residence with her and therefore giving her charge of day to day educational decision making, in my view, will benefit the children in this regard.

(g) I believe that these factors have been addressed in the matters set out previously.

(h) These children are not at risk of household violence. However, I am of the view that their wellbeing is at risk if negativity or disrespect continues between their parents. The risk to their wellbeing of the exclusion of one of their parents from their lives has now been abated. The parenting and care capacities of each parent have been positively assessed by Dr. Byrne Lynch. However, the challenges of co-parenting and dysfunctional parental relationships will negatively impact upon their psychological wellbeing if permitted to persist. It is for this reason, in the interests of the children's welfare, that the parents must actively take steps to endeavour to co-parent and, if this proves impossible, to adopt respectful parallel parenting initiatives.

(i) There were previously no such proposals. The evidence now is that both parties accept that each will have an on-going role in the children's lives. There are green shoots but no more. I am unconvinced that each party has had a Pauline conversion. I believe that professional assistance will be required. The children can benefit from the positive inputs of both parents.

(j) I have already expressed my concerns about the willingness and ability of each of the parents to facilitate and encourage a close and continuing relationship between the children and the other parent. I have determined that achieving this is better progressed by acknowledging the equal parental role of each and by having no issue of parental superiority. It is for this reason that I have determined that there should be joint guardianship and joint custody with a schedule of arrangements thereafter.

(k) Parental capacity assessment was specifically directed in the section 32 assessment and Dr. Byrne Lynch has made positive findings in this context and had found no deficits which are material. In terms of day to day decision making concerning education and medical matters, I have endeavoured to have regard to the particular strengths of both parents having regard to the particular needs of the children.

32. It is in this context that I make the Orders set out at the beginning of this judgment. I will list the matter for mention before me in relation to any matters arising or, indeed, any clarifications of the arrangements directed as may arise, on a date convenient for Counsel to be arranged with the Registrar/Judicial Assistant. The arrangements for the children provided for herein shall commence on the week following such for mention hearing.

*ADDENDUM

33. "Primary residence"

At Orders paragraph F and at paragraph 31 of my judgment, I indicated that the children's primary residence would be with the Appellant/Respondent and so directed. In so doing, the term "primary residence" is being used as a descriptive narrative, reflecting only that the day to day arrangements for the children involve them spending more time in the custody of the Appellant/Respondent than the Respondent/Applicant. Subsequent to my judgment being delivered, Counsel for the Respondent/Applicant sought to make submissions in relation to this determination and, there being no objection to this by the Appellant/Respondent, both parties made submissions as to the appropriateness of making a designation of primary residence for the children in this case.

THE SUBMISSIONS

34. The Respondent/Applicant submits that by so directing, I have reverted back to the difficulties inherent in the term "primary care and control" as the authorities demonstrate that these terms (primary residence and primary care and control) have been used interchangeably. The Respondent/Applicant submits that the use of the term "primary residence" has the same effect in terms of creating an assumption of parental imbalance as arises in the use of the terminology "primary care and control". He submits that references to these terms in precedent have reflected an understanding that they have the same/similar meaning.

35. In this regard, reference is made to:

(a) **C.Q. v N.Q** [2016] IEHC 486 (Abbott J.). The court did reference *"the primary care or primary residence of the children being with the applicant in her home"* but this was in the context of alluding to the terms of a previous consent agreement made between the parties rather than the court making any determination in this regard. The precise terms of the agreement as between the parties in relation to child arrangements are not disclosed in the judgment.

(b) **R.S. V T.S.** [2014] IEHC 257 (Keane J.) – in this case, in the context of a joint custody order being made by agreement, the court was addressing the issue of what the day to day arrangements for the children should be. The expert assessor recommended arrangements providing for the children to spend greater time with the mother while the court ultimately determined that an equal time arrangement should pertain. In the course of this discussion, a number of descriptive terms were used including "primary care and control", "primary residence" and, indeed, "primary custody". These were, it appears to me, descriptive terms used in the context of considering the appropriate division of time to be spent with each parent, not relating to qualitative legal duties and responsibilities.

(c) **R.L. v. Her Honour Judge Heneghan** [2015] IECA 120 where the Court of Appeal, in an application for judicial review of the decision of the Circuit Family Court, stated:

> *"The Court ultimately affirmed the order of the District Court refusing the s. 11 application, but, critically, it also directed that M. should henceforth have his primary place of residence with his father in Ireland. Liberty in relation to access and maintenance was given. The effect of this order was, of course, that the mother was deprived of her status as the primary carer of M., so that hence forth she would have access rights only."*

36. Of importance also, is the reference to the decision in **R.C. v I.S.** [2003] 4 IR 431 which has indicated that *"custody is generally understood as the right of a parent to exercise care and control over the child on a day to day basis"*.

37. The Respondent/Applicant submits that these decisions demonstrate a lack of differentiation between "primary care and control" and "primary residence" and that an allocation of "primary residence" creates a false assumption of legal inequality which is at odds with joint custody. The submission states that allocating a status of

primary residence to one location leads to the assumption that the home of the other parent is a secondary residence and that, in consequence, an imbalance in the dynamic, both for the children and the parents is created. It is accepted by the Respondent/Applicant that there is no legal definition (at least not in the circumstances under consideration) of "primary care and control" or "primary residence" and submits that *"the Court should and must guard against adopting phrases from 'common usage' which on examination confer no legal rights or obligations on the custodians, but which suggest a primacy of entitlement or authority to the parent on whom it is bestowed and conversely suggest a diminution of entitlement or authority on the other."*

38. The Respondent/Applicant does accept, however, that *"it is open to the Court to use whatever terminology or explanatory term deemed appropriate in setting out the care arrangements or time spent with a child by either parent."*.

39. The Appellant/Respondent has acknowledged that a designation of primary residence *"does not give [the Appellant] a superior entitlement to make decisions about the care and welfare of the children"*. She submits that the term "primary residence" is an expression of *"the factual reality which pertains"* in a particular case. The Appellant/Respondent submits that *"in granting joint custody of the children with the specific directions as to the arrangements for the care of the children, the Court has rejected the notion that either party has primary care and control of the children. However, in so doing, the Court has acknowledged the factual position which pertains and has designated that the children's primary residence in in [REDACTED]…. This direction confers no advantage to the Respondent/Appellant but merely adopts a pragmatic view of the situation and no difficulty arises with such designation."*

40. I did not find the authorities to which I was referred of great assistance in the context of the case before me. In the first two, the use of the terms "primary residence" and "primary care and control" were referenced in terms of prior consent orders agreed between the parties and, in the latter of the two judgments, by way of narrative description of the arrangements deemed appropriate for the children in that particular

case. The **R.L.** decision makes no reference to the custody orders (if any) in place but rather concerns a judicial review appeal considering jurisdictional issues arising in the context of particular applications (relocation and increased access) under the Guardianship of Infants Act 1964 as amended. Therein the references to primary care and control and primary residence are employed to describe the seismically altered role of the mother where a change in the living arrangements of the child was ordered in the context of the refusal of a relocation application by the mother.

41. An analysis of the submissions made on this issue reveals important points upon which the parties are in agreement:
    1. Custody effectively means care and control and therefore joint custody confers joint care and control duties and responsibilities upon the parties;
    2. The parties both accept that explanatory terminology may be used by way of direction to elucidate care arrangements, reflective of factual realities, always having regard to the welfare and best interests of the children;
    3. The parties would appear to each accept that with joint custody, each will share responsibility for the care of the children and that such an order reflects their parity of parental position.

42. In most instances, a finding of joint custody together with a determination of a schedule of child arrangements will suffice to provide for joint and equal parental role, exercisable during the time the children are in the care and control of the particular parent (subject always to guardianship rights and responsibilities in respect of major decision making) but in some instances the evidence before the court will require a fuller descriptive analysis in the directions necessary to fully address the welfare needs of the children. On the evidence before me, I have determined that this is such a case.

DECISION

43. For the avoidance of all doubt, I do not use the term “primary residence” as a term of legal art in this decision but I use the words in a descriptive context only. It is my

decision that the children in this case have very particular needs and I have sought to distribute parental responsibilities in a manner which best serves their welfare in this regard. The use of the phrase "primary residence" might equally be termed principal abode. It is important that all of the needs of these children are best addressed and it is my view that, to achieve this, inter agency discussion and co-operation may be required in the context of their health and educational needs. It is important that obstacles not be placed in the way of this co-operation by the involvement of multiple catchment areas and multiple agency locations. Regrettably, the Appellant/Respondent and the Respondent/Applicant have both on occasions displayed proprietorial tendencies in respect of the children, putting their own objectives and grievances ahead of the needs and welfare interests of the children. This must not continue if the best interests of the children are to be achieved.

44. It is my view that the terms 'primary care and control' and 'primary residence' are demonstrably different in their focus. Neither has any particular legal attribution but they are narrative descriptions. The term "primary care and control" seems to me to relating to parenting. In the present case, I have decided that joint custody is appropriate and, as a custody determination is a determination of care and control, therefore joint custody involves a finding that there is an equal parenting status in the context of care and control. Residence relates to the child's place of abode. If the day to day arrangements for a child involve the child living in one place for a greater time than another, it may or may not be necessary or appropriate, in accordance with the application of the welfare test, to indicate a primary residence. In many instances, it will not be necessary to so indicate. However, in the present case, based upon the needs of the children and the past actions of the parents, I am of the view that it is necessary and appropriate that the place where the children primarily or principally reside should be stated. This is not in any way to diminish or alter the joint responsibilities of the parents as joint custodians (and, indeed, as joint guardians) of the children. It is not intended and should not be understood as reflective of any superior parenting role but simply to make the abode of the children clear in the event that catchment area issues arise and to, hopefully, simplify the provision of health, education and other social services to the children.