

THE HIGH COURT

[2021] IEHC 784

[2020 No. 1869 SS]

**IN THE MATTER OF THE ADOPTION ACT 2010, SECTIONS 49(1) AND 49(3) AND
IN THE MATTER OF A (A MINOR) AND B (A MINOR)**

C AND D (FIRST AND SECOND NOTICE PARTIES)

THE ATTORNEY GENERAL (THIRD NOTICE PARTY)

JUDGMENT of Mr Justice Max Barrett delivered on 17th November, 2021.

SUMMARY

Mr D adopted his husband's two children in a US state. He now wishes the adoption decrees to be entered onto the register of intercountry adoptions maintained by the Adoption Authority. The Adoption Authority has raised this Case Stated. It happens that the adoptions arose following on a pregnancy which involved a surrogacy arrangement. However, this case is not directly concerned with the surrogacy arrangement. Its particular focus is whether or not to recognise two 'foreign domestic adoptions', a term considered later below. The court sees no legal difficulty to present in recognising the adoptions and having them entered onto the register of intercountry adoptions.

A. Introduction

1. The first and second notice parties are a same-sex male married couple. Mr C was born in England. Mr D was born in Northern Ireland. Some years ago they were married in the United States. They remain happily married today, still living in the United States, and have three children. Mr D retains strong connections with Ireland and he and Mr C come frequently to Ireland with the children. This case concerns two of the three children, referred to in this judgment as Master A and Miss B. They are twins, born in US State #1 a few years ago pursuant to a surrogacy arrangement. The third child of the family is not involved in these proceedings. So references herein to the children of the marriage are to Master A and Miss B.

2. Mr C is the natural father of the children. The woman who gave birth to them (the surrogate

mother) is referred to herein as ‘Ms E’. The egg donor was a Ms F. After the children were born, Mr D secured decrees of step-parent adoption from a court in US State #1. In 2017, Mr D made an application to the Adoption Authority to have those decrees entered onto the register of intercountry adoptions maintained by the Authority. The Authority was of the view that the application raised one or more public policy questions and thus required a Case Stated to be raised pursuant to s.49(3) of the Act of 2010.

B. Some Statutory Provisions

3. When it comes to applicable legislation, the first ‘port of call’ in this case is the Adoption Act, 2010. The long title to that Act reads as follows:

“AN ACT TO PROVIDE FOR THE DISSOLUTION OF AN BORD UCHTÁLA AND THE ESTABLISHMENT OF A BODY TO BE KNOWN AS ÚDARÁS UCHTÁLA NA hÉIREANN AND IN THE ENGLISH LANGUAGE AS THE ADOPTION AUTHORITY OF IRELAND; TO PROVIDE FOR MATTERS RELATING TO THE ADOPTION OF CHILDREN; TO GIVE THE FORCE OF LAW TO THE CONVENTION ON THE PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION SIGNED AT THE HAGUE ON 29 MAY 1993; TO PROVIDE FOR THE MAKING AND RECOGNITION OF INTERCOUNTRY ADOPTIONS IN ACCORDANCE WITH BILATERAL AGREEMENTS AND WITH OTHER ARRANGEMENTS; TO PROVIDE FOR THE RECOGNITION OF CERTAIN ADOPTIONS EFFECTED OUTSIDE THE STATE; TO REPEAL THE ADOPTION ACTS 1952 TO 1998; TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS AND TO PROVIDE FOR RELATED MATTERS.”

[Emphasis added].

4. Section 3(1) of the Act of 2010 (s.3 is headed “*Interpretation*”) provides, *inter alia*, that the phrase “*intercountry adoption effected outside the State*” means “(b) *an adoption, other than an intercountry adoption, of a child effected outside the State at any time on or after the*

establishment day that conforms to the definition of ‘foreign adoption’ in section 1 of the Adoption Act 1991 as it read on 30 May 1991” [Emphasis added]. For purposes of clarity the court cannot keep stating ‘limb (b) of the definition of “intercountry adoption effected outside the State” contained in s.3(1) of the Act of 2010’. So the court hereafter (i) uses the shorthand term ‘Limb B Definition’ when referring to limb (b) of the definition of “intercountry adoption effected outside the State” contained in s.3(1) of the Act of 2010, and (ii) uses the shorthand phrase ‘foreign domestic adoption’ when referring to the type of adoption contemplated by the Limb B Definition through its cross-reference into s.1 of the Act of 1991.

5. As mentioned, the Limb B Definition cross-refers into s.1 of the Act of 1991, which provides as follows:

“‘foreign adoption” means an adoption of a child who at the date on which the adoption was effected was under the age of 21 years or, if the adoption was effected after the commencement of this Act, 18 years, which was effected outside the State by a person or persons under and in accordance with the law of the place where it was effected and in relation to which the following conditions are satisfied: (a) the consent to the adoption of every person whose consent to the adoption was, under the law of the place where the adoption was effected, required to be obtained or dispensed with was obtained or dispensed with under that law, (b) the adoption has essentially the same legal effect as respects the termination and creation of parental rights and duties with respect to the child in the place where it was effected as an adoption effected by an adoption order, (c) the law of the place where the adoption was effected required an enquiry to be carried out, as far as was practicable, into the adopters, the child and the parents or guardian, (d) the law of the place where the adoption was effected required the court or other authority or person by whom the adoption was effected, before doing so, to give due consideration to the interests and welfare of the child, (e) the adopters have not received, made or given or caused to be made or given any payment or other reward (other than any payment

reasonably and properly made in connection with the making of the arrangements for the adoption) in consideration of the adoption or agreed to do so”.

6. What is before the court in this case is a form of “*intercountry adoption effected outside the State*”, being the form of “*foreign adoption*” contemplated by the Limb B Definition, *i.e.* a ‘foreign domestic adoption’. Such ‘foreign domestic adoptions’ are adoptions that take place in another jurisdiction under the laws of that jurisdiction and are availed of by persons who are either habitually resident or domiciled in that jurisdiction, and so are subject to the domestic rules of that jurisdiction. (In passing, the court notes that the observations of the Supreme Court in *Re JB and KB (minors)* [2019] 1 I.R. 270 and the wording of s.1 itself suggest that the proofs arising under s.1 fall to be read narrowly and in a reasonably limited manner).

7. Under s.57(2)(b) of the Act of 2010 (s.57 is headed “*Recognition and Effects of Intercountry Adoption Effected Outside State*”), amongst other matters, “[A]n *intercountry adoption effected outside the State that... (ii) [has] been effected in accordance with the Hague Convention or with a bilateral agreement or with an arrangement referred to in section 81, as the case may be, unless contrary to public policy, is hereby recognised...*” [Emphasis added]. The significance of the just-quoted text is that it is clear from s.57 that there are, on the one hand, ‘foreign domestic adoptions’ and also, on the other hand, types of intercountry adoption which must be effected in accordance with the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption 1993, *i.e.* there is not a requirement under Irish law for a ‘foreign domestic adoption’ to be compliant with the Hague Convention. An effect of the foregoing is that when the Authority suggests (and it has suggested) that the provisions of the Hague Convention and its mores/ethos are a signifier of public policy in relation to a ‘foreign domestic adoption’, this respectfully is not accepted by the court.

8. Continuing with a consideration of various relevant provisions of the Adoption Acts, the court notes that s.3(1) of the Act of 2010 defines the phrase “*register of intercountry adoption*” as “*the register established under section 6 of the 1991 Act as the Register of Foreign Adoptions and continued in being under section 90 as the register of intercountry adoptions*”.

9. Section 4 of the Act of 2010 (s.4 is headed “*References to Making Arrangements for Adoption*”) provides what “*the making of arrangements for the adoption of a child*” comprises,

stating:

“In this Act, references to the making of arrangements for the adoption of a child (whether a domestic adoption or an intercountry adoption) shall be read as including references to the following activities: (a) making any agreement or arrangement for, or facilitating, the adoption or maintenance of the child by any person; (b) initiating or taking part in any negotiations the purpose or effect of which is the making of any such agreement or arrangement...(g) providing information, advice and counselling concerning adoption to any prospective adopters; (h) providing information, advice and counselling concerning adoption to a mother or guardian who proposes to place a child for adoption;...(j) placing a child with any prospective adopters...”

10. Section 14 of the Act of 2010 (s.14 is headed “*Explanation to Mother or Guardian as to Effect of Adoption*”) emphasises the importance of the consent of the person putting the child up for adoption within the Irish statutory framework, providing as follows:

“Where the mother or guardian of a child proposes to place the child with an accredited body for adoption, the accredited body, before accepting the child, shall—(a) furnish the mother or guardian with a statement in writing explaining—(i) that a placement for adoption is the beginning of the adoption process, (ii) the effect of a placement for adoption upon the rights of a mother or guardian, (iii) the effect of an adoption order upon the rights of a mother or guardian, and (iv) the requirements specified in sections 26 to 28 in respect of the consents necessary under this Act in relation to an adoption order. (b) ensure that the mother or guardian understands the statement and signs a document to that effect, and (c) provide information, advice and counselling to the mother or guardian concerned.”

11. Section 19 of the Act of 2010 (s.19 is headed “*Welfare of Child*”) emphasises the welfare of the child and the best interests of the child, stating as follows:

- “(1) *In any matter, application or proceedings under this Act which is, or are, before—(a) the Authority, or (b) any court, the Authority or the court, as the case may be, shall regard the best interests of the child as the paramount consideration in the resolution of such matter, application or proceedings.*
- (2) *In determining for the purposes of subsection (1) what is in the best interests of the child, the Authority or the court, as the case may be, shall have regard to all of the factors or circumstances that it considers relevant to the child who is the subject of the matter, application or proceedings concerned including - (a) the child’s age and maturity, (b) the physical, psychological and emotional needs of the child, (c) the likely effect of adoption on the child, (d) the child’s views on his or her proposed adoption, (e) the child’s social, intellectual and educational needs, (f) the child’s upbringing and care, (g) the child’s relationship with his or her parent, guardian or relative, as the case may be, and (h) any other particular circumstances pertaining to the child concerned.”*

12. Section 26 of the Act of 2010 (s.26 is headed “*Consents to Adoption Orders*”) provides, amongst other matters, as follows:

“(1) The Authority shall not make an adoption order without the consent of every person, being the child’s mother or guardian or other person having charge of or control over the child, unless the Authority dispenses with the consent—(a) with the sanction of the High Court if the person whose consent is necessary is a ward of court, (b) in accordance with an authorisation of the High Court by order under this section...”

13. Section 28 of the Act of 2010 (s.28 is headed “*Validity of Consent*”) provides as follows:

*“(1) A consent to the making of an adoption order is not valid unless given—(a) after the child concerned has attained the age of 6 weeks, and (b) not earlier than 3 months before the application for adoption.
(2) The Authority shall satisfy itself that every person whose consent to the making of an adoption order is necessary and has not been dispensed with—(a) has given the consent, and (b) understands the nature and effect of the consent and of the adoption order.”*

14. Section 49(1) of the Act of 2010 (s.49 is headed “*Case Stated for High Court*”) provides that “*The Authority may refer any question of law arising on an application for an adoption order or the recognition of an intercountry adoption effected outside the State to the High Court for determination*” [Emphasis added]. Here, what is before the Adoption Authority is an application for the recognition of a form of intercountry adoption effected outside the State (a ‘foreign domestic adoption’). So it clearly comes within s.49. The “*may*” in the just-quoted text shows that the Authority possesses a discretionary power under s.49(1). However, under s.49(2), the discretionary power to refer any question of law becomes mandatory in certain circumstances. Thus s.49(2) provides:

“(2) Notwithstanding subsection (1), the Authority, unless it considers a question of law arising on an application for an adoption order or the recognition of an intercountry adoption effected outside the State to be frivolous, shall refer the question of law to the High Court for determination if requested to do so by—(a) an applicant for the order or recognition of the intercountry adoption effected outside the State, (b) the mother or guardian of the child, or (c) any person having charge or control over the child.”

15. Meanwhile s.49(3) of the Act provides (again in mandatory terms) that “*The Authority shall refer any question in relation the public policy arising with respect to entries in the register of intercountry adoptions to the High Court for determination.*” These proceedings have been brought pursuant to s.49(3) because the Adoption Authority considers that it is required by virtue of s.49(3) to be here.

16. Section 57 of the Act of 2010 (s.57 is headed “*Recognition and Effects of Intercountry*

Adoption Effected Outside State”) provides, amongst other matters, as follows:

“(2) *Subject to subsections (3) and (4), an intercountry adoption effected outside the State that...(b) if effected on or after the establishment day, has been certified under a certificate issued by the competent authority of the state of the adoption...(i) in the case of an adoption referred to in paragraph (b) of the definition of ‘intercountry adoption effected outside the State’ in section 3(1), as having been effected by an adopter or adopters who were habitually resident in that state at the time of the adoption under and in accordance with the law of that state, and...unless contrary to public policy, is hereby recognised, and is deemed to have been effected by a valid adoption order made on the later of the following: (i) the date of the adoption; (ii) the date on which, under section 90, the Authority enters particulars of the adoption in the register of intercountry adoptions.*”

[Emphasis added].

17. The combined effect of the Limb B Definition and the above-quoted portion of s.57(2) (being the portion applicable to the case at hand) is that a ‘foreign domestic adoption’ falls to be recognised in Ireland, provided that it meets the following criteria: (1) the ‘foreign domestic adoption’ is not an intercountry adoption; (2) the ‘foreign domestic adoption’ was made on or after the Act of 2010 came into effect; (3) the ‘foreign domestic adoption’ has been certified by the competent authority of the state of the adoption; (4) the adopters party to the ‘foreign domestic adoption’ were habitually resident, at the time of the adoption, in the jurisdiction where the adoption was granted; (5) the child/ren the subject-matter of the ‘foreign domestic adoption’ was/were under the age of 18 years at the date of the adoption in the foreign jurisdiction; (6) the ‘foreign domestic adoption’ was effected in accordance with the law of the jurisdiction where it was granted; (7) the ‘foreign domestic adoption’ conforms to the definition of a “*foreign adoption*” in s.1 of the Adoption Act 1991 as it read on 30th May 1991, and (8) the recognition of the ‘foreign domestic adoption’ is not contrary to public policy.

18. Continuing with the court’s ‘whistle-stop tour’ of the Act of 2010, as amended, the next provision of note is section 90 (s.90 is headed “*Register of Intercountry Adoptions*”), which

provides, amongst other matters, as follows:

“(2) The Register of Foreign Adoptions maintained until the establishment day under section 6 of the Adoption Act 1991 by An Bord Uchtála shall, notwithstanding the repeal of that section by section 7(1), continue in being under this Act and, on and after the establishment day, shall be – (a) known as the register of intercountry adoptions, and (b) kept and maintained under this Act by the Authority.

(3) The following persons may apply to the Authority to enter particulars of an intercountry adoption effected outside the State in the register of intercountry adoptions: (a) the adopted person; (b) a person by whom the adopted person was adopted...

(7) If the Authority is satisfied that the adoption is an intercountry adoption effected outside the State that complies with the requirements of this Act in relation to such an adoption, the Authority shall enter particulars of the adoption in the register of intercountry adoptions, together with a copy of the certificate referred to in section 57 concerned.”

19. Section 125 of the Act of 2010 (s.125 is headed “*Restrictions on Making Arrangements for Adoption*”) provides, amongst other matters, as follows:

“(1) A person shall not—(a) make or attempt to make an arrangement for the adoption of a child, (b) for the purpose of having a child adopted—(i) retain the child in the person’s custody, or (ii) arrange to have the child retained in the custody of another person, or (c) take part in the management or control of a body of persons which exists wholly or partly for the purpose of making arrangements for adoption.”

20. Section 145 of the Act of 2010 (s.145 is headed “*Prohibition against Receiving, Making or Giving Certain Payments and Rewards or Agreeing to Do So*”) provides, amongst other matters, as follows:

“(1) A person who is — (a) an adopter, (b) a prospective adopter, (c) a parent, or (d) a guardian, of a child shall not receive or agree to receive, in consideration of the adoption of the child, any payment or other reward.

(2) A person shall not make or give, or agree to make or give, any — (a) payment, or (b) other reward, the receipt of which is prohibited by subsection (1).”

21. Section 147(2) of the Act of 2010 (s.147 is headed “*Offences*”) provides that “*A person is guilty of an offence if the person—(a) contravenes...subsection (1), (2) or (3) of section 125 [or]...subsection (1), (2) or (3) of section 145*”.

C. Some Documents of Note

i. The Gestational Surrogacy Agreement

22. In January 2013, the two fathers entered into a Gestational Surrogacy Agreement with XYZ. This Agreement provided, amongst other matters, as follows:

“I. Recitals

Intended Parent(s) wish to retain XYZ...to locate a Surrogate Mother, administer certain provisions of the Surrogacy Agreement, maintain the funds deposited in escrow and to designate or refer appropriate professionals, whether legal, medical, psychological or otherwise, when called for herein....

II. Services Provided by Agency....

1. Surrogate search. Agency shall use every best effort to match Intended Parent(s) with a Surrogate....

2. Matching. Agency will provide Intended Parent(s) with up to ten profiles of reasonable surrogate candidates that meet the search criteria of Intended Parent(s). A reasonable surrogate candidate shall be defined as an available surrogate candidate willing to work with Intended Parent(s) with a fee within

Intended Parent(s)' desired range...and who is available in a location favourable to surrogacy or in a location desired by Intended Parent(s)....

5. Transfer. Agency shall coordinate travel for Surrogate and arrange for the transfer into the Surrogate of a fertilized embryo provided by the Intended Parent(s), through a licensed IVF or IUI physician....

...

IV. Fees

1. Agency Fee. In consideration of the services provided in Section II above, Intended Parent(s) agree to pay to the Agency a Nonrefundable Agency Fee, according to either of the following schedules.

a. Lump Sum. Intended Parent(s) agree to pay to the Agency the Fee of \$11,300, payable as a lump sum upon execution of this agreement; OR

b. Series of Payments. Alternatively, Intended Parent(s) may pay the Agency Fee of \$12,300 according to the following schedule....

4. Legal Fees. No legal fees are included in Agency Fee.

a. Surrogacy Agreement Draft Fee. Agency will refer Intended Parent(s) to independent attorneys to draft Surrogacy Agreement, to establish the parent-child relationship and obtain the birth certificate in Intended Parent(s)' name. Intended Parent(s) understand that those legal fees are variable and are not included in the Agency Fee above. Intended Parent(s) shall be billed separately by their attorney for those legal fees.

Estimates for these fees vary by state and can be provided at your request.

5. Medical Fees. Intended Parent(s) understand and agree that the fees and expenses associated with medical screening, IVF costs and any other fees and expenses not specifically stated in this Agreement to be included in Agency Fee above are the sole responsibility of Intended Parent(s). Intended Parent(s) agree that any and all IVF related fees will not be run through Surrogate's Insurance....

...

VIII. Miscellaneous Provisions....

4. Governing Law. The validity of this agreement...shall be construed pursuant to,

and in accordance with the laws of US State #2.”

ii. The Gestational Carrier Agreements

23. XYZ did its job under the Gestational Surrogacy Agreement and was able to identify a potential surrogate mother. This led in time to the respective execution in 2013 between Mr D and Mr C (as Intended Parents) and Ms E (as Gestational Carrier) of identical Gestational Carrier Agreements. They say, amongst other matters:

“RECITALS

D. The parties desire to enter into an agreement in which the Gestational Carrier will give birth to a child who is genetically unrelated to her and conceived by means of assisted reproduction and will relinquish all parental rights to the child to the Intended Parents....

1. Purpose and Intent of the Parties. *The sole purpose and intent of this Agreement is to provide a means for the Intended Parents to become parents of a child who is carried and birthed by Gestational Carrier, after in vitro fertilization of Donor egg(s) and semen from either Intended Father and transfer of fertilized egg(s) to Gestational Carrier’s uterus (‘the IVF procedure’). (For purposes of this Agreement, ‘child’ shall include all children born simultaneously pursuant to the in vitro fertilization contemplated herein.) Gestational Carrier shall not be genetically related to the child. It is expressly not the Gestational Carrier’s intention to raise any child conceived through the IVF procedure contemplated herein.*

2. Gestational Carrier Agreement. *All parties to this Agreement represent and warrant that – (a) the Gestational Carrier agrees to pregnancy by means of assisted reproduction; (b) the Gestational Carrier and the egg donor shall relinquish all parental rights and duties with respect to any child conceived through assisted reproduction under this agreement; (c) Gestational Carrier agrees and understands that although the Intended Parents are not both genetically related to*

the child, the Intended Parents will be the parents of any child conceived by means of assisted reproduction under this Agreement....

...

10. Payments & Reimbursements. *The Intended Parents shall pay to the Gestational Carrier the amount set forth on the attached schedules 1 [“Payment of Compensation/Additional Monies to Gestational Carrier”] and 2 [“Payment of Expenses/Non-Reimbursable Expenses/Method of Dispute Resolution”] as pre-birth child support for Gestational Carrier’s time and services in connection with bearing the child. Further, such amounts are paid in recognition of the Intended Parents’ obligation under State law to support their child from the time pregnancy is confirmed, the parties having agreed that such amounts are appropriate and necessary for the welfare and benefit of any child resulting from the transfer. The parties acknowledge and it is expressly understood that nothing of value has been offered or accepted for the delivery of the child to another or for possession of the child by another for purposes of adoption. Rather the parties recognise that the intended parents are the parents of the child....*

...

12. Covenants. *The Gestational Carrier covenants and agrees that: (i) the Gestational Carrier agrees to timely execute any and all necessary affidavits and documents and to attend any and all court hearings necessary to further the intent and purpose of this Agreement; (ii) Intended Parents shall be allowed to designate the venue for such proceedings; (iii) She will sign a medical release with all medical and psychological personnel authorising them to release to the Intended Parents and/or XYZ any and all relevant medical, psychological and obstetrical records relating to the pregnancy; (iv) she will notify the Intended Parents immediately upon experiencing signs of labor or childbirth; (v) she will surrender custody of the child to the Intended Parents upon its birth; and (vi) the Intended Parents shall name the child and both Intended Parents will be named the child’s legal Parents....*

...

21. Escrow. *Upon execution of this Agreement, Intended Parents will have funded a total amount of Ten Thousand Five Hundred Dollars...into an escrow account....This deposit is an initial amount for anticipated disbursements....*

22. Future Contact. *The Gestational Carrier agrees that, in the best interests of the child, she will not seek to view or communicate with the child at any time following the birth of the child except with the prior consent of the Intended Parents. The Intended Parents agree, at a minimum, to send a letter and a photograph of the child to the Gestational Carrier when the child is three months, six months, twelve months and twenty-four months of age....*

...

31. Governing Law. *This Agreement shall be governed by and enforced in accordance with the laws of US State #1.*

...

36. Independent Legal Counsel*The Intended Parents shall pay the attorney fees and costs of Gestational Carrier in accordance with the attorney's fee agreement in an amount not to exceed \$750.00, for independent legal advice regarding the meaning and consequence of this Agreement, but not for any legal advice or representations regarding breach or enforcement of this Agreement. The Gestational Carrier has chosen to retain _____ as her legal counsel. All Parties acknowledge that a potential conflict of interest exists when one Party pays the legal fees of another Party. All Parties waive any potential conflict of interest claim regarding payment of legal fees and agree that such potential conflict of interest cannot be used in any way to undermine the terms of this Agreement."*

iii. The Known Egg Donor Agreement

24. The next agreement of interest is the Known Egg Donor Agreement, entered into in 2014 between Mr D and Mr C (as intended parents) and Ms F (as donor). It provides, amongst other matters, as follows:

“[RECITALS]

...WHEREAS, INTENDED PARENTS desire to take into their home the child or children as their own which is/are created from the egg(s) of the DONOR and the sperm of each FATHER and to be carried by a GESTATIONAL SURROGATE (hereinafter ‘CHILD’); and WHEREAS, the DONOR wishes to assist INTENDED PARENTS in their goal of conceiving a child or children from the eggs of the DONOR and the sperm of each FATHER and the permanent placement of the CHILD with the INTENDED PARENTS....INTENDED PARENTS acknowledge that this Agreement pertains to a subject matter that is an unsettled area of law in US State #2 and that while they intend to be bound by the terms of this Agreement, they understand that it is possible that the Agreement may be declared by a court of law to be void as against public policy or held unenforceable on other grounds. INTENDED PARENTS warrant that they will not seek a declaration that this contract be declared void as against public policy or unenforceable on other grounds.

II. Representations of DONOR.

...C. DONOR believes any CHILD conceived pursuant to this Agreement is morally and contractually that of the INTENDED PARENTS, and should and will be raised by the INTENDED PARENTS without any interference by DONOR and without any retention or assertion by DONOR of any parental rights. DONOR does not desire to have any involvement in the gestation or birth of any child or children resulting from the donated eggs, nor does she desire to have any parent-child relationship or any other relationship whatsoever, or contact with, any child or children that may result from the donation of eggs by the DONOR....

G. DONOR acknowledges that this Agreement pertains to a subject matter that it an unsettled area of law in US State #2 and that while she intends to be bound by the terms of this Agreement she understands that it is possible that the Agreement may be declared by a court of law to be void as against public policy or held unenforceable on other grounds. DONOR warrants that she will not seek a declaration that this contract be declared void as against public policy or unenforceable on other grounds....

III. Intention of the Parties. *The PARTIES intend that DONOR shall donate any and all of her eggs retrieved from one (1) egg retrieval procedure to INTENDED PARENTS for their use in conceiving the child. The PARTIES are entering into this Agreement with the express understanding and intent that INTENDED PARENTS shall be the sole legal parents of the CHILD; INTENDED PARENTS shall assume all parental, custodial, inheritance and testamentary rights to the CHILD; DONOR shall not be the legal parent of the CHILD; and DONOR shall not have any rights or obligations whatsoever, whether legal or otherwise, with respect to the CHILD, including the right to inherit from the CHILD. The PARTIES agree and intend that [a stated provision]...of the US STATE #2 FAMILY CODE...shall apply to negate and terminate any and all of DONOR'S parental or custodial rights in or duties to the CHILD, whether legal or otherwise, if any. DONOR agrees that INTENDED PARENTS are the sole legal parents of the CHILD and that INTENDED PARENTS shall have all the rights and responsibilities associated therewith. Notwithstanding passage of any legislation that may apply to the conduct of the parties under this Agreement, each party hereby agrees that their intent, as set forth in this Agreement, shall govern any dispute should such dispute occur.*

IV. Agreement for Donation of Eggs. *In reliance on the representations set forth above, the PARTIES are hereby entering into this written Agreement whereby eggs shall be retrieved from the DONOR, fertilized with the FATHER'S sperm and transferred to uterus of a GESTATIONAL SURROGATE, all through the IVF process....DONOR understands that she is giving up any and all rights to the eggs, and any embryos created from the DONOR'S eggs and each FATHER'S sperm, including, but not limited to fertilization, implantation, gestation, birth, and custody rights to the eggs and any custody, visitation or adoption rights, or involvement whatsoever with any child or children that may result from the donation of eggs....The PARTIES specifically agree that both INTENDED PARENTS shall be considered the legal and natural parent of each CHILD. Each FATHER agrees that each CHILD shall be the legitimate child(ren) of both FATHERS and their heirs, considered in all respects including descent of property and that each FATHER completely waives forever any attempt to disclaim the CHILD.*

...

DONOR further understands and agrees that the eggs and/or embryos created from the eggs and either/each FATHER'S sperm may be frozen for future use solely by INTENDED PARENTS, and may be destroyed or disposed of by INTENDED PARENTS, in their sole discretion, at any time including after fertilisation or implantation, during gestation, or in the course of aborting any pregnancy....

...

VII. Anonymity. *The parties agree that it is not their intent and desire to remain anonymous. Accordingly, DONOR'S identity or any information that could be used to determine the DONOR'S identity, shall be disclosed to the FATHER, and FATHER's identity, or any information that could be used to determine the FATHER's identity, shall be disclosed to DONOR....*

...

IX. Payments. *The PARTIES agree that the only consideration paid pursuant to this Agreement constitutes complete and reasonable monetary compensation for all pain and suffering, all assumption of medical and psychological risks and reimbursement of expenses as stated forth below. DONOR is not selling her genetic material nor is she being paid to relinquish her parental rights to any child born from her genetic material.*

1. DONOR'S Fee. The DONOR shall be paid a fee of \$7,000 as compensation for pain and suffering and for DONOR'S assumption of all medical and psychological risks related to this Agreement. The DONOR shall receive \$750 upon confirmation that she has started [named medications]... in connection with the retrieval. The DONOR shall be entitled to receive the remaining \$6,250 within five days following the retrieval....

2. DONOR'S Attorney's Fees. The DONOR shall have the right to receive legal advice and consultation from an independent attorney. INTENDED PARENTS shall pay the attorney's fee for representing DONOR in connection with this Agreement, up to an amount that has been agreed in advance between the

INTENDED PARENTS and the attorney....

3. *DONOR'S Expenses.* *The DONOR shall be reimbursed for all reasonable and necessary expenses incurred in connection with the donation and retrieval of eggs....*

4. *Health Insurance.* *INTENDED PARENTS shall be responsible for the cost of a temporary health insurance plan...purchased by the AGENCY for the benefit of the DONOR and which will apply to all injuries or complications suffered by DONOR related to the cycle and/or retrieval....*

5. *Medical Expenses in Connection with the Egg Donation.* *INTENDED PARENTS shall pay all of the standard, anticipated medical expenses in connection with the Egg Donation Cycle....*

...

XI. Contact Between Parties. *DONOR agrees to inform the Agency and the IVF Clinic (or their designee(s)) of any change to her legal name, mailing address, email address and telephone numbers, within three months of any such change for a period of 18 years following the egg retrieval so that if the INTENDED PARENTS wish to, they may contact the DONOR through the Agency and/or the IVF Clinic.... DONOR agrees that she may be contacted by the Agency and/or the IVF Clinic on behalf of INTENDED PARENTS and/or the CHILD after the CHILD is old enough to understand the circumstances surrounding his or her conception, if the CHILD has questions about the donor and the INTENDED PARENTS consent in writing. Should the CHILD want to meet the DONOR, the DONOR shall make a determination at that time whether or not to meet the CHILD. If the CHILD does contact the DONOR, the DONOR shall not communicate with the CHILD until the DONOR has received written approval from INTENDED PARENTS of such communication.*

...

***XVIII. Miscellaneous**....**B. Governing Law.** This Agreement shall be governed and construed in all respects and be enforceable to the maximum extent permitted by the laws of US State #2.”*

iv. Admission of Non-Maternity and Advisement of Ms E

25. The next document of interest is a court document from US State #1 (from 2014) known as an “*Admission of Non-Maternity and Advisement of Ms E*” (Ms E, it will be recalled, being the woman carrying the children, *i.e.* the surrogate mother). It is a document obtained upon the petition of Mr C and Mr D and it concerns Ms E. It states, amongst other matters, as follows:

“I, Ms E, the Respondent herein, declare under oath as follows:

1. I am currently pregnant. I am not genetically linked to the Unborn Children (twins) I am carrying. I have agreed to act as a gestational surrogate for Petitioners....My pregnancy was a result of in vitro fertilisation. Embryos were created using sperm from [Mr C]...and eggs from a donor.

2. I freely admit that I am not the natural, genetic nor intended mother of the Unborn Children I am currently carrying.

3. I understand that I may have legal rights to the Unborn Children I am carrying. I do not wish to make any claim to such rights. I also understand that once Petitioners are adjudicated parents of the Unborn Children, I will not be able to petition this court for parenting time with the Unborn Children or for an allocation of parental responsibilities with respect to the Unborn Children.

4. I have entered into a gestational surrogacy agreement with Petitioners. It has always been my understanding that the natural parents of the Unborn Children are Mr C and Mr D.

5. I have read this Admission of Non-Maternity and Advisement and understand my rights.”

v. Verified Petition for Determination of Parent and Child Relationship

26. The next document of interest is a US State #1 court document from 2014 known as a “*Verified Petition for Determination of Parent and Child Relationship*” made upon the petition of Mr C and Mr D in the interest of the two unborn children and concerning Ms E, as respondent. It provides, amongst other matters, as follows:

I. FACTS....

1. *Petitioners entered into a gestational surrogacy agreement with Respondent. Pursuant to the agreement, Respondent...is to carry to term twins that were created in vitro using eggs from a donor and sperm from Petitioner, Mr C.*
2. *Respondent, Ms E, is not genetically linked to the Unborn Children.*
3. *Respondent, Ms E has admitted that she is not a parent of the Unborn Children....*
4. *Respondent is a resident of US State #1The Unborn Children will likely be born at [Stated Place].*
5. *Both petitioners are the intended natural and lawful parents of the Unborn Children. The Petitioners acknowledge their paternity of the unborn children....The Petitioners agree that Mr C will be listed as the Unborn Children's sole legal parent on the birth certificate. Mr D will be added as the Unborn Children's second legal parent through a step-parent adoption after the birth of the Children.*
6. *Petitioners, Mr C and Mr D, were married in [Stated Year]...and have been in a committed relationship for many years.*

II. ORDERS REQUESTED

7. *Petitioners request that this Court enters orders adjudicating Mr C to be the father of the Unborn Children and for birth certificates to be issued listing him as each Unborn Child's father and sole legal parent....*

III. ARGUMENT

13. *It would be in the best interests of the Unborn Children that birth certificates be issued immediately upon each Unborn Child's birth naming Petitioner, Mr C as the father of the Unborn Children. Further, the same would be the intent of the parties to this action.*

PETITIONERS, therefore, request that this Court enter [such] an Order.”

vi. Order Re: Verified Petition for Determination of Parent and Child Relationship

27. By order of 2014, the court before which the just-described Petition was brought made an order that stated, amongst other matters, as follows:

- “1. The Unborn Children (twins) at issue are being carried by Ms E and are due to be born on or about [Stated Date]....*
- 2. Ms E is not the natural mother of the Unborn Children at issue in this proceeding and her name shall not appear on either Unborn Child's birth certificate.*
- 3. Respondent, Ms E is not a parent of the Unborn Children and shall have no parenting rights or responsibilities.*
- 4. Petitioner, Mr C, is the lawful and natural parent of the Unborn Children at issue in this proceeding and shall have all parenting rights and responsibilities.*
- 5. The US State #1 Register...is ordered to prepare certificates of birth consistent with the findings of the Court and Mr C shall appear as the Father and sole legal parent of each Unborn Child.”*

vii. Final Decree of Step-Parent Adoption

28. The next document of interest is a Court Decree of Step-Parent Adoption from US State #1 made in favour of Mr D in 2015. As mentioned, the children were born in 2014 and steps were taken soon thereafter for Mr D to become an adoptive parent, leading eventually to this court decree which states, amongst other matters, as follows:

“The Petitioner appearing in person, and the Court having heard the testimony and evidence offered in support of the Petition and being fully advised finds:

- 1. That the child was born on [Stated Date in Stated Place]....*
- 2. That the written consent for adoption by the person having authority to execute the same [i.e. Mr C] appears to be genuine and the child is available for adoption.*
- 3. That the Petitioner appears to be of good moral character, to have the ability to support and educate said child, and to have a suitable home.*

4. *That the fingerprint-based criminal history record checks of the prospective adoptive parent, as reported to the Court by the county department of social services does not reveal a felony or misdemeanour conviction...at least 10 years prior to the filing of the Petition for Adoption.*

5. *The...background check...does not reflect a confirmed report of child abuse or neglect.*

6. *The mental and physical condition of the child appears to make her a proper subject for adoption by the Petitioner.*

7. *That the best interests of said child will be served by said adoption; and that the best interests and welfare of the said child will be promoted by the issuance of this Final Decree of Adoption.*

It is therefore ordered, adjudicated and decreed that the Final Decree of Adoption for the child is hereby granted, and that the name of the child remains as [Stated Name]... and that the child shall be and is hereby entitled to all rights, privileges and subject to all applications of a child pursuant to statute.”

29. This order issued in respect of one of the two twins. A like order issued in respect of the other twin. Almost three years later, Mr D applied, pursuant to s.90 of the Adoption Act 2010, as amended, to have the decree of step-parent adoption recognised and contained within the register of intercountry adoptions in Ireland.

viii. UK Parental Order

30. The family here have a close affinity with England, the country from which Mr C originally hails. As a consequence they previously made an application in that jurisdiction, pursuant to the Human Fertilisation and Embryology Act 2008, for a parental order in respect of the twins. This order issued in 2019. The solemnity and importance of such an order was brought home by Munby J. in *Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam) (HC), where he observed as follows, at para.54:

“A parental order, like an adoption order, has an effect extending far beyond the merely legal. It has the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious, consequences. It creates what

Thorpe LJ in Re J (Adoption: Non-Patrial) [1998] INLR 424, 429, referred to as 'the psychological relationship of parent and child with all its far-reaching manifestations and consequences.' Moreover, these consequences are lifelong and, for all practical purposes, irreversible...".

ix. US State #1 Affidavit of Law

31. Among the documentation furnished before the court was an affidavit sworn by an experienced attorney from US State #1 as to certain aspects of the law of US State #1. The key paragraph of the affidavit is para.4 in which the attorney avers as follows:

"I say and believe that the adoption confirms to the definition of 'foreign adoption' contained in section 1 of the Adoption Act 1991 as it read on 30th May 1991 in that the adoption satisfies the following criteria: (a) At the date on which the adoption was effected, the child was under the age of 18 years. (b) The adoption was effected...under and in accordance with the law of...US State #1 and in relation to which the following conditions are satisfied: (i) The consent to the adoption of every person whose consent to the adoption was under the law of...US State #1 required to be obtained or dispensed with was obtained or dispensed with under that law. (ii) The adoption has the legal effect of terminating absolutely and permanently all rights of the Birth Mother of the children. (iii) The law of...US State #1 required an inquiry to be carried out as far as was practicable into the adopters, the children, and the parents and guardians. (iv) The law of ...US State #1 required its court or other authority or person by whom the adoption was effected to give due consideration to the interests and welfare of the said children before deciding on the adoption. (v) The adopter has not received, made or given or caused to be made or given any payment or other reward other than payment reasonably and properly made in connection with the making of the arrangements for the adoption in consideration of the adoption or agreed to do so."

D. The Pleadings

32. A number of documents in the pleadings might usefully be mentioned.

(i) The Affidavit of Mr D

33. Mr D has sworn an affidavit in which he avers, amongst other matters, as follows:

“4. I say that your Deponent and the First Named Notice Party have three children....I say that the within Case Stated is in respect of Master A and Miss B, who are twins....

5. The purpose of this Affidavit is to firstly provide the High Court with the background to the application to the Adoption Authority of Ireland...to register my step-parent adoptions in respect of Master A and Miss B onto the Register of Foreign Adoptions (hereafter the ‘RICA’). Both your Deponent and Mr C are seeking the inclusion of my step-parent adoption of the twins, made by the [Stated Court of US State #1]...onto the RICA so that we can be recognised as their parents under Irish law.

6. Secondly, this Affidavit also addresses certain contents of the Case Stated....

Surrogacy in Respect of Master A and Miss B

16. In 2012, we made the decision that we wished to have a family of our own. We briefly considered adoption but there were practical barriers to us doing this in the United States and internationally, both because we are a same-sex couple and were not United States citizens at the time. In the same year, we attended a conference for same-sex couples who were interested in having children via gestational surrogacy and met XYZ, an agency based in US State #2.

17. Our surrogacy journey lasted from 2013 to 2018 during which we had two successful journeys with two separate surrogates. We now have three genetically related children from these journeys. There were other unsuccessful journeys with two other surrogates and an initial egg donor with whom we did not have success. We are so incredibly grateful to the...surrogate mothers...and to the egg donor...for making our family possible.

18. I say that GHI provided us with a selection of profiles for egg donors who were willing to be ‘known’ and also happy to work with same sex couples. Before deciding to match with a potential egg donor, we flew to ——— and met Ms F in person. It is very important to us that our children will have the chance to meet Ms

F when they are older. She has shared photos of herself and her family (including her [child]) with us and we regularly send her photos of the children, especially on special days such as their birthdays. Ms F is open to meeting them when they are older.

19. For our successful journeys, resulting in the births of all three of our children, the embryos used were created at [Stated Company in]...US State #2 with Mr C's sperm and donor eggs from Ms F.

20. ...The Known Egg Donor Agreement with Ms F dated...2014 confirms Ms F's position that she relinquished all of her parental rights and duties. I am advised and so believe that there was no further requirement, whether in US State #2 or elsewhere, for Ms F to complete any further written agreement or give consent to any subsequent steps.

21. After our first unsuccessful journey with a surrogate, XYZ helped us find Ms E, who was our second surrogate. It was very important to us to work directly with an agency to ensure that all the steps of the process were properly followed and that our journey was handled entirely in an ethical and legal way. XYZ helped us find our surrogates and a sister organization, GHI, helped us find our egg donor, Ms F.

22. As with the egg donation process, XYZ provided us with profiles for surrogates who were happy to match with same-sex couples. We liked Ms E's profile. We wished to find a surrogate who was unmarried and who was prepared to meet any child born as a result of the arrangement when they were older. After an initial video call via Skype, we flew...to meet Ms E in person. Over dinner, we discussed her motivations for becoming a surrogate. She wished to help another couple start a family and felt that she had the support of her family (her mother who lived locally and her father and brother). She shared photos of her [child]...with us. It was a very pleasant meeting and we felt that she understood the responsibilities of being a surrogate and that we could have a good surrogacy journey together.

23. Having met Ms E, we asked XYZ to 'match' us. The agency prepared a legal match sheet which was shared with their lawyer who drafted a gestational surrogacy agreement. We were represented by a different attorney to Ms E to ensure that we all entered into the agreement on an informed and equal basis. Ms E requested several changes to the draft agreement and these were reflected in the final document. Ms E entered into the agreement on the basis that we would be the parents of the children and that she would have no parental responsibilities, nor

obligations in relation to the children once born. Ms E acted as a gestational surrogate or carrier. I say that paragraph 6 of the Case Stated refers to the twins being born in the context of a commercial surrogacy arrangement. I say that I respectfully suggest that it is appropriate to refer to the arrangement as a compensatory surrogacy arrangement.

24. ...Notwithstanding the provisions in the agreement with XYZ that certain services be provided post-delivery, XYZ were not involved in any processes at the hospital relating to the birth certification, nor were they involved in any post-delivery legal processes.

25. Furthermore, notwithstanding the provisions in the agreement for the payment of legal fees, we were not involved in choosing a legal advisor for Ms E, who retained her own legal advisor. Ms E's legal advisor was totally independent of us and independent of XYZ. The payment to XYZ was for surrogacy related services and not adoption services.

26. Having completed the surrogacy agreement, we had an unsuccessful transfer with Ms E. On the second transfer, two embryos were transferred to Ms E, who became pregnant. We were overjoyed when the clinic told us that Ms E was pregnant. It was not immediately clear to us that both embryos had been successfully implanted but when a scan showed two heartbeats, we were delighted. Throughout the pregnancy we kept in touch with Ms E by phone and by text to provide her with additional support. She sent us photographs of any scans she had. We visited [Stated Place]...for the 20-week scan and met the birthing manager at the hospital where the twins would be born. We have the most amazing colour 3D photos from that scan.

27. Our attorney in US State #1 assisted with the pre-birth parental order which confirmed Mr C as the twins' legal parent and confirmed that Ms E was not their legal mother.

28. The twins were born prematurely and immediately after birth they were transferred to a neonatal intensive care unit where they remained for 3 weeks. On account of being very premature, they did not breath automatically all the time and occasionally would stop breathing. All decisions referable to their care were made by your Deponent herein and Mr C in consultation with treating doctors. We discharged, through insurance, the medical fees incurred for the purposes of the twins' care....

29. *For the first few days after the births, Ms E was also quite unwell due to pre-eclampsia and remained in the hospital. Ms E visited the twins....She was discharged not long after. We stayed in [Stated Place]...for several weeks after the children were discharged from hospital and Ms E visited us several times to spend time with the babies. Her family visited her and we met her father and her brother. Mr C's parents joined us not long after the twins' birth from the United Kingdom. They were overjoyed to spend time with their first grandchildren.*

30. *From immediately after their birth, the twins were given over to the care of your Deponent herein and Mr C. They have been in our care ever since. We are the only parents they have ever known.*

PAYMENT

31. *Throughout the surrogacy, certain payments were made by us to our surrogate through our surrogacy agency. The payments to Ms E were agreed by XYZ with her and us. We did not negotiate the fees to the agency or the payments to Ms E and were informed by the agency that the fees were standard. The fee structure was quite complex and we relied upon the agency to help us with this part of the process. It was also important to us that we were not involved with the payment process and all payments were made by the agency to E. An escrow account was set up for this purpose and this account was managed by XYZ. We also did not discuss payments with Ms E at all before, during or after the pregnancy. We wanted our relationship with her to concentrate on the pregnancy. We also paid a fee for the arrangement of the surrogacy to XYZ and a fee to the egg donor.*

32. *None of the payments referred to at paragraph 31 above were prohibited under the law of US State #1 or US State #2. The payments to both Ms E and Ms F were compensatory payments and in the case of Ms E, to provide pre-birth financial support....[S]uch payments were not provided either in contemplation of adoption or to support/maintain the twins after birth.*

STEP-PARENT ADOPTION OF MASTER A AND MISS B

33. *Not long after the twins were born, I followed a step-parent adoption process in...US State #1. At that point, the legal status of the non-biological same sex parent was not completely secure without this step.*

34. *...No payment was made or contemplated for the adoption of a child or children.*

Adoption was not in our contemplation at the time the agreement with XYZ was entered into. The Agreement with XYZ is dated...2013. The children were born [in]...October 2014 and the adoptions did not take place until...February 2015. If there is any suggestion being made that we acted illegally in some way, that is entirely refuted. The reality is that Mr C is the biological father of the children and I, as Mr C's husband, am the parent of the children by adoption. The adoption took place in...US State #1 and fully complied with the laws of that State.

35. I say that it is incorrect at paragraph 52(b) of the Case Stated to characterise your Deponent herein as being 'at all relevant times a prospective adopter of the children as an 'Intended Parent' under the agreements entered into'. Following Ms E becoming pregnant, we discussed the legal options for both your Deponent herein and Mr C securing parentage. I say that we were advised at that time that the status of a non-biological same-sex parent was unclear in the United States. This was a serious legal risk, for example, in respect of medical decisions, with consequent uncertainty for our children, that we were not prepared to accept. Accordingly, I only became a prospective adopter after Ms E was pregnant, at which point we discussed the options with an attorney in US State #1 for securing parentage and decided that a step-parent adoption was a more secure way of achieving parental rights.

36. Following the resulting pregnancy for Ms E and prior to the birth of the children, Mr C filed a Verified Petition for Determination of Parent and Child Relationship. Ms E was notified of same and filed an Admission of Non-Maternity and Advisement dated...2014 acknowledging that she had entered into a gestational surrogacy agreement with your Deponent herein and Mr C. In the Affidavit, Ms E states her understanding that the natural parents of the unborn children are your Deponent herein and Mr C and that she does not wish to make any claim to legal rights in respect of the unborn children.

37. [In]...August 2014, the [Stated Court in US State #1]...made an Order that Mr C is the lawful and natural parent of the twins and shall have parenting rights and responsibilities.

38. [In]...February 2015, the [Stated Court in US State #1]...made a Final Decree of Step-Parent Adoption in favour of your Deponent herein in respect of both children. As the sole legal parent of the twins the only consent required for the adoption of the twins by your Deponent herein was that of their sole parent Mr C,

which was provided.

39. The [Stated Court in US State #1]...heard testimony from both your Deponent herein and Mr C. I say that the Court adjudged your Deponent to be of good moral character, to have the ability to support and educate the children and to have a suitable home. The Court also recorded that both a criminal history check and a check by the Department of Human Services did not reflect any matters. The Court found that the best interests of the children would be served by the adoption and that the best interests and welfare would be provided by the issuance of the Final Decree of Adoption.

40. In response to paragraphs 44-48 of the Case Stated, I say that this was not a private placement. The adoption of the children was a step-parent adoption, which is a form of adoption well recognised under Irish law....

PARENTAL ORDER IN THE UNITED KINGDOM

42. On 18 June 2019, the United Kingdom Family Court...issued a Parental Order in respect of the twins pursuant to Section 54 of the Human Fertilisation and Embryology Act, 2008....Accordingly, under United Kingdom law, both your Deponent herein and Mr C are the parents of the twins....In relation to the Parental Order application for the twins made in June 2019, Ms E was named as a First Respondent. Ms E completed an acknowledgment of service confirming that she had been served with a C51 parental order application for the twins. Ms E was provided with the details of the time and location of the court hearing and declined to participate in the proceedings.

CURRENT LIVING AND CARE ARRANGEMENTS FOR THE CHILDREN

43. [The Deponent describes what is clearly a happy and loving home environment]....

44. We are very committed to our children's futures wherever they may be. We both enjoyed a good education and want the same for our children. It is also important for us that they appreciate both their United Kingdom and Irish identities....We travel regularly and they have visited both the United Kingdom and Ireland to see relatives several times....

45. ...[As regards] the question raised [in the Case Stated] regarding best interests and identity, I say as follows. In so far as the rights of our three children are

concerned, the egg donor...and the surrogate mothers...are both known. They have never been hidden from the children. We are in contact and communication with them. We exchange photographs and information about our respective families. We intend to share age-appropriate details with the children about their provenance and the people involved in the process. This was why it was particularly important for us to engage with surrogates who also supported us in this regard. In due course, we will share Ms F's egg donor profile and the profile of Ms E...with them. We will keep all the documentation from both successful journeys so that the children may review it at an appropriate point in their lives.

46. At all times, on each and every step of our journey, we considered the best interests of any children that we may have been fortunate to have as being at the centre of all decisions taken by us. We continue to do so and consider it to be in the best interests of the children that my step-parent adoptions be registered on the RICA in this jurisdiction.”

(ii) The Affidavit of Mr G

34. It will be recalled that the Gestational Surrogate Agreement is governed by the law of US State #1. As a consequence, the court has been furnished with an affidavit by Mr G, an attorney of US State #1, which treats with certain aspects of the law of US State #1. Mr G avers, amongst other matters, as follows (his averments as to the law of US State #1 are not contested):

“On October 25, 2017, Mr D...sought to register the step-parent adoptions with the register of intercountry adoptions maintained by the Adoption Authority in Ireland. Mr D sought to do so on the basis that once registered, the children would be recognised as Irish citizens and eligible for Irish passports. The Adoption Authority has questioned whether under Irish law they have the power to register the foreign adoption decrees due to the fact that the adoptions stem from the use of donor eggs and involve gestational surrogacy. The Adoption Authority of Ireland has stated a case to the Irish Family High Court in which numerous questions have been put to the Court for determination. Mr C and Mr D are joined as notice parties to the proceedings....[A] legal opinion [has been requested] from me addressing [certain] issues...for purposes of better understanding US State #1 law.

ISSUE 1: Whether US State #1 Law Requires the Consent of the Egg Donor and the Gestational Surrogate in a Stepparent Adoption?

...In the case at bar, the genetic and intended father of this gestational surrogacy arrangement, Mr C, appropriately initiated a prebirth parentage case to establish himself as the legal father of the twins under US State #1 law. It is significant that the gestational surrogate, Ms E, received notice of the parentage proceeding and specifically signed an Admission of Non-Maternity and Advisement on August 14, 2014. In that admission, the surrogate acknowledges that she is not the natural, genetic, nor the intended parent of the children she carried, and disclaims any parentage rights to the children. On the basis of the Petition filed by Mr C and the surrogate's admission, [a US State #1 court]...properly entered an order [in August 2014]...declaring that the surrogate, Ms E, is not a parent of the children and did not have any current or future parental rights or responsibilities. The Court found and held that Mr C was the lawful and sole parent of the children.

Due to the fact that the surrogate was determined not to be a parent in the prior parentage proceeding, US State #1 law provides that she was not entitled to notice; nor was her consent required in the subsequent stepparent adoption proceedings initiated by Mr D.....

It is also noteworthy that no notice nor consent of the egg donor was also required in the stepparent adoption proceedings....

ISSUE 2: Whether US State #1 Law Permits the Payment for Donation of Genetic Material and Payment to a Gestational Surrogate if a Subsequent Stepparent Adoption of a Child is Contemplated by the Parties?

US State #1 has no prohibition against compensating both donors of genetic material and gestational surrogates in contemplation of a parentage action and stepparent adoption proceedings. Indeed, US State #1 law supports the notion that intended parents can compensate egg donors and that they will support their children in-utero while being carried by a gestational surrogate.

In fact...[US State #1's law] allows a man or woman to establish paternity or maternity based upon considerations other than biology or adoption, and of which was utilized to establish Mr C as the initial sole legal parent, requires the parent to support his child in utero....

US State #1 statute...fully recognizes that donors can be compensated for their genetic material given the risks and time associated with the retrieval procedure....

ISSUE 3: Whether US State #1 Law Recognises a Gestational Carrier Agreement whereby a Subsequent Stepparent Adoption is Contemplated by the Parties to the Agreement?

The legal process by which Mr D and Mr C pursued to establish each of them as legal parents is specifically authorized and is consistent with US State #1 law. This process includes: (1) initially entering into a Gestational Carrier Agreement; (2) procuring a parentage decree on behalf of the genetic father; and (3) securing a stepparent adoption on behalf of the non-genetic spouse....

Here, Mr C and Mr D initially entered into an enforceable gestational carrier agreement with Ms E prior to the embryo donation. Once a pregnancy occurred, Mr C and Mr D were each independently established as a legal parent; Mr C by a prebirth parentage decree and Mr D through a subsequent post-birth adoption decree. Accordingly, the parties, Mr D and Mr C, fully complied with this law in all respects.

ISSUE 4: Whether US State #1 Law Permits a Court Order Prior to the Birth of a Child Whereby the Gestational Surrogate is Able to Give Up her Parental Rights to the Unborn Child.

The [law]...by which Mr C established himself prebirth as the sole legal parent of the children, specifically authorizes a parentage proceeding to be initiated prior to delivery....

ISSUE 5: Whether the Proposed Plan Involving an Initial Parentage Determination on Behalf of One Father Followed by a Stepparent Adoption by the Second Father is in the Children's Best Interests?

While Mr C and Mr D initially expected to file one prebirth parentage action to declare both of them as the legal parents of the children, as contemplated by the Gestational Carrier Agreement, they later changed their chosen legal pathway to establish parentage once their surrogate was pregnant based upon advice of their US State #1 legal counsel. Mr C and Mr D thus ultimately sought to establish each as a legal parent under US State #1 law through two different legal proceedings; one a pre-birth parentage proceeding, and secondly, a stepparent adoption proceeding filed after the children's birth. They did so on advice of counsel due to the fact that not all jurisdictions in the United States and abroad will universally recognize a parent-child legal relationship of the nongenetic father absent an adoption order....

CONCLUSION

Based upon my many years of practice and in-depth understanding of US State #1 law I believe that Mr D and Mr C have fully complied with all aspects of US State #1 adoption, surrogacy, and egg donation laws...such that a court of competent jurisdiction in US State #1 properly entered a step-parent adoption Order [in 2015]....In my legal opinion there were no irregularities with the substance and processes pursued by Mr D and Mr C in establishing themselves as legal parents of the twins under US State #1 law. While I appreciate that this is ultimately a question of Irish law...the US State #1 adoptions for the twins appear to conform with the definition of 'foreign adoption' contained in Section 1 of the Adoption Act of 1991 as it read on 30th May 1991."

(iii) The Affidavit of Ms H

35. It will be recalled that the Known Egg Donor Agreement is governed by the laws of US State #2. As a consequence, the court has been furnished with an affidavit by a US State #2 attorney, Ms H, which treats with certain aspects of US State #2 law. Ms H avers, amongst

other matters, as follows (her averments as to US State #2 law are not contested):

“COMPENSATED EGG DONATION IN US STATE #2

Compensation for egg donation is common in US State #2, both in the form of paying for expenses of the donor and direct payments to the donor. US State #2 law does not prohibit purchase or sale of sperm or eggs when they are being provided to a licensed physician for use in assisted reproduction....

The fact that Mr C and Mr D compensated their egg donor is standard practice in US State #2 or United States egg donation. It is consistent with US State #2 public policy...

US STATE #2 LAW REGARDING DONORS AS PARTIES TO SURROGACY AGREEMENTS

US State #2 law is clear that contracts between parties regarding stored genetic material (i.e. embryos, eggs, and sperm) are valid and binding....

When it comes to assisted reproductive technology law, US State #2 makes a distinction between two different categories of people: donors — who lack the status of legal parent and therefore all the rights and duties that come with parentage — and parents....

With...[the] crystal-clear disclaimer of a potential right by contract [via the Known Egg Donor Agreement] and with the norm in US State #2 being to not require egg donor approval of Gestational Agreements as a matter of statutory construction even without a contract disclaiming that potential right a US State #2 judge would not require Ms F to sign a US State #2 Gestational Agreement....

Unsettled Area of Law Language

It is sometimes said that Assisted Reproductive Technology is an ‘unsettled area of law’ in this country. That is in fact not the case in US State #2. US State #2 has a robust statutory framework regarding gestational surrogacy agreements...[and which state] what the prerequisites to a gestational agreement are....

Against public policy language

The Known Egg Donor Agreement includes the phrase: 'While the parties intend to be bound by the terms of this Agreement they understand that it is possible that the Agreement may be declared by a court of law to be void as against public policy or held unenforceable on other grounds.' This type of language is not uncommon in these agreements and merely means that were US State #2 or another relevant jurisdiction to change its laws or disapprove of the parties' agreement, the parties are affirming they still wish the agreement to remain valid to the maximum extent permissible by law....

[I]t is also consistent with US State #2 public policy to have an agency like XYZ facilitate the legal process of assisting Intended Parents to finalise their parentage through Surrogacy, and otherwise take the actions listed in the Gestational Surrogacy Retainer Agreement.

GESTATIONAL SURROGATE'S ATTORNEY

In the Gestational Surrogacy Retainer Agreement, XYZ and the Intended Parents agree that one of XYZ's tasks will be to 'ensure that the selected Surrogate has access to an independent attorney to counsel and advise her prior to signing the Surrogate Agreement so that Surrogate has 'informed consent'.'

This is not problematic in US State #2. First of all, it is the best practice for the surrogate to have her own attorney, who does not represent the agency or the Intended Parents, but only her (and occasionally also her spouse)....

PUBLIC POLICY OF US STATE #2

There is nothing about the way that Mr C and Mr D had their children that is against the public policy of US State #2. The use of an egg donor and compensated Gestational Surrogate is a not-uncommon, increasingly popular way for same-sex male couples to have their own biological children in US State #2 and elsewhere in the United States. Mr C and Mr D's paperwork is in order. As is perfectly legal in the United States, Mr C and Mr D contracted with a US State #2 egg donor and received an egg donation from her, doing nothing illegal or against US State #2 public policy. Then with the help of their US State #2 agency they found a US State

#1 surrogate. Mr C and Mr D contracted with the US State #1 surrogate and used US State #1 law to legally finalise their parentage in ways that are legal in US State #2 and consistent with US State #2 law and public policy. Furthermore, consistent with the norm in US State #2 and throughout the United States the Gestational Surrogate was represented by an attorney. The US State #1 agreement in this case acknowledges a potential conflict of interest. Representing one party while accepting payment from another is not a violation of the US State #2 Conflict of Interest rules. So long as the client consents, nobody interferes with the attorney-client relationship, and client confidentiality is maintained.”

36. There is no dispute in these proceedings but that the respective laws of US State #1 and US State #2 are as set out in the just-considered two legal opinions.

E. The Case Stated – I

43. The Case Stated goes through the details of the case in some detail. These have been considered above and the court does not propose to re-consider them here. It confines itself simply to reciting the questions that have been referred to it by the Adoption Authority:

“1. Is it contrary to section 125(1)(a) of the Adoption Acts, as amended (the ‘Acts’) for a person or persons to:

(a) enter into an agreement with a third party to assist in facilitating the birth of a child if the adoption of that child is contemplated by the parties to an agreement? (b) enter into an agreement with a person for the donation of genetic material if the adoption of that child is contemplated by the parties to the agreement?

(c) enter into an agreement with a person to give birth to a child in the mutual contemplation that the child will be adopted by one of the parties to the agreement? (d) apply for a court order prior to the birth of a child in which the person to give birth abjures her legal rights to the unborn children?

(e) arrange for the obtaining of an order in which the person to give birth abjures her legal rights to the unborn children in the contemplation that a person who is not the natural parent of the children will be adjudicated as the legal parent after birth?

2. *Is it contrary to section 145(1) of the Acts for:*

(a) a person to receive compensation for the donation of genetic material if the adoption of the resulting child is contemplated by the parties to the arrangement?

(b) a person to receive compensation for giving birth to a child if it is contemplated that the child will be adopted by one of the parties to the arrangement?

3. *Is it contrary to section 145(2) of the Acts for a person or persons to:*

(a) pay monies to a person for the donation of genetic material if the adoption of any resulting child is contemplated by the parties to the arrangement?

(b) pay monies of any kind to a person giving birth to a child if it is contemplated that the child will be adopted by one of the parties to the arrangement?

(c) pay monies for compensation and inconvenience to a person giving birth to a child if it is contemplated that the child will be adopted by one of the parties to the arrangement?

(d) pay monies for un-vouched expenses to a person giving birth to a child if it is contemplated that the child will be adopted by one of the parties to the arrangement?

4. *Is it contrary to section 145(3) of the Acts:*

(a) for monies to be paid to a third party to assist in facilitating the birth of a child if the adoption of that child is contemplated by the parties to the agreement?

(b) for monies to be paid to a person in connection with the donation of genetic material if the adoption of any resulting child is contemplated by the parties to the arrangement?

(c) for monies of any kind to be paid to a person giving birth to a child if it is contemplated that the child will be adopted by one of the parties to the arrangement?

(d) for monies for compensation and inconvenience to be paid to a person giving birth to a child if it is contemplated that the child will be adopted by one of the parties to the arrangement?

(e) for monies for un-vouched expenses to be paid to a person giving birth to a child if it is contemplated that the child will be adopted by one of the parties to

the arrangement?

5. Is it consistent with the Authority's duties under section 19 of the Acts to have regard to the best interests of the child as the paramount consideration to recognise an intercountry adoption effected outside the State where:

(a) legal orders waiving the potential rights of a parent were obtained prior to the birth of the child?

(b) arrangements were undertaken in contemplation of the adoption of a child prior to the child's birth?

(c) the aforesaid orders and arrangements were undertaken on foot of agreements which involved the payment of monies to the potential parent?

(d) the Authority has not been provided with evidence of any substantive assessment of the best interests of the child prior to an adoption order being made?

(e) the Authority has not been provided with evidence of any substantive assessment of the suitability of the prospective adoptive parent(s)?

(f) the sole evidence before the Authority regarding the best interests of the child is an order of a foreign court that records on its face that the adoption will serve the child's best interests?

6. Is the entry of an intercountry adoption effected outside the State into the register of intercountry adoptions without reference to the identity of the genetic mother or birth mother consistent with the rights of the child under the Constitution of Ireland and the European Convention on Human Rights to information concerning their birth and identity?

7. Where an application for recognition of an intercountry adoption effected outside the State relates to an adoption in the context of assisted human reproduction, is it necessary for the consent to be obtained of:

(a) the genetic parent(s) of the child?

(b) the birth mother of the child?

8. Where the consent of a person is required to recognise an intercountry adoption effected outside the State, is that consent valid if:

- (a) it is provided in the context of a contractual arrangement which provides for the payment of monies to the person providing consent?*
- (b) it is provided following the provision of independent legal advice that it paid for and procured by the prospective adoptive parent(s) or their agents?*
- (c) the consent is provided prior to the birth of the children?*
- (d) there is written consent to waive rights arising in respect of a process of assisted human reproduction but not in respect of the making of an adoption order?*

9. *Would the entry of the decrees of step-parent adoption in respect of the children in this case into the register of intercountry adoptions be:*

- (a) contrary to public policy?*
- (b) otherwise inconsistent with the provisions of the Acts?"*

F. Analysis

(i) Overview

37. As mentioned at the outset, this Case Stated concerns the recognition by Ireland of foreign domestic adoptions. It happens that the foreign domestic adoptions in this case arose following a pregnancy which involved a surrogacy arrangement. But the case is fundamentally about the recognition (in truth quite straightforward recognition) of two foreign domestic adoptions, something readily done ‘within the four walls’ of the Adoption Acts. It follows from the foregoing that the issues in this case must be viewed through the lens of the recognition of foreign adoptions and the rules about the recognition of foreign adoptions contained in the Adoption Acts. Those rules are quite precise, they have been in place since 1991, and despite opportunities for the Oireachtas to substantially reform them in 2010 and again in 2017, have been left largely intact. That this should be so (and it is so) is significant. It reflects a particular attitude to the issue of the recognition of foreign adoptions. That attitude is based on the notion that a foreign adoption concerns the status of the person subject to the adoption and of the adopters in relation to that person, such matters of status being, under the common law and under statute, essentially a matter for the law of the country of habitual residence.

(ii) The Questions that a Court Needs to Consider

38. The combined effect of the Limb B Definition and s.57 of the Act of 2010, is that a ‘foreign domestic adoption’ now falls to be recognised in Ireland, provided that the following questions can each be answered ‘yes’: (1) is it the case that the ‘foreign domestic adoption’ is *not* an intercountry adoption? (2) was the ‘foreign domestic adoption’ made on or after the Act of 2010 came into effect? (3) has the ‘foreign domestic adoption’ been certified by the competent authority of the state of the adoption? (4) were the adopters party to the ‘foreign domestic adoption’ habitually resident, at the time of the adoption, in the jurisdiction where the adoption was granted? (5) was/were the child/ren the subject-matter of the ‘foreign domestic adoption’ under the age of 18 years at the date of the adoption in the foreign jurisdiction? (6) was the ‘foreign domestic adoption’ effected in accordance with the law of the jurisdiction where it was granted? (7) does the ‘foreign domestic adoption’ conform to the definition of a “*foreign adoption*” in s.1 of the Adoption Act 1991 as it read on 30th May 1991? and (8) is it the case that the recognition of the ‘foreign domestic adoption’ is *not* contrary to public policy?

39. Here, it is clear from the evidence that the answer to Questions (1)-(6) is ‘yes’. That leaves Questions (7) and (8).

40. Question (7), when one has regard to the text of s.1 of the Adoption Act 1991 as it read on 30th May 1991, yields the following sub-questions, the answer to each of which must be ‘yes’: (i) was the adoption effected outside Ireland by a person or persons under and in accordance with the law of the place where it was effected? (ii) was the consent to the adoption of every person whose consent to the adoption was, under the law of the place where the adoption was effected, required to be obtained or dispensed with, in fact obtained or dispensed with under that law? (iii) does the adoption have essentially the same legal effect as regards the termination and creation of parental rights and duties with respect to the adopted child/ren in the place where it was effected as an adoption effected by an adoption order? (iv) does the law of the place where the adoption was effected require an enquiry to be carried out, as far as was practicable, into the adopters, the child and the parents or guardian? (v) does the law of the place where the adoption was effected require the court or other authority or person by whom the adoption was effected, before doing so, to give due consideration to the interests and welfare of the adopted child/ren? and (vi) is it the case that the adopters have not received, made or given or caused to be made or given any payment or other reward (other than any payment reasonably and properly made in connection with the making of the arrangements

for the adoption) in consideration of the adoption or agreed to do so?

41. The court returns to the issue of payment later below. Suffice it for now to note that the answer to each of sub-Questions (i) to (vi) is ‘yes’, with the result that the answer to Question (7) is ‘yes’, thus leaving the court to address Question 8, *i.e.* ‘Is it the case that the recognition of the ‘foreign domestic adoption’ is *not* contrary to public policy?’

(iii) Public Policy

42. It is perhaps useful for the court to note firstly the observation of Murray J. in *MR & DR v. An tArd Chláraitheoir* [2014] 3 IR 533 that “*Although there is no law either authorising or regulating surrogacy in any form, it is not unlawful, as such*”, para. 147. So there is no general illegality presenting in the surrogacy arrangements which preceded the adoptions in this case that would somehow operate to prevent those adoptions now being recognised under the Adoption Acts. (For the avoidance of doubt, the court notes that no illegality *at all* presents in the arrangements under consideration; the two fathers, to use a colloquialism, have been at pains throughout the surrogacy and adoption processes to do everything ‘by the book’ and in accordance with all applicable law).

43. The judgment of the Supreme Court in *Nottinghamshire County Council v. B* [2011] IESC 48 is also of interest (notwithstanding that it is an abduction case), for it suggests that the test as to whether the recognition of a foreign adoption in Ireland would offend against public policy, certainly in terms of offending against Irish constitutional norms, is very high, with a court in effect having to ask itself

‘Is it the case that a particular adoption is not (a) so fundamentally at odds with the forms of adoption which can be permitted under the Irish Constitution and (b) so clearly contrary to the values protected by the Irish Constitution, that an Irish court could not make an order which would in any way facilitate such a result?’

44. The court respectfully does not see that it needs to look beyond the dicta of the Supreme Court in *Nottinghamshire County Council* to reach the conclusion that, when it comes to the recognition of foreign adoptions, public policy has a limited function and is confined to egregious cases. However, if the court had to do so, it would respectfully adopt in this regard

the logic and reasoning of Munby P. in *In re N* [2016] EWHC 3085, [2018] Fam.117 (HC), in particular: (1) his reliance on the observation of Lord Denning MR in *In re Valentine's Settlement* [1965] Ch. 831 (CA), p.842, that “*If you find that a legitimate relationship of parent and child has been validly created by the law of the parents' domicile at the time the relationship is created, then the status so created should be universally recognised throughout the civilised world, provided always that there is nothing contrary to public policy in so recognising it*”; (2) his observation, at para. 92 of his judgment, by reference to the judgment of Hedley J. in *In re T and M (Adoption)* [2011] 1 FLR 1487 (HC), that the correct approach in comparing domestic adoptions and foreign adoptions is “*confined to concept and not process, substance rather than safeguards*”; and (3) the following observations as to the role of public policy, iterated by Munby P. at para.129 of his judgment:

“*[P]ublic policy in this context has a strictly limited function and is...properly confined to particularly egregious cases, as explained, compellingly and correctly, in the [following] passage from Dicey, Morris & Collins, The Conflict of Laws, 15th ed, vol 2, para 20-133...:*

‘If the foreign adoption was designed to promote some immoral or mercenary object, like prostitution or financial gain to the adopter, it is improbable that it would be recognised in England. But, apart from exceptional cases like these, it is submitted that the court should be slow to refuse recognition to a foreign adoption on the ground of public policy merely because the requirements for adoption in the foreign law differ from those of English law. Here again the distinction between recognising the status and giving effect to its results is of vital importance. Public policy may sometimes require that a particular result of a foreign adoption should not be given effect to in England; but public policy should only on the rarest occasions be invoked in order to deny recognition to the status itself.’”

45. Comfortingly, the stance taken by Munby P. and, indeed, by the learned authors of Dicey, Morris and Collins, finds echo in the approach adopted by the Supreme Court in *B & B v. An Bord Uchtála* [1997] ILRM 15.

46. Suffice it for the court to note that there is nothing immoral or mercenary at play in these proceedings, there are no prostitution, no trafficking, no child abuse issues presenting, nothing of the exceptional/egregious quality which would raise public policy concerns. All that presents is the wholesome love of two men for each other and for their children. On the Family List one so often encounters unhappiness that it is, frankly, wonderful to be asked to adjudicate in a case where such an abundance of love and joy presents. No public policy concern presents in terms of recognising the adoption that it has been sought to recognise here, not even as regards the payments to which reference has been made in the description of the applicable facts previously above and which the court now turns to consider in more detail.

(iv) The Payments Made

47. As was touched upon previously above, s.145 of the Act of 2010 provides, amongst other matters, as follows under the heading “*Prohibition against Receiving, Making or Giving Certain Payments and Rewards or Agreeing to do so*”:

“(1) A person who is — (a) an adopter, (b) a prospective adopter, (c) a parent, or (d) a guardian, of a child shall not receive or agree to receive, in consideration of the adoption of the child, any payment or other reward.

(2) A person shall not make or give, or agree to make or give, any — (a) payment, or (b) other reward, the receipt of which is prohibited by subsection (1).”

48. When it comes to s.145, the court respectfully adopts the substance of the reasoning urged on it by counsel for the Attorney General at the hearing of this matter:

“[T]he State’s position in this is that the Court can in this case distinguish between the surrogacy arrangements and the adoption arrangements and can see those as two separate issues, and it is perfectly clear that the law in US State #1...views these as two separate [matters]...And it’s quite interesting to note in Mr. G’s affidavit that in fact the law in US State #1 would have similar provisions about not paying for adoptions that we...have here, because it’s clear from the affidavit that what was required was that Mr D had to prove that he had not made payments to Mr C in relation to the procuring of the adoption, as it were, in order to obtain the adoption order. And to the extent that Mr D was obliged to submit to the Court

expenses that had been paid for medical care for the children because they had been born prematurely, it was necessary for the court in US State #1 to be told [the amount paid]...and...that that payment wasn't for the adoption and that in fact it had been largely discharged through medical insurance....So it wasn't enough just to say 'I didn't pay any money', [the fathers]...had to go through what had happened and give details of it. So it seems that the law in US State #1 would have similar considerations about the payment of money in a reasonably similar fashion to the law in Ireland. Obviously the same does not apply to surrogacy, which is permitted [in US State #1] on a commercial basis but is seen as separate. So it wasn't a case that Mr D, in the context of the adoption proceedings, had to give information about money that he paid in the surrogacy. He had to give information about any money that could be interpreted as being a payment for adoption and that only went to the medical expenses after birth. So can I suggest...that in circumstances where there is a clear and distinct separation of those two aspects as a matter of law in US State #1, and they're dealt with quite distinctly, that for the purposes of recognition applications the Court can look at what happened in the adoption and see that as separate to the surrogacy in the particular circumstances of this case? Everything in this case was very much above board. We are not talking about two people who went abroad and looked for a surrogate, we're talking about two people who live in the US and employed a surrogate in the US and did everything absolutely by the book and in circumstances where all the legal advices that could be given were given, all the formalities were entered into wholeheartedly and very straightforwardly and were utterly compliant with the local law. And so what I'm suggesting to the Court is that there is nothing that happened, and there's certainly nothing that happened in the context of the adoption, that could be so egregious that this court would find that it couldn't recognise the adoptions in the circumstances [presenting]. So although I absolutely acknowledge and it's quite clear that it was important in the [Irish] legislation that no payment was made, I think that in the circumstances that pertain and given the level of detail and given that adoption law in US State #1 also requires you not to make payments, that in those circumstances the Court can...be happy that the provisions of the recognition rules are satisfied in this particular case."

49. What the court understands counsel to be submitting in this regard is that, when it comes

to the payments made, there is nothing on the facts presenting which breaches s.145 or public policy. The court respectfully agrees with that.

(v) Best Interests

50. Chapter 1 of Part 4 of the Act of 2010, as amended, deals with adoption orders and consents to adoption orders. Section 19 of the Act of 2010, as amended, emphasises the welfare of the child and the best interests of the child, stating as follows:

“(1) In any matter, application or proceedings under this Act which is, or are, before—(a) the Authority, or (b) any court, the Authority or the court, as the case may be, shall regard the best interests of the child as the paramount consideration in the resolution of such matter, application or proceedings.

(2) In determining for the purposes of subsection (1) what is in the best interests of the child, the Authority or the court, as the case may be, shall have regard to all of the factors or circumstances that it considers relevant to the child who is the subject of the matter, application or proceedings concerned including (a) the child’s age and maturity, (b) the physical, psychological and emotional needs of the child, (c) the likely effect of adoption on the child, (d) the child’s views on his or her proposed adoption, (e) the child’s social, intellectual and educational needs, (f) the child’s upbringing and care, (g) the child’s relationship with his or her parent, guardian or relative, as the case may be, and (h) any other particular circumstances pertaining to the child concerned.”

51. In the context of recognition proceedings, the extent to which the issue of the best interests of the child arise to be considered, also has to be read in the light of s.57 and the Limb B definition, and through that definition s.1(1) of the Act of 1991, which refers, in the case of a “foreign adoption” as defined to, amongst other matters, the following conditions being satisfied:

“(c) the law of the place where the adoption was effected required an enquiry to be carried out, as far as was practicable, into the adopters, the child and the parents or guardian, (d) the law of the place where the adoption was effected required the court or other authority or person by whom the adoption was

effected, before doing so, to give due consideration to the interests and welfare of the child”.

[Emphasis added].

52. As can be seen, the Adoption Acts clearly contemplate that it is the law of the place of the adoption and the consents required under that law that are relevant. It is clear from the Final Decrees of Step-Parent Adoption made here by the US State #1 court that there was an investigation by US State #1 into the background of the person seeking adoption (see paras. 3-5) and that due consideration to the best interests of the child was given (see paras. 6 and 7, including the express reference to “*the best interests of said child*” at para.7). And all this occurs in a context where comfort falls to be taken from the fact that what presents is the father of a child arranging for his husband to be another parent of the child.

53. It follows from the foregoing that (i) the standards contemplated by s.1(c) and (d) of the Act of 1991 have been satisfied (indeed, there is undisputed evidence before the court that all the limbs of s.1 have been satisfied) and there is nothing that arises on the facts of the case that might, to use a colloquialism cause ‘alarm bells to ring’ in the court’s mind; (ii) the court can therefore be satisfied that the children’s best interests are served; (iii) in the context of the evidence before the court as to the circumstances of these particular children, the court can be satisfied in a general way for the purposes of section 19 that children’s best interests are served by recognising the adoptions. After all, what would happen if the adoptions were not recognised? How would that serve the best interests of these children? There is not a shred of evidence to suggest that they are other than deeply loved and well cared for. So the idea that the court would not recognise the adoptions by reference to the “*best interests*” of these children, to use a colloquialism, ‘does not hold water’. Indeed, were the court to decline to recognise the adoptions, that would yield the most undesirable scenario of what counsel for the Attorney General referred to in her submissions as a “*limping adoption*” whereby the children would be adopted children in one jurisdiction but unable to assert their relationship to their fathers in Ireland.

(vi) Information About Birth and Identity

54. It has been queried (by way of further public policy ground) whether the registration of the ‘foreign domestic adoptions’ in this case, without reference to the identity of the genetic or

birth mothers would be consistent with any right of the children to information concerning their birth and identity. The leading constitutional case in this regard is *IO'T v. B* [1998] 2 I.R. 321 in which the Supreme Court held that in circumstances where individuals were not formally adopted, there was an unenumerated personal right under Article 40 of the Constitution to know the identity of one's birth mother, albeit a right that had to be balanced against the birth mother's unenumerated right to privacy under Article 40. In a not dissimilar vein, the European Court of Human Rights in *Odièvre v. France* (Application No. 42326/98, 13th February 2003) found no breach of Art.8 ECHR where the French authorities refused to release information to an adopted person where the birth mother had expressly reserved her right to confidentiality. Additionally, there is at this time nothing in the manner in which foreign adoptions are presently registered which adverts in any way to the natural parents of a person whose adoption is the subject of registration. There are proposals afoot to change the applicable law in Ireland. Thus, the Minister for Children issued heads of bill last May concerning adoption tracing and there is also a private members bill on the same topic which is presently at its Second Stage in the Seanad. However, those are only draft measures (and even at the ECHR level the law is unsettled). All the foregoing being so it seems to the court that the high threshold for refusing, on public policy grounds, to recognise the adoptions now before the court has not been met.

(vii) Constitutional Law and the European Convention on Human Rights

55. The court respectfully does not see that it has to make any decision in respect to constitutional law/principle, still less on any rights presenting under the European Convention on Human Rights, to conclude that the adoptions at issue in this case are readily capable of recognition as a matter of Irish law. It is able to reach this conclusion by reference solely to, and 'within the four walls' of, the Adoption Acts.

G. The Case Stated – II

56. The court turns next to address the specific questions raised in the Case Stated. As stated at the outset, the Case Stated concerns the recognition by the State of foreign domestic adoptions. It happens that the foreign domestic adoptions in this case arose following a pregnancy which involved a surrogacy arrangement. But the case is fundamentally about the recognition (in truth quite straightforward recognition) of two foreign domestic adoptions, something readily done 'within the four walls' of the Adoption Acts.

57. The questions posed in the Case Stated appear in Bold text below. The court’s answers appear immediately thereafter. The court has considered the questions raised in the Case Stated by reference to the actual circumstances of this case, not by reference to hypothetical circumstances or by reference to the facts of other cases which may be presenting before the Adoption Authority but as to the detail of which the court knows nothing. Counsel for the Attorney General indicated in argument that she had come to court to meet (and could only meet) the actual case presenting, and she urged caution on the court in straying beyond the facts of the case presenting. Counsel for the two fathers likewise urged caution on the court when it came to straying beyond the actual facts presenting. For the court to have proceeded otherwise would have been inappropriate and could, for example, have led to its inadvertently binding the Authority or another party into some future course of action on the basis of reasoning that proceeded on hypothetical facts or facts unknown.

58. *“1. Is it contrary to section 125(1)(a) of the Adoption Acts, as amended (the ‘Acts’) for a person or persons to: (a) enter into an agreement with a third party to assist in facilitating the birth of a child if the adoption of that child is contemplated by the parties to an agreement? (b) enter into an agreement with a person for the donation of genetic material if the adoption of that child is contemplated by the parties to the agreement? (c) enter into an agreement with a person to give birth to a child in the mutual contemplation that the child will be adopted by one of the parties to the agreement? (d) apply for a court order prior to the birth of a child in which the person to give birth abjures her legal rights to the unborn children? (e) arrange for the obtaining of an order in which the person to give birth abjures her legal rights to the unborn children in the contemplation that a person who is not the natural parent of the children will be adjudicated as the legal parent after birth?”*

59. Section 125 establishes various restrictions on the making of arrangements for adoption. Three points might be made. First, the court does not see anything to suggest that the Oireachtas intended s.125 to apply to ‘foreign domestic adoptions’ made in the habitual residence of the adopters, *i.e.* the court does not see that s.125 is applicable to the case at hand. Second, the court notes that s.4 (which describes what is meant in the Act by references to the making of arrangements for the adoption of a child) appears not to apply to ‘foreign domestic adoptions’. Third, as previously mentioned, the court sees no public policy concerns to present on the facts of this case that would prevent recognition of the adoptions.

60. *“2. Is it contrary to section 145(1) of the Acts for (a) a person to receive compensation for the donation of genetic material if the adoption of the resulting child is contemplated by the parties to the arrangement? (b) a person to receive compensation for giving birth to a child if it is contemplated that the child will be adopted by one of the parties to the arrangement?”*

61. *“3. Is it contrary to section 145(2) of the Acts for a person or persons to: (a) pay monies to a person for the donation of genetic material if the adoption of any resulting child is contemplated by the parties to the arrangement? (b) pay monies of any kind to a person giving birth to a child if it is contemplated that the child will be adopted by one of the parties to the arrangement? (c) pay monies for compensation and inconvenience to a person giving birth to a child if it is contemplated that the child will be adopted by one of the parties to the arrangement? (d) pay monies for un-vouched expenses to a person giving birth to a child if it is contemplated that the child will be adopted by one of the parties to the arrangement?”*

62. *“4. Is it contrary to section 145(3) of the Acts: (a) for monies to be paid to a third party to assist in facilitating the birth of a child if the adoption of that child is contemplated by the parties to the agreement? (b) for monies to be paid to a person in connection with the donation of genetic material if the adoption of any resulting child is contemplated by the parties to the arrangement? (c) for monies of any kind to be paid to a person giving birth to a child if it is contemplated that the child will be adopted by one of the parties to the arrangement? (d) for monies for compensation and inconvenience to be paid to a person giving birth to a child if it is contemplated that the child will be adopted by one of the parties to the arrangement? (e) for monies for un-vouched expenses to be paid to a person giving birth to a child if it is contemplated that the child will be adopted by one of the parties to the arrangement?”*

63. For the reasons outlined previously above, s.145 presents no issue in this case.

64. *“5. Is it consistent with the Authority’s duties under section 19 of the Acts to have regard to the best interests of the child as the paramount consideration to recognise an intercountry adoption effected outside the State where (a) legal orders waiving the potential rights of a parent were obtained prior to the birth of the child? (b) arrangements were undertaken in*

contemplation of the adoption of a child prior to the child's birth? (c) the aforesaid orders and arrangements were undertaken on foot of agreements which involved the payment of monies to the potential parent? (d) the Authority has not been provided with evidence of any substantive assessment of the best interests of the child prior to an adoption order being made? (e) the Authority has not been provided with evidence of any substantive assessment of the suitability of the prospective adoptive parent(s)? (f) the sole evidence before the Authority regarding the best interests of the child is an order of a foreign court that records on its face that the adoption will serve the child's best interests?"

65. For the reasons outlined previously above, (i) the standards contemplated by s.1(c) and (d) of the Act of 1991 have been satisfied (indeed, there is undisputed evidence before the court that all the limbs of s.1 have been satisfied) and there is nothing that arises on the facts of the case that might, to use a colloquialism cause 'alarm bells to ring'; (ii) in the context of the recognition rules one can therefore be satisfied that the children's best interests are served; (iii) in the context of the evidence before the court as to the circumstances of these particular children, one can be satisfied in a general way for the purposes of section 19 that the children's best interests are served by recognising the adoptions.

66. *"6. Is the entry of an intercountry adoption effected outside the State into the register of intercountry adoptions without reference to the identity of the genetic mother or birth mother consistent with the rights of the child under the Constitution of Ireland and the European Convention on Human Rights to information concerning their birth and identity?"*

67. As mentioned previously above, given the present state of the law in this regard it seems to the court that the high threshold for refusing, on public policy grounds, to recognise the adoptions now before the court has not been met.

68. *"7. Where an application for recognition of an intercountry adoption effected outside the State relates to an adoption in the context of assisted human reproduction, is it necessary for the consent to be obtained of (a) the genetic parent(s) of the child? (b) the birth mother of the child?"*

69. *"8. Where the consent of a person is required to recognise an intercountry adoption effected outside the State, is that consent valid if: (a) it is provided in the context of a*

contractual arrangement which provides for the payment of monies to the person providing consent? (b) it is provided following the provision of independent legal advice that it paid for and procured by the prospective adoptive parent(s) or their agents? (c) the consent is provided prior to the birth of the children? (d) there is written consent to waive rights arising in respect of a process of assisted human reproduction but not in respect of the making of an adoption order?”

70. Again, the Case Stated concerns the recognition by Ireland of ‘foreign domestic adoptions’. It happens that the ‘foreign domestic adoptions’ in this case followed a pregnancy which involved a surrogacy arrangement. But the case is really focused on the recognition of two ‘foreign domestic adoptions’. It will be recalled that under s.1(a) of the Act of 1991, among the necessary hallmarks of a ‘foreign domestic adoption’ are that “*in accordance with the law of the place where it was effected... (a) the consent to the adoption of every person whose consent to the adoption was, under the law of the place where the adoption was effected, required to be obtained or dispensed with was obtained or dispensed with under that law*”. The opinion of Mr G indicates that *only* Mr C’s consent was required and of course it was obtained. That, on the facts of the case before the court, ends any question as to necessary consents.

71. “9. *Would the entry of the decrees of step-parent adoption in respect of the children in this case into the register of intercountry adoptions be: (a) contrary to public policy? (b) otherwise inconsistent with the provisions of the Acts?”*

72. For the reasons considered previously above, no public policy issue presents, nor would such entry be otherwise inconsistent with the provisions of the Acts.

SUPPLEMENTAL NOTE

Since delivering my original judgment in this matter I have kindly been referred by counsel for the Attorney General to the decision of the Supreme Court in *HAH v. SAA* [2017] IESC 40, which was inadvertently omitted from the authorities to which the court was referred at the original hearing. All the parties are agreed, and the court respectfully agrees with them, that there is nothing in *HAH* which ought to, nor has it, altered the judgment of the court in this matter.

Max Barrett (Judge)

3 December 2021.

**TO MR C AND MR D:
WHAT DOES THIS JUDGMENT MEAN FOR YOU?**

Dear Mr C and Mr D

In the previous pages I have written a long judgment about your case. The judgment is full of legal language and you may find it less than easy to understand. I am aware that family law judgments touch on really important issues in people's lives. So I now typically add a 'plain English' note to the end of my family law judgments explaining briefly what I have decided. That is the least you deserve. Everyone else in this case will get to read this note but really it is for your benefit. (The Adoption Authority and the Attorney General are well able to read and understand my judgment for themselves).

Because lawyers like to argue over things, I should add that this note, though a part of my judgment, is not intended to replace the detailed text in the rest of my judgment. It is merely intended to help you understand better what I have decided. Your lawyers will explain my judgment in more detail to you.

I have referred to you as Mr C and Mr D in my judgment (and to the twins as Master A and Miss B). This makes the judgment (and this note) a bit impersonal but it is done to preserve your anonymity.

Mr D adopted the twins in a US state and now wishes the adoption decrees to be entered onto the register of intercountry adoptions maintained by the Adoption Authority. Although all the details of the surrogacy arrangements were rightly provided to me, at its heart this is really a case about whether or not Mr D's adoption of the twins should be recognised in Ireland. I indicated in court when the hearing of this case ended that I saw no reason in law why the adoptions should not be recognised and entered onto the register. I remain of that view.

I wish you and your three children every good fortune in life.

Yours sincerely

Max Barrett (Judge)