S60

Judgment Title: M.R. and D.R.(suing by their father and next friend O.R.) & ors -v- An t-Ard-Chláraitheoir & ors

Neutral Citation: [2014] IESC 60

Supreme Court Record Number: 263/2013

High Court Record Number: 2011 46M

Date of Delivery: 07/11/2014

Court: Supreme Court

Composition of Court: Denham C.J., Murray J., Hardiman J., O'Donnell Donal J., McKechnie J., Clarke J., MacMenamin J.

Judgment by: Denham C.J.

Status of Judgment: Approved

Judgments by	Link to Judgment	Result	Concurring
Denham C.J.	Link	Appeal allowed - set aside High Court Order	O'Donnell Donal J.
Hardiman J.	Link		
O'Donnell Donal J.	Link		Hardiman J.
Clarke J.	Link		
MacMenamin J.	Link		O'Donnell Donal J.

Outcome: Allow And Set Aside

Notes on Memo: Judgments also from Mr. Justice Murray, Mr. Justice Hardiman and Mr. Justice McKechnie

32

THE SUPREME COURT

APPEAL No 263/2013

Denham C.J.
Murray J.
Hardiman J.
O'Donnell J.
McKechnie J.
Clarke J.
MacMenamin J.

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 60(8) OF THE CIVIL REGISTRATION ACT, 2004, AND IN THE MATTER OF THE CONSTITUTION OF IRELAND AND IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT, 1964, AND IN THE MATTER OF THE STATUS OF CHILDREN ACT, 1987, AND IN THE MATTER OF M.R. AND D.R. (CHILDREN)

BETWEEN

M.R. AND D.R. (SUING BY THEIR FATHER AND NEXT FRIEND O.R.), O.R. AND C.R.

APPLICANTS/RESPONDENTS

and

AN tARD-CHLÁRAITHEOIR, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS/APPELLANTS

and

L.L. (NEE M.)

NOTICE PARTY

Judgment delivered on the 7th day of November, 2014 by Denham C.J.

1. This appeal arises to be decided at a time when there have been radical scientific developments in assisted human reproduction which have not been addressed in legislation. The Court was informed that, a few days before the hearing of the appeal commenced, the Department of Justice published the Draft Heads of a General Scheme of a Children and Family Relationships Bill, 2014, of which Part 5 purported to make provision for surrogacy arrangements. However, this is not an Article 26 Reference, there is no challenge to the constitutionality of any Act of the Oireachtas, and the appeal must be decided on the law as it stands.

2. At the core of the case is the application by the applicants/respondents that the fourth named applicant/respondent be registered as the mother of the first and second appliants/respondents. This case arises out of a surrogacy arrangement whereby the fourth named applicant/respondent is the genetic mother of the children, and the notice party is the gestational mother. The State appellants submitted that the gestational mother is the mother for the purpose of the Civil Registration Act 2004, while the applicants/respondents submitted that the genetic mother should be so registered.

Appeal

3. This is an appeal by An tArd-Chláraitheoir, Ireland, and the Attorney General, the respondents/appellants, referred to as "the appellants", from the judgment of the High Court (Abbott J.) delivered on the 5th March, 2013, and from the orders of the High Court made on the 16th May, 2013, and perfected on the 23rd May, 2013.

Background facts

4. I adopt the background facts as set out by the learned High Court judge.

5. In this appeal the term "genetic father" refers to the man who provides the sperm which is used in the fertilisation process. In this case the third named applicant/respondent, referred to as the "third

named respondent", is the genetic father of the first and second named applicants/respondents, who are referred to as "the twins".
6. The term "genetic mother" refers to the woman who provides the ovum which is used in the fertilisation process. In this case the fourth named applicant/respondent referred to as the "fourth named respondent", is the genetic mother.
7. The term "gestational mother" refers to the woman in whose womb the zygote is implanted, who carries and subsequently gives birth to a child. In this case the notice party is the gestational mother.
8. The fourth named respondent was unable to become pregnant and to give birth and so by arrangement with the notice party, her sister, ova provided by the fourth named respondent were fertilised by sperm provided by the third named respondent. That fertilisation took place *in vitro*. The zygotes which were produced as a result of that fertilisation were implanted in the womb of the notice party, who subsequently gave birth to the twins.
9. The third and fourth named respondents and the notice party agreed prior to the birth of the twins that they would be brought up and would be reared as children of the third and fourth named respondents, and that is what has occurred.
10. There is no dispute between the genetic parents and the gestational mother as to how they wish the twins to be treated in fact and in law. However, the State authorities take the view that, as a matter of law, the person who must be registered as the mother of the twins is the gestational mother.
11. After the birth of the twins, the notice party and the third named respondent attended the Registrar's Office and were registered as the parents. Following registration, a letter accompanied by DNA evidence was sent to the Superintendent Registrar for Dublin seeking the correction of an error under s.63 of the Civil Registration Act, 2004. This request to have the fourth named respondent recorded as the mother of the twins was refused.
12. There is no dispute as to the fact that the third and fourth named respondents are respectively the genetic father and the genetic mother of the twins. Nor is it disputed that the notice party is the gestational mother of the twins.
13. All named applicants/respondents are referred to collectively as "the respondents".

High Court Judgment

14. In a very broad ranging judgment the learned High Court judge considered matters of fact, the common law, statutory law and the Constitution. He reached the following conclusions on the law:-

> "100. The maxim *mater semper certa est* is part of a series of maxims relating to maternity and paternity arising from the ancient Roman law. It can be said that the maxim achieved such prominence, acceptance and fixity by reason of the fact that before IVF the mother of the baby was determined at parturition or birth and the maxim (being an incontrovertible truth) expressed the facts of the situation. In the parlance of the common law the maxim became a presumption at law and in fact. Because it was based on incontrovertible facts, it became an irrebuttable presumption in any court proceedings. That meant that motherhood would be presumed in respect of a baby as between a woman and that baby once parturition of that baby was proven in relation to the woman. No other evidence or argument was required. The matter was self evident. No evidence could be adduced to controvert this presumption. If perchance evidence could be permitted by the law to be introduced to controvert this conclusion, then the presumption would change from being irrebuttable to rebuttable. The presumption could be rebutted by whatever evidence was appropriate. Prior to surrogacy arrangements, this possibility of the rebuttal of *mater semper certa est* did not arise. The fundamental issue in this case is whether, in the circumstances of this case of surrogacy, such a possibility arises within the current legal and constitutional framework of this jurisdiction.
>
> 101. In examining what the answer should be to the question posed by this issue, it is best

to consider the very strong argument put forward by Ms. O'Toole SC on behalf the Attorney General, that the maxim *mater semper certa est* has received a constitutional approval in the pro-life amendment of the Constitution (Article 40.3.3). She has argued that the word mother appears in the Article in connection with pregnancy as unquestionably the mother who carries the baby the 'unborn' (to use the specific description of the Constitution). She argued that the harmonious interpretation of the Constitution requires that the word 'mother' should carry the same meaning throughout the Constitution and the statutory provisions of the Status of Children Act and all other relevant legislation. However, I am of the opinion that the word mother in this Article has a meaning specific to the Article itself, which is related to the existence of the unborn which was held by the Supreme Court in the frozen embryo case of **Roche v. Roche** to have an existence only when the foetus was in the womb and not otherwise.

102. I am particularly influenced by the passages cited on behalf of the applicants in the judgments of Fennelly J. and Geoghegan J. pointing to the specificity of that amendment. It is clear from the judgments of Fennelly J. in ***N v. Health Service Executive*** **and** ***J.McD v. PL*** that the concept of blood relationships or links are paramount in deciding parenthood. It should be determined what the courts meant by "blood" relationships or links. In the case of paternity it was easy enough to answer this question. It was paternity established through a DNA link as proven a by scientific test or otherwise if necessary by a blood test under the 1987 Act. However, Ms. O'Toole eloquently argued that to proceed from this conclusion, to argue that maternity should likewise be determined on the same blood test procedure, was to compare "apples with oranges". She argued that this comparison did not recognise the fundamental difference between motherhood and fatherhood and pointed to the evidence in relation to epigenetics and the more dramatic incidence of how a mother's cocaine consuming habits could result in physical deformities to children and also the experience of persons born with deformities as a result of medical treatment by thalidomide and the like.

103. In view of my findings in relation to the determinative nature of chromosomal DNA, I find that while the input of a gestational mother to an embryo and foetus not containing genetic material from her is to be respected and treated with the care and prudence which the best medical practice dictates, the predominant determinism of the genetic material in the cells of the foetus permits a fair comparison with the law and standards for the determination of paternity. It would be invidious, irrational and unfair to do otherwise. In reaching this conclusion, I am supported by current legislative practice in the most recent Adoption Act of 2010 where the legislature recognised the importance of blood relationships by ensuring control at High Court level of the process by which a mother proposing to consent to adoption would at least be counselled in relation to the importance of knowing the genetic background of a child which is proposed to be adopted.

104. The final question is whether, in view of the conclusions of this judgment in relation to the fair comparison between fathers and mothers for the purpose of establishing blood relationships, and the feasibility of a maternal DNA test to facilitate registration, the application of the maxim *mater semper certa est* as an irrebuttable presumption is consistent with fair procedures under the Constitution. The judgment of O'Hanlon J. in **S. v. S.,** relating to the irrebuttable presumption in certain cases relating to paternity within marriage, is ample authority to enable the court to conclude that the presumption of *mater semper certa* did not survive the enactment of the Constitution insofar as it applies to the situation post IVF. To achieve fairness and constitutional and natural justice, for both the paternal and maternal genetic parents, the feasible inquiry in relation to maternity ought to be made by on a genetic basis and on being proven, the genetic mother should be registered

as the mother under the Act of 2004. The conclusion does not raise the consideration of the best interest of the child which in most cases, if not in all, would be best served by an inquiry of the genetic interest.

105. As a subtext to the discussions before the Court and by way of final check in relation to the conclusions of the Court, it is important to assume that the Court inquired in relation to international consensus, in particular European consensus, in relation to the applicability of the irrebuttable presumption of *mater semper certa est*. An tArd-Chláraitheoir indicated that there was, in fact, a European consensus among a number of governments (including the Irish Government) that the irrebuttable presumption was still accepted internationally as the appropriate point of departure in relation to dealing with surrogacy questions. This perceived international position and the widespread historic acceptance of the principle of *mater semper certa est*, (although not a specific binding international instrument of legislation), is nevertheless authorative or at least the cause of taking a pause for thought, in a critical sense, in relation to the conclusions to which the Court has been driven in this judgment so far. I am strongly of the view that this so called international and historic consensus should not restrain the Court from making the conclusions so far appearing in this judgment for the reason that the Attorney General did not advance any detailed comparative law analysis to show why this consensus had arisen (apart from historical convention), such as instances of some of the constituent jurisdictions of the international consensus and having by their positive laws actually making the contract of surrogacy absolutely illegal and void, and introducing other positive law dealing with surrogacy which specifically by a statutory code recognised the maxim of *mater semper.* Indeed, in a situation where a jurisdiction had moved legislatively to declare the surrogacy contract illegal, it would follow that the maxim *mater semper certa est* would be an irrebuttable presumption regardless of statutory enactment of same. As distinct from such an atmosphere of positive legislative enactment banning the surrogacy contract or positively co-defining the irrebuttable nature of *mater semper est*, the situation in this jurisdiction is one where positive legislation on this area is totally absent, meaning that the surrogacy contract in this case is not illegal. As Mr. Durcan SC said, the surrogacy contract and arrangements pursuant thereto leading to the birth of a child do not lead to any wrong, whether of a criminal or civil nature in this jurisdiction. The only weakness of the surrogacy contract in the Irish legislative context or in the context of the common law of this jurisdiction as agreed by all parties and held by the Court that its performance would not be enforceable by any court. There is nothing in the Irish legislative context that positively affirms the maxim of *mater semper certa est*, or for that matter makes illegal any surrogacy contract. Therefore, the Court should not be swayed from its conclusions or doubt same by reason of the assertion of this so called European consensus.

106. I am thus disposed to grant declarations in the forms sought in paras. 1 and 2 of the claim of the special summons herein."

High Court Order

15. The High Court granted the following declarations:-

(a) A declaration that the fourth named respondent is the mother of the first and second named respondents, the twins, pursuant to s. 35(8)(b) of the Status of Children Act, 1987, or otherwise pursuant to the inherent jurisdiction of the Court; and

(b) A declaration that the fourth named respondent is entitled to have the particulars of her maternity entered on the Certificate of Birth, and that the first and second named respondents are entitled to have the particulars of their relationship to the fourth named respondent recorded on their Certificates of Birth.

Notice of Appeal

16. The State appealed against the judgment and orders, filing 29 grounds of appeal, as follows that:-

(i) The learned trial judge erred in both fact and law in not concluding that the gestational mother, the notice party, is the mother of the children whom she bore and gave birth to, the first and second named respondents, the twins;

(ii) The learned trial judge erred in both fact and law in concluding and declaring that an individual, the fourth named respondent, other than a gestational mother, could be regarded in law as the legal mother of the children;

(iii) The learned trial judge erred in both fact and law in concluding that maternity is defined only by reference to the chromosomal DNA in circumstances where the genetic material was supplied by the third and fourth named respondents, but where the gestational mother was another person, the notice party;

(iv) The learned trial judge erred therefore in placing overwhelming weight on chromosomal DNA as being determinative of maternity;

(v) The learned trial judge erred in not placing the relevant and sufficient weight on the biological role of the gestational mother, the notice party, in coming to the conclusion that the fourth named respondent is the mother of the first and second named respondents;

(vi) The learned trial judge erred in fact and law by not placing sufficient weight on the fundamental distinctions which exist between maternity and paternity and motherhood and fatherhood, taking into account the evidence presented in this respect specifically in relation to maternal gestation;

(vii) The learned trial judge erred in law in concluding that blood relationships or links are paramount in deciding parenthood and that the said blood relationship or link equated to the genetic link only;

(viii) The learned trial judge erred in law and fact in concluding that while the input of the gestational mother to an embryo and foetus (not containing genetic material from her) is to be respected and treated with care and prudence, the predominant determinism of the genetic material in the cells of the foetus, permits for a comparison with the law and standards for the determination of paternity. In this respect, the learned trial judge erred in making an equal comparison of maternity to paternity and therefore erred in declaring the fourth named respondent as the mother of the first and second named respondents;

(ix) The learned trial judge erred in law in finding that the term "mother" as it appears in Article 40.3.3º of the Constitution has a meaning only specific to the Article 40.3.3 itself, which is related solely to the existence of the unborn;

(x) The learned trial judge erred in law in having insufficient regard to the constitutional meaning

of the term "mother" as stated and anchored in Article 40.3.3 of the Constitution and elaborated upon in the cases of **AG v. X** [1992] 1 I.R. 1 and **Roche v. Roche** [2010], 2 IR 321, and which error in law thereby permits the existence of two mothers, an interpretation in law which leads to constitutional and public law absurdity;

(xi) The learned trial judge erred in law in finding that there is nothing in the Irish legislative context that positively affirms the maxim of *mater semper certa est*;

(xii) The learned trial judge erred in law in granting the declaration that the fourth named respondent is the mother of the first and second named respondents;

(xiii) The learned trial judge erred in law in granting a declaration that the fourth named respondent is entitled to have the particulars of her maternity entered on the Certificates of Birth of the first and second named respondents and further that the first and second named respondents are entitled to have the particulars of their relationship to the fourth named respondent on their Certificates of Birth and described as their mother;

(xiv) The learned trial judge erred in law in failing to have due regard to the role of the birth mother in giving life to a child;

(xv) The learned trial judge failed to attach any, or sufficient, weight to the role of the birth mother in giving life to the child, and the influence of the birth mother during pregnancy on the health of the child and on the development of the child at an epigenetic level;

(xvi) The learned trial judge erred in that he attached no, or no sufficient, weight to the fact that motherhood is a status to which legal and constitutional rights are attached;

(xvii) The learned trial judge in failing to attach sufficient weight to the legal and constitutional status of motherhood, failed to address the difficulties and anomalies arising if the lawful mother of the child is other than the birth mother of the child;

(xviii) The learned trial judge failed to attach any or any sufficient weight to the evidence and/or the implications of the evidence that within the State many couples availing of assisted human reproduction rely on donor gametes, including donor eggs, to found a family. In addition, most of these gametes are donated anonymously;

(xix) The learned trial judge erred in upholding that the constitutional or public law status and relationship of motherhood is determined by, or depends on, the private intentions of, or agreements (if any) between, individuals who are parties to a surrogacy or IVF arrangement;

(xx) The learned trial judge erred in fact and in law in concluding that the presumption of *mater semper certa* did not survive the enactment of the Constitution insofar as it applies to the situation post IVF;

(xxi) The learned trial judge erred in fact and in law insofar as he held that *mater semper certa est* did not survive the practice or availability of IVF in this jurisdiction;

(xxii) The learned trial judge erred in finding that in order to achieve fairness and constitutional and natural justice for both the paternal and maternal genetic parents, the feasible inquiry in relation to maternity ought to be made on a genetic basis and on being proven, the genetic mother should be registered as the mother under the Act of 2004;

(xxiii) The learned trial judge erred in fact and in law in concluding that the interests of the child concerned would be best served by an inquiry of the genetic interest;

(xxiv) In holding that the genetic mother is the lawful mother of the child, the learned trial judge failed to have any or any proper regard to or consideration of the implications for the welfare of a child born to a woman other than the genetic mother, where all maternal rights are vested in the genetic mother;

(xxv) The learned trial judge erred in fact and in law in finding that the Attorney General did not advance any detailed comparative law analysis to show why the consensus in respect of *mater semper certa est* existed. The written submissions of the Attorney General referred to various reports and papers of European institutions to demonstrate such a consensus. Further, the learned trial judge erred in law and in fact, in making such a finding, in circumstances where any detailed comparative law analysis as required by him in the judgment, was not adverted to in the course of the hearing or raised as an issue by the Court or the parties;

(xxvi) The learned trial judge erred in law and in fact in finding that the international consensus was based on, positive legal enactments in the jurisdiction concerned rendering surrogacy illegal, or in the alternative enshrining *mater semper certa est* as a maxim in their legal code, as a basis for the learned trial judge's findings that the Court should not be swayed from its conclusions or doubt same by reason of the assertion of what the learned trial judge refers to as the so called European consensus;

(xxvii) The learned trial judge erred in law and in fact in granting the respondents their costs of the proceedings, including reserved costs, including the costs of discovery and advice on proofs including the cost of redaction work carried out by Junior Counsel;

(xxviii) The learned trial judge erred in law and in fact in granting the notice party her costs, to include her costs in respect of the separate applications made herein in relation to media reporting of the proceedings;

(xxix) Such further or other grounds as may be advanced at the hearing of the appeal herein.

Submissions

17. Written submissions were filed on behalf of the appellants, the respondents, the notice party, and on behalf of the Equality Authority and the Irish Human Rights Commission, the latter two as *amicus curiae*.

Submissions on behalf of the appellants

18. In their written submissions the appellants submitted that the maxim of *mater semper certa est* is an irrebuttable presumption well established in Irish law, recognised in Article 40.3.3º of the Constitution, and reflected in the case law of this jurisdiction.

19. The appellants submitted that the “mother” envisaged by Article 40.3.3º of the Constitution is the mother who is both the genetic and the gestational mother of the child.

20. It was submitted that Article 40.3.3º of the Constitution makes reference only to a pregnant woman and that to find otherwise would be to suggest that two different women can simultaneously be the mother of a child, one during pregnancy, and the other whose rights are in abeyance during pregnancy, but can be asserted after the birth of the child.

21. The appellants submitted that any such interpretation is precluded by the provisions of the Constitution, which are unambiguous and make it clear that the mother of the child is the pregnant woman.
22. It was submitted that the trial judge erred in finding that the case law provides that the relationship and "blood link" which exists between mother and child exclusively is contingent on the genetic link which exists between them. It was submitted that this was an incorrect interpretation of the relevant decisions, which in fact place emphasis on the physical relationship arising from pregnancy between mother and child. The appellants submitted that the trial judge did not afford adequate weight to the role of the birth mother during pregnancy, and that his analysis of her role places the birth mother in a subordinate position.
23. The appellants rejected the contention that the Status of Children Act, 1987, placed genetic testing on a statutory basis in order to determine both motherhood and fatherhood (in the context of declarations of parentage), thereby altering the status of the *mater semper certa* rule. The appellants submitted that the purpose of the Act of 1987 was to provide for blood testing where there had been situations such as fraudulent claims of maternity and mix ups of new born babies.
24. The appellants submitted that the Birth Registration System established in this jurisdiction is based on a recording of observable facts pertaining to the birth of the child and is not capable of recording later events in the existence of the person concerned. Any amendment to the register is confined to factual errors. The appellants relied on the decision in **Foy v. An tArd-Chláraitheoir** [2012] 2 I.R. in this regard. It was submitted that the first and second named respondents do not have any constitutional right to have their genetic mother named on their Birth Certificate.
25. The appellants rejected the contention that it would constitute invidious discrimination between mothers and fathers not to permit genetic testing for the basis of determining motherhood. On this point, the appellants submitted that axiomatic differences exist between motherhood and fatherhood.
26. The appellants rejected also that the fourth named respondent is suffering from invidious discrimination as a result of a disability, *i.e.*, the inability to give birth to a child.. It was argued that any discrimination which may be suffered, though disputed, by virtue of the fact that the woman who gives birth to the child is recognised as the lawful mother of the child, is based on the reasonable requirement of maintaining the integrity of the birth registration system, the unambiguous meaning of legal motherhood in the interests of society, and the interests of welfare of children.
27. The appellants submitted that were this Court to uphold the decision of the High Court, in overturning the *mater semper certa* principle, it would give rise to unforeseen and unintended consequences which extend beyond the facts of the present case. The appellants submitted that the issues which arise in the instant case are matters within the policy making role of the Oireachtas, and accordingly the Oireachtas must provide comprehensively for the rights of parties in the position of the respondents.
28. Counsel on behalf of the appellants also made various oral submissions to this Court. It was submitted that the trial judge erred and was in excess of jurisdiction in finding that it would be unconstitutional not to confer the legal status of motherhood to a genetic mother. It was submitted that the Oireachtas did not intend to alter the meaning of "mother" by the Status of Children Act, 1987. Further, it was submitted at hearing that the "blood link" as referred to in the jurisprudence of this Court is not to be construed as referring solely to the genetic link which exists between mother and child. The appellants adopted the position that, as a matter of Irish public law, the legal status of mother is to be attributed to the birth mother. The appellants submitted, however, that this status may be transferred to another woman, to the exclusion of the birth mother, by law within the parameters of the Constitution.

Submissions on behalf of the respondents

29. The respondents submitted that the issues which arise for determination in this case are governed by the Status of Children Act, 1987, as amended. In particular, s.35, which provides a procedure whereby any person, other than an adopted person, can seek and obtain a determination as to whether a

named person is "his father or mother" or that two named persons are "his parents".
30. It was submitted by the respondents that the structure and effect of the provisions of Part VII of the Act of 1987 are clear, namely, that blood tests can be used to establish whether a person is, or is not, the mother or father of a person. The respondents submitted therefore that it is the presence or absence of "shared inheritable characteristics" which are determinative of who is the mother or father of the child. The Act of 1987, therefore, is inconsistent with the proposition advanced on behalf of the appellants that the woman who gives birth is automatically the mother of the child.
31. The respondents submitted that the maxim *mater semper certa est* is founded in Roman law, which until more recent times reflected the biological reality - motherhood followed from the fact of birth. However, it is now known, it was submitted, that this is not always necessarily accurate and the maxim cannot amount to an immutable rule of law.
32. The respondents submitted that the *mater semper certa* rule does not take into account scientific developments. Further, Parts VI and VII of the Act of 1987 do not reflect, or give statutory effect to, the irrebuttable presumption that a woman who gives birth to a child must always be recognised in law as the mother of that child.
33. It was submitted that, in the absence of specific statutory arrangements, parents of children born by way of surrogacy must be determined in accordance with s.35 of the Act of 1987. The respondents submitted that there is nothing in the wording of s .35 to preclude a child born by way of surrogacy from seeking a declaration pursuant to that section.
34. The respondents submitted that the Constitution does not expressly define "parents", this is a matter which has been left to be determined by law.
35. The respondents submit that the although temporal scope and effect of Article 40.3.3º of the Constitution are limited to when the child is in womb, this provision does not to determine who, after the birth, is to be considered the mother of the child in law.
36. It was submitted that notwithstanding that the clear reference to "mother" in Article 40.3.3º of the Constitution as the woman carrying the child, it does not automatically follow from this that no other woman may become or be treated as the mother of the child following birth. The respondents submitted that the woman who is attributed with the legal status of mother may change after the birth of the child.
37. It was submitted that the Act of 1987 provides an existing statutory structure by which the alteration of maternal legal status can be achieved. Further, it was submitted that the Constitution does not preclude such an interpretation of the Act of 1987.
38. It was submitted on behalf of the respondents that the Constitution recognises the importance of "blood link" and/or or genetic link between a parent and his or her child and recognises a duty to protect and vindicate that bond or link.
39. The respondents submitted that the provisions of Parts VI and VII of the Act of 1987 should be interpreted in a manner which permits and requires the third and fourth named respondents to be recognised as the lawful parents of the first and second named respondents in order to protect and vindicate their constitutional rights.
40. It was submitted that a failure to grant such recognition has many ramifications for the respondents, such as, *inter alia*, the respondents do not constitute a family for the purposes of Articles 41 and 42 of the Constitution. The respondents are, as a result, denied the rights and protections afforded to a family unit. Further, it was submitted that the exclusion of the fourth named respondent as mother would have the effect as to deprive her of her rights under Articles 41, 42 and 40.3 of the Constitution to educate, protect and care for the first and second named respondents and deprive the children of their correlative rights. In addition to this, it was argued that failure to recognise the fourth named respondent as the mother of the children infringes on the right of the first and second named respondent to have their welfare protected. Finally, it was submitted that it impinges also on the property rights and right to marry of the first and second named respondents.
41. In oral submissions to this Court, counsel on behalf of the respondents stood over "large portions"

of the judgment of the High Court judge. These included where:-

> (i) The learned High Court judge found that, historically, following parturition the woman who gave birth was the mother. In light of the availability of birth by surrogacy, the fundamental question was whether "within the current legal and constitutional framework" it was possible to regard that someone other than the person who gave birth as the mother.
> (ii) The learned trial judge held, at paragraph 101, that the provisions of Article 40.3.3º do not require that "mother" referred to in the Constitution and in all statute law, in particular the Status of Children Act, 1987, must mean the woman who gives birth to the child.
> (iii) The learned trial judge referred to Fennelly J. in **N. v. HSE** [2006] 1 I.R. 374 and **J. McD. v. P.L.** [2010] 2 I.R. 199, and stated that the concept of blood relationships or links are paramount in deciding parenthood. Counsel for the respondents submitted that this finding goes too far if it suggests that the approach of Fennelly J. in these cases was that parenthood must in law be determined by the existence of blood or genetic links. However, counsel submitted, that the decision can and should be understood as indicating that Fennelly J. acknowledged the importance of the blood or genetic links between a parent and child and the obligation to appropriately protect such links.
> (iv) The learned High Court Judge concluded, at paragraph 103, that a fair comparison can be made between the manner in which paternity and maternity are assessed.
> (v) The learned High Court judge held, at paragraph 104, that to achieve fairness and constitutional and natural justice, an enquiry based on genetic links should be used to determine maternity, rather than the application of a universal rule that the woman who gives birth is always the mother.
> (vi) Counsel submitted that the High Court judge was correct to hold that maternity should be determined by the presence or otherwise of genetic links, but should have reached that conclusion based on the provisions of the Status of Children Act, 1987, as opposed to any constitutional necessity.
> (vii) Counsel also submitted that the learned High Court judge was correct to hold that there is no rule of law that the woman who gives birth to a child is always the mother, having regard to scientific developments which mean that she may not have provided the genetic material from which the child is created.

Submission on behalf of the notice party

42. Counsel for the notice party adopted, in general, the submissions made on behalf of the respondents to the appeal.
43. The notice party submitted that the maxim *mater semper certa est* no longer proves that which the State seeks to assert, as it presupposes that the genetic mother and gestational mother are the same person which is not always, it was submitted, accurate.
44. The notice party clarified that it did not seek to assert that *mater semper certa est* no longer operates in Irish law, but rather that it continues to operate in the form of a rebuttable presumption. It was submitted that for *mater semper certa est* to bear any relevance, it must account for developments in science and medicine, and, moreover, the fact that the genetic mother and gestational mother can be two separate persons.
45. The notice party submitted the definition of "mother" within the Constitution is not to be gleaned solely by reference to the narrow interpretation of "mother" contained within Article 40.3.3º of the Constitution, which protects the child within the womb. Reference must also be had to Article 41.2.2º of the Constitution which, unlike Article 40.3.3º, contains temporal limitation as to how long a woman constitutes a "mother", and that the duties performed by mothers for the purpose of Article 41.2.2º of the Constitution go beyond pregnancy and birth.
46. The notice party submitted that the trial judge was correct in equating a "blood link" with a genetic

link. Further, it was submitted that the Oireachtas has, pursuant to s.35(1) of the Act of 1987, expressly acknowledged the relevance and application of a "blood link" in establishing the mother of a child. The notice party submitted that the "blood link" represents evidence that may be relied upon in seeking to rebut the *mater semper certa* presumption.

47. The notice party rejected the argument that the issues which arise in this case are matters for the Oireachtas, arguing that thus far it has failed to legislate for same. The notice party also rejected the floodgates argument raised by the appellants, submitting that this case is to be determined on its own particular facts.

Submissions on behalf of the Equality Authority

48. Counsel on behalf of the Equality Authority submitted that the provisions of s.35 of the Act of 1987 did not preclude the genetic mother of a child being born to a surrogate from being declared the mother of the child in question. Further, it was submitted that the operation of *mater semper certa est* as an irrebuttable presumption against the genetic mother's maternity, in all circumstances, is not warranted by the legislation itself.

49. It was submitted on behalf of the Equality Authority that Article 40.3.3º of the Constitution does not have the meaning or effect that the mother of the child under Irish law is always, as a matter of constitutional requirement, the woman who gives birth to a child. It was submitted that the Constitution must be interpreted in a manner that takes account of scientific and social developments, that protects the status and role of mothers and their relationships with their children, and affords protection to children by legal recognition of that relationship. It was submitted that this interpretation is both supported and required by constitutional principles of equality deriving from Article 40.1 of the Constitution.

50. It was submitted that if *mater semper certa est* were to operate as an irrebuttable presumption, this would amount to an inequality of treatment.

51. The Equality Authority submitted further that legislation is necessary to regulate this area of the law. In the absence of such legislative regulation, however, it was submitted that the issue in the instant case is one that could be determinated by this Court.

Submissions on behalf of the Irish Human Rights Commission

52. The Irish Human Rights Commission submitted that the European Convention on Human Rights and the UN Convention on the Rights of the Child provide guidance to the Court in these proceedings.

53. It was submitted that the State, having failed to regulate or restrict the right of persons such as the third and fourth named respondents to found a family by way of surrogacy, the State cannot deny such persons parental status or prevent the first and second named respondents from being members of that family.

54. It was submitted that a fundamental consideration in securing the vindication of the rights of the first and second named respondents is the provision of certainty regarding their familial status. The best interests of the twins require such certainty.

55. The Commission submitted that the first and second named respondents have a right to an identity; that recognition and respect for that identity goes to the core of their person and is also fundamental to their "place" in society.

56. The Commission submitted that the failure of the State to allow for the recognition of a familial relationship between persons in the situation of the fourth named respondent and the twins does not vindicate the rights of respondents protected by Articles 40.3 or 41 of the Constitution.

57. Counsel on behalf of both *amici curiae* made oral submissions to this Court, namely that this case raises complex social, legal and ethical issues which are best dealt with by legislation. It was submitted, however, that in the absence of legislation the situation that the instant case presents must be dealt with by the law as it stands.

58. Counsel on behalf of the *amici curiae* submitted that *mater semper certa est* is rebuttable on the basis of DNA evidence. It was submitted that the question of parentage, is a broad concept. Counsel submitted that it did not contend that legal status of "mother" is solely to be attributed to the genetic

mother. It was submitted, however, that genetics constitutes an important link by which motherhood may be established. Counsel on behalf of the *amici curiae* submitted that it is appropriate in the instant case that *mater semper certa est* be rebutted by way of genetic evidence.

59. Counsel on behalf of the *amici curiae* expressed concern that the position adopted by the appellants does not recognise or vindicate the rights of the twins. Further, it was submitted that the fourth named respondent is entitled to a declaration of parentage pursuant to s.35(8) of the Act of 1987.

Decision

60. The core issue in this appeal is the registration of a "mother" under the Civil Registration Act, 2004; and the declaration sought that the fourth named respondent, the genetic mother, is entitled to have the particulars of her maternity entered on the Certificate of Birth, and that the twins are entitled to have their relationship to the fourth named respondent recorded on their Certificates of Birth.

The Constitution

61. The Constitution does not give a general definition to the term "mother". There are two references to "mother" in the Constitution. Article 40.3.3° of the Constitution describes a very specific relationship, it provides that:-

> "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."

62. Article 40.3.3° refers to the special connection that exists in the particular circumstances which arise after implantation. I have described this previously in **Roche v. Roche** [2010] 2 I.R. 321, at p. 373:-

> "After the implantation the mother has carriage of the embryo and the embryo enters a state of 'unborn', there is an attachment between the mother and an unborn. It is that attachment which gives rise to the relationship addressed in Article 40.3.3° where the State acknowledges the right to life of the unborn and the due regard to the equal right to life of the mother. The interpretation of the 'unborn' arising after implantation is a harmonious interpretation of the Constitution consistent with other rights under the Constitution."

63. This description of mother is specific to Article 40.3.3º.

64. A much broader approach to mothers is seen in Article 41.2.2° of the Constitution. Article 41.2 states:-

> "1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.
>
> 2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home."

65. Article 41.2.2° clearly encompasses a more expansive view of mothers. For example, it would include mothers who are neither the gestational nor genetic mother of the child.

66. Thus, there is no definitive definition of "mother" in the Constitution.

Mater Semper Certa Est

67. A core aspect of the legal argument in this appeal, especially as advanced by the appellants, was on the status of *mater semper certa est*. The appellants submitted that as a matter of common law, it is the

woman who gives birth who is the mother of the child. Unlike presumptions, such as those pertaining to husbands, the question of status of who is a mother is answered, they submitted, by *mater semper certa est*, an irrebutable presumption of the common law which provides that it is the woman who gives birth to the child who is the mother. It was submitted that as a matter of public law, adoption allows the status of mother to shift from the birth mother to the adoptive mother, under a specific statutory regime. Following the adoption process, a constitutionally protected family is created. Counsel argued that the determination of the status of mother, as a matter of public policy, is exclusively a matter for the Oireachtas.

68. On the other hand, counsel for the respondents and the notice party relied on the Status of Children Act, 1987, seeking a declaration of parentage, submitting that *mater semper certa est* was an established proposition of fact prior to scientific advances in assisted human reproduction.

69. *Mater semper certa est* can be traced back to ancient Roman law, as contained in Justinian's Digest, *Liber Secundus,* IIII, 5 (D. 2.4.5 Paulus*)*. There it was stated "*quia semper certa est, etiam si uologo conceperit: pater uero is est, quem nupitae demonstrant*."

This is a continuation of an above paragraph of Ulpianus, when read in its entirety reads:- *"sed ed si uolgo quasitus sit filius, matrem in ius non uocabit, quia semper certa est etiam si uolgo conceperit: pater uero is est, quem nupitae demonstrant."* Unlike a mother who was certain, fatherhood was proved by the existence of marriage. Under Roman law parents, whether natural or adoptive, could not be summonsed to court by their children. A mother could never be summonsed to court by her child, whether such child was legitimate or illegitimate, as under Roman law certainty protected her maternal status: *mater semper certa est*. This was however different to the position of the father or an illegitimate child, as under Roman law fatherhood was demonstrated by marriage: *pater est quem nupitae demonstrant*. An unmarried father, as a result of the uncertainty of his parental status, could be summonsed to court by his (illegitimate) child under Roman law.

70. There does not appear to be any evidence that the maxim *mater semper certa est* formed part of the Common Law.

71. The legitimate child is defined in **Blackstone's Commentaries on the Laws of England** (5th edn., 1765). Reference is made to the maxim *pater est quem nupitae demonstrant* and Blackstone states at p. 466 that this:-

> "…is the rule of the civil law (a); and this holds with the civilians, whether the nuptials happen before or after, the birth of the child. With us in England the rule is narrowed, for the nuptials must be precedent to the birth; of which more will be said when we come to consider the case of bastardy."

72. Blackstone continued to describe the common law surrounding illegitimate children. It was stated at pp. 454 - 455 that:-

> "[a] bastard, by our English laws, is one that is not only begotten, but born out of lawful matrimony. The civil and canon laws do not allow a child to remain a bastard, if the parents intermarry (i): and herein they differ most materially from our law; which, though not so strict as to require that the child be begotten, yet makes it an indispensable condition that it shall be born, after lawful wedlock. *And the reason of our English law is much superior to that of the Roman*, if we consider the principal end and design of establishing the contract of marriage, taken in a civil light; abstractedly from any religious view, which has nothing to do with the legitimacy or illegitimacy of children. The main end and design of marriage therefore being to ascertain and fix upon some person, to whom the care, the protection, the maintenance, and the education of the children should belong; this end is undoubtedly answered by legitimating all issue of the same parties, even before wedlock, so as wedlock

> afterwards ensues: 1. *Because of the very great uncertainty that there will generally be, in the proof that the issue was really begotten by the same man; whereas, by confining the proof to the birth, and not to the begetting, our law has rendered it perfectly certain, what child is legitimate, and who is to take care of the child…*"
>
> [Emphasis added]

Blackstone's statements reflect a different social approach to parenthood, and a time prior to modern medical and scientific advances.

73. There is no stream of reference to *mater semper certa est* in legal writings.

Latin for Lawyers (2nd edn, Sweet & Maxwell, 1937) contains various maxims of the common law, and while *pater est quem nupitae demonstrant* was contained in the text, no reference was made to either *mater semper certa est*, or to *mater est quam gestation demonstrat*.

74. Similarly, *mater semper certa est* was omitted from **Broom's Legal Maxims: A Selection of Legal Maxims**, (Kersley, 10th edn., Sweet & Maxwell, 1939). On the "Rules Relating to Marriage and Descent" it was stated that "[t]he son must have been born after the actual marriage between his father and mother; this rule excluded in the descent of the law in England, the application of the rule of the civil and canon law, *pater est quem nupitae demonstrant…*" Again, in **Broom** the maxim relating to the uncertainty regarding a father is present whereas *mater semper certa* is not.

75. In **Glossary of technical terms, phrases and maxims of the common law** (Stimson, University Press, 1881) only *pater est quem nupitae demonstrant* is present.

76. Neither *mater semper certa est* nor the maxim *pater est quem nupitae demonstrant* is provided for in the following: **Maxims of the Laws of England** (Noye, Albany, 1870), **Maximes of Reason: Or, the Reason of the Common Law of England** (Wingate, 1658),
The Elements of the Common Lawes of England (Bacon), and, **Summary of the Common Law of England** (Finch, Anne Salutie, 1673).

77. Thus, in the legal text books on maxims of the common law which have been consulted, there appears to be no reference to *mater semper certa est* as a maxim of the common law. In contrast, the uncertainty of fatherhood is expressed in the maxim *pater est quem nupitae demonstrant.*

78. The *principle* that the mother is always certain, however, is reflected in common law cases. In particular in probate cases concerning the devising to children born outside wedlock. For instance, Lord Chancellor Eldon in **Wilkinson v. Adam** (1 V. & B.422, 1812) held at p. 446:-

> "I know no Law against the devising to the Children of a Woman, whether natural or not; as that creates no Uncertainty. The Difficulty arises upon as Devise to the Children of a particular Man by a Woman, to whom he is not married."

This was cited with approval by the Court of Chancery in **Mortimer v. West** (3 Russ. 370 1827). The Court held that although a bequest by a father to an illegitimate child may fail, the same was not the case for mothers as:-

> "… where they are described as the children of a particular woman, the objects are as certain as if they were legitimate."

79. In **The Ampthill Peerage Case** [1977] 1 A.C. 547, the House of Lords refused an application by a son of Lord Ampthill, the third Baron, to have the declaration of legitimacy granted to another son, Geoffrey Russell born to a previous marriage, overturned. It was contended that Geoffrey Russell was not the lawful son of the third Baron and therefore, as he was not in fact a son of a peer, should not be

permitted to succeed to the third Baron's titles. Lord Simon of Glaisdale stated, at p. 577, in words that have been repeated in many cases in the United Kingdom and elsewhere that:-

> "Legitimacy is a status: it is the condition of belonging to class in society the members of which are regarded as having been begotten in lawful matrimony by the men whom the law regards as their father. *Mother, although also a legal relationship, is based on fact, being proved demonstrably by parturition. Fatherhood, by contrast, is a presumption*." (emphasis added)

80. The Family Division of the High Court of England and Wales heard an application for a declaration as to the parentage of twins born by way of surrogacy in **Re W. (Minors) (Surrogacy)** [1991] 1 F.L.R. 385. Lord Justice Scott Baker stated at p. 386 that:-

> "Until recently, when the advance of medical science created the possibility of in vitro fertilisation, it was not envisaged that the genetic mother and the carrying mother could be other than the same person. *The advent of IVF presented the law with a dilemma: whom should the law regard as the mother?...Agreement in this case has been made possible by the Human Fertilisation and Embryology Bill…"* (emphasis added)

This dictum suggests that Scott Baker L.J. was satisfied that there existed no common law rule or maxim in relation to maternity, it was a fact. The case was resolved by the statutory position adopted by the Human Fertilisation and Embryology Act. 1990.

81. The issue of motherhood has been addressed in academic writings. In **Shatter's Family Law** (Butterworths, 4th edn, 1997) at pp. 429-430 it is stated:-

> "Until relatively recently a woman by giving birth to a child irrefutably established the fact of mother. For the vast majority of births, this is still so. However, developments over the last decade in medical science which have resulted in the availability of new techniques to assist human reproduction have meant that the mere fact of birth for a small minority of women may not conclusively determine motherhood. For example, if a child born following the fertilisation of a donor egg with a husband's sperm using the technique known as in vitro fertilisation (IVF) or by way of gamete intra-fallopian transfer (GIFT) is the mother of such child the woman who gives birth or the egg donor? A similar question arises where a woman gives birth to a child following the use of either of the above techniques where she is acting as a surrogate for a couple whose eggs and sperm were used for the conception. No statutory provisions have been enacted to date to answer these questions nor has any case raising such issue yet come before the Irish courts. In the absence of legislation, whether the courts would favour the birth mother or the genetic mother is a matter of conjecture. It is also uncertain what relationship in law such child would be held to have to the birth mother's or genetic mother's relations. None of these questions or difficulties arise in the context of a medically assisted conception where the birth mother's eggs are used in the conception of the child. In such circumstances, the birth mother and genetic mother are the same person and she is in law the mother of the child born to her, even if she has agreed to act as a surrogate for her child's father and wife."

82. In contrast to this jurisdiction, the law in the United Kingdom on this topic has advanced in recent decades, and thus the academic literature is a useful comparative reference. In **Law and Parenthood** (Barton & Douglas, Butterworths, 1995) it is stated at p.54 that:-

> "[i]t was never established in the common law whether the legal mother of the child was the

> genetic or gestational mother, since the problem could not arise until recently. There were, however, dicta to the effect that gestation was a key factor. In the Ampthill Peerage case, Lord Simon said 'Motherhood…is based on a fact, being proved demonstrably by parturition. This obiter dictum derived from the saying, *mater est quam gestation demonstrate* (motherhood is proved demonstrably by parturition), but since it is most unlikely that his lordship could have imagined any other alternative were possible, it is not a particularly convincing citation." (emphasis added)

83. In **Hayes & Williams' Family Law** (Gilmore & Glennon, 3rd edn, Oxford University Press, 2012) under the heading "Legal Parenthood-Motherhood" at pp. 357-358 it is stated:-

> "Lord Simon of Glaisdale in the *Ampthill Peerage Case* stated that motherhood, although 'a legal relationship, is based on a fact, being proved demonstrably by parturition.' These words do not equate giving birth with motherhood; they speak of proving motherhood. It could be argued therefore that, as a matter of *common law*, the underlying basis for motherhood might be a genetic connection, *as evidenced* by parturition. Usually of course there is not issue because the woman carrying the child will also be the genetic mother. However, a woman can now give birth to a child to whom she is not genetically related, for example where an embryo is implanted in her which has been created with the egg of another woman. Is the woman who gave birth the mother of the child or is the woman who donated her egg the mother?" (emphasis in original)

84. In the abstract of an article by D'Alton- Harrison, "**Mater Semper Incertus Est: Who's Your Mummy**?" (2014) Medical Law Review 27 it is stated:-

> "In English law, the legal term for father has been given a broad definition but the definition of mother remains rooted in biology with the Roman law principle *mater semper certa est* (the mother is always certain) remaining the norm. However, motherhood may be acquired through giving birth to a child, by donation of gametes or by caring and nurturing a child so that the identity of the mother is no longer certain particularly in the case of surrogacy arrangements…"

85. The English literature is noteworthy as it acknowledges the uncertainty surrounding the basis of motherhood in light of modern scientific and medical advances.
86. Academia has made reference to *mater semper certa est* as any of the following a "maxim", ancient dictum", "norm", and "roman law principle". Indeed there does not exist any agreement amongst the academic literature as to the status of *mater semper certa est*. Further, there does not appear to be any authority to suggest that it is either an irrebuttable presumption or that it is enshrined as a maxim of "Irish public law", as argued by the appellants.
87. The only reference to *mater semper certa est* in Irish case law that I can find is that contained in the *obiter dicta* of Walsh J. in **O'B. v. S.** I.R. 316. In that case Walsh J. stated that it was 'desirable' to make reference to the decision of the European Court of Human Rights in **Marckx v. Belgium**. After finding that the European decision could have no bearing on the question to be determined on that particular case, he stated, at p. 338:-

> "…In so far as it deals with the question of the obligation to establish the relationship between the mother and the child which was necessary under Belgian law, that point does not arise in this jurisdiction as the maxim mater semper certa est did not apply in Belgian law but does apply in Irish law by reason of the provisions of ss. 1, 7 and 28 of the Births and Deaths Registration Act (Ireland), 1880."

88. It appears to me that in fact the maxim *mater semper certa est* was not part of the common law of Ireland. It was a statement which recognised the medical and scientific fact that a birth mother was the mother of a child. The common law of Ireland has not addressed the issue of motherhood in a surrogacy situation.

Statutory Law

89. Walsh J. in **O'B v. S.** [1984] I.R. 316 at p. 338, as quoted above, stated that the maxim *mater semper certa est* applied in Irish law by reason of ss. 1, 7 and 28 of the Births and Deaths Registration Act (Ireland), 1880. Section 1 of the above Act of 1880 provided:-

> "In the case of every child born alive after, or whose birth has not been registered previous to the commencement of this Act, it shall be the duty of the father and mother of the child, and default of father and mother, of the occupier of the house in which to his knowledge the child is born, and of each person present at the birth, and of the person having charge of the child, to give to the registrar, within forty-two days next after such birth, information of the particulars required to be registered concerning such birth, and in the presence of the registrar to sign the register."

90. Section 7 of the said Act of 1880 provided:-

> "In the case of an illegitimate child no person shall, as father of such child, be required to give information under this Act concerning the birth of such child, and the registrar shall not enter in the register the name of any person as father of such child, unless at the joint request of the mother and of the person acknowledging himself to be the father of such child, and such person shall, in such case, sign the register, together with the mother."

91. Under Miscellaneous provisions of the Act of 1880, s. 28 provided:-

> "An entry, or certified copy of an entry, of a birth or death in a register under the principal Act, or in a certified copy of such a register, shall not be evidence of such birth or death, unless such entry either purports to be signed by some person professing to be the informant, and to be such a person as is required by law at the date of such entry to give to the registrar information concerning such birth or death, or purports to be made upon a certificate from a coroner, or in pursuance of the provisions of this Act with respect to the registration of births and deaths at sea, or in pursuance of section six of this Act.
>
> When more than three months have intervened between the day of the birth and the day of the registration of the birth of any child, the entry or certified copy of the entry made after the commencement of this Act of the birth of such child in a register under the principal Act, or in a certified copy of such a register, shall not be evidence of such birth, unless such entry purports,-
>
> (a). If it appear that not more than twelve months have so intervened, to contain a marginal note that a statutory declaration has been made by a properly qualified informant;
> (b). If more than twelve months have so intervened, to have been made with the authority of the Registrar General, and in accordance with the prescribed rules.
>
> …"

92. However, the said statute reflects merely a factual situation of 1880 - that the birth mother was the mother. Neither science nor medicine allowed for a situation in which a woman other than the gestational mother was the genetic mother of a child. The Act of 1880 was repealed by the Civil Registration Act, 2004.
93. The Civil Registration Act, 2004, s. 19 provides:-

> "Subject to the provisions of this Part, when a child is born in the State, it is the duty of -
> (a) the parents or the surviving parent of the child, or
>
> (b) if the parents are dead or incapable through ill health of complying with the subsection, each other qualified informant, unless he or she reasonably believes that another qualified informant has complied with it in relation to the birth,
>
> not later than 3 months from the date of the birth -
> (i) to attend before any registrar,
> (ii) there, to give to the registrar, to the best of his or her knowledge and belief, the required particulars of the birth, and
>
> (iii) there, to sign the register in the presence of the registrar.
>
> …"

Section 60(8) of the same Act provides:-

> "A person who is dissatisfied with a decision (including a revised decision) of an tArd-Chláraitheoir may appeal against it to the High Court."

94. Both the Births and Deaths Registration Act (Ireland) 1880 and the Civil Registration Act, 2004, are similar in purpose. They are Acts to provide for, *inter alia*, the registration of births.
95. The Status of Children Act, 1987, as described in its long title, was an Act to equalise the rights of children and to amend the law relating to legitimacy. It does not provide a statutory structure by which the alteration of maternal legal status in the situation of a surrogacy arrangement can be achieved.
96. Neither the Civil Registration Act, 2004, nor the Status of Children Act, 1987, as amended, or any other legislation, has been passed by the Oireachtas to address the issues which arise on surrogacy arrangements. Legislation to date in Ireland has not addressed the issues arising as a result of surrogacy arrangements. As a significant social matter of public policy it is clearly an area for the Oireachtas, and it is not for this Court to legislate on the issue.

The Commission on Assisted Human Reproduction

97. The Commission on Assisted Human Reproduction was established in March 2000. The terms of reference approved by the Government were:-

> "to prepare a report on the possible approaches to the regulation of all aspects of assisted human reproduction and the social, ethical and legal factors to be taken into account in determining public policy in this area."

98. The Report states that it was established against the backdrop of:-

> "…growing public concern that such complex and potentially controversial Assisted Human Reproduction (AHR) procedures are being practiced in Ireland in the absence of any legislative controls."

99. The Commission of 25 members, and additional Working Group members, delivered its Report in

April 2005. Its principle recommendation was the establishment of an independent statutory regulatory body to regulate assisted human reproduction services in Ireland.
100. The Commission also made a number of additional recommendations including, *inter alia*, guidelines in relation to a number of aspects of assisted human reproduction, such as the freezing and storing of gametes; super ovulation, freezing and abandonment of extra gametes *etc*.
101. The Commission considered how best to address the legal and ethical concerns surrounding surrogacy. It recommended that surrogacy be permitted, subject to regulation by the statutory regulatory body. In its Report the Commission stated that, as far as possible:-

> "Regulations should be introduced that would protect the various interests of all parties to a surrogacy arrangement, with particular reference to the interests of any resulting children."

The Commission noted that it was likely, as the law then stood (and as a corollary as the law currently stands) that the surrogate or birth mother would be considered to be the legal mother of the child.
102. In relation to legal parentage of a child born through surrogacy, the Commission considered four suitable options open to the legislature; and recommended that the child born to such an arrangement be presumed to be that of the commissioning couple. This, the Commission stated, allowed enough flexibility in relation to the legal parentage of the child in circumstances where there was a fundamental change in the circumstances under which the surrogate mother consented to the agreement.
103. The Commission recommended that:-

> "new legislation should be introduced to establish an independent and regulatory body to regulate the provision of assisted human reproduction in this jurisdiction".

The Commission recommended that surrogacy come within the ambit of this statutory regulatory body.

Conclusion

104. There is a core issue on this appeal. It is as to the registration of the "mother" under the Civil Registration Act, 2004. On the question of - who is the mother? - a quotation from Lord Simon of Glaisdale in **The Ampthill Peerage** case [1977] AC 547, has echoed throughout, and was initially followed, in many common law jurisdictions. He stated at p. 577:-

> "Legitimacy is a status: it is the condition of belonging to class in society the members of which are regarded as having been begotten in lawful matrimony by the men whom the law regards as their father. Motherhood, although also a legal relationship, is based on fact, being proved demonstrably by parturition. Fatherhood, by contrast, is a presumption." (emphasis added)

105. That statement of Lord Simon is evocative of its time. It reflects a different society, and a time prior to the modern scientific and medical developments of assisted human reproduction.
106. Following in the slip stream of modern medical developments in assisted human reproduction, other States have passed legislation to govern and regulate the area.
107. Such statutory development has not occurred yet in Ireland.
108. The appellants have placed great reliance on, what they referred to as a legal maxim, *mater semper certa est*.
109. As discussed above, I am not satisfied that a maxim, or principle, *mater semper certa est* has been part of our common law.
110. However, whether such a maxim or principle was part of our common law or not is not

determinative of this case. The words were a simple recognition of a fact which existed prior to the modern development of assisted human reproduction.
111. There have been statutory developments in other jurisdictions to address issues which arise where there has been assisted human reproduction. Legislatures have recognised the need to address issues that now arise as a result of scientific and medical developments enabling children to be born in circumstances such as surrogacy.
112. Neither the Status of Children Act, 1987, nor the Civil Registration Act, 2004, or any legislation in Ireland, currently address the issues arising on surrogacy birth of children.
113. Any law on surrogacy affects the status and rights of persons, especially those of the children; it creates complex relationships, and has a deep social content. It is, thus, quintessentially a matter for the Oireachtas.
114. As stated earlier, there is no definitive definition of "mother" in the Constitution. Nor is there anything in the Constitution which would inhibit the development of appropriate laws on surrogacy.
115. The words *mater semper certa est*, upon which the appellants laid much stress, is not the basis of Irish law on the issue before the Court. The words simply recognise a fact, which existed in times gone by and up until recently, that a birth mother was the mother: both gestational and genetic. This was the factual situation until scientific and medical advances enabled persons to avail of assisted human reproduction.
116. There is a lacuna in the law as to certain rights, especially those of the children born in such circumstances. Such lacuna should be addressed in legislation and not by this Court. There is clearly merit in the legislature addressing this lacuna, and providing for retrospective situations of surrogacy.
117. Under the current legislative framework it is not possible to address issues arising on surrogacy, including the issue of who is the mother for the purpose of the registration of the birth.
118. The issues raised in this case are important, complex and social, which are matters of public policy for the Oireachtas. They relate to the status and rights of children and a family. It is important that the rights of the twins, the parent respondents, the notice party and the family are vindicated pursuant to the law and the Constitution. Neither the common law nor statutory law to date address the issue of the registration of the fourth named respondent on the certificate of birth of children born by a surrogacy arrangement.
119. For the reasons given, I would allow the appeal, and quash the orders of the High Court.

JUDGMENT of Mr. Justice Hardiman delivered the 7th day of November, 2014.

1. I would allow the appeal and set aside the order of the High Court. I agree in general with the reasoning of O'Donnell J. I wish to make three additional points.

My first point relates to the urgent need for legislation in this area.

---

2. The dilemma in this case was precisely articulated some twenty-four years ago in an English case, **Re W. (Minors) (Surrogacy)** [1991] 1 F.L.R. 385. In that case, Scott-Baker L.J. said:

"Until recently, when the advance of medical science

> created the possibility of *in vitro* fertilisation, it was not envisaged that the genetic mother and the carrying mother could be other than the same person. The advent of IVF presented the law with the dilemma: whom should the law regard as the mother?"

3. In that case, the issue was resolved by reference to the (U.K.) Human Fertilisation and Embryology Act, 1990.

4. No parallel resolution is possible in this jurisdiction because, almost a quarter century after the English Act, the legislature has yet to address the matter. It intends to do so as a matter of urgency; there has been a Report which clarifies many issues; there has been a Bill the relevant sections of which have not, however, been proceeded with. I wish to join with my colleagues in pointing out the urgency of the need for legislation on this topic. There is, at present, a serious disconnect between what developments in science and medicine have rendered possible on the one hand, and the state of the law on the other. It is as if Road Traffic Law had failed to reflect the advent of the motor car. The failure to adapt the law in relation to developments in Embryology of course, affects far fewer people, but it affects them in a peculiar and intimate fashion which makes statutory law reform in this area more than urgent.

5. Secondly, I am firmly of the view that law reform in this area, is primarily, perhaps entirely, a matter for the Oireachtas. I am sorry to differ in this regard from Mr. Justice Clarke in his judgment in the present case. The extent of this difference should not be overstated. Like him, I acknowledge that the "sole and exclusive" power to make laws under the Constitution is conferred on the Oireachtas by Article 15.2.1. I certainly agree with Mr. Justice Clarke's comment on this:

> "In that context, there are limits to the extent to which it is constitutionally appropriate for the Courts to engage in a reinterpretation of the Common Law where such interpretation might cross the line into legislation and, thus, infringe the constitutionally protected role of the Oireachtas".

6. Outside the context of the Superior Courts' constitutionally mandated

role as interpreters of the Constitution, I agree with Mr. Justice Clarke that:

> "… it is clear that the role of the Courts… while important, is limited. Short of the existing law being found to be in breach of the Constitution, the only proper role of the Courts is to play their part in the evolution of the Common Law in its application to new conditions and circumstances or to interpret legislation. Even where it is clear that the existing law is no longer fit for purpose it may well be that the only solution lies in legislation. This will particularly be so where any solution to identified problems requires significant policy choices and detailed provisions beyond the scope of the legitimate role of the Courts".

7. There have been endless judicial and academic attempts to define the proper role of the Courts, as against that of the legislature, in the process of law reform. I will refer to one or two of these below. But for the purposes of the present case, it is unnecessary to go beyond the last quoted phrase from the judgment of Clarke J., to support the proposition that the present case is, emphatically, not one for judicial law reform precisely because it "requires significant policy choices and detailed provisions beyond the scope of the legitimate role of the Courts".

A policy choice.

8. There is no doubt in my mind but that the dilemma, perfectly described by Lord Justice Scot Baker, quoted above, is one which requires for its solution an important policy decision. The question as to whom the Court should regard as the mother of a particular child, born as a result of assisted reproduction, raises fundamental issues the most basic of which is, "what is motherhood?".

9. It is to my mind self evident that the questions as basic as the one just posed cannot be answered by any technical legal exegesis or even by any purely logical process. This is because, at bottom, the question raised is not a legal question or a purely logical question. It is a question of values and attitudes so deep that it is an understatement to call it a matter of policy. In my judgments in **Sinnott** and **T.D** ([2001] 2 I.R. 545 and

[2001] 4 I.R. 259, respectively) I give several reasons for the conclusion that the Courts should not impose their own opinions on questions which are not, fundamentally, of a legal nature at all.

10. I do not intend to repeat that discussion here, merely to mention it, lest failure to note my reservations regarding the expansive attitude to the Courts power expounded by Mr. Justice Clarke might suggest acceptance of it. The point will inevitably arise in other cases, sooner rather than later.

11. It is plainly necessary for any Common Law judge confronted with the (often very seductive) temptation to change the law in the interests of what he or she perceives to be justice, to be very clear as to the legitimate scope of a judge's ability to do so.

> Justice Oliver Wendell Holmes was Chief Justice of the General Court of Massachusetts and subsequently for twenty-five years a Justice of the United States Supreme Court. He was the author of a well-known treatise on "*The Common Law*". He was a scholar, *par excellence*, of the role of the Common Law judge and in particular of the scope for such a judge to develop or evolve that body of law. In **Southern Pacific Company v. Jensen** 244 US 205, he said in an influential passage at p.244 of the Report:
>
> > "*I recognise without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from Molar to Molecular motions. A Common Law judge could not say I think the doctrine of consideration a bit of historical nonsense and I shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say I think well of the Common Law Rules of Master and Servant and propose to introduce them here en bloc.*"
>
> Justice Holmes language is in part somewhat unusual. But "molar" means of or relating to a very large body or mass; molecular, on the other hand, connotes an extremely small entity.
> This passage was adopted in **Kleinwort Benson v. Lincoln City Council** [1999] 2AC 349 at 377, by the distinguished English jurist Lord Goff:
>
> > *"When a judge decides a case which comes before him, he does*

> *so on the basis of what he understands the law to be. This he discovers from the applicable statutes, if any, and from precedents drawn from reports of previous judicial decisions… In the course of deciding the case before him he may, on occasion, develop the Common Law in the perceived interests of justice, though as a general rule he does this 'only interstitially…' This means not only that he must act within the confines of the doctrine of precedent, but that the change so made must be seen as a development, usually a very modest development, of existing principle and so can take place as a congruent part of the Common Law as a whole. In this process, what Maitland has called 'the seamless web' and I myself… have called the 'mosaic' of the Common Law is kept in a constant state of adaptation and repair, the doctrine of precedent, the 'cement of legal principle' providing the necessary stability".*

12. It must be very clear that what is proposed in the present case could not possibly be described as an "interstitial" development. This word means pertaining to, forming or occupying interstices, according to the Oxford English dictionary. An interstice is "an intervening, usually empty, space, especially a relatively small or narrow space, a chink, a crevice". The modest scope of the power described by this adjective is sufficiently suggested by that definition. What is proposed here is emphatically not something that can be done "within the confines of the doctrine of precedent". It is in no sense a development of a "seamless web"; it is a proposal to extract a significant part from that web and replace it with something quite different.

> This is an invitation to overrule the established understanding of "mother" and then to legislate in the area left vacant, and to do so without any evidence-based assessment of the merits of the new dispensation. If the Court were to accede to the Respondents' invitation, it would dangerously approach illegitimacy.

13. Mr. Justice Clarke will refer to the need to develop the law of contract, which took its rise in its modern form "in the era of the mounted courier and the telegraph", in light of the developments of the electronic era. I doubt if the mounted courier and the telegraph co-existed for very long but the mention of the first of these things

indicates the great period of time over which this development has taken place. Further, the developments in question were not developments of principle, but developments intended to take account of the fact that communication at a distance, once confined to the speed of a rider on horseback, is now virtually instantaneous. But the principles remain the same. Here, the substitution of a new principle is in question, on a topic as fundamental as motherhood.

14. It seems to me that the principles I have outlined above are enshrined in Irish law as well. In **Hynes-O'Sullivan v. O'Driscoll** [1988] IR 436, this Court was invited to amend the long standing Common Law defence to a defamation action, that of Qualified Privilege. The Court refused to do this, for a number of reasons which are set out by Henchy J. at pages 449-450 of the Report. On the latter page he said:

> "I am of the opinion that the suggested radical change in the hitherto accepted law should more properly be effected by statute. The public policy which a new formulation of the law would represent should more properly be found by the Law Reform Commission or by those others who are in a position to take a broad perspective as distinct from what is discernable to the tunnel vision imposed by the facts of a single case. That is particular so in a case like this where the law as to Qualified Privilege must reflect a due balancing of the constitutional right to freedom of expression and the constitutional protection of every citizen's good name. The articulation of public policy on a matter such as this would seem to be primarily a matter for the legislature".

15. I consider that this approach applies all the more obviously where we are concerned, effectively, with the question of the nature of motherhood.

16. The third point which I wish to make relates to the learned trial judge's finding that "examination of the genetic material is the sole and determinative" evidence of parenthood.

17. I do not consider that the Court should address this question at all, for the reasons given in an earlier Section of this judgment. But I would specifically depart from this finding of the learned trial judge because I

fear that for the Courts to express a specific view on this subject in advance of legislation might tie the hands of the legislature.

18. In particular I am afraid that the view which the learned trial judge expressed, if it stood, would permanently exclude from the status of "mother" a woman who has given birth, having become pregnant with "donor" genetic material. In the English legislation on this topic it is provided that a woman who has given birth by reason of the implantation in her of donor materials, "and no other woman" shall be treated as the mother of the child born as a result.

19. I am apprehensive that to uphold the learned trial judge findings in this regard might preclude the Oireachtas, assuming it to be so minded, from legislating along the same lines. I am far from suggesting that the Oireachtas should (or should not) follow the English precedent, but I do not think that any judgment of the Court should preclude them in advance from doing so if they thought fit.

20. It must be borne in mind, in this context, that the facts of the present case are most unusual. As I understand it, in the large majority of assisted reproduction cases, the woman seeking the assistance is entirely capable of bearing the child but requires the implantation of donor material within her to commence the gestation. In the present case, by contrast, Mrs. R. is quite capable of producing the genetic material but, for anatomical reasons, is unable to bear the child. Apart from any other consideration, I do not think this unusual case is an appropriate one in which to lay down rules of general application. I am very conscious of Mr. Justice Henchy's cautionary reference to "the tunnel vision imposed by the facts of a single case".

Judgment of O'Donnell J. delivered the 7th of November 2014

1. This case involves a couple, the third and fourth named applicants, who are married, and who wished to have children. The fourth named applicant was diagnosed with a syndrome called MRKH when she was eighteen years old. As a result of this condition she does not have a uterus and therefore cannot carry a pregnancy. She does have fully functioning ovaries and is able to produce ova. Accordingly the third and fourth named applicants investigated the possibility of surrogacy arrangements. During this process of investigation the fourth named applicant's sister (the notice party) agreed to act as a surrogate and ultimately all relevant steps in this case occurred in this jurisdiction through the medium of a private clinic providing fertility treatment. The fourth named applicant and her sister underwent the hormone treatment involved in in vitro fertilisation ("IVF"). The fourth named applicant had to take medication to stimulate her ova for retrieval and her sister had to undergo treatment to prepare her body for pregnancy. Ova from the fourth named applicant were fertilised by sperm from the third named applicant and implanted in the uterus of the notice party. The first attempt at implantation was unsuccessful but a second attempt in March 2008 resulted in pregnancy. The notice party gave birth to twins, the first and second named applicants, who were taken home and cared for by the third and fourth named

applicants as their family. On the birth of the twins, the third and fourth named applicants and the notice party sought to have the fourth named applicant registered as the mother of the twins (the third named applicant being registered without difficulty as the father, because fatherhood can be acknowledged). However the first named respondent/appellant, the Chief Registrar for Births, Marriages and Deaths, refused on the basis that the registration system was obliged to register the woman who had given birth as the mother of the children born. Accordingly, the notice party was registered under protest as the mother on the birth certificates, and an application was brought to correct the register. Again, this was refused by the first named respondent/appellant, and these proceedings were commenced seeking a declaration that the fourth named applicant is the mother of the twins, and accordingly entitled to be registered as their mother.

2. For ease of identification and reference, and without attributing any legal significance thereto, and indeed without intending any offence, I will in the course of this judgment hereinafter refer to the fourth named applicant as the "genetic mother" or "commissioning mother" and to the notice party as the "birth mother" or "surrogate mother". The legal issue in this case arises because developments in science mean that it is now possible that the female role in conception, pregnancy and childbirth, which for women fortunate enough not to face reproductive problems is a single process, can now be separated and performed by two or more persons, in this case the genetic mother and the birth mother.

3. While this case is focussed upon a difficult question of the law of registration of births, an area which rarely comes before these courts, it clearly touches upon important and fascinating questions of ethics, science and law. A court must address and decide issues properly coming before it for adjudication. But for reasons which I will address later in this judgment, it is also important that the Court focus upon and determine only those issues which are necessary to be determined. It is, I think, useful therefore to remind ourselves at the outset that this case does not raise any question of the enforceability or validity of a surrogacy agreement or the recognition or enforcement here of surrogacy agreements performed in jurisdictions with legislative codes which permit such agreements. Nor does it involve any dispute between a commissioning parent and a surrogate mother and equally clearly it does not involve the question of the constitutional validity of any legislation regulating or even prohibiting surrogacy agreements. Each of these situations involves complex legal issues which must be addressed and determined if and when they arise in the context of facts which may define and illuminate the issue to be determined. But they do not arise here. What this case does involve is a narrow but important point of the law of registration: who is to be registered by the first named respondent/appellant as the mother of the first and second named applicants? The Court has received written and oral submissions from the parties, the notice party and the amici, and I have found them very useful in a broad sense in understanding the background and nuances against which this issue must be determined. However, the issue is and remains a narrow one: under the Irish law of registration, who is entitled to be registered as the mother of the applicant children? Before addressing that question, it is desirable to make some general observations to set the context in which the legal issue raised in this case is to be determined.

4. First, the issue raised in this case arises because of at least two extraordinary but unconnected advances in science which occurred in the late 20th century. The discovery by Crick and Watson in 1953 of the structure of DNA as a double helix was an extraordinary scientific achievement but it was many years before it was possible through further advances to develop practical applications of this discovery. The discovery of DNA, while important in a therapeutic context, has also had a significant impact in the field of testing, and in particular criminal investigation. Until relatively late in the 20th century, blood testing was essentially negative, it was possible in some cases to exclude any connection, but not to positively establish connection. However the realisation that an individual's DNA is essentially formed at the point of conception and by the provision of DNA from the male and female meant that it was in theory, possible to establish identity and also parental, filial and family connections with a high degree of certainty. Significant as this science was in the field of criminal investigation, its impact on the law of domestic relations might have been relatively marginal. The irresponsible seducer of the Victorian melodrama might no longer be able to gamble on denying parentage and the possibility of hospital confusions and mix-ups at birth might have been reduced, but without the advances in assisted reproduction made in the 1970s, the development of the science of DNA would only have led to a more efficient testing regime to identify persons whose role and status had been understood for millennia: the male/father and the female/mother. On its own the discovery of DNA did not alter those roles. By contrast, the science involved in the first successful birth as a result of in IVF (developed by Edwards and Steptoe) in 1978 was itself relatively simple, albeit discovered after years of frustrating research, and its impact was immediate and enormous. It has been estimated that in the two decades that followed the first successful IVF pregnancies, 40,000 pregnancies were generated using the technique, and it must be presumed for parents struggling with the pain of infertility and who, only a few years earlier would in all probability have been childless. The issue arising in this case flows directly from those two remarkable achievements of science in the late 20th century.

5. Second, despite the advances in the field of assisted reproduction, the enormous impact of these advances on the most intimate parts of human lives, and the fact that assisted reproduction has been provided on a private basis in Ireland for some time now, this is an area which is devoid of legislative guidance. The absence of legislation does not mean an absence of assisted reproduction; rather it means an absence of regulation. Generations of children have now been born in Ireland through assisted reproduction into a legal half world

where the only constraints on the process are those imposed by the dictates of a private market and the sense of responsibility of practitioners. Furthermore, Irish society in general has not addressed the important issues that arise in the field of assisted reproduction. In this regard, surrogacy arrangements pose particular problems. It might be recalled that the 1984 Warnock Report in the UK (*Report of the Committee of Inquiry into Human Fertilisation and Embryology*) into the field of assisted reproduction, which recommended regulation of the field, also recommended against permitting surrogacy arrangements, saying: "it is inconsistent with human dignity that a woman should use her uterus for financial profit and treat it as an incubator for someone else's child" (p. 45) (see the admirable discussion in Madden, *Medicine, Ethics and the Law* (Dublin; Butterworths Professional; 2011; 2nd ed.). In addition to those who have ethical or moral objections to the process, there are also those who oppose it because of concerns about the commercialisation and commodification of women's reproductive organs. Even the limited survey of the position in different states in the world, and particularly in Europe, shows that there are many different possible approaches which require to be considered. Should surrogacy be permitted at all? If it is to be permitted are there any restrictions such as age or marital status on the person seeking it or on the person acting as a surrogate? Should it be available only to those with reproductive difficulties or should it be available to anyone who seeks it for reasons of lifestyle or convenience. Can payment be made to a surrogate for services rendered? If so is there a limit? If it is not permissible to pay the surrogate mother is it possible to make payments to a clinic providing the technical assistance and if so is there any limit on such payments? What is the status of any agreement between the parties? What is to occur if there is a disagreement during the course of the pregnancy arising perhaps from the death of one of the commissioning parents, a separation or divorce, a change of mind on the part of the surrogate or perhaps the detection of significant abnormalities? These are only some of the questions which arise and must be addressed. Alongside each of them is a further difficult legal question: in the event that some regulations are imposed on surrogacy arrangements what is the position when, as inevitably will happen, children are born where those regulations have been breached? If for example, the consequence is that the surrogacy arrangement cannot be recognised or given effect, and the children do not become members of the family of the commissioning parents, then they will, through no fault of their own, exist in something of a new legal limbo. On the other hand, if notwithstanding breach of some or all of the regulations, the surrogacy agreement is enforced, and the children become members of the commissioning parent's/parents' family, then the system of regulation may become irrelevant.

6. These are not easy questions. However, and without attributing blame, it is surely wrong that Irish society has not had the opportunity to address these questions and express its views ultimately though the people's representatives in the legislature. It is also a cause for regret that The Irish Council for Bioethics no longer functions. In a field of rapidly changing science, strong beliefs and stronger emotions, neutral information, thoughtful reflection and interaction between disciplines is invaluable. The absence of legislative guidance is also surely wrong from the perspective of couples struggling with the pain of infertility and the considerable stresses of fertility treatment. They should not be required to become a vociferous pressure group to achieve more general regulation, most of all when the issue involves an intimate matter which few couples would wish to publicise, particularly if it means exposing their children to the possibility of ill informed comment and worse. Finally however, it is surely most clearly and profoundly wrong from the point of children born through an unregulated process into a world where their status may be determined by happenstance, and where simple events such as registration for schools, attendance at a doctor, consent to medical treatment, acquisition of a passport and even joining sports teams may involve complications, embarrassment and the necessity for prior consultation with lawyers resulting in necessarily inconclusive advice. This Court in clear and forceful terms drew attention to the absence of regulation in its decision in *Roche v. Roche* [2010] 2 I.R. 321. The need for legislation is even more urgent today.

7. Third, the absence of legislative action means that citizens will inevitably seek a resolution of their problems through litigation. Courts cannot abstain from determining a legal issue which is properly before a court and which requires to be decided. But this does not mean that the Court can provide a legislative scheme, whether detailed or simple. Instead a decision on a constitutional matter can be a frustratingly binary choice between upholding legislation, or striking it down and leaving a gap which it is for the other constitutional organs to fill. In some cases the consequence of a decision on constitutionality may even limit the options for legislation. In the case of statutory interpretation, a court's function will be to declare what the law is, rather than what it ought to be. Any such declaration of the law will however inevitably affect other cases. Thus in this case for example, the issue might be said to be whether under the Civil Registration Act 2004 the genetic mother or the birth mother is to be registered on the birth certificates. The choice of one excludes the other and will apply to all cases.

8. Fourth, it may seem strange at one level that this case which touches on so many important ethical and philosophical issues should focus on an issue of registration. The registration of births, marriages and deaths is an important but largely colourless process, necessary in any developed society. Like the census it reflects the Victorian urge to systematise, organise and record. As such it might be said to be an unlikely subject for contention. If for example, a birth certificate is no more than a snapshot in time albeit an important one, and a recording of a fact, then it might reasonably be questioned what difference it makes if the fact of birth is recorded? However the certification process is a method by which the law determines certain status. Sir Henry Maine observed that the development of the law had been a development from status to contract. But that observation, true in many areas of the law, only emphasises the significance of those areas where status

remains important: for example, citizenship, birth, parentage, death and marital status including not just whether a person is single, married or divorced but also the definition of those persons who may achieve that status. To a degree, the law and society assumes that status follows from or is at least established by, registration and certification. Important legal consequences may follow from the achievement or termination of a particular status not least in relation to inheritance. Certification, while often routine, is therefore important. It is significant for example that where the Status of Children Act 1987 ("the 1987 Act" or "the Act of 1987") contemplates a process for the declaration of parentage by a court, it provides for consequential registration, or re-registration, of birth and the issuance of a new certificate.

9. Fifth, and finally, it is important to observe that the facts of this case are somewhat unusual. It is, we were told, a much more common female infertility problem that a woman would require the donation of ova, rather than as here where a woman might be in a position to produce an ovum but not be capable of carrying a pregnancy. At least one formulation of the applicants' case involves an invitation to this Court to update the law or to make a choice between competing definitions of mother. It is a relevant consequence that such a declaration would apply generally and to all situations, so that previously registered mothers and fathers could lose that status and anonymous donors of sperm and ova could become entitled to declarations of parentage and registration. It might be said that this is a possibility more theoretical than real and that the current system allows commissioning parents in that situation a facility denied to the parents in this case, of having their parentage registered, in the case of a woman by birth, and in the case of a father by acknowledgement, and in neither case are they obliged to bring the arrangements to the attention of the registrar. Nevertheless it is in my view not an irrelevant consideration, insomuch at least as this is a matter of discretion rather than legal interpretation. These then are only some of the considerations forming the background to this case.

The High Court Judgment

10. In an extensive judgment the High Court Judge considered detailed evidence from distinguished experts in the fields of genetics, pregnancy and birth and in particular relating to the developing field of epigenetics. Epigenetics was described as the process of gene expression whereby some genes are turned off and some turned on, and significantly for present purposes, this can occur through a number of factors including what happens in the womb. The Court also considered such references in the case law as were invoked by respective parties. The State, through the first named respondent, maintained that the person to be registered was the person who had given birth. This, it said, was no more than an application of the ancient maxim of *mater semper certa est*, the mother is always certain, or perhaps more precisely - ascertainable. The applicants on the other hand, together with the notice party, contended that the evidence showing the genetic link between the fourth named applicant and the first and second named applicants meant that the fourth named applicant was entitled to be registered as the mother of the first and second named applicants. Although clearly an issue such as this, or any issue concerning surrogacy has not previously been considered in any detail by an Irish court, the parties sought to mine the case law to extract *dicta* supportive of their respective positions. In particular, the applicants relied upon dicta arising principally in the field of contested adoptions in which the Court has considered the importance of what was described as the "blood link" between a mother and her child. Once such *dictum* was that of Kenny J. in *G. v. An Bord Uachtála* [1980] I.R. 32 at p. 98:

> "The blood link between the plaintiff and her child means that an instinctive understanding will exist between them which will not be there if the child remains with the notice parties. A child's parent is the best person to bring it up as the affinity between them leads to a love which cannot exist between adoptive parents and the child. The child is now 12 months old and children of that age are infinitely adaptable."

11. It would be surprising if any *dicta* from a period preceding the developments allowing assisted reproduction by the separation of the ovum producing function from the birth giving function could resolve or even shed much light on the issue which arises in this case. In the event, both sides quoted the same scripture for their own purposes. The applicants relying on the blood link as a proxy for a genetic connection said that this approach showed that Irish law had always treated that connection as determinative. The respondents countered by arguing that Irish law's distinction between, and preference for, maternal links showed that it valued the pregnancy and birth giving function over the mere provision of genetic material. I do not find the references to the importance of the blood link either persuasive in themselves or helpful in the resolution of this case. The judgment also referred to the important observations in *Foy v. An t-Árd Chláraitheoir* [2002] IEHC 116. That case had certain points of similarity with the present in that it involved a claim by a person, in that case a transsexual, to have a birth certificate altered. There, McKechnie J. stated that "[t]he resulting register is a document of historical value, being current only at the date of birth and not beyond. It is no more than that" (para. 170). While I agree that the register (and certificate) is a document of historical value and documenting a historical fact, I would respectfully doubt that it can be said to be no more than that. It clearly had considerable significance for the plaintiff in that case and the applicants in this.

12. Having recorded the evidence and arguments the Court came to certain conclusions. While acknowledging the developing field of epigenetics, it was found, unsurprisingly, that the influence of such epigenetics was not of such significance as to alter what it described as the "overriding significance of chromosomal DNA for the

purpose of determining identity and inherited characteristics leading to a conclusion of the paternity and genetic maternity" (para. 98). The judge further rejected the State's argument that Article 40.3.3o of the Constitution had embedded an interpretation of motherhood so as to give constitutional approval to the *mater semper certa est* maxim. While accepting that the Article used the word "mother" in the sense of the person carrying the child, the Court concluded, relying on the decision of this Court in *Roche v. Roche*, that Article 40.3.3o had been adopted in the very specific context of an anti-abortion amendment and did not have any broader significance and certainly did not determine the issue of entitlement to registration. The core of the judgment is to be found in a passage at paragraph 103:

> "In view of my findings in relation to the determinative nature of chromosomal DNA, I find that while the input of a gestational mother to an embryo and foetus not containing genetic material from her is to be respected and treated with the care and prudence which the best medical practice dictates, the predominant determinism of the genetic material in the cells of the foetus permits a fair comparison with the law and standards for the determination of paternity."

Having reached this conclusion the Court relied on the judgment of O'Hanlon J. in *S. v. S.* [1983] I.R. 68 to conclude that any irrebuttable presumption of *mater semper certa est* was inconsistent with fair procedures under the Constitution and did not accordingly survive the entry into force of the Constitution. This is a time honoured formulation when dealing with pre 1937 and pre 1922 legislation or provisions of the common law, but this case illustrates its limitations, and to some extent its artificiality. If the principle of *mater semper* was part of Irish law and became unconstitutional, this development took place when the facts changed in the late 1970s and when the process of motherhood became divisible. Until that point it could not be said that there was any difficulty with the application of the maxim: it was an elegant statement of an incontrovertible fact, and there could be no question about the validity of any registration affected by application of the maxim. On an appropriate occasion therefore, it may be necessary to reconsider the question of just how and when a provision of law can be said to be, or become, unconstitutional.

13. Having reached these conclusions, the Court turned to consider the evidence of what appeared to be an international or at least European consensus that a presumption of *mater semper certa est* was the appropriate starting point in dealing with the surrogacy question. This evidence was given by the registrar and comprehended the fact that even in those countries where surrogacy is permitted, the birth mother is first registered as the mother. Then, if appropriate, commissioning parents may apply to change the birth certificate. If this application is successful second birth certificates may be issued with evidence of the original circumstances of birth left on the register too. The trial judge expressed the strong view that any so called international and historic consensus of registration of the birth mother should not restrain the Court from coming to the conclusions it did, because no reasons had been advanced to show why any such consensus had arisen. As a result, the Court granted declarations that the fourth named applicant was the mother of the first and second named applicants pursuant to s. 35(8)(b) of the Status of Children Act 1987 and furthermore, that she was entitled to be registered as mother on the birth certificates and the first and second named applicants (the children) were correspondingly entitled to have her registered as their mother.

14. Finally the Court went on to consider what it described as "alternative arrangements". While acknowledging that it was not strictly necessary to do so in the light of the findings, nevertheless the Court expressed the view that it was feasible for the parties in this case to agree, and then the notice party could consent to the twins being placed for adoption with the third and fourth named plaintiffs and that it was likely "subject to the formalities, that such adoption would be sanctioned with the least possible difficulty" (para. 108). In such an event, the problems envisaged with inheritance, taxation and marriage would be effectively eliminated. However this conclusion did not affect the outcome of the case. The Court considered that the fourth named applicant was entitled to registration as the mother as a matter of law. The respondents have appealed against the judgment, and the matter has been fully argued in this Court by all the parties and the *amici curiae*.

Adoption

15. It is necessary first to consider the ancillary findings made by the High Court Judge that adoption was possible in this case since at the time of birth, the notice party/surrogate/birth mother was no longer married and could place the children for adoption, since it was argued that this removed any necessity to address the more general issues. The High Court considered that adoption would regularise all of the "difficulties complained of in this case" (para. 83) as on adoption, the children would become legally and indisputably the children of the third and fourth named applicants. This finding was relied on by the appellants (heretofore "the respondents") in this appeal. It was argued that the finding undermined the decision of the High Court both in practical and legal terms. Adoption was a route which solved in a practical way all the applicants' difficulties, present and anticipated. Furthermore, if this was so, then a procedure was available to deal with the applicants' collective difficulty, and accordingly it could not be said that initial registration of the birth mother as mother, subject to subsequent registration of the fourth applicant on adoption, was an unfair procedure and inconsistent with the Constitution. It was acknowledged that the applicants objected to the concept of adopting children they regarded as their own and that they maintained that the fourth named applicant was entitled to be registered as their mother as of right, and to the exclusion of any reference to the birth mother. It was suggested however that

whatever psychological validity and importance this might have for the applicants, the law could not, or at least should not, be used to bend the facts to suit a personal narrative, however important that was to the individual. The fact was that the children were born to another woman and that fact could not, and should not be entirely erased. Furthermore, for reasons which will be considered later in this judgment, the appellants argued that a uniform practice of initial registration of a birth mother was an important part of the system of registration.

16. If it could be shown that the adoption procedure would necessarily, and as a matter of certainty, lead to the children becoming the lawful children of the fourth named applicant without difficulty, then in my view that would have had a significant impact upon this case, and removed the necessity for this Court, and more importantly the High Court, to consider the difficult issues raised here, and which have important consequences for many other citizens not represented in these proceedings. (It is more important that where appropriate, the High Court abstain from addressing far reaching issues which do not properly require determination, because if it does not do so, it may not be possible for this Court to refrain from addressing such issues. The decision of the High Court will stand as a declaration of law, which this Court may then be required to address). Furthermore, I imagine that if there was serious practical difficulty in relation to inheritance, taxation or marriage, the parties would have been well advised to follow the route of adoption which, even if cumbersome, at least avoids the necessity of engaging with the stress, expense and disclosure involved in legal proceedings. However, in my view it does not matter if these proceedings were commenced for reasons of strongly held principle, or obduracy, or a more general desire to drawn attention to a lack of regulation for a surrogacy, or a mixture of these factors and others. I have come to the conclusion that the applicants were entitled to maintain these proceedings and have them determined. I would be very reluctant to decide this case (or more accurately abstain from deciding it) on the basis that an adoption process was readily available, at least on the limited argument and information advanced. Out of court solutions often appear beguilingly simple when viewed from the perspective of the difficulties encountered in court, but become much more difficult once investigated. Here I would require to have much greater clarity about the legal consequences of the fact that the birth mother/surrogate mother although separated was still legally married at the time of birth, and about what precisely is involved in the process of placing for adoption, the time scale and procedures involved and the degree of assurance, legal as well as practical, that the applicants would indeed become the adopted parents, before I would be prepared to decide that adoption by the commissioning parent or parents was both available, and removed all possible difficulties so as to render these proceedings either unnecessary in fact or ill founded in law. Fundamentally however, the adoption process could only resolve the difficulties posed by surrogacy, and assisted reproduction generally, if the legislation specifically addressed those issues, and the one fixed point in these proceedings is that that is something which Irish legislation has, shamefully, failed to do. It would be a matter of pure happenstance if a current adoption regime was able to resolve all these applicants' practical and legal difficulties. I am not satisfied that it would, as anything other than a nod and wink Irish solution to an Irish problem. In my view therefore, the applicants are entitled to maintain these proceedings and the Court must address them.

17. The High Court Judgment is a careful consideration of a very difficult area. Considering itself to be faced with a choice between a birth mother and a genetic mother, it eschewed ideology, and followed what it considered was the best scientific knowledge, and in doing so can be said to have made new law. In deciding individual cases courts may unavoidably establish principles which determine all other disputes raising the same issue of principle (at least until those principles are themselves altered by further decisions, legislation or possibly constitutional amendments). That is in one sense to make law, even if it occurs much less often than students and commentators imagine or would perhaps like. But such decision making, even with far-reaching effect, is not legislation nor is it the same as legislation. A court's function and skill is in deciding justly the particular case before it, and it does not necessarily have full visibility of, or information in relation to, all other circumstances potentially affected by its decision. Furthermore, it is constrained as to how it can decide a case. The court is required to decide a case according to the law. It is not free to decide a case simply because it considers the result popular, wiser or more attractive, or indeed because it affects an acceptable if illogical compromise between competing interest groups. The court's options are limited. Taking this case as one example, the decision in the High Court appears to have been one to all intents and purposes between the genetic mother and the birth mother, and the choice of one excludes the other. Even then, whoever is registered must stay registered for all time, as I understand it, no one suggests that it is open to the Court to create a scheme for sequential registration. Nor can it decide that if certain requirements are followed, the commissioning parent is to be treated as the parent; still less can it decide what those requirements are. In principle, and subject to the Constitution, a much wider range of options are open to the Oireachtas.

18. These structural constraints impose limits on the manner in which courts develop the law. In most cases courts develop principles incrementally and avoid so far as possible sweeping generalisations, however much that might be applauded by the law student in search of a simple or memorable principle, or commentators who happen to agree with the outcome. Sometimes this incremental approach is couched in terms that the Court should not usurp the functions of the legislature. In this jurisdiction, courts on occasions point to the sole and exclusive power to legislate conferred upon the legislature by Article 15.2 of the Constitution. But in my view, this limitation is perhaps better understood as a limitation on the powers of courts which is inherent in the nature of courts and the administration of justice. Sometimes the administration of justice may indeed require a decision which has dramatic and far-reaching implications. If the decision is truly *required* to decide the case

then it is not a valid objection that it sweeps far and it would not be contrary to Article 15.2. But such a step must be truly required by the obligation to administer justice in the case, even considered broadly. If it is not necessary to decide a particular issue or decide it in a particular way to decide the case, then it may be necessary, or at least wise, not to decide it.

Submissions of the Respondents/Appellants

19. The appellants' arguments focus on the broader implications of the determination in the High Court. Acknowledging as they must, that little harm could be said to be caused if this fourth named applicant is registered as the mother of the infant applicants, the appellants nevertheless argue that if the judgment of the High Court is correct, it must follow that the provider (female or male) of genetic material is always entitled to be declared the mother or the father as the case may be, and registered accordingly. The condition that so unfortunately afflicts the fourth named applicant and means that she does not possess a uterus capable of permitting the implantation and gestation of a fertilised ovum, is relatively unusual (indeed it was said that this might be one of the first cases in Ireland of surrogacy using the ovum of the commissioning mother). It is accepted on all sides in this case however, that it is much more common that women experiencing fertility difficulties would have the reverse condition: while having a functioning uterus, might not be able to produce ova, or at least ova capable of being fertilised and implanted naturally. A male partner may desire children but be unable to produce sufficiently fertile sperm, and the couple may accordingly seek a donor. As the law currently stands, in these more commonly encountered cases, the male and female partner will be registered as parents without difficulty: the female because she gives birth and the male because he is either the husband or has acknowledged parenthood. But the appellants point out that at least in theory, all of these people and their families would be at risk of losing their status and have their legal position thrown into uncertainty if the High Court Judgment is correct. While it might be fanciful to imagine a stream of donors of ova and sperm coming forward to assert parenthood, it is highly undesirable that these families' legal status should be conditional and defeasible as would be the case if the High Court Judgment is correct. Furthermore, since status is relevant to issues of inheritance and taxation and therefore money as well as relationships, it is not just as implausible that for example, on marital breakdown, or on issues of inheritance, spouses or siblings or other relatives may seek to deny to others the status of parent, child or sibling as the case may be, if as the High Court seemed to conclude, genetics are decisive in determining parenthood.

20. It might be argued (although this issue does not appear to have been considered in the High Court), that this alarming scenario is not so much a consequence of the ruling of the High Court as the unsatisfactory state of legislation. Since assisted human reproduction has been possible, and has been at least tacitly permitted in Ireland in the sense that it has not been directly prohibited or even regulated in any way, anomalous outcomes are possible whoever the Court decides is required to be registered on the birth certificate initially. The law, it might be argued, cannot be decided on the basis of a head count. A decision must be made on the basis of the best available evidence. If the result arrived at on this basis is insufficiently nuanced, then legislation can be introduced and indeed a court decision might be the best impetus for such legislation. This argument has some merit. However, the appellants go further and argue that a consequence of the High Court Judgment is to impose a significant straight jacket upon the types of legislative solution that might be introduced. Thus it is argued that if the High Court Judgment means only the genetic parent could be registered as the father or mother, and if this is constitutionally required (as the judgment seems to hold) then it would follow that any legislative regime which did not accord with it would be invalid. Thus, for example, it might not be possible to introduce a regime which would require initial registration of a birth mother followed by a process for the recognition and approval of a surrogacy agreement and subsequent re-registration. There are many public policy reasons favouring such a process, and it is a solution adopted in other countries, but it is argued that if the High Court Judgment was correct, it could not be legislated for here. Far from stimulating legislation it is said, the judgment hinders it.

The Submissions of the Applicants

21. Faced with these arguments, counsel for the applicants have taken a more nuanced line. Arguing in favour of the outcome arrived at in the High Court, counsel stopped short of supporting those portions of the High Court Judgment, particularly that quoted above, which seemed to hold that registration of the genetic mother was constitutionally required. Instead it was argued that registration of the genetic mother was required, as it happened, by the current state of Irish legislation and in particular those provisions introduced by the 1987 Act relating to blood testing for proceedings determining parentage. Counsel, in a careful and intricate argument, sought therefore to support the conclusion arrived at in the High Court but on a basis with less far-reaching implications for future legislation.

22. It is argued that "mother" was not defined either in the Civil Registration Act 2004 ("the 2004 Act" or "the Act of 2004") or more generally, perhaps for the reason that it was not considered necessary. Section 50 of the 1987 Act provides that, so far as that Act relates to declarations of parentage, it is to be read together with the Births and Deaths Registration Acts. The 1987 Act plainly lays emphasis upon blood testing as a method of proving parentage. In keeping with the science known at the time, it was understood that blood testing could exclude, but not positively prove, parentage. Thus s. 40(2)(b) of the 1987 Act provides that where a blood test was ordered by the court, the person taking the test should report to the court:

"(i) whether the person to whom the reports relates is or is not excluded by the results from being a parent of the person whose parentage is in question, and

(ii) if the person to whom the report relates is not so excluded, the value, if any, of the results in determining whether that person is a parent of the person whose parentage is in question".

23. From these statutory provisions in relation to blood testing and reporting, two related conclusions are drawn by the applicants: first, the law was and is guided by and reflective of the best available scientific knowledge and second, and more particularly, blood relationship (if provable) is understood, and intended, to be the determining feature in parentage. In 1987, so the argument runs, blood testing could disprove parentage and the only thing limiting its capacity to positively prove parentage was the then limitations of the science. But as between blood and birth (which arguably was the issue in this case), the provisions of the 1987 Act make clear that parenthood is in principle to be determined by blood. Now that DNA testing is available, that means that genetics determine parenthood, and more specifically, motherhood.

24. The next step in the reasoning is the decision of the High Court (Budd J.) in *G.N. v. K.K.* (unreported, 21st of December 1993) in which it was accepted that the blood tests contemplated by the 1987 Act could include DNA testing which might not simply exclude paternity (which was an issue in that case) but might positively establish it. Thus the 1987 Act, it is argued, must be understood as showing that paternity or maternity is to be established by blood testing and, now, by DNA testing.

25. This argument is reinforced by a consideration of the development of parallel provisions of the law of the United Kingdom. There, blood testing was provided for by s. 25 of the Family Law Reform Act of 1969, and such testing was introduced in 1972. This testing was to be carried out to identify the presence or absence of "inheritable characteristics of blood". From the 1st of April 2001 scientific tests could be used rather than merely blood tests and the criterion was amended to provide for the identification of "inheritable characteristics of bodily fluids or bodily tissue". By way of comparison it should be said that s. 37 of the 1987 Act defines a blood test in similar terms as a test made "with the object of ascertaining inheritable characteristics". Importantly, UK law provides for the regulation of assisted reproduction in general and for surrogacy agreements under limited circumstances, in the Human Fertilisation and Embryology Acts of 1990 and 2008. It is pointed out that that legislation is careful to specifically provide that a woman who has a child by IVF is a mother, and s.25 of the Family Law Reform Act 1969 was amended to provide that persons who had children by artificial insemination or IVF were not to be excluded from parentage because of the absence of "inheritable characteristics". It is argued that it should be deduced from this that without such an express saver such a person would have been excluded from the definition of parent. In simple terms, it is therefore argued that the UK, by providing for blood and now scientific testing, made genetics the determinant of parenthood generally. Finally, it is argued that Ireland adopted essentially the same approach in permitting blood testing (which must now be understood to include genetic testing) with the same consequence, but had made no such similar saver. The conclusion for present purposes is that motherhood and maternity were, by statute, to be determined by genetics and not by birth. An irrebuttable presumption of *mater semper certa est* could not therefore stand and the presumption must be capable of rebuttal just as it was held in *S. v. S*. by O'Hanlon J. that an irrebuttable presumption of legitimacy did not survive the coming into force of the Constitution, and that a man must have the right to disprove parentage. (It may be observed that this last step is not essential to the argument since if the applicants are correct, "mother" in the 2004 Act means, in effect, the genetic mother as a matter of statutory interpretation alone. If this is correct, then any irrebuttable presumption of maternity even if it existed, has simply been overridden by statute, and it is not necessary to resort to the Constitution to achieve that outcome)

26. It should be observed that the argument made here is made by reference to what is to be deduced from the statutory provisions and the applicable case law, rather than from their application in this case. Although a declaration was sought that the fourth named applicant was the mother of the first and second named applicants, the procedure under the 1987 Act was not invoked, no tests were ordered and no reports made pursuant to s. 20 of the 1987 Act. Counsel for the applicants argued merely that on a true interpretation of the statutory provisions taken together "mother" in Irish law, for the purposes of registration on birth, was, at least in cases of dispute, to be determined by reference to genetics rather than the fact of birth.

Conclusion

27. It becomes important, indeed critical, to define with as much precision as possible the issue before this Court. The applicants sought and were granted a declaration that the fourth named applicant was the mother of the first and second named applicants. But this was not a declaration in the abstract. It was a necessary step to the second declaration granted namely that the fourth named applicant had a right to have the birth certificates of the first and second named applicants altered, and to be entered upon those birth certificates as their mother, to the exclusion of the notice party who had been so registered by the first named respondent. The first and second named applicants had, it was held, a corresponding right to have the fourth named applicant registered on their birth certificates as their mother. I consider it therefore both fair and accurate to identify the precise question for this Court as this: who, on the acknowledged facts, is entitled to be registered as the mother of the first and second named applicants on their birth certificates, pursuant to the provisions of the Civil Registration

Act 2004? That is in turn essentially a question of statutory interpretation. The interpretation of statutes may of course also involve the interpretation of the Constitution both as potentially influencing the interpretation of the statute where that is required and possible, or as possibly leading to the constitutional invalidity of the statute as interpreted. But in the first place, I consider that it is useful to approach this as a simple question of statutory interpretation: what does the 2004 Act mean when it refers to "mother"? In particular, does it mean in this case the woman whose egg is fertilised and which develops through pregnancy into the baby who is born, or does it mean the woman who gives birth to the baby, or perhaps to both?

28. This is not an easy question but it is useful to identify just what is not involved. This is not a question of whether a genetic or a gestational mother provides more genetic material to a child. Nor does it involve a question of policy as to who *should* be registered as a mother where the gestational and genetic mothers are not the same person, now that we know for the first time in human history that it is possible to separate the functions of reproduction and birth into at least two if not more parts which can be carried out by at least two, if not more, people. Nor does this case involve any question of the validity or enforceability of surrogacy agreements in this or in any other case. Nor, at least in my view, does it involve any inquiry into the common law predating legislation such as the Births and Deaths Registration Act (Ireland) 1880 ("the 1880 Act"), or the existence and scope of any maxim of *mater semper certa est*. To approach this case on the basis that because the word "mother" is not specifically defined in the 2004 Act it does not have a specific meaning in the relevant legislative context, and that it is therefore necessary to consider the existence and persistence of a Latin maxim, or the state of 19th century common law, is in my view an error. We should not be too quick to abandon the statutory context.

29. Concepts such as presumptions whether rebuttable or irrebuttable, and phrases and maxims may often be very useful to lawyers since they express reasonably precisely concepts which are well understood and in that way, as helpful shortcuts, may assist reasoning. However, if not properly deployed, at times they can deflect from, rather than assist reasoning. It is true that Walsh J. said in *O'B. v. S.* [1984] IR 316 :

> "…[t]he maxim *mater semper certa est* … does apply in Irish law by reason of the provisions of ss.1, 7 and 28 of the Births and Deaths Registration Act (Ireland), 1880." (p. 338)

But in my view at least, that does not lead to a consideration of the application of a presumption, irrebuttable or otherwise. The important words in that sentence are "by reason of". Walsh J. did not suggest that the maxim applied in Irish law prior to the enactment of the statute, or applied more generally. In effect, all that that learned judge was saying in that passage was that the effect of the legislation was to require registration of the mother as the woman giving birth. That legislation was in that form and contained that requirement, no doubt because the Victorian legislators shared the universal assumption contained in the Latin maxim and put elegantly by Lord Simon of Glaisdale in *Ampthill Peerage* [1977] A.C. 547 at p. 577:

> "Motherhood, although also a legal relationship, is based on a fact, being proved demonstrably by parturition. Fatherhood, by contrast, is a presumption."

But whether that assumption was, or more pertinently is now, correct, is strictly irrelevant to the legal issue of statutory interpretation in this case. If indeed the 1880 Act requires registration of the birth mother as mother it does so by virtue of the statute and not because of any maxim or common law. If these factual assumptions underlying the legislation has been falsified by subsequent developments and scientific knowledge then that may be a reason to change the legislation, but it cannot change its meaning. There are of course examples of cases in which courts have been able to adopt what has been described as an updating interpretation of legislation, and this case illustrates at least one such circumstance. The statutory concept of blood test for the purpose of ascertaining parenthood has been interpreted to include much more precise scientific tests. In my view, this case is not one of those limited circumstances in which this technique is available. On the assumption for this aspect, that the legislation whether in 1880 or in 2004 identified the person giving birth as the mother, then to interpret the legislation to make the person providing the ovum and therefore the DNA as the mother rather than the birth mother would be to alter and reverse the original meaning of the legislation, rather than merely interpreting it to apply not only to the original situation but also to a circumstance not envisaged at the time. It follows that in my view, the question is what the 2004 Act meant, and still means, when it required registration of a birth and in doing so registration of the "mother".

30. The 2004 Act is very similar in structure to the 1880 Act because of course it performs the same function. The relevant provisions of s. 19 containing the obligation to register the birth of a child have been set out. Thus it is sufficient to point out that the provisions apply "when a child is born in the State" and a duty is imposed upon the parent and others to give "the required particulars of the birth" to the registrar. The required particulars are set out in Part I of the First Schedule of the 2004 Act and include: forename(s), surname, birth surname, address and occupation of mother, former surname(s) (if any) of mother, date of birth of mother, marital status of mother, personal public service number of mother and birth surname of mother's mother. The same details are required in respect of the father.

31. This is similar to the structure of the Births and Deaths Registration Act (Ireland) 1880. Section 1 of that Act provided that:

> "In the case of every child born alive … it shall be the duty of the father and *mother* of the child, and in default of the father and *mother*, of the occupier of the house in which to his knowledge the child is born, and of each person present at the birth, and of the person having charge of the child, to give to the registrar, within forty-two days next after such birth, information of the particulars required to be registered concerning such birth, and in the presence of the registrar to sign the register." (emphases added)

Again, among the particulars required were the name and address of the mother. It is perhaps noteworthy that both statutes, for obvious reasons, speak of "mother" in the singular and without a definite or indefinite article. It is an indivisible, or at least undivided, concept.

32. When this issue is approached as the narrow question of statutory interpretation of the identification of the person required to be registered as mother, it becomes less complex. It becomes apparent that the Act of 2004 follows the 1880 Act in contemplating registration of the birth mother as the mother. As Learned Hand J. observed in *Cabell v. Markham* (1945) 148 F.2d 737 it is necessary to "remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning" (p. 739). Here, the purpose of the 2004 Act (and indeed the 1880 Act) is plain. It is to establish and maintain a system of registration. That registration in this case is of the fact of birth. The Act operates by reference to the date of birth and requires compliance within a fixed period thereafter. While a birth certificate has subsequent importance as evidence, its original and basic function is demographic. The 1880 Act was part of the Victorian age's admirable urge for organisation, cataloguing, counting and defining and by that process providing an essential substratum of information for the understanding and governance of society. The 2004 Act follows the same structure and performs the same function. From the function it was intended to fulfil and the circumstances in which it operated, it seems clear that under the Act, the person to be registered on the birth certificate as mother under both the 1880 Act and the 2004 Act is unsurprisingly, the person giving birth. Science may have undermined or at least qualified the assumptions upon which the Act was based, but that does not alter the interpretation of the Act.

33. However, it was argued by counsel for the applicant that the Status of Children Act 1987 had in effect changed the law so that the indicium of parenthood, whether by paternity or maternity, was the existence of a blood relationship, originally only capable of disproof by blood testing, but now capable of positive proof though DNA testing. While at the time of passage of the 1987 Act there may have been no consideration of the possibility that the person providing the ovum and the DNA might not be the person giving birth, the fact was that by permitting such blood testing in accordance with the then state of the art scientific knowledge, the 1987 Act shifted the indicium of maternity from birth, to blood/DNA testing. In 1987 that might only have been a more definite way to identify the person who gave birth in for example, the case of mistakes made in hospitals, but it had the effect that when science permitted a child to be born where the ovum was provided by one person and the birth by another, the 1987 Act meant that maternity was determined by testing and therefore the person who provided the ovum/DNA was, by that process, the person to be registered as mother.

34. I regret that I cannot accept this ingenious argument. The developments in the United Kingdom legislation are in my view too ambiguous and elusive to assist in establishing unmistakably the meaning of separate Irish legislation. No authority was cited for the meaning of the UK Act before or after the Human Fertilisation and Embryology Act 1990. It is in general, dangerous to seek to interpret the provisions of an Act by reference to a subsequent amendment without knowing whether that amendment was intended to alter or clarify or simply remove doubt. It is obviously even more difficult to use this process to interpret legislation in another jurisdiction. If the interpretation of the 1880 Act and the 2004 Act as set out above is correct, then by that legislation the "mother" required to register the birth, and be registered as "mother", is the person giving birth. If so, then the 1987 Act did not purport to change that understanding or meaning. The 1987 Act was instead itself based on the assumption that blood testing could establish at least negatively, parenthood, which in the case of a woman at the time of passage of the 1987 Act, meant the woman who gave birth. The assumption that blood testing would even negatively prove birth in all cases may have been falsified by the developments in the science of reproduction, but the 1987 Act did not alter the identity of the person to be registered. That was and remained, the person giving birth.

35. I found the submissions by the *amici curiae* in this case helpful and insightful. It is necessary to consider one argument advanced on equality grounds in the course of this appeal. This was based largely on the judgment of O'Hanlon J. in *S. v. S*. in which it was held that the irrebuttable presumption of fatherhood contained in the rule against giving evidence which would have the effect of rendering a child illegitimate (as the law at the time stood), was repugnant to the Constitution, and accordingly had not survived the coming into force of the Constitution. It was argued therefore that any irrebuttable presumption of motherhood (or perhaps even statutory provisions which permitted the registration of the birth mother only) were also unconstitutional, and indeed created an inequality based on gender.

36. The argument made had some superficial attraction. In my view however, it is misplaced for a number of reasons. Any equality argument involves the proposition that like should be treated alike. Any assertion of inequality involves identifying a comparator or class of comparators which it is asserted are the same (or alike), but which have been treated differently (or unalike). In each case it is necessary to focus very clearly on the context in which the comparison is made. It is important not simply that a person can be said to be similar or even the same in some respect, but they must be the same for the purposes in respect of which the comparison is made. A person aged 70 is the same as one aged 20 for the purposes of voting, but not of retirement.

37. On consideration, it seems clear that whatever the superficial similarities, there are significant differences between the situation here and that which was dealt with by O'Hanlon J. First, he was considering a common law rule of evidence rather than the interpretation of a statute. Second, the case did not involve, at least directly, registration of birth but rather ongoing practicalities of parenting/inheritance. But perhaps the most significant difference arises from the different gender roles in reproduction and which consequently, have particular consequences given the advances in science already discussed. In nearly all areas of human activity which come before the courts there is no relevant distinction between male and female. However, the fundamental distinctions between men and women are rooted in the reproductive function. The male/paternal role in reproduction is a limited but, at least as matters stand, indivisible one. The only impact of science upon this role has been that methods of testing now allow paternity to be proved almost as a matter of certainty rather than something which could be uncertain. It is obvious however that the female role in reproduction goes far beyond the provision of an ovum containing DNA. Again as the science currently stands it also involves implantation of the fertilised ovum, gestation and, ultimately, birth. Critically for present purposes, the advance of science now means that that function is not necessarily carried out by the same person. Once DNA testing became available, it became possible to identify the one and only one person who was the father. Positive identification of the father also rules out any other male person as involved in the reproductive process. It was obviously unfair to insist that in every case a husband was to be treated as the father even when that could be disproved. By contrast, the female role in reproduction is not only different and more complex, it is also now divisible. DNA testing does not permit, any more, the identification of the *single* female person involved in the reproductive process from conception to birth, and the exclusion of any other person. For the purposes of registration, a choice must be made between two persons who each fulfil part of the function traditionally performed by a mother. It is not self-evidently contrary to any constitutional scheme to require the registration of the birth mother as mother, at least initially, especially when to do so maintains consistency with all other births, and indeed other birth registration systems.

38. It should be apparent however that this conclusion is dependent upon the essentially narrow focus of this case. It is in my judgment permissible to have a birth registration system registering the birth mother, initially. That is what the 2004 Act does. But that only illustrates the fact that serious constitutional issues must necessarily arise if that position is maintained for all time and for all purposes. From a human point of view it is completely wrong that a system, having failed to regulate in any way the process of assisted reproduction, and which accordingly permits children to be born, nevertheless fails to provide any system which acknowledges the existence of a genetic mother not merely for the purpose of registration, but also in the realities of life including not just important financial issues such as inheritance and taxation, but also the many important details of family and personal life which the Constitution recognises as vital to the human person. Very different issues would arise in such circumstances. In my view however, on the narrow question of registration on birth raised in this case, the first named respondent is correct that the 2004 Act on true construction requires the registration of the birth mother and in doing so is not unconstitutional. I wish to make it as clear as is possible that this decision is limited to the question of immediate registration of birth: it should not be taken as deciding anything more.

Judgment of Mr. Justice Clarke delivered the 7th November, 2014.

1. Introduction

1.1 What is motherhood? Who is a mother? These are questions to which it might be thought there were uncontroversial answers. Such issues could be debated at a scientific, ethical or philosophical level. However, these proceedings are not, or at least not mainly, about how the term mother might be considered in those or other disciplines. These proceedings are about the current legal definition of motherhood and the current legal identity of the person or persons who might properly be regarded as a mother.

1.2 The underlying facts are neither disputed nor, in any legal sense, controversial. The children named in the title to these proceedings are twins ("the twins"). There is no doubt but that the third named applicant/respondent is the genetic father of the twins and that the fourth named applicant/respondent is their genetic mother (respectively "the genetic father" and "the genetic mother", collectively, "the genetic parents" and together with the twins collectively "the R family"). The genetic mother suffered from a medical condition which, while permitting her to produce ova, meant that she was unable to carry and give birth to a child. The notice party ("the birth mother") is the sister of the genetic mother. The genetic parents came to an agreement with the birth mother that, utilising modern scientific methods, an embryo or embryos would be produced by the fertilisation of ova taken from the genetic mother by spermatozoa taken from the genetic father. It was agreed that such embryo(s) would be implanted in the birth mother who would then carry what would turn out to be the

twins to the point of their being born. In those circumstances both of the genetic parents and the birth mother are all agreed that the genetic mother should be regarded as the mother of the twins in law.

1.3 However, the first named appellant/respondent ("an tArd Chláraitheoir"), based on legal advice, took a different view. On the basis of that advice an tArd Chláraitheoir considered that the only person entitled to be registered as the mother of the twins, in the agreed circumstances to which I have just referred, was the birth mother. It was on that basis that these proceedings were launched in which it is asserted that the genetic mother is entitled to be registered as the mother of the twins. For reasons which it will be necessary to address in some detail, the proceedings were successful before the High Court (Abbott J.) who gave judgment on the 5th March, 2013 (*M.R & Anor v An tArd Chláraitheoir & Ors* [2013] IEHC 91).

1.4 An tArd Chláraitheoir and the other state respondents/appellants (collectively "the State") have appealed to this Court against that finding. It should also be recorded that, with the permission of the Court, the Equality Authority and the Human Rights Commission (collectively "the amici") were permitted, as amici curiae, to file written argument and make oral submissions at the hearing of the appeal. While it would, I think, be fair to say that the position adopted by the amici was not identical to that urged by both the genetic parents and the birth mother and likewise was not identical to the position determined on by the trial judge in the High Court, nonetheless the position of the amici was broadly supportive of the rights asserted by the genetic parents and the birth mother.

1.5 This appeal raises difficult but extremely important questions. But it is, I think, of equal importance that there be clarity about the role of this Court and equal clarity not just about what issues this Court has to decide but also about what questions are outside the scope of this Court's role. For that reason it seems to me to be important to start with some general observations about the scope of this appeal.

2. General Observations on the scope of the Appeal

2.1 As noted earlier this case is about how the law currently defines a mother for the purposes of the registration of a child. In that context it will be necessary to say something about the legislation which governs the registration of births in due course. It will also be necessary to say something about the legislation which enables the Court to declare persons to be the parents of a child. There can be little doubt but that a proper analysis of that legislation forms an important part of the consideration which this Court has to give to the issues which arise on this appeal.

2.2 It is also important to record the fairly obvious fact that there have been very significant advances in reproductive science over the last number of decades. It will again be necessary to touch on some of those advances in the course of this judgment. It is important, however, to be clear that the issues with which this Court is concerned are not, at least directly, ones of science. It is important that the respective roles of law and science in controversies such as this are both well understood and clearly defined. Law is to be found in the Constitution and in those other sources of law which the Constitution recognises. Given that both the Constitution of the Irish Free State (Article 73) and Bunreacht na hÉireann (Article 50.1) recognise the continuance in force (subject to consistency with the provisions of the respective constitutions) of the law as it existed immediately prior to their respective adoption, the common law forms part of the constitutionally recognised law of Ireland. The common law is based on historical precedent with due recognition of the binding nature of the decisions of higher courts. The common law has, of course, inherent within it, its own capacity to evolve to meet changing circumstances and to apply established principles to new conditions. Were it not for this inherent capacity, the common law would have remained frozen (either generally or at least in this jurisdiction under our constitutional regime) and it is difficult to see how landmark cases such as *Donoghue v. Stephenson* [1932] A.C. 562, *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd*. [1964] A.C. 465, and *Central London Property Trust Ltd. v. High Trees House Ltd*. [1947] K.B. 130, could have been determined the way they were and, indeed, accepted as informing the common law in this jurisdiction. At a minimum those, and other similarly important, cases can be said to have restated in altered terms or even redefined those aspects of the common law with which they were concerned.

2.3 However, the sole and exclusive power to make legislation under the Constitution is conferred on the Oireachtas (Article 15.2.1). In that context, there are limits to the extent to which it is constitutionally appropriate for the courts to engage in a reinterpretation of the common law where such interpretation might cross the line into legislation and, thus, infringe the constitutionally protected role of the Oireachtas. The application of underlying existing common law principles to new circumstances is one thing. The development of substantially new principles or policies is another.

2.4 Thus, the way in which law can change is by means either of a legitimate and permissible evolution of existing common law principles to meet new circumstances and conditions as part of the inherent evolution of the common law, by express legislation, or by means of constitutionally mandated changes resulting from the role of the courts as interpreters of the Constitution. In the latter context the law may change either because statute law is found to be unconstitutional, common law rules are likewise found to infringe the Constitution, or it is necessary to otherwise ensure that constitutional rights are protected and vindicated.

2.5 However, it is clear that the role of the courts in that process, while important, is limited. Short of the existing law being found to be in breach of the Constitution, the only proper role of the courts is to play their appropriate part in the evolution of the common law in its application to new conditions and circumstances or to interpret legislation. Even where it is clear that the existing law is no longer fit for purpose it may well be that the only solution lies in legislation. This will particularly be so where any solution to identified problems requires significant policy choices and detailed provisions beyond the scope of the legitimate role of the courts.

2.6 Where science fits into such a picture may very well depend on the circumstances of the case. Just because scientific advances have rendered existing law obsolete does not mean that the courts can provide a ready solution. There may, of course, as earlier noted, be circumstances where the courts are required, in the ordinary way in the exercise of the proper role of the courts in the evolution of the common law, to develop common law principles to meet new scientific circumstances. Contract law, which developed in the age of the mounted courier and the telegraph has had to adapt, largely without legislative assistance, to the electronic era. Traditional concepts in the criminal law have had to be applied in very different circumstances to those in which they originally evolved. The application of long established law to an era of social media is often a vexed question. There is, therefore, scope for permitting the proper evolution of the common law to meet new scientific circumstances. But in many cases a law (whether the common law or statute law) which is outdated, no longer fit for purpose and at odds with the developments in science, can only properly be changed by legislation. In such circumstances all the courts can do is to exercise their proper role. It seems to me that that role is, potentially, threefold:-

(a) The courts can ascertain whether it is both appropriate and permissible to allow for the evolution of common law principles to meet the sort of new circumstances and conditions which have been brought about by advances in science;

(b) The courts may have to consider whether, in the light of the current state of scientific knowledge, any breach of constitutional rights has been demonstrated such as would warrant the intervention of the courts; but

(c) In the absence of either of the above being appropriate, the courts can only take such measures as may be within the courts proper constitutional role to attempt to bring about a necessary change in legislation.

2.7 It is of particular importance to emphasise at this stage that this case is about the law as it now is and not about the law as it should be. In order to consider what the law now is, it is, of course, necessary to review what the common law traditionally said. Next, an assessment must be made as to whether that law needs to be reconsidered (within the scope of the proper role of the courts) by reason of modern conditions. If necessary, consideration may have to be given to whether any constitutional rights are involved and, of course, to the proper application and interpretation of any statute law governing or affecting the situation. However, if, as a result of the proper consideration of all of those sources of law, the situation remains unsatisfactory then the only solution is legislation. To the extent that it might be said, in such circumstances, that the law has failed to keep up with science, then this is a failing of the legislature rather than of the courts. For the reasons which I have sought to address the courts have an important but ultimately limited role in the evolution of the law under our constitutional regime. If law becomes outdated by reference to modern scientific developments there may be, therefore, only limited means available to the courts to remedy that situation. The principal remedy may well lie in the hands of the Oireachtas.

2.8 It might also be said that the law cannot, and does not, adopt an approach which flies in the face of common sense. On a superficial basis it might be said that everyone knows what a mother is. Why then, it might be asked, can there be any doubt about what the term "mother" means in law. However, a commonly accepted and common sense understanding of what a word may mean may come to be challenged by, amongst other things, scientific change. Leaving aside altogether meanings of "mother" or "motherhood" which are concerned with changes in legal status brought about by fostering, informal adoption or, most importantly, legal adoption, it may well have been the case that no reasonable person would have entertained any doubt about what the word "mother" meant until relatively recent times. It is true that the word "mother" might well have been applied, with an appropriate prefix, to a foster mother or an adoptive mother. However, everyone would have understood that the person concerned had only acquired their status by reason of the events giving rise to their having charge over the child concerned. The term "natural mother" would always have been understood to have a different meaning.

2.9 But would the proverbial man or woman, or indeed child, in the street now have a common understanding of precisely what the term "mother" means in the light of the scientific developments which are at the heart of the issues which arise in this case? It might be said that every child knows what "mother" means. But if the child was old enough to understand the basics of science and was told that one person had provided half (that coming from the female side) of their genetic make up (so that they shared inheritable physical characteristics) while a different person had carried them and given physical birth, would the same child necessarily say that the answer to the question as to who their mother was was obvious? I very much doubt it. Scientific advances whether in understanding or technique can lead to all of us interpreting basic and common terms in a different way.

2.10 But whether such a change affects the legal position (in the absence of legislation) depends on a proper analysis of the law as it stood prior to the scientific change which gives rise to the issue of difficulty. The law often, in very many differing areas, deems things to be so, even though they may not be so. For the purposes of bringing certainty the law may define a particular word as having a very specific meaning for a specific purpose. This may be so even though the common usage of the term may be different or wider or, indeed, narrower. Likewise, there may be good reason for a term being defined in a particular way (for example, to prevent abuse or confusion) even though the definition may not correspond with ordinary usage. It is, of course, the case that language used in all legally binding measures, whether statutory or otherwise, will ordinarily be given its normal meaning. But where a term is defined it will be taken to mean what the definition says even if that is at variance with the commonly accepted usage of the term concerned.

2.11 In that context, of course, it may be possible that a definition of a term becomes outdated. The purpose for which the definition was adopted in the first place may cease to be fulfilled. There may well, in such cases, be an important and urgent need to amend the definition. But unless and until such an amendment is put in place the word remains defined as it is for all the adverse consequences which may flow.

2.12 It seems to me that all of these very general questions arise in a consideration of the difficult issues with which this Court is faced. For all of human (and indeed, one might say, mammalian, history) there was no distinction between what one might call a genetic mother and a birth mother for, as a matter of science, both were necessarily the same person. It would have been not only unnecessary but completely redundant to have two different terms to describe a female who provided part of the genetic material to a child and a female who physically carried and gave birth to that child.

2.13 However, that situation no longer necessarily applies. It will be necessary to turn shortly to what the common law had to say about the meaning of the term "mother" and how that term is used in a number of relevant legislative provisions. But that common law developed long before there was any potential for a distinction between a genetic mother and a birth mother. Likewise, much of the relevant legislation predates the significant recent advancements in reproductive science which lie at the heart of this case.

2.14 The real issues which, in my view, have to be addressed concern the following:-

(a) What was the common law meaning of the term "mother"?

(b) Given that, as will be clear from the relevant legislation to which reference will be made in due course, the term "mother" is not defined, how should the term "mother", as used in that legislation, be interpreted? In particular, can it be said that the provisions of any such legislation have altered the common law meaning of the term "mother"?

(c) To what extent, if any, can it be said that the meaning of the term "mother", whether as used by the common law or as used in any of the relevant legislation, must be required to be interpreted in the light of the scientific fact that there can now be a distinction between a genetic mother and a birth mother?

(d) To what extent, if any, can it be said that the Constitution impacts on any of those question and, if so, in what way?

2.15 In addition, one set of broad considerations needs at least to be considered for the purposes of analysing whether it has any effect on the answers to those questions. The various parties to this appeal went to some length to point out the practical difficulties and real potential for human misery which would flow from the interpretation of "mother" as urged by the other side. Counsel for the genetic parents and the twins urged that the proper meaning of mother was genetic mother. If that be so, countered counsel for the State, what would the situation be in respect of those many women who have had an embryo implanted in them which derived from an ova which was not their own (whether fertilised by a partner or an unknown person)? Does it mean, counsel rhetorically asked, that a child to which such a woman gives birth is not regarded as the child of that woman - that the woman is not the child's mother? What then of the status of that child to whom the woman may give birth but who will not be regarded as her child in law? What of the child's citizenship? What of the many legal rights which a child has in respect of their parent for support, inheritance and under many other headings?

2.16 On the other side, counsel for the State urged that the meaning of "mother" at common law, and now, means birth mother and that there was nothing in any relevant legislation which has changed that fact. On counsel's argument, the legal definition of "mother" was birth mother unless, and until, legislation was introduced to change that situation, although counsel did draw to the Court's attention the fact that there was proposed legislation in precisely that regard under consideration. However, counsel for the genetic parents and the twins countered by pointing to the consequences for persons in a position such as his clients. The same sort of consequences as to identity, citizenship, inheritance and support will apply.

2.17 The practical difficulties identified by counsel on both sides, as potentially stemming from the acceptance by this Court of the other side's argument, all stem from the status of a child by reference to its mother. I use the term "status" in that context to mean legal status rather than social standing or the like. While legal status is not everything, it is important. The law cannot make parents love their children or vice versa. The law cannot alter the feelings which persons may have towards those with whom they share a close familial relationship irrespective of the presence or absence of a formal legal status to that relationship. However, many important legal rights and obligations are dependent in whole or in part on the legal status which a person has. Constitutional rights attaching to the family may be affected. As noted by both counsel, citizenship, support and inheritance rights can be altered. The obligations of adults towards children may be defined or significantly influenced. The status which the law confers, in terms of familial relationship, is, therefore, of significant importance not only in itself but also in the way in which it affects many other rights and obligations. As these proceedings demonstrate, people understandably feel strongly about the status which the law confers on them (or, as in this case, does not). But people also feel strongly about other issues of connection. The often documented search which adults (whether formally adopted or otherwise) make over long periods of time to identify their true origins is testament to that fact as well. There are, therefore, serious issues and arguments which turn on the proper status which the Court attributes in law to individuals.

2.18 To those arguments can be added others. What is to happen in complicated situations, unlike the present case, where there may be a dispute between the genetic parents and the birth mother? To what extent can parties be said to be bound by agreements reached in relation to such matters? To what extent can the Court countenance arrangements which might be regarded as exploitative? The potential list of difficulties is almost endless. That it is beyond the powers of the courts to establish a detailed regime which deals with all of those problems in a respectful and considerate way is, in my view, far beyond doubt. These circumstances cry out for legislation. As long ago as Roche v Roche [2010] 2 I.R. 321, this Court made clear that the absence of modern legislation had the potential to create the very kind of difficulties which have now emerged and which are bound, in many cases, whatever the result of these proceedings, to give rise to much human misery, great legal doubt and no advantage to society as a whole. It is to be regretted that the warning words of this Court, concerning the need for urgent legislation, were not heeded in a more timely fashion, although the prospect that legislation may now be about to be brought forward is to be welcomed. I make this latter point without, of course, in any way commenting on the merits of the specific measures contained in the proposed legislation to which the Court's attention was drawn by counsel for the State and also noting that, since the hearing, the relevant provisions have also, at least temporarily, been removed from the proposed legislation.

2.19 But the position does not end there. Science does not stand still. In this area, indeed, science appears to be advancing at a pace. It is not unreasonable to anticipate that it may be scientifically possible in the relatively near future that a new human being may come into existence without going through the process of birth at all (in any sense of the term "birth" as it would have been traditionally understood). Likewise, it is already the case that it is possible to engineer the genetic material which goes to make up a developing embryo by the introduction of material taken from neither the principal male and female genetic parents. The time may well come when it is at least scientifically possible to clone an individual so that the person concerned could not be said to have a genetic father or a genetic mother in any traditional sense of those terms. The extent to which it may be considered desirable to regulate or even prohibit practises in this area is another matter altogether.

2.20 However, it seems to me that counsel for the amici drew the Court's attention to a very important distinction. Legislative regulation in this area has to deal with two very distinct questions which counsel helpfully termed the "ex ante" and "ex post" situations. The former, or "ex ante", issues concern the proper regulation of the circumstances in which modern scientific techniques, such as those which arise in this case and such as those which may arise in the future (only some of which I have touched on), are to be controlled or, perhaps, in some circumstances, outlawed. The "ex post" provisions will be needed to deal with the treatment and status of human beings who come into being as a result of such measures.

2.21 Indeed, it seems to me that one of the most difficult questions which any legislation will need to address is the interaction between those two types of measures. Whatever form of regulation is considered appropriate to prevent abuse, exploitation or other practises which may be considered to be undesirable, there is always the risk that a child will come into existence in circumstances which are a breach of those regulations. Such a situation will not be the child's fault. The law will have to deal with that child as that child is. Any legislation needs not only to deal with the proper regulation of practise and methodology in this area but also the proper recognition of the status of children who result from advances in modern science. In the context of new advances in science the law will have to deal with the problem of what to do in circumstances where, in breach of whatever regulation may be put in place, a new human being has come into the world. That is not an easy legislative task but one thing is clear - the courts cannot make up the sort of detailed rules that are necessary to ensure a humane, workable and coherent system. Even if it were constitutionally permissible for the courts to attempt such a task (which it most clearly is not) same could only be done on a case by case basis as issues arise. The uncertainty that would prevail until the case law had settled down (if it ever truly could given that it would be dealing with a constantly evolving scientific frontier) would lead to its own substantial cost in human misery (not least those of children) and the high likelihood of unnecessary disputes, in a whole range of areas

from succession to citizenship, which would likely be hugely costly both in human and monetary terms.

2.22 I have drawn attention to these factors simply to emphasise that I do not believe that the courts are in any way unaware of the need to bring certainty to these areas but also to emphasise that the courts are, on any view, not best placed to achieve that end.

2.23 But there has not been legislation, despite this Court drawing attention to the emerging problems in Roche. This Court must, therefore, do the best it can. It must determine the proper meaning of the term "mother" for the purposes of registration in the context of the existing law, having regard both to the common law, the relevant legislation, and, to the extent that it may be relevant, the Constitution. That the answer to that question is almost certainly going to be highly unsatisfactory cannot be doubted. But the only truly satisfactory solution can be achieved by legislation. Having identified those issues, I think it is appropriate to start by considering the way in which the trial judge addressed them.

3. The Findings of the Trial Judge

3.1 In order to fully understand the issues with which Abbott J. was confronted, it is necessary to briefly introduce the principal argument relied on, on behalf of the State, both before the High Court and this Court. The Latin maxim mater semper certa est (the mother is always certain) ("mater semper") is suggested by the State to represent the traditional position at common law. On that basis, the State argued that the historical legal position was that the person giving birth to a child was treated, as a matter of law or definition, to be the child's mother. There were, obviously, issues between the parties in the High Court as to whether the maxim truly represented the common law position in Ireland or, indeed, if it did, what precisely it meant. In addition, there were questions as to whether, even if the maxim as interpreted in the manner contended for by the State represented the common law position, that position had been altered either by legislation or by virtue of the requirements of the Constitution. That broad overall picture represents the backdrop against which the judgment of Abbott J. needs to be viewed.

3.2 The earlier part of the judgment is concerned with setting out the issues, the evidence and the submissions of the parties. Abbott J.'s conclusions can be found from para. 95 of his judgment, onwards. However, the trial judge began by addressing the argument which came under the broad heading of epigenetics. Up until recent times it had been widely thought that the influence of chromosomal DNA was the sole influence on the identity and development of a foetus. Epigenetics suggests that other factors, such the transfer of microchimeric cells from mother to baby and drug abuse during pregnancy, can also influence the genetic make-up of a child. However, having considered the evidence adduced on this issue, Abbott J. was satisfied that "*the influence of such epigenetic occurrences is not of such significance as to alter the overriding significance of chromosomal DNA for the purpose of determining identity and inherited characteristics leading to a conclusion of the paternity and genetic maternity*" and that "*it is most unlikely that epigenetics will ever trump the deterministic quality of chromosomal DNA*." No appeal has been brought against that finding.

3.3 Abbott J. addressed the status of the maxim mater semper between paras. 100 and 106. It was suggested that the maxim, in expressing a historically incontrovertible truth, became an irrebuttable presumption of law and of fact. The trial judge later noted that mater semper was not positively affirmed in any legislative context. The international position of the maxim was also briefly averted to. In addition, Abbott J. suggested that, in the absence of a legislative intervention outlawing such arrangements, a surrogacy agreement could not be deemed illegal nor give rise to any criminal or civil wrong.

3.4 Abbott J. then rejected the argument put forward by counsel for the State to the effect that the introduction of Article 40.3.3. into Bunreacht na hÉireann provided constitutional recognition of what was argued to be the pre-existing situation, insofar as that Article uses the term "mother" by reference to the person who carries a child during pregnancy. Referring to the decision of this Court in *Roche*, (particularly the judgments of Fennelly and Geoghegan JJ), the trial judge concluded that the word mother in Article 40.3.3 had a meaning specific to that Article itself, and that any meaning attributable to the term "mother" in that article was temporally limited to the period which a foetus spends in the womb.

3.5 Abbott J. expressed the view that the concept of "blood relationships or links" was paramount in deciding parenthood and found support for this view in the judgments of Fennelly J. in *N v. Health Service Executive* [2006] 4 I.R. 374 and *J.McD. v P.L* [2010] 2 I.R. 199. In the context of paternity, it was observed that such a link could be definitively proved by a blood test under the Status of Children Act 1987 ("the 1987 Act"). Abbott J. equated such "*blood relationships or links"* with the genetic material inherited by a child from its genetic parents, and that, therefore, the inquiry as to maternity ought also to be made on a genetic basis. At para. 103, he held:

"In view of my findings in relation to the determinative nature of chromosomal DNA, I find that while the input of a gestational mother to an embryo and foetus not containing genetic material from her is to be respected and treated with the care and prudence which the best medical practice dictates, the predominant determinism of the genetic material in the cells of the foetus permits a fair comparison with the law and standards for the determination of paternity.

In his view, to do otherwise, and treat the determination of maternity and paternity differently, would be "*invidious, irrational and unfair*". This conclusion was said to be supported by the provisions of the Adoption Act 2010 ("the 2010 Act") in relation to the counselling afforded to a mother proposing the adoption of her child as to the importance of knowing the child's genetic makeup.

3.6 Abbott J. then turned to the constitutionality of the maxim's application as an irrebuttable presumption. Having cited the judgment of O'Hanlon J. in *S. v. S.* [1983] 1 I.R. 68, which dealt with an irrebuttable presumption of paternity within marriage, Abbott J. concluded that "*the presumption of mater semper certa did not survive the enactment of the Constitution insofar as it applies to the situation post IVF*". Although this did not raise a consideration of the best interests of the child, it was observed that this would "*in most cases, if not in all, … be best served by an inquiry of the genetic interest*."

3.7 In summary, therefore, Abbott J. accepted that the maxim mater semper did form part of the common law in Ireland and was to be interpreted as meaning that a woman giving birth to a child was irrebuttably presumed to be its mother. However, that legal position at common law did not, in Abbott J.'s view, survive the adoption of the Constitution so that the maxim, constitutionally construed, must now be taken merely to give rise to a rebuttable presumption.

3.8 Abbott J., therefore, ordered that the genetic mother was the mother of the twins and that she had an entitlement to have particulars of her maternity entered on the certificates of birth of the two children. The trial judge also ordered that the twins had a corresponding right to have their genetic mother recorded on their birth certificates as their mother.

3.9 Against that background, it is next appropriate to turn to the position adopted by the parties on this appeal.

4. The Position of the Parties

4.1 The State argued on this appeal that the trial judge erred in a number of his conclusions. In particular, it was said that Abbott J. was incorrect in his findings on the "*determinative nature of chromosomal DNA*" in relation to parenthood for the purposes of the law, and his finding that the maxim mater semper did not survive the enactment of the Constitution.

4.2 It was said by the State that the trial judge erred in characterising the maxim as an irrebuttable presumption of law. Thus, in applying the judgment of O'Hanlon J. in *S. v S.*, to the facts of this case, Abbott J. was said to have erred. Rather, the State argued that the maxim is an established legal fact, which has been recognised in the common law, enshrined in the Constitution and reflected in case-law.

4.3 In support of the common law argument, counsel referred to the decision of the House of Lords in *The Ampthill Peerage* [1977] A.C. 547, and the comments of Walsh J. in *O'B. v S.* [1984] I.R. 316. It was further said that the legal status of the maxim in Ireland was recognised by the European Court of Human Rights in *Johnston v. Ireland* [1987] 9 E.H.R.R. 203.

4.4 The State contended that reference to "mother" in Article 40.3.3 of the Constitution can only be referable to the birth mother and, by virtue of the doctrine of harmonious interpretation, that definition should be read into the Constitution as a whole. Such a construction, it was said, supports the constitutional status of the maxim. The decisions of this Court in *Roche* and *Attorney General v. X* [1992] 1 I.R. 1 were also said to equate the birth mother with legal motherhood.

4.5 The State further argued that the High Court judgment in effect removed the status of parenthood from a birth mother immediately following birth and, in so doing, failed to give recognition to the constitutionally recognised natural link between a child and its birth mother and the vital role played by a woman in giving birth to a child. In this regard, the State cited the various judgments delivered by this Court in *G v. An Bórd Uchtála* [1980] I.R. 32.

4.6 In equating blood link with genetic link, the State submitted the trial judge fell into error. It was said that this conclusion failed to adequately take into account the differences between men and women and their respective roles in reproduction. The State contended that the judgment of Fennelly J. in *J.McD. v. P.L.* [2010] 2 I.R. 199, being a case concerning the rights of a sperm donor, does not support the conclusion that blood relationships are paramount in deciding both maternity and paternity. Similarly, it was argued that this Court, in *N v. HSE* [2006] 4 I.R. 374, did not have in mind the possibility of there being both a gestational and genetic mother and, thus, it was said that the comments in the judgment in that case cannot be seen as being determinative on the applicability of a blood link or genetic test.

4.7 On the 1987 Act, counsel for the State submitted that the same was not drafted with the intent or knowledge that it would be used to resolve disputes in a surrogacy scenario. It was said that it would, therefore,

be wrong for this Court to attempt to apply its provisions in determination of the issues in this case which, of course, are solely concerned with the identity in law of a mother. Rather, the State argued that the intent of the 1987 Act, insofar as it relates to declarations of maternity, was to identify the mother in situations such as a fraudulent claim of maternity or a mix-up of new born babies in a maternity ward. It was argued that any fundamental change in the law, such as that contended for by the genetic parents, would have to have been clearly signalled in the 1987 Act. It was argued that no such clear wording is to be found in the legislation. In addition, counsel pointed to the Civil Registration Act, 2004 ("the 2004 Act"), which, although not defining the term "mother", uses the term, it was said, in the sole context of a birth mother and, thus, is a recognition and an application of the maxim mater semper.

4.8 The State also drew attention to the many policy issues which arise in relation to surrogacy arrangements. As has already been noted these include the desirability, or otherwise, of surrogacy arrangements being governed solely by private agreement between the respective parties, the risk of the commodification of both women and children, and the possibility of a legal vacuum being created if the maxim is held to be no longer applicable. The State, therefore, argued that there is a risk of the Court usurping the role of the Oireachtas in this regard and that the Court should adopt a deferential approach and wait for legislation to regulate this issue.

4.9 Finally, the State contended that any prejudice suffered by the application of the maxim to the genetic parents in this case could be remedied by an application to adopt the twins. Both the State and the R family expressly rejected the notion that two women can simultaneously be regarded as the legal mother of a child.

4.10 The fundamental position adopted by the R family was that the provisions of the 1987 Act govern this dispute. Counsel for the R family argued that the maxim mater semper was never recognised in Irish law and that there is no binding recognition of the maxim in this jurisdiction. In the alternative, it was argued that the effect of the 1987 Act, in updating the law as to declarations of parentage, was to introduce genetic testing as the accepted method of determining parenthood, whether that be paternity or maternity. This was said to be so because parentage of a child is, under that Act, to be determined by the presence or absence of inheritable characteristics. In so doing, it is said that the 1987 Act overruled the maxim insofar as it still might have applied until that point in time. Although counsel accepted that this scenario may not have been forefront in the minds of the drafters of the 1987 Act, he argued that such is the effect of the relevant provisions, and that, in the absence of some unconstitutionality or other legislation directly governing this area, the Court is constrained to apply the terms of the 1987 Act.

4.11 The R family argued that such an interpretation is consistent with the Constitution, and that a failure to so construe the provisions of the 1987 Act would constitute a failure to protect and vindicate their constitutional rights. In particular, it is said that, if the 1987 Act were not applicable, they would be deprived of the protections afforded to the constitutional family under Articles 41 and 42 of the Constitution.

4.12 The R family did not accept the submission that Article 40.3.3 provides an answer to the question of the constitutional meaning of motherhood for all purposes. In this regard, the provisions of the Adoption Act, 2010, which allow for a woman who gives birth to be no longer treated as that child's mother, were noted. The R family supported the conclusions of Abbott J. to the effect that the temporal scope and effect of Article 40.3.3 is limited to the period the child is in the womb and referred to passages from the judgments of the members of this Court in *Roche* as authority for that proposition.

4.13 The R family contended further that both the existence and importance of the blood link between a child and his or her genetic parent has been recognised in many judgments of this Court. These were said to include *J.K. v. V.W.* and Others [1990] 2 I.R. 437 and N v. Health Service Executive. It was said that the judgment of Fennelly J. in *J.McD. v P.L.* makes it clear that the term "blood link" is properly understood as being the sharing of genetic material.

4.14 If the genetic parents were to fail in their basic claim, it was suggested as a fallback position that it was appropriate that they be appointed guardians of the twins, either pursuant to section 6A of the Guardianship of Infants Act, 1964, as amended, or pursuant to the inherent jurisdiction of the court. It was said that the Court has the inherent jurisdiction to do all things necessary to defend and vindicate the personal rights of a child and *D.G. v. The Eastern Health Board* [1997] 3 I.R. 511 was cited in support of this proposition.

4.15 At the hearing, the birth mother adopted the submissions of the R family. On the question of the maxim mater semper, the birth mother submitted that such a rule of law ought to continue to operate, but on the basis of it being a rebuttable presumption capable of being rebutted on a case by case basis. The birth mother argued that, in this case, the presumption should be rebutted in favour of the genetic mother.

4.16 The amici presented a joint oral submission at the hearing. However, both had lodged individual written submissions with each focusing on their respective areas of expertise, being respectively whether, and to what extent, the operation by an tArd Chláraitheoir of mater semper as an irrebuttable presumption or rule of law was compatible with relevant constitutional principles and requirements of equality in relation to the individuals

involved and whether the rights of the individuals involved under Articles 40.3, 41 and 42 of the Constitution have been violated by operation of the maxim in the manner contended for by the State. Both amici argued that Article 40.3.3 does not require the recognition of a birth mother as constitutional mother in all circumstances and that, particularly in the circumstances of this case, it does not so require. It was also submitted that, while the agreement between the parties may not be legally enforceable, there is nothing illegal about the agreement in the absence of legislation prohibiting or regulating such an agreement. Both amici place significant reliance on various decisions of the European Court of Human Rights ("ECtHR").

4.17 The Equality Authority accepted that no indirect discrimination necessarily arose from the relevant legislative provisions, and that the 1987 Act was capable of recognizing the rights of the genetic mother in the circumstances of this case. Rather, it contended that it was the application of the maxim mater semper as an irrebuttable presumption by An tArd Chláraitheoir which gave rise to breaches of the equality guarantee contained in Article 40.1 of the Constitution. The Equality Authority submitted that Article 40.1 required that the maxim operate only as a rebuttable presumption. If not so operated, it was contended that there was unjustifiable discrimination on the grounds of gender equality - in treating genetic mothers and genetic fathers differently - disability equality - in treating the genetic mother with a reproductive disability differently from a genetic mother with no such disability - and children's equality - in that the best interests of the children in this case are said not to be protected unlike the interests of children born through a non-surrogacy arrangement.

4.18 The Irish Human Rights Commission based their submission on the right to beget children as recognised by Costello J. in *Murray v. Ireland* [1985] I.R. 532. Counsel on their behalf submitted that, having failed to regulate in this area, it is not now open to the State or its organs to deny both the genetic parents and the twins the rights afforded to members of a constitutional family under Articles 41 and 42 of the Constitution. It was also said that the failure to recognize the primary care givers in this case, that is, the genetic parents, and the resultant divergence between the practical and legal realities, fails to protect the best interests of the twins as guaranteed by Article 40.3 of the Constitution.

4.19 Against the backdrop of those submissions it seems to me to be appropriate to turn first to the question of seeking to identify the historical position at common law in Ireland concerning the definition of who might be said, in law, to be a mother.

5. The Common Law in Ireland on Motherhood

5.1 The legal authority on the question of the definition of motherhood in the common law as it is understood in Ireland is, in my view, extremely limited. Attention was drawn on behalf of the State to the judgment of Walsh J. in *O'B v. S*, and, in particular, the highlighted part of the following sentence on p. 338:

"In so far as it deals with the question of the obligation to establish the relationship between the mother and the child which was necessary under Belgian law, that point does not arise in this jurisdiction ***as the maxim mater semper certa est*** did not apply in Belgian law ***but does apply in Irish law by reason of the provisions of ss. 1, 7 and 28 of the Births and Deaths Registration Act (Ireland), 1880.***" (emphasis added)

5.2 First, it should be noted that Walsh J. does not appear, in the passage cited, to suggest that the maxim mater semper applied in Ireland by virtue of the common law, but rather suggests that it applies in Ireland by virtue of the relevant provisions of the Births and Deaths Registration Act (Ireland), 1880 ("the 1880 Act"). The sections of the 1880 Act cited by Walsh J. are as follows:-

"s.1 - In the case of every child born alive after, or whose birth has not been registered previous to the commencement of this Act, it shall be the duty of the father and mother of the child, and in default of the father and mother, of the occupier of the house in which to his knowledge the child is born, and of each person present at the birth, and of the person having charge of the child, to give to the registrar, within forty-two days next after such birth, information on the particulars required to be registered concerning such birth, and in the presence of the registrar to sign the register.

…

s.7 In the case of an illegitimate child no person shall, as father of such child, be required to give information under this Act concerning the birth of such child, and the registrar shall not enter in the register the name of any person as father of such child, unless at the joint request of the mother and of ***the person acknowledging himself to be the father of such child***, and such person shall, in such case, sign the register, together with the mother.

…

s.28 An entry, or certified copy of an entry, of a birth or death in a register under the principal Act, or in a certified copy of such a register, shall not be evidence of such birth or death, unless such entry either purports to be signed by some person professing to be the informant, and to be such a person as is required by law at the

date of such entry to give to the registrar information concerning such birth or death, or purports to be made upon a certificate from a coroner, or in pursuance of the provisions of this Act with respect to the registration of births and deaths at sea, or in pursuance of section six of this Act.

When more than three months have intervened between the day of the birth and the day of the registration of the birth of any child, the entry or certified copy of the entry made after the commencement of this Act of the birth of such child in a register under the principal Act, or in a certified copy of such register, shall not be evidence of such birth, unless such entry purports,-

(a) If it appear that not more than twelve months have so intervened, to contain a marginal note that a statutory declaration has been made by a properly qualified informant;

(b) If more than twelve months have so intervened, to have been made with the authority of the Registrar General, and in accordance with the prescribed rules.

Where more than twelve months have intervened between the day of a death or the finding of a dead body and the day of the registration of the death or finding of such body, the entry or certified copy of the entry made after the commencement of this Act of the death in a register under the principal Act, or in certified copy of such register, shall not be evidence of such death, unless such entry purports to have been made with the authority of the Registrar General, and in accordance with the prescribed rules."

5.3 It is clear, therefore, that s.1 simply imposes a duty on "the father and mother" of a child to give appropriate details and to sign the relevant register. Section 7 provides that in the case of persons then regarded as illegitimate, no father is to be registered except on the joint request of "the mother and of the person acknowledging himself to be the father" of the child concerned. Section 28 simply provides that entries in the register can be evidence provided the conditions specified in that section are met.

5.4 It may be possible to discern a distinction between the use of the term "mother" and the use of the term "the person acknowledging himself to be the father" in the case of an illegitimate child. No such qualification is applied to the father of a legitimate child but, of course, at that time, the husband was presumed to be the father of any legitimate child.

5.5 In any event, it seems to me that, on a full reading of the judgment of Walsh J. in that case, the real question with which that aspect of his judgment was concerned was to contrast the position which applied in Ireland to that which applied in Belgium. On the basis of the judgment, it would appear that Walsh J. was satisfied that, in Belgian law at that time, the relationship between an unmarried mother and her child was not established as a matter of law without proper registration. In contrast, the position in Ireland was that registration was not necessary in order for the status of a mother and her child to be established. This was and is because the law confers status without the necessity of registration. Registration is a matter of obligation and can provide evidence but is not a prerequisite to establishing status. To the extent, therefore, that the passage from the judgment of Walsh J., which I have cited, might be taken to be an indication that the maxim mater semper formed part of Irish law, it seems to me that the judgment is only of very limited authority in that regard.

5.6 Likewise, what is said to be the recognition by the ECtHR of the maxim as representing the law in Ireland which is to be found in *Johnston v. Ireland*, is no more than that court noting what was then said by the parties to the case to be the legal position in Ireland without any reference to supporting authority. At para. 25 of its judgment, the ECtHR observed:

"In Irish law, the principle mater semper certa est applies: the maternal affiliation of an illegitimate child, such as the third applicant, is established by the fact of birth, without any requirement of voluntary or judicial recognition."

5.7 Academic commentary has questioned the extent to which it can properly be said that the maxim forms part of Irish law at all. For example, Dr. Maebh Harding in her chapter "Surrogacy in Ireland" in K. Trimmings and P. Beaumont, International Surrogacy Arrangements: Legal Regulation at the International Level, (2013, Hart Publications) argues that, in the absence of legislation expressly providing for a legal presumption in favour of a birth mother, the legal definition of "mother" in Irish law is unresolved. Although she concedes that the maxim formed part of Roman law, she contends that the principle does not exist in the common law tradition:

"While a presumption in favour of the gestational mother is present in Roman law, there is no such principle in the common law tradition. Common law texts set out principles of legitimacy which make reference only to the father."

She refers to another academic paper (C. Baldassi, "Mater Est Quam Gestatio Demonstrat: A Cautionary Tale", 27th June 2007) in support of this proposition. She also suggests that the comments of Walsh J. in O'B v S are

obiter. In the alternative, she argues that, even if such a presumption is held to exist in favour of a birth mother, it could be rebutted by genetic evidence through the machinery of the Status of Children Act, 1987.

5.8 It follows that there is only sparse and limited authority for the proposition that the maxim mater semper ever formed part of the common law of Ireland. But it is, perhaps, equally if not more important to consider what the maxim, to the extent that it might be considered to have formed part of the law of Ireland, could be said to have meant. Some criticism was advanced on behalf of the State with the characterisation by the trial judge of the maxim as being an irrebuttable presumption of law rather than a definition or statement of legal fact. I am far from convinced that there is, in reality, any great difference between the two concepts. A rebuttable presumption is, of course, a different thing altogether. A rebuttable presumption merely defines a default position which is to apply unless and until somebody establishes, in the appropriate way, that the presumed matter is not in fact so. But if a presumption is stated to be irrebuttable, for whatever reason, then it amounts to a definition for all legal purposes. Indeed, it seems to me that the term definition as a matter of law is more appropriate than the term irrebuttable presumption for there is little of the "presumption" in a proposition which the law does not allow to be contested.

5.9 It seems to me, therefore, that the real question which needs to be addressed is as to whether the common law of Ireland defined the term "mother" as applying only to a woman who gave birth to a child. I am not satisfied that it did.

5.10 In that context, it is appropriate to consider two different possibilities. The first is that the law defined, as mother, the person who provided the female side of the genetic material that went to make up a child. While the state of scientific knowledge in respect of the precise manner in which characteristics were inherited changed over the centuries, the predominant view, at least since the earlier part of the 19th century, was that genetically inherited characteristics came from both father and mother and were, in some way, inherent in both parents (contrary to the theories espoused by those such as Lamark who suggested that acquired characteristics could be inherited). It is true that the precise mechanism by which characteristics were inherited did not become clear until the earlier work of Mendel became more widely known from the publication of separate research by de Vries, Correns and Von Tschermak in the spring of 1900. Prior to that most biologists considered that the traits of both parents were blended in some fashion. But the precise mechanism by which genetic inheritance took place was not really relevant to the overall question of whether characteristics were inherited from both parents. Such a view had ultimately prevailed over the alternative strand of thought, which suggested that inheritance was solely from the male with the female simply nurturing and carrying the offspring to birth. Against the background of an acceptance that any child inherited its characteristics from both male and female parent, how would a legal definition of a mother have worked? In any age prior to the recent past and prior to the recent developments in reproductive science which are at the heart of this case, a definition of a mother which equated motherhood with the provision of genetic material would have, as a matter of certainty, treated a person who could be shown to have given birth to a child as its mother. But that would have been so not because the person giving birth was, by legal definition, the mother, but rather because it was, in the light of the state of scientific advancement at that time, a matter of scientific certainty that the person who gave birth was also the person who gave the female genetic material to the child.

5.11 Thus, even if the proper definition of a mother as a matter of law were taken to have been the "genetic mother", a maxim of mater semper would have been equally applicable, for it would have been "certain" that the birth mother was the person who had provided the relevant genetic material. There is nothing, therefore, in my view, inconsistent with a legal rule which treated a genetic mother as being the mother with a maxim which recognised the scientific certainty that the birth mother was the person who was the genetic mother.

5.12 An acknowledgment that a person giving birth was certainly the mother is, therefore, equally consistent with the mother being defined as the birth mother or being defined as the genetic mother.

5.13 In the light of that analysis, I am not satisfied that the common law, in defining the identity of a mother, made any distinction between a birth mother and a genetic mother. The maxim mater semper was simply a recognition of the fact that, in the light of the state of science at that time, the birth mother and the genetic mother were necessarily one and the same person. It seems to me to be a significant over-interpretation of the maxim to suggest that it sought to define mother as birth mother as opposed to recognising that the genetic mother and birth mother were necessarily one and the same person and that the identity of both the birth mother and the genetic mother could, therefore, be definitively determined by identifying the person who gave birth. I am not, therefore, satisfied that the common law in Ireland defined mother in a way which confined that term to birth mother to the exclusion of genetic mother. I will return to the consequences of that conclusion in due course. However, as pointed out earlier, the next question which must logically be addressed is as to the effect, if any, of relevant legislation on the common law position. I, therefore, turn to that question.

6. The Legislation

6.1 Section 35 of the 1987 Act provides for declarations of parentage by a court in the following terms:-

"(1) (a) A person (other than an adopted person) born in the State, or

(b) any other person (other than an adopted person),

may apply to the Court in such manner as may be prescribed for a declaration under this section that a person named in the application is his father or mother, as the case may be, or that both the persons so named are his parents.

(2) An application may be made under subsection (1) of this section notwithstanding the fact that any person named in the application as the father or the mother or a parent, as the case may be, is not, or may not be, alive.

…

(8) Where on an application under this section it is proved on the balance of probabilities that—

(a) a person named in the application is the father, or

(b) a person so named is the mother, or

(c) persons so named are the parents,

of the applicant, the Court shall make the declaration accordingly.

(9) Any declaration made under this section shall be in a form to be prescribed and shall be binding on the parties to the proceedings and any persons claiming through a party to the proceedings, and where the Attorney General is made a party to the proceedings the declaration shall also be binding on the State."

6.2 A court can direct that blood tests be taken to assist the court in its determination under s. 38(1) of the 1987 Act:

"(1) In any civil proceedings before a court in which the parentage of any person is in question, the court may, either of its own motion or on an application by any party to the proceedings, give a direction for the use of blood tests for the purpose of assisting the court to determine whether a person named in the application or a party to the proceedings, as the case may be, is or is not a parent of the person whose parentage is in question, and for the taking, within a period to be specified in the direction, of blood samples from the person whose parentage is so questioned, from any person alleged to be a parent of that person and from any other person who is a party to the proceedings, or from any of those persons."

6.3 Blood tests are defined in s. 37 as "*any test carried out under this Part and made with the object of ascertaining inheritable characteristics*".

6.4 Section 40(2) sets out the contents of a report resulting from a blood test under s. 38 as follows:-

"(2) The person under whose control blood samples are to be tested by virtue of subsection (1) of this section shall make to the court by which the direction was given a report in which he shall state—

(a) in relation to each person from whom blood samples were so taken, the results of the tests, and

(b) in relation to each person (other than the person whose parentage is in question) from whom blood samples were so taken—

(i) whether the person to whom the report relates is or is not excluded by the results from being a parent of the person whose parentage is in question, and

(ii) if the person to whom the report relates is not so excluded, the value, if any, of the results in determining whether that person is a parent of the person whose parentage is in question,

and the report shall be received by the court as evidence in the proceedings of the matters stated therein."

6.5 Section 19 of the 2004 Act, as amended, deals with the obligation to register the birth of a child. This section, insofar as is relevant, provides:

"(1) Subject to the provisions of this Part, when a child is born in the State, it is the duty of—

(a) the parents or the surviving parent of the child, or

(b) if the parents are dead or incapable through ill health of complying with this subsection, each other qualified informant, unless he or she reasonably believes that another qualified informant has complied with it in relation to the birth, not later than 3 months from the date of the birth—

(i) to attend before any registrar,

(ii) there, to give to the registrar, to the best of his or her knowledge and belief, the required particulars of the birth, and

(iii) there, to sign the register in the presence of the registrar.

…

(3) Where, owing to non-compliance with subsection (1), a birth is not registered and, having made reasonable efforts to do so, the Superintendent Registrar in whose registration area the birth occurred is unable to contact either parent of the child concerned, the Superintendent Registrar may give a qualified informant a notice in writing requiring the informant—

(a) to attend before a registrar in that registration area, at the office of the registrar or such other (if any) convenient place as may be specified by the Superintendent Registrar on or before a day so specified (not being less than 7 days from the date of the notice nor more than 12 months from the date of the birth),

(b) there, to give to the registrar, to the best of his or her knowledge and belief, the required particulars of the birth, and

(c) there to sign the register in the presence of the registrar,

and, unless the birth is registered before the date of the attendance aforesaid, the informant shall comply with the requirement.

(4) Where paragraphs (i) to (iii) of subsection (1) or, as the case may be, paragraphs (a) to (c) of subsection (3) have been complied with in relation to a birth, the registrar concerned shall register the birth in such manner as an tArd-Chláraitheoir may direct.…"

6.6 The required particulars are set out in Part 1 of the First Schedule to the 2004 Act, as amended. In relation to the parents of a child, these particulars include:

"Forename(s), surname, birth surname, address and occupation of mother.

Former surname(s) (if any) of mother.

Date of birth of mother.

Civil status of mother.

Personal public service number of mother.

Birth surname of mother's mother.

Forename(s), surname, birth surname, address and occupation of father.

Former surname(s) (if any) of father.

Date of birth of father.

Civil status of father.

Personal public service number of father.

Birth surname of father's mother."

6.7 Section 63 of the 2004 Act deals with the correction of errors in a registrar:

"(1) An alteration shall not be made in a register maintained under paragraph (a), (b) or (d) of section 13(1) otherwise than in accordance with the provisions of this Act.

(2) On the application in that behalf of a person having an interest in the matter to a Superintendent Registrar in

writing, he or she may—

(a) correct in the manner specified by an tArd-Chláraitheoir a clerical error in any register maintained under section 13, or

(b) correct an error of fact in a register specified in the said paragraph (a) or (d) if the person gives to the Superintendent Registrar such evidence as he or she considers to be adequate and a statutory declaration, in a form standing approved by an tArd-Chláraitheoir, of the facts concerned made by—

(i) a person required by this Act to give to the registrar the required particulars in relation to the birth, or death, concerned, or

(ii) if such a person as aforesaid cannot be found, two credible persons having knowledge of the facts concerned."

6.8 In addition some mention should be made of s. 2 of the Guardianship of Infants Act, 1964 which defines 'mother' as including a "*female adopter under an adoption order*".

6.9 There is no doubt that the focus of the 1987 Act is on genetic inheritance. Section 35(8) is mandatory in form and provides that a court "shall" make a declaration of parentage where it is proved on the balance of probabilities that a specified person is the mother of a particular child. Such a declaration is binding not only on the parties but others by virtue of subsection (9). That provision does not, of course, of itself convey any particular meaning as to the term "mother".

6.10 Section 38 allows the Court to give a direction for the use of blood tests "for the purpose of assisting the Court to determine whether a person named in the application or a party to the proceedings […] is or is not a parent" of a relevant person. A blood test is defined in s.37 as meaning any test made with the object of "ascertaining inheritable characteristics". The results of a blood test are required to be set out in a report which must state, in respect of any person sampled (with the exception of the person whose parentage is in question), whether that person is or is not excluded from being a parent or, if not so excluded, the value of the results in determining parentage.

6.11 It is true, as counsel for the State argued, that the 1987 Act does not, in express terms, specify that parentage can only be determined by virtue of the establishment of a blood link or inheritable characteristics. On that basis counsel argued that the 1987 Act could not be said to have altered the common law definition of a "mother". In answer to the question as to what the point would be of elaborate provision being made for blood tests together with their receipt in evidence, in cases involving not only a dispute as to who the father might be (in which case the use of such tests was obviously of significant potential value) but also in the case of disputed motherhood, counsel suggested that such tests might be relevant in a limited number of cases where there was doubt as to the true birth mother (such as cases involving a mix-up in a maternity hospital or an abandoned child).

6.12 That being said, it does have to be acknowledged that the 1987 Act does seem to imply that, at a minimum, blood tests will play an important role in determining parentage, not just in the case of fathers but also in the case of mothers. It is true that the scientific advances which have given rise to the difficulty in this case (being the possibility of the separation of the identity of a genetic mother and a birth mother) were in their early stages at the time the 1987 Act was adopted. It is perhaps worthy of some note that the 1987 Act was closely modelled on equivalent United Kingdom legislation, the Family Law Reform Act, 1969, which was enacted well before those scientific developments occurred.

6.13 This is, of course, a case in which the parentage of the twins is in issue. It is clear that in such a case the Court could, had there been any dispute about the matter, have directed appropriate tests in accordance with s.38(1) of the 1987 Act and would, doubtless, have received back a report which would have made clear that the genetic mother was certainly just that. To use the language of s.40 of the 1987 Act, which deals with the contents of the relevant report, it seems almost certain that such a report would have specified that the genetic mother, far from being excluded, was in fact the mother to an extremely high level of likelihood amounting, in practise, to a certainty. Faced with such a report, on what basis could a court do other than conclude that the genetic mother was the mother of the twins?

6.14 It might be said that the Court could, provided it was satisfied as a fact that the twins had been given birth to by the birth mother, nonetheless conclude that the genetic mother was not the mother as defined in law by reason of the proper legal definition of the term "mother".

6.15 On balance, I have come to the view that, while the 1987 Act places a high weight on the existence of genetics, and, thus, inherited characteristics, it does not do so to the point of altering the definition of a mother as defined in law. If such were to be the case, then it seems to me that the Act would have needed to have gone

further and have expressly altered that definition.

6.16 That leads to a consideration of the 2004 Act. Section 19 of that Act places a duty on parents, within three months of the date of the birth of a child, to give appropriate particulars of the birth. In that regard it is similar to the 1880 Act cited by Walsh J. in O'B v. S. The relevant particulars required are set out in part 1 of the first schedule of the Act and include the name of the mother and various other details concerning the mother.

6.17 On that basis it is argued that the term "mother" must, in that context, mean birth mother rather than genetic mother for, if they be different, the genetic mother might not necessarily even know of the birth so as to be in a position to meet the obligation to register.

6.18 There certainly seems to be a significant argument in favour of the proposition that the person on whom the obligation to register lies is, at least predominantly, the birth mother in any case in which there may be a distinction between the birth mother and the genetic mother. However, for like reasons to those which I analysed in the context of the 1987 Act, I am not satisfied that the 2004 Act can be said to affect a change in any pre-existing legal definition of the term "mother", in the absence of clear and express terminology used in that Act such as would demonstrate an intention on the part of the Oireachtas to alter the legal definition of "mother".

6.19 I have, therefore, come to the view that neither the 1987 Act nor the 2004 Act can be said to be couched in sufficiently clear terms to alter any previously existing common law definition of "mother". Undoubtedly, the 1987 Act emphasises genetic connection and inherited characteristics. Equally, the 2004 Act emphasises the woman giving birth. But neither does so in a way which establishes a clear intent to alter the legal definition of "mother". Against that background, and before considering any constitutional issues, it seems to me to be necessary to return to the common law position.

7. The Common Law Position

7.1 For the reasons which I have already sought to analyse, I am not satisfied that the maxim mater semper governed the common law of Ireland or at least did so in a way which defined only a birth mother as the mother of a child.

7.2 On the contrary, it seems to me that the common law regarded, as mother, both the genetic mother and the birth mother for, at the time when that common law evolved, there was no scientific possibility of those roles being carried out by two different persons. The law did not make a distinction between a birth mother and a genetic mother because science, to that point in time, could not separate the two roles. The 1880 Act simply recognised that scientific fact.

7.3 It follows, it seems to me, that the common law regarded both the genetic mother and the birth mother as being the mother of a child for the simple reason that there was, in practical reality, no distinction between them. For the reasons already analysed, I am not satisfied that the language of either the 1987 Act or the 2004 Act was sufficiently clear to alter that pre-existing position. What then is the consequence for the meaning of the term "mother" (unless specifically defined for a particular purpose in a particular statutory context) of the development of reproductive techniques which now allow those two roles to fall on different persons. That seems to me to be the real question which lies at the heart of this case. The law did not distinguish between a birth mother and a genetic mother because there was no distinction in scientific fact. Now that there is a distinction in scientific fact how does that previous legal definition apply? Before answering that question it is necessary to consider the extent, if any, to which the Constitution may have an impact on that issue.

8.0 The Constitutional Position

8.1 A starting point for the consideration of any possible constitutional impact on the issues which arise in this case must be the constitutional position of the family specified in Art. 41 of the Constitution. Article 41.1.1 recognises the family as the natural primary and fundamental unit group of society. The term "family" is not expressly defined in the Constitution but it does need to be noted that Art. 41.3 refers to the institution of "Marriage" "on which the Family is founded". It must be recalled that, for much of the life of the Constitution, the former Art. 41.3.2 prevented the enactment of any law providing for the grant of dissolution of marriage. The case law on the meaning of the family which predates the amendment to the Constitution which first permitted divorce must be seen in the light of a constitutional regime where marriage was indissoluble. It is also true that the European Convention on Human Rights recognises a broader range of units as being properly regarded as a family. Furthermore, it may well be said that one of the greatest changes in social conditions in Ireland over the last quarter of a century has been a radical alteration in what might ordinarily be understood by mainstream opinion as constituting a family.

8.2 As the matter was not argued it would be inappropriate to express any view as to whether the question of the proper definition of the term "family" as it is used in the Constitution needs to be revisited. At a minimum, it may be necessary to consider what the effect of the removal of the constitutional prohibition on divorce is on a harmonious interpretation of the relevant provisions of the Constitution. It is true, of course, that the

constitutional regime now contemplates the possibility that persons may remarry after divorce. Thus, the presence of divorce does not necessarily mean that the family can be said to exist, from a constitutional perspective, outside marriage. On the other hand, there are difficult questions. Where a person is divorced and has remarried, what family, from a constitutional perspective, does that person now belong to? Clearly, as far as their spouse is concerned, it is the person to whom they are now married. But what about children from an earlier marriage? What family are they a part of? The definition of "marriage" in a constitutional context given by Costello J. in *Murray v. Ireland* [1985] I.R. 532 (at 536), as "*an irrevocable personal consent given by both spouses which establishes a unique and very special life-long relationship*" may need to be reconsidered in the light of the fact that the Constitution now recognises that the parties to an original marriage may become divorced and remarry other persons so that they may, in many senses, belong to a number of families. While the constitutional statement that the family is based on marriage remains, the precise definition of "family" is a matter which may need to be looked at again in an appropriate case.

8.3 However, it may well be that the precise current meaning of "family" in a constitutional context is not decisive for the purposes of this case. As Finlay C.J. pointed out in this Court in *L. v. L.* [1992] 2 I.R. 77, Article 41 is concerned with protecting the family from external forces rather than in dealing with the individual rights of members of the family. It is true that the question of family does have a material relevance to the constitutional status of many individuals including those who may be born as a result of one of the many forms of surrogacy that are now possible. If the traditional view of the meaning of the term "family" is to prevail at a constitutional level and if the arguments of the State in this case are to prevail, then one of the effects would be, potentially, to deprive the twins of what might otherwise be their status within a constitutional family.

8.4 Apart from Article 41, Article 42 focuses on education and recognises what are described as "parents" as the natural and primary educators of children. In *State (Nicolaou) v. An Bórd Uchtála* [1966] I.R. 567, this Court held that the word "family" when used in Article 42, referred only to those families where the relationship was based on marriage. If that situation prevails then there is a significant difference in constitutional status between children whose parents are married and those who are not. In the latter case, Article 43 confers constitutional rights on the mother (see *G. v. An Bórd Uchtála*) but not on the father. To the extent that the rights of a father were referred in *J.K. v. V.W*., it was suggested in *W.O'R. v. E.H*. [1996] 2 I.R. 248 (at 288) that those rights "*do not refer to any constitutional right or any natural right recognised in the Constitution*". Given that there is no doubt that the genetic father is regarded as the father of the twins in law then it clearly follows that the determination as to who the twins mother is to be, as a matter of law, will determine whether the parents of the twins are married and thus, potentially, affect important constitutional rights.

8.5 Be that as it may, the principal constitutional entitlement, which seems to me to arise in the circumstances of this case, is the entitlement which persons have, as part of their natural entitlement to human dignity, to have the State recognise their status by reference to such relationships as they may have, whether to parents, siblings, wider family members and within such family or families (however defined) as their status may place them. The State is, in my view, entitled, within bounds, to properly regulate the recognition of such status. Laws providing for the possibility of adoption, but also specifying the circumstances in which legally recognised adoption is to take place, form a clear example of one such regulation.

8.6 But I see no reason in principle why the legislature cannot constitutionally act to regulate the increasingly complex situation, which exists by virtue of the rapid development of reproductive science. As already noted, in the course of argument it was emphasised, not least by counsel for the amici, that the sort of matters which require regulation include issues concerning how the conduct of surrogacy procedures themselves are to be regulated (referred to as ex ante measures) together with issues concerning the status of persons who are born as a result of such measures (referred to as ex post measures). The need for regulation of both those types can hardly be doubted. But there are very many policy choices indeed involved in respect of both ex ante and ex post regulation. It seems to me that, in this increasingly complex area, it is important to acknowledge that the Constitution confers a wide discretion (but not an unlimited one) on the State to legislate in the public good to ensure that proper protection is afforded to those, particularly the vulnerable, who might be exploited in the context of surrogacy arrangements, but also in bringing certainty to issues relating to the personal status of individuals born as a result of such arrangements.

8.7 But the problem with which this Court is now faced is that no such legislation has as yet been enacted. The question which needs to be addressed is as to whether the Constitution can be said to require that the existing legal status of persons in the position of the twins in this case, requires to be determined in any particular way. Put simply, in the absence of legislation specifically dealing with the matter, the current status of the twins must be considered by reference to the common law definition of "mother", to any relevant statutes which might impact on that position and to any requirements which the Constitution might mandate. I have already indicated that, in my view, the common law position was one which did not distinguish between a genetic mother and a birth mother. I have also indicated my view that neither the 1987 Act nor the 2004 Act altered that position. I cannot see that the Constitution requires that that position be altered either. The Constitution permits the State to regulate. It may well be that the State will choose to regulate in such a way as will cause, in some cases, a birth mother to be regarded as a mother, and, in other cases, a genetic mother to be regarded as a mother.

Within constitutional bounds it is largely a question of policy for the Oireachtas to determine the precise parameters of any such regulation.

8.8 There is no doubt that the idea that two persons may, in different ways, be regarded as the mother of a child is counter-intuitive. But so also is not regarding the person who gives birth to a child as being its mother, and, equally in not so regarding the person who has given the female half of the genetic material which underlies such a child's makeup. Advances in reproductive science have led to a situation where, in the absence of legislation, whatever the law determines as the meaning of mother will, to an extent, be counter-intuitive in some cases. It may well be that the proper answer to the question as to who should be recognised as a mother in the often complex situations which can arise in this field is "it depends". However, that begs the next question. On what does it depend? That involves many policy choices which are primarily a matter for the Oireachtas and not, unless they break the limits of what is constitutionally permissible, the courts.

8.9 I have reached those conclusions on the lack of a constitutional effect on the issues which arise in this case only because I have concluded that the law, in the absence of legislative amendment, regards both a birth mother and a genetic mother as "mothers" or at least as having some of the legal characteristics of a mother. If I had come to a different conclusion on that point then there might well have been significant constitutional issues. To what extent would it be legitimate, for example, in current scientific conditions, for a definition of "mother" to potentially deprive a child or children of the status of forming part of a constitutionally protected family including their father? To what extent would it be constitutionally permissible, on the other hand, to deprive a birth mother of any potential recognition as a mother? These, and doubtless other, constitutional issues will need to be considered in the difficult and delicate balancing exercise in which the Oireachtas will have to engage before finalising any legislative intervention. They are also issues which, in my view, necessarily would loom large if either the genetic mother or the birth mother were, by definition, in all circumstances, and without any possibility of legal intervention, to be excluded by definition from being a mother for constitutional purposes. However, given the views which I have formed on the current definition of "mother" (in the absence of legislative intervention), those issues do not seem to me to arise on the facts of this case.

8.10 For those reasons I have come to the view that the Constitution does not mandate any different approach to the definition of "mother" than that defined by the common law amended, if it be amended, by constitutionally permissible legislation. It follows that, in my view, in the absence of definition, the term "mother", when used in Irish law in current scientific circumstances, applies equally to a birth mother and a genetic mother. In the light of that finding I will turn shortly to the consequences of that finding for the issues which arise in this case. However, I should deal first with the question of whether this case can be resolved on the basis solely of a construction of the 2004 Act.

9. Are the Issues simply ones of Statutory Construction?

9.1 On one view it might be said that the only issue which really arises in this case is as to the proper construction of the relevant provisions of the 2004 Act. The R family and the birth mother seek a declaration that the genetic mother is the mother of the twins and also a consequential order requiring the alteration of the registration of the birth of the twins to reflect that fact.

9.2 On that basis it might be said that the two issues are essentially the same for they both might be said to turn on the question of who should be registered as the mother under the 2004 Act. It seems to me that such analysis raises an important question concerning the true issues which arise in this case. As noted towards the beginning of this judgment it can, of course, be the case that, for a particular legal purpose, a word is given a specific definition which may not exactly conform with the commonly accepted meaning of the word concerned and which may not, therefore, affect the way in which that same word might be interpreted if used in a different context outside the scope of the measure in which the definition is to be found. The fact that, for the purposes of one specific piece of legislation, a particular term is defined in a particular way does not necessarily mean that that term, used anywhere else, has the precise meaning which its definition in the relevant legislation provides.

9.3 On that basis it might be said that, subject to ensuring that the relevant legislation is interpreted in a constitutionally permissible fashion, this case really only turns on what the term "mother", as used in the 2004 Act, means. Looked at that way the issues might appear to come down largely to ones of statutory interpretation with a potential constitutional element to that interpretative exercise. On that basis it might be said that the only real issue in this case is as to the meaning of the term "mother" as used in the 2004 Act informed, if necessary, by any constitutional requirements.

9.4 However, I am not persuaded that this case can be resolved on such a narrow basis. In order to decide this case on that basis, it would be necessary to accept one of two propositions. Either that the State has devised a system for the registration of births which allowed for the registration of a person as a mother who was not to be regarded as the mother of the child concerned for most other legal purposes or that the definition or interpretation of the term "mother" as used in the 2004 Act must significantly influence or even determine the meaning of that term for other (even potentially constitutional) purposes.

9.5 In other words, if this case is to be resolved solely on the basis of a consideration of the regime for the registration of births without regard to the legal definition of the word "mother" for wider purposes such as those canvassed in the course of these proceedings (the Constitution, succession, inheritance, status and the like) then it would follow that a person who is to be regarded as the "mother" of a child for, for example, inheritance purposes, either might not be the same person as one who was properly registered as the "mother" of the same child for the purposes of the registration of the child's birth or that the meaning of "mother" in the 2004 Act governs inheritance rules. Obviously such a situation can arise where, for example in the case of adoption, there is a further intervening and formal event, being the adoption of the child concerned. But in such a case there would be further formal measures (being the relevant adoption proceedings) which would recognise the change in status concerned. But in the absence of such formal change is there a proper legal basis for treating the term "mother" as being different for registration as opposed to other purposes?

9.6 In addition, and as I have already noted, there is the constitutional dimension. Given the many references to family and mother in the Constitution, can it be said that the State could properly exclude a person from being registered in the registry of births as the mother of a child (by reason of the definition of motherhood for the narrow purposes of registration) where that person nonetheless had the potential to be regarded as a mother for constitutional purposes depending on the circumstances of the case? Or, alternatively, is someone to be regarded or not regarded as a mother for constitutional purposes by reference to the meaning of mother in the 2004 Act? There was, of course, no constitutional challenge to the 2004 Act and for that reason it would, therefore, be wholly inappropriate to make any comment on the constitutional status of that legislation. I should also restate my view that, in the complex situation with which it is now faced, the Oireachtas must be afforded a wide margin of appreciation in attempting to regulate the very difficult issues which arise. However, it seems to me that a form of regulation which precluded any possibility in any circumstances of a genetic mother from being recognised as the mother of a child or which precluded giving at least some recognition to the status of the genetic mother in some appropriate way, would be of doubtful constitutional validity. It would, for example, as already noted, preclude persons, such as the twins in this case, from ever being part of a constitutional family with their father.

9.7 While not decisive, it is also worth noting that persons, understandably, place a high value on the way in which their status is officially recognised. We do not maintain, in this jurisdiction, any general register of persons which records matters such as their age, gender and indeed, parentage. The closest we have is the register of births, marriages and deaths. In those circumstances it is hardly surprising that persons are concerned that the way in which their birth is registered accurately reflects the legal situation, for it is, in normal circumstances, the only official record of their status. While it may, at least in some circumstances, be possible for the State to provide, in legislation relating to registration, for definitions which may not accord with everyone's view, it is nonetheless important that the register of births reflects, as best can be achieved, the general legal position. It would, in my view, certainly in the absence of some significant countervailing factor, be difficult to justify an important definition for the purposes of registration differing very substantially from the meaning of the same term in other legal contexts.

9.8 It might, of course, be that the Oireachtas actually took the view that, for registration purposes alone, the birth mother was to be regarded as the mother whatever might be the proper meaning of "mother" in other legal contexts. But the suggestion that "mother", as the term is used for registration purposes in the 2004 Act, means birth mother is one of inference rather than resulting from a clear legislative intent. For that reason, it seems to me that, certainly in the absence of a clear wording displaying a legislative intent which would require a different approach, the term "mother" as used in the 2004 Act should correspond, insofar as possible, to the meaning of the term "mother" as used in the general law. Thus, I would approach the issues in this case on the basis of first considering the meaning of the term "mother" in general law and only then considering whether there was anything in the 2004 Act which displaced that meaning for registration purposes. I would not favour an approach which looked at the issues which arise in this case the other way round.

9.9 For the reasons which I have sought to analyse, I am not satisfied that the term "mother", when used as a general and undefined term in the law, necessarily excludes either the birth mother or the genetic mother. In the absence of constitutionally permissible regulation which would, in the circumstances of a particular case or category of case, wholly exclude one or other of those persons, I am satisfied that both are entitled to be regarded as having some of the characteristics of a mother. Given that view of the general law I am not satisfied that there is anything in the 2004 Act which is sufficiently clear to mandate excluding a person who might otherwise be properly regarded as having some of the characteristics of a mother from being registered as such in some appropriate fashion. For those reasons I would not favour attempting to resolve this case on the narrow basis of a construction of the registration legislation even if approached with a constitutional eye. I, therefore, turn to the consequences of and conclusions to be drawn from the findings already addressed in this judgment.

10. The Consequences and Conclusions

10.1 For the reasons earlier set out I am, therefore, satisfied that both the genetic mother and the birth mother have some of the characteristics of "mothers" as that term is currently used in our law. The term "mother", historically, referred to both because both were, as a matter of then scientific fact, necessarily the same person.

They are no longer now, however, necessarily the same person. But neither has, in my view, by reason of that scientific advancement, necessarily lost their status.

10.2 I fully appreciate that a legal regime where two persons can be regarded as having some of the characteristics of a mother of a child for legal purposes brings with it many complications concerning the very types of matters which were the subject of argument in this case. Issues of constitutional status; issues of citizenship and inheritance; and doubtless others. But those issues arise whatever the answer. Those same issues have the potential to create difficulties if either the position argued for by the R family or that advanced by the State is found to prevail. A child having two persons who have some of the characteristics of a mother may be highly counter-intuitive. But so is a child not being regarded as the offspring of the person who gives birth to them, but so equally is the person who has given such a child half of their genetic material not being regarded as the child's parent. Whatever the answer, in the absence of careful, detailed and sensitive legislation, the result will be counter-intuitive, messy, create a whole range of legal difficulties and, undoubtedly, be very unsatisfactory from the perspective of many persons.

10.3 But there just is no solution short of the sort of legislation which may now be contemplated. In the meantime, all a court can do is to declare the position as it currently stands and invite the legislature to take urgent action. For the reasons which I have sought to analyse I am satisfied that proper legal analysis confers aspects of the status of motherhood, on the law as it currently stands, on both the genetic mother and the birth mother. Insofar as it might be a material consideration, it seems to me that such an eventuality runs the least risk of unfairness. That is not to say that there may well be cases where the merits would overwhelmingly favour declaring either a birth mother or a genetic mother as being properly regarded as the mother to the exclusion of the other. But there is just no legal framework in which such a decision can properly be taken which differentiates between one case and another. In the absence of legislation the law must be the same in all cases. In those circumstances a law which does not exclude either has the potential to do less harm than a law which necessarily completely excludes one.

10.4 While it might well cause significant difficulties for the registration of children born as a result of the advances in reproductive science which are at the heart of this case, nonetheless it seems to me, at present, that a recognition that both a birth mother and a genetic mother are entitled to be registered in some way is the least bad solution. Pending any relevant legislation it seems to me to be a matter for an tArd Chláraitheoir to put in place such administrative measures as might be necessary to give effect to that type of registration.

10.5 While appreciating that this view does not command a majority, I would have proposed that the Court make a declaration to the effect that the genetic mother is the mother of the twins without prejudice to the status of the birth mother. I would also have proposed making an order directing an tArd Chláraitheoir to take whatever steps might be necessary to ensure that the registration of the birth of the twins reflects the status of the genetic mother thus declared. In the light of the recognition that this would cause administrative difficulties for an tArd Chláraitheoir I would, had this been a majority view, have proposed hearing counsel further on the precise form of order which should be made.

Judgment of Mr. Justice John MacMenamin dated the 7th day of November, 2014.

1. I would agree with the order proposed by Denham C.J., Hardiman J. and O'Donnell J. in allowing the appeal. However I wish to add some observations of my own on the issues before the Court, and the form of order which a Court might make, in an exceptional case such as this. The appeal is against the judgment of Abbott J. in the High Court wherein he granted a declaration pursuant to s.35 8(b) of the Status of Children Act 1987 that the fourth-named applicant, C.R., is the mother of the first- and second-named applicants, and a further declaration that the State's continued failure to recognise and acknowledge the applicants, C.R. and O.R. as the mother and father of the two children was unlawful, and failed to vindicate and protect the applicants' constitutional rights under Articles 34, 40.4.1, 40.3.2, and 41 of the Constitution.

2. At first sight, the circumstances of this case would attract immediate sympathy. The fourth-named applicant/respondent, C.R. (to whom I will refer without it having a legal significance as the "the genetic mother"), and O.R. the third-named applicant/respondent ("the genetic father"), are a married couple who wished to have a family. Unfortunately, the genetic mother suffers from a congenital medical condition which prevents her bearing children. Consequently, the couple came to a surrogacy agreement with the genetic mother's sister ("the birth mother"). The agreement was that the father's sperm, and the genetic mother's egg, would be implanted in the birth mother's womb. The birth mother would undergo the process of gestation, and ultimately give birth to the child or children. Arrangements were put in place by a Dublin fertility clinic. The parties signed a surrogacy agreement which sought to address various legal consequences which might arise both during, and after, the pregnancy. As it happened, the result was the birth of twins. These are the first- and second- named applicants/respondents. They are now living with the genetic parents. To all intents and purposes they are all treated as being one family.

3. It might appear that registering the genetic parents as being the legally recognised, parents would be a

straight-forward resolution in this case. But this would be to rush to judgment. Even after this Court had heard the ably presented oral arguments, two news stories emerged which demonstrated that, unfortunately, surrogacy can raise difficult issues. It is necessary only to present the outline of both accounts here without sensationalism. The first report related to a twin baby boy with Down's syndrome who was "left behind" by his Australian commissioning parents with his Thai surrogate mother because, it was said, of a number of medical problems.

4. The second case concerned another commissioning couple, where it was suggested, an Australian commissioning father had engaged in sexual misconduct with the surrogate children, in circumstances where the Thai surrogate mother had been ambivalent about the commissioning parents taking the twins to Australia.

5. Such cases are not unique. They demonstrate some of the issues which can, sometimes, arise with surrogacy. In this appeal, the adult parties entered into an altruistic arrangement amongst the adult parties. There was no commercial dimension. But the question arises as to whether the facts of this case be segregated from others in law? This judgment seeks to approach the questions arising, primarily at the level of statutory interpretation, within the parameters argued in the appeal.

6. I differ from my colleagues in the majority in that, I would have been disposed to grant an alternative order, as considered later in this judgment, which might further vindicate the children's rights, as far as is practicable in accordance with the Constitution. That proposed order would be that the matter be remitted back to the High Court in order to consider whether the third- and fourth-named applicants be appointed legal guardians of the first- and second-named applicants. This could be as a preliminary to adoption procedures. At the High Court hearing now under appeal, counsel for the State indicated that the authorities would co-operate in expediting such a course of action. The effect of such orders and procedures, if completed, would be that, under Irish Law, the twins, would for all purposes, have been regarded as their genetic parents' children.

7. Having outlined the events following the birth of the children, this judgment addresses the question as to how the statutes, said to inhibit the genetic parents' rights, are to be construed, under Irish law. Thereafter the judgment considers how, exceptionally, the rights of the children might be vindicated in accordance with law in this unique case.

8. For clarity, references to "the applicants" will be to the genetic parents, save where the context otherwise clearly indicates. The first-named respondent will be referred to as the "An t-Ard Chláraitheoir". The notice party will be referred to as "the birth mother", the Equality Authority and the Irish Human Rights Commission as the "amici curiae".

Events Subsequent to the Birth of the Children

9. Subsequent to the twins' birth, the question arose as to genetic father and the birth mother being registered as the parents of the children. This was because, in the law of the State, it was the birth mother who was recognised as being "the mother" for registration purposes. This approach, hitherto universally applied, was in reliance on a legal principle, expressed in the Latin terms *mater semper certa est*, that is, the (identity of the) mother is always certain. This is to be contrasted with the position of paternity, which, traditionally, was established by a presumption arising from marriage to the mother of the child.

10. Subsequent to the decision by An t-Ard Chláraitheoir, the genetic parents' solicitor wrote, seeking to have their clients registered as being the twins' parents. An t-Ard Chláraitheoir refused to do this on the basis of legal advice. The genetic parents then sought to "correct" the entry in the register. They were informed that the matter could not be treated as being an "error of fact", pursuant to the provisions of s.63 of the Civil Registration Act, 2004, which would allow for such corrections and that there was no legal basis to treat the entry as incorrect. The operation of the 2004 Act was extensively considered by McKechnie J., then in the High Court, in *Foy v An t-Ard Chláraitheoir, Ireland and the Attorney General* [2002] IEHC 116.

The Public Interest and Public Policy Aspect of the Case

11. The issue of interpretation in this case does not concern just one adult couple, the twins and their particular situation. All these interests and rights fall to be determined, insofar as the issues are of statutory interpretation. In that process of interpretation there can be a substantial public policy dimension. The implications of some elements of the case would have consequences well beyond its apparently confined facts. While surrogacy itself does not fall for consideration here, the subject raises concerns in some quarters as being both exploitative of women, (surrogate mothers), the absence of legislation in some countries, and also because it infringes children's rights, an issue considered later in this judgment. Our courts will be asked to address further issues in this area in the future. The gravity, range and policy dimensions of these questions are such that they might be more appropriately addressed in the Oireachtas, rather than the Courts.

12. Some indication of the complexities arising from the general issue here can be gleaned from the fact that, after the High Court judgment, which found in favour of the applicants herein, the then Minister for Justice and Equality drafted and produced a draft Bill seeking to address questions arising from that judgment. It is not the

function of this Court to provide advisory judgments on proposed legislation. However the very complexity of the matters addressed in the draft, insofar as it addressed surrogacy, showed the ethically profound nature of the questions engaged both before and after birth. This judgment expresses no view relating to the constitutionality of any intended legislation. The question which the Court is asked to address, rather, is how, the term "mother" in present legislation, now already in effect, should be interpreted.

The Main Issue

13. The main issue in the case derives from the fact that registration of birth under the Civil Registration Act 2004 is applied, according to the "*mater semper certa est*" principle. The applicants do not say that the application of this principle in other circumstances is, unreasonable, or arbitrary. But they contend that the 2004 Civil Registration Act should be interpreted so as to allow for their registration as the parents. The Equality Authority and the Irish Human Rights Commission, which both were joined as amici curiae, prepared valuable and thought-provoking submissions. Counsel for both bodies, Ms. Nuala Butler S.C. submits that the refusal to register the genetic parents is an invidious discrimination, prohibited under Article 40 of the Constitution, which, while declaring all citizens as equal before the law, also provides that the State may, in its enactments, have due regard to differences of physical and moral capacity, and of social function.

Relevant Provisions of the Civil Registration Act, 2004 and the Status of Children Act, 1987

14. To fully understand the applicants' case, it is necessary to consider now the scheme of the legislation under which the register is operated.

15. S. 22(1) of the 2004 Civil Registration Act ("the 2004 Act") provides:

> *"The father of a child who was not married to the mother of the child at the date of his or her birth or at any time during the period of 10 months before such birth shall not be required to give information under this Act about the birth."*

In that context, the section also makes provision for the registration of both an unmarried father and the birth mother, if both of them so request (s. 22(2)(a)). When the word "mother" occurs in this section, it is always in the context of, and in connection with, the birth of a child and the duty of registration. S. 60 of the Act of 2004 identifies circumstances wherein a registrar may 'fail', or 'refuse', to register the appropriate details of a birth. The Act allows for a process of appeal against such failure or refusal, identifying an appeals officer for that purpose; and thereafter allowing a further appeal to the High Court. Section 63 of the Act allows an informant to apply, in writing, to a Superintendent Registrar to correct "*an error of fact on a register*". This will arise if such a person gives to the Superintendent Registrar such evidence as he or she considers to be adequate to correct the error and a statutory declaration containing the required particulars in relation to the birth concerned. In this case, the surrogate mother was registered as the mother.

16. The Status of Children Act 1987 permits a Court to make a declaration of parentage. This may be established by blood, or DNA testing. In his testimony to the High Court, An t-Ard Chláraitheoir made clear that, if his office was presented with a declaration as to parentage in favour of the genetic parents pursuant to s.35 of the 1987 Act then he would act on it for registration purposes without further enquiry. Insofar as material, s.35 provides:

> *"35.(1) (a) A person (other than an adopted person) born in the State, or*
>
> *(b) any other person (other than an adopted person),*
>
> *may apply to the Court in such manner as may be prescribed for a declaration under this section that a person named in the application is his father or mother, as the case may be, or that both the persons so named are his parents."*

Taken together, however can the 1987 and 2004 Acts be interpreted so as to encompass the situation of surrogate genetic parents? The applicants say that to apply the *mater semper* principle to exclude them is to apply the legislation unlawfully, in that the terms of the two Acts taken together should not prevent their being registered as parents. Under s.19 of the 2004 Act, the parents of a child must register the birth of the child not later than 3 months after the birth. To do this, the parents must give a registrar the "*required particulars*" of birth to their "*best knowledge and belief*" s.19(1)(b)(ii). Those particulars must include the date and place of birth, the forenames, surname, birth surname, address and occupation of the mother, and even the birth surname of the mother's mother. (See First Schedule to the 2004 Act). The Act identifies the parents of a child as being "*qualified informants*" in relation to the birth of the child (s.19(6) the Act of 2004).

17. To achieve the outcome sought, in the appeal, the applicant parents must demonstrate a legal rationale whereby the legislation should be interpreted and applied so they can be registered. Mr. Gerard Durcan, S.C., for the applicants argues that the relevant legislation does not in terms require, that parents, or in particular a female parent, should necessarily be the birth mother. He is supported in this by counsel for L.L, who is the surrogate mother who is the notice party. In fact, Mr. Durcan S.C. submits, there are legal authorities which

recognise the blood or genetic link between parents and children as being a factor in determining parenthood. He contends that his clients are entitled to be registered as "the parents". One immediate consequence of such registration would be, of course, to raise the question as to what is the status of the birth mother? As the case histories mentioned earlier, (and later) in this judgment, show, these are not at all easy questions, and would require a form and range of analysis not easy to perform in an adversarial court setting, where the arguments are largely confined to the facts of the case.

18. Counsel for the applicants point out that under the 1987 Act, there is power for a court to direct the use of blood tests for the purpose of determining whether a person named in an application is, or is not, a parent of the child whose parentage is in question. These tests operate by ascertaining the presence or absence of shared inheritable characteristics as between the two people concerned. This Court has already determined on the lawfulness of directing DNA tests in addition to blood tests (see *JPD v. MG* [1991] 1 I.R. 47). As McCarthy J. pointed out in his judgment there:

> *"The birth of each child is registered under the relevant statute, and the name of the husband is entered as the father of each child; this creates a further presumption that he is the father of each child unless the contrary is proved on the balance of probabilities."*

The Applicants' Core Submission

19. The applicants' argument in this appeal is persuasively made. It differs from the High Court judgment somewhat, however. While not challenging the trial judge's findings on the scientific evidence, the applicants' submissions are, for this appeal, predicated more on a process of statutory interpretation, without abandoning a claim based on invidious discrimination. Counsel submits that, until the late 1970's when scientific advances first permitted in vitro fertilisation, a woman who gave birth to a child would inevitably have shared DNA with her child. Self-evidently the mother would share "inheritable characteristics" with a child born by her. However, counsel submits, while this continues to be the case in the vast preponderance of births, it is no longer inevitable. For example, as a result of an in vitro fertilisation procedure, where the egg of a third party is implanted in a birth mother, that birth mother will not, share inherited characteristics with a child whom she bears. Counsel submits, therefore, that, as a matter of fact, the question of who gave birth is, even now, not always determinative of who is the child's mother. On the one hand, DNA tests may show a pattern of inheritable characteristics. Thus, parental relationship is established. On the other hand, the outcome of such tests might, in some cases, disclose an absence of any shared inheritable maternal characteristics. Were this so, a woman who gave birth to a child would be precluded from being registered as a parent. Thus, a situation might arise where the "birth mother" of a child would not share *any* genetic connection with her child, despite the fact that she was, in fact, the woman who had given birth to that child. Counsel argues the underlying assumption as to the existence of a necessary link between genetics and giving birth is, no longer a valid one. He contends that, in this case, the relevant provisions of the 1987 Status of Children Act should be interpreted so as to give effect to an, "evidence based", genetic, or blood link, one which in other contexts is now recognised as establishing parenthood. Such an approach would, of course, run counter to the hitherto universal application of the *mater semper* principle. What is under consideration here is how, on balance, this Court should interpret the relevant sections of the 1987 and 2004 statutes, which are closely connected. The issue is not "science versus law" but rather how the statutes, as they now stand, should be understood and interpreted.

20. It is now necessary to consider the derivation of the *mater semper* principle, which is not only applied in Ireland, but in a number of European countries. What is the legal status of this principle?

The Legal Status of the *Mater Semper Certa Est* Principle

21. Mr. Michael McDowell SC, counsel for the State forcefully submits that the *mater semper* doctrine is an irrebuttable presumption in common law. Thus, he says, there was no option but to apply the principle on the basis of the legal advice received. It is a matter of law. The legislation, he submits, must always be interpreted in accordance with the *mater semper* principle. Consequently, he submits that the legislation is not open to some other interpretation.

22. One might pause here to observe that legislative provisions are frequently interpreted and applied in accordance with "canons" or principles of interpretation, some of which are identified in the Interpretation Act, 2005. Although not explicitly referred to in argument, that Act does permit legislation to be construed in the light of "*changes in the law, social conditions, technology, or the meaning of words used in the Act … which have occurred since the date of passing of that Act …"*, but only insofar as the text, purpose and context permit (see s.6, the Interpretation Act 2005). Section 20 of the Act provides:

> *"Where an enactment contains a definition or other interpretation provision, the provision shall be read as being applicable except in so far as the contrary intention appears in -*
>
> *(a) the enactment itself, or*

(b) the Act under which the enactment is made."

However, this does not preclude a Court from on occasion resorting to other legislation in order to clarify how, in the same, or a very similar context, a term has been commonly interpreted.

23. As is the case with many legal maxims, the provenance of the *mater semper* principle is shrouded in the mists of history. The question of such a distinction did not truly arise, in science or law until the twentieth century. What Mendel, working in Central Europe, discovered about inherited traits in the 1850's and 1860's did not become common currency until a process of rediscovery in the early 20th century. There is no doubt that there was a legal presumption that *paternity* was established by marriage to the mother of a child (see further, International Surrogacy Arrangements 2013 Hart Publications; in particular "Surrogacy in Ireland" by Dr. Maebh Harding). With one exception, adverted to below, we have not been referred to any relevant pre-independence statute carried over in our law by Article 73 of Constitution of 1922 or by Article 50.1 of the Constitution of Ireland 1937. But a legal interpretation dependent on silence, or omission, must necessarily be measured against other provisions, where, by explicit expression or clear implication, the meaning of a term is clear and generally understood. While a term in an enactment may be "updated" to encompass modern developments that may fall within the ambit of such a term, its meaning may not be completely altered by an application of an "updated" construction which was not within the original intendment, or its commonly understood meaning. Neither can the purpose of a provision be altered in this way. An interpretation which will create broad uncertainty, ambiguity or doubt, is to be avoided. Assuming, as a matter of interpretation, that a genetic mother is registered under the present regime, would this entail that a birth mother had no legal status; an indeterminate status; or a status depending on the agreement or actions of surrogates, and on the terms of a surrogacy agreement? The possibility of a child having in law, two mothers (one genetic and one birth), is surely telling. Such a contingency creates uncertainty. The *indicia* of motherhood found in many other of our statutes, referred to later, relate to pregnancy and child bearing but not, at present, to genetics. I would add that while a statute can be *interpreted* in accordance with ECtHR jurisprudence, that process of interpretation must accord with established rules of law relating to such interpretation and application (s.2 ECHR Act, 2003). Recent ECtHR jurisprudence described at the conclusion of this judgment allow for a wide margin of appreciation for member states to legislate on, or even against, surrogacy, so far as adults are concerned. The Article 8 and Article 19 rights of children, considered in those judgments, are to be seen in the light of the fact that French law did not provide a remedy for them to be placed in a family unit, even by adoption.

24. By contrast the absence of any statutory provision which specifically recognises the rights or attributes of a "genetic mother" weighs against the applicants' case. The *mater semper* principle is referred to by the House of Lords in the *Ampthill Peerage* Case [1977] AC 547, but not in such terms as to be definitive as to its legal status in our law. It is referred to also in *Johnson v Ireland* (app. No. 9697/82) (ECtHR 18 Dec, 1986) by the ECtHR Grand Chamber, but again in passing.

25. But as I now seek to explain, the principle of a nexus, or a clear link between birth, pregnancy and maternity is long established, in statute, in case law and, implicitly, in the Constitution itself. In the case of statutes, context and purpose are fundamental to interpretation. An examination of all the extant legislation, in context, shows a legislative purpose which is to provide for certain protections for pregnancy motherhood, and children, either explicitly or impliedly but, in doing so, recognising the status of "birth motherhood". Underlying the entirety of this appeal is the question as to the purpose of the provisions in question. The applicants say should now be applied, in a manner which should include them. The amici curiae say the application is unjustly discriminatory. However, in interpretation, as well as context and purpose, one may have regard to public policy as expressed in a statute. The purpose of the provisions now considered, the State respondents say, is to identify clearly the holders of rights, entitlements, and duties. Counsel for the State submit this is an area where the public, and the State, has legitimate interest in maintaining clarity, and avoiding doubt.

The Statutes

26. The existence of the *mater semper* principle, perhaps best seen as an underlying *assumption* or implied understanding, in law, was recognised in *O'B v. S* [1984] 1 I.R. 316 where Walsh J. observed that the principle applied "*in Irish law by reason of the provisions of ss. 1, 7 and 28 of the Births and Deaths Registration Act (Ireland), 1880."* A consideration of those provisions, together with the forms contained in the Schedule to that Act, demonstrates that, while the *mater semper* principle might not, as argued by counsel for the State, be an "irrebuttable presumption", it was, nonetheless a premise, or implied meaning, on which references to "mother" was always predicated The sections of the 1880 Act, identified above, deal with the duties of parents or other persons present at birth, and the procedures necessary for the registration of the birth of a child. The actual terms of s.1 of the Act of 1880 impose a duty on the "*father and mother of the child"* or "*the occupier of the house in which … the child is born*" and "*… each person present at the birth"* and "*… the person having charge of the child*", to give "*to the Registrar within forty-two days next after such birth information of the particulars required to be registered concerning such birth and in the presence of the Registrar to sign the register*". Section 28 of the 1880 Act makes reference to the circumstances in which the Register is not to be evidence of paternity, unless it was signed by some person present at the birth of the child. The implied meaning of the term "mother" is clear from these.

27. But this is not the sole relevant legislative provision. The meaning of a term in one statute will not always have the same meaning in another statute. But without going so far as to hold that statutes next considered are also *in pari materia*, (on the same subject matter), there must come a point where, the universal identification or symmetry of common attributes or the same meanings in a variety of statutes has a real significance beyond the scope of any one statutory meaning or definition (*Barras -v- Aberdeen Steam Trawling & Fishing Co.* [1933] AC 402). This principle of interpretation will apply, unless the statutory context indicates otherwise.

28. The provisions of s. 22 of the 2004 Act, (already referred to earlier) actually contain the word "mother" on some eight occasions, and always in the traditionally understood context involving a woman giving birth. This does not sit easily with the appellants' argument based on an application of a "genetic identity" criterion. The argument hinges also on a close interrelationship between the 1987 Status of Children Act and the 2004 Civil Registration Act.

29. In a less enlightened era, the Illegitimate Children (Affiliation Orders) Act, 1930, defines the term "mother" in the following terms:

> *"1. In this Act -*
>
> > *(b) the word "mother" means any of the following persons who is with child or has been delivered of an illegitimate child, …".* (emphasis added)

A linkage between motherhood and birth in similar terms is found in s.7 of the Legitimacy Act, 1931.

30. Even at a time after the possibility of in vitro fertilisation was thought of, the same implied understanding of "mother" is to be found in statutory form. To take further examples, s.28(2) of the Social Welfare (Consolidation) Act, 1981 provides:

> *"(2) In deciding whether or not to make an order under section 21A of the Family Law (Maintenance of Spouses and Children) Act, 1976 (inserted by the Status of Children Act, 1987), in so far as any such order relates to the payment of expenses incidental to the birth of a child, the Circuit Court or the District Court, as the case may be, shall not take into consideration the fact that the mother of the child is entitled to maternity allowance.".* (emphasis added)

31. While it might be said this provision does not actually preclude another interpretation, it is not easy to ignore the statutory juxtapositions of the terms "*mother of the child*" and "*birth of the child*".

32. The link between motherhood and birth is also to be found in the Maternity Protection Acts, 1994 to 2004, designed and intended to protect the rights of both pregnant employees, and employees who have given birth. Section 16 of the 1994 Act (as amended by s.10 of the Act of 2004) defines "*the mother*" as a person "*who has been delivered of a living child …*" The protection extended by the legislation again links or connects pregnancy, birth and motherhood (see also s.6 of the 2004 Act).These close associations are difficult to ignore.

33. Reverting then to the 1987 Status of Children Act, that statute also contains a number of references showing the same legislative intent and intended meaning of the word "mother". Section 5 of the 1987 Act contains an amendment to the Irish Nationality & Citizenship Act, 1957. That amendment provides that in relation to the Act of 1957, references to *father*, *mother* or *parents* includes, and shall be deemed always to have included, "*the father, mother or parent, as the case may require, who is not married to the child's other parent at the time of the child's birth or at any time during the period of 10 months preceding the birth*".

34. Elsewhere, the Status of Children Act, 1987 makes provision in relation to the maintenance of a child. This provision includes claims against a parent which may be made under s.15 of the 1987 Act, (effectively a duty on the father to maintain the mother) to make payments of "*a lump sum in respect of the expenses for the birth or funeral of a child …*"

35. In fact, other provisions of the 1987 Act itself create a difficulty for the construction for which the applicants' argue. The same strong implied contextual linkage between conception, gestation and birth emerges in s.46 of the Act, in the context of identifying procedures for registration of births of children. This section provides:

> *"(1) Where a woman gives birth to a child -*
>
> *(a) during a subsisting marriage to which she is a party, or*
>
> *(c) within the period of ten months after the termination, by death or otherwise, of a marriage to which she is a party,*
>
> *then the husband of the marriage shall be presumed to be the father of the child unless the contrary*

is proved on the balance of probabilities. …"

36. These references are to be seen in light of the references to s.22 of the Civil Registration Act, 2004 referred to earlier in this judgment. While the two acts may not be in *pari materia*, they are certainly very closely associated on the interpretative issues arising in this case.

37. Establishing the applicants' claim, therefore, is not easy, having regard to this commonly used meaning or understanding of the term mother as being a woman who, having become pregnant gives birth to a child. It is self-evident that, in day to day reality, the role of a mother goes far further than this. But for the purposes of this discussion, it is the connection with birth which is material, in discerning the context, intent and purpose of the provisions in question. No other contrary interpretation appears in any Act of the Oireachtas. To my mind, in the light of this widespread usage and meaning, it is not possible to say that we are dealing here with a term "mother" as specifically defined for a particular purpose in enactments. The meaning imparted is too universal to allow for such a conclusion. Clearly, in the case of adoption the status of mother, otherwise generally understood, is altered by statute and procedure intended for that purpose.

Provisions of the Constitution

38. The proposition advanced by the applicants must also be seen in light of the provisions of the Constitution which deal with women and the family, even though, just as in statute law, one cannot find the *mater semper* principle itself explicitly stated in constitutional terms. The issue in question simply was not within the contemplation of the drafters of the Constitution in 1936/1937.

39. However, Article 40.3.3 provides that:

> *"The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."* (emphasis added)

Even accepting that the meaning of the term "mother" is to be seen within the scope of that Article, the implication is nonetheless clear.

I am not persuaded that the constitutional provisions on the family (Article 41) or education (Article 42) assist in the process of interpretation.

Interpretation by the Courts

40. The prior, generally understood, meaning of mother is to be found in recent authority interpreting the meaning of Article 40.3.3.

41. In *Roche v. Roche* [2010] 2 I.R. 321 this Court addressed the constitutional and legal status of frozen embryos, specifically in the context of whether a frozen embryo could constitute an "unborn" within the meaning of Article 40.3.3. Murray C.J. observed in the course of his judgment that:

> *"Of course the gestation and birth of a child is inextricably and humanly linked to the mother and its development in the womb."* (at page 348)

He added that:

> *"the evolution post implantation of the embryo to the birth of a child remains inextricably linked with the mother as indeed it is in the normal process of conception, implantation and birth."*

42. To similar effect, Denham J., (as she then was), observed that:

> *"After the implantation the mother has carriage of the embryo and the embryo enters a state of "unborn", there is an attachment between the mother and an unborn. It is that attachment which gives rise to the relationship addressed in Article 40.3.3 where the state acknowledges the right to life of the unborn and the due regard to the equal right to life of the mother. The interpretation of the "unborn" arising after implantation is a harmonious interpretation of the Constitution consistent with other rights under the Constitution."* (at page 373)

43. The policy considerations arising from "alienation", or handing over a child to another can be discerned from the terms of Article 42.1 of the Constitution which speaks of 'inalienable' parental rights. That concern can be seen in the State regulation of adoption, by statute.

44. The High Court judgment contains reference to the absence of material before that court as to the existence of a European consensus on the question of surrogacy. This Court has been informed that seven member states of the European Union have a complete prohibition on surrogacy (Bulgaria, France, Germany, Italy, Malta,

Portugal and Spain). Eight more prohibit commercial surrogacy. Greece is the only E.U. member state which allows for altruistic surrogacy arrangements.

45. In summary, the balance of legislative tradition weighs heavily in favour of the proposition that, *unless a contrary intention is expressed*, in legislation, the birth mother should be regarded as being "the mother" of the child. These considerations of purpose, intent and context weigh significantly against the construction of the 1987 Statute now urged on behalf of the applicants.

Analogies with Adoption Issues under Legislation

46. The child's welfare principle also lends itself to a clear "purpose and intent" analysis of the term "*mother*". There is a state interest in clearly identifying parental duties towards children in an area where complex problems can arise. The case of *N v. HSE* (the Baby Anne case) [2006] 4 I.R. 344, revealed the difficulties which can emerge in circumstances where a natural mother, having placed her child for adoption, reassessed her decision, and later, having married the father, successfully commenced proceedings for the return of the child from the potential adopters. In *Dowse v. An Bord Uchtala & The Attorney General* [2006] 2 I.R. 507, the parents having identified a suitable child in Indonesia adopted that child under Irish law. But later, when the adoptive mother herself became pregnant, the couple relinquished the care of the adopted child. It is not hard to envisage analogous cases in the area under consideration.

47. These reminders, and the international cases cited at the beginning of this judgment, show the State interest in regulating this sphere of human activity relating to adoption, and, *a fortiori*, surrogacy. The applicants' argument, as it stands, does not readily allow for such a state role or regulation either by statute or the courts. In so far as it may be material, it is worth observing that, in the neighbouring jurisdiction, the view was taken that the first step in recognising that a relationship could be created by assisted reproduction was by legislation (see s. 27 Family Law Act 1987, and the Human Fertilisation and Embryology Act 1990).

Blood and Genetic Link

48. In the light of these considerations, it is necessary now to turn to the jurisprudence of our courts in addressing the question of the blood or genetic link upon which the applicants seek to rely. It is true, of course, that there have been a number of judicial pronouncements on the question of such links. But, it is necessary to point out such dicta arise in a quite different context.

49. In law, as it is frequently pointed out, "context is all". Some of the observations on "the blood link" cited on behalf of the applicants relate to the establishing of paternity or to the access rights of a sperm donor, to a child, in the custody of a lesbian couple. It is quite true that in that case, *JMcD v. PL* [2010] 2 I.R. 199, Fennelly J. observed that:

> *"The blood link, as a matter of almost universal experience, exerts a powerful influence on people."*

50. There are numerous similar references both in the context of paternity and maternity in the judgment of this Court in the adoption case of *N v. HSE*, referred to earlier. But these are far from providing clear authority for the proposition that a principle of interpretation of long-standing, should now, and in a different context, be abandoned, or treated as being of no effect. It is, no doubt, true, as Fennelly J. observed in *JMcD*, that, even the restrictive role of a sperm donor, did not "*prevent the development of unforeseen but powerful paternal instincts."* But what was in question in that case was the distinct role, of fathers, *as compared to the role of mothers*. Other such observations, and to the same effect, do not relate to the position of mothers as generally understood, in the context of, and their relationship, to child-bearing.

51. Quite often discussions revolve around the notion of a "right to a child" *i.e.,* the right to have, or to rear a child or a family. But sometimes such discourse can obscure the rights *of* the child. On behalf of the Equality Authority Ms Nuala Butler SC in her submissions adverted to these very important rights. The following usefully re-illustrate some of the policy considerations which may arise; by Article 8 of the United Nations Convention on the Rights of the Child (UNCRC), state-parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations. The same Article provides that parties are pledged to provide appropriate assistance and protection with a view to establishing identity speedily when a child is deprived of some or all elements of his or her identity. Article 9 UNCRC contains guarantees to prevent a child being separated from his or her parents, save when such separation is deemed necessary, and in the best interests of a child, by a competent judicial authority. When such a process might be necessary, all parties should be given an opportunity to participate in legal proceedings and make their views known. Under Article II UNCRC, state parties are to take measures to combat the illicit transfer and non return of children abroad. Article 21 of the Convention sets out extensive and detailed requirements in relation to the application of the child's "best interests principle" in adoption, including safeguards and adoptive counselling. Adoption placement is not to result in improper financial gain for those involved in such procedures. If these principles are broadly applied in the case of adoption, the same question may arise in the case of surrogacy. Moreover, the blood/genetic link involves not only "genetic" fathers and mothers; but a range of other potential family connections which a child may wish to establish. While these observations might appear somewhat perceptive to the task of interpretation

of the word "mother" they demonstrate the very broad policy considerations which arise, which show that a narrow 'value neutral' interpretation of the term "mother" in the provision is not feasible.

52. The "*mater semper*" maxim refers not only to rights, but to duties. The applicants' argument begs the question as to who, precisely, would owe a duty of protection, care, maintenance and education to children, in a maternal context? This is not an area where ambiguity or doubt is desirable, especially in circumstances, where, the possibility exists of disputes between the rights of genetic parents against birth mother, or a rights-conflict where just one parent is a donor of sperm or gamete; or a case where neither of the commissioning claimants has any genetic link with the child. The need for legislation is clear. It has been clear since the mid-1990s when Irish academic scholars and highly experienced practitioners in family law drew attention to the problem.

The High Court Judgment Considered in More Detail: Equality

53. This section of the judgment addresses in more detail the submissions of the Equality Authority and the Irish Human Rights Commission in the context of the High Court judgment which was based on a finding of invidious discrimination. These submissions were particularly valuable in placing the quite narrow issue here in a broader context. Can the applicants' argument successfully be framed in terms of Article 40.1 of the Constitution? That Article, while recognising that "*All citizens shall, as human persons, be held equal before the law"*, adds "*This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."*

54. The trial judge based his findings on a number of sequential steps. He noted that DNA chromosomal testing can be scientifically determinative of parenthood. He acknowledged that, while the input of a gestational mother to an embryo and foetus was to be "*respected and treated with care and prudence*", nonetheless the children's predominant feature was their genetic material. On this basis, he concluded that a failure to recognise the role of the genetic mother, (and father), would be an "*invidious, irrational, unfair*" discrimination contrary to Article 40.1. He considered that the position of the genetic parents in this case was to be recognised on the basis of equality rights as guaranteed under the Constitution. However, the issue of the alleged discriminatory effect of the statutes must primarily be seen through the prism of the Constitutional jurisprudence of the courts.

55. The starting point of the High Court judge's reasoning on this question was the High Court judgment in *S v. S* [1983] I.R. p.67. The case concerned the long established irrebutable presumption of paternity based on marriage to the mother of a child. The question was whether this presumption should continue to subsist when the question of paternity is required to be established as a necessary aspect of the administration of justice. In the High Court, O'Hanlon J. held that the presumption had not survived the adoption of the 1937 Constitution. On this Abbott J. commented:

> *"The judgment of O'Hanlon J. in S v. S relating to the irrebuttable presumption in certain cases relating to paternity in marriage, is ample authority to enable the court to conclude that the presumption of mater semper certa did not survive the enactment of the Constitution insofar as it applies to the situation post IVF. To achieve fairness and constitutional natural justice for both the paternal and maternal genetic parents, the feasible enquiry in relation to maternity ought to be made on a genetic basis and on being proven the genetic mother should be registered as the mother under the Act of 2004. The conclusion does not raise the consideration of the best interests of the child which in most cases, if not in all, would be best served by an enquiry of the genetic interest."*

56. The difficulty that arises from this critical passage is that it focuses on the individual circumstances of the case before this Court on appeal. The consequence of the finding would go far beyond the facts of this case. To take one example; how would the considerations alter, if, for example, what was in question here had been a commercial transaction, where there was either a male sperm donor or, alternatively, a female gamete donor? In either circumstance there might be, at least partly, a genetic link, or, possibly, no such link. The procedures and series of transactions for surrogacy might not necessarily involve Irish citizens, or take place in Ireland. Such procedures might involve a donor input where that donor may not be readily traceable, either by the commissioning parents, or the Irish State, or both. Again, this emphasises that an "evidence based" approach is not, in fact, "*value neutral*". Circumstances will arise where a child might have a clear interest, or even a right to information about his or her genetic make-up or parenthood. While the trial judge observed that the best interests of the child will be best served by "an enquiry of the genetic interests", will this always be so?

57. In seeking to emphasise the "neutral character" of the statutory scheme, the counsel for the amici curiae submits that parturition can no longer be the exclusive proof of motherhood which protects the status and role of mothers, their relationships with their children, and affords protection to children by legal recognition of that relationship. It is said that this conclusion is both supported and required by the constitutional principle of equality deriving from article 40.1 of the Constitution.

58. It is stating the obvious to point out that, in this context "*differences in capacity*" between mothers and fathers may be of "*physical capacity*" if not of "*social function*". Fatherhood is achieved by a genetic process. In motherhood, there must be, at least as technology and science currently stands, both a genetic, and a

gestational process.

59. Counsel for the amici curiae contends that, in the case of an act of the Oireachtas which evinces no intention to discriminate between persons to whom that statute applies, such discrimination cannot be introduced by the administration of that act (*Purcell v Attorney General* [1995] 3 IR 287). But as outlined earlier, such an intent is, in fact, discernable from the scheme of the legislation, by virtue of the specific, identified role and attributes of motherhood to be found in the statutes referred to earlier. The Constitution can not always provide for perfectly equal treatment between all citizens. It must, on occasion, have regard to inherent differences of physical and moral capacity and of social function. The judgment of this Court in *MD (a minor) v. Ireland* [2012] 1 I.R. 697 concerned different criminal liability for young males and females for sexual offences. Certain observations made in that case are nonetheless material, and may be taken as statements of a more general principle, rather than confined to the facts of that case. On these, Denham C.J. pointed out:

> *"[43] The second sentence of Article 40.1 recognises that human persons have or may be perceived by the Oireachtas to have "differences of capacity, physical and moral, and of social function".*

The Chief Justice continued:

> *"Some of these differences, particularly of capacity, are inherent, most obviously in the case of the sexes. It is axiomatic that only a woman can become pregnant. Thus, the Maternity (Protection) Act 1994 and the Maternity Protection (Amendment) Act 2004 apply to women, although a father is allowed to take time where a mother has died. Laws prohibiting discrimination on the grounds of pregnancy have justifiably applied to women."*

She added:

> *"[44] It follows that laws such as these are not an example of the State holding men or women respectively unequal before the law. It follows also that the first and second sentences of Article 40.1 should not be treated as if they were in separate compartments. It is not correct to look at a law to see if it offends against the first sentence before turning to the second sentence to seek justification. The second sentence is concerned with what the first sentence means."*

60. While these views were expressed in the context of this Court holding constitutional the provision that a female child under the age of 17 years should not be guilty of an offence under the Criminal Law (Sexual Offences) Act, 2006, the logic and application of the observations extends equally to the issue now under consideration.

61. The judgment in *S v. S* now relied on by analogy had a powerful policy dimension, that is, the administration of justice in the courts. It was in the interests of justice that paternity should be established as a matter of certainty. O'Hanlon J. had to decide whether paternity should be determined by the presumption arising from marriage to the mother. But at the level of constitutional principle this case hinges on the distinct, and not analogous, roles of fathers and mothers in procreation.

62. I am unable to accept, therefore, that the "paternity presumption", which was held to constitute invidious discrimination in the case of *S v. S,* applies in the same way in the instant case. It would not be to compare like with like. An over-rigid but not always apt analogy can lead to an incorrect conclusion in law. The fact that the roles of men and women in child-bearing are obviously distinct means that one cannot simply take a principle applicable to one situation and apply it in another quite different context. In law, as in science, history and logic, analogies can be deceptive. This case is no exception.

Is There an Invidious Discrimination?

63. That Article 40 cannot be a guarantee of absolute equality was emphasised in the recent judgment of this Court in *Fleming v. Ireland* [2013] IEHC 2. Necessary differentiation can inevitably arise by reason of distinct human attributes. In analysing discrimination, it is necessary to enquire whether the distinction which a law makes between citizens is rational; that is, can it be rationally justified? Among the categories of potential differentiation calling for close scrutiny are race, religion, gender, or nationality. But, as Denham C.J. pointed out in *MD*, a distinction based on gender may be so closely related to the very nature of gender itself that it is justified. Can it be said the existence of the "*mater semper*" principle "*invidiously*" discriminate against the genetic parents?

64. A court must enquire whether the application of the law in question has a discriminatory intent. The fact that a law has an "impact" on a person coming within a particular category does not *per se* indicate invidious discrimination. The question is, rather, whether the provision has a discriminatory effect under one of the headings where objection might legitimately be raised? In *Gilligan v. Ireland* [2013] IESC 1 the following observation is made:

> *"49. The litmus test is whether this classification made by the Oireachtas is for a legitimate legislative purpose, is relevant to its purpose, and treats members of each class fairly. The fact of classification always involves a degree of exclusion or inclusion; whether that inclusion is legitimate can be measured by relevance to its purpose, fairness and the category of classification."*

65. It cannot be said that the manner in which the registration system operates, in the 1987 and 2004 Acts is arbitrary, random or disproportionate in its effect (see *Cox v. Ireland* [1992] 2 I.R. 503). I would, therefore, disagree with the submission of the Irish Human Rights Commission. The submission is based on the constitutional right to have a family. This case does not concern the right to beget children, a matter considered by Costello J. in *Murray v. Ireland* [1985] I.R. 532. Obviously, that right has some bearing on the question at hand. But the fundamental question here is the administration of statutes concerning declarations of parenthood and the registration of births, different questions from those in *Murray v. Ireland*. The manner in which the Register is operated under both the 1987 and 2004 Acts, is not invidiously discriminatory; but rather is, in fact, focused on a legitimate constitutional and legal purpose, that is, the clear identification of parents who, *inter alia*, owe legal duties to children. The fact that a law impacts on a particular person or category of persons, in a particular way, is not, *per se*, indicative of invidious discrimination on the part of an official operating and applying that provision with a legitimate purpose. An analysis based on purpose and intent is again relevant: the purpose and intent of the legislation is the identification of the rights and duties of maternity in accordance with well-understood criteria. It is true that no section of any Act prohibits surrogacy *per se*. But can it then be said that An t-Ard Chláraitheoir is *under a duty* to register the applicants on the basis of the genetic results?

66. The "*mater semper*" principle seeks to achieve certainty. Were it dis-applied what other criteria would be adopted in applying the legislation as it now stands? Would the principle be replaced in an individual case by genetic criteria which might, in fact, arise in the range of very variable circumstances described earlier, and where many couples who enter into surrogacy arrangements would not, in fact, come within the "genetic test"? Such a procedure would of course require DNA or blood evidence to be provided on each registration. Would this evidence always be available to the commissioning parents from a surrogate? And should a "genes based" application of the statutes apply in the case of every birth mother henceforth, even though, currently, the vast majority of birth mothers are also the genetic mother? Even raising these questions shows that what would be required would be substantial amending legislation. The argument must be seen as contingent on an interpretation that suits a very small category of persons, even within the realm of surrogacy parents. As the legislation now stands, the dis-application of the *mater semper* principle would lead, inevitably, to the result that the twins would have not one, but two mothers, that is to say, the birth mother and the genetic mother. Such a consequence would create uncertainty. The law leans against interpretations which create uncertainty or ambiguity. In situations where some uncertainty lies on both sides of a question, a court should lean towards the interpretation favouring greater certainty. In summary, therefore, I am not convinced that there is an "*equivalence*" between the establishment of paternity, such as arose in *S v. S*, and the establishment of maternity.

The order proposed - Vindicating the Children's Rights

67. I differ from my colleagues in the majority in that, in my opinion, a number of steps could be taken further to secure the constitutional and legal position of the first- and second-named applicants. The evidence in the High Court was to effect that the third-and fourth-named applicants had, for their own reasons, chosen not to pursue any other legal or administrative remedies, such as either adoption or a guardianship application. It has not, in fact, been suggested that there would be any obstacle to pursuing either course. Were the children adopted, they, and their genetic parents, would, for all purposes, be regarded as a constitutional family. The procedure would ensure the full lawful transfer of all parental rights from the surrogate mother to the third and fourth applicants, and confer on them and the children, all the status of such a constitutional family. Guardianship and adoption are, therefore, available remedies which apparently have not been fully explored, still less exhausted.

68. The power of a court to act on the basis of its inherent jurisdiction must be exercised sparingly and only in exceptional cases which are not addressed by statute. In my view, this is such an exceptional case. I would have been disposed to remit the matter to the High Court to determine whether, in accordance with its inherent jurisdiction, and in vindication of the children's rights to be reared and educated in a family unit, and in order to eliminate the risk of any other adverse legal consequence of their present uncertain status, the third and fourth-named applicants should first be appointed as the twins legal guardians, as a preliminary step to adoption. I am not convinced that it would be appropriate to appoint guardians by an order under s.6A of the Guardianship of Infants Act, 1964, which addresses guardianship generally by statute. That provision would allow for the appointment of an *unmarried father* as the guardian of a child. Section 8 of the 1964 Act allows the appointment of "*any person*" as a guardian, but where a *child has no guardian*. But the twins have one parent who is their biological father, and who can be their legal guardian. The 1964 Act does not, however, give an express power to appoint the fourth-named applicant (the genetic mother) as a guardian of the twins. Where the terms of a statute are fully clear, they cannot be construed otherwise. But the statute does not address a situation such as this one. The power of the courts should be sufficiently ample to vindicate the rights of children which arise under the Constitution (*DG v. Eastern Health Board* [1997] 3 I.R. 611). MR and DR do have

constitutional rights to be parented, and to be reared and educated where possible, in a family unit. They have, at minimum, a clear interest in having their identities and status established in law. But their rights and interests must be balanced against the broader rights of others, the public at large, and both adults and children, all of which are engaged here. These broader considerations militate against a resolution of the case which would extend the recognition of the twins' rights at the cost of the right of the State to regulate matters in the public interest, or the creation of uncertainty where it is unnecessary. No legislative intention precluding reliance on inherent jurisdiction appears in the 1964 Guardianship of Infants Act or its amendments. The twins should, in my view, be entitled to enjoy rights on the same basis as other children. The legitimate State interest in the policy questions identified earlier in this judgment may be protected by supervision and review by the High Court in this exceptional, indeed unique, case.

The Requirement for Legislation

69. I would make two final observations which are necessarily obiter dicta. This appeal was unique in that, between the time of the High Court order and this appeal, the then Minister for Justice produced a draft Bill which was placed before the Oireachtas, *inter alia*, addressing surrogacy (see General Scheme of Children and Family Relationships Bill, 2014). These questions should not be put "on hold". Some of the issues which arose in this case will, in some other guise, arise again soon. Science does not stand still, especially in exploring the frontiers of human existence by use of assisted human reproduction. The human situation in this case, and others, renders it incumbent on the legislature to attempt to address these questions.

Rights Under the ECHR

70. I would also observe that the submissions of the amici curiae addressed a range of ECHR judgments The Court's attention was drawn to judgments on surrogacy questions pending in the ECtHR. Subsequent to this appeal, that court pronounced judgment in three cases on the subject, vis. *Mennesson v. France* 651952/11, *Labasse v. France* 65941/11 and *D and R v. Belgium* 29176/13). While the facts of the Belgian case differ from those in this appeal, each judgment distinguishes between the interests of commissioning parents and the rights of children born of surrogacy arrangements. Each judgment emphasises the rights of member states to provide in law for the regulation of surrogacy.

71. In the two French cases, the relevant sections of the ECtHR held that there was a wide margin of appreciation, whereby member states might properly regulate the issue, even by laws precluding surrogacy agreements entirely. Both judgments bear some striking resemblances to the circumstances of this appeal. The issue was whether the French authorities could, under French law, register the births of twins who had been born arising from a surrogacy arrangement made in the United States and where the commissioning parents had been recognised in law there as being the parents of the children. Here, the issue is fundamentally one of statutory interpretation. However, the judgments resonate to a degree with the situation in the instant appeal, in addressing the interests of commissioning parents in a manner distinct from the rights of children. French law did not even permit surrogate parents to adopt children born of a surrogacy agreement. Such agreements were actually a criminal offence. However applying the "best interest" principle, the ECtHR held that it could not be in a child's best interest to deprive him or her of a family tie, when the biological reality of that tie was established, and the child and the parent both sought recognition of that link. Thus, the ECtHR held that, by completely preventing the recognition and establishment of children's legal relationships with their biological father, the French State had overstepped the permissible margin of appreciation. The ECtHR held that the children's Article 8 ECHR rights to respect for their family right had thereby been infringed. By way of contrast, however, the Court observed that, subject to the terms of Article 8, there was no prohibition on a member state legislating against surrogacy insofar as such legislation was in accordance with the law, and necessary in a democratic society, in the circumstances outlined in Article 8.2 ECHR.

72. For the reasons outlined therefore I would allow the appeal, and reverse the declarations granted in the High Court, I would however, have remitted the claim to the High Court on the question of appointing O.R. and C.R. as guardians of the first- and second-named applicants, M.R. and D.R..
