THE SUPREME COURT

Record No. 2013/

High Court No. 2011/46M

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.) AND O.R. AND C.R.

Applicants/Respondents

- and -

AN tARD CHLARAITHEOIR, IRELAND AND THE ATTORNEY GENERAL

Respondents/Appellants

- and -

L.L

Notice Party

OUTLINE WRITTEN SUBMISSIONS

ON BEHALF OF THE EQUALITY AUTHORITY

A. Preliminary

1. The present outline written submissions are delivered on behalf of the Equality Authority as *amicus curiae*, for the assistance of the Supreme Court, in advance of the hearing of the within appeal. The Equality Authority (also "the Authority") is an independent body established under the Employment Equality Act 1998. The Authority promotes equality of opportunity and seeks to prevent and provide redress and support for people who experience discrimination on any of the nine grounds.

2. As indicated in the course of its application to be granted leave to appear in this case, the Authority is conscious that these proceedings have not been taken under and do not put in issue any aspect of the interpretation or application of the Employment Equality Acts 1998-2011 or the Equal Status Acts 2000-2011. Nonetheless, whilst those Acts provide the statutory framework for the activity of the Authority, the Authority was concerned to emphasise the wider constitutional context underpinning the statutory framework for its work, whereby it has the capacity and interest to act as *amicus curiae* in proceedings such as these which raise significant equality issues.

3. In accordance with this Honourable Court's directions, the focus of these submissions is the general principles and rules of equality law as are raised by these proceedings and within the scope of the present appeal. These are whether and to what extent the maintenance by an tArd Chlaraitheoir of an irrebuttable presumption *mater semper certa est* in the context of persons in a like situation to CR may be compatible with constitutional principles and requirements of equality as it relates to gender and disability and to childrens' right to equality both in respect of their relationship with their genetic mothers and in respect of their status vis-à-vis other children generally

4. Before proceeding to these aspects, it is proposed to briefly highlight certain elements of the High Court judgment and of the applicable statutory scheme, to set out in summary the Authority's position on the core issue, and to proceed then to a brief overview of judicial interpretation of constitutional equality, as a backdrop to the above discrete areas, with a view to assisting the Court in relation to the equality issues arising in this appeal.

B. The Equality Dimension in the Judgment and Decision of the High Court

5. It was the legal maxim *mater semper certa est* rather than the interpretation of any provisions of the Status of Children Act 1987 ("the 1987 Act") or the Civil Registration Act 2004 ("the 2004 Act") that took centre stage in the High Court proceedings. In examining the *mater semper certa est* principle, the trial judge found that, prior to surrogacy arrangements, the possibility of rebutting the principle did not arise. He stated that 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."*[1] The trial judge rejected the Appellants' argument that the maxim received constitutional approval in the pro-life amendment of the Constitution in 1983 (Article 40.3.3). Insofar as the word 'mother' appears in the Article 40.3.3 in connection with pregnancy, he concluded that the word 'mother' in that 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."* [2]

6. The trial judge also concluded that the Supreme Court decisions in *N v Health Service Executive* and *J.McD v PL* made it clear *"that the concept of blood relationships or links are paramount in deciding parenthood".*[3] In the case of paternity, this blood relationship or link could be established through DNA as proven by scientific test, or if necessary, by a

[1] Para. 100
[2] Para. 101
[3] para. 102

blood test under the 1987 Act. Critically, Abbott J rejected the argument that motherhood and fatherhood were so different that maternity could not be established in a similar way[4]:

7. It is to be noted that the language of equality rings through in the trial judge's reference to a *"fair comparison with the law and standards for the determination of paternity"* and that it would be *"invidious, irrational and unfair to do otherwise"*. Immediately following this important finding on the parity of position as between mother and father, the learned trial judge stated that the *"final question is whether … the application of the maxim mater semper certa est as an irrebuttable presumption is consistent with fair procedures under the Constitution".*[5] In ruling that it was not, he relied upon the decision and judgment of O'Hanlon J in *S v S,* relating to the irrebuttable presumption in certain cases relating to paternity within marriage, as *"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".* Abbott J concluded, again in language redolent of equality terminology:

> 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. 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.

8. In so concluding, Abbott J was of the view that European consensus on the applicability of the irrebuttable presumption of *mater semper certa est and "widespread historic acceptance of the principle"* should not restrain him from reaching the conclusions he did, as no *"detailed comparative law analysis to show why this consensus had arisen (apart from historical convention)"* had been advanced, and, in this jurisdiction, in contradistinction to the banning the contract of surrogacy in some other European jurisdictions, there had been no positive legislation at all, with the consequence that the contract of surrogacy was not illegal. According to the learned trial judge:

> 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 is 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.[6]

[4] para. 103
[5] para. 104
[6] para. 105

C. The Neutral Character of the Statutory Scheme

9. On its face there is nothing in the provisions of section 35 of the Status of Children Act 1987 to prevent the genetic mother of a child born to a surrogate from being declared the mother of the child in question. On the contrary, section 35(8) provides that where on application to a Court "it is proved on the balance of probabilities" that a named person is the father (sub-paragraph (a)) or the mother (sub-paragraph (b)) of the applicant "the Court shall make a declaration accordingly". Thus, the 1987 Act envisages declarations as to motherhood being made once motherhood is proven on the balance of probabilities. Section 38 is contained in Part VII of the 1987 Act which covers the use of blood tests in determining parentage in civil proceedings. Such tests ascertain "the presence of shared, inheritable characteristics between two people and the statutory definition of blood tests is broad enough to cover DNA tests[7]

10. A declaration made under section 35 is binding on the State, and it was the evidence of An tArd Chlaraitheoir before the High Court that if his office is presented with a declaration pursuant to section 35, then his office will act on it without further inquiry.[8] In that regard, sections 63 and 65 of the Civil Registration Act 2004 are also permissive on their face, to the extent that there is nothing on the face of those provisions, or elsewhere in the 2004 Act, to prevent the genetic mother of a child born to a surrogate from being registered the mother of the child in question. Section 63 provides for correction of the Register on application by a person having an interest in the matter. Section 65 of the Act provides that an enquiry may be carried out. Neither section, nor any other provision of Part VII of the 1987 Act governing blood tests, or what may be loosely termed "the registration provisions" as a group,[9] contain or mandate a legislative classification based on parturition. Nor is any restriction or qualification made in either legislative scheme on genetic qualification as a 'mother' or on the means of proving maternity when compared to the means of proving paternity. Consequently, the legislative provisions here at issue do not constitute measures of direct discrimination.

11. Further, although recognition of a genetic mother may require some distinction to be made in the application of the legislation to persons who have availed of a surrogacy arrangement, the operation of an irrebuttable presumption against the genetic mother's maternity in all circumstances is not warranted by the legislation itself. In this regard, whilst alternative views no doubt exist as to whether surrogacy arrangements should be

[7] para. 50 of the High Court judgment
[8] Transcript, Day 4, 24th January 2013, p. 151, Q. 474
[9] The grouping of these legislative provisions is the approach that the learned trial judge took in his decision, as can be seen in his conclusions on the law, when he spoke first of reaching equivalence with the determination of paternity under the 1987 Act, but then also declared that *"the genetic mother should be registered as the mother under the Act of 2004".*

proscribed,[10] it is submitted that in the absence of legislative regulation the better view is represented by the position adopted by the trial judge in the present case, namely that although contracts of surrogacy may not be enforceable in Irish law, they are not illegal or contrary to public policy.

12. It is true that, unlike the legislation at issue in *Fleming v Ireland* [2013] IESC 19, considered below, the legislation here at issue is at least partly addressed to the Respondents, as a father and a mother and as parents, who wish to be registered as such following submission of DNA evidence of their genetic link to a child. However, in the absence of any indirect adverse impact on the genetic mother's application arising from the necessary operation of the scheme in law – absent the application of the maxim itself – no indirect discrimination necessarily arises from the relevant statutory schemes.

13. In the premises, it is submitted that what occurred here is that the 2004 Act was *differentially applied* by An t-Ard Chláraitheoir on the basis of an advice that the *mater semper certa est* principle ought to apply. This advice was given in the absence of any stipulation in the relevant legislation dictating that the maxim should universally apply, or should apply in this particular context. The sequence of events is fully set out in the High Court judgment[11]. Therefore, the constitutional equality analysis that follows does not involve analysis of discrimination direct or indirect as caused by the terms of any existing legislation on any of the cited grounds.

D. Summary of the Authority's Position

14. In the Authority's submission, Article 40.3.3 of the Constitution does not have the meaning or effect that the mother of a child under Irish law is always, as a matter of constitutional requirement, the woman who gives birth to a child. As stated by Geoghegan J. in *Roche v Roche & Others* [2010] 2 IR 321, Article 40.3.3 has the single purpose of protecting the child (including the foetus) in the woman's womb. By contrast, it is submitted that the Constitution must be interpreted in a manner that takes account of scientific and social developments,[12] such that parturition can no longer be the exclusive proof of motherhood, and that protects the status and role of mothers and of their relationships with their children, and affords protection to children by legal recognition of that relationship. For the reasons canvassed below, it is submitted that this conclusion is both supported by and required by constitutional principles of equality deriving from Article 40.1.[13]

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[10] See for example *The Etrhical Case against Surrogate Motherhood: What We Can Learn from the Law of Other European Countries (Iona Institute),*

[11] At paras 18,21 and 97

[12] *McGee v AG* [1974] IR 81; *Sinnott v Minister for Education* [2001] 2 IR 545, 681, *per* Murray J

[13] It appears also to be supported and required as an aspect of the personal rights respectively of genetic mothers and of their children as protected under Article 40.3.1 of the Constitution, cf. *G v An Bord Uchtala* [1980] IR 32; *IO'T v B & Others* [1998] 2 IR 321; *North Western Health Board v HW &*

15. Furthermore, having regard to the neutral and permissive character of the governing legislative provisions, it is submitted that the existing legislative framework is readily capable of recognizing and protecting the relationship between a genetic mother and her child in the context of an agreed gestational surrogacy arrangement, and, that given the constitutional equality interests and rights arising in this context, as further elucidated below, the legislation on registration ought to operate in cases such as the present on the basis that the *mater semper certa est* maxim is a rebuttable presumption only.

16. The Authority relies in this regard on *Purcell v Attorney General*,[14] which concerned the imposition of farm tax pursuant to the Farm Tax Act 1985. The Supreme Court held that where an Act of the Oireachtas evidenced no intention to discriminate between persons to whom the statute applied, it would be unconstitutional for discrimination to be introduced in the administration of the Act. The Court's analysis proceeded from the well-known principle in *McDonald v Bord na gCon* [1965] IR 217 that, in cases where a statutory provision is capable of two or more constructions, one of which is constitutional and the others not, it is presumed that the Oireachtas intended only the constitutional construction.

17. The Authority submits that the decision of the High Court on the interpretation of the maxim *mater semper certa est* ought to be upheld by this Honourable Court. It is submitted that established principles and requirements of constitutional equality, on grounds of gender, arising from the rights of families and couples in this context, on grounds of disability, and on grounds of equal treatment of children both *inter se* and in their relationships with their genetic mothers, support the conclusion that the statutory provisions on registration ought to be understood in the way in which the High Court construed them. In particular, in circumstances where the relevant statutory provisions are neutral and capable of being so applied, the Authority submits that the *mater semper certa est* principle is a presumption that ought to be capable of being rebutted upon probative evidence proffered to an t-Ard Chláraitheoir by the genetic mother, supported, as here, by the gestational mother. In such a case, the genetic mother should be capable of being appropriately recorded as the mother under the 2004 Act.

18. Furthermore, in cases of purely gestational and consensual surrogacy arrangements, it is submitted that to operate the legislation the way in which an tArd-Chláraitheoir has in the present case, by reference solely to the *mater semper certa est* principle, will lead to inequality and unwarranted discrimination. In cases such as the present, to permit the *mater semper certa est* principle to operate as an irrebuttable presumption affecting the civil registration system in the State is to bring about an inequality of treatment as between

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Others [2001] 3 IR 622, 725. Also, in cases where, as here, the relationship is one that is rooted in the 'family' as protected by the Constitution, Articles 41 and 42 provide additional constitutional support for this conclusion, see *N v Health Service Executive* [2006] 4 IR 477.

[14] [1995] 3 IR 287

the genetic mothers and genetic fathers, as well as between the genetic mothers and the children of such surrogacy arrangements and other genetic mothers and their children, and between those categories of children inter se, which inequalities of treatment are not justified by any difference in the status of those respective mothers, fathers and children as human persons or in any relevant difference of capacity, physical or moral, or of social function. In the premises, it is submitted that the *mater semper certa est* principle should be utilised by an *tArd-Chláraitheoir* as a rebuttable presumption only in the case of genetic mothers in like situations to CR.

19. In making this submission the Authority acknowledges that not all surrogacy arrangements will co-incide with the facts of this case and, in particular, that the intending mother will not always be the genetic mother of a child born to a surrogate. Further, advances in assisted human reproductive technology now mean that a woman may give birth to a child which she intends to rear which has been created through the use of a donor egg. In these and possibly other cases, to emphasise the genetic link of the mother to the child may not be appropriate and may itself give rise to equality issues. Thus there could be an important role for the intention of the parties to operate on the presumption of mater semper certa est in cases of surrogates who are also donors of maternal gametes.[15] The Authority believes and is acutely conscious that a one size fits all approach is not possible and is ill advised across the spectrum of births through assisted human reproduction. What is important in terms of achieving equality for the parents and children concerned is that the law allow a facility for such births to be registered in a manner which reflects the reality of each family's situation.

20. The Authority is of the view that legislation governing this area of law is quite urgently needed. However, this wider context does not detract from the primary point for determination in this case, which the Authority believes, in the absence of legislative regulation of the issue, is one that may properly be determined by this Court.

21. In particular, it appears to the Equality Authority that this case is of the most straightforward type that may arise from surrogacy arrangements, as it is wholly gestational, involving the gametes of the commissioning couple alone, and has always been and remains wholly consensual. As it happens, this particular arrangement has also taken place wholly within a family, and also wholly within this jurisdiction.[16] In these circumstances, it is submitted that the presumption ought to be capable of being rebutted in the present case, and in similar cases of wholly gestational and wholly consensual

[15] See Horsey, *Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements* (2011) 22 *Child and Family Law Quarterly* 449 for discussion of the way in which intention could govern various arrangements.

[16] For a useful summary of the difficulties often arising in the case of international surrogacy arrangements, see Michael Nicholls QC, *Legal Problems with International Surrogacy Arrangements* (21 October 2013),

arrangements in respect of children born in this jurisdiction, so as to allow the genetic mother to be recorded as the mother, and thereby to bring about a position of equality before the law for all persons affected.

22. In so submitting, the Authority is conscious that there is an additional probative element required in the case of the genetic mother, not present in the case of a genetic father, namely that there is continuing agreement and intention of all parties that the genetic mother will be the mother of the child (to the exclusion of the gestational mother who will have no such role). Assuming this is established, then proof of the genetic link should lead to legal recognition of her status as the mother of the child under the respective legislative schemes. To that extent, the parenthood of genetic mothers in the like position of CR would still be treated differently, in terms of proofs, than genetic fathers, but it is submitted that that difference of treatment would not be discriminatory, as it properly takes account of the constitutional interests and rights of all persons affected including the best interests of the child and the interest and rights of the gestational mother.

23. The grounds of gender equality, disability equality and children's equality which support this position shall now be outlined in turn. Before doing so, it is proposed to very briefly consider the comparative position and the EU law position, insofar as they may be of assistance in the present case.

E. Comparative and EU Law

24. The practice of regulation of surrogacy varies widely as between European countries and internationally, such that, from a constitutional perspective, the Authority believes that little is to be gained from an equality analysis of the position in comparative law. In this regard, the Authority points to the May 2013 comparative study of the European Parliament on the Regime of Surrogacy in EU Member States, which demonstrates the lack of any legal trend across the EU in relation to regimes of surrogacy.[17] Furthermore, a consideration of the statutory position in England,[18] and of the spectrum of statutory and non statutory positions adopted throughout the United States,[19] confirms and demonstrates both the

[17] *A Comparative Study on the Regime of Surrogacy in EU Member States* (PE 474.403: Directorate General for Internal Policies). This study shortly post-dates the High Court judgment in this case.
[18] Summarised at pages 10-12 of the Outline Submissions of the Respondents to this appeal. See also Bainham & Others, *What is a Parent? A Socio-Legal Analysis* (1999); Bainham, *Children, The Modern Law* (4th ed, 20-13); *What is the Point of Birth Registration?* (2008) Child & Family LQ 449; also *Arguments about Parentage* (2008) 67 CLJ 322-351; Fortin, *Children's Rights and the Developing Law* (3rd ed, 2009); Horsey, *Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements* (2011) 22 *Child and Family Law Quarterly* 449-474; Snyder & Byrn, *The Use of Prebirth Parentage Orders in Surrogacy Proceedings* (2005) 39 Family LQ 633-662
[19] Cf., Spivack, *The Law of Surrogate Motherhood in the US* (2011) 58 AJ Comparative Law 97-114; Gruenbaum, *Foreign Surrogate Motherhood; Mater Semper Certa Erat* (2012) 60 AJ Comparative Law 475-505; Meyer, *Parenthood in a Time of Transition* (2006) 54 AJ Comparative Law 125-144; in California, *Johnson v Calvert* (1993) 5 Cal 4th 84.851 P 2d 776, and Orozco, *Intent and Biology in California's Lesbian Parenting Cases* (2006) 46 Jurimetrics 421-436

need for regulation of surrogacy in all its forms and the range of differing policy responses the Oireachtas might adopt in tackling the wider issues.

25. Having said that, the Authority believes that it is important to highlight certain jurisprudence of the European Court of Human Rights (ECtHR) which it believes to be of relevance to the equality issues raised in this appeal, bearing in mind the interpretative obligation of courts under section 2 of the European Convention on Human Rights Act 2003, and also the possibility of the grant of a declaration of incompatibility pursuant to section 5 of the 2003 Act. These cases are highlighted below.

26. Turning briefly to principles of EU law in respect of equality, EU Treaty commitments to equality are numerous. Article 3 TEU provides that the Union shall combat discrimination and promote *inter alia* "equality between women and men, … and protection of the rights of the child". Articles 8, 10 and 19 of the Treaty on the Functioning of the European Union (TFEU) contain various provisions committing the Union to eliminating inequalities, promoting equality and combating discrimination both on gender grounds and on a range of other grounds including disability. Further the Charter of Fundamental Rights in Article 20 provides that "everyone is equal before the law", and Article 21 prohibits any discrimination on a range of grounds including sex, birth and disability. However the Charter binds the Member States only when they are implementing Union law (Article 51).

27. Various primary Treaty commitments are reflected in secondary legislation, however, the range of Directives on equality which could be of relevance operate in certain defined contexts such as the sphere of employment or consumption of goods and services. Some of these Directives are the focus of EU litigation concerning employment rights in relation to surrogacy, and in this regard it is noteworthy that two Advocates General have recently released opinions on two separate surrogacy cases before the Court of Justice, in *CD v STC*,[20] and in *Z v A Government Department*[21] which latter case concerns a reference from the Equality Tribunal of this jurisdiction on whether the fact that a woman whose genetic child has been born through a surrogacy arrangement is refused paid leave of absence from employment constituted a breach of EU law. In the CD case Advocate General Kokott concluded that where the intending mother of a child born through surrogacy takes the child into her care immediately after birth she should have the right to receive maternity leave thus broadening the definition of who might be recognised as the child's mother.

[20] Case C-167/12, Opinion released 26 September 2013.
[21] Case C-363/12, Opinion released 26 September 2013.

28. However, in light of the fact that the contextual setting in this case is not an employment one, nor one relating to access to or the consumption of goods and services, it is submitted that EU equality law is directly relevant to the present proceedings.

F. Principles of Constitutional Equality

29. Article 40.1 of the Constitution provides for an equality guarantee, with a proviso that reflects the Aristotelian equality position that it is also unjust to offer sameness of treatment to those who are different:

> All citizens shall, as human persons, be held equal before the law.
> 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.

The Respondents' reliance on Article 40.1 is summarized at paragraph 6 of the decision of Abbott J.

30. In *MD v Ireland*,[22] the Supreme Court described equality as *"among the highest and noblest aspirations included in the Constitution of every modern state"*[23] and commented as follows as regards Article 40.1:

> Article 40.1 is both more specific and more general. It is specific insofar as it relates expressly to "the law". At the same time it prescribes the general principle that citizens are to "be held equal before the law".
> Equality is not, in all cases, an easy principle to apply in concrete situations. People may be equal in some respects but not in others. Aristotle's oft-quoted definition illustrates the lack of precision in the notion of equality. His definition of the principle of equality is paraphrased as meaning "that things that are equal should be treated alike while things that are unalike should be treated unalike in proportion to their unalikeness." [Nicomachean Ethics 1131a]. In other words, not only must the law treat comparable situations equally, it must not treat different situations in the same way, in the absence of justification.[24]

31. In *Quinn's Supermarket v Attorney General*, Walsh J expanded on the meaning of the constitutional guarantee of equality in one of the foundational decisions on the principle:

> Article 40 s.1… is not a guarantee of absolute equality for all citizens in all circumstances but it is a guarantee of equality as human persons and (as the Irish text of the constitution makes quite clear) is a guarantee related to their dignity as human beings and a guarantee against any inequalities grounded upon an assumption, or indeed a belief, that some individual or individuals or classes of individuals, by reason of their human attributes or other ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in the community.[25]

32. The decision and judgment of the Supreme Court in *Fleming v Ireland* [2013] IESC 19 represents one of the most recent analyses of equality by this Court. The applicant sought Orders which would enable her partner to assist her in committing suicide without facing prosecution. The passage of *Quinn's Supermarket* quoted above was described by

[22] [2012] 1 IR 697
[23] Ibid, at [38]
[24] Ibid, at [39]-[40]
[25] [1972] IR 1, at 13 to 14

Denham CJ as *"an important guide to the understanding of Article 40.1".*[26] Situations where a law makes a distinction on its face between citizens were discussed, and Denham CJ stated that a law *"may be unfairly targeted against one class of persons"*[27] or may classify people by reference to *"such classes as race, religion, gender or nationality"*, in which case close scrutiny will operate. The discrimination at issue in such cases is direct discrimination appearing on the face of the law, and, fortunately, there are few examples of this type of direct discrimination in modern legislation.

G. Gender Equality

33. The courts have long deprecated gender inequality. In *de Búrca v Attorney General* two members of the Supreme Court considered that the exclusion of women from mandatory jury duty was an impermissible discrimination on the basis of gender. Walsh J considered that where women are not any different when compared with men in terms of the function they fulfill, they must not be treated any differently:

> However, the provision made in the [Juries] Act of 1927, is undisguisedly discriminatory on the ground of sex only. It would not be competent for the Oireachtas to legislate on the basis that women, by reason only of their sex, are physically or morally incapable of serving and acting as jurors. The statutory provision does not seek to make any distinction between the different functions that women may fulfill and it does not seek to justify the discrimination on the basis of any social function. It simply lumps together half of the members of the adult population, most of whom have only one thing in common, namely, their sex. In my view, it is not open to the State to discriminate in its enactments between the persons who are subject to its laws solely upon the ground of the sex of those persons. If a reference is to be made to the sex of a person, then the purpose of the law that makes such a discrimination should be to deal with some physical or moral capacity or social function that is related exclusively or very largely to that sex only.[28]

34. The Courts have held as unconstitutional a number of *"archaic common law rules that discriminated against women in their civil status".*[29] In the case of *Re Tilson*[30] common law rules that a father's authority over his children was paramount (such as to allow him break an ante-nuptial agreement as to the religion in which the children would be reared) were struck down in favour of a principle of a joint power and duty as between married parents.

35. In the case of *S v S*,[31] a rule of law which had prohibited the admission of the evidence of a wife to prove that a child borne to her during wedlock was not the child of her husband was held by O'Hanlon J to be inconsistent with the application of the fair procedures guaranteed by the Constitution and was calculated to defeat the due administration of justice. Accordingly, it had not been continued in force as part of the law by the provisions

[26] Ibid, at para. 128
[27] Ibid, at para. 129
[28] [1976] IR 38, at 53-54
[29] Oran Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus Press, 2008) at [3-15]
[30] [1951] IR 1
[31] [1983] IR 68

of Article 50 of the Constitution. In consequence, the evidence adduced by and on behalf of the genetic parents was admissible to prove the paternity of the genetic father.

36. In *State (DPP) v Walsh and Conneely*[32] the Supreme Court held that the common law presumption of coercion had not been carried over by Article 50 of the Constitution. Henchy J noted that the raison d'etre for the rule *"had been swept away by legislation and judicial decisions"* and that the presumption *"presupposes a disparity in status and capacity between husband and wife which runs counter to the normal relations between a married couple in modern times."* Most significantly, however, he held that the rule had not survived the enactment of the Constitution as it offended the concept of equality before the law in Article 40.1:

> A legal rule that presumes, even on a prima facie and rebuttable basis, that a wife has been coerced by the physical presence of her husband into committing an act prohibited by the criminal law, particularly when a similar presumption does not operate in favour of a husband for acts committed in the presence of his wife, is repugnant to the concept of equality before the law guaranteed by the first sentence of Article 40, s 1, and could not, under the second sentence of that Article, be justified as a discrimination based on any difference of capacity or of social function as between husband and wife. Therefore, the presumption contended for must be rejected as being a form of unconstitutional discrimination.[33]

37. Similarly, in the case of *W v W*[34] it was held that the common law rule of dependent domicile of a married woman ceased to be part of Irish law by virtue of Article 50 of the Constitution, being inconsistent with Article 40.1 and did not survive the Constitution's enactment. Blayney J remarked on the inequality in the following passage:

> I have no doubt that if the rule were still in force a married woman would not be held equal before the law. She would be in a position of inequality firstly by comparison with her husband, and secondly by comparison with women who are not married. As between the married woman and her husband, he would retain the independent domicile which he enjoyed before his marriage while his wife would lose the independent domicile which she had previously enjoyed. Furthermore, her independent domicile previously enjoyed would become converted by law into a domicile dependent on that of her husband. So the law would clearly be giving unequal prominence or importance to the husband by providing that it was his domicile which would be the common domicile of the couple throughout their marriage. The rule would also treat unequally the married woman by comparison with a woman who is not married. It would continue to attribute an independent domicile to the latter whereas the former, simply by virtue of her marriage, would cease to have an independent domicile.
>
> The inequality inherent in the rule is not simply theoretical. It can give rise to practical disadvantages for a married woman….[35]

38. When addressing legislative measures, however, the courts have generally been slower to conclude that the discrimination was not based on a relevant difference.[36] This deference is explicitly mandated by the proviso in Article 40.1, whereby it is permissible for legislation to distinguish between persons where this is relevant having due regard to "*differences of*

[32] [1981] IR 412
[33] Ibid, at 450
[34] [1993] 2 IR 476
[35] Ibid, at 499
[36] Doyle, note 30, at [3-17]

capacity, physical and moral, and of social function." In *Lowth v Minister for Social Welfare*,[37] a deserted husband argued that the failure to provide a deserted husband's payment was in breach of Article 40.1, 40.3 and 41 of the Constitution. In rejecting the claim Hamilton CJ stated:

> It is not the function of this Court to adjudicate upon the merits or otherwise of the impugned legislation. It is only necessary to conclude, as this Court has done, that there were ample grounds for the Oireachtas to conclude that deserted wives were in general likely to have greater needs than deserted husbands so as to justify legislation providing for social welfare whether in the form of benefits or grants or a combination of both to meet such needs.[38]

On the evidence there were ample grounds for the Oireachtas to conclude that deserted wives were in general likely to have greater needs than deserted husbands and therefore to differentiate between them.

39. In *M v Ireland*[39] the plaintiff argued that s. 62 of the Offences Against the Person Act 1861, as amended, breached Article 40.1 of the Constitution in that it amounted to an unjustifiable inequality before the law, as it imposed a maximum sentence of ten years imprisonment for indecent assault on a male person, a sentence five times greater than the maximum sentence for a first conviction of indecent assault on a female. Laffoy J held that the difference was *prima facie* discriminatory and inconsistent with the Constitution unless the differentiation created by the law was legitimated by reason of being founded on difference of capacity, whether physical or moral, or difference of social function of men and women in a manner which was not invidious, arbitrary or capricious. She concluded

> I can find nothing in the Act of 1861 or in any objective consideration of the differences of physical capacity, moral capacity and social function of men and woman which points to a legitimate legislative purpose for imposing a more severe maximum penalty for indecent assault on a male person than for the same offence against a female person. Therefore, I have come to the conclusion that the relevant provision is inconsistent with Article 40.1.[40]

40. The recent decision and judgment of the Supreme Court in *MD v Ireland*[41] also had gender equality as its focus. Section 3 of the Criminal Law (Sexual Offences) Act 2006 provides, *inter alia*, that any person who engages in a sexual act with a child who is under the age of 17 years shall be guilty of an offence and be liable on conviction on indictment to imprisonment. Section 5 of the 2006 Act provides that *"[a] female child under the age of seventeen years shall not be guilty of an offence under this Act by reason only of her engaging in an act of sexual intercourse."* The case concerned a then-fifteen-year-old boy who had sexual intercourse with a fourteen-year-old girl. He could be prosecuted for unlawful sexual intercourse, but she could not. The boy contended that the distinction violated his right to equality before the law under Article 40.1. The Supreme Court held that Article 40.1 of the Constitution recognised that perfectly equal treatment was not

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[37] [1998] 4 IR 321
[38] Ibid, at 324
[39] [2007] 4 IR 369
[40] Ibid, at [78].
[41] [2012] 1 IR 697

always achievable nor always desirable because it could lead to indirect inequality due to inherent differences of capacity, physical and moral and of social function. The Court continued:

> 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". 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.
>
> 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.[42]

41. The Court (relying on the decision of *Michael M. v Sonoma County Superior Court* (1981) 450 U.S. 464) upheld the decision of the High Court that the legislative distinction between boys and girls is justified essentially on the ground that girls can get pregnant:

> The legislation in California recognised the innate differences between males and females participating in the act of sexual intercourse. To recognise this difference is not necessarily to discriminate. The exemption of a very young female from prosecution for an offence of taking part in an act of intercourse was regarded by the legislature as justified by the need to deter the male from having sexual intercourse with her, protecting her from the risk of pregnancy, and encouraging her to report the case. A similar approach was taken by the Oireachtas.
>
> In considering s. 5 of the Act of 2006, the State justified the legislation by a social policy of protecting young girls from pregnancy, by creating a law governing anti-social behaviour, i.e . under age sexual intercourse. This was a choice of the Oireachtas. Even in a time of social change, it is a policy within the power of the legislature. The issue of under age sexual activities by young persons involves complex social issues which are appropriately determined by the Oireachtas, which makes the determination as to how to maintain social order. The Oireachtas could have applied a different social policy but s. 5, the policy which they did adopt, was within the discretion of the Oireachtas, and it was on an objective basis, and was not arbitrary.[43]

42. These recent cases concern legislative classification and distinction. Here, however, there is no classification on the face of the registration legislation, and instead the crux of the issue is whether the maxim *mater semper certa est* ought to operate on the administration of the registration system as an irrebuttable presumption which cannot be displaced. Therefore, it is submitted that assertions of deference to the Oireachtas are misplaced.

43. In the High Court, Abbott J analysed the operation of the Status of Children Act 1987 and concluded that the routes of establishing the genetic link for mothers existed and could operate to allow biological truth to be revealed, so long as the *mater semper certa est* principle did not prevent this from happening. He concluded at paragraph 95 that whilst DNA testing to establish paternity or maternity was “not foolproof”, parenthood could be

[42] Ibid, at [43] and [44].
[43] Ibid, at [52] and [53].

established by evidence as in the case of disputed claims of paternity currently resolved either by the First Named Appellant of by the Courts. The very fact that the 1987 Act expressly allowed for the use of blood and hence DNA testing in relation to determining maternity meant that there was a legally established avenue for investigation of the claims of the genetic mother of a child born through surrogacy provided of course the maxim did not preclude this.

44. However, invoking the spirit of the proviso and arguing that there was a clear reason for the 1987 and 2004 Acts to operate differently when it came to women, the Appellants argued that gestation means that men and women are not in fact equal in relation to the establishment of genetic parenthood. The underlying rationale of this argument – the effect that the environment in the gestational mother's womb may have on the developing foetus (epigenetics) – was not accepted by Abbot J as likely to "ever trump the deterministic quality of chromosomal DNA".[44] This finding in turn bolstered the conclusion that no difference ought to be made in the operation of the civil registration system as between men and women seeking to establish paternity and maternity respectively. To do otherwise would be "invidious, irrational and unfair".[45]

45. The Authority supports the considered views of Abbott J concerning the importance of genetics as opposed to epigenetics in this context, and it is submitted that his decision places genetic mothers and fathers on an equal footing as regards the operation of the 1987 Act. By contrast, the *status quo ante* in terms of administrative practice in An t-Ard Chláraitheoir's office meant that the genetic father of the child could establish his paternity through DNA testing, but the legal principle of *mater semper certa est* operated to deny the mother the right to establish her maternity and have this recorded as a proven fact.

46. The practical and legal disadvantages of this inequality from the mother's point of view are numerous. In this case, if the twins are in law, irrebuttably the children of the gestational mother, there are a variety of ways in which the genetic mother's involvement in the lives of her children is excluded or made more difficult, which obstacles will not obtain for the genetic father who may attend at the Registrar's office and provide a declaration to the Registrar that he is the father, as occurred in the present case.

47. The disadvantages suffered by the genetic mother CR as canvassed in evidence[46] are matters for the parties to address. However, quite apart from any particular impact on the affected individuals in this case, it is submitted on behalf of the Authority, from its perspective in promoting respect for equality generally, that the resulting difference of

[44] para. 98
[45] para. 103
[46] The effects are summarized at para. 34 of the High Court decision.

treatment as between genetic mothers and genetic fathers in this context self-evidently has highly important effects, impacting on the core relations of mothers and children. It is also submitted that no justification can be identified for so differentiating between women in their status and role as mothers and men in their status and role as fathers. In the language of Article 40.1, the difference in treatment is not justified by any difference in the respective status of those mothers and fathers as human persons or in any relevant difference of capacity, physical or moral, or of social function. It follows in the Authority's submission that to operate the *mater certa semper est* maxim as a presumption which cannot be rebutted in this specific context is to hold the mother as unequal to the father before the law in respect of their genetic parenthood in a manner that offends against the constitutional principle of equality pursuant to Article 40.1 of the Constitution.

48. The net issue on this aspect is whether the *mater semper certa est* principle should be permitted to bar a genetic mother in a like position to CR from gaining recognition of her maternity in the same way that a commissioning genetic father can. In the submission of the Equality Authority, the non-standard method of conception and gestation of the twins does not provide any plausible or sound basis for discriminating between men and women in their access to recording a biological truth; their genetic connection to their child, cf. *CM v TM (No,2)* [1990] 2 IR 52; *JW v JW* [1993] 2 IR 476. The consequences of not being recorded as the child's mother, and of another woman being so recorded are very serious and permanent consequences for all concerned, including in particular the children.

49. As against these important and constitutionally protected considerations, it is submitted that appeals to legal certainty and the integrity of the birth registration system cannot prevail. Notably, these appeals to maintenance of the *status quo* are not based upon any legislative choice, but rest instead on the case for the continuing universal vitality of a legal maxim, developed in a different age, which, undoubtedly, has been overtaken in certain important respects by scientific and social developments in the field of human reproduction. No administrative convenience or appeal to legal certainty can serve to justify a state of affairs whereby the birth registration system should operate so as to cause gender inequality as between men and women. This is especially so when the governing legislation is readily capable of accommodating the genetic truth, and when the legal maxim is capable of being qualified or rebutted to reflect the genetic truth, and where that truth amounts in effect to a certainty in fact.

50. Further, to acknowledge and register that truth in the case of men who wish to establish paternity, and to deny the genetic link in the case of the commissioning mother, is not an example of justifiably treating different persons differently according to their differences as no pertinent difference exists. Nor is the insistence on the presumption a case of ensuring equality as between purely gestational mothers participating in a surrogacy arrangement

on a consensual basis, on the one hand, and genetic mothers who give birth to their children in the ordinary way, on the other, as equality is not served by treating these categories of persons precisely the same, and by disregarding the important differences including the genetic differences in their respective positions.

ECtHR Decisions

51. The ECtHR has not yet decided any surrogacy decisions raising the issues that this case does, however there is one such case pending before the Strasbourg Court - *Mennesson v France*.[47] The case concerns the refusal of the French authorities to recognise a couple as the parents of twin daughters born through gestational surrogacy in California although their filiation was legally established in that State.[48] The fact that that case involves a donated ovum and a foreign birth are distinguishing features. However, this Court, in its interpretation of the 1987 and 2004 Acts, and in its consideration of the status of the maxim *mater semper certa est* as a rule of law, ought to have regard to Article 8 ECHR concerning the right for respect for private and family life, and specifically, the right to identity and establishment of filiation under that Article, combined with Article 14 ECHR which prohibits discrimination in enjoyment of Convention rights.

52. There is a significant body of ECtHR case law concerning people's right to establish accurate legal reflection of their family relationships, or biological facts. It is submitted that genetic mothers have a right to establish their legal relationship with their child, and that Article 14 means that they should be allowed do this on the same basis as genetic fathers. In *Marckx v Belgium*[49] the applicant complained that under Belgian law, for a single mother, maternal affiliation could be established only by means of voluntary recognition by the mother or through legal proceedings taken for that purpose. The applicant complained that this restricted the possibility for her to bequeath her property to her child and created no legal bond between the child and her family. Only by getting married and then adopting her own daughter (or applying for her legitimation) could she have secured the same rights for her as those enjoyed by legitimate children. The ECtHR held that there had been a violation of Articles 8 and 14. The discrimination in the *Marckx* case was between unmarried and married mothers,[50] however the reasoning concerning safeguarding the establishment of maternal affiliation resonates in the context of this case.

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[47] App. no. 65192/11.
[48] The Court communicated the application to the Government on 12 February 2012 and put questions to the parties under Articles 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the Convention.
[49] Application No. 6833/74 [1979] ECHR 2
[50] See para 62:

> *On the other hand, the distinction made in this area between unmarried and married mothers does raise an issue. The Government put forward no special argument to support this distinction and, in the opinion of the Court … the distinction lacks objective and reasonable justification; it is therefore contrary to Article 14 taken in conjunction with Article 8 (art. 14+8)*

53. The case of *Kroon v the Netherlands*[51] is also relevant. This case concerned the authorities' refusal to acknowledge the applicant's partner as the father of her child. Domestic law created two legal presumptions. Firstly, a child born during marriage was presumed to be the issue of the mother's husband and this presumption could be rebutted only by the mother's husband, who to that end must provide proof to the contrary. The applicant had had no contact with her husband for several years, but her divorce had not come through until after her son was born so the child had been registered as her husband's son. As under Dutch law it was not possible for Mrs Kroon to have entered in the register of births any statement that her former husband was not the father, her new partner was not able to legally recognise the child as his. The ECtHR found a violation of Article 8 of the Convention, pointing out that the notion of "family life" was not confined solely to marriage-based relationships and might encompass other "family ties".[52] Where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible as from the moment of birth or as soon as practicable thereafter the child's integration in his family. The Court held:

> …"respect" for "family life" requires that biological and social reality prevail over a legal presumption which, as in the present case, flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone. Accordingly, the Court concludes that, even having regard to the margin of appreciation left to the State, the Netherlands has failed to secure to the applicants the respect for their family life to which they are entitled under the Convention.[53]

It is apparent that the Strasbourg Court here favoured legal recognition of the biological and social reality underpinning the relationship protected by the Convention, in preference to the legal security provided by the presumption in domestic law.

54. In the case of *Mizzi v Malta*,[54] the applicant complained about an irrefutable presumption of paternity, and also that he had suffered discrimination, because other parties with an interest in establishing paternity were not subject to the same strict conditions and time-limits. He had obtained DNA evidence which established that he was not his wife's daughter's father. However, he was automatically considered to be the girl's father under Maltese law and although he tried unsuccessfully to bring civil proceedings to repudiate his paternity he never had the possibility of bringing, with a reasonable prospect of success, an action aimed at rebutting this presumption. The Court held that there had been a violation of Article 8 ECHR. The fact that he had never been allowed to deny paternity was not proportionate to the legitimate aims pursued. No fair balance had been struck between the general interest of the protection of the legal certainty of family

[51] Application no. 18535/91; (1994) 19 EHRR 263.
[52] See also *Keegan v Ireland* (1994) 18 EHRR 342.
[53] Note 56, at para 40. The applicants also complained that, while Netherlands law made it possible for the husband of a child's mother to deny being the father of the child, the mother's right to challenge her husband's paternity was much more limited. They relied on Article 14 (art. 14) of the Convention, however the Court found, at para. 42 that this complaint was essentially the same as the one under Article 8. Having found a violation of that provision taken alone, the Court did not consider that any separate issue arose under that Article in conjunction with Article 14 (art. 14+8).
[54] Application no. 26111/02; (2008) 46 EHRR 27

relationships and his right to have the legal presumption of his paternity reviewed in the light of the biological evidence. The Court also found a violation of Article 14 read in conjunction with Articles 6 § 1 (right of access to a court) and 8. The following passage of the Court on the violation of Article 8 merits quotation:

> The Court is not convinced by the Government's argument that such a radical restriction of the applicant's right to institute proceedings to deny paternity was "necessary in a democratic society". In particular, it has not been shown why society as a whole would benefit from such a situation. The potential interest of Y in enjoying the "social reality" of being the daughter of the applicant cannot outweigh the latter's legitimate right to have at least the opportunity to deny paternity of a child who, according to scientific evidence, was not his own. As to the interests of legal certainty, the Court cannot but reiterate the observations developed under Article 6 § 1 of the Convention (see paragraphs 87-90 above).
>
> According to the Court's case-law, a situation in which a legal presumption is allowed to prevail over biological reality might not be compatible, even having regard to the margin of appreciation left to the State, with the obligation to secure effective "respect" for private and family life (see, mutatis mutandis, Kroon and Others, cited above, § 40).
>
> The Court considers that the fact that the applicant was never allowed to contest his paternity of Y was not proportionate to the legitimate aims pursued. It follows that a fair balance has not been struck between the general interest in the protection of legal certainty of family relationships and the applicant's right to have the legal presumption of his paternity reviewed in the light of biological evidence. Therefore, despite the margin of appreciation afforded to them, the domestic authorities have failed to secure respect for the applicant's private life, to which he is entitled under the Convention.[55]

In examining compliance with Article 14 ECHR the Court observed:

> The Court reiterates that Article 14 safeguards individuals who are "placed in analogous situations" against discriminatory differences of treatment (see Rasmussen, cited above, p. 13, § 35).
>
> The Court accepts that there might have been differences between the applicant and the other interested parties – namely X, Y and Y's biological father. However, the fact that there are some differences between two or more individuals does not preclude them from being in sufficiently comparable positions and interests. The Court considers that with regard to their interest in contesting a status relating to paternity, the applicant and "other interested parties" were in analogous situations within the meaning of Article 14 of the Convention (see, mutatis mutandis, Rasmussen v. Denmark, no. 8777/79, Commission's report of 5 July 1983, Series A no. 87, p. 24, § 75).
>
> According to the Court's case-law, a difference in treatment is discriminatory for the purposes of Article 14 if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" ….
>
> The rigid application of the time- limit, coupled with the Constitutional Court's refusal to allow an exception, deprived him of the possibility of exercising the rights guaranteed by Articles 6 and 8 of the Convention, which, on the contrary, were and still are enjoyed by the other interested parties.[56]

55. The subsequent case of *Różański v Poland*[57] concerned an attempt to establish rather than disclaim paternity, which was frustrated by the Contracting State. The circumstances involved several changes of mind by both the applicant and also the mother of the child. The applicant made no headway in attempts to get proceedings underway because of

[55] Ibid, at paras. 111 -114
[56] Ibid, at paras. 130 - 132 and 134 – 136.
[57] Application No 55339/00; 2007) 45 EHRR 26

procedural difficulties and also because the proceedings required the consent of the mother. The Court agreed that there had been a violation of Article 8 of the Convention:

> To sum up, when making the assessment of the case the Court had regard to the circumstances of the case seen as a whole. Hence, it has taken into consideration, firstly, the lack of any directly accessible procedure by which the applicant could claim to have his legal paternity established …. Secondly, the Court noted the absence, in the domestic law, of any guidance as to the manner in which discretionary powers vested on the authorities in deciding whether to challenge legal paternity established by way of a declaration made by another man should be exercised ... Thirdly, the Court considered the perfunctory manner in which the authorities exercised their powers when dealing with the applicant's requests to challenge this paternity ... Having examined the manner in which all these elements taken together affected the applicant's situation, the Court concludes that, even having regard to the margin of appreciation left to the State, it failed to secure to the applicant the respect for his family life to which he is entitled under the Convention (Mizzi v. Malta, no. 26111/02 § 114, mutatis mutandis).[58]

56. In conclusion on this aspect, this case law demonstrates a preference for biological truth over the maintenance of legal presumptions. In the case at hand, it is submitted that men have a way to register paternity of their genetic children, whereas women do not have this facility if the *mater semper certa est* maxim cannot be rebutted. Any inconsistent operation of the 1987 Act is unequal treatment on grounds of sex in respect by the State for the private life of its citizens. It is submitted that the operation of civil registration must not be permitted to operate in such a way that gender inequality results.

H. Disability Equality

57. Evidence was given during the High Court trial by various medical experts, of the necessity for some women, including CR, to resort to surrogacy to give life to their genetic children in light of their inability to gestate their own pregnancies. This inability is a type of Infertility, a condition defined by the World Health Organisation as *"a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse."*[59]

58. There is not as yet any Irish decided Superior Court authority dealing with infertility as a disability. As a point of reference, the Employment Equality Acts 1998 to 2011 and the Equal Status Acts 2000-2011 both define ''disability'' as—

> (a) the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,
>
> (b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,
>
> (c) the malfunction, malformation or disfigurement of a part of a person's body,
>
> (d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or

[58] Ibid, at paras. 79 and 80.
[59] http://www.who.int/reproductivehealth/topics/infertility/definitions/en/

(e) a condition, disease or illness which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour;[60]

59. Certainly in the case of women who lack a uterus, they fall into category (a) of this definition and many other women will fall into category (c) insofar as part of their body may be malfunctioning, in the absence of more sensitive terminology.[61] Further, such women are persons with a disability within the meaning of the UN Convention on the Rights of Persons with Disabilities, which has been signed[62] but not yet ratified by Ireland,[63] and which serves as an important interpretative guide for the European Court of Human Rights in its assessment of claims of discrimination based upon disability status, which the Court has found to fall within the scope of Article 14 ECHR, e.g., *Glor v Switzerland*, Decision of 30 April 2009 (Application No. 13444/04); It follows from Articles 3, 4, 5 and 23 of the UN Convention that States Parties have particular obligations to ensure respect for the dignity of persons with disabilities in relation to parenthood and their relations with their children without discrimination of any kind on the basis of disability.

60. It is submitted that CR suffered a disability by virtue of her *"inability to give birth in the normal way"*[64] and that many women who avail of surrogacy will suffer from such a disability. To prevent such women being registered as mothers is to discriminate against them on grounds of their disability. Able-bodied women who can gestate their own pregnancies are considered to be the mothers of their children by virtue of the *mater semper certa est* maxim. However, where a woman cannot gestate a pregnancy, she is prohibited from having her genetic relationship with her child recognised by the law. The disabled woman is in a directly comparable position with the able-bodied woman. Both women have children which are genetically theirs, both women are rearing the children of which they are are for all social and psychological purposes *de facto* mothers and both women naturally wish to be legally recognised as the mother of their child. Recognition is straightforward for the woman without the disability. However, the woman who has had to resort to surrogacy due to her disability is cut off from recognition, with serious negative consequences for her status and role as a mother and her relationship with her child.

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[60] The Disability Act 2005 provides: *"disability", in relation to a person, means a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment;*

[61] It appears that women who are incapable of carrying a child to term and giving birth may not satisfy the definition of 'Disability' in section 2 of the Disability Act 2005, being '*a substantial restriction in the capacity of the person to carry on a profession, business or occupation in the State or to participate in social or cultural life in the State by reason of an enduring physical, sensory, mental health or intellectual impairment*.' although it is at least arguable that an inability to have children constitutes a restriction on a person's capacity to participate in the social life of the State.

[62] On 30th March 2007.

[63] This does not mean that regard cannot be had to its provisions in interpreting corresponding provisions of Irish law including of the Constitution, e.g., *State (DPP) v Walsh* [1981] IR 412.

[64] para. 4 of High Court decision

61. There is a dearth of decided case law on equality and disability in this jurisdiction. There was one unsuccessful outing for disability rights in the case of *Draper v Attorney General*.[65] Owing to multiple sclerosis the plaintiff was unable to attend at polling stations to exercise her right to vote. She alleged that section 26 of the Electoral Act, 1963, requiring all electors, with limited exceptions, to cast their votes at polling stations, amounted *inter alia* to a breach of Article 40.1. Her claim was rejected. The Supreme Court held that the right of a citizen to vote at elections for members of Dáil Éireann (declared in Article 16 of the Constitution) is conditional on compliance with the provisions of the law relating to such elections, and that the then existing statute law provided a reasonable regulation of such elections, having regard to the obligation of secrecy, the need to prevent abuses and other requirements of the common good. The failure to provide facilities to enable the plaintiff to vote at elections did not amount to an interference by the State of the right to vote declared in s. 1, sub-s. 2, of Article 16 of the Constitution; nor did that failure constitute a breach by the State of the provisions of Article 40.1 of the Constitution. According to O'Higgins CJ, for the Supreme Court:

> The case made by the plaintiff in this action rests entirely on the failure of the State to provide special facilities for her and for those similarly situated. In the opinion of the Court, such failure does not amount to an interference by the State in the exercise of the right to vote under Article 16, s. 1, sub-s. 2, of the Constitution. Nor is it, in the opinion of the Court, a breach by the State of the provisions of s. 1 of Article 40. While under this Article the State could, because of the plaintiff's incapacity, have made particular provisions for the exercise by her of her voting rights, the fact that it did not do so does not mean that the provisions actually made are necessarily unreasonable, unjust or arbitrary. For the reasons already stated, the Court could not so find.[66]

62. In *Re Article* 26 *and the Employment Equality Bill 1996*,[67] it was determined that a requirement on employers to provide reasonable accommodation to disabled workers, providing that accommodation did not give rise to an undue burden, was unconstitutional. The Court remarked that *"The Bill has the totally laudable aim of making provision for such of our fellow citizens as are disabled. Clearly it is in accordance with the principles of social justice that society should do this"*[68] However, the Bill went too far in attempting to transfer the cost of the exercise onto one particular group, namely employers without exempting small firms or firms with a limited number of employees. Moreover, the terms of the Bill meant that it was impossible to estimate in advance what the likely cost to an employer would be. Accordingly, the burden imposed by the Bill was so onerous as to amount to a failure to adequately protect the rights of employers to earn their livelihood and also amounted to an unjust attack on their property rights.

[65] [1984] IR 277.
[66] Ibid, at 290-291
[67] [1997] 2 IR 321
[68] Ibid, at 367

63. In contrast to these earlier decisions, the case of *DX v Buttimer*[69] contains recent affirmation of this jurisdiction's commitment to disability equality. The applicant sought an order of certiorari to quash a decree of judicial separation in respect of his marriage to the notice party, granted by the respondent pursuant to s. 3 of the Judicial Separation and Family Law Reform Act 1989. Mr X contended that the order was *ultra vires* in three separate respects. Pertinently, he maintained that Judge Buttimer acted contrary to fair procedures and in breach of s. 40(5) of the Civil Liability and Courts Act 2004 in failing to permit him to be attended in court by a friend of his. Mr X was treated for cancer of the larynx in 1997 and, as a result, suffered a largnectomy. He could speak, but with considerable difficulty and he tired easily as a result. Furthermore, his speech could not always be easily understood by those who were not familiar with his condition.

64. In his judgment, Hogan J, having noted the provisions of section 40(5) of the 2004 Act,[70] found that the section aimed to achieve the provision of support and reassurance to litigants in daunting family law proceedings.[71] However, Hogan J then went on to find that constitutional equality provisions mandated the inclusion of a friend in Court:

> There was, moreover, a further particular reason why the respondent could not properly have excluded Ms. S. in the circumstances. Mr X.'s largnectomy considerably affected his capacity to speak and he was hugely dependent on Ms. S. for all types of practical assistance. Furthermore, she was familiar with his manner of speaking and she could probably have directly conveyed his instructions to his legal team better than anyone else. Article 40.1 of the Constitution obliges the judicial branch of government to ensure that all persons are "held equal before the law." In practical terms, this means that the courts must see to it that, where this is practical and feasible in the circumstances, litigants suffering a physical disability (such as Mr. X.) are not placed at a disadvantage as compared with their able-bodied opponents by reason of that disability, so that all litigants are truly held equal before the law in the real sense which the Constitution enjoins…..
> Yet absent the presence of Ms. S., Mr. X. was placed at such a disadvantage, since her presence was vital to assist him in view of his particular disability in giving effective instructions to his legal team.
> In these particular and unusual circumstances, the failure of the respondent to permit Mr. X. to have Ms. S. present to give the kind of practical assistance which the able-bodied litigant takes for granted also amounted to a breach of Article 40.1.[72]

65. It is noteworthy that Hogan J identified and secured a free-standing constitutional equality right, not linked to legislation, i.e. the 2004 Act. In the case at hand, there is a vacuum of regulation for surrogacy and no particular legislation concerning infertility as a disability. Nonetheless, it is self-evident that CR and women in her position are discriminated against by reason of their own physical impairment if they are not permitted to have the biological truth of their genetic motherhood recognised.

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[69] [2012] IEHC 175

[70] *(5) Nothing contained in a relevant enactment shall operate to prohibit a party to proceedings to which the enactment relates from being accompanied, in such proceedings, in court by another person subject to the approval of the court and any directions it may give in that behalf.*

[71] Ibid, at para. 10

[72] 1Ibid, at paras 4-16

66. It is submitted that the resulting difference of treatment, as between the disabled genetic mothers of children born through surrogacy and other genetic mothers is not justified by any difference in the respective status of those mothers as human persons or in any relevant difference of capacity or of social function. In particular, to operate the *mater certa semper est* maxim as a presumption which cannot be rebutted in this specific context is to hold the disabled genetic mother as unequal to other genetic mothers before the law in respect of their status and role as mothers in a manner which offends against the constitutional principle of equality pursuant to Article 40.1 of the Constitution.

67. On a final point on this aspect, it may be noted that the disability discrimination law resulting from the European Convention on Human Rights is nascent and, it is submitted, does not provide assistance for the resolution of the equality issues arising in this case.[73]

I. Equality as between Families/Couples

68. It is submitted that the above arguments apply mutatis mutandis to the position of commissioning couples, as marital families protected by the Constitution, as here, or more generally as couples who are unmarried and wish to have children, when compared to families and couples who are not faced with the difficulties resulting from the disability of the genetic mother preventing her from carrying the child to term. Whilst different considerations may come into play in circumstances where the decision to have a child through surrogacy has not been made in consequence of the genetic mother's disability, these considerations do not arise on the facts of this case and consequently are not addressed further in this submission.

J. Children's Equality Rights

69. A fundamental principle of law which is applicable to legal disputes concerning children is that the child's best interests must be paramount. Whilst the validity of the 31st Amendment to the Constitution to strengthen the constitutional rights of the child is the subject of an appeal pending before this Court, the paramount character of the best interests of the child is already established in Irish law as it relates to private disputes,[74] care proceedings[75] and adoption proceedings.[76] That a child has a personal right under Article 40.3.1 of the Constitution to have decisions in relation to his or her guardianship, custody or upbringing taken in the interests of his or her welfare, and to have his or her welfare protected, with a correlative obligation on the State in that regard, is also an

[73] See Loucaides, *The European Convention on Human Rights and the Rights of Persons with Disabilities*, http://www.coe.int/t/e/social_cohesion/soc-sp/text_LoucaidesE.pd; also
[74] Section 3 of the Guardianship of Infants Act 1964.
[75] Section 3(2)(b)(i) of the Child Care Act 1991.
[76] Section 2 Adoption Act 1974.

established principle of constitutional law, cf. *FN & Another v CO & Another* [2004] IEHC 60 (Finlay Geoghegan J); *DG v Eastern Health Board* [1997] 3 IR 511; *N v Health Service Executive* [2006] 4 IR 374 and 470.

70. The best interests of the child principle is well established in international law as evidenced by Article 3(1) of the UN Convention on the Rights of the Child, which was ratified by Ireland in 1992. The Authority submits that emphasis on the child's best interests is fully compatible with a perspective that emphasizes equality, and submits that the best interests of a child require that his or her relationship with his or her genetic mother is legally recognised. The Authority endorses the submissions of the Irish Human Rights Commission in this regard.

71. The Authority believes that the 1987 Act eliminated most overt forms of discrimination against children born outside of marriage. In particular, it conferred equal rights of succession and maintenance on children, regardless of whether they were born inside or outside marriage. This Act, along with the subsequent Children Act 1997, strengthened the role of fathers in the lives of children born outside of marriage, by facilitating the father's acquisition of guardianship responsibilities, by agreement or by court order.[77] However, as a result of rapid scientific and social developments, it has been observed, dramatically but not without good cause, that a new form of illegitimacy threatens to deny children who are born following the use of new reproductive technologies the same rights enjoyed by those born through conventional methods.[78]

72. The Authority believes that the purpose of the 1987 Act should be reiterated; to equalise the rights of children and to remove differences in their status. The problems faced by CR if she is not permitted to be registered as the mother of her children are obviously equally appreciable as problems experienced by her children. These problems concern the genetic mother and primary carer's legal impotence *vis-à-vis* her own child in terms of issues such as decision-making and inheritance, which powerlessness can have negative consequences for the child's welfare and prosperity. These difficulties are not experienced by those who are not born to surrogates, including by children who are adopted.

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[77] See section 2(4) and section 6(A) of the Guardianship of Infants Act 1964.

[78] See Richard F. Storrow, "The Phantom Children of the Republic: International Surrogacy and the New Illegitimacy" Journal of Gender, Social Policy & the Law, Volume 20, Issue 3, Article 8, at 608:

> *Throughout history, the doctrine of illegitimacy has been used to heap opprobrium and disparate treatment upon the heads of both children born to an unmarried couple and the couple themselves. But there is far less stigma and legal disadvantage associated with "illegitimacy" of birth today than in previous generations. Nonetheless, new ideas about what makes children and their families illegitimate have begun to emerge in response to new reproductive technologies. Since assisted reproductive techniques do not involve illicit sexual intercourse and are often employed by married couples seeking to have children, it would seem at first blush as if they would not be linked with adultery and illegitimacy. Alternative insemination was, however, associated with adultery and illegitimacy from a very early stage, and, more recently, countries have begun to classify families created through international surrogacy as unworthy of civil status.*

73. Notably, in respect of children who are adopted, the Civil Registration Act 2004 provides for the registration of the relevant particulars post the making of an Adoption Order in the Adoption Register. Thus, the State by that Act provides for a sytem of record and formal recognition that reflects the changed identity and family circumstances of the adopted child, yet there is no comparable facility for children born in the type of factual circumstances in which MR and DR were born. Once again, it is difficult to discern any justifiable basis, based upon differences of capacity, physical or moral, or of social function, between these two categories of children.

74. Furthermore, it appears that the result contended for by the Appellants impacts unequally upon the fundamental right to one's identity enjoyed by every child. In *I.O'T v B and Others*[79] the Supreme Court held that there was an unenumerated constitutional right to know the identity of one's mother. This had to be balanced against the privacy rights of the mother who had placed or had given the child to the adoption society. Hamilton CJ stated:

> The right to know the identity of one's natural mother is a basic right flowing from the natural and special relationship which exists between a mother and her child, which relationship is clearly acknowledged from the passage quoted from the judgment of the *State (Nicolaou) v. An Bord Uchtála and G v. An Bord Uchtála*.
> The existence of such right is not dependent on the obligation to protect the child's right to bodily integrity or such rights as the child might enjoy in relation to the property of his or her natural mother but stems directly from the aforesaid relationship. It is not, however, an absolute or unqualified right: its exercise may be restricted by the constitutional rights of others, and by the requirement of the common good.[80]

75. The Authority submits that several ECtHR decisions similarly emphasise the importance for children of having their identity recognised. As shown in relation to the cases considering a mother's right to establish filiation, the ECtHR judgments in Marckx and Kroon emphasise the importance of biological fact. It is submitted that children born through surrogacy who are blocked from the enjoyment of rights that children gestated by their genetic mothers can enjoy are also in a position to draw on case law which combines Article 8 and Article 14. The right to know one's ascendants, falling within the scope of "private life", which encompasses important aspects of one's personal identity, such as the identity of one's parents, was established in cases such as Odièvre v France.[81] The absence of any legal obligation on a man against whom a paternity suit was brought to comply with court orders to undergo DNA tests was found to leave a child born out of wedlock uncertain as to her personal identity and thus to violate Article 8 in Mikulić v Croatia.[82]

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[79] [1998] 2 IR 321
[80] Ibid, at 348.
[81] Application no. 42326/98, § 29, ECHR 2003. However, the Court concluded that in this adoption case, there had been no interference with Article 8. It had to take on board that there were two competing interests in the case before it: on the one hand, the right to know one's origins and the child's vital interest in its personal development and, on the other, a woman's interest in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions.
[82] Application no. 53176/99; [2002] ECHR 27.

76. In *Jäggi v Switzerland*[83] a 67 year old man sought authorisation for a DNA test to be carried out on the remains of the person he claimed to be his father. It was held that there was a violation of Article 8 on account of the fact that it had been impossible for the applicant to obtain this DNA analysis. The Court's approach is summarised in the following passage:

> In weighing up the different interests at stake, consideration should be given, on the one hand, to the applicant's right to establish his parentage and, on the other hand, to the right of third parties to the inviolability of the deceased's body, the right to respect for the dead, and the public interest in preserving legal certainty.
> Although it is true that, as the Federal Court observed in its judgment, the applicant, now aged 67, has been able to develop his personality even in the absence of certainty as to the identity of his biological father, it must be admitted that an individual's interest in discovering his parentage does not disappear with age, quite the reverse. Moreover, the applicant has shown a genuine interest in ascertaining his father's identity, since he has tried throughout his life to obtain conclusive information on the subject. Such conduct implies mental and psychological suffering, even if this has not been medically attested.[84]

77. Similarly in *Phinikaridou v Cyprus*[85] a procedural barrier to establishment of paternity in the form of an absolute limitation period was found to be a violation of Article 8 ECHR. The Court reiterated the principles in this area of law:

> The Court reiterates that birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life guaranteed by Article 8 of the Convention (see Odièvre v. France [GC]…Respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality (see, for example, Mikulić v. Croatia…, and Gaskin v. the United Kingdom..). This includes obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents (see Jäggi v. Switzerland, Odièvre, § 29; and Mikulić, §§ 54 and 64; both cited above).[86]

78. It is submitted that the resulting difference of treatment as between the children of surrogacy arrangements of the kind here at issue and other children, both as to their status *inter se* and as to their respective relationships with their genetic mothers, is not justified by any difference in the respective status of those children as human persons or in any relevant difference of capacity, physical or moral, or of social function. In particular, to operate the *mater certa semper est* maxim as an irrebuttable presumption is to hold the children of such arrangements as unequal to other children before the law in the context of the legal recognition, and the protection afforded by such recognition, of their genetic mothers as their true mothers in a manner which offends against the constitutional principle of equality pursuant to Article 40.1 of the Constitution.

K. Concluding Remarks

79. It is submitted that Article 40.3.3 of the Constitution does not have the meaning or effect that the mother of a child under Irish law is always, as a constitutional requirement, the

[83] Application no. 58757/00; (2008) 47 EHRR 30.
[84] Ibid, at paras 39 and 40.
[85] Application no. 23890/02
[86] Ibid, at 45.

woman who gives birth to a child, and this conclusion is both supported by and required by constitutional principles of equality deriving from Article 40.1 of the Constitution.

80. Furthermore, having regard to the neutral and permissive character of the governing legislative provisions, it is submitted that the existing legislative framework is readily capable of recognizing and protecting the relationship between a genetic mother and her child in the context of an agreed gestational surrogacy arrangement. Further, given the constitutional equality interests and rights arising in this context, as elucidated above, the legislation on registration ought to operate in cases such as the present on the basis that the *mater semper certa est* maxim is a rebuttable presumption only.

81. In so submitting, the Authority wishes to emphasis that this submission is confined to the position of genetic mothers in like situations to CR, where a surrogate carries a child that is not genetically related to her and does not wish to be regarded as a parent, possibly having entered into a surrogacy agreement on that basis, either formal or informal.

82. The Authority is of the view that legislation governing this area of law is quite urgently needed. It has worked both together with and independently of the government in seeking to identify and tackle the variety of issues to be considered by the Oireachtas in legislating on this issue, some of undoubted legal, moral and ethical complexity, and it believes that in certain cases it may be that intention, and not the genetic link, may play a dominant role in determining parentage. However, this wider context does not detract, in the Authority's submission, from the primary point for determination in this case, which the Authority believes, in the absence of legislative regulation of the issue, is one that may properly be determined by this Court.

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13th January 2014