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**FAMILY LAW CLINIC**

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**Family Law Case Study November 2022**

Case concerns a mother whose estranged husband has primary care of the dependent child due to her health difficulties. The husband wants to re-locate to North Co Mayo and the mother lives in West Cork. Clinic tasked with identifying recent caselaw on “move away” applications which might inform the court’s decision, with particular reference to the statutory factors to be applied.

**Child Relocation case – Relevant and related caselaw**

**Key Observations:**

Under s.31 of the Guardian of Infants Act 1964 obliges the court to consider a range of factors including the following-

* The benefit of the child of having a meaningful relationship with each of his/her parents
* The willingness and ability of each child’s parents to facilitate and encourage a close and continuing relationship between the child and parents alongside relatives insofar as possible
* Physical, psychological and emotional needs of the child must be considered
* Court must consider the views of the child

As demonstrated throughout **SP v JE** the court considered ‘important balancing factors’

1. Present welfare of the child
2. Possible disruption of the child if relocation is not granted and the impact on his welfare
3. The impact on the access rights of the respondent if relocation is granted
4. Whether contact be maintained with the non-custodial parent if relocation is granted

Furthermore, as seen throughout **HOR v MR** permission was sought by the custodial parent to relocate 85 kilometres from her residents. Abbott J. considered the factors under s.31 of the 1964 Act. He indicated a ‘meaningful relationship would require ‘the relationship should not be trivial, but earnest and sincere’. Abbott J. also considered the purchase of the property as a constraining factor under s.31. The court held if the mother sought an order to approve the initial relocation-

“In all likelihood would not have been approved by the courts as it would have been viewed as not being in the interest of the child or father insofar as it places an obvious strain on access arrangements”.

This case demonstrates the father’s decision to move 251 kilometres away from the child’s mother (Cork – Mayo) places an obvious strain on access arrangements.

In **SK v AL** the relationship ended between parties when the child was 18 months old. The mother resided in Ireland with her fiancé and the child’s father resided in the UK. An access order was implemented since 2013 and proved effective. The mother wished to move to the US due to her husband’s employment. Father denied this move and sought primary custody of his son. The High Court held the court observed the child’s best interest- as the most important factor and held the child’s best interest was to remain with his mother- the custodial parent. On appeal the Court of Appeal held the father has made no basis for a claim for custody. Prima facie, the High Court’s decision was upheld.

This decision highlights the weight attached to the best interest of the child – consequently with his mother. The weight attached to the mother in this case highlights the child’s best interest remained with his custodial parent of 16 years.

In **DK v PIK** the parties got married in 2005 and have three dependent children. The marriage broke down in 2015 and separated in 2016. Italian law proceedings commenced in 2017 by the applicant (mother). The applicant sought to have the judicial separation agreement enforced in Ireland however the court denied jurisdiction. The applicant decided to move from Rome to Denmark with the three dependent children without the permission of the father as the applicant claimed the children would benefit from the education system in Denmark. The court balanced the rights of the parties and the children, understanding the mothers desire to relocate alongside balancing the applicant’s depression and health difficulties. In doing so the court held the best interest of the children would not be served remaining in Denmark and refused the applicant’s request. O’Hanlon J. noted the effect of this ruling was that both parents enjoyed joint guardianship rights and a shared parenting arrangement. Therefore, the children were to remain in place of their usual residence – Rome.

The facts displayed throughout DK v PIK highlights the importance of co-parenting and in balancing the interests of the three dependent children remaining in Rome ensured contact with their father could continue. The present case demonstrates similar facts regarding the mother’s health issues. Consequently, it appears the father (custodial parents) desire to move to Mayo may be rejected based on the factors considered under s.31 of the 1964 Act as the child’s welfare may be disrupted if relocated a significant distance from his mother as access may be limited which may result in the physical, psychological and emotional welfare of the child being jeopardised.

**More detailed consideration and exploration of relevant and related caselaw**

From an examination of the case law, it is clear that the determining factor will be the best interests of the child. The court will take into account a number of factors, expressed most clearly in Abbott J’s judgement in **HOR v MOR** (considered in detail below). This case is also of particular importance, because the relocation of the child is happening within Ireland, as opposed to abroad. The other cases mentioned refer to a parent wishing to relocate abroad with the child.

**Considered cases:**

* **D v D [2020] IEHC 268; High Court, Jordan J, 2 April 2020**
* **DK v PIK [2021] IEHC 516; High Court, O'Hanlon J, 23 July 2021**
* **DK fee PAK D.K. v P.I.K.[2022] IECA 54**
* **In the Matter of the Guardianship of Infants Act, 1964, as amended and In the Matter of the Family Law (Maintenance of Spouses and Children) Act, 1976 as amended and In the Matter of PC, A Child; D.H. v K.C. *[2021] IEHC 579***
* **SK v AL [2019] IECA 177; Court of Appeal; Whelan J; 3 July 2019**
* **H.O.R. v M.R. [2016] IEHC 781**

**D v D [2020] IEHC 268; High Court, Jordan J, 2 April 2020**

This decision highlights the weight attached to the best interest of the child – consequently with his mother. The weight attached to the mother in this case highlights the child’s best interest remained with his custodial parent of 16 years.

FAMILY RELOCATION – ACCESS – GUARDIANSHIP OF INFANTS ACT 1964 – CONSTITUTION OF IRELAND, ARTICLE 42A

* This was an application for an appeal of an order of the Circuit Court of 28 March 2019, in which the appellant had made an application under s.11 of the Guardianship of Infants Act 1964 to be allowed to relocate to reside in the UK, her place of origin, along with her daughter, the child of her marriage with the respondent, who is Irish
* *The court stated that there is no presumption in favour of or against relocation in respect of the parent with primary custody of the child or the other parent, and made its assessment as one of welfare assessment viewed through the legal and practical lens of the child's best interests.*
* The court considered principles set out by Flood J in **EM v AM**, unreported, High Court, 16 June 1992:
  + “Which of the two [hypothetical outcomes] will provide the greater stability of lifestyle for [the child].
  + The contribution to such stability that will be provided by the environment in which [the child] will reside, with particular regard to the influence of his extended family.
  + The professional advice tendered …
  + The capacity for, and frequency of, access by the non-custodial parent.
  + The past record of each parent, in their relationship with [the child] insofar as it impinges on the welfare of [the child].
  + The respect, in terms of the future, of the parties, to orders and directions of this Court.”
* These principles were referenced with approval by MacMenamin J in **UV v VU [2012] 3 I.R. 19**, in which the High Court was assessing the relocation to Spain of two children. Refusing the application to relocate, MacMenamin J rejected the suggestion that there was a presumption in favour of the custodial parent and he pointed out that the fundamental constitutional and legal principle applicable in such cases is the children's right to have decisions taken as to their welfare, with that welfare being the prime concern.
* The court noted the decision of the Court of Justice in **McB v E (C-400/10 PPU),** observing that it was in accord with the basic welfare considerations which apply under Irish Law, where, referring to art.7 of the Charter of Fundamental Rights, that court observed that the article must be read in such a manner so as to respect the obligation to take into consideration the child's best interests, and the fundamental right of the child to
  + “maintain on a regular basis a personal relationship and direct contact with both of his or her parents … The Charter likewise recognises, in Article 7, the right to respect for private or family life. This provision must be read in conjunction with the obligation to have regard to the child's best interests, which are recognised in Article 24(2) of the Charter, and taking account of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both his or her parents”.
* The court considered at length the Court of Appeal decision in **SK v AL [2019] IECA 177**, in which Whelan J set out the law pertaining to relocation of children. Whelan J distinguished between the role of a judge dealing with any aspect of an application pursuant to the Hague Convention or the Child Abduction and Enforcement of Custody Orders Act 1991, where the purpose is to achieve restoration of the status quo ante, and the role of a judge in making a determination under the Guardianship of Infants Act 1964, where the best interests of the minor is the paramount consideration in all determinations of welfare. Whelan J summarised the objectives underpinning the legislative approach as being to direct the focus of the enquiry away from recriminations, blame or fault finding with regard to the past conduct of either parent unless it is “relevant to the child's welfare and best interests only” (s.31(4)).
* The court took note of the reports of two clinical psychologists, setting out the recommendations of each. These reports took differing views on whether it would be in the best interests of the child for her to relocate with the mother to Manchester.
* The court found that it was beneficial for the child to have a meaningful, consistent and structured relationship with each of her parents and with her other relatives (including her grandparents, uncles, aunts and cousins) on both sides of the family. Any regime going forward should provide for the opportunity of meaningful contact with the extended family to nurture and maintain these relationships. The court was persuaded that the family dynamic on both sides was such that R did have a closer and more child-centred relationship with the relatives on her mother's side than she had with those on her father's side. It held that it was clear that the child was too young to express her own views and preferences on the issue of relocation, but the reports of both experts stated that she had a strong bond with both her parents and wished it to continue. It also found that she had proved resilient and unperturbed by the travel arrangements to Manchester.
* The court found that the social, intellectual and educational upbringing and needs of the child could be well catered for in Dublin and in Manchester, but that the family support in the extended family was stronger and more available in Manchester. The court took the view that compelling the appellant to remain in Ireland would not be in the best interests of the welfare of the child because the appellant was not happy or content living in Ireland. However, it held that it was important that regular, structured and meaningful access between the child and her father continue. It noted its concern with previous actions taken by the mother, but was persuaded, on the balance of probabilities, that the mother and her family in Manchester meant what they said in terms of facilitating access and nurturing the relationship between the child and her father, were the relocation application to be granted.
* The court had no concern in relation to the ability of the parents to act and behave as responsible parents in respect of the child, and although she had a strong bond with both parents, it was satisfied that she was emotionally and psychologically dependent upon her mother who was and had been her primary carer for almost all her life
* *The court allowed the appeal against the Circuit Court and permitted the mother to relocate to Manchester with the child, on the basis that a structured access regime (appended to the judgment) be put in place to allow the continuation and nurturing of the essential and important relationship which the child had with her father.*

**DK v PIK [2021] IEHC 516; High Court, O'Hanlon J, 23 July 2021**

The facts displayed throughout **DK v PIK** highlights the importance of co-parenting and in balancing the interests of the three dependent children remaining in Rome ensured contact with their father could continue. The present case demonstrates similar facts regarding the mother’s health issues. Consequently, it appears the father (custodial parents) desire to move to Mayo may be rejected based on the factors considered under s.31 of the 1964 Act as the child’s welfare may be disrupted if relocated a significant distance from his mother as access may be limited which may result in the physical, psychological and emotional welfare of the child being jeopardised.

JUDICIAL SEPARATION PROCEEDINGS – RELOCATION APPLICATION – SECTION 47 REPORT – VIEWS OF THE CHILD – DIPLOMATIC IMMUNITY

* The parties were married in England in 2005. There were three children of the marriage, E., aged 14, L., aged 12, and I., aged 10. The family initially lived in Ireland but moved to Rome in 2013 due to the husband's employment as a diplomat with the Irish Embassy. Two of the three children were born in Ireland. The marriage broke down in 2015, and the parties initially lived separately within the one home until setting up separate homes in 2018
* Family law proceedings were commenced in Italy by the wife in 2017, but the Italian courts declined jurisdiction as a result of the husband's diplomatic status. Subsequently, Hague Convention proceedings became necessary when the children were removed from Rome to Denmark by the wife without the knowledge or consent of the father in July 2019. An order for return was made in December 2019.
* Upon the children's return to Rome following the conclusion of the Hague proceedings, a “week on, week off” arrangement in relation to access with the children was put in place. This was achieved with the therapeutic involvement of a child psychologist in Italy, who was working with the parties and the children.
* Judicial separation proceedings were then issued by the husband in this jurisdiction. Within these proceedings, the wife brought a relocation application seeking to relocate the children to Denmark. This judgment concerns that application.
* The wife argued that as she was English-qualified as a veterinarian, the situation of degree recognition in Italy was almost impossible and that she would need medical-level fluency in Italian to obtain employment in Italy. She argued that the children's education would be equally, if not better, served by their relocation to Denmark, despite the Irish Government discharging the private school fees of the children in Rome.
* She gave extensive evidence about free orthodontic care in Denmark, parental benefits, and funding for third-level education. She said her parents would be an hour from her home in Denmark, and while they travelled to Rome regularly, they were getting older.
* The mother provided a detailed plan for the father's access should the relocation be granted. She did not want to return to Ireland with the children.
* The husband argued that he and his wife had a shared parenting regime in place. His view was that it was in the best interests of the children to build on the stability they had in Italy since their return post-abduction. He stated that the week on, week off arrangement was working well for the children. He emphasised the difficulty in obtaining access to the particular area in Denmark where the mother sought to reside, citing limited flights and expensive travel costs
* S47 report obtained from a consultant clinical psychologist
* In her report, the expert recommended that the children remain in Rome until the summer of 2021, finish off the academic year there and continue their work with the child psychologist in Rome. Thereafter, she recommended that the children be told they would be relocating to a different country. Both parents were to prepare them for this. Should the parents agree to live in the same country, she recommended access continue on a week on, week off basis. If they could not agree to live in the same country, the expert determined that the wife had greater capacity for providing for the needs of the children and, given her greater supports in Denmark and ability to obtain employment there, the expert found that her wellbeing would be better served overall by living in Denmark than in Ireland.
* The expert gave lengthy evidence to the court. She placed great emphasis on the relocation to Denmark as the ideal solution. Her evidence was that the children thrived overall, no matter where they lived. She said that their needs were best met with the mother as she was more attuned to their emotional needs and provided more structure and stimulus for them. The court, however, did not accept this view and felt that the father was actually more attuned to their needs.
* O'Hanlon J did not agree with the expert's view on many aspects of her findings. The court noted that the expert's evidence was opinion evidence only, albeit from a clinical psychologist. The court fundamentally disagreed with the expert's assessment of the father and of the children, finding her to be unnecessarily negative about the father. The court did not find that the mother was without any power or control in Italy, nor that she was incapable of working in Rome. While the mother stayed at home to mind the children for a long number of years, the court found that the father had always been very involved and that both parties excelled in their respective parenting roles.
* Considering the recommendation that the children would move from Rome at the end of the academic year, the court found that this was contra-indicated on the evidence, having regard to the best interests of the children and their stated views. The court observed that the children were not in a position to tolerate an international separation and that they needed certainty, which would be best served by having them remain where they were.
* The court spoke with each child and noted that the older two children presented as very mature for their ages and significant weight ought to be given to their views. Similarly, while the youngest child, I., was only aged 10, the court found her to be exceptionally articulate and that considerable weight should also be placed on her view.
* O'Hanlon J noted that the children expressed concern about missing the other parent, were their parents to live in different countries. Overall, their preference was for week on, week off contact. They did not want to be separated as siblings and were very positive about their parents. The court found that they had not yet recovered from being separated from their father when the wrongful removal to Denmark took place.
* *The court took the view that this application was cutting across therapeutic support that was intensively being carried on in Italy, as well as a co-parenting regime in operation there*. It found that this therapy was incomplete and that the children had not yet processed what had happened to them in Denmark. While the court gave great consideration to the expert report, the court felt it was very much in favour of allowing a relocation without due regard to the implications of same.
* The court noted that, pursuant to s.31(4) of the Guardianship of Infants Act 1964 as amended, *it may have regard to the conduct of either parent that is relevant to the child's welfare and best interests only*. O'Hanlon J found that the objective underpinning this legislative approach is to direct the enquiry away from recriminations, blame or fault finding with regard to past conduct of either parent, unless it is relevant to the best interests of the child. In this case, while the child abduction was a fact and the court could not look behind the Hague Convention order, the court stated it had to consider where the children's best interests lay at this point
* The court noted the contents of Art.42A of the Constitution and the criteria it must consider in determining the best interests of the children in accordance with s.31 of the Guardianship of Infants Act 1964.
* The court then considered a number of authorities concerning relocation applications in this jurisdiction. It found that it was clear from the Court of Appeal decision in **SK v AL [2019] IECA 177**, as a matter of principle, that where orders have been made, pursuant to the Hague Convention following a wrongful removal for the summary return of a child, the parent who is the subject matter of the return order has the entitlement to bring an application before the courts of habitual residence of the child seeking leave to relocate to a new jurisdiction and in considering that application, a judge is unfettered by any order made in the context of the Hague proceedings. It was further clear from this decision that it was imperative that the views of the children were considered and taken into account in an application of this nature.
* The court highlighted that the only motion brought before it was one where the relief sought by the wife was an order granting her liberty to permanently relocate the children to Denmark from Italy. In this context, the court noted the decision in **RL v Her Honour Judge Heneghan [2015] IECA 120**, where it was held that a court does not have freestanding jurisdiction to make any order it thinks fit beyond the reliefs specifically sought in the application.
* *The court felt that to relocate these children was clearly not in their best interests. It stated that to allow the relocation would affect the non-relocating parent in terms of causing difficulty in ensuring that the children's rights to their father would be vindicated, as well as causing a great deal of disruption for the children. The court took what it described as an entirely child-centred approach to the application and accepted the father's evidence that he would be able to access continuing employment in Rome. While the court considered, to a great degree, the wish of the mother to leave Rome and the extensive research she had carried out, it found that it was not appropriate to move the children at this time.*
* *The court concluded that it was not in the best interests of the children to be relocated to Denmark and refused the application. The children would continue to reside in Rome pending further court orders or agreements between the parties.*

**DK fee PAK D.K. v P.I.K.[2022] IECA 54**

Childs right to be heard discussed

* In February 2020 PIK applied in the judicial separation proceedings for orders directing that the children be returned to her primary care, regulating DK's access to them and permitting her to permanently relocate the children to D. In addition, PIK sought an order pursuant to section 32 of the Guardianship of Infants Act 1964 (as amended) (“the 1964 Act ”) appointing an expert to determine and convey the wishes of the children. As explained below, a section 32 order was made in advance of the hearing of the motion and the only relief ultimately pursued at the hearing was that of relocation. That being so, I shall refer to this application as the “relocation application.”
* DK opposed the application. After a 5 day hearing in June 2021, the High Court (O' Hanlon J) refused the application for the reasons set out in her lengthy judgment delivered on 23 July 2021 **([2021] IEHC 516**). In essence, the High Court concluded that the proposed relocation was not in the best interests and welfare of the children.
* As her judgment records, the Judge met with each of the children. While the Judge refers to her interactions with the children as “interviews ”, I prefer to refer to them as meetings. The meetings all took place on 8 July 2021 – after the conclusion of the hearing and before judgment was given – face-to-face in the courtroom, in the presence of the registrar. The Judge met each of the children separately. Neither DK or PIK nor their legal representatives were present. The meetings were recorded by the Digital Audio Recording (DAR) system and, on the direction of the Judge, a transcript was prepared and put on the court file in a sealed envelope (Judgment, para 123). The circumstances in which these meetings took place is discussed in more detail below.
* PIK subsequently appealed the refusal of the relocation application to this Court and that appeal is listed for hearing on 4 April 2022
* After the Judge gave her Judgment, PIK applied for access to the DAR of the meetings with the children (she also sought the DAR of the hearing itself but that aspect of the application is not relevant to this appeal). The application came before the Judge on 30 July 2021. DK opposed the application and it was refused
* PIK appealed that refusal. The net question presented by the appeal was whether the Judge was justified in refusing access to the transcript of the meetings. The appeal came on for hearing on 6 December 2021. Having heard the submissions of counsel for each of the parties, the Court announced that it was allowing the appeal and it directed that the transcript of the meetings should be furnished to the solicitors for each party, subject to the condition that they may be used only for the purpose of the judicial separation proceedings (including the appeal from the refusal of the relocation application). The Court indicated that it would give its reasons at a later date. This judgment sets out my reasons for allowing the appeal.
* It is necessary at this stage to say something more about the course of the proceedings in the High Court.
* As I have mentioned, one of the reliefs sought by PIK in the relocation application was an order appointing an expert pursuant to section 32 of the 1964 Act.
* Talks about s32 report
* In due course, Dr Moane furnished what the Judge described as a “comprehensive report ” (Judgment, para 123). That report was not put before the Court for the purpose of this appeal but it is apparent from the Judgment that Dr Moane made a number of recommendations including, it appears, a recommendation to the effect that, in the event that the parents could not agree to live in the same country, the Court ought to allow the relocation of the children to D (Judgment, para 88(4)). Dr Moane's report was provided to the parties and she gave evidence at the hearing and was cross-examined (Judgment, paras 66-87). It seems from the Judgment that her evidence tended to support the position of PIK.
* Unfortunately, there was no discussion as to the parameters within which the suggested meetings should proceed or their precise purpose. Neither party raised any question as the basis on which any meetings should proceed. That question was not raised by the Judge either. The High Court (Abbott J) had previously offered guidance about judges meeting with children in **O' D v O' D[2008] IEHC 468, [2013] 3 IR 189**. Putting aside the detail of that guidance for the moment (and I shall return to it), its over-riding message is the need for clarity in advance of any such meeting. Unfortunately, the Judge was not referred to O' D v O' D before deciding to meet the children. If she had, it seems likely that the issue giving rise to this appeal could have been avoided.
* Her Judgment is not, of course, the subject of this appeal. For present purposes, it is sufficient to note the following aspects of it:
  + • The Judgment refers extensively to the Judge's meetings with the children and to the views expressed by them (Judgment, paras 100 – 113).
  + • The Judgment records that the Judge had, ascertained the views of the children “ both by virtue of Dr Moane's comprehensive report and by the court interviewing the children individually” (Judgment, para 123)
  + • The Judgment makes it clear that the Judge rejected the evidence of Dr Moane in a number of significant respects and in particular rejected her recommendation that, if the parents could not agree to live in the same country, PIK should be permitted to relocate the children to D.
  + • In reaching the conclusions that she did, including her decision to reject the evidence of Dr Moane, the Judge appears to have placed reliance on (inter alia) the views expressed by the children at her meetings with them. This was accepted by counsel for both parties at the hearing of this appeal, though they differed as to the extent of such reliance and about the significance of the meetings to the ultimate outcome of the relocation application. However, what is significant for the purposes of this appeal is the undisputed fact that the Judge relied on what was said to her during the meetings with the children in reaching the decision she did.
* PIK then applied for the transcript of the DAR of the 8 July meetings. Her application was heard on 30 July 2021. Her counsel submitted that fair procedures required that the DAR be made available to her. In response, the Judge indicated her view that it had been a “*private interview* ” with the children where they had “ *to feel safe to speak* ”. That view was supported by counsel for DK who submitted that it was important that the privacy of the children should be protected and suggested that it would not be in the best interest of the children to provide access to the DAR. In response, counsel for PIK made reference to ***O' D v O' D*** and stated that there had been no suggestion that the children would be speaking to the court in confidence and that the children had not sought such confidence
* PIK's first ground of appeal (the only one relevant to this judgment) asserts that the Judge erred in law in refusing to release the DAR and/or transcripts of her interviews. Reference is made to the fact that, in refusing the relocation application, the Judge rejected the recommendations of the Court-appointed assessor who had interviewed the children and prepared a report for the Court and it is said that the Judge substantially based her judgment on the interviews conducted by her. The refusal to release the DAR of those interviews amounts (so it is said) to a denial of fair procedures which prejudiced PIK in the preparation of her appeal from the Judge's substantive judgment refusing the relocation application
* As explained at the outset of this judgment, the Court has already given its decision on this appeal and made an order for the disclosure to the parties of the transcripts of the Judge's meetings with the children. This judgment has set out the reasons why I concluded that it was appropriate to make that order
* There remains the issue of the costs of this appeal. The appeal was strenuously opposed by DK. That opposition has been unsuccessful. Given that PIK has been “entirely successful ”, section 169(1) of the Legal Services Regulation Act 2015 gives her an entitlement to an award of costs against DK, subject to any order otherwise that this Court might make. The parties have already incurred significant costs in the proceedings thus far. But further costs were incurred in this appeal and the real question is whether PIK should have to bear those further costs herself or whether she should be permitted to recover those costs from DK. In my provisional view, it would not be appropriate that PIK should have to bear those costs and, accordingly, I would be minded to make an order directing DK to pay the costs of PIK, such costs to be the subject of adjudication in default of agreement. I would be minded to put a stay on that order pending the determination of the substantive appeal (though, in reality, such a stay may be of little practical consequence). If DK wishes to contend for a different order, he will have liberty to apply to the Court of Appeal Office within 14 days for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the terms I have suggested, DK may be liable for the additional costs of such hearing: In default of receipt of such application, an order in the terms proposed will be made.
* In **AP v Minister for Justice and Equality[2019] IESC 47, [2019] 3 IR 317**, Clarke CJ (Dunne and O' Malley JJ agreeing) noted that it did not appear “that there is any provision in Irish law which would allow a court, making a substantive decision on the merits, to have regard to information which is not available to both sides of the case”(at para 41).
* Referred to Abbott J extensively in terms of meeting with the child

**In the Matter of the Guardianship of Infants Act, 1964, as amended and In the Matter of the Family Law (Maintenance of Spouses and Children) Act, 1976 as amended and In the Matter of PC, A Child; D.H. v K.C. *[2021] IEHC 579***

* The primary relief being claimed by the mother is an order pursuant to s.11 of the Guardianship of Infants Act 1964 (as amended) granting her liberty to remove and relocate the child to the United Kingdom.
* The mother was born in 1995 in the United Kingdom and the father was born in 1987. The parties met in the United Kingdom and were in a non-marital relationship for a period prior to and subsequent to the birth of the child. That non-marital relationship ended when the child was approximately 20 months old.
* The mother is at present residing along with the child in an apartment in the northwest of the country. The father is residing in his parent's home also in the northwest, some 90 miles distant from the residence of the mother and child.
* At present the mother has sole custody of the child but the father does have regular overnight access or contact, primarily at weekends. Contact has given rise to issues between the parents and it has not been regulated by any court order or mediated agreement.
* The mother is a British citizen and the father is an Irish citizen. They met in late July, 2017 in the United Kingdom. Due to a new job opportunity the father relocated to the east of Ireland in September 2017 and the parties continued in a long distance relationship. On the 2017 the mother discovered that she was pregnant and she then agreed to relocate to the east of Ireland from January 2018. The parties initially resided in rented accommodation in the east but they subsequently moved to the northwest in September 2019.
* According to the mother the father had always agreed that they would return to the United Kingdom if she wished to do so and she says he also told her that his old job would be open to him if he did return to the United Kingdom. She gave evidence that this agreement was in the context that she was very upset at the thought of leaving her family and she had only met his family once or twice. In fact, this assertion concerning the agreement on the part of the mother is not really in contest. In evidence the father accepted that “early on” he may have said that – but he went on to say that he was in good employment and on good money in Ireland and this was no longer the correct thing to do as time went by. When asked as to whether his old job was still available to him in the United Kingdom the father indicated that he did not know. Nonetheless, as a matter of probability, it does seem to be the position that the father has employment opportunities in the United Kingdom. It is also established by the evidence that the father has hoped for a reconciliation with the mother since the relationship ended – and it is established that he did make efforts to persuade the mother to reconcile. Indeed, part of the mother's case is that the father was agreeable to returning to the United Kingdom as a family if there was a reconciliation. When this was put to the father in cross-examination he acknowledged that he may have suggested this “ once upon a time”.
* Difficulties arose in the relationship and according to the mother the father consented in February 2020 to herself and the child returning to reside in England. She made arrangements to do so. He then withdrew his consent. The mother left anyway with the child. As a result, the father initiated child abduction proceedings through the central authority for Ireland on the 11th March 2020 seeking the return of the child to Ireland. On the 11th May 2020 a Consent Order was made by the High Court Family Division of England regarding residence and maintenance of the child. It was ordered, *inter alia*, that the child was to be returned to Ireland no later than the 8th June 2020.
* The mother gave evidence that she would find it very difficult if she had to remain in Ireland because of the isolation and lack of support in circumstances where she has no family and few friends in Ireland. In her evidence the mother did make it clear that there were no circumstances in which she would leave her child behind her in Ireland. In other words, if the father is awarded custody or if she is refused permission to bring the child to the United Kingdom then she will remain in Ireland for his sake and because she cannot part from him
* It is the position that the mother has been the primary carer for the child since he was born. It is also clear from the evidence given by the father and by the mother that the child is thriving and happy
* The Court is without any report from an expert although such reports are ordinarily available in relocation cases. However, the parties explained that they did not apply for any direction for the provision of such an expert report because of the tender age of the child. Although not articulated as a reason the Court appreciates also that the cost of obtaining such a report was probably an added consideration. If the Court felt it necessary or desirable that such a report be obtained it would not hesitate in directing that one be obtained. However, it is clear from the evidence that the child is well cared for by his mother and when on access with the father. In the latter respect, it is clear that the paternal grandmother is significantly involved in the care of her grandchild when the opportunity presents itself. It is also clear from the evidence that the father, the mother and the extended family on both sides care deeply for the child and do look out for his best interests. Equally, the child has formed strong attachments with his parents and with the extended family on both sides. This young child is much loved and is well looked-after
* In her evidence the mother was careful to acknowledge the importance of the father in the life of their son
* It was evident during cross-examination that the father was vague and uncertain when asked specific questions about childcare matters
* An alternative option proposed by the father was that the mother could go back with the child as long as there was a reconciliation and he was going with them. The Court accepts that the father did tell the mother that they would be back in England if they got back together. This is of some significance given the complaints which the father advances about the mother's character and the concerns he expresses concerning the welfare of the child if she remains primary carer and if she can return to the United Kingdom. This significance is all the greater when one considers that the father did, and the court is satisfied of this, tell the mother when she was coming to Ireland originally that if she was not happy they would return to the United Kingdom – whilst adding that his former manager in the midlands of the United Kingdom had told him that his job there would remain open for him. The father seeks to be more circumspect on this in his replying affidavit which was sworn on the 20th November 2020. He says on this point that “the possibility of return to the UK was left open on the basis that the parties agreed to see how things went in Ireland, and it was agreed that, if things were going well, there would be no return to England.”
* During the case, both in affidavits filed on his behalf and in his oral evidence, the father has unfortunately been keen to emphasise a number of negative allegations concerning the character of the mother
* This Court rejects the father's assertion that the mother leads a highly chaotic lifestyle and “continues” to suffer from serious alcohol issues such that she would not be in a position to consistently or safely meet the child's needs and such that it would not be in his best interests to be in her sole custody. The uncontroverted evidence from both sides is that the child is thriving and happy – and in circumstances where the mother is and has been his primary carer.
* It is the position that the father did acknowledge the fact that the child's mother is one of the two main attachment figures in his life and is an integrally important person to the child – and that therefore there should be a wealth of access and meaningful contact with both parents built into any Court Order
* *The Court finds that it is in the best interests of the child that he be allowed to relocate with his mother to the United Kingdom as she has requested*. The Court will make the necessary Orders in that regard, including a clear and comprehensive contact Order. It will order child maintenance to be paid by the father of €500.00 per month to be paid into the mother's bank account as at present. Although this is a modest amount, the father is in weakened financial circumstances at present and the Court is not going to order any increase on what is currently being paid. The Court will also declare the father to be a Guardian of the child but the mother will have custody of the child subject to the Court Order regulating contact. The Court proposes to make no order as to costs but it will list this matter on Wednesday the 19th May 2021 at 10.30 am to hear the parties in relation to the form of the Order, the issue of costs and any other matters arising. It is important to note that the actual Order is not yet made pending the submissions on behalf of the parties as to its form. Relocation is not therefore permitted yet, but the order will be made after hearing both sides on Wednesday the 19th May 2021.

**SK v AL [2019] IECA 177; Court of Appeal; Whelan J; 3 July 2019**

GUARDIANSHIP OF INFANTS ACT 1964 – RELOCATION – NO PRESUMPTION IN FAVOUR OF EITHER PARENT – ARTICLE 42A – ACCESS

* In the High Court, by order dated 27 July 2018, the respondent mother was granted liberty to remove the parties' 10-year-old daughter from the jurisdiction and relocate to the US.
* The parties in this case cohabited and their daughter was born in England, in August 2008. At all material times, they resided in England. The relationship between the parties ended when the child was 18 months old and thereafter, the child resided in the primary care of her mother. In December 2012, the mother relocated to Ireland with her fiancé for work purposes. An English court order of April 2013 authorised her to relocate to Ireland with the child, with the father's consent. It also provided for access between the child and her father. The child thus became habitually resident in Ireland. The mother subsequently married her partner and had two children. The father at all times resided in England with his wife and children
* The mother's position was that access under the English court order had worked reasonably well. In early 2017, she informed the father that her husband would be working in the US for 6-8 weeks in August 2017 and she proposed to move the family to the US for that period of time. The father exercised his summer access in 2017 in accordance with the 2013 English order. Thereafter, the mother travelled to the US with the child in August 2017. Shortly after they arrived, an enhanced work opportunity arose for her husband and the family made a decision to permanently move to the US. In September 2017, she informed the father that she wished to remain in the US with the child and she requested that they modify access arrangements having regard to the US school calendar. The father did not agree to the permanent relocation of the child and insisted that the mother and child reside in Ireland for the purpose of facilitating the exercise of his rights pursuant to the English order. He disputed the mother's version of events. He questioned her bona fides, summarising that it was more likely that she had formed an intention to relocate before August 2017
* The father argued that the High Court order granting the relocation and determining his access should have mirrored the access provisions contained in the English court order, made in 2013.
* The Court of Appeal considered the law in relation to relocation applications. It stated that the approach of the court is governed by the provisions of the Constitution, the Guardianship of Infants Act 1964 (as amended) and the jurisprudence governing the best interests of the minor. In this case, the court stated that it was of relevance that the proposed relocation was to a non-EU State. Significant distance can impact on the frequency and modalities of contact and generally can be a relevant factor in judicial consideration of the minor's best interests. The court stated that in relocation cases, there are a variety of competing interests engaged including: the best interests of the child in question; the rights and interests of the parent who proposes to relocate, including their circumstances vis-à-vis any spouse, partner or family; and the rights and interests of the left-behind parent and his or her spouse, partner or family. Such an application frequently, if not invariably, brings into stark relief the conflicting aims and objectives of the parent who proposes to relocate and who is usually the primary carer of the child with the rights of the left-behind parent to maintain a relationship with the minor.
* The Court of Appeal made it clear that in any application to relocate a child, having regard to the constitutional mandate and the clear provisions of the relevant legislation, including the Children and Family Relationships Act 2015 and the Guardianship of Infants Act 1964 (as amended), there is no presumption in favour of or against either the applicant parent or the remaining parent. It is purely an exercise in welfare assessment. Pursuant to art.42A, the best interests of the child are the paramount consideration of the court in relocation applications
* In such proceedings, the court determining the relocation pursuant to the 1964 Act is unfettered by any order, direction or step taken in the context of the prior Hague proceedings and its functions are wholly distinct from those of a judge dealing with Hague Convention applications.
* The Court of Appeal considered s.31 of the 1964 Act and the factors and circumstances enumerated therein which the court must have regard to in any applications under this Act. It stated that the objective of the 1964 Act is to direct the focus of enquiry away from blame or fault-finding and only consider the conduct of either parent to the extent that same is relevant to the child's best interests pursuant to s.31(4). Thus, it held that it was not open to the trial judge in this case to engage with the speculation advanced by the father that the mother's actions were premeditated. There was no evidence adduced that any conduct on the part of the mother was adverse to the child's welfare and accordingly the trial judge correctly disregarded such allegations.
* The court determined that the constitutional mandate to hear the child's views was met in the section 32 report prepared by the expert following two interviews with the child.
* The court noted that parents in relocation proceedings may invoke rights, for instance freedom of movement in relation to the relocating parent, and article 8 rights to family relations for the remaining parent. The paramount consideration, however, is the best interests of the child. In this case, the court held that the High Court correctly applied the relevant legal principles to the facts and made its decision based on the best interests of the child. When evaluating access, the court noted that it should be borne in mind that access is also the right of the child and accordingly contact arrangements in relocation cases should be structured to preserve and vindicate the child's relationship with the non-relocating parent, so as to minimise disruption to same and ensure that relationship is maintained.
* The Court of Appeal found that the father had made no basis for a claim for custody of the child and did not meaningfully pursue same at the hearing. It found that there was nothing to suggest that the High Court had made its determination on the relocation application otherwise than in accordance with the paramount consideration that it was in the child's best interests. The trial judge paid due attention to the difficulties in relation to access arising from the relocation, had regard to the contents of the expert report and granted more access than the clinical psychologist had recommended—taking into account issues such as costs and travel restrictions. The court held that it would be inappropriate for it to vary any such access orders as provided in the High Court order. Similarly, the court held that the High Court was correct to make no order pursuant to s.34 of the Enforcement of Custody Orders Act 1991. Given that the within proceedings were brought pursuant to the 1964 Act, the trial judge was correct in considering the best interests of the child as the paramount consideration. The father's complaint that the trial judge did not have regard to the provisions of the Hague Convention was thus erroneous. The Court of Appeal therefore dismissed the father's appeal on all grounds

**H.O.R. v M.R. [2016] IEHC 781**

**\*\*For clarity and ease of reference we have copied and pasted lengthy paragraphs of this important judgment to demonstrate how Abbott J interpreted the s31 factors**

* This judgment relates to an appeal by the respondent father of an order made in the Circuit Court on 18th April, 2016
* The husband and wife were lawfully married to one another on 6th October, 2007. Child O was born on 26th December, 2008, when the parties resided in the city. The applicant wife (after judicial separation) purchased a home in a town in the south west of the outer commuter belt of the city (hereinafter referred to as “D”). In her affidavit, she claimed that the husband did not object to this move, and at the initial stages, he cooperated with parent teacher meeting procedures in the school at D. The child O did, in fact, attend the school at D, but subsequently and as a result of applications in the Circuit Court, O attended a school in the city again, and the wife came to reside in the city sharing accommodation with some others there, but retaining her home in D
* The appealed order provides that the wife be permitted to relocate to D with the child O and such relocation should take place at the termination of the school year. The order makes further detailed provisions for access, Christmas holidays, public holidays and an order that each parent should make a telephone call to O on any day that he does not see him for the whole day. The thrust of the husband's case is that O should continue to attend his school in the city and that a relocation to D is not in his best interests, especially as access arrangements are cumbersome and the economics of the wife commuting from D to her work in the city is burdensome to the extent that the husband appellant suggested that if the current arrangements were to continue, he would contribute a certain sum to alleviate the cost of rent accrued by the wife for her secondary accommodation in the city so as to avoid a round trip of over 170 km for O midweek, when evening access was permitted by existing arrangements.
* The court is directed by s. 45 of the Children and Family Relationships Act, 2015, to decide the relocation of O to the school in D, having regard to his best interests. The court is further directed by statute in s. 63 of the Guardianship of Infants Act 1964, as substituted by s. 31 of the Children and Family Relationships Act, 2015, as to how the Court is to determine the best interests of the child. Section 31(2) of the Act of 2015 provides a guide to the factors and circumstances of s. 31(1) of the Act of 2015, which provides as follows
  + “In determining for the purpose of this Act what is in the best interests of the child, the court shall have regard to all of the factors or circumstances that it regards as relevant to the child concerned and his or her family.”
* I propose in this judgment to examine such factors set out in paras. (a) to (k) of s. 31 (2) of the Act of 2015, as follows:
* “(a) the benefit to the child of having a meaningful relationship with each of his or her parents and with the other relatives and persons who are involved in the child's upbringing and, except where such contact is not in the child's best interests, of having sufficient contact with them to maintain such relationships”
  + This is a very broad factor to be taken into consideration, and given that the legislation is new, and has not often been considered by the courts, it is important to set out the understanding of the court of the term “meaningful relationship”. It is not defined in the Act, and its interpretation on the plain meaning of words certainly means that the relationship should not be trivial, but earnest and sincere throughout the range of positive description of that term, up to the optimum range. In seeking to interpret the “meaningful relationship” in this way a great degree of circularity creeps into the process. On the interpretation as it is applied in the context of s. 31 (2) of the Children and Family Relationship Act, 2015 and the general circumstances with young children, it is clear that the circularity definition or interpretation may be extended further by the realisation that in some families (which are on the cusp of a breakdown of relationship), *the courts should continue to strive for the barest minimum relationship by contact through letter, phone or some other basic route, so that the potential for improvement of contact is preserved, and that total loss of contact, with all the disastrous psychological consequences, is avoided*. Having regard to the decision making process to which s. 31(2) of the Act of 2015 invites the court, I am of the view that a *functional interpretation of “meaningful relationship*” should be taken to further define the literal (and possibly circular) interpretation, by taking it to involve the process of optimisation of relationships within the parameters of the factors and circumstances to which the court should have regard pursuant to s. 31(2) of the Act of 2015. In many cases, this process may involve an attempt by the court to salvage the relationship for the child with one of his parents, where the child has become alienated. In this case, by any definition, there is a meaningful relationship between O and each of his parents. Both of his parents love him dearly notwithstanding the unresolved differences between them. The function of the court in this appeal is therefore to *optimise this meaningful relationship and the making of an order that ensures to the greatest extent the endurance of such a relationship for the chid O, continuing into adulthood*. Clearly all the evidence from the parties and expert evidence attests to the benefit pursuant to s. 31(2)(a) of this relationship.
* “(b) the views of the child concerned that are ascertainable (whether in accordance with section 32 or otherwise”
  + O has spoken to Prof. Sheehan and has expressed a preference for going to school in D, with O citing the fact that he would like to be close to his maternal grandmother in so doing, *but also more importantly that overall he would like to be “in peace*”. This means that his view is that he would like to be in school in D but also would dearly and strongly wish to see the end of the multiple court applications and disputes, not to mention the relentless change of school he has experienced over the course of his short life. While the husband appellant argues in this case and also with Prof. Sheehan that the views expressed by D were for the purpose of pleasing mother *I am satisfied that Prof. Sheehan thought that for a child over seven years, he had sufficient awareness, maturity and understanding, to express a view, and that his wish was he wanted to be in peace should be given considerable weight, in the context of ascertaining the objectivity of his wish to attend school in D.*
* “(c) the physical, psychological and emotional needs of the child concerned, taking into consideration the child's age and stage of development and the likely effect on him or her of any change of circumstances”
  + These needs are to be supplied by two dedicated parents working under the strain of employment and long journeys involving access. However, this situation (on the basis of Prof. Sheehan's report) could be seriously challenged by a continuation of disputes between the parties leading to court applications and a possible tendency on the part of the husband appellant, in the words of Prof. Sheehan, to “catastrophise the outcome”.
* “(d) the history of the child's upbringing and care, including the nature of the relationship between the child and each of his or her parents and the other relatives and persons referred to in paragraph (a), and the desirability of preserving and strengthening such relationships”
  + The child O has had quite a normal upbringing with respect to contact with relatives on both sides of his family, which has been *significantly upset by the disruption of marital disharmony and court applications.* Notwithstanding all this he survives. He has contact and relationships with his maternal grandmother and paternal grandparents. *One of the complaints of the husband appellant is that access arrangements from D leave it impossible to have worthwhile contact at the weekend by travelling from D to a far flung end of a provincial country, and that the paternal grandparents are not good travellers so as to allow them to travel to D to make up for this deficiency*. However, while the paternal grandparents are part of the child O's social capital, I am not satisfied that this should be defined, in the words of s. 31 (2)(a) of the Act of 2015 above, *as persons “who are involved in the child's upbringing”.* I take the same view in relation to various uncles and aunts and cousins who are part of the social capital of child O., and may have a more intense involvement during emergencies in the event of mother being away and when assistance may be required with school, but the activities of such persons are random and casual and *should not be taken as such to the formal status of “other relatives”* envisaged in s. 31(2)(a) of the Act of 2015 above.
* “(e) the child's religious, spiritual, cultural and linguistic upbringing and needs”
  + No change envisaged here
* “(f) the child's social, intellectual and educational upbringing and needs”
  + No change envisaged here, except that father has complained that *O will lose contact with his playmates in the city.* As a very sporting child, he will lose contact with those who he may ultimately play on a team of soccer or Gaelic, or both, in the city. This concern can be met by the father taking part in similar activities in D and becoming involved in whatever club or association invites facilities for young children in D. *Indeed, it should be a comfort for him that the wife (applicant) has informed the court that on the occasions where he may not have formal access arrangements he may bring child O to his practices and participate as a mentor whether by being involved in the club/association or otherwise*
* “(g) the child's age and any special characteristics”
  + The child has no special characteristics. As a child under eight, he still needs certainty described in his own words as “peace”, and the conclusion of these proceedings by affirmation of the order made in the Circuit Court allowing relocation to D is highly desirable at his age
* “(h) any harm which the child has suffered or is at risk of suffering including harm as a result of household violence, and the protection of the child's safety and psychological wellbeing.”
  + There was no household violence in this case, but there was a lot of argument and at one stage a protection order was obtained against the appellant husband which was resolved at return stage by an undertaking not to interfere with the wife's occupation of the new home at D. From the wishes of the child and the parallel reporting of Prof. Sheehan, *I am satisfied that there must be an end to litigation now: otherwise the psychological wellbeing of the child may be affected*. Even if the child could look forward to having the normal periods of access envisioned under the order together with the odd spontaneous appearance of the father at his sports training sessions or games outside of the formal access arrangements, then I can see the child progressing and his psychological wellbeing assured. I mentioned this aspect because Prof. Sheehan has warned against the appellant husband “catastrophizing” the relocation, by his observance of the appellant husband indicating some tendencies in this regard. I note too, Prof. Sheehan's account of the appellant husband interviewing the child in relation to his responses to Prof. Sheehan's questions. This type of interference with the child is entirely unfair, and places him in a position where he feels bound to adjudicate between the parents or is to blame for the continued differences and acrimony between them. A further adverse effect of this activity by the husband appellant is that when the child is interfered with in this way regarding his accounts to the investigating psychologist, he may be very reluctant to cooperate again with a psychological inquiry and will prefer to remain silent, thereby depriving the court of very valuable evidence in the event of any further inquires being made on behalf of the court. This type of interference is akin to the offence of contempt in the face of the court by interference with witnesses
* “(i) where applicable, proposals made for the child's custody, care, development and upbringing and for access to and contact with the child, having regard to the desirability of the parents or guardians of the child agreeing such proposals and cooperating with each other in relation to them.”
  + The appellant husband made proposals to the court that the applicant wife would let her house to a tenant and take an apartment in the city thereby facilitating a less fraught system of access that involves considerably less travel and expense with consequent strain on the child O. *If such a proposal were feasible in terms of the combined budget of the parties, then on balance I would favour such an arrangement, however I cannot see the applicant wife agreeing to such a proposal or the court imposing it as an order, as the wife convinced me in her evidence that if the house were let there would (as likely as not) be a tax wedge, and that in any event it might be difficult to let the house*. In addition she stated that she would use the backup of extended family and friends in D to cater for the child's school needs when she was absent due to work. *I do consider that the move or relocation by the applicant wife to D in the first instance was one that in all likelihood would not have been approved by the court as it would have been viewed at that stage as not being in the interest of the child O or father insofar as it placed the obvious strain on access arrangements and cut off options that would be preserved for the child if both parents were remaining in the city close to their employment. However, the respondent husband did not object or seek a court order in relation to the proposed relocation when the applicant wife first proposed to purchase the house in the vicinity of D. The ownership of the house in D is now a major constraint in the case and for the husband to be making his proposals now is very much closing the door after the horse has gone.*
* “(j) the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent and to maintain and foster relationships between the child and his or her relatives”
  + It should be noted that the term “continuing relationship” is used here and relatives are mentioned simpliciter, not relatives “who are involved in the child's upbringing” as envisaged by s. 31(2)(a) of the Children and Family Relationship Act, 2015. *The difference in wording is to be presumed as not accidental.*
  + *The lack of willingness and ability on the part of one parent to facilitate and encourage the relationship envisaged by para. (j) could pose a risk to that parent of having custody transferred away from them to the other parent, or access arrangements severely curtailed. Each of the parties in this case score well under this paragraph, and both seem to avoid denigrating the other parent or the relatives*.
* “(k) the capacity of each person in respect of whom an application is made under the act-
* (i) to care for and meet the needs of the children
* (ii) to communicate and cooperate on issues relating to the child and
* (iii) to exercise the relevant powers, responsibilities and entitlement to which the application relates.
  + Both parents meet these criteria, subject to my comments above in relation to the appellant husband failing to put the child's interest first by seeking to interview him in relation to his talks with Prof. Sheehan, and also a slight tendency towards “catastrophizing” any outcome in relation to custody and access
  + Issues on para. (k)(iii) of the Act of 2015 arising from any alleged household violence do not arise in this case. Lest it is not clear in the foregoing, *it should be stated that a major factor in reaching the courts conclusion is the fact that an applicant wife already has purchased a house in the vicinity of D and for a time allowed the child O*. *to attend school there*. It was not desirable that she would have preempted the decision making power of the court and the appellant husband in that way. However it is a new constraint now which influences the event.
* Having regard to the foregoing I affirm the order of the Circuit Court and await submissions of Counsel in relation to the costs arising

**Relocation: Best Interests in the Shadow of Presumptions and Judicial Guidance, Kieran Walsh**

* Over the last decade, relocation has become one of the most litigated and researched areas of family law in the common law world. This article has a simple, and limited aim—to commence a conversation about how Irish courts ought to approach relocation disputes in light of recent constitutional and legislative developments, while drawing on the experience of jurisdictions with broadly similar legal frameworks. To this end, it will look at the development of relocation principles in the English courts, and then at the relocation judgments handed down by the Irish courts, decisions which have often relied heavily on English case law. It will then attempt to fill a gap in the current Irish literature by examining current trends in relocation law internationally, both in terms of judicial approaches to the problem and, crucially, the debates about exactly how courts should approach the application of the best interests principle in a way that addresses the peculiarities of a relocation dispute
* What emerges from the literature and case law is that a pure best interests approach based on legislative statements of broad factors to be considered is insufficient in relocation disputes. A form of structured guidance, including an indication of relative weighting of these factors, which falls short of the use of strong presumptions is best suited to handling this particular kind of case. It will conclude that the Irish courts need to find a way of providing guidance as to how to implement s.31 of the Guardianship of Infants Act 1964. Simply considering various factual circumstances found in a case against statutory criteria would run contrary to the emerging international preference for weighting guidelines, and may lead to courts failing to fulfil the overarching constitutional duty to ensure that the best interests of the child really are the paramount consideration
* Exploration of case law in England and Wales
* **EM v AM High Court, 16 June, 1992**.
  + The father was the child's sole custodian, and the mother sought to relocate with the child to the US to be near her family. Flood J outlined that the welfare of the child had to be the first and paramount consideration, and then went on to state that “the task of the Court is to decide … which of the two [parents], in all the prevailing circumstances, is the more appropriate to have custody by virtue of the fact that joint custody has proved unworkable”. 30As a result, he regarded the relocation application as a trigger for a more far-reaching assessment of how to promote the child's welfare. In undertaking this exercise, regard had to be had to six factors:
  + “(1) Which of the two [hypothetical outcomes] will provide the greater stability of lifestyle for [the child];
  + (2) The contribution to such stability that will be provided by the environment in which [the child] will reside, with particular regard to the influence of his extended family;
  + (3) The professional advice tendered [by an expert witness];
  + (4) The capacity for, and frequency of, access by the non-custodial parent;
  + (5) The past record of each parent, in their relationship with [the child] insofar as it impinges on the welfare of [the child];
  + (6) The respect, in terms of the future, of the parties, to orders and directions of this Court”.
  + The decision in EM is rather unusual, in that it was the noncustodial parent who sought to relocate with the child. The non-custodial parent was allowed to relocate with the child, which led a later court to state that EM in no way creates any form of presumption in favour of the custodial parent.
* **KB v LO'R [2009] IEHC 247.**
  + Murphy J made the rather curious statement that “the welfare of the children and of their mother, who have constituted a unit since 2003 is of paramount importance”.
* **UV v VU [2011] IEHC 519,**
  + A more comprehensive restatement of the Irish position on relocation was undertaken in UV v VU
  + McMenamin J expressly disavowed the notion that presumptions played any role in English relocation law, while acknowledging that there had been some inclination towards such a position. MacMenamin J did cite Butler-Sloss P's judgment in Payne with approval, and then proceeded to place some *significant weight on “the protection of [the child's] rights to access or contact with each parent, where practicable, and appropriate, having regard to their welfare*”. This was indeed seen as necessary under the EU Charter of Fundamental Rights, which “must be read in such a manner so as to respect the obligation to take into consideration the child's best interest, and the fundamental right of the child to ‘maintain on a regular basis personal relationships and direct contact with both of his or her parents, stated in Article 24(3)'“. MacMenamin J highlighted that the *rights established by the Constitution must be used as the guiding principles in relocation disputes*. He restated that Art.40.3 contains the right of the child to have decisions in relation to guardianship and custody taken in the interests of his or her welfare, and that under Art.42, any action by the State to further a child's welfare must also have due regard for the natural and imprescriptible rights of the child, including the right to be educated by the family and to be provided by its parents with religious, moral, intellectual, physical and social education. With specific reference to the relevance of the Constitution to relocation disputes, MacMenamin J held that *“the issue is the identification of the balance of rights between the individual parents who are in contention, and the rights of the children. In such a situation the rights of the children are, as a matter of constitutional law, to be the paramount consideration*”. Relating this constitutional principle to the discussion surrounding Payne, he stated that “*very great weight should be attached to the views of the custodial parent, but there can be no actual presumption that the views of that parent should hold sway with a court. The children's welfare is paramount. A fortiori, this observation applies in circumstances where (as here) the parents have joint custody. This is very far from determining that the children's welfare is the only consideration. However, the rights of all parties must be weighed in accordance with the fact that the welfare principle is the overarching one. But a presumption raises issues of equality. All citizens are entitled to equal status before the law*”. Later in the judgment, MacMenamin J considered a variety of factors, *including the stability of the current arrangements, the findings of expert evidence, the mother's motivation for relocation, the feasibility of her plans, the feasibility of maintaining a meaningful contact with the father, the relationship between the parents and the father's conduct to date, the children's views, and the potential impact of relocation, or its refusal, on each parent*. These factors were not listed as issues that had to be considered as a matter of law, but rather *as evidential issues going to the determination of where the children's welfare lay*. So far as legal principles can be extracted from the case, it eschews the idea that presumptions can play any part in the law, and while recognising that the views of the relocating parent should be attached some significant weight, *the determining factor will always be the child's welfare.* This would seem to indicate the *Irish approach has been to adopt an open-ended, best interests test with some significant weight attached to the maintenance of close relationships with both parents and to the views of the custodian parent, a position which could, in some cases, come close to contradiction*
  + The decision in UV was interpreted by Abbot J in **G v K [2013] IEHC 650** as meaning that “in the Irish context any presumptions or quasi presumptions in relation to movement were not consistent in many cases with the best interests of the child, or with the specific dictates of the Guardianship of Infants 1964, as amended, and the Irish Constitution in relation to the paramountcy of the interests of the child”. Presumptions, therefore, were not seen as unconstitutional per se, but inconsistent with the underlying constitutional and statutory principles steering the courts towards a more open-ended approach to welfare.
* A further attempt at providing a list of “important balancing factors” was undertaken in **SP v JE [2013] IEHC 634.**
  + White J considered a relocation application where the mother sought to relocate to England permanently, having moved between England and Ireland over several years. He quoted extensively from the UV decision, before going on to summarise what he regarded as the “important balancing factors”:
  + “(i) The present welfare of the child;
  + (ii) The possible disruption to the child if relocation is not granted and the impact on his welfare;
  + (iii) The impact on the access rights of the respondent if relocation is granted; and
  + (iv) [Whether] contact be maintained with the non custodial parent if relocation is granted?”.
  + Reviewing the evidence, he highlighted the presence of the mother's extended family in England, the tenuous nature of her housing and employment prospects in Ireland, and the feasibility of access arrangements to be relevant indicators of these four criteria. As a result, the relocation was permitted, with significant access arranged which was to take place in each jurisdiction. This places no emphasis whatever on the child's views, the feasibility of the proposed move, or the reason for the proposed relocation, all of which were considered to be important evidential matters in UV.
* One point of crucial significance emerged from the decision of **RL v Judge Heneghan [2015] IECA 120.**
  + In the older case of EM v AM, Flood J used the relocation application as an opportunity to revisit the primary question of custody. However, in RL it was held that in relocation applications, the courts are not empowered to undertake a wide-ranging review of the child's situation which may lead to the making of orders transferring custody from one parent to another, if that is outside the scope of the proceedings. At the conclusion of the Circuit Court appeal proceedings in which a custodial mother was seeking to relocate, Judge Heneghan refused the mother's application and also made the father the child's primary carer, overturning the pre-existing relationship.
  + The Court of Appeal was clear that, even though s.11 of the 1964 Act is widely drafted, the Circuit Court was exercising its appellate jurisdiction, and the powers of the court are limited by the nature of the initial application. In the present case, the father had not sought custody of the child; as such a custody application was not before the Court, and so the order granting him custody was quashed. This clarifies that s.11 does not grant a free-standing jurisdiction to undertake a full welfare review. A non-custodial parent may continue, as in EM, to apply for relocation, but the section does not allow the court to grant orders not sought in the pleadings under its own motion.
* Goes through facts of **HOR v MOR** (Abbott J judgement)
  + The judgment does contain some highly concerning statements relating to relocation law however. The mother was seeking permission to relocate to her own home where she had previously lived with the child with the knowledge and cooperation of the father. Nonetheless, Abbott J saw her initial move as an undesirable pre-emption of the decision-making power of the court.53This is a very problematic statement. No proceedings were in existence at the time of the initial move, and it is not evident from the judgment that there was an indication that proceedings were likely; this was not a unilateral or surreptitious move designed to interfere with the relationship between father and child, but one that the child's primary carer firmly believed to be in the child's interest and which was carried out in conjunction with the father. To characterise a consensual relocation in such negative terms can only have a chilling effect on such moves which may be in a child's interests. Abbot J further characterised the purchase of the property as a constraining factor on his application of s.31 criteria, which indicates that what happens prior to an application being brought may be regarded as a fait accompli. This would be especially concerning if the action in question were one which was manifestly adverse to the child's interests.
  + An even more troubling view is the one expressed by Abbott J that if the mother had sought a court order to approve her initial relocation, it “in all likelihood would not have been approved by the court as it would have been viewed at that stage as not being in the interest of the child O or father insofar as it placed the obvious strain on access arrangements and cut off options that would be preserved for the child if both parents were remaining in the city close to their employment”.54
  + This is an extremely concerning statement. Nowhere does the Constitution or the legislation permit the court to consider the best interests of a parent in any proceedings relating to children. It is the child's best interests alone which can determine the outcome of such proceedings. Even taking this statement to mean that a relocation application would have been premature, it must be asked at what point an application would be appropriate. Many relocations take place shortly after parental separation,55and there seems to be no clear basis for determining that an application has been made too soon. Implicitly, it seems from Abbott J's statement that the best interests test demands that options be kept open or be given a chance to work before relocation becomes an option. Yet all options regarding access and other matters can be considered in the context of a relocation action. Following the approach of the English Court of Appeal in Re F, a holistic assessment of all the options can be entered into when a relocation is sought 56; there is no need to “wait and see”. It reads almost as if there is a presumption against early relocation.
  + Clearly, s.31 is going to place new demands on courts and will impact on the way in which relocation applications are approached. No case law was cited in the HOR judgment, so it can be assumed the Abbott J's decision sought to resolve a very particular problem. However, relocation cases will continue to present difficulties for courts, parents, and children.
* The presence of a new constitutional and legislative framework, coupled with international experience of the problems relocation presents, demand that a workable solution is found for the Irish courts. Present guidance is inadequate—much of the Irish case law predates the current legislation, and the post-2015 case law shows a troubling inclination to accommodate irrelevant factors. What does seem clear is that the constitutional position both under Arts 40.3 and 42A.4 is that the welfare of the child must remain the paramount consideration.

This case supports the argument that the father’s decision to move 251 kilometres away from the child’s mother (Cork – Mayo) will place an obvious and detrimental strain on access arrangements.