Case No: FD04P01713

Neutral Citation Number: [2005] EWHC 1811 (Fam)
IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/08/2005

Before :

THE HONOURABLE MR JUSTICE SINGER

- -

Between :

W	**Plaintiff**
- and -	
W	**Defendant**

- -
- -

Miss Judith Parker QC and Mr Deepak Nagpal (instructed by **Lyons Davidson**) for the **Plaintiff mother**
Mr Mark Everall QC and Mr Frank Feehan (instructed by **Charles Russell LLP**) for the **Defendant father**
Mr Michael Nicholls instructed as Advocate to the Court by CAFCASS Legal

Hearing dates: 22 September, 18 & 19 October 2004 and 4 to 6 May 2005

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE SINGER

This judgment is being handed down in private on 5 August 2005. It consists of 118 paragraphs and has been signed and dated by the judge. The judge hereby gives leave for it to be reported as **W v W (Foreign Custody Order: Enforcement)**.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

Mr Justice Singer :

1. This complex litigation relates to the future home, whether they live in England with their father (F) or in Ireland with their mother (M), of the three children of their family, SW a girl now aged 12, MW a boy now 10, and RW a girl now almost 9.

2. The primary application is made by M to enforce an order made on 2 April 2004 (the April 2004 order) at the conclusion of a six-day appeal by way of a full rehearing before Mr Justice McKechnie in the High Court in Dublin. The thrust of that order relevant for present purposes was that whereas the children should remain in the joint custody of both parents their primary day-to-day care and control was to pass to M in time for them to start the next school year commencing September 2004 in Ireland. The order also contained provision for contact both direct, by telephone and by email.

3. On 30 July 2004 Mr Justice Abbott, at a hearing in Dublin in which F did not participate, declared him to be in breach of the April 2004 order and ordered him to bring the children to Ireland for a hearing on 5 August 2004. On that day the same judge declared F to be in continuing breach and ordered him to return the children to M forthwith.

4. F did not comply with any of those orders. F, who had acted in person in the Irish litigation, at least from the time of the hearing before McKechnie J, in due course discovered that no appeal lay from the April 2004 order. So far as I know he has not made any attempt to apply to the Irish Court to vary that order.

5. The children remained living in England with F. The pattern of contact with M which had operated until that time was disrupted. F maintains that, although he was obviously dissatisfied with the April 2004 order, its non-implementation accords with the opposition of the children to the change in primary carer and of home which the order prescribed and that with the passage of time and in light of changes in the circumstances if it ever was in the children's interests the order is now so positively contrary to their welfare and wishes that this court should not enforce it.

6. He therefore strenuously opposes the application which on 22 August 2004 M launched by Originating Summons, entitled 'in the matter of the Child Abduction and Custody Act 1985 (CACA) and the Supreme Court Act 1981', whereby (in its original form) she asked the English High Court to recognise, register and enforce the Dublin orders. The Originating Summons refers specifically as a basis of relief to the *Council of Europe Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children 1980* (the European Convention), but also to this Court's inherent jurisdiction and to the powers available under the Children Act 1989.

7. In response to that F on 2 September 2004 issued Children Act proceedings for a specific issue order 'to consider where the children should continue their education'. He sought a direction for a CAFCASS report to be prepared on the

proposed return of the children, with particular regard to their ascertainable wishes and feelings. I made that direction, and also invited CAFCASS Legal to instruct an Advocate to the Court in light of the complexity of the legal issues which only then began to unfold, when the proceedings came before me for the first time for what was intended to be final disposal on 22 September 2004, with a 2 hour time estimate.

8. Some cases become simpler as issues narrow over time, but these applications have expanded beyond ordinary contemplation. On 18 October 2004 I received written submissions from Mr Nicholls who was instructed as Advocate to the Court by CAFCASS Legal. Although he made no oral submissions and did not participate further in the case I am grateful for his assistance. So I heard two days of argument, and evidence from the CAFCASS officer Mr John Mellor. The order I then made established a framework to enable contact to resume with M in Ireland on the basis that at its conclusion the children would return to England. The parties also agreed that the child psychiatrist Dr Hamish Cameron should be jointly instructed by them to see them and the children and to advise and assist on the issues arising in these proceedings.

9. I adjourned the applications to 4 May 2005. Over 3 days I then heard evidence from Dr Cameron, and via video link from 2 members of the Irish Bar as to aspects of law and procedure within the Republic. Counsel's submissions were not concluded by the expiry of the time available for the hearing, and in particular F's submissions had not commenced. It then proved impossible to find a date before the end of July when the court and the advocates were available for submissions to conclude. Accordingly I asked for those submissions to be made in writing and on 9 and 19 July respectively received substantial documents from Mr Mark Everall QC (who with Mr Frank Feehan represents F) and, in reply from Miss Judith Parker QC and Mr Deepak Nagpal for M.

10. The main bones of technical contention, and those which have given rise to such lengthy debate, relate to the applicable enforcement procedure. M's initial position was that the European Convention governed the situation, and thus that enforcement (within which I subsume the accompanying registration and recognition for which it provides) should take effect pursuant to CACA, by which statute the Convention's provisions are incorporated into English law. F maintains that the European Convention does not apply in the circumstances of this case, but that if it does enforcement should be refused by applying what I will term the 'escape provisions' of arts 9 and 10(1)(a) and (b).

11. M's primary position if the European Convention was inapplicable was that the April 2004 order falls to be enforced under what is referred to as the Brussels II Regulation (BII): *Council Regulation (EC) No 1347/2000 of 29 May 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses*. F contended that that too does not apply. Between the October 2004 and May 2005 hearings, however, BII was repealed by what is commonly known as Brussels II Revised and to which I will refer as BIIR: *Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning*

Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 which as from 1 March 2005 replaces BII and has an extended scope in matters relating to parental responsibility (as therein defined). Clearly the provisions of the Irish orders do relate to parental responsibility. Whether either Regulation applied or applies in this case depends on a number of other factors, including the interpretation to be given to their respective transitional provisions and involving issues of Irish law and procedure. F argues that for a number of reasons the Brussels Regulations are not apt, but that if they are then again he seeks to avert enforcement by relying on the 'escape provisions' common to both Regulations (BII art 15(2); BIIR art 22(a)).

12. If M is unable to rely on any of these codes, then she asks that the court should exercise its inherent jurisdiction to enforce compliance with the April 2004 order, thus recognising Ireland as the more convenient forum for the resolution of disputes concerning these children, and affording comity to its decisions. As is clear from the recent House of Lords decision in **Re J (a child)(return to foreign jurisdiction: convention rights)** [2005] UKHL 40, [2005] 2 FCR 381, HL welfare considerations have their place when a court exercises its jurisdiction to order children's return or removal to another jurisdiction, whether upon a summary basis or after investigation.

13. F maintains that the appropriate conclusion at which I should arrive is that neither the European Convention nor the Brussels Regulations codes apply, that the inherent jurisdiction should not be used to effect the children's removal to Ireland, and that a full welfare-based investigation should now be undertaken by the English courts which should conclude that the children should remain with him and at their present schools.

14. The foregoing summary merely scratches the surface, and describes but a few layers of the successive skins of the onion to whose core I must attempt safely to penetrate. Attached to this judgment is a flow-chart very helpfully prepared by Mr Nagpal at my suggestion which graphically shows the complexity of the waters I must navigate. It is, to say the least, ironic that so much intellectual dexterity must be applied to decide whether the April 2004 order should be enforced when (a) the purpose of the European Convention includes as one of its objectives (which are not reproduced in Schedule II to CACA) 'the making of arrangements to ensure that decisions concerning the custody of a child can be more widely recognised and enforced [to] provide greater protection of the welfare of children'; and (b) an objective of both BII and BIIR was to facilitate in European Community Member States and to render more prompt and effective the enforcement of judgments relating to a range of decisions concerning children.

15. It is therefore possible that neither code applies, or that if I select one rather than the other that I arrive at the wrong destination. However I regard the answer to the question 'enforce or not' as so much more important to these parents and to their children that I propose first to address what the outcome on that issue should be if either the Regulations or the European Convention do apply. I will then consider what may be thought to be the more arid question of which code applies, which largely depends on the construction of

what as time passes will become the decreasingly frequent relevance of the transitional provisions in the Regulations. Finally I will consider the inherent jurisdiction, but briefly. First however it will be helpful to chart the family history and the course of the Irish proceedings.

The History of the Marriage and the Irish proceedings

16. F is now 43 and M 42. He was born in Wales, and she is Irish. They married in Dublin in May 1992 and their children were born between March 1993 and September 1996. The family lived successively in Dublin, England, Germany and Japan. It was in Tokyo in about February 1998 that they agreed to separate and in July or August of that year M went to Ireland, by agreement taking the children with her. F thereupon came to live in England. M faced financial and housing difficulties. In the autumn of 2001 she became unwell, suffering from what was initially thought to be depression but was ultimately diagnosed as bipolar disorder. This adversely affected her ability to cope with the children. In mid-December 2001 she was hospitalised for 5 weeks but was shortly thereafter readmitted for 2 months until the end of March 2002. Her condition was ultimately stabilised with appropriate medication.

17. The evidence before the Dublin High Court in the spring of 2004 led McKechnie J to conclude that M's health had been stable for a considerable period, without manifesting clinical evidence of mood disturbance, but that she remained at unquantifiable risk of relapse. There has been none since. Her consultant psychiatrist's opinion was that her condition should not disqualify her from being the children's carer. By the time of the spring 2004 hearings she was holding down a responsible job and taking steps to construct a house as her home. She currently remains in employment, and her house is said to be nearing completion.

18. It was during the period of her first hospitalisation in December 2001 that F perforce assumed care of the children. M was not in a position to oppose this nor to formulate alternative proposals, having regard to her state of heath. F brought the children to live at his flat in London and since then has lived with them in rented accommodation at various addresses.

19. So far as their current and proposed schooling is concerned, at the time of the hearings which led to the April 2004 Order the two younger children attended a primary school called FS. RW is still there, but MW has achieved the significant success of winning a 90% scholarship to a prestigious boarding prep school. His parents have agreed that he will go to that school come what may as the outcome of these proceedings, so that the schooling issues so pressing for the girls scarcely impact on him. As for SW, at the time of the Dublin judgment it was known that she had secured entrance to a well-regarded local school, to which she went last September. There is a complex issue as to the extent to which M in fact encouraged her to attempt entry to that school, and certainly it appears that SW regards her as having done so which is a reason why she is upset that M pursues these enforcement proceedings, but I am not in a position to nor do I think it to be appropriate to venture conclusions on this and other tangled factual issues in the case.

20. Meanwhile, on 20 May 1999 M had issued a Family Law Civil Bill (FLCB) in the Dublin Circuit Family Court, the appropriate process and venue for an application for a decree of judicial separation pursuant to the (Irish) Judicial Separation and Family Law Reform Act 1989 as amended by the Family Law Act 1995. Under section 31(4) of the 1989 Act that court's jurisdiction:

> 'shall only be exercisable where either of the spouses is domiciled in the State on the date of the application commencing proceedings or is ordinarily resident in the State throughout the period of one year ending on that date.'

21. M might well have pleaded, but did not, her own Irish domicile as the basis for jurisdiction. She asserted that she was ordinarily resident in Ireland but did not specify for how long that had been the case. But she had not in fact been living in Ireland for as long as the requisite year, as was indeed apparent on the face of the pleadings from paragraphs 6 and 8 of her own Indorsement of Claim.

22. F's first response was to issue a competing divorce Petition in the Principal Registry in London on 3 June 1999. Later that same month he filed an Appearance (but expressly under protest for the purposes of contesting jurisdiction) in the Dublin Circuit Court. M for her part filed an Acknowledgement of Service stating her intention to defend the English suit, and denying F's claim that he was domiciled in England and Wales at the date of presentation of the Petition. She followed this up with an Answer essentially to the same effect and seeking dismissal of the Petition or, failing that, a stay pending determination of the issues of jurisdiction and forum conveniens. The parties thus seemed set to embark upon an all too familiar war of competing jurisdiction attrition. These particular battle ranks were however disbanded when on 22 September 1999 DJ Segal stayed the proceedings by consent, upon the express basis (amongst others) however that that order was without prejudice 'to any argument that either party may hereafter advance as to jurisdiction and forum conveniens'.

23. The next relevant step in the Irish proceedings was that F filed a Defence and Counterclaim in March 2000. What is noticeable is that although by that pleading he denied that the Dublin court had jurisdiction by virtue of M's purported domicile (upon which she had not relied) he continued: '[F] accepts the jurisdiction of this Honourable Court is derived from [M] now having been ordinarily resident within the jurisdiction of this Honourable Court for a period in excess of one year.'

24. Moreover by paragraph 16 of the same pleading he expressly admitted that M was entitled to a decree of judicial separation and himself cross-prayed for just such a decree, as well as seeking the children's custody. That admission was upon the basis that M was entitled to rely on section 2(1)(f) of the 1989 Act which specifies as a ground for applying for a decree of judicial separation:

> 'that the marriage has broken down to the extent that the court is satisfied in all the circumstances that a normal marital relationship has not existed between the spouses for a period of at least one year immediately preceding the date of the application.'

25. The case did not come on for hearing as a contested suit before Her Honour Judge Delahunt until it commenced on 8 May 2002, and it culminated with an order made by her on 31 July 2002. She granted mutual decrees of Judicial Separation under section 2(1)(f) above, made a joint custody order with primary care and control to F (in England), and made provision for access. She also made financial orders.

26. On 8 August 2002 M filed a Notice of Appeal against those orders. At one of a number of interlocutory hearings McKechnie J in July 2003 specifically directed that the children were to remain at the English school specified in the Circuit Court's 31 July 2002 order notwithstanding which F changed the children's school, an action which McKechnie J characterised as demonstrating 'an absolute disregard for court orders'.

27. It is one of the greater oddities of the complex morass in which this application puts these hapless parents that one aspect of F's defence to these proceedings leads his representatives to contend that because of the admitted fact that the Dublin court lacked jurisdiction to entertain M's FLCB the entirety of the Irish proceedings from 1999 through to 2004 should be regarded by me as a nullity, and moreover so treated notwithstanding that the Irish court has never had that argument addressed to it for consideration. This argument is advanced in defence against M's attempt to enforce the custody and access orders rather than specifically in relation to the mutual decrees of judicial separation, but if correct as to the former must also render the decrees of no effect. Unfortunately I have nothing to inform me as to what extent if at all the jurisdictional defect was considered and perhaps addressed by the Irish judge, except an account gleaned by the Irish solicitor Ms Stephanie Coggans from those acting at the July 2002 hearing that their recollection is that the issue was not raised before the judge. This is a point to which I must revert.

28. McKechnie J heard the appeal by way of a re-hearing over six non-consecutive days culminating with his judgment delivered on 2 April 2004. He heard and saw 8 witnesses as well as the parties. Four of those witnesses were experts, of whom two were appointed by the court and one by each parent. He accepted some of the experts' conclusions and rejected others'. He was particularly critical of the appraisal and the fluctuating opinions of Dr Byrne, the consultant psychiatrist instructed by F.

29. I have already stated the judge's findings in relation to M's health and her capacity in the light of that to care for the children. Cardinal amongst his other findings were these:

- That the children's views are heavily influenced by the parent with whom they are staying at the particular time, and that he should therefore be cautious not to give them undue - much less conclusive - weight (transcript, p25).

- There was no real distinguishing element in factors such as housing, location or education which should compulsively swing him in one direction or another (p28).

- In relation to difficulties which M related in maintaining her contact with the children, her allegations that those were caused by F were by and large correct (p33). The judge described F as having been deliberately obstructive (p34).

- He based this conclusion on an assessment of the parents. He described F as aggressive and argumentative and manipulative (pp30/31). He concluded that M was impressive, calm though persistent (p32) and that her evidence in pivotal matters was in essence true.

- He found that M would permit and cooperate in access arrangements to F reasonably, were the children to live with her (p34).

- He accepted the evidence of the experts that the children needed to see M more than they were doing, and that their overall welfare and interests dictated that they should live with M in Ireland (p34).

- He gave liberty to apply in relation to the hand-over and access arrangements which he set out in detail, designed to enable the children to move to live in Ireland in time to start school there at the beginning of the 2004-05 academic year (p36).

If either of the Brussels Regulations applies should the order be enforced: the law

30. If BII applies to the Irish orders of April and 5 August 2004 in the circumstances of this case (the question I defer for consideration until later in this judgment) then the relevant provisions are the following articles of Chapter 3, prime amongst which is art 15(2):

> CHAPTER III
>
> RECOGNITION AND ENFORCEMENT
>
> Article 13
>
> Meaning of "judgment"
>
> 1. For the purposes of this Regulation, "judgment" means a divorce, legal separation or marriage annulment pronounced by a court of a Member State, as well as a judgment relating to the parental responsibility of the spouses given on the occasion of such matrimonial proceedings, whatever the judgment may be called, including a decree, order or decision.
>
> * * *
>
> Section 1
>
> Recognition
>
> Article 14
>
> Recognition of a judgment
>
> 1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.
>
> * * *
>
> 3. Any interested party may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgment be or not be recognised.

* * *

Article 15

Grounds of non-recognition

* * *

2. A judgment relating to the parental responsibility of the spouses given on the occasion of matrimonial proceedings as referred to in Article 13 shall not be recognised:

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;

(b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;

(c) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;

(d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;

(e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;

or

(f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

* * *

Article 17

Prohibition of review of jurisdiction of court of origin

The jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Article 15(1)(a) and (2)(a) may not be applied to the rules relating to jurisdiction set out in Articles 2 to 8.

* * *

Article 19

Non-review as to substance

Under no circumstances may a judgment be reviewed as to its substance.

* * *

Section 2

Enforcement

Article 21

Enforceable judgments

1. A judgment on the exercise of parental responsibility in respect of a child of both parties given in a Member State which is enforceable in that Member State and has been served shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.

2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

* * *

Article 24

Decision of the court

1. The court applied to shall give its decision without delay. The person against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

2. The application may be refused only for one of the reasons specified in Articles 15, 16 and 17.

3. Under no circumstances may a judgment be reviewed as to its substance.

* * *

Article 29

Partial enforcement

1. Where a judgment has been given in respect of several matters and enforcement cannot be authorised for all of them, the court shall authorise enforcement for one or more of them.

2. An applicant may request partial enforcement of a judgment.

* * *

Section 3

Common provisions

* * *

31. If however BIIR is the applicable Regulation then (subject to the issues as to that upon which I express my conclusions below) the substance of its Recognition and Enforcement Chapter III (arts 21 to 52) is identical for present purposes. The differences of wording are largely to reflect the expanded coverage of parental responsibility issues to cover all children rather than just those (who alone were regulated by BII, and included such as these) where the judgment relates to the parental responsibility of their married parents and is given on the occasion of matrimonial proceedings. Thus the grounds of non-recognition in art 15(2) of BII are mirrored by art 22 of BIIR (save for an additional ground not relevant for present purposes). The BII art 17 prohibition of review of the court of origin's jurisdiction is to be found at BIIR art 24; and the BII art 24(3) embargo on the review of the judgment as to its substance is reproduced at BIIR art 26. The test for non-recognition in the two Regulations is therefore identical.

32. The only provision relevant to this case is BII art 15(2)(a) [BIIR art 22(a)]: and the question is therefore whether recognition of the Irish orders is

manifestly contrary to English law taking into account the best interests of the child.

33. Mr Everall's final written submissions addressed this point thus, arguing that in any event, the Irish orders should not be recognised. He relied upon **Re S (Brussels II: Recognition: Best Interests of Child)(No 1)** [2004] 1 FLR 571, and particularly on paragraphs [24] and [32] - [33], suggesting that to return the children to Ireland would be so strongly against their welfare interests that to do so would be contrary to public policy. He referred also to the sequel to that case, **Re S (Brussels II: Recognition: Best Interests of Child)(No 2)** [2004] 1 FLR 582. He relied upon the report and the oral evidence of Dr Cameron for the proposition that here are strong and plain welfare grounds for not enforcing this order.

34. The reference to [33] of the **Re S (Brussels II: Recognition: Best Interests of Child)(No 1)** judgment comes to this: Mr Everall then as now contends that here I should find we have the situation Holman J envisaged as 'possible to contemplate', namely 'a situation in which an order of a foreign court is so strongly contrary to the welfare of the child concerned that it would be possible to conclude that its recognition was manifestly contrary to the public policy of our State.'

35. As to Mr Everall's reliance upon **Re S (Brussels II: Recognition: Best Interests of Child)(No 2)**, at that stage Holman J had moved from registration to enforcement issues, and had to decide to what extent he could temper the rapid progress of contact to substantial staying contact which the Belgian court had ordained in the case of a 3-year old who was to remain in the primary care of his mother. Here I have to deal with comparatively far more mature children for whom the necessity to live primarily in one parent's home in one country rather than with the other in another, and (in the case of the girls) to go to school accordingly, is rather too black and white to permit of 'phasing in' of the sort which he applied.

36. Miss Parker responded that 'welfare' is not a ground for non-enforcement. **Re S (Brussels II: Recognition: Best Interests of Child)(No 1)** does not say that it is. In that case it was submitted that a judgment based on a lie should not be enforced. This proposition was not adopted by Holman J. It has no factual relevance to our situation. Here the father, who knew the facts, had expressly submitted to the jurisdiction. There was no lie in the mother's pleadings. It was nowhere stated that she had been [ordinarily] resident for the requisite 12 months when she issued her FLCB and in the surrounding documentation she always stated when she had returned to Ireland from Japan.

37. In **Re S (No 1)** Mr Justice Holman did not state that the Belgian order should not be enforced under Article 15(2)(a). What he said (obiter) at [33] was that it is possible to contemplate a situation in which an order is so strongly contrary to the welfare of the child that it would be possible to conclude that its recognition was manifestly contrary to public policy. But he also reminded himself [at 32] that a judgment may not be reviewed as to its substance (Article 19) and that Article 15(2)(a) does not refer to recognition being contrary to the best interests of the child, but that recognition has to be contrary to public policy, taking into account the best interests of the child,

and that as an International Convention has to be applied purposively, and (citing **Krombach v Bamberski** [2001] 3 WLR 488, a decision of the European Court of Justice) that recourse to the public policy clause is only to be had in exceptional circumstances. In **Re S (No 2)** he said that there was an overwhelming duty to enforce a foreign order and that welfare was not paramount nor even a paramount consideration.

38. The proposition set out by Mr Everall in his argument that there are strong and plain welfare grounds for not enforcing the order (which in itself overstates the evidence in the case) applies the wrong test. There is no basis upon which recognition of this order, made after consideration of detailed evidence, on express welfare principles, and after a lengthy hearing, could possibly be considered to be contrary to public policy. On the contrary, its non-recognition would be contrary to public policy.

39. Thus submitted Miss Parker. The passage from the judgment of Holman J in **Re S (No 1)** certainly merits citation, to set this discussion in its context:

> **[32]** 'It seems to me that, in applying Art 15(2)(a), I have to give proper weight and effect to the language that is used. The Article does not refer simply to recognition being contrary to the best interests of the child. It refers, rather, to recognition being contrary to public policy, taking into account the best interests of the child. Merely to reconsider the best interests of the child would be to review the Belgian judgment (which is clearly welfare based) as to its substance, which is forbidden by Art 19. I have to take into account the best interests of M, but ultimately to consider whether recognition is manifestly contrary to English public policy. To say that something is contrary to public policy is a high hurdle, to which the Article adds the word 'manifestly'. This is an international convention and I must apply it purposively, giving appropriate weight to the word manifestly. Indeed, the judgment of the European Court in the case of **Krombach v Bamberski** [2001] 3 WLR 488, given on 28 March 2000, although given in a very different context, affords some guidance. At para [21] the court said in relation to a similar provision of a similar convention, although not employing the added qualification of 'manifestly':
> '… the court has held that this provision must be interpreted strictly inasmuch as it constitutes an obstacle to the attainment of one of the fundamental objectives of the Convention … With regard, more specifically, to recourse to the public policy clause … the court has made it clear that such recourse is to be had only in exceptional cases …'
> **[33]** I accept the submission of Mr Everall that it is possible to contemplate a situation in which an order of a foreign court is so strongly contrary to the welfare of the child concerned that it would be possible to conclude that its recognition was manifestly contrary to the public policy of our State. But, in my judgment, this order in relation to M falls far short of that. I have frankly said that in my view it is not an order which was in his best interests, but I am quite unable to conclude that it is so contrary to his best interests that it would be actually contrary, let alone manifestly contrary, to some English principle of public policy to enforce it. Accordingly, in my view, no defence or exception to recognition and registration of this judgment has been established and I am bound by the mandatory terms of Art 14(1) to recognise it.
> **[34]** I accordingly hold that the judgment is recognised in England and Wales, and, pursuant to r 7.44 of the Family Proceedings Rules 1991, I make an order giving the father permission to register the judgment under Art 21(2) of

> Brussels II. Armed with my order, the father will now be able to take the necessary administrative steps actually to register it.
> **[35]** Rule 7.44(2) provides:
> 'Every such order shall state the period within which an appeal may be made against the order for registration and shall contain a notification that the court will not enforce the judgment until after the expiration of that period.' However, that provision is not referring to an appeal from me to a higher court, but rather to the appeal that would be made to the court of first instance if the normal procedure had been followed of an application for registration being heard and determined without notice initially to the other party. The way in which the present case has developed has been such that that step has, in effect, been by-passed and the decision as to long-term recognition and registration is being made here today after full notice to, and argument on behalf of, the mother. Accordingly, it is not necessary for the order in the present case to identify a period pursuant to r 7.44(2).
> **[36]** As I have already made plain during the course of argument, it seems to me that Brussels II draws a clear distinction between recognition and registration on the one hand and enforcement on the other hand. I am conscious that Art 21(1) is in mandatory terms in that it provides that a judgment on the exercise of parental responsibility 'shall be enforced in another Member State', when it has been declared enforceable there; and that the process of registration amounts within the UK to declaring the judgment enforceable. Nevertheless, all issues of enforcement are for another day, and, provisionally, it seems to me that the English court, as the enforcing court, will have similar discretions as to the extent to which and terms upon which it enforces the order, as it would have when deciding how far to go in actual enforcement of an order of its own.'

40. It is to be noted that Holman J expressed reservations whether the Belgian order met the child's best interests, a point to which I shall return. Miss Parker furthermore submits in relation to that point that the order made in that case fell far short of the threshold erected by art 15(2)(a) of BII. She draws attention to the policy considerations (once a case falls within one or other Regulation) which are to speed and to simplify the recognition and enforcement of parental responsibility judgments between Member States. A high onus rests upon a parent who seeks to reopen welfare issues which, normally, would have been relatively recently the subject of investigation and decision in the courts of the country where the order was made, and to avoid that outcome as a matter of policy 'under no circumstances may a judgment be reviewed as to its substance'. The importation of these Regulations into English domestic law has the effect, as it seems to me, that our own public policy must enshrine and give credit to the concept that the child's interests (as the judge in the court of recognition and enforcement may perceive them) are but an element in the equation, and thus that the policy must be save in the most exceptional of circumstances not to allow the foreign judgment to be subverted.

If the European Convention applies should the order be enforced: the law

41. Again I defer the detailed consideration of the question whether the European Convention does or does not apply. What is clear is that if either Brussels Regulation applies then the European Convention is disapplied and the provisions of the Regulation take precedence: BII art 37 and BIIR art 60. But

if neither Regulation is applicable then the European Convention must (it would seem to me) be the governing code, unless Mr Everall's submissions to the effect that the Convention does not apply because the Irish orders are not enforceable there hold good, I will set out my conclusions on them once I have considered the substance and effect of the 'defences' available to F in response to M's application to recognise register and enforce the Irish orders under this European Convention, and their merits.

42. The provisions of the Convention upon which Mr Everall relies are the following:

> **Part II – Recognition and enforcement of decisions and restoration of custody of children**
>
> **Article 7**
>
> A decision relating to custody given in a Contracting State shall be recognised and, where it is enforceable in the State of origin, made enforceable in every other Contracting State.
>
> **Article 9**
>
> 3. In no circumstances may the foreign decision be reviewed as to its substance.
>
> **Article 10**
>
> 1. In cases other than those covered by Articles 8 and 9, recognition and enforcement may be refused not only on the grounds provided for in Article 9 but also on any of the following grounds:
>   a. if it is found that the effects of the decision are manifestly incompatible with the fundamental principles of the law relating to the family and children in the State addressed;
>   b. if it is found that by reason of a change in the circumstances including the passage of time but not including a mere change in the residence of the child after an improper removal, the effects of the original decision are manifestly no longer in accordance with the welfare of the child;
>
> **Part III – Procedure**
>
> **Article 15**
>
> 1. Before reaching a decision under paragraph 1.b of Article 10, the authority concerned in the State addressed:
>   a. shall ascertain the child's views unless this is impracticable having regard in particular to his age and understanding; and
>   b. may request that any appropriate enquiries be carried out.

43. If these decisions are indeed 'enforceable in the State of origin', then I have no difficulty for my part in concluding that art 10(1)(a) does not avail F. The argument advanced by Mr Nicholls and supported by Mr Everall is that even if art 7 is satisfied, nevertheless the English court should regard the Irish orders as made without jurisdiction (which as will transpire I do not), and as a matter of public policy that these courts should not enforce them. Mr Everall relies on dicta from the speeches of Lord Hailsham and of Lord Simon of Glaisdale in the House of Lords case of **Vervaeke v Smith** [1983] AC 145, at 156 and 163 respectively which I do not propose to set out in full. The essence of what Lord Diplock pithily categorised as 'this sordid case' was that a Belgian prostitute entered into a marriage of convenience with the objective of securing herself against the hazard of deportation through the acquisition of British nationality. She failed to persuade the English court that the marriage was void ab initio because neither party intended to cohabit. The Belgian courts however, whom she next petitioned, held on the same facts that this mock marriage achieved no change of status and thus that no marriage had taken place and granted a declaration that the purported marriage was void ab initio. The resourceful lady then sought a declaration from the English courts that the Belgian declaration was entitled to recognition here. It is not hard to see how English courts (at every level) might strive to thwart her objective (which was in fact to establish herself as the widow of a notorious – and wealthy - criminal whom she had 'married' on the very day of his death), another marriage of considerable convenience to her (it might be thought) if only she could escape the disqualifying bonds of the first by establishing it as a nullity.

44. The crux of the ratio enunciated by their Lordships was that as the truth as to the phoney nature of the first marriage had only emerged when she was caught out as a result of a Queen's Proctor intervention, and thus she was shown to have pursued a false case until unmasked, it was offensive to public policy (and to the principles of res judicata) to allow her by the by-wind of the Belgian decree to subvert the trial judge's rejection of her nullity claim in accordance with English law principles. That outcome and that reasoning accord therefore with the repugnance which Lord Hailsham at least felt when he expressed the view that to recognise the Belgian decree would 'offend the conscience of the court'.

45. **Vervaeke** was a case on very special facts, and its reasoning is not apt to the circumstances of this case. The Belgian nullity decree was, so far as appears from the report of the proceedings in the House of Lords, internally unimpeachable, and no question of want of jurisdiction arose. There were in that case, but are not here, earlier English proceedings giving rise to two mutually incompatible outcomes. On the contrary, both of these parties had co-operated to stay the English suit on the basis that M would proceed apace with what was then and for six months remained M's undefended judicial separation suit till F filed his Defence and Counterclaim. Moreover, Ms Vervaeke's actions and her litigation lacked merit. Those circumstances are light years away from the decisions here under consideration, taken by a court which, even if (on this assumption for present purposes) it did not have jurisdiction, was in no sense misled by M as to the true facts, and in relation to

proceedings in which F explicitly (even if mistakenly, as is now asserted on his behalf) accepted that the court had obtained sufficient jurisdiction to pronounce the decree to which he conceded M was entitled (and for good measure the mutual decree pronounced at his own suit). For these reasons I hold that, even if I could or should conclude that the Irish court's orders are to be treated as nullities, no overriding considerations of public policy should bar their enforcement under the European Convention if that instrument's terms apply and are complied with.

46. As to art 10(1)(a), I will not burden this necessarily lengthy judgment with a full recitation of the considerations which lead me unhesitatingly to reject Mr Everall's assertion that 'the effects of the [Irish decisions] are manifestly incompatible with the fundamental principles of [English] law relating to the family and children'. I agree with Miss Parker's submission that the transcript of the judgment that led to the April 2004 order demonstrates nothing remotely, never mind manifestly, incompatible with family law principles which would be applied to a case such as this by an English court. It is clear that McKechnie J reached conclusions based upon a search for the outcome which best met these children's welfare.

47. Less straightforward is the approach to be applied when considering under art 10(1)(b) whether 'the effects of the original decision are manifestly no longer in accordance with the welfare of the child'. Before such a finding could be made there must be 'a change in the circumstances including the passage of time but not including a mere change in the residence of the child after an improper removal' to which it is attributable.

48. Here there was no 'mere change' in these children's residence after F failed to comply with the April 2004 order that they should commence the September 2004 academic year in Ireland, and that for that purpose they were to be returned to M three days prior to the start of term. It was that non-compliance which brings that failure within the definition of 'improper removal' contained in art 1(d).

49. In his written submissions Mr Everall cited **Re: A (Foreign Access Order: Enforcement)** [1996] 1 FLR 561, CA and a decision of Charles J: **T v R (Abduction: Forum Conveniens)** [2002] 2 FLR 544. I have also borne in mind the guidance contained in **Re: L (Child Abduction: European Convention)** [1992] 2 FLR 178 and **Re: G (Foreign Contact Order: Enforcement)** [2003] EWCA Civ 1607, [2004] 1 FLR 378. My attention has also been drawn to paragraphs 48 and 49 of the Explanatory Report on the Convention which, although it 'does not constitute an instrument providing an authoritative interpretation of the Convention … might be of such nature as to facilitate the application of [its] provisions…' [Preamble II to the Explanatory Report]. Those paragraphs (omitting the passage referring to cases involving change of residence after improper removal) reads as follows:

> '48. Paragraph 1.b is designed to afford an equitable solution in cases where the court addressed has grounds for thinking that circumstances have so changed that the decision to be recognised or enforced no longer corresponds to the child's welfare. If, having regard to the assessment made

> by the original court, the court addressed finds that the circumstances have changed, it can refuse to recognise or enforce. The necessary change in the circumstances may be constituted by a new factor, but also by the mere passage of time as a result of which the child's welfare is no longer the same as it was previously. …
>
> 49. It should be noted that the term "manifestly" is used both in sub-paragraph a and sub-paragraph b of paragraph 1. The intention of those who drafted these texts was that these grounds for refusal should not be used except in a clear case.'

50. From these sources I derive the following principles which arise if this is a case to which the European Convention applies:

- F must demonstrate a change of circumstances.
- The passage of time may itself constitute such a change.
- In the light of these changes he must establish that enforcement of the order is manifestly no longer in accordance with the children's welfare.
- The use of the word 'manifestly' connotes a very high degree of disparity between the order's effects if now enforced and the child's current welfare interests, and that disparity must be wrought by the changed circumstances.
- Whether or not such manifest disparity exists is to be tested against the immediate enforcement of the order, without delay, review or alteration.
- Art 10 is to be construed and applied stringently. The burden is on F to establish these factors cogently, and they are likely only to arise in exceptional cases.
- The children's views are to be ascertained where practicable. They may inform but clearly do not determine the outcome.
- In no circumstances may the foreign decision be reviewed as to its substance.
- In any event a finding that an art 10(1)(b) situation is established does not inevitably lead to a refusal of enforcement. The court has a discretion and at this point policy considerations of the Convention's objectives re-enter the balance to inform the exercise of that discretion.

The family's circumstances from April 2004 to May 2005

51. This was a period of a little over a year during which the children did not move from their home with F in England, nor from schools here to schools in Ireland. The essential elements of their lives therefore remained unchanged: not living with their mother in Ireland and not going to school from her care as McKechnie J had ordered should happen.

52. When I consider enforcement under any of these codes there can be no review of the substance of McKechnie J's decision. The elements just enumerated and

the contact régime which he specified to accompany it are the bedrock from which any application of the 'escape provisions' must start. I must unreservedly apply the relevant considerations on the basis that McKechnie J's decisions were congruent with and designed to advance all three children's welfare. A consequence of what F describes as the children's unwillingness to make the changes the order required – an unwillingness which, at the least, he did not seek to overcome – has been their estrangement from M and the breakdown of contact. Whereas McKechnie J had decided that their interests demanded that they should see more of M they have in fact seen far less.

53. At paragraph [29] I have identified the key passages and findings which led to McKechnie J's conclusions. As I have already indicated, I approach the 'escape provisions' under each of these potentially applicable codes on the basis that his findings and his reasoning are unassailable and the conclusion that the children should move to live with M in Ireland was impeccable.

54. It is against that back-cloth that Mr Everall advances a number of elements contributing to what he says are changes of circumstances which should lead me to conclude (if either of the Brussels regulations applies) that to recognise and enforce would be manifestly contrary to English public policy taking into account the children's best interests, or (if the European Convention applies) that to enforce the decision now fully and rapidly would manifestly no longer accord with these children's welfare. The considerations upon which F relies are the following:

- The children's views are now clear and strongly held.
- SW has in fact started at her new school, a school chosen with the mother's encouragement. MW through his own effort and achievement has gained a scholarship at a school where he will board, as he wishes to do (and as both parents agree he should irrespective of the outcome of this application).
- The children are faced with the reality of a decision that requires them to go to Ireland. Their views are clear and appear unchanged.
- There has been the further passage of time. The children have integrated into their home in England.
- The children's refusal to have contact with M between April 2004 order and October 2004.
- The Irish court believed that M would soon have completed the building of her house in Ireland; in fact, it still remains unfinished.

55. To this he adds considerations which he invites me to adopt and which he claims emerge from the evidence and opinions of Mr Mellor (albeit incomplete through lack of available time) and Dr. Cameron.

56. Mr Mellor's role was defined by the order whereby I asked CAFCASS to report on the children's wishes and feelings and as to their degree of maturity and understanding in relation to the issues. His report dated 5 October 2004 is

sensitive and reflects fully the complex issues which McKechnie J considered but six months earlier. Mr Mellor concluded that the children were fervently opposed to the move to Ireland and to new schools there and that SW and perhaps also MW would fiercely resist. He underlined the difficulties to which implementation of the order would lead in the short, medium and long-term, and what he evaluated as the very real risk that to enforce would cause the children more harm than good.

57. Mr Mellor concluded that both SW and MW were exceptionally intelligent for their age, whereas RW as the youngest was not yet so well-equipped to grasp the implications of the proposals as they affected her. But many aspects of what the children at that stage said give rise to question marks concerning the source of some quite strongly-stated views. As to this Mr Mellor concluded that the children's expressed views were genuinely their own, albeit allowing for F's influence which he saw nothing to suggest might be 'alienating'.

58. As the time allotted for the October 2004 hearing ran out it was apparent to me that a negotiated or mediated outcome to this dispute was the one which, if it could be achieved, would be in these children's overall best interests, given the scope for further embittering, hostile litigation. It was in the hope that such might be achieved that the parents agreed to Dr Hamish Cameron's intervention. The purpose of that was to enable him to advise and assist on the issues arising in the proceedings, and he certainly met my expectations of how he would approach his role when he described it as being that of a mediator in a position to express and indeed advocate the position of the children. It was with the mediatory aspect of his anticipated intervention in mind that the parties agreed that he should not necessarily file a report in these proceedings, although in the event that is what with their consent he did. I emphasise however that Dr Cameron was in no way invited to consider whether the effects of the order no longer accorded with the welfare of the child. It goes without saying, however, that his views have been valuable in assisting me to give appropriate weight to these children's undoubted objections to implementation of the Irish order, although sadly in the event Dr Cameron's intervention did not lead the parties to agreement.

59. Dr Cameron did however make prodigious efforts to enable the parties to come to terms with each other. His approach correctly and inevitably was based on his assessment of what he regarded as being in the children's best interests, not least in the light of the interviews with them which he held and the observations of them which he made in each household. In his report dated 20 April 2005 as in his oral evidence in May 2005 he was clearly alive to the influences which might have been and which might continue to be brought on the children. His guarded observations on this topic, supplementing those of Mr Mellor, supply me not only with a clear view of what were the children's wishes and feelings about their future at the times that they were seen, but also the keen perception that (as McKechnie J found) they are susceptible to influence (whether overt, subliminal, unintentional or a combination of all three) in the household where they spend their time. That household has continued to be F's, and their exposure to any countervailing effect M might have had has been limited.

60. Although Dr Cameron had a large measure of apparent success in bringing the parents towards agreement about how their involvement in the children's lives might be shared, whichever of them was the non-resident parent, he acknowledged that it must be uncertain how far the arrangements proposed would stand the test of potential parental disagreement and hostility once the restraints of continuing court proceedings were removed. I must say that the transformation apparently wrought in terms of improved attitudes to contact between M and the children seems to me similarly to be untested.

61. A very real danger is that I should be drawn into a welfare-oriented approach when the question for me is to apply whichever enforcement code proves apt. I have to say, that as a judge most usually charged with the task of treating children's welfare as the paramount consideration, my instinct might perhaps have led me to a different conclusion than that reached by McKechnie J. Furthermore, were I now to have fully to consider these children's future welfare in the light of circumstances as they were in May 2005 I might conclude against return to M in Ireland. But the reasons which might lead me to such a conclusion are not all one way, are balanced by many competing considerations, and are emphatically not compelling. The warning bells sounded by McKechnie J concerning this father's manipulativeness are not laid to rest (in my provisional view) by any observations made or conclusions reached by Mr Mellor or Dr Cameron, nor by the fact that what may only prove to be a fragile basis for future cooperation between the parents was laid by Dr Cameron. In this context I remind myself that McKechnie J's decision was to a considerable extent based on his findings about the history of access difficulties put in M's way, and his conclusion that for the children to be seeing as much of M as they needed would be best achieved by them living with her.

62. I do not therefore conceive it to be a necessary part of my function at this stage of this dispute to enter into the detail of the evidence I have read and heard from Mr Mellor and Dr Cameron. The approach I should adopt seems to me not dissimilar from the broad evaluation of the written evidence of the parties which the court conducts in an article 13(b) Hague Convention abduction case. I need and should only take their evidence into account to the extent that it is necessary to determine whether or not the relevant 'escape provisions' apply.

63. The weight which I can properly give to the welfare considerations canvassed is, for me, put in appropriate scale by the tenor of Dr Cameron's oral evidence. It was to the effect that the children's opposition to the moves and changes contemplated by the Irish orders would be real and significant, but that if the order were implemented then they would accommodate to the changes. McKechnie J's finding in April 2004 was that he had 'no fears that if I should come to the conclusion that [the children] should go to live with [M] that they would not adapt to the new circumstances and new surrounds. And I have equally no fears that their intelligence and brightness and learning capability can be furthered in either jurisdiction.'

64. There can be no doubt that the passage of time and the protracted uncertainty brought about by these proceedings' seemingly inevitable duration have led to their resistance to such changes developing in the children. But I regard it as

very significant that, when contemplating enforcement of the order, Dr Cameron accepted that the children would comply, albeit not without upset and difficulty particularly in the case of SW.

65. Dr Cameron struck the balance fairly in my view when he said that the children have two good homes; and that they also share two parents neither of whom is bad and each of whom has a powerful and arguable case; as do their children.

66. Dr Cameron may thus be pointing towards what in May 2005 he would have regarded as the best outcome for the children. But even if I share his view, and accept the children's wishes as a genuine reflection of what they wanted, I cannot simply give them what they want.

Conclusion on the 'escape provisions'

67. I in fact find myself in much the same position as was Holman J in **Re: S (Brussels II: Recognition: Best Interests of the Child)(No. 1))** where at paragraph [29] he said that if he had been deciding upon the contact issue in relation to which Belgian courts had made the orders he was called upon to enforce (as he ultimately did), he would not have made those orders. He too, it is to be observed, attempted to mitigate that situation by inviting the parties to find a way out of the 'all or nothing' outcome of the stark choice between enforcement and non-enforcement. But I am of course prohibited from reviewing McKechnie J's decision as regards its substance, and I must not allow myself to be drawn so far into welfare considerations as to allow them in any sense to drive my approach to the application of the 'escape route provisions' to the circumstances of this case.

68. If either Brussels Regulation applies, I am quite unable to reach the conclusion that, taking into account the best interests of the child, McKechnie J's decision is 'manifestly contrary' to and offends any public policy rule consideration applied by English courts. It is sufficient it seems for present purposes to say that his decision was well within the bounds and scope of what an English judge could and might have decided on the findings he reached. In putting the test in that way I am by no means expressing the view that were a decision in another case to fall outside that scope it would necessarily be permissible not to enforce it. I mean only to indicate how consistent with our own policy approach to decision-making over children's issues this particular decision is, and thus how very far (as it seems to me) F is from establishing what art 15(2)(a) of BII or art 23(a) of BIIR requires to be manifest.

69. So far as art 10(1)(b) of the European Convention is concerned my conclusion is that its stringent requirements have not been met, and thus that if the Convention applies the Irish orders should be enforced.

70. The changes of circumstances relied upon deserve scrutiny to establish to what extent they really constitute changes, or whether they are more appropriately to be viewed as circumstances which existed at the time of the April 2004 judgment and have since persisted. If the latter is the case then it must be asked how the result of the passage of time, that a pre-existing circumstance

has endured or been prolonged, can in itself constitute a change of circumstance.

71. To take each of the factors enumerated above and relied upon by F:

- According to F the children's views were the same as what they now are when they were told the outcome of the Irish hearing, and have not changed. I accept that they have been held and to some extent will have developed over the intervening year, but their essence remains as it was.

- It was in fact known by McKechnie J, and is referred to in his judgment, that SW had gained entry to the school where since, on the evidence, she has become happy and settled. But this does not invalidate his findings that she could make a move (although it will clearly be for her a difficult one), nor his conclusion that on the balance he struck she should make that move.

- So far as MW is concerned, his schooling plans will continue in view of his achievement in securing a scholarship at the boarding preparatory school of his choice which both parents now endorse.

- F suggests that the children's refusal to have contact with M for six months after the April 2004 order constitutes a change of circumstances relevant for this purpose, having in particular regard to the part which difficulties over access played in McKechnie J's decision-making process. I cannot see how that can be so. I express no view as to the extent to which F may have played a role in that breakdown. In the ensuing six months Dr Cameron demonstrated that it may be possible for these parents to share their parenting sufficiently to secure their children's appropriate contact with the non-resident parent, whichever of them that may be.

- I have no detailed evidence as to when M's house will be ready for occupation, nor what may have been the causes for delay. McKechnie J was unperturbed by the possibility that the children might arrive in Ireland before the house is ready. I see no reason why to take a different view, as this consideration was so clearly subordinate to what he regarded as the children's need to become settled with M.

- That the passage of time has allowed the children to become more integrated in their life with F is, for the reasons I have tried to explain, an example of a situation where I have difficulty in construing the impact on an existing factor of time's passage as a relevant change of circumstance. But if it is capable of being such, then clearly that results from the failure to implement the order a year ago. The delay may well have made it harder for the children to leave that home and to change primary carer, but it by no means follows that this factor (whether alone or in combination with any other or others) now makes the order so manifestly not in the children's welfare interests that it should not be enforced.

72. If I had reached the contrary conclusion, then I would need to consider whether to exercise the discretion not to enforce the order to which art 10(1)(b) would thus have opened the door. This consideration only arises if

the governing code is the European Convention as if the 'escape provisions' for either of the Brussels Regulations apply, the judgment is quite simply not to be recognised. But art 10(1)(b) of the European Convention, if established, opens the door to a judicial discretion not to enforce. I however would conclude that the change of circumstance relied upon so largely results from F's failure to comply with the Irish orders, aggravated by the time which these proceedings have taken, that it would be damaging to the policy objectives of the Convention to decline enforcement. I would acknowledge the unhappiness these children would confront when the order is belatedly complied with, but after balancing that against the relevant policy considerations would conclude that the latter deserve and require compliance. I would therefore order enforcement nonetheless.

Which if any code applies?

73. This intricate issue has taken up a disproportionate amount of the already over-extended hearing-time in this case. I must explain the insurmountable difficulties which I face in giving the questions reflected in the flow-chart the full consideration which the parties and the advocates are entitled to expect. I have already, however, stated that the submissions in this case were not completed until 19 July 2005, and it is only now in vacation and in the days preceding the handing-down of this judgment that sufficient and uninterrupted time has become available to enable me to confront the task. In fact the available time has proved insufficient to do full justice to the arguments advanced on these issues of jurisdiction and scope, because of the parties' need urgently to know my decision so that, at least in principle, the children's future schooling can be confirmed.

74. All parties accept that the terms of the Irish orders do fall within the scope of both Brussels Regulations, relating as they do to matters of parental responsibility (in the autonomous sense of the Regulations) affecting the children of two spouses. It is also clear and not in dispute that if enforcement falls to be considered under either of the Brussels Regulations, then the European Convention is disapplied (BII art 37 and BIIR art 60). Thus I commence with a consideration of the Brussels Regulations.

75. Which if either of them potentially applies turns, first, upon the inter-relationship of two of the transitional provisions of BIIR, art 64(4) and 64(1) (see what is described as the Preliminary Issue at the start of the Legal Framework flow-chart, where what I have referred to as BIIR is called 'Brussels II bis'). These articles are in the following terms, with relevant dates inserted in square brackets:

> CHAPTER VI
>
> TRANSITIONAL PROVISIONS
>
> Article 64
>
> 1. The provisions of this Regulation shall apply only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to agreements concluded between the parties after its date of application in accordance with Article 72 *[1/3/05]*.

* * * *

> 4. Judgments given before the date of application of this Regulation *[1/3/05]* but after the date of entry into force of Regulation (EC) No 1347/2000 *[1/3/01]* in proceedings instituted before the date of entry into force of Regulation (EC) No 1347/2000 *[1/3/01]* shall be recognised and enforced in accordance with the provisions of Chapter III of this Regulation provided they relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings and that jurisdiction was founded on rules which accorded with those provided for either in Chapter II of this Regulation or in Regulation (EC) No 1347/2000 or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

76. In this case the judgment was given between 1 March 2003 and 1 March 2005 in the Irish FLCB proceedings (or indeed, if they are to be viewed as a separate entity, on F's Counterclaim). However, the question arises whether these enforcement proceedings (if all other criteria are met) should be regarded now that BIIR is in force as determinable under BIIR, or whether BII remains the relevant code as that Regulation had not yet been replaced when in August 2004 the enforcement proceedings commenced here. Nice questions may arise. BIIR art 71(1) repeals BII from 1 March 2005, from which date the operative provisions of BIIR apply by virtue of art 72, Article 71(2) requires references to BII to be construed as references to BIIR and supplies a comparative table. Article 64 does not on its face regulate the remaining progress of pending applications to which BII applies but where no judgment has been given before BIIR started on 1 March, 2005 to apply.

77. Mr Everall rightly draws to my attention certain provisions of **The European Communities (Jurisdiction and Judgments in Matrimonial and Parental Responsibility Matters) Regulations 2005** [SI 2005 No. 265] which amend domestic law to make consistent and to clarify its relationship with the directly effective BIIR. Article 20 provides that proceedings started under BII 'may continue under that Regulation until judgment as if these regulations had not been made.' The question, it seems to me, is however not whether the English enforcement proceedings are caught by one Regulation or another. The relevant question is whether the Irish order is enforceable under the Brussels Regulations. If so then in my view the combined effect of arts 64(1) and (4) does not preclude the BIIR enforcement code (Chapter III) from applying.

78. This may however be a distinction without a difference in the current context, as Miss Parker describes it. For Mr Everall contends that, as these proceedings by amendment now seek to rely on BII's enforcement procedures pursuant to that Regulation's own transitional provisions contained in art 42(2), they remain the applicable provisions for the purpose of this application notwithstanding the subsequent repeal of BII; whereas Miss Parker suggests that the more correct approach is by way of BIIR's art 64(4). Both routes however lead to conclusions within each respective Regulation which are for present purposes in indistinguishable terms. There is no material difference between BII art 42(2) and BIIR art 64(4). Chapter V (Transitional Provisions) of BII contains but a single article, art 42, which is in these terms:

TRANSITIONAL PROVISIONS

Article 42

1. The provisions of this Regulation shall apply only to legal proceedings instituted, to documents formally drawn up or registered as authentic instruments and to settlements which have been approved by a court in the course of proceedings after its entry into force.

2. Judgments given after the date of entry into force of this Regulation in proceedings instituted before that date shall be recognised and enforced in accordance with the provisions of Chapter III if jurisdiction was founded on rules which accorded with those provided for either in Chapter II of this Regulation or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

79. It can be seen that the effect is the same and the coverage identical with what is achieved for BIIR by arts 64(1) and (4).

80. There has been no convention between Ireland and this country with jurisdictional rules which might be relevant. The proviso which must be met before the Brussels Regulation provisions as to recognition and enforcement can arise for consideration is that jurisdiction for the proceedings which led to the subject judgment must have been 'founded on rules which accorded with those provided for in Chapter II of [BII]' or (for the purposes of art 64(4)) of the equivalent Chapter ('Jurisdiction') of BIIR.

81. The researches of counsel have failed to find any helpful guidance in the European jurisprudence on the meaning to be ascribed to the idea of one rule or set of rules which 'accords with' another or others. The explanation offered by the Borras Report on article 37 of the BII Convention (which took effect as Article 42 of BII) is not illuminating, but for what it is worth paragraph 111 reads:

> 'There is, however, provision for the possibility of allowing a judgment to benefit from the system in the Convention, even if the action was brought before its entry into force, if the following requirements are met: (a) the Convention is in force between the Member State of origin and the Member State addressed; (b) jurisdiction was founded on rules which accorded with those provided for either in Title II of this Convention or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted. The provision that the Rules of jurisdiction applied 'accorded with those provided for in Title II' means that the court in the State addressed will have to examine the jurisdiction of the court of origin, which could not have been examined at the request of the respondent in the State of origin on the basis of the Convention (see Article 8, and Article 40(2)).'

82. I wish to clarify that at this stage of this judgment I am seeking to establish what the rules are upon which jurisdiction was founded and which must be examined to see whether they accord with relevant provisions of the Brussels Regulations. At a later stage I will need to decide whether it matters, if the jurisdictional requirements do accord, that they may not have been fulfilled.

83. Mr Everall points out that the same terminology is employed in art 54 of the 1968 Brussels Convention, commonly known as Brussels I, and that the relevant Explanatory Report (the Jenard Report, [1979] OJ C59 at para OJ C59/57-58) suggests that 'accord' in this context means 'agree with' or 'be similar to'. I confess that having read and re-read that commentary on article 54 of Brussels I do not distil the same assistance from it. But, having said that, Miss Parker's submissions expressly suggest that 'accord' would cover rules which are similar or which agree with one another, but adds that it may suffice if they are just consistent or congruent with each other.

84. I agree that the sense of 'accord' to be invoked does not require that the rules compared must be the same. I believe that the objective is to ensure that the connecting factors founding jurisdiction are the same in principle, while not ruling them out if their application differs in practice.

85. The relevant Irish jurisdictional basis required by section 31(4) of the Judicial Separation and Family Law Reform Act 1989 is that one of the spouses should have been ordinarily resident in Ireland throughout the year preceding the commencement of the proceedings. The comparable BII (and BIIR) jurisdictional basis for matrimonial proceedings is the fifth indent to art 2(1)(a) of BII (mirrored in art 3(1)(a) of BIIR) which applies when only the applicant is habitually resident in the State where the action is initiated. No one argued that habitual residence was any different from ordinary residence.

86. It can be seen that the Irish rule is wider in that jurisdiction can be founded on the ordinary residence of either spouse. But if only the respondent were ordinarily resident at the time of the institution of proceedings jurisdiction for the purposes of the Brussels Regulations would be engaged because of the third indent which would give Ireland jurisdiction on the basis that the respondent was then habitually resident there, whether or not for so long as a year.

87. If that were sufficient to dispose of the issues raised by the use of the word 'accord' I would conclude that there exists sufficient similarity between the Irish domestic and the Brussels Regulation rules as to jurisdiction to regard them as in accord, even though they are not identical. I would therefore regard the transitional provisions in whichever Brussels Regulation was applicable as potentially allowing resort to the enforcement procedures.

88. But Mr Everall and Mr Nicholls suggest that there is a dual test for 'accord' in a case where the judgment decides parental responsibility issues, and that it applies equally whether the applicable Regulation is BII or BIIR, even though the former dealt only with such issues in relation to children of spouses involved in matrimonial proceedings. In the case of BII art 3 provides that:

> 1. The Courts of a Member State exercising jurisdiction by virtue of Article 2 on an application for divorce, legal separation or marriage annulment shall have jurisdiction in a matter relating to parental responsibility over a child of both spouses where the child is habitually resident in that Member State.
>
> 2. Where the child is not habitually resident in the Member State referred to in paragraph 1, the courts of that State shall have jurisdiction in such a matter if the child is habitually resident in one of the Member States and:
>
> (a) at least one of the spouses has parental responsibility in relation to the child;
>
> and
>
> (b) the jurisdiction of the courts has been accepted by the spouses and is in the best interests of the child.
>
> 3. The jurisdiction conferred by paragraphs 1 and 2 shall cease as soon as:
>
> (a) the judgment allowing or refusing the application for divorce, legal separation or marriage annulment has become final;
>
> or
>
> (b) in those cases where proceedings in relation to parental responsibility are still pending on the date referred to in (a), a judgment in these proceedings has become final;
>
> or
>
> (c) the proceedings referred to in (a) and (b) have come to an end for another reason.

89. Thus for the Irish domestic jurisdiction rules to 'accord' they submit that it would be necessary for the rules to require either that the children be habitually resident there, or that it should be a case where article 3(2) applied. But in fact the position in Ireland is that jurisdiction over children is accepted automatically once relevant matrimonial proceedings are in train. There is no requirement for the child to be habitually resident there at any stage of the proceedings.

90. If these submissions are correct and the 'accord' must extend also to the jurisdictional basis upon which parental responsibility issues are founded, then it is clear that the transitional provisions' requirements of neither BII nor BIIR are met. Miss Parker accepts that if that is the true construction of the transitional provisions, then the enforcement procedures of the Brussels Regulations are not available to M.

91. Miss Parker however argues that 'accord' with the jurisdictional rules for divorce, legal separation and marriage annulment in whichever Regulation applies is sufficient, and that the respective transitional provisions do not require compliance with the dual test when the issue

relates to parental responsibility. My difficulty with that is that whereas for BII it was a pre--requisite that the parents of the limited class of children affected by that Regulation should be subject to jurisdiction exercised by a Member State 'by virtue of Article 2 on an application for divorce, legal separation or marriage annulment', and so it would not be illogical for the gateway 'accord' to the primary matrimonial issue to carry an automatic open sesame to the dependant parental responsibility jurisdiction, that single avenue approach does not apply under BIIR where parental responsibility jurisdictional issues can arise in relation to all sorts and conditions of children, and not only the strictly marital.

92. Under BIIR the equivalent provision is art 8 which provides:

> Parental responsibility
>
> Article 8
>
> General jurisdiction
>
> 1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.
>
> 2. Paragraph 1 shall be subject to the provisions of Articles 9, 10 and 12.

93. Thus for BIIR habitual residence is the primary connecting factor, and parental responsibility proceedings have been uncoupled from the matrimonial status proceedings train.

94. It would be logically consistent therefore, in my judgment, for the applicability of the BIIR transitional provisions to depend upon jurisdictional accord with recognition and enforcement of a) judgments fully within the relevant time-slot which relate to divorce, legal separation or marriage annulment; or b) parental responsibility for the children of both spouses; or c) both. And it would be understandable if the gateway to recognition and enforcement of a parental responsibility judgment required entry through the double-doors of Mr Everall's suggested dual requirement.

95. If that logic prevails and explains the position in relation to the transitional provisions in BIIR, then it would be curious if those for BII should be differently construed given that the language used is to all intents and purposes the same. So, on balance, and notwithstanding Miss Parker's counter-arguments, I conclude that the Irish orders fail the transitional provision tests for both the Brussels Regulations, as habitual residence of the children in Ireland was not a jurisdictional basis which accorded with the Irish requirement simply that there be matrimonial proceedings within which parental responsibility orders can be applied for and made. The fact that it would appear that the children were indeed habitually resident in Ireland when M launched judicial separation proceedings is neither here nor there.

96. At this point therefore the process of reasoning which I adopt would switch me to the European Convention track, and I would not proceed further along Brussels Regulation lines. I must however have regard to the possibility that I may end up on the wrong route if I take the wrong points at any stage of this journey. I will therefore proceed to consider the position if I am wrong on the 'accord' issue, and the correct analysis is held to be that the transitional provisions of either Regulation are indeed met.

97. In that event the next conundrum bowled by Mr Everall and Mr Nicholls is the argument that the search for 'accord' extends not only to a comparison of the two sets of jurisdictional rules relied upon, but that they must also be honoured in their application. The basis of this submission is the undeniable fact that when M launched her judicial separation proceedings in May 1999 she had not been ordinarily resident in Ireland for the requisite year.

98. Messrs Everall and Nicholls maintain that this defect is fundamental, and that not only must the basis of jurisdiction enable transition through art 42(2) of BII or art 64(4) of BIIR to the enforcement procedures beyond, but also that those jurisdictional requirements must be met. Mr Nicholls asserts that it is implicit in the transitional provisions that the rules should have been complied with.

99. On much the same basis they assert (as already discussed) that the resultant April 2004 order is to be treated by me as invalid, and that it would be contrary to public policy to enforce it. As an additional route to such a finding Mr Nicholls suggests that if I admit the order through the transitional provisions gate I should then refuse to recognise it pursuant to art 15(1)(a) of BII (mirrored at art 22(a) of BIIR) which is in these terms:

> Article 15
>
> Grounds of non-recognition
>
> 1. A judgment relating to a divorce, legal separation or marriage annulment shall not be recognised:
>
> (a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought;

100. But in my opinion such an approach is blocked by art 17 (reproduced at art 24 of BIIR) which provides:

> Article 17
>
> Prohibition of review of jurisdiction of court of origin
>
> The jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in Article 15(1)(a) and (2)(a) may not be applied to the rules relating to jurisdiction set out in Articles 2 to 8.

101. This seems to me to mean that once the transitional provision requirements are met it is impermissible to raise public policy issues

based on questions concerning jurisdiction. Accordingly I do not accept the argument advanced by Mr Nicholls that, as in a BII case the ability of the court to decide issues relating to parental responsibility is dependent on the subsistence of matrimonial proceedings, so the court if it denies recognition to the latter on policy grounds must inevitably decline to enforce a parental responsibility judgment.

102. Miss Parker also in this connection validly draws attention to preamble (17) of BII which provides that 'the State addressed should review neither the jurisdiction of the State of origin nor the findings of fact'.

103. I prefer Miss Parker's approach. Any challenge to the basis upon which the Dublin court took and continued to exercise jurisdiction, with F's explicit acquiescence and involvement both in relation to the judicial separation proceedings and in relation to children issues, should be launched before the courts, in Ireland, which have primary responsibility for the application of their own domestic law. The Irish court clearly regards the orders made in April and August 2004 as enforceable, as is evident from the terms of the latter. If F has any remedy then he should seek it directly from the Irish courts rather than attempt by a side wind to sidestep the effects of the order in these proceedings.

104. But, as it happens, I do not accept that the Irish court had no jurisdiction to pronounce at least one decree of judicial separation, and to entertain and rule upon children issues within the context of those proceedings.

The Irish question

105. I heard evidence as to Irish procedural and substantive law from two senior members of the Dublin bar, Inge Clissmann SC and Cormac Corrigan SC. They took opposite positions on what (from an English perspective) seems a relatively straight-forward question: when in judicial separation or divorce proceedings a respondent files an Answer cross-praying for relief does the pleading stand as a separate proceeding and speak from the date when it is filed; or is it entirely subservient to the Petition and thus in no sense a separate and independent cause of action?

106. It appears that there is no clear Irish authority on the question. Without initially referring to any English authority, my first and tentative conclusion would be that an Answer seeking relief (as opposed to one merely asking that the suit commenced by the opposing party's Petition should be dismissed) is indeed a free-standing cause of action, but one which for convenience the rules and practice have permitted to be brought by way of Counterclaim in the same suit. It speaks from and as of the date when it is filed. Thus, for example, if a relevant period of separation or of desertion expired between the filing dates of the Petition and of the Answer, then the respondent could rely on that period because its expiry antedated the filing of his pleading, whereas the petitioner would not be entitled by amendment to do so. Similarly, if the court's jurisdiction to entertain the suit had not arisen by the time a Petition was

filed but had done so by the date of the Cross-Petition, then the respondent could at the same time assert that the petitioner was not entitled to relief on the basis that the court lacked jurisdiction in relation to her petition, and himself cross-pray. If the facts were as in this case, then a husband could found jurisdiction to cross-pray for judicial separation on the basis that the requisite period of habitual residence by the petitioner had now elapsed. I have of course for the purposes of this discussion ignored the impact of BII and BIIR in any case involving member states (other than Denmark) of the European Community.

107. If reference to authority were required in English law, I would rely on **Blacker v Blacker** [1960] P 146, CA. There Hodson LJ referred to the well-known rule of pleading that an amendment relying on a period elapsed since the filing of the pleading sought be amended is ineffective 'as that would be to defeat the plain language of the statute, which requires a period of three years to elapse not before the amendment of but before the presentation of the petition.' He then (at page 151) posed the question in issue here and answered it affirmatively: that if the necessary three years have expired before the presentation of a cross-petition, that is sufficient to found jurisdiction to deal with an issue of desertion, for 'for this purpose an original answer may be regarded as a cross-petition.' At page 157 Devlin LJ observed that a cross-petition was a separate proceeding.

108. I am not dissuaded from this view of English law by Mr Everall's attempt to rely on the decision of Bodey J in **W v W (Divorce Proceedings: Withdrawal of Consent after Perfection of Order)** [2002] 2 FLR 1225. He there had to consider the effect of the phrase 'the proceedings in which the divorce is granted' where each party had secured a decree, the husband on a petition filed before the relevant date for pension-sharing orders, and the wife on a cross-petition filed after that date. Bodey J took a broad view to arrive at the conclusion that the statutory phrase 'was intended to mean, broadly, and wheresoever possible, simply the divorce case within which the parties' divorce was obtained.' He was construing the meaning of 'proceedings' in a very specific statutory environment, and deliberately eschewed what he described as 'esoteric disputes as to the niceties of the law and practice of divorce pleading'.

109. I do not intend any disrespect to the Irish expert witnesses, but I regard the point as clear in English law. Mr Corrigan did not to my mind demonstrate any way in which Irish statute or procedure had departed from what was a shared tradition. I found the reasoning of Miss Clissmann more persuasive, and her conclusion more consistent with what I feel confident the Irish court would as a matter of domestic law have held: that it had jurisdiction to entertain F's judicial separation suit because the relevant period of habitual residence by M had elapsed by the time he filed his Defence and Counterclaim in the Dublin court.

110. That would be sufficient to dispose of Mr Everall's point, as clearly jurisdiction concerning the children would follow. But if I am wrong to

take that view of Irish law, my conclusion remains that is not for this court to investigate the question whether the Irish court did or did not have jurisdiction, there having been no challenge in those courts to the validity of their orders.

Conclusion

111. I conclude therefore that the European Convention applies in this case, and that the Irish orders should be recognised, registered and enforced at the earliest practicable opportunity.

112. I would reach the same conclusion if either BII or BIIR applies.

113. If however none of these régimes is applicable, then I would not order peremptory return of the children in exercise of this Court's inherent jurisdiction, as I regret to say that I would not feel sufficiently satisfied that an order for them to move to Ireland made without some investigation of the merits would currently be in their best interests.

114. Counsel for M have pointed out two interlinked points which they suggest I should have referred to in my judgment. I agree that it is appropriate for me to incorporate brief reference to them.

115. Article 7 of the European Convention (set out at [42] above) makes enforceability here of a decision relating to custody (which clearly the Irish orders are) dependent upon its enforceability in Ireland.

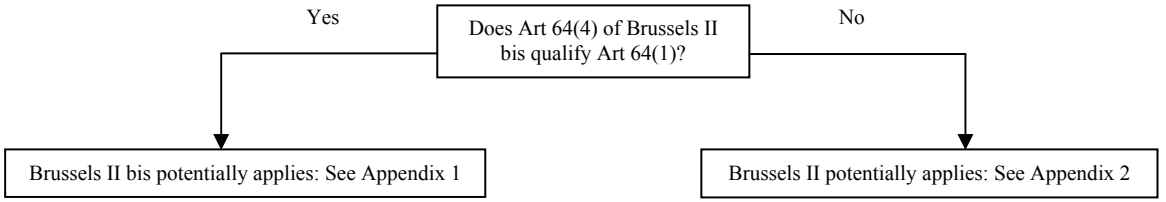
116. I have already referred at [103] above (but in the context of the Brussels Regulations) to the 5 August 2004 order being made clearly upon the basis that the Dublin High Court regarded the April 2004 order as enforceable. I understand that during the course of this application in this court F's attempt to appeal the April 2004 order has been dismissed.

117. I do not accept Mr Everall's submission that the Irish court would not or should not enforce its April 2004 order for any alleged lack of jurisdiction. I maintain that view even if I am wrong to have decided that the Irish court did indeed have jurisdiction to grant at least one decree of judicial separation, and to decide the custody issues.

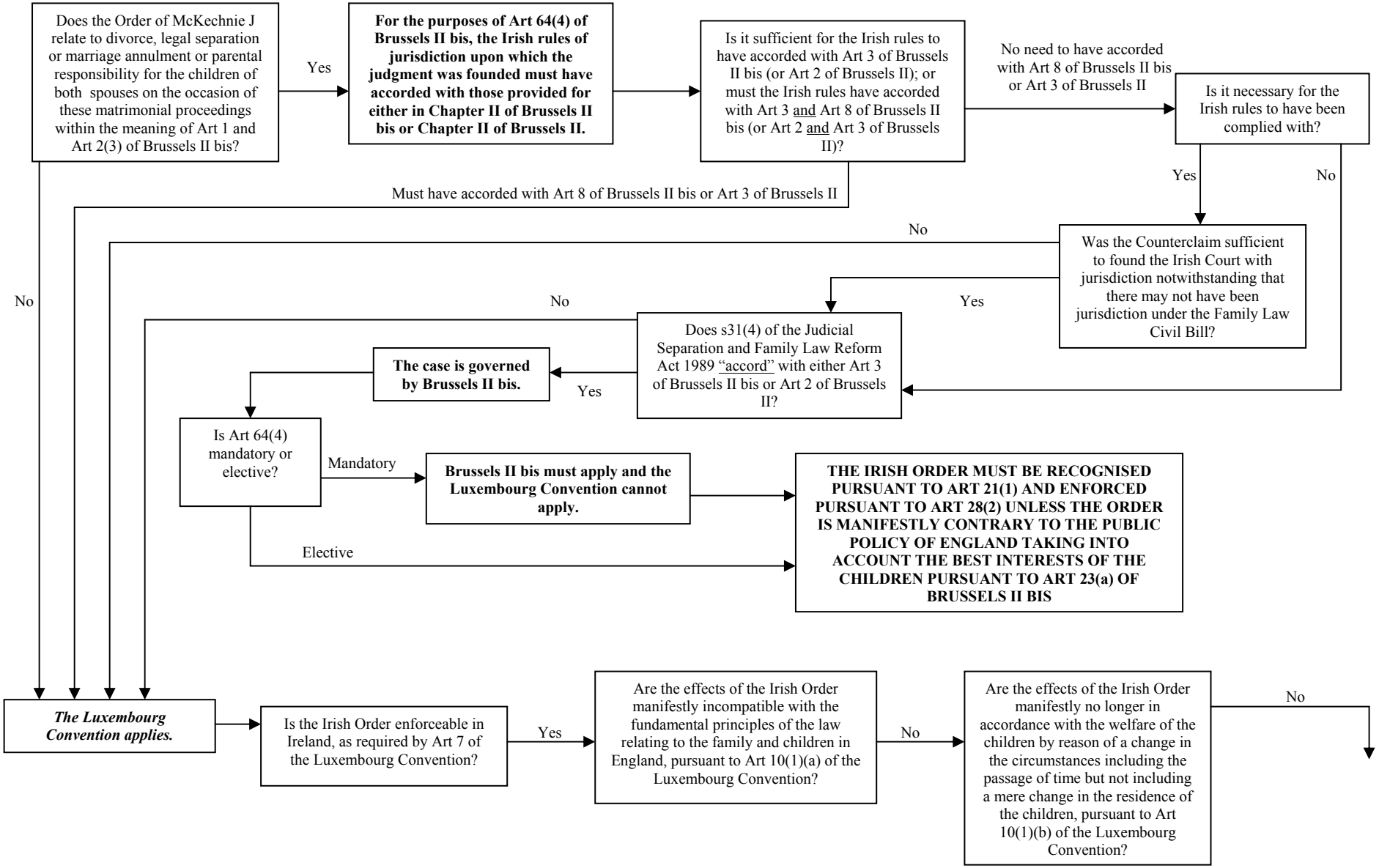
118. I am fortified in this by the agreement of the Irish law experts that the Irish orders as a matter of Irish law remained and remain enforceable until set aside. There has been ample opportunity to seek to take the point, if it is open. Even if such an application is now viable (as to which I express no view) none has been launched. I was not at any stage asked to adjourn or delay this enforcement application to await the outcome of such an attempt. On the basis of this agreed aspect of the Irish law experts' evidence it would have been quite wrong to do so.

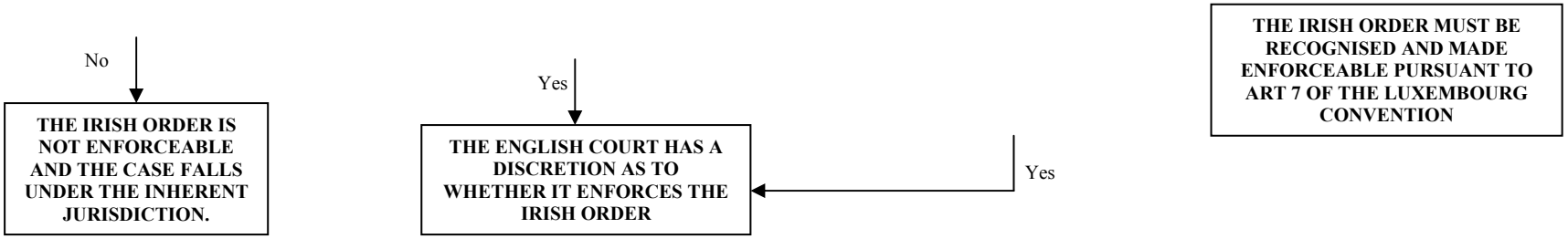
LEGAL FRAMEWORK

Preliminary Issue:

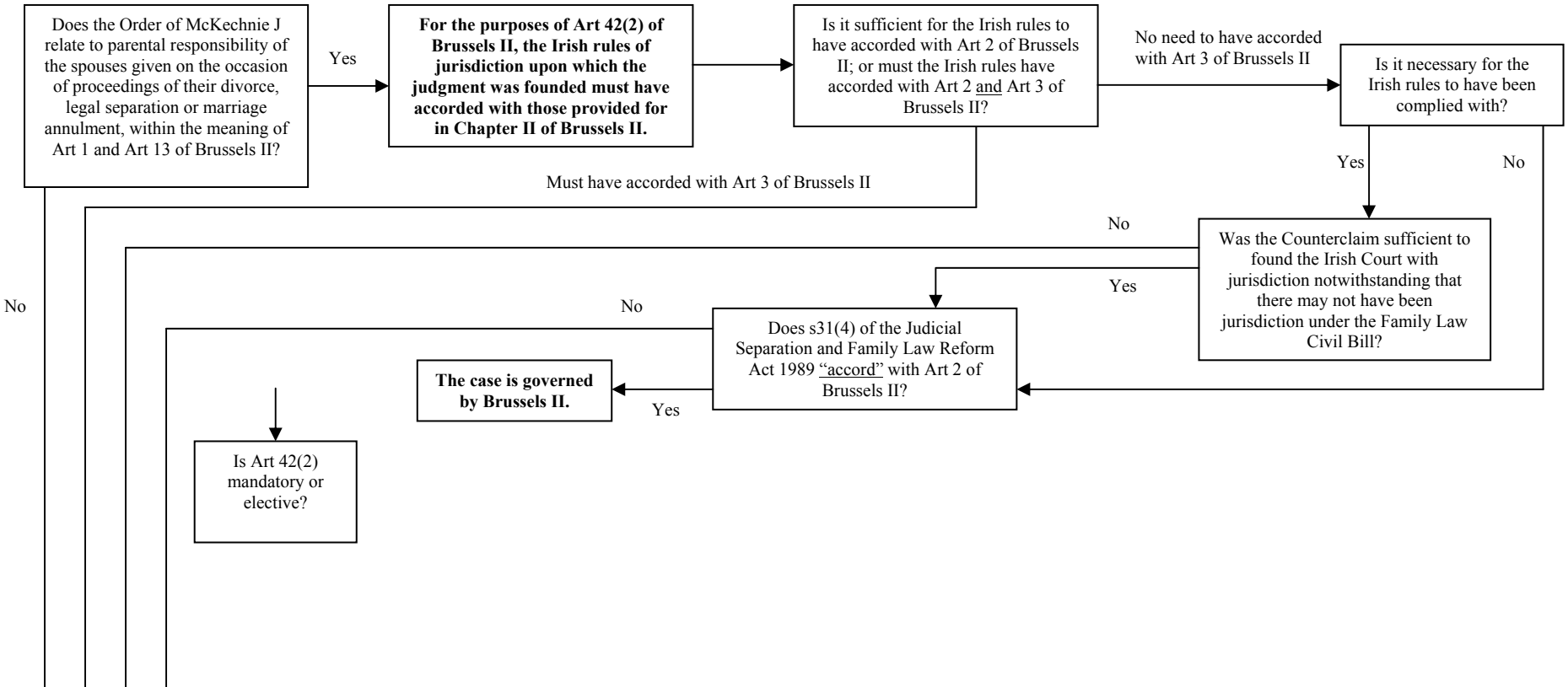


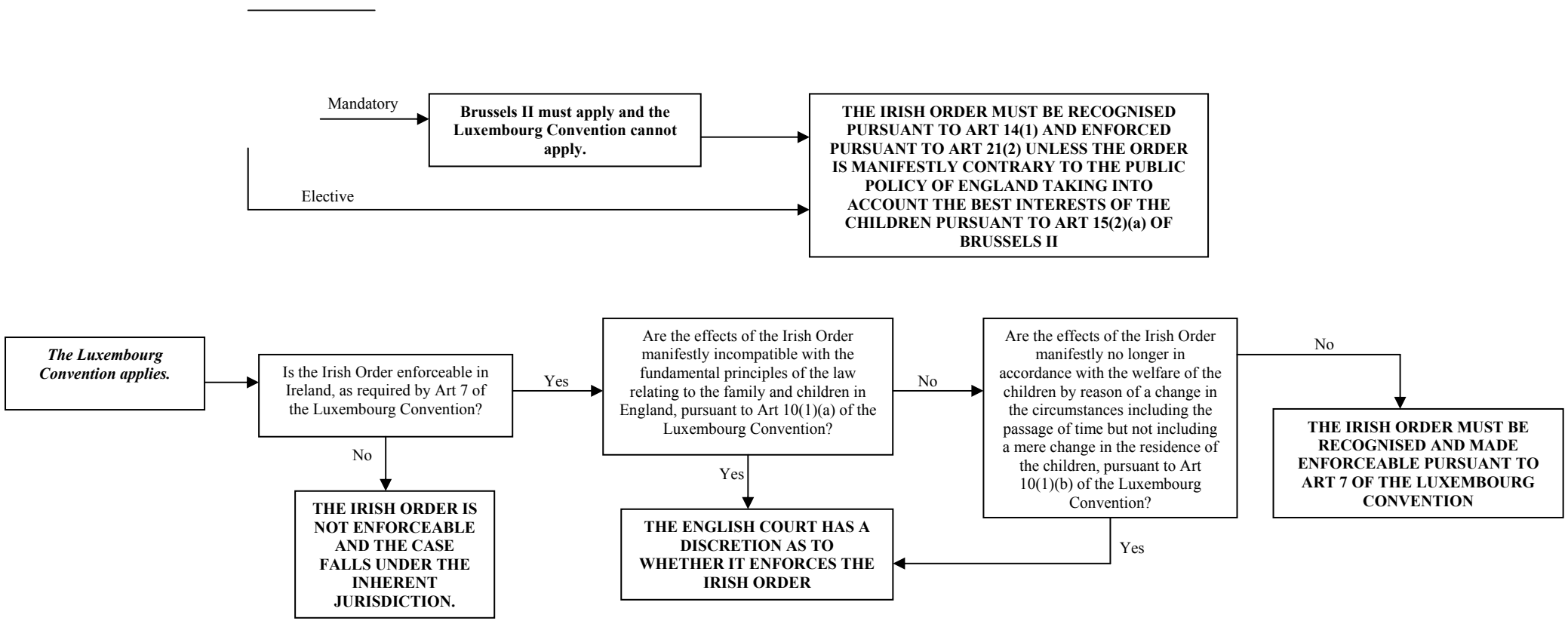
Appendix 1


Does the Order of McKechnie J relate to divorce, legal separation or marriage annulment or parental responsibility for the children of both spouses on the occasion of these matrimonial proceedings within the meaning of Art 1 and Art 2(3) of Brussels II bis?
Yes
For the purposes of Art 64(4) of Brussels II bis, the Irish rules of jurisdiction upon which the judgment was founded must have accorded with those provided for either in Chapter II of Brussels II bis or Chapter II of Brussels II.
Is it sufficient for the Irish rules to have accorded with Art 3 of Brussels II bis (or Art 2 of Brussels II); or must the Irish rules have accorded with Art 3 and Art 8 of Brussels II bis (or Art 2 and Art 3 of Brussels II)?
No need to have accorded with Art 8 of Brussels II bis or Art 3 of Brussels II
Is it necessary for the Irish rules to have been complied with?
Yes
No
Must have accorded with Art 8 of Brussels II bis or Art 3 of Brussels II
No
Was the Counterclaim sufficient to found the Irish Court with jurisdiction notwithstanding that there may not have been jurisdiction under the Family Law Civil Bill?
Yes
No
No
Does s31(4) of the Judicial Separation and Family Law Reform Act 1989 "accord" with either Art 3 of Brussels II bis or Art 2 of Brussels II?
Yes
The case is governed by Brussels II bis.
Is Art 64(4) mandatory or elective?
Mandatory
Brussels II bis must apply and the Luxembourg Convention cannot apply.
THE IRISH ORDER MUST BE RECOGNISED PURSUANT TO ART 21(1) AND ENFORCED PURSUANT TO ART 28(2) UNLESS THE ORDER IS MANIFESTLY CONTRARY TO THE PUBLIC POLICY OF ENGLAND TAKING INTO ACCOUNT THE BEST INTERESTS OF THE CHILDREN PURSUANT TO ART 23(a) OF BRUSSELS II BIS
Elective
The Luxembourg Convention applies.
Is the Irish Order enforceable in Ireland, as required by Art 7 of the Luxembourg Convention?
Yes
Are the effects of the Irish Order manifestly incompatible with the fundamental principles of the law relating to the family and children in England, pursuant to Art 10(1)(a) of the Luxembourg Convention?
No
Are the effects of the Irish Order manifestly no longer in accordance with the welfare of the children by reason of a change in the circumstances including the passage of time but not including a mere change in the residence of the children, pursuant to Art 10(1)(b) of the Luxembourg Convention?
No


No
THE IRISH ORDER IS NOT ENFORCEABLE AND THE CASE FALLS UNDER THE INHERENT JURISDICTION.
Yes
THE ENGLISH COURT HAS A DISCRETION AS TO WHETHER IT ENFORCES THE IRISH ORDER
Yes
THE IRISH ORDER MUST BE RECOGNISED AND MADE ENFORCEABLE PURSUANT TO ART 7 OF THE LUXEMBOURG CONVENTION

Appendix 2


Does the Order of McKechnie J relate to parental responsibility of the spouses given on the occasion of proceedings of their divorce, legal separation or marriage annulment, within the meaning of Art 1 and Art 13 of Brussels II?
Yes
For the purposes of Art 42(2) of Brussels II, the Irish rules of jurisdiction upon which the judgment was founded must have accorded with those provided for in Chapter II of Brussels II.
Is it sufficient for the Irish rules to have accorded with Art 2 of Brussels II; or must the Irish rules have accorded with Art 2 and Art 3 of Brussels II?
No need to have accorded with Art 3 of Brussels II
Is it necessary for the Irish rules to have been complied with?
Yes
No
Must have accorded with Art 3 of Brussels II
No
Was the Counterclaim sufficient to found the Irish Court with jurisdiction notwithstanding that there may not have been jurisdiction under the Family Law Civil Bill?
Yes
No
Does s31(4) of the Judicial Separation and Family Law Reform Act 1989 "accord" with Art 2 of Brussels II?
The case is governed by Brussels II.
Yes
No
Is Art 42(2) mandatory or elective?


Mandatory
Brussels II must apply and the Luxembourg Convention cannot apply.
THE IRISH ORDER MUST BE RECOGNISED PURSUANT TO ART 14(1) AND ENFORCED PURSUANT TO ART 21(2) UNLESS THE ORDER IS MANIFESTLY CONTRARY TO THE PUBLIC POLICY OF ENGLAND TAKING INTO ACCOUNT THE BEST INTERESTS OF THE CHILDREN PURSUANT TO ART 15(2)(a) OF BRUSSELS II
Elective
The Luxembourg Convention applies.
Is the Irish Order enforceable in Ireland, as required by Art 7 of the Luxembourg Convention?
Yes
No
THE IRISH ORDER IS NOT ENFORCEABLE AND THE CASE FALLS UNDER THE INHERENT JURISDICTION.
Are the effects of the Irish Order manifestly incompatible with the fundamental principles of the law relating to the family and children in England, pursuant to Art 10(1)(a) of the Luxembourg Convention?
Yes
No
THE ENGLISH COURT HAS A DISCRETION AS TO WHETHER IT ENFORCES THE IRISH ORDER
Are the effects of the Irish Order manifestly no longer in accordance with the welfare of the children by reason of a change in the circumstances including the passage of time but not including a mere change in the residence of the children, pursuant to Art 10(1)(b) of the Luxembourg Convention?
No
THE IRISH ORDER MUST BE RECOGNISED AND MADE ENFORCEABLE PURSUANT TO ART 7 OF THE LUXEMBOURG CONVENTION
Yes