

THE HIGH COURT

FAMILY LAW

[2017 No. 4822 P.]

IN THE MATTER OF ARTICLE 41 OF THE CONSTITUTION

AND IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT, 1964, AS AMENDED

AND IN THE MATTER OF THE INHERENT JURISDICTION OF THE HIGH COURT

AND IN THE MATTER OF THE ENFORCEMENT OF AN ORDER MADE BY THE FAMILY COURT STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS KENT, SC

AND IN THE MATTER OF E. McA, A CHILD

BETWEEN

P. McA.

PLAINTIFF

AND

V. H.

DEFENDANT

JUDGMENT of Ms. Justice Reynolds delivered on the 1st day of September, 2017

1. In these proceedings, the plaintiff seeks an Order recognising and enforcing the Order of the Kent County Family Court, Rhode Island, United States of America, made on the 24th August, 2016 and the 16th December, 2016 directing that the child, the subject matter of the within proceedings, be required to move to live in Rhode Island with the plaintiff.

Background

2. The plaintiff is the father of the child, E., born on the 8th September, 2004 and now almost thirteen years of age. The plaintiff resides in Rhode Island in the United States of America. The defendant is the mother of the child and resides in this jurisdiction.

3. The parties were married on the 15th August, 1996 in this jurisdiction. There were three children of the marriage, E. being the youngest of the siblings. The parties resided in the United States with the children of the marriage.

4. Unfortunately, difficulties arose in the marriage and an Order was made on the 15th February, 2008 by the Rhode Island Family Court granting the parties a Decree of Divorce together with ancillary orders, including orders in respect of custody and placement of the three dependent children.

5. There have been considerable difficulties in relation to the custody and care of the three children including previous proceedings before this Honourable Court entitled "Record No.: 2014/1131A, the High Court, Family Law, In the matter of the Child Abduction and Enforcement of Custody Orders Act, 1991, In the matter of the Convention of the Civil aspects of Child Abduction (the Hague Convention), In the Matter of the Guardianship of Infants Act, 1964 and In the matter of P. McA. (a minor), C. McA. (a minor) and E. McA. (a minor), Between V. H. plaintiff and P. McA. defendant". These proceedings were eventually adjourned generally in April 2016 by the High Court (O'Hanlon J.).

6. Difficulties arose in relation to the defendant's custody and care of the youngest child, E., arising from which the plaintiff sought further Orders from the Rhode Island Courts in which the defendant fully participated and was legally represented.

7. On the 16th August, 2016, the Rhode Island Family Court (per Mr. Justice Stephen J. Capineri) made Orders directing, *inter alia*, that the parties be awarded joint custody of the three minor children; that the father would continue to enjoy placement of the two older children, that the father would be awarded forthwith the placement of the minor child E., that the mother was awarded all reasonable rights of visitation with the minor children.

8. The defendant mother filed an appeal and was unsuccessful in her application to the Supreme Court in Rhode Island.

9. On the 31st August, 2016, the Rhode Island Family Law Court ordered the defendant mother, *inter alia*, to bring E. to the United States on or before the 3rd September, 2016. The defendant refused to comply with the Order.

10. On the 16th December, 2016, on foot of further applications by the plaintiff and in light of the defendant mother's contempt of court, the Rhode Island Family Court granted, *inter alia*, sole custody of all of the children including E. to the plaintiff forthwith.

11. The defendant has refused to comply with the Orders from the Rhode Island and Providence Plantations and has cut off all contact between the child, E., and the applicant. Further, the child E. has been alienated from her siblings in circumstances where all contact in that regard has ceased also.

12. The defendant has further frustrated the litigation process by moving from her established address in this jurisdiction to unknown accommodation, hence the delay in bringing the within proceedings before the Court.

Proceedings before this Court

13. The proceedings herein were commenced by Plenary Summons dated the 26th May, 2017. The defendant subsequently issued a motion dated the 18th July, 2017 wherein the defendant claims that two preliminary issues arise in respect of the within proceedings as follows:-

- (i) That the Courts of Ireland have exclusive jurisdiction where a child is habitually resident in Ireland regarding issues of parental responsibility, and,

(ii) That the High Court does not have jurisdiction to hear the within proceedings.

14. It was agreed by the parties that these issues required determination by the Court in advance of any substantive hearing with regard to the reliefs sought in the within proceedings.

First Issue

15. The defendant submits that the Courts of Ireland have exclusive jurisdiction in respect of issues of parental responsibility involving children habitually resident in Ireland, by virtue of the provisions of Brussels II bis (Council Regulation (EC) No. 2201/2003) and in particular Article 8 thereof.

16. Article 8 provides:-

"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."

17. It is submitted on behalf of the defendant that the Court has no jurisdiction to recognise and enforce the foreign Order because the child E. was habitually resident in Ireland at the time the Order was made. In this regard, the defendant relies on the decision of Sheehan J. in *O'K. v. A.* [2008] 4 I.R. 801 which dealt with jurisdictional issues arising where the applicant issued proceedings in this jurisdiction seeking a decree of judicial separation and ancillary reliefs, and where the respondent thereafter instituted divorce proceedings in Florida. The High Court held that the children involved were habitually resident in Ireland when the proceedings commenced and that the requirements of Article 3 of Brussels II bis were satisfied. Further, Sheehan J. held that the High Court had exclusive jurisdiction in the proceedings insofar as they related to, *inter alia*, parental responsibility.

18. Clearly, the facts of that case are distinguishable from the facts in the instant case where the defendant fully participated and was legally represented in the proceedings before the Rhode Island Family Courts, where all issues were contested, including jurisdiction and where the proceedings have now been concluded. In the *O'K.* case, it was clear that the proceedings had only just commenced in Ireland and the United States, an entirely different position on the facts to the instant case.

19. The defendant further relies on the decision of *F. v. G.* [2014] 1 I.R. 417 (High Court, Keane J.), wherein the applicant obtained orders from the Court in California, granting her custody of the dependent child and permitting them to relocate to Ireland subject to the respondent's access rights. The respondent contested both the issues of custody and relocation and had appealed both matters in the Courts of California. In dealing with the issue of recognition and enforcement of foreign orders, the High Court accepted that it could not "blindly follow the Order made by a foreign court" and must form an independent judgment on what is required to protect the welfare of the child. It was held that the first and paramount consideration of the Court must be the best welfare interests of the child.

20. The issue of jurisdiction in the within proceedings has already been canvassed before the High Court in previous proceedings between the parties reported as *D.F. v. E.M.* IEHC 510 and the judgment of Baker J., delivered on the 9th September, 2014, is exhibited in the plaintiff's grounding affidavit. Having considered the very comprehensive judgment given by the Court wherein the Court considered a number of authorities relating to the issue of jurisdiction, including *O'K. v. A.*, the Court made an order staying the proceedings in the Irish Courts pending the determination of the Court of Rhode Island and Providence Plantations on the question of whether it had and would assume jurisdiction to determine the issues in the case. The defendant did not appeal that decision and the issue of jurisdiction was then decided by the Rhode Island Supreme Court on appeal, in which proceedings the defendant fully engaged and was legally represented. In the circumstances, the Court is satisfied the defendant is now estopped from raising this issue again in the context of the within proceedings.

Second Issue

21. It is submitted by the defendant that the High Court has no original jurisdiction in proceedings brought under part II of the Guardianship of Infants Act, 1964 and that the Circuit Court and District Court have exclusive jurisdiction in this regard.

22. The plaintiff submits that the defendant's contention has no substance in law or fact and relies upon the provisions of Order 70A of the Rules of the Superior Courts 2015. The plaintiff also relies on the provisions of Article 34.3.1 in dealing with the full original jurisdiction of the High Court and further contends that the proceedings are properly before this Court in terms of seeking enforcement of international Court Orders by the High Court of Ireland.

23. It is patently clear that in the earlier proceedings brought before this Court, as referred to above, the defendant sought to invoke the provisions of the Guardianship of Infants Act, 1964 and sought relief pursuant to same despite the claim now being made on her behalf that the High Court does not have jurisdiction relating to the 1964 Act. The defendant's position of approbation and reprobation in the context of the within proceedings is simply unsustainable.

Conclusions

24. For the foregoing reasons, the Court rejects the issues raised by the defendant which have prolonged the delay in dealing with the substantive issues in this case. The defendant, having engaged fully in the proceedings in Rhode Island, has chosen to blatantly disregard and defy the Orders of that Court. The relief claimed by the defendant seeks to undermine the principles of cooperation between Courts and would be tantamount to a complete failure of the principles of comity of Courts.

25. In all the circumstances, I must refuse the relief sought in the Notice of Motion herein.