

THE HIGH COURT

FAMILY LAW

[2015 No. 44 M.]

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964

(AS AMENDED)

AND IN THE MATTER OF J.R., A CHILD

BETWEEN

M.R.

APPLICANT

AND

D.R.

RESPONDENT

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 15th day of June, 2016

1. The special summons issued in this case on 30th July, 2015 and the Notice of Motion, also dated 30th July, 2015, came before the Court, brought by the mother as applicant seeking that access with the child J. take place in Illinois, USA. This case has a long history before the courts of this jurisdiction and before the courts of the jurisdiction of Illinois, USA.

2. J.R., the child, the subject matter of these proceedings, was born on 28th March, 2007, in Illinois and he is the sole child of the non-marital relationship of the applicant and respondent. The applicant mother lives in the United States of America, and the respondent father and the child reside in this jurisdiction, with the father's wife and J's half sibling, born of the father's relationship to his present wife.

3. The Court was told that the aspiration of the mother was that the child would go to school in the United States of America but that for the purposes of this hearing and decision, that that issue was not before the Court and that the issue before it on this occasion was whether the child could travel to the USA over the summer holidays in 2016 to visit his mother in her home setting. The Court heard that the parties envisaged a further review of matters towards the end of this calendar year or the start of next year. The applicant was willing to attend at mediation in the meantime and this was recommended by Ms. More O'Ferrall, who carried out the section 47 assessment in this case. It was also noted by Ms. More O'Ferrall that such mediation would not be costly for the parties as both were entitled to same free on legal aid. Skype contact between the applicant mother and her child is an issue for this hearing.

Background to this Notice of Motion

4. On 8th April, 2008, the Carlow District Court granted the respondent herein and applicant in the Carlow District Court proceedings the following orders *ex parte*:

- 1) An order directing the mother of J. to deliver the passport of the child to a nominated solicitor
- 2) An order restraining the mother of J. from removing J. from Ireland pending the determination of the substantive proceedings in the Irish District Court
- 3) An order directing that the airport and port authorities be notified of the order at paragraph 2.
- 4) Liberty to the applicant father in those proceedings to move an application under s. 11 of the Guardianship of Infants Act 1964 seeking to restrain the removal of the child from Ireland
- 5) Listing the substantive proceedings on 17th April, 2008

5. On 22nd April, 2008, Teehan J. of the Carlow Circuit Court vacated the above orders of the District Court dated 8th April, 2008.

6. On 25th June, 2008, Harnett J. of the Carlow District Court declined jurisdiction in respect of the orders sought by the father.

7. This was appealed and on 29th July, 2008, Doyle J. of the Carlow Circuit Court allowed the appeal and declared that the Irish courts had jurisdiction to hear the respondent's applications regarding the child.

8. The applicant herein applied for a judicial review of this decision and was granted leave to do so on 30th July, 2008 by Sheehan J. of the High Court of Ireland. On 26th November, 2008, the Irish High Court refused relief by way of judicial review.

9. The case then returned to the Carlow Circuit Court and on 10th February, 2011, Buttimer J. of the Irish Circuit Court ordered as follows based upon the evidence heard including a s. 47 report:-

- 1) D.R., the respondent father in these proceedings was appointed guardian of the child

- 2) The father was granted joint custody of the child
- 3) The child was to reside in Ireland
- 4) The parenting was to be on a 50:50 basis
- 5) The extended families of both parties were to have access to the child
- 6) The child was to be enrolled in a particular school in Ireland starting in September 2011
- 7) School reports were to be shared
- 8) The court also recommended that the parties attend mediation on parenting their child

10. On 10th February, 2011, Buttimer J. also refused the applicant mother's application to reside with the child in Illinois, USA although she put a stay on that refusal until 30th March, 2011. The applicant was permitted to go to the USA with the child to put her affairs in order after giving undertakings to the Irish Court that she would return to Ireland with the child. It is recorded in the American Court of Appeal judgment dated 25th July, 2013 that the applicant never intended to abide by those undertakings. The undertakings given to the Irish Court by the applicant included that she would not assert the child's habitual residence as being outside of Ireland, she would not make an application to any court outside of Ireland, and she would return to Ireland with the child by 30th March, 2011.

11. The applicant did not return by that date. On 14th April, 2011, Buttimer J. of the Carlow Circuit Court made the following orders:

- 1) Granting liberty to the solicitors for the applicant mother in those proceedings to come off record
- 2) Directing the production of the child before the Courts Service
- 3) Directing the return of the child to Ireland
- 4) Directing that the applicant mother discontinue proceedings instituted outside the State and restraining her from making any further application to any court outside the State
- 5) Directing that the applicant mother abide by the orders and undertaking made on 10th February, 2011
- 6) Granting liberty to the respondent father to issue and serve a motion to attach and commit her for breach of the orders and undertakings

12. On 10th May, 2011, Buttimer J. of the Carlow Circuit Court made a further order requiring the mother to return the child within one week and the production of the child before the court on 30th June, 2011.

13. The applicant mother did not abide by any of the above orders and on 30th June, 2011, Buttimer J. of the Carlow Circuit Court made the following orders:

- 1) Attaching and committing the applicant mother for breach of the orders of 10th February, 2011
- 2) Permitting the release of the s. 47 report to any judge in the USA
- 3) Releasing the father from his undertaking to pay maintenance pending the return of the child to Ireland
- 4) Declaring that the retention of the child after 30th March, 2011 was wrongful within Article 3 of the Hague Convention, and that the child was ordinarily resident in Ireland, and that the retention was in breach of rights of custody which were being exercised by the father and
- 5) Declaration that a return would not expose the child to physical or psychological harm or otherwise place the child in an intolerable situation and a declaration that the return would not breach or contravene fundamental principles relating to the protection of human rights and freedoms

14. The applicant mother applied to the Cook County Court, Illinois, USA for relief against domestic violence as against the respondent father and seeking sole custody of the child in February, 2011. Cook County Court granted the applicant mother interim sole custody of the child and made an interim order for special protective relief as against the respondent, dated 24th March, 2011.

15. On 30th June, 2011, the Irish Circuit Court made a declaration that the retention of the child after 30th March, 2011, was wrongful within the meaning of Article 3 of the Hague Convention.

16. The respondent herein issued Hague Convention proceedings in the USA which were successful. The return of J. to Ireland was ordered by the United States District Court on 9th July, 2012.

17. The applicant appealed this decision and the Seventh Circuit Federal Appeals Court of the USA found that the child had been habitually resident in Illinois, and on 25th July, 2013, overturned the return order of 9th July, 2012, of the U.S. District Court. The formal order requiring the child's return to the USA was made on 10th December, 2013.

18. The mother instituted Hague Convention proceedings in Ireland, dated 27th August, 2014, to have J. returned to the USA.

19. The father sought to register the Irish Circuit Court order of 10th February, 2011, in the USA. On 1st July, 2015, Degnan J. of the Circuit Court of Cook County, Illinois, USA granted the registration of the Carlow Circuit Court orders of 10th February, 2011, thereby recognising the jurisdiction of the Irish courts, the rights of guardianship and custody of the father and the order for the child to live in Ireland.

20. On 2nd July, 2015, an application was made in Ireland on behalf of the applicant in respect of the attachment and committal order made by the Carlow Circuit Court, and, upon consultation with An Garda Síochána, the Irish Circuit Court Judge indicated that said

orders were no longer enforceable.

21. In the Irish High Court, the applicant mother then withdrew the proceedings in Ireland under the Hague Convention on 20th July, 2015, in light of developments which had occurred in the various proceedings. The applicant has stated on affidavit and in sworn testimony before this Court that she accepts that Ireland is the correct jurisdiction for the hearing of this case and she filed the within proceedings on 30th July 2015 in Ireland under the Guardianship of Infants Act 1964, as amended.

22. The applicant has stated on affidavit, dated 12th November, 2015, that she accepts that J's place of habitual residence is Ireland. The applicant has now fully submitted to this jurisdiction dealing with this case. The child has Irish and USA citizenship and has been living here now since 2012 at least. He is habitually resident in Ireland. For a number of reasons, including the above development, this Court finds that it has jurisdiction to hear this Notice of Motion.

23. This Court considered this motion on a full welfare basis as set out by the Guardianship of Infants Act, 1964, as amended by the Child and Family Relationships Act 2015. This Court made an order on 15th October, 2015, for an assessment to be carried out pursuant to s. 47 of the Family Law Act 1995. This Court made an order dated 27th November, 2015 that a preliminary report be procured in writing from Ms. Ruth More O'Ferrall on the issue of whether it is appropriate for the child, the subject of these proceedings, to travel for an access visit to America and to assess the risk and obtain the child's views. The case was scheduled for hearing before this Court on 21st December, 2015 however, the parties made a settlement in relation to interim access in Ireland. This allowed Ms. More O'Ferrall time to complete a more full report dated 28th March, 2016 for the purpose of this motion.

24. The hearing of this motion for access between mother and child in Illinois, USA took place on 4th May, 2016.

The Applicant's Evidence

25. The applicant confirmed that she lived with her parents in a three bedroom house that they own in Illinois, USA. The applicant confirmed that she was now in a subsequent relationship with a Mr. D, an Irish person who was working in the United States of America and he, himself, although divorced, has a good relationship with his own two daughters who are now adults and that he was in close contact with them. The applicant indicated that it was her intention that herself and Mr D. would rent a property fifteen or twenty minutes away from her current location which was a two bedroom property and which would cost approximately \$1,300 a month.

26. The applicant indicated that she will be able to pay one third of that rent and that she works in a bar and restaurant four shifts a week, Monday, Tuesday, Thursday and Friday during the day at present. She also stated that she has created a website where she is marketing other businesses and she is hoping that that business will grow. Her present income is between \$1,500 and \$2,000 a month. The applicant indicated that her parents do not charge her rent and that the child J. lived in her parents' house and went to playschool and preschool from there when he was in Illinois, USA.

27. The applicant avers that she maintains access with her son by Skype and that she found it hugely important that they see one another's faces. She described a gap of three years in her physical togetherness with her child because of what had happened in this case. She had physical access with her child in July 2015, which was three years since he had been returned to Ireland. She described him as being a little shy at first, but that he was soon sitting on her lap and they were giggling and chatting together. The applicant gave evidence that, in order to have access in this jurisdiction, she rented a holiday home near where the child lives with his father. She also stated that she rents a car when in Ireland and that has a cost for which she required financial assistance from her aunt. She further referred to a non-vouched estimate as to the cost of her coming to Ireland for visits which she says came to €9,760 over a year, which this Court calculated as amounting to €813.33 a month. The applicant also described herself as having a full Irish driving license.

28. The applicant described that, in January 2016, she visited Ireland again and had extensive access with the child while she was here. She described having overnight access seven nights in a row which went really well and that she was happy to be there. She described them as "besties" and that he wanted to be around her so much and was really happy to be with her.

29. She described her son as saying, in July 2015, that he would like to go to the United States of America four times a year but that he just did not want to go every week. She also described how, in Illinois, he would have a huge extended family of great aunts and uncles, friends and a large Irish American community. The applicant indicated that there would be no accommodation costs if the child were to travel to Illinois. She also stated that food and petrol were more expensive in Ireland generally and were cheaper in the United States of America. The applicant expressed herself as happy to consider the father bringing the child over to America and that she would pay half of the fare for the child to travel. The applicant suggested that the respondent could stay with his uncle who lived fifteen minutes away from the applicant.

30. The applicant was asked in evidence about concerns that she might spirit the child away when he gets to America. She replied that she never had that intention and that there could be a mirror order in America to ensure the enforceability of any order of the Irish Courts. The applicant opined that the present Irish Circuit Court Order, establishing Ireland as the correct jurisdiction, is in place and would be completely enforceable in most states of the United States of America.

31. The applicant indicated that she referred to the respondent as an abuser in order to explain why she left him. She confirmed in her evidence that she does not believe that the respondent is physically abusing the child J. at all. She also confirmed that her only complaint was that she needed more access with her son. The applicant then confirmed in her evidence that she was not saying that the child J. had gone through severe alienation and she commented that she and her son could now Skype each other, but that there was sometimes a lot of noise in the background and that their Skype sessions can be cut short. The applicant explained that she had obtained an iPad for the child, that he contacts her on Facetime and that he can call her whenever he wishes to. She stated that it was not possible at this time for her to move to Ireland. The applicant indicated that she would like an increase of Facetime/Skype access.

32. The applicant described when the child was returned by court order in America to Ireland, her own mother came to Ireland for an eight month period. However, she was only given supervised access for one hour at a time and the applicant indicated that this was very hard on her own mother and on the child J. The applicant accepted that the respondent had provided a home for the child J. The applicant was asked about the child's half sibling, indicating that she had no problem with this child and she accepted that he was an important part of her son's life. She stated that she believed that the bond she had with her son was stronger and more important than that of the half sibling bond he had with his younger brother.

33. The applicant described their current access arrangement while she was in Ireland for the hearing of this case. She described that she arrived on Monday morning and had access until 8pm and that on Tuesday, after school, until 8pm, with an overnight on

Wednesday after school until school time Thursday. She also described Thursday access as to continue from after school until 8pm and that after school then there would be an overnight on Friday until Saturday evening at 8pm.

34. The applicant then explained that an invitation that she attend the child's Holy Communion came through Ms. More O'Ferrall. She had originally rejected this invitation, however, she had reconsidered this and was now agreeable to discuss attending Holy Communion and the party after the ceremony.

35. When asked about media coverage of this case which had taken place in the United States of America, and the ability of people to access information on the internet about it, she answered that anything she had any control over she took down from the internet. She indicated that there are different rules in America surrounding family law proceedings, and thus believed that she was not breaching any rules by publicising the case and having fund raising events. The applicant confirmed in sworn evidence before this Court that she will not break the *in camera* rule as she understands the implications of same in Ireland.

36. The applicant said that she is now very open to pleasing the Irish Court. She describes it as being very important to her that her son would get at least a short visit in the United States of America where he has family and cultural ties there. She further stated that she both misses him and loves him. She also pointed out that, as she sees it, the child J. has been cut off from the entire side of his family who reside in Illinois, USA.

37. The applicant gave further evidence that she was advised that Ireland did not have jurisdiction to make a custody order in this case and that she was advised in the United States of America by the local judge not to leave the jurisdiction of that court with the child when she first applied there. She explains that this is why she fought the case so much and why she remained in the USA, despite her undertakings to the Irish Circuit Court to return to Ireland. The applicant expressed her desire to enjoy her time with her son and to move on from the lengthy litigation in both jurisdictions.

38. The applicant indicated that there are considerable costs outstanding and that there is a judgment against her parents' house in terms of legal fees. She told the Court that she had paid her former US attorney for some part of previous proceedings but that there is a judgment now and, as her parents were guarantors, the judgment has now been registered against their family home. The applicant explained that, in terms of her understanding of bankruptcy law in Illinois, as long as her parents keep paying the mortgage they are not at any risk of losing the family home.

39. The applicant expressed her desire that relations would improve between the parties and that she would like to get to a situation where there would not be any arguments or fighting between them. She did accept that there were old wounds but she wants to move on and enjoy time with her son. She accepted that the whole situation had been terrible for everyone.

40. Under cross examination, the applicant was asked what had made her change the approach that she had held since 2008 going through to 2015. She pointed out in her answer that she did what she thought was in the best interests of her child at those times but that she does not want to live in the past. She wants life to be happy for her son. She accepted that a period of trust building needs to take place. She accepts that the child J currently wishes to stay in this jurisdiction. It was put to the applicant that it was reasonable for a court to be very cautious and to assure itself of a genuine change of heart over a period of time when it would test her *bona fides* going forward. The applicant indicated that she has had a genuine change of heart on her part and that she would look for ways to prove that she was trustworthy in that regard. However, she indicated that she was unclear as to how she could prove that she would bring J. back from the USA if he were to visit without him actually visiting.

41. The applicant further stated that the school in Ireland was inferior to the school in Illinois, both academically and electronically. The applicant also indicated that the child J. has a significant cultural bond with the USA. The applicant reiterated that her son was a huge White Socks fan and enjoyed many activities that were available to him in America.

42. She explained that the assessor, Ms. More O'Ferrall, had asked her to tell the whole story from the beginning and that included a lot of bad things but she wanted to move forward now. She referred to an allegation she made back in 2012, that the respondent's wife had been shaking the child. She also referred to the said wife standing at the door of the house when she was saying goodbye to her son. The applicant also said that the respondent's wife was also rather intrusive. These statements have the status of allegations and the Court makes no findings of fact in relation to same.

43. Regarding the suggestion which was put to her that the parties consider mediation, it was put to her that she had emailed a definitive "no" to mediation. However, the applicant explained to this Court that when mediation was explained to her in detail she was in favour of it.

44. It was put to the applicant that, for a three year period, she did not come to Ireland to see him and that she could have returned to this jurisdiction at any point and purged her contempt before the Irish Circuit Court. The applicant replied that she believed that she would have been incarcerated had she returned to Ireland because of breaching multiple Irish court orders. It was put to her under cross examination that, as far back as July 2011, she was aware that she was not going to be incarcerated and that she actually remained in the USA for fear that she may lose the jurisdiction of the American courts. The applicant's response to this was that she did not know how long an order for attachment and committal would last. The applicant gave evidence that she was advised by both her Irish and her American lawyers that she might have ended up in prison had she visited Ireland during that time.

45. It was put to the applicant that the Cooke County Court, Illinois, USA had found that she had lied to the Irish Courts and that she never had an intention of returning the child to Ireland and that this had led to awful effects on the child and the respondent. It was not until July 2012 that the child was returned to Ireland, despite her undertakings to the Irish Court that she would return to Ireland with the child in March 2011. The general tenor of the applicant's evidence was that things had changed now and that nobody had explained to her before that she could have made an application in this jurisdiction for custody.

46. The applicant told the Court that there was a great deal of acrimony between the parties, who were always fighting and that she wanted to go as far away from the respondent as was possible. She confirmed under cross examination that she has already accepted that J. will be living in Ireland and that she needs a chance to prove herself. In answer to the question under cross examination, as to the need for the development of the relationship between the child J. and herself before he would travel to the United States of America, the applicant responded that she does not feel it is necessary as she does not know what they need to work on. The applicant suggested that the child could travel with his father to the USA and that might reassure both the child and his father.

The Evidence of the Respondent

47. The respondent confirmed that he works in the building trade, and that he had his own business for eight years but it went into

liquidation in 2008. He stated that he lives with his son J., the subject matter of these proceedings, his wife and the son of their relationship who was born in 2013.

48. The respondent described obtaining custody of the child J. in 2012 after a prolonged legal battle. He accepted that the first couple of weeks were difficult but that his son is now doing very well, both in school and at home. The respondent described having a happy home and that the child J. enjoys movies, sport, exploring, hurling, football, mountain walking and using his imagination. The respondent described his son as a child who likes to win but he does not mind losing either and that he is a child who likes the company of other children. He described other children coming to the house to play. He also indicated that the child loves his wife dearly and that he looks up to her and listens to her although he is very clear that she is not his mother and does not address her as such. He also described his two sons as getting on very well and that the child J. is very close to his half-brother.

49. Regarding Skype, the respondent described the average call usually lasting one hour. He stated that he never tried to interfere or stop the Skype access and that he always tries to be there to facilitate it. The respondent confirmed that he always wanted his son to have a relationship with both his parents. In relation to Skype, the respondent indicated that 1pm in Illinois would mean 7pm in Ireland and that they did their best to adhere to that, although circumstances sometimes delayed things.

50. The respondent complained that, at times, he felt that the child had been told inappropriate things regarding court. He indicated that he keeps all court papers in the attic and never let the child see him dressed in his suit in order to protect him from knowing that there are ongoing court proceedings. The respondent emphasised that he wanted his son to live a carefree life and not be concerned by the conflict between his parents. The respondent felt that the child had been exposed to too much and he was afraid that the child was in the limelight for all the wrong reasons. The respondent also complained that his son had told him that, on a previous visit with some of the applicant's family members, they had chastised the child J. about his Irish school not being good and had asserted that his half brother was not his real brother. This is the reason why the respondent now supervises access between the child and any of the applicant's family members.

51. The respondent father indicated that he has sympathy for the applicant as he had also been put in the position of being in a different jurisdiction to his child. However, he is of the view that the applicant is choosing not to live in Ireland, whereas he does not have an entitlement to work or live in the United States of America, being entitled only to a ninety day holiday visa.

52. In relation to the upcoming Holy Communion, the respondent confirmed that the applicant was welcome to come to the ceremony in the church and the party afterwards in his home. The respondent confirmed that the applicant was welcome to attend this communion with her parents and/or a friend and that it does not have to be as awkward as people say. The respondent confirmed that they had not spoken in general conversation in four years, and that there might not have been a full sentence spoken. The respondent did, however, feel that, for the child's fulfilment and happiness, it was important that his parents could both support him without hostility towards each other at events such as this.

53. Regarding the issue of whether or not the child should travel to the United States, the respondent said this would cause severe difficulty, and he was sure that, regardless of what is said, that the child would not be coming back and that it would be made impossible for him to have contact in the same way as before. The respondent indicated that he had extensive difficulties in enforcing the Irish Circuit Court order in Illinois. He is worried that this might end up happening again. The respondent confirmed that he would not feel safe about the child going to the United States of America and that he would not feel comfortable about it. He was of the view that there would be no guarantee of return. He could not go through the events of the past again, neither emotionally nor financially.

54. The respondent described his net take home pay in or around €2,000 per month and that they were renting a house at a cost to him of €650 per month.

55. The respondent indicated that he is very happy to facilitate access between mother and son in Ireland. The respondent felt it appropriate that a two year plan be put in place - setting scheduled visits down - so that everyone would know what was happening in advance. The respondent stated that sworn testimony was given that he was willing to accede to a suggestion from the Court that there would be an additional overnight access on the Thursday night to facilitate more time with mother and son. The respondent wanted to engage in mediation and he felt that future access arrangements could be worked out in advance through mediation.

Evidence of Ms. More O'Ferrall

56. Ms. Ruth More O'Ferrall confirmed in evidence that she had carried out an interim report dated 19th December, 2015, and an updated full report dated 28th March, 2016. Ms. More O'Ferrall detailed her qualifications in evidence; she has a bachelor degree in social studies, a national qualification in social work and a post graduate diploma in child forensic psychiatry. She has worked as a guardian *ad litem* and a family law assessor for Barnardos Service since 2007.

57. Ms. More O'Ferrall described a situation for the child where there was disharmony between the parties with a ripple effect throughout the whole extended family. The assessor felt it was not necessary to be entirely pessimistic. She viewed the more positive approach being taken for the benefit of the child, namely the new found willingness to engage in mediation, as hugely positive. The assessor felt that the applicant had entirely refused her recommendations in relation to mediation. The applicant had said, however, that she would do therapy for separated parenting to hone her skills concerning parenting in an absentee role. The applicant also later indicated that she would engage in mediation but not "couples therapy". The assessor's preference is that real comprehensive work as a separated parent would take place for the applicant. She noted that this was a very adversarial case and that work would have to be done, in order to ensure that the applicant mother would have a more moderated view of the respondent as the other parent of their son.

58. It was the view of Ms. More O'Ferrall that, before this Court could consider allowing the child to travel to the United States on holidays, the Court would need watertight guarantees concerning the return of the child to Ireland after this holiday.

59. Ms. More O'Ferrall recognised that, at the time of her assessment, the applicant had only seen the child face to face twice since 2012. Ms. More O'Ferrall found that the child was very unsure as to when he was going to see his mother again. Ms. More O'Ferrall felt that the applicant had to prove that she is a reliable parent, in other words, that when she says she will come to see the child, she will in fact come and it would be on the basis of clear dates. She explained further that the meetings between mother and son should not just be a holiday time and that the applicant needs to develop a more bounded parenting relationship. In terms of the child's needs, Ms. More O'Ferrall stated that he needs to feel confident that his mother is a reliable adult who will keep him safe. The assessor described the child as not liking it when his mother goes away because he does not know when he will see her again.

60. Ms. More O'Ferrall stated to the Court that she did not go into detail in relation to the various costs around the child as neither parent had given her clear financial information. However, Ms. More O'Ferrall noted that the applicant felt that she should not be obliged to pay maintenance as she had paid for three trips to Ireland since July 2015. Both parties have indicated that their financial circumstances are currently difficult.

61. The child in this case indicated to the assessor his wish that they could all live together in the same house and he felt that all of them could get on well together. Ms. More O'Ferrall was pleased with this as it indicates a belief that they all do get on well and that the child has been protected from the conflict between his parents. However, she emphasised how important it was to maintain this situation.

62. Ms. More O'Ferrall stated that these parents need to develop their co-parenting skills and there needs to be much more communication between them. She was concerned that strict parameters for a child are difficult to maintain if one parent has not been communicated with by the other. This issue arose in particular in relation to the fact that the applicant mother did not communicate with the respondent father but had given the child an internet access hand-held device which was on all the time. The assessor was not at all happy with this and said that it was important that this would be worked out properly between the parents. The communication problems were notable again in January 2016 when the applicant bought communion clothes without consultation, even by text, with the respondent. The assessor gives this as an example of poor communication and said that the child knows that his mother loves him but that she needs to prove her reliability as a parent.

63. In terms of the child's description of going to America, Ms. More O'Ferrall explained to the Court that he said that he would go if he was a bird and could come back to Ireland whenever he wanted to. The assessor felt that this showed the child's concern that he would not be returned and this went to the issue of stability for the child.

64. Ms. More O'Ferrall acknowledged that she was aware of how difficult it would have been for the mother to leave the child. However, when the applicant was leaving at the airport after her last visit to Ireland, she video-called the child and was visibly crying. Ms. More O'Ferrall felt that this was not wise and it made it very difficult for a little boy. She noted that children need to know that the adults around them are strong and can cope well with the situation.

65. Another difficulty highlighted by the assessor was the fact that the mother sees little merit in the child's lifestyle here in Ireland, and that she believes school and education here are substandard. However, Ms. More O'Ferrall noted that the last school inspection and reports were very good in his two teacher school and that there had been a lot of investment in the school. In addition, the applicant was found by Ms. More O'Ferrall not to regard the wife of the respondent or the half-sibling of the child to be of particular significance. Ms. More O'Ferrall noted that it was reported to her that, if the child's half-sibling goes out when the applicant is present, she does not particularly acknowledge him. Ms. More O'Ferrall also found that the applicant sees this respondent as unsafe. In addition, her view was that, if the respondent's wife signs homework, the applicant sees this as intrusive but from the child's point of view he gets comfort from his step-mother, who is a significant person in his life.

66. Ms. More O'Ferrall therefore feels that she would be concerned that the applicant might feel justified in disobeying court orders because she does not see the value in the child's life in Ireland. Ms. More O'Ferrall is of the view that the applicant mother had to practice parenting skills and attend mediation before a visit to America could be considered by this Court.

67. Ms. More O'Ferrall's suggestion is that a two year calendar with visits to Ireland for access set out needs to be sent by the applicant and given to the respondent and to the child. She acknowledged that both parties have limited means.

68. Ms. More O'Ferrall specifically stated that the child was not ready to go to the United States of America for two or three weeks this year and that it would be detrimental to his relationship with his mother for this to happen. The assessor referred in that regard to the child's experience in 2012, where it was accepted that he was in front of television cameras and that he was taken away from his mother and was flying to Ireland with his grandmother to be met by the Gardaí. The assessor then pointed out that for three years he only saw his mother on a screen. The assessor likened the two visits that had since occurred to "holiday time" spent with a "doting aunt" as the applicant showered the child with gifts and love and affection. Ms. More O'Ferrall feels that the child needs to establish a secure relationship with her as his mother.

69. Ms. More O'Ferrall indicated that the child's prime need was for security and to have confidence in his mother. She further asserted that the child is telling her that he is not ready for the visits to the United States of America and that it is not urgent from his point of view.

The Law

70. There is a constitutional obligation on this Court that the best interests of the child shall be the paramount consideration in deciding proceedings, such as these, relating to the guardianship, custody or access to a child. Article 42A of the Constitution now sets out the following:-

"4 1° Provision shall be made by law that in the resolution of all proceedings –

1) brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affect, or

2) concerning the adoption, guardianship or custody of, or access to, any child,

the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child."

71. This amendment was enacted by the Thirty-First Amendment of the Constitution (Children) Act 2012 as of the 28th April, 2015. Therefore, this Court must decide whether it would be in the best interests of the child J. to have access with his mother in Illinois, USA.

72. The determination of the best interests of the child shall be in accordance with the new Part V of the Guardianship of Infants Act 1964, as inserted by the Children and Family Relationships Act 2015 and commenced on 18th January, 2016. Therefore, this part of

the Act came into being between during the course of these proceedings and the decision of this Court must have regard to these provisions also. Section 31(2) of the Guardianship of Infants Act 1964, as amended, sets out a non-exhaustive list of the factors to be considered when the Court is determining what is in the best interests of the child:-

"(2) The factors and circumstances referred to in subsection (1) include:

- (a) the benefit to the child of having a meaningful relationship with each of his or her parents and with the other relatives and persons who are involved in the child's upbringing and, except where such contact is not in the child's best interests, of having sufficient contact with them to maintain such relationships;
- (b) the views of the child concerned that are ascertainable (whether in accordance with section 32 or otherwise);
- (c) the physical, psychological and emotional needs of the child concerned, taking into consideration the child's age and stage of development and the likely effect on him or her of any change of circumstances;
- (d) the history of the child's upbringing and care, including the nature of the relationship between the child and each of his or her parents and the other relatives and persons referred to in paragraph (a), and the desirability of preserving and strengthening such relationships;
- (e) the child's religious, spiritual, cultural and linguistic upbringing and needs;
- (f) the child's social, intellectual and educational upbringing and needs;
- (g) the child's age and any special characteristics;
- (h) any harm which the child has suffered or is at risk of suffering, including harm as a result of household violence, and the protection of the child's safety and psychological well-being;
- (i) where applicable, proposals made for the child's custody, care, development and upbringing and for access to and contact with the child, having regard to the desirability of the parents or guardians of the child agreeing to such proposals and co-operating with each other in relation to them;
- (j) the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and his or her relatives;
- (k) the capacity of each person in respect of whom an application is made under this Act –
 - (i) to care for and meet the needs of the child,
 - (ii) to communicate and co-operate on issues relating to the child, and
 - (iii) to exercise the relevant powers, responsibilities and entitlements to which the application relates."

Section 31(4) further indicates that "a parent's conduct may be considered to the extent that it is relevant to the child's welfare and best interests only".

73. Section 32(1) gives the Court the power to:-

- "(a) give such directions as it thinks proper for the purpose of procuring from an expert a report in writing on any question affecting the welfare of the child; or
- (b) appoint an expert to determine and convey the child's views."

Section 32(6) outlines that the expert shall:-

- "(a) ascertain the maturity of the child,
- (b) where requested by the court, ascertain whether or not the child is capable of forming his or her views on the matters that are the subject of the proceedings, and report to the court accordingly,
- (c) where paragraph (b) does not apply, or where paragraph (b) applies and the expert ascertains that the child is capable of forming his or her own views on the matters that are the subject of the proceedings-
 - (i) ascertain the views of the child either generally or on any specific questions on which the court may seek the child's views, and
 - (ii) furnish to the court a report, which shall put before the court any views expressed by the child in relation to the matters to which the proceedings relate."

Status of these Proceedings in the American Courts

74. The issue of the effect of the decision of the Seventh Circuit Federal Appeals Court of the USA dated 25th July, 2013 finding that the child had been habitually resident in Illinois, USA and ordering a return of the child to the USA is contested. The respondent succeeded in having the Irish orders dated 10th February, 2011 registered in the American Court on 1st July, 2015. The applicant then withdrew her Hague Convention proceedings in Ireland on 20th July, 2015 on the basis that the American courts had recognised the jurisdiction of the Irish courts to deal with these proceedings. The respondent fears that the judgment of the Seventh Circuit Federal Appeals Court stands and could be used to retain the child in America if the child is allowed to have access with his mother there.

75. Mr. Sreeram Natarajan, attorney for the applicant mother in the USA proceedings, stated his understanding in an affidavit dated

9th July, 2015 that the respondent has not moved to enforce the registered orders of the Irish Circuit Court dated 10th February, 2011 in the USA. He further stated that he will make all relevant arguments opposing enforcement of the registered Irish orders. Mr. Natarajan also stated that the Seventh Circuit Federal Appeals Court decided that the child should be returned to Illinois, USA despite the fact that the Irish custody order might be enforced.

76. Mr. David Schaffer, attorney for the respondent father in the USA proceedings, stated in his affidavit of 9th July, 2015 that the respondent has not sought enforcement in Cook County, Illinois of the 10th February, 2011 Irish custody decree because there has been no need to. He relied on the Illinois Uniform Child Custody Jurisdiction and Enforcement Act 750 ILCS 36/307 - 311. It is the opinion of Mr. Schaffer that the order confirming the registration of Ireland's initial child custody determination dated 10th February, 2011 supersedes any orders of the Federal Court as it has no jurisdiction over custody issues.

77. In his responding affidavit dated 17th July, 2015, Mr. Natarajan stated that the Illinois court has not made a final determination as to the viability and enforceability of the Irish custody order. He further stated that he, on behalf of the applicant mother, will oppose any move to enforce said order by the respondent.

78. There is a difference of opinion between the parties as to the current status of these proceedings in the Illinois courts, the respondent fearing that the applicant has not taken sufficient action to vacate such orders or that she might in future, try to rely on them or to reiterate matters in the USA and the applicant stating that she has taken all possible steps in this regard.

Conclusions

79. This Court is of the view that it is a positive step that the applicant has withdrawn her Hague Convention application and has accepted the exclusive jurisdiction of this Court, regarding custody and access of J. and she accepts that he is habitually resident in Ireland. However, this Court notes that the applicant has given multiple undertakings to the Irish Courts over the years and has breached them along with Irish Court orders. This Court finds, therefore, that an undertaking from her to return the child to Ireland cannot be seen as a complete guarantee.

80. There has been many years of confusion surrounding the conflicting orders of this jurisdiction and the jurisdiction of the USA. The Irish Circuit Court Order of 10th February, 2011, was registered in the Illinois Court on 1st July, 2015, and the information given to the Court by way of affidavit from the US attorneys is that that order is enforceable in the USA. However, there is also the issue of the judgment of the Seventh Circuit Federal Appeals Court of the USA, dated 25th July, 2013 which states that the child's place of habitual residence is Illinois, and that it was the appropriate jurisdiction in which to litigate custody and access issues. The respondent fears that, in a situation where the applicant may wrongfully retain the child in the USA, the complications in the American courts may lead to further prolonged litigation before his son could be returned to Ireland.

81. It is the recommendation of the Family Law Assessor, Ms. Ruth More O'Ferrall that it would not be in the best interests of the child J. to leave the jurisdiction of this Court at this time. In addition, the assessor does not feel that this is a priority or urgent matter for the child and that the parenting relationship between himself and his mother has to be first consolidated and she has to prove herself as a reliable parent before this would be reconsidered as being in the best interests of J.

82. Each side has submitted an affidavit of laws from their respective American lawyers in relation to a technical issue where the applicant's counsel has argued in this Court that it is impossible to change the federal court ruling dated 25th July, 2013. The respondent's counsel argues on this point that this is something which would have to be changed by court order before the respondent would feel sufficiently confident to allow the child travel to the United States of America given what occurred in the past. In the view of the respondent, the applicant retained the child there for a very lengthy period of time thereafter, despite undertakings given in advance of such travel by the applicant herein to the Irish courts, which he sees as having been immediately broken thereafter. In fact, there are declaratory orders to that effect in this jurisdiction.

83. This Court concludes that it is beyond doubt at this point that the child has been habitually resident in this jurisdiction since 2012 when he was returned here by his grandmother and was met by An Garda Síochána on his arrival on foot of orders obtained by the respondent herein as an applicant in an incoming application in the United States of America under the Hague Convention. It seems to this Court that the issue is now beyond doubt and has been confirmed in evidence by the applicant and is a clearly stated fact that she accepts that the Irish courts have sole and exclusive jurisdiction in relation to the issue of the habitual residence being Ireland and the custody and welfare of this child during his minority being issues for the Irish Courts to determine. Technically, the Hague Convention is operative until a child reaches the age of 16 years but of course he will be a minor until he reaches his 18th birthday. He is now part of a new family setting and it has been well established as such where his father has married and the child has a half sibling where he lives and where he is happy and thriving.

84. Despite the very acrimonious litigation which has occurred between the parties both in the United States of America and in Ireland, there are now hopeful signs or signals that the parties may be able to use mediation and family therapy to achieve a better equilibrium between themselves, for the benefit of this child. The assessor has found that the mother in this case must undertake work so that she has a more moderated view of the father and establishes herself as a reliable parent in the eyes of this child.

85. In the circumstances it seems to this Court that the mother must adopt the child's pace in all of this and match his needs accordingly. As the child gets older it will be very clear that his needs and wishes may well change with regard to any proposed visit to the United States of America. However, at the moment, it does seem to be contraindicated in the light of all the evidence heard by this Court and in the light of the assessment which has been most helpful and comprehensive, carried out by the assessor.

86. This Court considers it appropriate therefore that an access plan be presented to the Court to cover the next twelve months and that that be worked out by the mother in terms of what she can reasonably afford. This should include, hopefully, at least three visits over the next twelve months by her to Ireland where she would have full day and overnight access with the child for at least one week at a time. The child would go to normal school from whatever house she rents for that purpose and have his normal activities and it should not include curtailment of the life of the child in terms of having other children come to play which is important to him. She should be able to bring him to his normal activities as he is deeply interested in sport.

87. It seems to this Court that a one hour Skype telephone call can occur at 7pm Irish time (1pm Illinois time) in accordance with the child's wishes. If the child so wishes the one hour period could be lessened depending on what the child is doing at that time it seems a long period in terms of such a young child but there is no indication that it cannot occur on a daily basis. The child is not to have a hand held iPad on all the time as the assessor has given evidence as to how unsuitable this is but he can have this device for the one hour period every day for Skype access.

88. This Court considers that the three proposed visits which the Court sees as reasonable by the applicant should have full details

given within six weeks of today's date or sooner if possible so that the child has the certainty of knowing when these visits will occur and what the details are in terms of arrangements.

89. The Court has had the benefit of hearing extensive evidence from both parties to this litigation and very importantly from very highly qualified and experienced assessor who reflected to the Court the voice of the child and who advised the court that it would not be in the child's best interest to leave this jurisdiction at this time. The Court has a discretion with regard to the extent to which the Court will take on board the views of the assessor but nonetheless the Court has to give very careful consideration to the particular points raised by her and balance those in terms of the legislative framework in this case. Between the time of commencement of this case in this jurisdiction on this limb of the case and the second assessment taking place the new Child and Family Relationships Act 2015 had come into force. The relevant sections which amended Part V of the Guardianship of Infants Act 1964 were commenced on 18th January, 2016 and it was applied in terms of the checklist available to the assessor for her consideration of the voice of the child and assisting the Court to decide what was in his best interests and welfare in terms of the reliefs sought.

90. Despite the very fractious nature of this case to date, the assessor's report itself has been of great assistance to the parties in perhaps coming to a better understanding of the needs of this child at this point in time and of the appropriate way to go forward to ensure his best interests and welfare. Given the very difficult litigation history of the matter, the relationship between the mother and this child can be developed to a point in the future where the Court could reconsider this issue of the child leaving the jurisdiction with the mother for a short holiday period, but it is contraindicated on the evidence the Court has heard and in the view of the appointed assessor and in the view of her evidence and report. The Court is happy to review this case as matters progress but cautions that patience will be required in an effort to ensure the well being of the child going forward.

91. In considering whether a visit with his mother to America is in the best interests of this child the Court has given serious consideration to the various factors set out in s. 31(2) of the Guardianship of Infants Act 1964, as amended. The following is an analysis of the factors set out in s. 31(2)(a)-(k) as they relate to these proceedings:-

(a) This Court accepts that it is to the benefit of this child to have a meaningful relationship with each of his parents and with other relatives and of having sufficient contact with them to maintain such relationships. It is the view of the assessor that the child would benefit from a rebuilding of his relationship with his mother prior to this Court sanctioning an access visit in the USA. The assessor accepts that it is also important for the child to maintain his relationships with his relatives in America, however, she is of the view that this is secondary to his need for stable relationships with both of his parents.

(b) This Court accepts the views of the child as indicated by the assessor in her report that he wants to live in Ireland and that he would like to visit his mother in America but that he would definitely want to return to Ireland.

(c) In terms of the child's physical, psychological and emotional needs, the Court accepts the evidence of the assessor that this has been a "bitter and embroiled transatlantic battle between his parents" that must come to an end in the best interests of the child. The parents need to improve their communication for the benefit of the child.

(d) The history of this child's upbringing and care has been very contentious. He lived for some time in America with his mother to the exclusion of his father. He has been living in Ireland with his father since 2012 where his father encourages and facilitates daily Skype access with his mother and face to face access in Ireland. In considering the history of this case, the Court is concerned about the mother's attitude towards the child's relationship with his father, half sibling and stepmother, and whether she recognises the desirability of preserving these relationships.

(e) In terms of the child's religious, spiritual, cultural and linguistic upbringing and needs, this Court recognises the importance of both his Irish and his American identity with regard to each of these comments.

(f) In terms of the child's social, intellectual and educational upbringing and needs, the applicant has raised an objection to the quality of schooling that this child is receiving in Ireland as she believes he would receive a superior education in America. However, this Court accepts the evidence of the assessor who ascertained that the primary school where the child is currently attending and the secondary school where it is intended he will attend, both have very good reputations and positive inspector reports.

(g) The child is now nine years old and was described as the assessor as bright, articulate, thoughtful and engaging.

(h) In terms of the issue of any harm which the child has suffered or is at risk of suffering and the protection of the child's safety and psychological well-being, the assessor is of the view that there is a significant risk that, if the mother were permitted to take the child on a visit to America that she would disobey any court order and refuse to return to Ireland. The assessor believes that should this occur, it would be very detrimental to the child's psychological well-being.

(i) This Court recognises the desirability outlined in subsection (i) of the parents of the child agreeing access proposals and cooperating with each other. The Court notes and accepts the evidence of the assessor that the contentious nature of this case is not in the best interests of the child and endorses the assessor's recommendation that the parents should make efforts to improve the communication with each other around the parenting of their child.

(j) The father appears on his evidence to be making every effort to facilitate and encourage the continuing relationship between the child and his mother. Historically, when the child was in the care of his mother in America the mother did not facilitate the child's relationship with his father. This is a concern to the Court as it is certainly deemed by this Court to be in the best interests of the child to have a close relationship with both of his parents.

(k) Both parents are recognised by the Court, on the evidence of the assessor, as being capable of caring for and meeting the needs of the child. They have both had significant difficulty in communicating and cooperating with each other on issues relating to the child. This application is for access between mother and child outside of the jurisdiction. The Court is concerned that the applicant mother may step outside of the powers and entitlements that could be granted and that she may not return to Ireland with the child if such access in America is granted.

This Court further notes that s. 31(4) of the Guardianship of Infants Act 1964, as amended, which states that a parent's conduct may be considered when it is relevant to the child's welfare and best interests. In considering this, this Court takes the previous history of the parties into account as well as the extensive history and gives priority to the best interests of this child taking in

account the constitutional imperative and the check list as set out in herein and each specific motion thereof, pursuant to the 2015 Act.

92. This Court orders as follows:-

- 1) The Irish High Court shall continue to have exclusive jurisdiction to deal with the custody, access, and guardianship of the child J. and notes that J. is deemed by both parties herein to be, and is, habitually resident in Ireland.
- 2) This Court is willing to further review this case but wishes the recommendation as set out herein to have been attended to in the meantime and concludes that, at least, three scheduled visits in Ireland shall take place prior to any review. A review may occur after two years.
- 3) This Court notes the orders of Buttimer J. made in Carlow Circuit Court on 10th February, 2011, appointing the respondent father herein, with the applicant in the previous proceedings in 2011, as guardian of the child J., which said order remains in place.
- 4) This Court further notes the aforesaid order as having granted joint custody of the child J. to his father, the applicant in those proceedings, the respondent in the within proceedings.
- 5) This Court orders a continuation of the aforesaid orders for the avoidance of doubt.
- 6) This Court notes the terms of the order of the Carlow Circuit Court of 10th February, 2011, which ordered that child J. was to continue to reside in Ireland. For the avoidance of doubt, this Court orders that child J. is and continues to be habitually resident within the jurisdiction of the Irish Courts and further by consent of the parties, this Court orders that the Irish High Court has exclusive jurisdiction to deal with this case while the child is habitually resident in Ireland.
- 7) This Court orders, for the avoidance of doubt, that child J. is not to be removed from this jurisdiction without further order of this Court.
- 8) This Court notes that should the extended family of the applicant mother in these proceedings wish to have contact in Ireland with the child by way of an access visit, the father of this child is entitled to be present during such access.
- 9) This Court notes that while there is, and shall continue to be a joint custody in order, in being, that given that the child's mother resides and will continue to reside for the foreseeable future in the United States of America, it shall not be possible for her to parent the child on a 50:50 basis, at present. However, this Court orders that the applicant mother in these proceedings may, if she wishes to have contact with the child in Ireland for an extended period of a week or more, is entitled to at least three visits a year during each of the next two twelve month periods. This Court directs the mother to furnish a plan for the next two years access within the next month including precise details, at least two months in advance of each such visit, of her flight arrival times, her arrival at the home of the child J., collection and departure times during such periods as she wishes to spend in this jurisdiction. It is understood that these vacations will be during either term time or the child's school holidays but if she wishes to spend a week in this jurisdiction during his school term time, she shall be responsible for taking the child to and from school during her visit and to any extra curricular activities he would have.
- 10) This Court directs, for the avoidance of doubt, that school reports shall be shared. For the avoidance of doubt, in an emergency this Court orders that the respondent father to this application shall be at liberty to make any decision concerning the child's health or welfare in an emergency situation, without first having to contact the applicant but after any such event, he is to inform the applicant mother of the child's progress.
- 11) This Court notes the willingness of the applicant mother to attend a face to face parenting course and to provide full details of same to the assessor within a reasonable timeframe and the desirability as described by the assessor of the parties attending mediation although this Court is not in a position to order the parties to attend any such mediation and indeed family therapy which is recommended.
- 12) Nightly Skype access up to a maximum time of one hour from 7pm Irish time (which is 1pm Illinois time) is to continue. This Court directs that the father of the child keeps the iPad hand held device which the child has and releases it to the child in accordance with the recommendations of the assessor for the Skype access only each day for the present.

93. I adjourn this matter with liberty to re-enter. This matter can be re-listed for review following the completion of the three separate visits by the mother.