

THE HIGH COURT**FAMILY LAW HLC LIST****[2006 No. 38 HLC]**

**IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT, 1991
AND IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION
AND IN THE MATTER OF K. L.P.
AND E. E. P. MINORS**

BETWEEN**M. W. P.****APPLICANT****AND****T. K. P. (ALSO KNOWN AS T. K. E.)****RESPONDENT****Judgment of Mr. Justice McGovern delivered the 4th day of May, 2007****The Facts**

1. The applicant and the respondent were married on the 15th August 1992.

They have two children, both daughters. K. L.P. was born on the 16th February, 1992. E. E. P. was born on the 31st October, 1995. The applicant and the respondent were divorced on the 22nd May, 1997. The applicant and the respondent and their children are citizens of the United States of America. Prior to the respondent and the children arriving in Ireland in 2005 they lived in Texas. The applicant still resides there.

2. At the end of March or early April, 2005 the respondent left the United States with K. and E. ("the children"). It appears that they came to Ireland via Canada. The respondent brought the children to Ireland without the knowledge of or consent of the applicant and their removal from the United States was unlawful and in breach of Court orders made in the State of Texas.

3. The applicant, in these proceedings, seeks relief under the Hague Convention including an order returning the children to the United States. The applicant and the respondent enjoy joint parental responsibility for the children and the applicant was appointed sole custodian of the children by order of a court in Texas dated 26th September, 2005. That order was made in the absence of the respondent who had fled the jurisdiction of the United States with the children by that time.

4. The respondent seeks to prevent the applicant obtaining an order returning the children to the United States.

The Law

5. The Hague Convention has the force of the law in the State pursuant to the provisions of s. 6 of the Child Abduction and Enforcement of Custody Orders Act, 1991. The Convention is concerned with the removal of a child from his habitual environment where custody of the child has been granted to a natural or legal person. The objects of the convention are distinctly stated in Article 1 and are:

"(a) To secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and access under the law of one Contracting State are effectively respected in the other Contracting States."

Article 2 of the convention mandates Contracting States to "...take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available". The Convention is based upon the principle that any debate on issues such as custody rights should take place before the competent authorities in the State where the child had its habitual residence prior to its removal. The default position is that children wrongfully removed to one Contracting State should be returned to the Contracting State from which they came and that issues concerning their custody and other ancillary rights should be determined there. In the present case a dispute exists between the applicant and the respondent concerning custody of and access to the children. It is the Court in Texas which has determined those issues. Under the scheme of the Convention it is important to bear in mind that the Irish Courts cannot act as a Court of Appeal in respect of the decisions made in the Court in Texas nor do the Irish Courts have a reviewing role over those decisions. Save in the very limited circumstances provided for in the Convention the children must be returned to the United States promptly the onus of proving that the children come within one of the limited exceptions provided for rests on the respondent who wishes to keep them in Ireland.

6. This case revolves to a great extent around Articles 12 and 13 of the Convention. Article 12 has the effect that if these proceedings were instituted within a period of one year from the wrongful removal of the children from the United States to this jurisdiction the courts here have an obligation to return the children forthwith. Where more than one year has expired the courts here "...shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment".

7. Article 13 provides that the Irish Court is not bound to order the return of the children if the person (in this case the respondent) opposing the return of the children establishes that –

"(a) The person, institution or other body having the care of the person of the children was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesce in the removal or retention;

or

(b) There is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation".

Article 13 also goes on to provide that the court may refuse to order the return of the child if it finds that the child objects to being returned and "...has attained an age and degree of maturity at which it is appropriate to take account of its views".

It is accepted by counsel that paragraph 1 of Article 12 does not apply since the proceedings were commenced more than one year after the date of wrongful removal of the children. The children were removed at the end of March or early April, 2005 and the special summons grounding the proceedings was issued on the 2nd November, 2006. It is also accepted by counsel that sub paragraph (a) of the first paragraph in Article 13 does not apply since the applicant was not actually exercising custody rights at the time of removal or retention and he did not consent to their removal nor did he acquiesce in their removal from the United States of America.

8. The respondent states that the children are settled in their new environment and she states at paragraph (b) of the first paragraph in Article 13 applies namely there is a grave risk that the return of the children would expose them to physical or psychological harm or would otherwise place them in an intolerable situation. The respondent also states that the children object to being returned and have attained an age or degree of maturity at which it is appropriate to take into account their views.

Background Information

9. Having considered all the documents produced in court and the submissions of Counsel it seems to me that the following facts are relevant for me to consider in the exercise of my limited discretion as to whether I should decline to order the return of the children to the United States of America.

10. On the 8th July, 2004 a Protective Order was made by the court in Texas following a finding that the applicant had committed "family violence". The court held that Protective Orders were necessary for the safety and welfare of the respondent and other members of the family and household. In the course of that order the applicant was directed to submit to a psychological and psychiatric evaluation and anger counselling. This followed as serious assault with a knife on the respondent by a lady named C.M. who is now married to the applicant. Criminal proceedings have been brought against Ms. M. in respect of the assault. In that assault the respondent suffered serious stab wounds as appears from a medical report which was exhibited among the papers. The respondent also claims that the applicant threw K. against a wall and injured her on one occasion. A medical report was exhibited by the respondent showing that on February, 17th 2004 a patient by the name of "K. P." presented to Dr. Alexander Glogau with a right shoulder injury. The history is stated to be as follows:

"This is the first AOSM visit for this 12 year old young lady who on the 02/11/04 was grabbed by her father and thrown up against a wall. She had immediate pain to her right shoulder. Her mother took her to medical centre of Plano where x-rays were taken. No fracture was noted. She has been using a sling and states that her pain has become worse with time."

A copy of a document dated the 2nd June, 2004 from the Texas Department of Family and Protective Services deals with the allegation of physical abuse by the applicant on K. The letter (addressed to the applicant) states, *inter alia*, "An investigation has been completed and the results have been reviewed by a Supervisor. Based on the information received it has been determined that there is reason to believe that this did occur."

11. K. repeated this allegation when interviewed by Dr. Helen Greally a Clinical Psychologist who is directed to see her by this Court.

12. The examination by Dr. Greally was directed by Finlay-Geoghegan J. and she was asked to investigate the following:

1. The degree of maturity of K.P. and E. P..
2. Whether these children object to being returned to Texas in the United States of America.
3. If the children do object to being returned to Texas, the grounds for such an objection and whether it relates specifically to living in Texas in the United States of America and/or a desire to remain living in Ireland or whether it relates to an objection to living in the vicinity of a particular parent and/or a wish to live with the other parent
4. Whether any objections expressed have been independently formed or result from the influence of any other person including a parent or sibling.

Evidence of Dr. Greally

13. Dr. Greally prepared a report for the court and also gave evidence. She told the court that she carried out one interview with the children individually and one interview with them together. The report shows that K. had significant difficulties with her father since about the age of 5 or 6. She described being at her father's family home where his mother lived and she was playing in the swimming pool with E. She told Dr. Greally that her father punched her on the jaw because he said she was trying to drown her sister. She was reluctant to go on visits to her father and said she was always afraid of him because of his anger problems. She described how she developed difficulties with depression. She gave accounts of verbal abuse at the hands of her father and described how he physically assaulted her on one occasion injuring her shoulder. The matter was reported to the Family and Protective Services Authority for investigation and after that time her father's visits were supervised. But when a period of time had elapsed the visits became unsupervised again but no overnight visits were allowed. She described the incident where her mother was stabbed by the applicant's girlfriend and how her father was arrested on that occasion for drink driving. In short her description was one of fear of her father and a history of verbal abuse and some physical abuse.

14. She told Dr. Greally that she was happy living in Ireland for two reasons. She was well settled in her school in Ireland and her mother was also happier because her father was not around. She said her father and no regard for her mother and she found this difficult. She could not think of anything positive to say about her father. When asked what she liked about Ireland she said that she was very happy and knows her father cannot see her here. She likes her school and her friends and she likes the fact that her mother is happier here. Dr. Greally concluded that K.'s age and degree of maturity were very well reflective of her chronological age and was similar to that of a 16 year old child although she was almost 15 at the time of the interview.

15. Dr. Greally also interviewed E. She told Dr. Greally that she had moved to Ireland with her mother and sister because her father assaulted her mother on at least one occasion and was very mean to both K. and her. She described a history of her father yelling at her and her sister. Initially she missed her friends in America but this is less so now. She recalled her sister being thrown against a wall on one occasion and said the only person she misses in America is her maternal grandfather but she speaks to him on the phone. She described herself as being absolutely terrified of her father. Both E. and her sister K. got upset during the interview when discussing their father. Like K. she was unable to remember any positive features of her relationship with her father. She strongly objects to being returned to the United States of America and does not want to meet her father. She was unable to say what she liked about living in America because her father lived there and she was always afraid of him. Dr. Greally felt that E. was able to

answer the questions asked of her and that she was a bright child. Her chronological age is reflective of her cognitive ability and her age and degree of maturity is reflective of her chronological age and similar to that of a 12 or 13 year old child. She was 11 years and two months old when interviewed.

16. In the course of her evidence Dr. Greally said that it was very unusual for children of their age who have lived as long as they did in the United States to have such negative feelings towards their father and the United States of America. She accepted that the similarity of their accounts was somewhat worrying. She also made the same observation on the fact that neither had any bad words to say about their mother. When pressed she said they were absolutely determined that they were afraid of their father and they were absolutely consistent. Dr. Greally expressed the view that it would amount to an intolerable situation if they were sent back to their father who has been given custody of them because that would involve

(a) living with their father who frightens them and

(b) with the lady who had assaulted their mother. That lady is now married to their father.

17. Both the applicant and respondent were cross-examined on their affidavits. The respondent quite frankly accepted that she came to Ireland with her children to evade an order made by the court in Texas on the 17th March, 2005 which modified previous restrictions on the applicant. She stated that her intention was to keep the children from seeing their father and that even if he sought access in this jurisdiction she would seek to prevent him getting this.

18. The applicant was cross-examined and he denied physically assaulting his daughters and in particular K. He said he did not cause them psychological harm. He said that whether his mother-in-law or the respondent were tried for abducting the children was "...not germane to me". This seemed to me to be somewhat at variance with what was stated at paragraph 25 of his affidavit sworn on the 25th January, 2007 where he said that the respondent and her mother should "...turn themselves in to the United States Department of Justice to be tried in court for kidnapping and interference with the child custody charges currently pending". In paragraph 9 of the same affidavit he suggested that the respondent has a long history of making false and exaggerated statements to the court and that on account of this the courts gave full custody of the children to him. In fact it appears that she did not attend at that hearing as she was already in Ireland and the custody terms were varied because of her non appearance. He said she was upset with the decision giving him full custody of the children and that she denied him visitation to the children and attempted to hide them in Ireland and elsewhere. That simply cannot be true because she had already left by the time that order was made. In evidence he said the respondent was upset with the decision and left the U.S.A. Again that cannot be true because the order was made on the 26th September, 2005 by which time the respondent and the children were in Ireland for some months.

19. In paragraph 10 of his affidavit the applicant stated that "(K.) has never been diagnosed as being 'depressed' by a medical doctor in the United States." Yet it is clear from the evidence that her Paediatrician prescribed anti-depressant medication. When cross-examined on the events leading to the respondent being stabbed and the reason for his presence and his girlfriend's presence in the vicinity of the respondent's home he declined to answer any question relying on the privilege against self incrimination and the privilege he claimed against incriminating his spouse. While initially he seemed reluctant to admit that he had been obliged to attend anger management counselling he accepted that he went through this counselling or therapy because it was provided for in the Protective Order. This was after a letter of the 22nd December, 2004 was put to him in which the Psychologist Dr. Holmes states "In the Protective Order noted above, it states that Respondent submit to anger counselling. Mr. Peterson saw me seven times between August 31 2004 and October 7 2004 where I used Cognitive Therapy to address Anger Management and Emotional Regulation issues. He successfully completed this portion of therapy and has met the requirement of the Protective Order."

The Role of this Court

20. This court has no role as an appeal court from the decision of the court in Texas nor is it the function of this court to review that decision. The court is obliged to direct the return of the children unless I am satisfied that the children come within one of the exceptions provided for in Articles 12 and 13 of the Convention.

Conduct of the Respondent

21. The conduct of the respondent in removing the children from the United States was wrong and is to be deplored. It seems clear from authorities which have been open to me that I should consider whether the facts bring the children within the exceptions provided for in Articles 12 and 13 notwithstanding the conduct of the respondent and her motives which were, clearly, to frustrate the decision of a court in the U.S.A.

Decision

22. I found the applicant Mr. P. to be somewhat evasive in his evidence. I have some concerns about the two matters that troubled Dr. Greally namely the similarity of the account given by the two children to her and also the fact that they had not one single negative thing to say about their mother. The possibility of her exercising undue influence over the children cannot be ruled out. However it is clear that Dr. Greally, who is an experienced Psychologist was absolutely sure that the children are greatly in fear of their father and there is objective evidence among the papers to show that there was cause for concern about his behaviour to the point that the U.S. Courts found it necessary to make orders restricting his access to the children and to make a Protective Order. Even making allowances for the influence of the respondent over the children I am satisfied that there would be a grave risk to the children of being exposed to physical or psychological harm if they were returned to the United States of America. I am also satisfied that they would be placed in an intolerable position by being returned there on account of the fact that the applicant is now married to the lady who is accused of assaulting their mother and causing her serious injury.

23. I am also entitled to refuse to order the return of the children to the U.S.A. if I find that the children object to being returned and have attained an age and degree of maturity at which it is appropriate to take account of their views. I have considered the report of Dr. Helen Greally in that regard and I have heard her evidence. I am satisfied that both K. and E. have expressed the strongest objections to being returned to the U.S.A. and relate this to the fact that their father is there. I accept that they have attained an age and degree of maturity which makes it appropriate for me to take into account their views. It is significant that both K. and E. became extremely distressed and tearful when the possibility of them having to return to the U.S.A. was raised by Dr. Greally.

24. The other matter I must consider is whether or not the children are now settled in their new environment. In *Re N (Minors) Abduction* [1991] 1 F.L.R. 413 Bracewell J. stated at 417 "The second question which has arisen is: what is a degree of settlement which has to be demonstrated? There is some force, I find, in the argument that legal presumptions reflect the norm, and the presumption under the Convention is that children should be returned unless the mother can establish the degree of settlement which is more than mere adjustment to surroundings. I find that word should be given its ordinary natural meaning, and that the word 'settled' in this context has two constituents. First, it involves a physical element of relating to, being established in, a community and an environment. Secondly, I find that it has an emotional constituent to denoting security and stability...". In the case of *Re L*

(Abduction: Pending Criminal Proceedings) [1999] 1 F.L.R. 433 at 441 it was made clear that the time in hiding cannot go to establish settlement and that it would be wrong for a parent who has abducted a child to rely on the fact that they had concealed the whereabouts of the child for some time and then rely on the fact that the child has been so long in the jurisdiction that it has now settled and that the court should exercise a judgment not to return him to the original jurisdiction.

25. I accept that the settlement in a new environment referred to in Article 12 requires that the party raising that exception must clearly show that the settlement was so well established that it over-rides the otherwise clear duty of the court to order the return of the child.

26. I am satisfied that in the present case the children are settled in their new environment. Whether they are so settled in a physical sense as to come within the ambit of Article 12 is not completely clear although it does appear that they are well settled. I take the view that their settlement in Ireland also has "...an emotional constituent denoting security and stability" as referred to *Re N*. The evidence establishes that they feel safe here and part of this is bound up in the fact that they feel their mother is safe and secure. Accordingly on that basis I would hold that they are settled in their new environment to such an extent as to come within the ambit of Article 12.

27. In reaching my conclusions I am conscious of the objects of the Convention which are:

(a) To secure the prompt return of children wrongfully removed to or retained in any Contracting State;

(b) To ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

The courts cannot likely disregard these objects and over-ride the comity which exists between the courts of Contracting States. But I am satisfied that in the exceptional circumstances that arise in this case I should exercise my discretion to do so for the reasons I have set out and accordingly I refuse the relief sought by the applicant in this matter.