

REDACTED

THE HIGH COURT

FAMILY LAW

2010 25 HLC

IN THE MATTER OF ARTICLE 11(6) OF REGULATION NO. 2201/2003 AND

**IN THE MATTER OF THE FOREIGN PROCEEDINGS ENTITLED CASE NO. IIINsm 396/09 BEFORE DISTRICT COURT OF M AND CASE
NO. IICA BEFORE G CIRCUIT COURT, II FAMILY DIVISION**

AND

**IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION AND
ENFORCEMENT OF CUSTODY ORDERS ACT, 1991**

AND

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT, 1964

AND

IN THE MATTER OF A. K. (A CHILD)

BETWEEN

A. O. K.

APPLICANT

AND

M. K.

RESPONDENT

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 9th day of September, 2011

1. This judgment is given following the full hearing on oral evidence over four days of a custody dispute between the mother and the father in relation to their child. The matter is before the court pursuant to Article 11(7) of Council Regulation (EC) No. 2201/2003 of 27th November, 2003 ("the Regulation").

2. An Interim Ruling in this application was delivered by me on 28th January, 2011, in which I set out in detail both the factual background and the legal framework in which this matter comes before the court. For clarity, I propose only recording in short form in this judgment the factual background legal framework and the matters which have occurred in the proceedings since 28th January, 2011. This judgment should be considered with the written Interim Ruling delivered on 28th January, 2011.

Background Facts

3. The applicant ("Mother") is the mother of the child, the subject of the proceedings ("the Child"). The respondent ("Father") is the father of the child.

The Mother and Father were married to each other at the birth of the Child. The Mother, Father and the Child are Polish nationals. The Child was born in Poland in 2000. The Mother has a son of a previous relationship born in 1993.

4. In February 2005, the Father came to Ireland to work. The Child, the Mother and her son joined him in 2006. The Mother and Father both obtained work in Ireland.

5. In late 2008, the Father commenced travelling to Poland to work there. From early 2009, the Father spent most of his time in Poland. By the summer of 2009, the relationship between the Mother and the Father was in difficulty. In June, 2009 the Father came to Ireland to take the Child on a pre-arranged holiday to Poland. There were to be family celebrations following the Child's First Communion which had taken place in Ireland. The Mother appears to have become concerned as to whether the Father would return the Child to Ireland following the holiday.

6. On the 29th June, 2009, the Mother commenced an application under the Guardianship of Infants Act 1964 (as amended), before E District Court. The application came on for hearing on the 2nd July. Both parties were legally represented. A settlement was reached. Orders were made by the District Judge in the terms of a consent signed by the parties and filed in court on the 2nd July. The principal terms of the consent were a declaration that the habitual residence of the Child is in Ireland, and that the Child be permitted to travel to Poland on 7th July,, and was to return to Ireland with the Mother on 15th August, 2009. The application was adjourned by consent to 15th September, 2009.

7. The Child travelled to Poland with the Father on 7th July, as agreed. The Child was not returned to the Mother for the purpose of returning to Ireland on or before 15th August, or at all, in breach of the terms agreed and provided for in the District Court order.

8. Since August 2009, the child has continued to live with the Father in Poland. Until the commencement of this application, there was limited access between the Child and the Mother by telephone and in Poland. There has been further access by agreement of the parties in Poland in March 2011, and the Child was brought to Ireland in July 2011 for two weeks, pursuant to an order made in these proceedings on 23rd June, 2011, and returned to Poland in accordance with the terms of that order.

Proceedings in the District and Circuit Courts in Ireland

9. On 15th September, 2009, there was the adjourned hearing before E District Court. The Father did not appear but was legally represented. An order was made that the Mother have sole custody of the Child. On the same day, a Certificate was issued by E District Court pursuant to Article 42(1) of Council Regulation (EC) No. 2201/2003 of the 27th November, 2003, ("the Regulation") in respect of the order made on the 2nd July, 2009. On 17th September, a similar Certificate issued in respect of the order made on 15th September, 2009.

10. An appeal was lodged by the Father against the order of the District Court of 15th September, 2009. This came on for hearing in L Circuit Court on 8th or 10th December, 2009. The Father was again represented but did not appear. The order made was that the appeal be struck out and the order of the District Court affirmed. A Certificate was issued by L Circuit Court on 8th December, 2009, pursuant to Article 39 of Regulation 2201/2003.

11. The above orders have not been enforced in Poland.

Application for the Return of the Child in Poland

12. The Mother commenced proceedings for the return of the Child, pursuant to the Hague Convention on Child Abduction and the Regulation before the District Court in M Poland. These first came before that court on 6th October, 2009, and were determined by a decision of 18th December, 2009. The application was dismissed.

13. An appeal was lodged against that decision to the G Circuit Court and on 18th May, 2010, a decision was made that the appeal be dismissed.

14. By letter of 5th July, 2010, the Polish Central Authority notified the Irish Central Authority, pursuant to Article 11(6) of the Regulation, of the decision taken by the G Court on 18th May, 2010, dismissing the appeal against the order of the M Court on 18th December, 2009, dismissing the Mother's application for the return of the Child to Ireland.

15. On 30th July, according to the documents exhibited before the Court, the Central Authority forwarded this correspondence to the solicitor in the Legal Aid Board in E, now representing the Mother. These proceedings were subsequently commenced on behalf of the Mother. For the reasons set out in the Interim Ruling, no issue arises in relation to the nature of the proceedings.

Interim Ruling

16. Following the initial exchange of affidavits between the Mother and the Father, there was dispute as to how the application should proceed and be heard and determined by this court. It appears to have been the first such application seeking custody of a child following a notification pursuant to Article 11(6) of the Regulation of the making of a non-return order in another EU Member State.

17. At the time of the Interim Ruling, there were certain core facts and issues relating to the jurisdiction of the Irish High Court which were not in dispute and which remain undisputed. These include the fact that in the summer of 2009, the Child was habitually resident in Ireland and that the retention of the Child in Poland after 15th August, 2009, was a wrongful retention within the meaning of the Hague Convention and the Regulation. The Irish courts were then and remain the courts with jurisdiction under the Regulation in relation to the current disputes between the Mother and the Father in relation to the custody of the Child. In particular, in accordance with Article 10 of the Regulation, the Irish courts now retain their jurisdiction in relation to the Child, notwithstanding that she has lived in Poland since August 2009, as none of the four conditions set out in Article 10(b) of the Regulation have been met.

18. It is not in dispute that the Polish courts have issued non-return orders pursuant to Article 13 of the Hague Convention within the meaning of Article 11(6) of the Regulation. It follows that the proceedings before this court are before it pursuant to Article 11(7) of the Regulation and that Article 11(8) applies to any judgment given in the proceedings.

19. In the Interim Ruling, I set out in summary my conclusions at paragraph 53 in the following terms:

(i) The substantive proceedings before this Court, pursuant to Article 11(7), having regard to the submissions already made and notices of motion issued on behalf of the parties, require this Court to ultimately determine the dispute between the parties in relation to the custody of the Child. Each of the parties seeks custody of the Child.

(ii) In determining that substantive issue, the Court has full jurisdiction it would have in accordance with Irish law, pursuant both to its inherent jurisdiction and the Guardianship of Infants Act 1964 (As Amended).

(iii) The exercise of its jurisdiction, including in relation to any interlocutory application, must be informed by the provisions of Regulation No. 2201/2003 and, in particular, Articles 11 and 42, and the 1980 Hague Convention on Child Abduction.

(iv) Its jurisdiction includes the power to make, on an interlocutory application, an order for the return of the child to Ireland. In determining any such application, the court will apply a welfare test in the relevant factual and legal context, but will not conduct a full welfare enquiry of the type which would be done prior to the determination of the substantive custody dispute.

(v) In determining any interlocutory application for the return of the Child, the court must comply with the minimum procedural requirements of Article 42(2), including giving the child an opportunity to be heard, unless a hearing is considered inappropriate, having regard to her age or degree of maturity.

(vi) The court retains its full jurisdiction to make interim orders for access and custody.

It is the first three conclusions which are of particular relevance to this judgment following the hearing of the substantive custody dispute.

Subsequent Steps in Ireland and Poland

20. In the Interim Ruling, I sought to encourage the parties to engage in a process of mediation and attempt to agree upon future living arrangements for the Child. Regrettably, this has not proved possible, but there has been some improvement in contact between the parties and, in particular, in the Father's approach to contact between the Mother and the Child. The parties also, ultimately, at the suggestion of the Court, agreed, on the Mother's part, not to pursue interim or interlocutory applications for the return of the Child, and on the Father's part, not to pursue an application under Article 15 of the Regulation. The primary purpose was to move speedily towards the full custody hearing. Initially, it was hoped that that would take place prior to the end of July, but by reason of logistical constraints, particularly in relation to the necessary interview and assessment of the Child, it was not possible to commence the hearing until 31st August, 2011.

21. On 9th June, 2011, the Court made an order pursuant to s. 47 of the Family Law Act 1995, that Dr. Anne Byrne-Lynch interview the Child and report to the court, making recommendations in relation to future custody and access in the best interests of the Child. The Court identified certain matters upon which the Child should be given an opportunity of expressing her views to the court. The Court had expressed the view on more than one occasion in the course of the directions hearing that it was desirable that Dr. Byrne-Lynch have the opportunity of interviewing the Child both in Poland and in Ireland, whilst she was residing in the respective houses in which her Father and Mother currently live. Regrettably, the Father, despite opportunities given, did not agree to bring the Child to Ireland, notwithstanding that the Court had made clear by an ex tempore ruling delivered on 9th June, 2011, that the Court would make orders to ensure, in relation to any such visit, that the Child would be permitted to return to Poland. Ultimately, the Court, on 23rd June, 2011, ordered that the Father bring the Child to Ireland no later than Sunday 10th July, 2011, for the purpose of the Child having contact with her Mother for a minimum period of fourteen days at the Mother's home in Ireland in July 2011. The order provided that the Child return to Poland at the end of the fourteen-day period and noted an undertaking of the Mother not to apply to any court in Ireland for the Child to remain in Ireland after the fourteen-day period or for the variation of the order the Court was making and provided for contact between the Father and the Child during the period she resided with her Mother.

22. The Father complied with the order of the Court of 23rd June, 2011, and brought the Child to Ireland. The Father remained in Ireland during the period the Child was here, staying with a friend, and had contact with the Child during that period.

23. Dr. Byrne-Lynch had interviews with the Child and the Mother whilst the Child was in Ireland. She also travelled to Poland in August 2011, and interviewed the Child and her Father in Poland. Dr. Byrne-Lynch prepared a written report dated 28th August, 2011 of her interviews, assessment and recommendations.

24. At the hearing over four days, the court heard evidence, principally from the Mother, the Father and Dr. Byrne-Lynch. There was minor evidence given by two other witnesses, one on behalf of the Mother and one on behalf of the Father. It is not necessary to refer to that evidence for the purpose of the issues which I have to determine.

25. By order of the Court of 8th February, and with the consent of the parties, it was requested that both the District Court and Circuit Court in Poland transmit a list of the relevant documents for the purposes of Article 11(6) of the Regulation concerning the decisions taken on 18th December, 2009, and 18th May, 2010, respectively, in relation to the Child, the subject matter of the proceedings. This was responded to and the following documents transmitted to the Court via the Central Authorities:

- (i) Minutes of the District Court in M of 6th October, 2009;
- (ii) The minutes of the District Court in M of 18th December, 2009;
- (iii) The minutes of the appeal hearing in the Circuit Court in G on 18th May, 2010.

26. This Court also has the decision of the District Court in M of 18th December, 2009; the decision of the Circuit Court in G of 18th May, 2010, and the opinion of the Diagnostic and Advisory Centre in S of 25th November, 2009.

27. The Court, in reaching its decision in this judgment, has taken into account the reasons for and evidence underlying the Orders of Non-Return issued by the District Court in M and Circuit Court in G as disclosed by those documents.

28. The Father commenced divorce proceedings in Poland. In the course of this application, since January last, an issue has been raised on more than one occasion as to whether or not the Father proposed continuing with his application for custody in the divorce proceedings whilst the present proceedings were before the Irish courts. This Court made clear on more than one occasion that, in accordance with its ruling of 28th January, 2011, the Irish courts retained jurisdiction in relation to any dispute concerning the custody of the Child. Notwithstanding, it appears from documents now exhibited by the Father that, in June 2011, his Polish lawyer pursued, on his behalf, an application for an urgent injunction in relation to the Child. On 4th July, 2011, the Regional Courts in G granted an injunction to the Father "establishing that the [Child] shall reside with her Father for the duration of the proceedings". In the course of the recent hearing, the Father explained that this had been sought on the basis of legal advice received in Poland. He drew the Court's attention to the fact that notwithstanding the injunction, he complied with the Irish High Court's order of 23rd June that his daughter travel to Ireland and reside with her Mother for contact in July 2011. The Father further indicated to the court in the course of his evidence that he was not intending to rely upon the Polish court's injunction. His current position is that he has now received advice from a specialist lawyer in Poland, and that he accepts the jurisdiction of the Irish courts to determine all questions in relation to the custody of the Child. He has further indicated, through his counsel, that even if this Court's decision includes an order for the return of the Child, it is not his intention to challenge any Certificate which may be granted for the purpose of enforcement of that order in Poland. As he is entitled to, he obviously reserves his right to appeal against any order made by the Irish High Court in this jurisdiction. The Father has also indicated a willingness to seek to vacate any orders of the Polish courts which would be contrary or inconsistent with any order now made by the Irish High Court.

Legal Approach to the Court's Decision

29. There is no significant dispute between the Father and Mother in the submissions made by their respective Senior Counsel on the proper approach of the Court to making the decisions on custody and access in relation to the Child. There was a difference in emphasis and, of course, a difference in the submissions as to the proper application of those principles to the facts herein.

30. The common starting point is that pursuant to Articles 8, 10 and 11(6)-(8) of the Regulation, the Court, in "examining the question of custody", is conducting a full hearing in relation to the custody dispute between the parents. In so doing, the Court is exercising its full jurisdiction pursuant, in particular, to s. 11 of the Guardianship of Infants Act 1964, in that it is determining a question affecting the welfare of the Child and it has a general jurisdiction to make such order "as it thinks proper". The Court is directed by s. 3 of the Act of 1964, to regard the welfare of the child as "the first and paramount consideration". Welfare is defined in s. 2 of the Act as comprising "the religious, moral, intellectual, physical and social welfare of the child". This requires the court to consider the welfare of the Child in the widest sense and consider the entire picture presented by the evidence before it. See, *inter*

alia, Walsh J. in *O.S. v. O.S.* [1976] 110 ILTR at 57, and Flood J. in *E.M. v. A.M.* (Unreported, High Court, 16th June, 1992).

31. Insofar as there is a difference in approach between counsel for the Father and the Mother, it arises in relation to how the Court should approach what I referred to in the summary of my conclusions in the Interim Ruling at paragraph 53(iii) as requiring the Court, in exercising its jurisdiction, to be informed by the provisions of the Regulation (in particular, Articles 11 and 42), and the 1980 Hague Convention on Child Abduction. The difficult, and perhaps novel question, is how, in practical terms, this is to be done on a full custody hearing held pursuant to Article 11(7) of the Regulation.

32. Ms. Browne, on behalf of the Mother, submits that the court, in examining the question of custody, should put itself in the position it would have been if the Child had not been abducted or, in this case, wrongfully retained in Poland. She makes this submission primarily in reliance upon the decisions of the English High Court in *Re A.H.A. v. M.B.* [2008] 1 FLR 289, *M. v. T.* [2010] 2 FLR 1685, and *D. v. N.* [2011] EWHC 471(FAM). She then submits that following that principle, the Court should consider the present application as if it were an application by the Father for leave to relocate the Child from Ireland to Poland, and for that purpose, apply the principles set out by MacMenamin J. in *U.V. v. V.U.* (Unreported, 15th April, 2011). She also draws attention to what I said in *C.A. v. C.A.* (otherwise *C. McC*) [2010] 2 I.R. 162 at paragraph 37 when considering the impact of Articles 11(6)-(8) on the discretion to be exercised by a court on an application for return where an Article 13 defence of a child's objections is made out:

"Care must be taken that the policy of the Convention to deter abduction is not undermined by giving an advantage in any subsequent hearing (i.e. a custody hearing pursuant to Article 11(7)) to a parent who wrongfully removed children. If the court of the jurisdiction of habitual residence is required to consider custody issues, including an issue of return, in the context of the court of another Member State having made an order for non-return, there may be such an advantage or a perceived advantage."

33. Ms. O'Toole, on behalf of the Father, submits that the Court must now make the custody decision in the interests of the welfare of the Child, having regard to the present position of the Child. In particular, that includes the fact that the Child has been living in Poland for the past two years. She submits that it is therefore not appropriate to consider it as a relocation case from Ireland to Poland. Nevertheless, she does not dispute that certain of the principles which govern a court's approach to relocation would also apply when determining what is now in the best interests of the Child. However she submits that the Child should not be punished by reason of any wrongdoing of the Father in retaining the Child in Poland and that this could be the effect of ignoring the fact that the Child has lived in Poland and gone to school there during the past two years.

34. The English decisions to which I was referred are of limited assistance as they all relate to applications for summary return and not the hearing of a full custody dispute. In my judgment, the Court must, in a full hearing of a custody dispute, make its decision having regard to the welfare of the Child as the first and paramount consideration, and in accordance with what it now considers to be in the best interests of the Child in her present circumstances. It follows that the Court must take into account the fact that the Child has been in Poland for the last two years. However, the Court should also take into account any relevant factual impact on the Child as a result of her wrongful retention. That is not in any sense to punish the Child but, rather, to take cognisance of the effect of her wrongful retention in Poland, having regard to the relevant facts of this case. In case C-211/10 PPU, *Povse*, the Court of Justice, in its judgment of 1st July, 2010, referred, at paragraph 64, to the general effect of an unlawful removal (as would similarly apply to an unlawful retention), where it stated:

"One of the fundamental rights of the child is the right, set out in Article 24(3) of the Charter of Fundamental Rights of the European Union, proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p.1), to maintain on a regular basis a personal relationship and direct contact with both parents, respect for that right undeniably merging into the best interests of any child (see Case C-403/09 PPU *Detiëek* [2009] ECR I-0000, paragraph 54). It is clear that an unlawful removal of the child, following the taking of a unilateral decision by one of the child's parents, more often than not deprives the child of the possibility of maintaining on a regular basis a personal relationship and direct contact with the other parent (see *Detiëek*, paragraph 56).

On the facts herein the Court, in making a decision as to what is now in the best interests of the welfare of the Child, will be taking into account the fact that the Child has been deprived during the past two years of an appropriate relationship with her Mother.

35. The Court's decision will also be informed by Article 11 of the Regulation and the Convention by taking into account the fact of the wrongful retention by the Father in the Court's assessment of the Father's likely future behaviour insofar as it relates to achieving what is in the best interests of the Child. On the facts herein this includes, in particular, his ability to recognise the importance of and foster an appropriate relationship between the Child and her Mother. It therefore appears to me that insofar as the Court must now take into account the factual situation of the Child as having lived in Poland for two years, the Court, in doing so, will not be doing so in a manner which creates an advantage for the Father as the parent who wrongfully retained the Child. The Court will also bring into account the period of separation between the Child and her Mother in the assessment of what is now in the best interests of the Child's welfare. Further, insofar as the court is assessing the Father, it will bring into account the fact that he retained the Child in Poland in breach of an agreement reached with the Mother which was made the subject of a District Court order in Ireland and continued to prevent the Mother having appropriate contact with the Child, whilst, of course, taking into account the explanations offered by the Father, in evidence, for his behaviour.

36. It follows from the above that it does not appear to me that the Court should now treat this application as if it were an application for relocation of the Child to Poland. The difference is that, on the evidence, the court must make a decision in a context where the Father is living in Poland, the Mother is living in Ireland and the Child lived in Ireland until 2009, and since 2009, has been living in Poland, albeit as a result of a wrongful retention. There is, however, an overlap in the matters to be addressed by the Court in determining what is in the Child's best interests.

37. Finally, Article 42 of the Regulation also informs the Court's decision insofar as the Court has considered the judgments of the District Court in M of 18th December, 2009, and of the Circuit Court of G of 18th May, 2010, and reasons expressed therein, and the evidence underlying those decisions as disclosed in the documents furnished to this Court, including the minutes and expert opinions. I respectfully agree with the approach of the English courts in the three decisions to which I was referred, that, in giving consideration to the Polish decisions, this Court is not carrying out an appeal process in respect of the decision of the Polish courts. This Court is not exercising a jurisdiction under the Hague Convention, and in particular, Article 13 thereof. It is for the reasons already explained, exercising quite a different jurisdiction and where the Court has had different evidence before it in relation to the Father, Mother and Child.

Conclusions

38. The decision to be taken by the Court is neither obvious nor easy. The evidence of the Mother, Father and Dr Byrne-Lynch

contain contra indications as to what decision is now in the best interests of the Child having regard to her overall welfare.

39. I find that each parent is capable of providing an appropriate, loving and caring parental relationship for the Child. The Child, at any time, will be safe in the care of either parent. The Child should be in the joint custody of the Mother and the Father such that both will be involved in all-important decisions concerning the Child. However, as they cannot at present agree on where she should live and go to school, the Court must make those decisions. At any given time the Child should be in the day-to-day care of the parent with whom she is residing. Such parent should be required to keep the other fully informed of all-important matters concerning the Child.

40. I am also satisfied that each of the parents has a legitimate reason for which he or she has chosen to live in Poland or Ireland. In the case of the Mother, there are legitimate reasons relating to her employment and her obligations to her son and his education, which require her to continue living in Ireland for the foreseeable future. In the case of the Father, it is his employment in his father's business in Poland and the lack of employment opportunities in Ireland. It is a regrettable fact that the marital relationship between the parents appears, at present, to have broken down. There is, on the Mother's part, a significant lack of trust in the Father, arising, at least in part, from the wrongful retention of the Child in Poland and the actions taken in the subsequent Polish proceedings. The Father, for his part, appears overly critical of the Mother's skills as a parent, arising, in part, from unfortunate difficulties emanating from the parenting of her son, and he resents her choice to continue living in Ireland.

41. The Child, who is aged eleven years, has been interviewed by Dr. Byrne-Lynch in both Ireland and Poland. On the report of those interviews, the Child appears an intelligent girl, able to discuss her own situation, but with significant emotional vulnerability relating to the difficulties in her family situation. She expressed the view that she loves both parents "the same". She has expressed a desire to spend more time with her Mother. She also expressed a wish to maintain better contact with her brother. She also expressed a preference for attending school in Poland. Dr. Byrne-Lynch reported this as a strong and consistent view through both contacts. In her oral evidence, Dr. Byrne-Lynch indicated that the Child had a real sense of her Polish nationality and identity and that a sense of national identity was not unusual for an eleven year old.

42. The Child described a strong, affectionate bond with her Father, and an expectation of exclusivity in their relationship. This appears to create some anxieties in the Child and is perceived by Dr. Byrne-Lynch as potentially interfering with her proper development and a sense of security in her Mother's care.

43. Whilst, in the course of the interviews, the Child expressed the preference to go to school in Poland, she does not appear to have ruled out returning to live with her Mother in Ireland. She spoke of her Father's new girlfriend, and is reported as having "declared emphatically that she would go and live with her Mother if her Father's girlfriend were to move into the house". No evidence was given of the relationship between the Father and his new girlfriend. In interview with Dr. Byrne-Lynch, he referred to her as only a "platonic" female friend. I make no finding based on any significant relationship, but simply refer to the Child's declaration as indicating some ambiguity in her thinking as to where she wishes to live.

44. What the Child wishes she cannot have. Her first wish is that her parents would reunite and the family would live together. Her second is that both her parents would live separately, but close by, in Poland, in which event she would see herself as dividing her time equally between her parents' homes. The decision which the Court must now make is based upon a premise that for the foreseeable future, the parents will, for legitimate reasons, live one in Poland and one in Ireland.

45. In referring to Dr. Byrne-Lynch's recommendations, I am referring to her written report as amplified, explained and, to some extent, modified in her oral evidence. Regarding the totality of such evidence, her first and primary recommendation is that the Child has a real and significant parenting input from each parent. Each parent has positive and different qualities to contribute to the parenting of the Child. Dr. Byrne-Lynch recognises, on the facts, that the input cannot be equal in terms of time if the Child is to go to school in one jurisdiction, but emphasised that this must be a real input from each parent. Dr. Byrne-Lynch stressed that it is important that she now have an increased input from her Mother because of the deficit over the last two years. She indicated that the input of the Mother must be real and substantial and not an "added extra".

46. The second recommendation of Dr. Byrne-Lynch, provided it was consistent with the first, was that the arrangements determined by the court should give effect to the Child's expressed preference to go to school in Poland. She confirmed, in oral evidence, that the Child, in interview, was more positive about school in Poland than in Ireland and observed that with the passage of time, the child had become integrated in her life and school in Poland. She spoke of the Child's national identity being Polish and desire to learn to speak and write Polish well.

47. Dr. Byrne-Lynch however expressed the view that whilst she had recommended that the Child go to school in Poland, she had doubts about the recommendation, primarily because she believed it might be difficult to achieve, in practice, the appropriate parenting input from the Mother in a context where the Child was to continue going to school in Poland. She expressed the view that if there were to be any risk in such arrangement to the appropriate parenting input from the Mother that her primary recommendation should take priority, as the entire emotional wellbeing of the Child depends upon the relationship with both parents.

48. Dr Byrne-Lynch's doubts were, in part, based upon her assessment of the character of the Father and his failure to recognise the importance of the Child maintaining her relationship with her mother over a two-year period. Whilst the Father in evidence had indicated to the Court that he had considered carefully what was said of him in Dr Byrne-Lynch's report and was now prepared to recognise the importance of the Child's relationship with her Mother. The Court recognises some hope of improvement but, nevertheless, has concluded that the doubts and potential risks identified by Dr Byrne- Lynch are well founded. In my judgment, if the Child were now immediately to continue to go to school in Poland with only holidays spent with the Mother, there is a serious risk that a balance which included a real and appropriate parenting input from the Mother would not be achieved.

49. The relatively short length of time the Child would spend living with the Mother during Polish school holidays, approximately 12 weeks in each year, also contributed to the doubts expressed.

50. Nevertheless, the Court considers the Mother's application for an order that the Child return to Ireland for all her future schooling would not be in her best interests as it would not take into account the Child's expressed preference to go school in Poland and sense of Polish identity.

51. The Court put to Dr Byrne Lynch a variation on her written recommendation and sought her views. The Court's proposal, as refined in discussion with Dr Byrne -Lynch, was that the Child return to Ireland at the coming half term and go to school in Ireland for the balance of 5th class and return to Poland for 6th class with a view to pursuing secondary school in Poland. Dr Byrne -Lynch, following examination by Counsel, expressed the view that, on balance, she recommended such a decision rather than a straight

continuation of school in Poland. In doing so she recognised the possibility of short term upset for the Child but considered that, if properly explained in a context where her preference for Polish education was in the main being recognised by the Court, then the Child would accept the short term change. She also considered that there were longer term benefits for the Child. It would engender a consolidation of her relationship with her Mother which would permit an appropriate parenting input with lesser contact (school holidays) going forward. She considered that the Child was sufficiently bright and intelligent to make up any lost ground in 6th class and pointed out the benefits to her English studies.

52. The Mother sought in response a decision that the Child spend the last two years of primary school in Ireland with an undertaking from the Mother that she would not object to the Child going to secondary school in Poland. The Mother gave evidence of a Saturday Polish school in the west of Ireland, and enquiries made of the Principal of the school. On the final day of her evidence, she produced a letter from the Principal indicating that this is a complementary weekend school for children who attend Irish schools during the week. Classes take place each Saturday from 10.00am to 2.00pm. Polish teachers expressed to be certified by the Polish Ministry of National Education give classes in the Polish language, history and geography. Further information was given in relation to the relationship with the Polish Ministry of National Education and the preparation of the children for Polish exams. The Father did not have a reasonable opportunity to examine these assertions, nor was evidence offered directly by any person from the Polish school in the west of Ireland.

53. I accept, for the purpose of these proceedings, that there is an association running a Saturday Polish school of the type described, providing classes by Polish teachers in Polish language, history and geography. I make no finding as to the status of the school or its ability to prepare students for Polish examinations.

54. The Father objected to the Child spending any period at school in Ireland. He gave evidence of the State exam done in Maths/Science and Polish language, history and geography at the end of 6th class. His evidence was that the Child's performance in those exams affected her ability to choose the gymnasium school (1st two years of secondary in Polish system) and the subjects to be studied. He expressed the view that if she spent any time out of the Polish system she would fall behind which would upset her. When asked by the Court if she was to spend only one of 5th or 6th class in Ireland and then return for secondary in Poland which he would suggest, he stated she should spend 6th class in Ireland. This appeared inconsistent with earlier evidence in relation to the importance of the State exam and the need to be in Poland in 6th class to take it.

55. I have concluded it is now in the best interests of the welfare of the Child that she return to Ireland to live with her Mother and go to school in 5th class in Ireland for the remainder of this academic year. She should then return to school in Poland for 6th class. Having regard to the present, consistently expressed, preference for school in Poland and, taking into account the Father's evidence in relation to the State exam, I have concluded that it is preferable that she return for 6th class in Poland to be prepared for that State exam. Carefully considering all the evidence in my judgment, the potential benefits to the present and future welfare of the Child in spending the current school year living with her Mother outweigh any educational disruption. The Child is a bright and intelligent girl. She is only in primary school. In Ireland, she will be returning to the school she had already attended and in which she has friends. She will be required to attend Saturday Polish school to keep up her Polish language. Whilst there may be differences in curricula she will be in a position to make up any gaps early in 6th class. It is not uncommon for children to spend a school year in a different system and return.

56. It is important that the Court's decision is carefully explained to the Child as one now taken in her best interests to allow her spend significant time during this school year living with her Mother, in part to make up for the little time spent in the last two years, and in anticipation of less time in future years when she goes to school in Poland. Both parents should speak to her about it. As she currently lives with her Father he will initially have the greater opportunity. It is essential that he explains that the Court has listened to and taken into account the Child's preference to pursue her schooling in Poland and that, in the longer term, the Court is acceding to that wish on her part. It is important that the Father presents the decision in such a way that the Child has his support in dealing with the necessary adjustments. He has consistently indicated to this Court in the course of the hearing that he now recognises this Court's jurisdiction to take the decisions on custody matters and that he now accepts the importance of the relationship between the Mother and the Child.

57. The Order now being made by the Court is one which requires the return of the Child to Ireland and in accordance with Article 11(8) and Articles 40(1)(b) and 42 of the Regulation the Court is satisfied to issue a certificate as:

- (i) The Child was given an opportunity to be heard;
- (ii) The parties were given an opportunity to be heard; and
- (iii) The Court has taken into account in the decision in this judgment the reasons for and evidence underlying the orders issued by the District Court in M and Circuit Court in G pursuant to Article 13 of the 1980 Hague Convention.

Relief

58. The following are the orders I intend to make having regard to the decisions I have made on the issues in dispute and the evidence and submissions not necessarily all referred to in the preceding part of the judgment.

1. The Mother and the Father shall have joint custody of the Child. This order supersedes the Order for sole custody granted to the Mother by the District Court on 15th September 2009 and affirmed by the Circuit Court which now ceases to have effect.
2. The Child will be in the day-to-day care of the Mother during the periods she resides with the Mother in Ireland or in Poland.
3. The Child will be in the day-to-day care of the Father during the periods she resides with the Father in Poland or in Ireland.
4. The Father shall, at his expense, return the Child to Ireland on or before the 2nd November.
5. The Child shall reside with her Mother in Ireland during the Irish school terms for the remainder of the Irish primary school year 2011/2012. She shall attend 5th class in primary school in Ireland. She shall also attend the Saturday Polish School while in Ireland.

6. The Child shall spend the 2011 Irish Christmas school holidays, February/March half term, Easter school holidays and summer half term(if any) residing with the Father in Poland.
7. If the Mother travels to Poland during the Christmas holidays the Mother shall have contact with the Child for at least 3 hours on each of 24 and 25 December and for at least two other half days during the holiday period. If the Mother does not travel the Child shall have contact with the Mother's family in Poland during such periods to be arranged through the Mother's brother.
8. The Child shall reside with the Father in Poland or wherever he shall reside during July 2012.
9. The Child shall reside with the Mother in Ireland or wherever she shall reside during August 2012 until 30th August 2012.
10. The Child shall reside with the Father in Poland during the school year 2012/2013 and attend 6th class in primary school in Poland and for that purpose return to Poland on or before 31st August, 2012.
11. The Child shall at the option of the Mother travel to Ireland for 1 week around the 1st November 2012 or the Mother shall travel to Poland and be permitted to live with the Child for 1 week and the Father move out of the house for that purpose .
12. The Child shall spend the 2012 Polish Christmas school holidays residing with the Mother in Ireland or Poland as the Mother chooses. If it is in Poland, the Father shall have contact for at least 3 hours on each of 24 and 25 December.
13. The Child shall, in 2013, spend the Polish 2 week winter break, 1 week at Easter and the months of July and August residing with the Mother in Ireland or wherever the Mother shall reside during such periods.
14. When the Child is residing with either parent, the other parent shall have reasonable telephone contact with the Child. Reasonable telephone contact for this purpose means 3-4 times per week.
15. Each parent shall ensure that the other is kept fully informed of the Child's school progress in Ireland and Poland and arrange that each parent has full access to the Child's school records and to her teachers, where appropriate.
16. If the Mother travels to Poland between now and 1st November 2011 she shall have contact with the Child for an aggregate minimum period of 6 hours.

Further issues and Jurisdiction

59. The parties did not address the question of how the cost of the Child's travel should be met. *Prima facie* it appears that for the next two years, apart from the first return, the Mother and the Father should share the cost in equal shares. However, before making a final decision, I propose allowing the parties consider how this should be shared and whether it is necessary to specify which party makes the travel arrangements.
60. As the Orders now to be made include an order for the return of the Child, it appears that the Irish Courts will retain jurisdiction. This may not continue indefinitely. Hopefully, the parties will be able, henceforth, to agree on living arrangements for the Child based on this order. The present order sets out arrangements until the summer of 2013 and the Court's present intention in relation to the Child going to secondary school in Poland. The parties may consider whether it is necessary to provide expressly for review in 2013 or simply to give the parties liberty to apply.
61. In the course of the hearing, Counsel indicated that it might be necessary to have Polish orders vacated or mirror orders made. This may require further consideration.
62. The Court has not made express provision for visiting contact by either parent to the Child in the other country during school terms after 1st November, 2011. There will be liberty to apply in relation to same in the context of the decisions taken herein. Hopefully, such visits may be capable of agreement.