Neutral Citation: [2013] IEHC 650

THE HIGH COURT

[2011 No. 93 CAF]

BETWEEN

G.

APPLICANT

AND

K.

RESPONDENT

JUDGMENT of Mr. Justice Henry Abbott delivered on the 26th day of July, 2013

1. This matter came before the court on the 22nd November, 2011, for the hearing of an application to vary the order of the Master refusing to allow an extension of time to add grounds to the respondent's (hereinafter "the mother") existing notice of appeal in relation to an order of the Circuit Court (Judge Heneghan) dated 6th April, 2010. The Circuit Court had refused an application by the mother to have the Irish Court request a German Court to hear the custody application of the applicant (hereinafter "the father") in respect of the infant son, D., of the parties born on the 18th September, 2003. The father and mother were never married and resided together prior to, and for a period of approximately two years subsequent to, D.'s birth. The parties separated in or about September 2005, and following a declaration of guardianship of the father, the parties had consent order ruled by the District Court on the 6th December, 2005, permitting the removal of D. from this jurisdiction to Germany and providing for matters of interim access. The father became unhappy with this situation and may have apprehended that the mother intended to act on the consent order and issued a family law civil bill on the 13th March, 2008, and on the same date applied for and obtained an interim injunction from the Circuit Court (Judge Teehan), restraining the mother from removing D. from the jurisdiction. However, when the interim injunction was returned to the Circuit Court in Carlow for further consideration at the interlocutory stage, Judge Teehan refused to continue same. No appeal was served by the father in respect of such refusal of the Circuit Court, but a considerable time later an application for extension of time for leave to appeal was granted by the Master on the 22nd October, 2008, which was affirmed on appeal by the High Court (Dunne J.) on the 19th December, 2008. In the meantime, shortly after the relocation by the mother of the infant D. to Germany and immediately after the refusal of the Circuit Court to continue the injunction against his removal on the 15th May, 2008, the father applied to the German Central Authority to initiate proceedings for the return of D. to the Irish jurisdiction under the Hague Convention. The German Central Authority decided that this application by the father was unfounded and ultimately, both the German and Irish Central Authorities closed their files on the matter. The father then personally applied to the German Court for the return of the child under the Convention on the Civil Aspects of International Child Abduction ("the Hague Convention") but this application too was rejected by the German Court on the grounds that D. was removed from the Irish jurisdiction pursuant to agreement of the parties, which by consent had become a rule of the District Court in Ireland. The following table of dates as informed by the parties to the court is instructive in relation to the duration and degree of complexity of proceedings relating to the infant D.:-

1. Statutory declaration of guardianship, 5th July, 2005.

2. Consent order permitting the removal of D. from the jurisdiction, 6th December, 2005.

3. Mediation agreement (not of significance to this application).

4. Issue of family law civil bill in Ireland, 13th March, 2008.

5. Interim order, Judge Teehan, Circuit Court, Ireland, 13th March, 2008.

6. Order of Judge Teehan refusing continuation of interim order preventing removal of D. from the Irish jurisdiction, 3rd April, 2008.

7. Application to Carlow District Court, 4th March, 2008.

8. Application to Central Authority Germany, 18th April, 2008.

9. Refusal by German Central Authority of father's application as being considered evidently unfounded according to Article 27 of the Hague Convention and with reference to the effective agreement of the parties from 6th December, 2005, with regard to the right of the mother to leave the country with the joint son D.

12. Extension of time for leave to appeal granted to the father (in respect of order of the Circuit Court dated 3rd April, 2008), 22nd October, 2008.

13. Appeal by the mother against order of the Master of the High Court, 10th November, 2008.

14. Order of the Master of the High Court affirmed 19th December, 2008.

15. Application to Munich District Court, Germany, 7th April, 2009.

16. Oral hearing before Munich District Court and order refusing relief under the Hague Convention, 4th June, 2009.

17. Liberty granted by Circuit Court in Dublin to the mother to make an application for transfer of the above entitled proceedings to Germany pursuant to Article 15 of Council Regulation (EC) No. 220112003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in maintenance matters and the matters of parental responsibility (hereinafter "Brussels II *Bis*"), 25th August, 2010.

18. Refusal by the Circuit Court Dublin to transfer the case to Germany, 6th April, 2011.

19. Various sittings at which the Circuit Court in Dublin heard the balance of the case, between April2011 and July 2011.

20. Judgment and order of Circuit Court in Dublin (now appealed) awarding custody of infant D. to the father, 4th August, 2011 and relocation of the child from Germany to Ireland.

21. Order of the Master of the High Court refusing extension of time to appeal the order of the Circuit Court dated 6th April, 2011 (the order the subject of this appeal).

The Hearing on this Appeal

2. Counsel for the mother (Ms. Clissmann S.C.) relied on the affidavit of the mother's solicitor which averred to facts, which she submitted met the criteria set out in the well known case *Eire Continental Trading Company Ltd v. Clonmel Foods Ltd* [1955] I.R. 170 as proper matters for the consideration of the court in exercising its discretion in determining whether the time should be extended. These criteria are as follows:-

1. The applicant must show that he or she had a *bona fide* intention to appeal formed within the permitted time.

2. He or she must show the existence of something like mistake and that mistake as to procedure and, in particular, the mistake of counsel and solicitor as to the meaning of the relevant rule was not sufficient.

3. He or she must establish that an arguable ground of appeal exists.

3. Counsel for the mother further submitted that Lavery J. in Eire Continental Trading stressed that these conditions must be considered in relation to all the circumstances of the particular case. In *Eire Continental*, Lavery J. quoted the words of Sir Wilfred Green M.R. in *Gatti v. Shoesmith* [1939] 1 Ch. 841, [1939] 3 All E.R. 916, that:-

> "The discretion of the court being, as I conceive it a perfectly free one, the only question is whether upon the facts of this particular case that discretion should be exercised."

Counsel for the mother very fairly admitted that the oversight in not filing the appeal within the time limit of 10 days after the 6th April, 2011, was caused by an error on her part, as she had considered that the time would only run from the finalisation of the proceedings, which was in August, 2011. She also argued that the Circuit Court Judge had proceeded with the hearing of the substantive aspect of the case after refusal of the Article 15 application by reason of the fact that she had claimed that she (Judge Heneghan) had been "directed by the High Court to do so". I do not rely on this submission for three reasons:-

1. It was not based on any evidence in the affidavit open to the court.

2. Judge Heneghan obviously was not acting as an automaton under direction of the High Court in relation to the Article 15 issue, as she appears to have considered it over the space of two days, culminating on the 6th April, 2011.

3. The High Court gave no such direction, but merely dealt with whatever aspects were before it in an appeal dealing solely with the refusal of an interlocutory injunction by the Carlow Circuit Court in 2008.

4. Counsel for the mother then drew the attention of the court to the discussion of the authorities following *Eire Continental* in Delany and McGrath, *Civil Procedure in the Superior Courts* (Dublin: Round Hall, 2nd ed., 2005), pp. 533- 536 inclusive. She argued that that discussion pointed to the courts liberally exercising the discretion to extend the time, that the court was not confined to considering the three conditions and that its discretion should be exercised in each case in light of its particular facts.

5. However, in para. 20-24 at p. 535, Delaney and McGrath state:-

> "namely that the applicant must show that he had a *bona fide* intention to appeal formed within the committed time, as an express requirement that this Court has repeatedly laid down."

Counsel for the mother conceded that she had not had a *bona fide* intention to appeal at the time of the Circuit Court decision, but argued that had she been able to anticipate how matters would develop, she would not have wanted to lose her right to appeal. In *C.A.B. v. M.C.S.* (Unreported, Supreme Court, ex tempore, 30th January, 2002), Keane C.J. rejected this argument in the following terms:-

> "I find it sufficient to say that the machinery of appeals to this Court which has to respect the constitutional and legal rights of both parties would be impossible to operate, with fairness to both parties, if the court were to allow that form of conditional intention, as it were, to appeal to be a ground for diluting or eroding the criterion always applied by the court, namely as to the whether the putative appellant had a *bona fide* intention of appealing to this court at the time of the High Court decree."

In the circumstances, Keane C.J. concluded that the requirement in relation to *a bona fide* intention to appeal at the relevant time had not been complied with and he refused to grant the extension of time sought.

6. Counsel for the father (Ms. Brown S.C.), in response, relied on the judgment of Keane C.J. in *C.A.B. v. M.C.S.* just referred to, and also strongly queried that the mother had an arguable ground of appeal. She further stated that the court in using its discretion should consider the prejudice which might result from the extension of time having regard to the fact that her client might not have embarked on the expensive hearing in the Circuit Court had he known that it was the intention to appeal the order of the Circuit Court of the 6th April, 2011. She argued that the intention to appeal alleged by the mother was only a conditional intention in terms of the judgment of Keane C.J., insofar as the mother was quite satisfied to allow the case proceed to a hearing of substantive matters in the Circuit Court after refusal of the application for an order under Article 15 on the 6th April, 2011.

7. She also argued that the mother did not have an arguable case for an Article 15 transfer, as whatever difficulties occurred in the Circuit Court hearing (for instance, the German expert who prepared the social report from Germany did not attend as a witness in the oral hearing in the Circuit Court), could be rectified by the appropriate use of video conferencing and proper case management for the

High Court hearing of the appeal in Ireland. She also raised very important procedural questions in relation to how a German court, on an Article 15 transfer, could effective]y deal with an appeal of an order of an Irish court, and, if it could, how the procedural rules would be adapted to facilitate this, and whether a German court could be in a position to adjudicate at the end of the appeal about the issue of costs in the Circuit Court, as would be expected if the case proceeded to an appeal hearing in the High Court in this jurisdiction. In response to concerns of the court, counsel for the father submitted that there should be no concern about the likelihood of conflicting decisions from an Irish court and German court relating to the infant D., as the German Court merely made an order for non-return of the infant D. under the Hague Convention and that this did not preclude a further hearing in Ireland pursuant to Article 11 of the Hague Convention. In response to the concern of the court as to the reasons why neither of the parties responded to my promptings during the considerable time when this case was listed in the Case Management Directions list (from early 2009), counsel for the father replied that it was not the practise of the Irish lawyers to "look over the shoulders" of the German lawyers in relation to Hague Convention proceedings before the German Court, which were commenced in mid-2009. Hence, she submitted that her client was entitled to wait to deal with custody aspects after the non return order of the German Court having regard to the fact that the Irish Court retained custody of the infant D., by reason of the continuation of the Irish Circuit Court proceedings, in respect of which there had been a continuation afforded by the appeal to this Court, ultimately affirmed by order of Dunne J. on the 19th December, 2008. She also stated that the father did not have a German translator and that while the German Court understood that his German lawyer would explain to him in English how the proceedings in the German Court progressed, this system of language translation had not worked, and this difficulty had been compounded by reason of the fact that his German lawyer became unavailable to him (through no fault of either lawyer or client). There was also a difficulty in the Irish court arising from the fact that the granting of legal aid to the mother was not forthcoming for a considerable period of time. The Court also raised the issue as to whether it retained an implied power, by virtue of the wording of Article 15, to transfer the case to Germany in light of the fact that the appeal was a rehearing and that Article 15 related to matters of jurisdiction regarding any hearing by the court. The Court was further concerned that this was a family law case where the interests of the infant D. were paramount under the Guardianship of Infants Act 1964, as amended, and where Brussels II *bis* directed throughout that the procedure thereunder was to be in the best interests of the child, and that the authorities reviewed in Delaney and McGrath must be considered in the light of the additional factor of the child's interests, however defined.

Conclusions

(I) In relation to the first criterion set down in *Eire Continental*, the *bona fide* intention to appeal, I find that while, in this case, the intention is not so manifestly conditional as was described in the judgment of Keane C.J. in *C.A.B.*, it does appear to contain large elements of conditionality as evidenced by the fact that no attempt was made to produce documentation showing efforts to seriously prevent the substantive hearing proceeding after the order of Judge Heneghan made on the 61h April, 2011.

(II) In relation to the second criterion in *Eire Continental*, counsel for the mother has very properly conceded that the mistake was hers, and I also accept that the court should be flexible about allowing this mistake to be ignored as grounds for refusing the appeal if, for other reasons, it is in the interests of justice to allow it.

(III) In relation to the third criterion in *Eire Continental* regarding arguable grounds for appeal, I accept that counsel for the applicant has raised very helpful questions regarding the implications of a transfer to the German Court and the legal and procedural difficulties caused by this action. I consider that they have more application in relation to the actual hearing of the appeal itself, rather than at this stage. I accept counsel's submission that the Circuit Court and hence, this Court, retains custody of the child D., notwithstanding that counsel has very properly alerted the court to the fact that this view of the law may not be taken by all European continental jurisdictions, and may have to be resolved eventually by a decision of the European Court of Justice. In this context I have had the opportunity of reading in full the judgment of the Supreme Court in *G.T v. K.A.O.* [2008] 3 I.R. 567 where Murray C.J. cites the judgment of Keane J. in *H.I v. N.G.* [2001] I.R. 110 at 132 as follows:-

> "Even where the parent, or some other person or body concerned with the care of the child, is not entitled to custody, whether by operation of law, judicial or administrative decision or an agreement having legal effect, but there are proceedings in being to which he or it is a party and he or it has sought the custody of the child, the removal of the child to another jurisdiction while the proceedings were pending would, absent any legally excusing circumstances be wrongful in terms of the Hague Convention... In such cases, the removal would be in breach of rights of custody not attributed to the dispossessed party, but to the court itself, since its right to determine the custody or to prohibit the removal of the child necessarily involved a determination by the court that, at least until circumstances change, the child's residence should continue to be in the requesting state."

I also note that having considered the judgment of Thorpe J. in *Re H* (*Abduction: Rights of Custody*) [2000] 1 F.L.R. 201, Murray C.J. stated at p. 628 that:-

> "Undoubtedly one can consider it to be the law in this country that a spurious application to the District Court for directions regarding the custody of a child or one which was manifestly tainted by a want of *bona fides* could, in the circumstances of a particular case, be deemed not to vest rights regarding custody in the District Court. A similar approach could be adopted in relation to an applicant who having duly brought such an application was so inactive in pursuing it that his or her *bona fides* or genuine intent to seek relief sought was called in question."

(IV) I am satisfied that while there has been delay in this case, such delay cannot (on the test suggested by Murray C.J. in *G.T. v. K.A.O.*), be regarded as such that would displace the rights of custody of the Circuit Court. Such delay must be considered in the light of prompt action to pursue matters before the German and Irish central authorities and eventually the German Court. The decision of the Master of the High Court and on appeal the order of the High Court (Dunne J.) for an extension of time to appeal the Circuit Court order, although involving further delay was important for the continuation of custody of the child in the Irish courts. Counsel for the father submitted, (and I agree), that the Irish Court continues to have custody of the infant for the purpose of this appeal. She did not agree with the suggestions of the court that it had an implied power in any event to transfer the case under Article 15 in a rehearing. However, this view met with considerable enthusiasm on the part of counsel for the mother.

(V) I am, therefore, of the view that the authorities reviewed in Delaney and McGrath have to be considered in the light of the paramount interests of the child or the best interests of the child. While the interests of the child are considered in the context of these authorities, it is realised that these authorities have not dealt with family law cases, but, in the main, have dealt with cases involving what might be described in mathematical financial jargon as cases dealing with decisions in binary issues on past events rather than decisions relevant to the ongoing and ever changing interests of a child or family which decided (especially in the case of a rehearing like the Circuit Court on appeal), on the basis of the

existing interests of the child rather than on the basis of a retrospective examination of the principles upon which the Circuit Court acted. This distinction between the child's case (which may also apply to divorce and separation cases) has to be considered in asserting a degree of flexibility which is greater than that described by Delaney and McGrath in considering an application for an extension of time to appeal, so as to ensure that in the interests of the child, procedural or evidential benefits are not lost. The Court is mindful of the fact that the Guardianship of Infants Act 1964, as amended, reserves to the court a somewhat inquisitorial role in relation to the preservation of the rights of a child insofar as it may accept- or refuse to accept- without modification, an agreement made between the parties, in relation to custody and access for a child. These latter factors to be considered in the interests of the child do not necessarily trump the authorities analysed in Delaney and McGrath and discussed by counsel before this Court. Those authorities should be used as a guide so as to ensure that outright abuse of the process of the court and severe prejudice and injustice to a party potentially affected by an extension of time are to be avoided, either by a refusal of extension of time or extension of time subject to a reservation in relation to the consideration of the court at the substantive appeal, or balancing orders such as might relate to costs in relation to prejudice suffered by any party by reason of the extension of time. Therefore, while I consider that notwithstanding that, out of the three criteria, the mother only succeeds totally in meeting the third *Eire Continental* criterion, that in relation to an arguable case, the court should have regard to the history of this case, and the necessity to avoid misunderstandings from the parties (and courts internationally at a subsequent date) arising from the unfortunate confusion and delay in the proceedings between the parties so far in a period from 2008 to 2012. The interests of the infant D. should be protected by (at least) allowing the appeal so that the parties may argue the issue as to whether the Article 15 transfer should be made or not.

(VI) Regardless of whether the consideration of the appeal hearing allows for an extension of time, I consider that the High Court, in dealing with the Circuit Court appeal, conducts a rehearing (and not in the manner of an appeal of the Supreme Court) has the power of deciding on an application for an Article 15 transfer under its general jurisdiction powers conferred by the Brussels II *bis* Regulation.

(VII) Depending on the decision of the court in this judgment (which was communicated to the parties on the 22nd November, 2011, without reasons) the court directed that the issue of the s.15 referral proceed before this Court as arranged by the court in consultation with the parties.

Article 15 Request to German Judge

8. When this matter was first listed into the High Court case management list, D. had been resident in Germany for some years and was attending school there. I suggested to the parties that the case seemed to be most suited to be referred back to the German Court for decision pursuant to Article 15 of Brussels II *bis* on the grounds of the outstanding issues being more conveniently heard by the German Court than by the Irish Court and, of course, subject to the more formal jurisdictional requirements of Article 15 being met. The mother did not have legal aid at that stage and for a long time thereafter, and the matter of referral to the German Court fell into abeyance. The issue became alive again when the case proceeded for a full oral hearing before the Circuit Court, and while the learned Circuit Court Judge rejected making such a request, I am still of the view that, given that D. was still resident in Germany, the case would be one in which the balance of convenience then indicated that the hearing should proceed in Germany.

9. A full appeal of the proceedings came on for hearing before me in this Court in April 20 12 and, again, the issue of making a request pursuant to Article 15 that a German judge would hear the case arose.

10. However, by this stage circumstances had changed as follows:-

1. The residence of D. had changed from Germany to Ireland since the previous August, as a consequence of the order of the Circuit Court Judge in respect of which no stay was granted;

2. D. had commenced his schooling in Ireland from September 2011;

3. A greater number of Irish witnesses would have been accumulated, such as teachers and medical experts from Ireland to push the "centre of gravity" of convenience somewhat closer over to Ireland;

4. Time had marched on significantly to such an extent that one could fairly say that the German Court would find the overall delay utterly perplexing;

5. The case had reached a stage of far greater urgency by reason of the fact that, in addition to the perplexing delay of many years, D. was approaching a new school year, commencing in September, either in an Irish school or a German school (depending on the decision of this Court or the German Court) and a request to the German Court would require that a decision would be made in time before July or August of 2012 to enable arrangements to be made for D. either to continue in the Irish school or change back to the German school. Assuming that the Irish Court could trespass on the patience and indulgence of a German judge to the extent of persuading the German judge not only to accept the case, but to disrupt other schedules to meet this deadline, the question remained whether the deadline might ultimately be defeated despite the best efforts of the German judge by reason of the fact that either of the parties might have a right of appeal in Germany which would, in the natural course of things, endanger, if not completely prejudice, meeting of the deadline.

6. The parties introduced evidence to show that the inconvenience of an Irish hearing could be compensated for considerably by using the facility of an Irish video conference to hear German witnesses in Germany.

7. In view of the foregoing changed factors, I concluded (despite my earlier expressed enthusiasm for the idea) that given that the father's counsel was opposing the transfer, and having regard to the fact that a request might have a destructive result, the court should not in the interests of the child make a request.

Framework of the Hearing

11. The framework of the hearing consisted of three elements:-

1. The oral evidence given by the parties, including medical experts, before this Court sitting in Dublin in May and June

2012;

2. The s. 47 report furnished by Professor K as ordered by the court together with Professor K's oral evidence given under cross examination before the court, and;

3. The video evidence facilitated by the German Court.

The latter two aspects of the main framework of the hearing deserve comment.

12. Firstly, in relation to the s. 47 report relating to the welfare of D., terms of reference for Professor K were drawn up by the parties at the direction of the court. This is in accordance with fairly recent practice to save costs and provide a focus in s.47 reports. The Court in directing terms of reference is dependent on parties' counsel to draw up such terms having regard to the policy of the court. In this case, a pressing and most important part of the terms of reference was that Professor K, as one of the foremost experts in these matters, would report on whether D. had Attention Deficit Disorder (hereinafter "ADD") and, if so, to report on various aspects of this condition relevant to the hearing. However, at the insistence of the father's counsel, a further term of reference related to the examination of the extent of the bonds of attachment which existed between D. and each parent was added. This latter term of reference turned out to be the cause of much unnecessary time spent on these issues and, in hindsight, I consider that the court itself should have taken a more robust approach to the setting out of the terms of reference and, indeed, to managing the issues of the case by noting that the examination of the extent or any imbalance of bonds of attachment would ultimately be irrelevant in deciding the case. In doing so, the court had at its disposal the existing decision of Finlay Geoghegan J. when dealing with the issue of the application for a stay on the Circuit Court order changing the residence of D. when she heard and stated that "the stay should not be granted, as D. was a truly international child".

13. The arrangements between the Irish Court and the German Court for the taking of video evidence were very efficiently and courteously carried out. A letter in the German language was sent by me on behalf of the Irish Court enclosing the prescribed form of the Regulations completed in German to the President Oberlandes Gerichts Muenchen. The request was accepted by the Munich Court in a letter written on its behalf by Frau Popp Krueger (Rechtspflegeamstin). A letter of the 12th April, 2012, set out the conditions for the attendance of German witnesses on a voluntary basis and also enclosed a list of the locations for video conferencing in the area of the Munich Court with the contact persons, phone numbers and email addresses for all locations. Matters proceeded very efficiently leading up to the actual video conference between Ireland and Germany and I wish to thank the President Oberlandes Gerichts Muenchen, and Frau Popp-Krueger and all her colleagues on the German and Irish side, who produced a successful technical link for the video conference. I also thank all counsel involved in the case, especially Mr. Dillon Malone B.L., whose knowledge of German and ability to have correspondence professionally translated, assisted greatly. An experience gained from the video conference was that it would have been helpful (on the Irish side) to appraise the translators of the glossary of international family law technical terms a day or two before the hearing.

The Facts

14. The mother first attempted to relocate D. from Ireland to Germany in 2008, but was frustrated in her attempt by the father notifying the Irish police (Gardaí) who forestalled the attempt at the airport on the basis of a suspected abduction. Judge Teehan in the Circuit Court in Ireland subsequently ruled that he did not have jurisdiction to halt the removal by reason of the existence of a court ruled consent order made between the parties (in the District Court) which is as follows:-

"[mother's name]- natural mother and legal guardian

[father's name]- natural father and legal guardian

The child- [D.K.G.], born on 18th day of January, 2003,

1. In the event of [mother] deciding to reside outside this jurisdiction, [father] hereby agrees to the removal of the child, [D.K.G.] outside this jurisdiction.

2. Upon [mother] and [D.K.G.] residing outside the jurisdiction, [mother] agrees that she will facilitate access at all times for [father] to avail of same to the dependent child.

3. [Mother] hereby agrees that she will at all times act in the best interests of the dependent child, [D.K.G.], and in the event there is agreement between [mother] and [father] in respect of the welfare of the child, they both agree that they will attend mediation for as long as the process takes and they both agree to be bound by the recommendation of the mediator.

4. Whilst the child remains living within this jurisdiction, [father] to avail of access every second weekend, [father] to collect and return the child. Other access to be agreed between the parties.

5. [Father] agrees to pay the sum of €100 per week maintenance for the dependent child.

6. Both [mother] and [father] hereby agree and confirm that they have been independently legally advised in respect of the meaning and effect of this agreement.

Dated 6th December, 2005"

15. This consent was made an order of the District Court by Judge Connellan on 6th December, 2005, on that judge being satisfied that the welfare of the child required that an order would be made in accordance with the consent. It is not disputed that an attachment grew between D. and his father between the approval of the consent in 2005 and relocation to Germany in 2008. While the mother averred that overnight access ceased, the father has explained that the reason for this was that the conditions on the lease of the house then occupied by him did not allow occupancy by children, by reason of a somewhat dangerous staircase. r accept the father's account that the attachment to him became greater by reason of the fact that the mother took up employment in the catering industry in Ireland, and her work dictated that D. would be in the care of his father for longer periods of time.

Post Relocation to Germany

16. Access for the father in Germany was initially facilitated by his being able to stay with an old hunting friend, however, this facility diminished by reason of the fact that his friend was getting older, and became preoccupied with his own problems, and the father did

not wish to trespass further on his generosity. The father then became dependent on hotel accommodation in Germany and found it difficult to find facilities, even for the use of the toilet in the family house of the mother in Germany. On relocation D. spoke little or no German and the father felt very hurt when he observed D. reacting with his peers in Germany, where his difficulty with German and unusual behaviour became manifest. He found it particularly hurtful to witness D.'s reaction to friends by whom he may have been somewhat threatened (in his own mind) by lying on the ground, squirming and grimacing, in disconcerting fashion. Even recounting this experience was manifestly hurtful for the father as he gave evidence. He claimed that D.'s behaviour was as a result of the emotional disturbance of D. resulting from the abduction to Germany.

17. D. had been accompanied to Germany by his half-brother L. who is four years his junior.

18. D. had attended kindergarten for a short time in Ireland and the parents differ as to whether he exhibited any behavioural or learning difficulties at that stage. As D. progressed from kindergarten to primary school in Germany, learning and behavioural difficulties became noticeable in school and the mother attempted to have recourse to holistic treatment measures in relation to a diagnosis of ADD. In 2010 medical treatment by way of German equivalent of Ritulin medicine and holistic group therapy was prescribed by D.'s German medical consultants, (who treated D. without consulting the father).

19. The father deeply resented such a unilateral course and has not accepted the ADD diagnosis, which he attributes to the trauma of relocation. German school reports indicate that while D. had initial difficulties with the German language, he has learned German quite well. The German school reports outline D.'s difficulties in behaving normally in a classroom situation along the lines of the Irish school reports, and the medical findings and surveys conducted in Ireland.

20. I have heard D. speak German in two recordings taken by the father and mother respectively, which for other purposes were admitted in evidence, and I am satisfied that he has reasonably fluent German and the ability to use natural connectors which have the effect of indicating whether there is a natural fluency or not. The evidence does show, however, that he has some difficulties with vocabulary as was demonstrated by the account given by father that D. apparently mistook a metaphorical warning by his German grandmother that if he did not come back to Germany that they would "starve" when the father (who is no expert in German himself) picked up the word "sterben" in the conversation (which, of course, is the word for "to die"). Despite his suspected ADD symptoms, D. seems to have good intelligence, although his performance in Maths, English, Spelling and Writing leave a lot to be desired. If he were to be given a career in the future it would seem to be in Art and Design, but this is greatly hindered by his very poor dexterity. However, indications from both the mother and father and his Irish school are that this may be rectified by development of keyboard and computer skills leading to an ability whereby D. may unleash his undoubted imagination and creative potential.

21. From the evidence given by the mother, father, mother's two sisters, fiancée and father's wife, it appears that D. has a deep attachment to both parents. This is confirmed by Professor K's report. From their activities together I get the strong impression that there is a very deep father/son relationship, close to hero worship of the father by his son D. The relationship between the mother and D. on the other hand seems to be more mundane. While the father's counsel seek to exploit these subtle differences by pointing to particular areas of friction between mother and son, and was in a position to exploit a misplaced moral panic caused in the Circuit Court by an unfounded complaint by D. in respect of the mother as perceived by the s. 47 reporter at the time, there is nothing between the levels of attachment to either parent such as would warrant the same to be a basis for deciding the issue as to whether D. stays in Ireland or not.

The Medical Evidence

22. Professor K is an acknowledged expert in ADD. He interviewed D. and commissioned a snap survey consisting of about 90 questions for completion by his teachers. This survey indicates (through the questions) the degrees of unusual or disruptive behaviour which can be exhibited by the subject. From his interview with D. and the snap report, Professor K concluded that D. suffered from ADD and that the treatment of the German doctors, including the administration of the German equivalent of Ritulin, was properly indicated. He also said that ADD was of genetic origins and that people were naive to think that a person with ADD could realistically survive without taking Ritulin throughout their entire lives, although he did concede that Ritulin "holidays" were possible and even desirable.

23. Dr. L's evidence was given without any report being presented or without the joint agreement of the parties or order of the court for the examination of D. Despite these deficiencies, having regard to the best interests of D., the court decided to hear Dr. L's evidence. He was scathing in his criticism of the methodology of Professor K saying that in his practice the use of the snap survey or questionnaire was only a screening process and never a tool for diagnosis. He added (somewhat eccentrically) that he did not have to interview a child with suspected ADD - he would know by listening to the noises and commotion outside his consulting room. I was inclined to discount Dr. L's evidence by reason of his eccentric approach towards diagnosis, were it not for the fact that the report of Dr. A.P. of the National Educational Psychological Service of the Irish Department of Education takes the same view of the limitations of the snap survey as a diagnostic tool, and also says that the rating scales contained therein were used as screening tools only. I find it difficult, therefore, to reconcile the evidence of the two foremost Irish experts, Professor K and Dr. L, nor do I think I have to for the following reasons:-

(I) D. is nine years of age and has little time to avail of the opportunities of improvement through the taking of Ritalin.

(II) He has taken the equivalent of this drug under the supervision of an expert in Germany and his mother thinks it helped him significantly,

(III) The diagnosis of the experts in Germany and decision on the suitability of their version of Ritulin was, at best, provisional, and subject to review by them. On the basis that the administering of Ritulin or similar drug is likely to be provisional and under review, it is unnecessary for me to decide in absolute terms in relation to this matter which is subject to such a flexible and tentative approach from the wisest medical experts.

(IV) Suffice it to say that the conclusion the court must reach is whether it is worthwhile for D. to have the benefit of such medical treatment on this basis or whether the court would take a grave risk on his behalf by deciding that the medicine should not be administered.

(V) While I find that the diagnosis of Dyspraxia made by Mr. Stephen Oakes, Senior Occupational Therapist, accounts for some ofthe unusual behaviour and complaints of D., it does not account for much of the anti social and eccentric behaviour which are more associated with ADD. have no doubt that the recommendations of Mr. Oakes (which are accepted by both parents) will be helpful in any situation and it is my intention to incorporate his recommendations into any order to be made in this case.

(VI) I consider that the best chance of D. receiving the benefit of continuing supervised, and well funded medical treatment using Ritulin type drugs is in Germany, by reason of the fact that, firstly, the father is vehemently against such a course and would find it very difficult to be supportive of such action (notwithstanding his stated courteously expressed intention that he would obey any order made by the court in that regard), and secondly, by reason of the fact that either in terms of institutional professional medical support or funding for such treatment in Ireland, there was no evidence offered that the prospects for such were anything but bleak.

Other Conclusions on the Facts

24. Some attempt was made to suggest that the Irish schools offered a better opportunity for D. It seems to me that the evidence showed that the schools in both Ireland and in Germany were highly professional and, therefore, I hold that the educational opportunities are about equal with, perhaps, the slight advantage being on the German side by reason of not being so badly affected by the slump in state funding and being able to provide additional facilities such as better computer technology and group therapy opportunities.

25. On a more significant basis I find that the social advantage is probably more in favour of Germany insofar as D. has the company of a half sibling in L., and also has established a relationship with a young friend of the same age who is a neighbour and who apparently understands his individual behaviours and problems. The mother's employment, allowing her to be home at a time to match D. coming out of school, is a significantly better support than the present situation in Ireland where D. must go to a neighbour's house to play with other children until his father comes home from work later in the evening. I discount long term educational opportunities or long term employment or training opportunities, as who is to say where D. will choose to live by his own choice, when it comes to that stage.

The Law

Article 11 Brussels II bis

26. Counsel for the father made the point that the German Court, having refused the return under the Hague Convention, ought to have sent a report back to the Irish Court so that the Irish Court could, pursuant to Article 11 of Brussels II *bis*, conduct a welfare inquiry at the instigation of one or both of the parties. While I accept that this is a standard Hague type procedure in the cases of an order for non-return on the basis of certain exceptions of the Hague Convention that a return order ought to be made, it was not applicable in this case as I find, as did the German Court find, that D. was relocated from Ireland by consent and that his removal was not wrongful and not an abduction and, therefore, Article 11 does not apply.

Relocation of Child

27. The parties submitted a number of booklets of authorities. Among the most relevant of the authorities is the decision of the court of Appeal in England and Wales *Payne v. Payne* [2001] Fam. 473 and, in particular, the judgment Thorpe L.J. in which the position of the departing custodial parent was preferred to the point where it could be argued that there was a presumption in relation to relocation for such a parent.

28. A further case was *E.M v. A.M* (Unreported, High Court, Flood J., 16th June, 1992) in which Flood J. proposed a check list to be used in such cases. Another Irish case was *C v. W* [2008] IEHC 469 (Unreported, High Court, Abbott J., 11th July, 2008), where I decided that a teenage girl's inoculation, which was being objected to by her father who proposed to relocate her to Hong Kong, ought to be required as a condition of relocation to Hong Kong (even though the teenage girl might otherwise have been considered to be in a position to be primarily self determinative in relation to that issue by reason of her age).

29. A further Irish case is *K.B. v. L.O'R* [2009] IEHC 247 (Unreported, High Court, Murphy J., 15th May, 2009), where Murphy J. accepted the judgment of Thorpe L.J. in the *Payne* case and applied it to the particular facts arising.

30. I consider the leading and most persuasive case in the series to be *U v. U* [2011] IEHC 519 (Unreported, High Court, MacMenamin J., 15th April, 2011) where MacMenamin J., then a High Court judge, found the judgment of Butler Sloss L.J. in the *Payne v. Payne* case to be more persuasive and found that in the Irish context any presumptions or quasi presumptions in relation to movement were not consistent in many cases with the best interests of the child, or with the specific dictates of the Guardianship of Infants 1964, as amended, and the Irish Constitution in relation to the paramountcy of the interests of the child (which for all practical purposes is equivalent to the concept of the best interests of the child). I find that *U v. U*, directing the court to decide the best interests of the child in relation to whether there is to be a relocation, is the primary guide for this Court, except that in retrospect one has to consider that the position initially facing Teehan J. in 2008 was that, while he may have been in error for deciding that the court had no jurisdiction by reason of the consent incorporated into the order of the District Court some time before, he nevertheless would have been in a position to give the agreement contained in the consent order considerable weight. I consider that while such consents are (like all orders in relation to children's welfare) interlocutory in nature, this does not mean that they are to be lightly disregarded. Quite the contrary. When two parents make an agreement in relation to the welfare of a child, that agreement very often relates to the long term interests of the child and providing a stable atmosphere in which both parties may grow in their attachment and care for their child without worrying that, by allowing each other growing attachment, it would be used as a bargaining chip in later disputes and proceedings. The whole ethos of Irish family law in terms of guardianship of infants proceedings, separation and divorce, is to encourage through statutory provisions resort to mediation procedures from the very outset. It would be strangely contradictory to such clearly stated statutory policies for courts not to give very great weight to agreements of this kind. Of course considerable time has elapsed in relation to the decision that has to be made in the case now under appeal as it was heard in 2012, and whereas a decision to have a location in Ireland would be a grave disappointment to D.'s mother, the whole experience and interest in D. has indicated that she would respect the decision of the court. While the consent order made in the District Court many years ago is still of some assistance to her, it may not be now of such weight and must be considered in conjunction with the evidence which has now emerged from what has been a natural experiment arising from the relocation to Germany of D. in 2008 and his return to Ireland following the Circuit Court proceedings in 2011. It was suggested to the court that a procedure could be adopted using the Flood J. checklist. It is my view that using this checklist or, indeed, the checklist of the courts of England and Wales, really does not illuminate the decision making process or assist greatly therein except to ensure that no consideration has been overlooked in deciding the case.

31. I am satisfied in view of the even balance arising from most factors that might be placed on a checklist (or, perhaps, a slight swaying of the balance towards Germany), that the two factors which must be balanced as being far and away the most decisive are as follows:-

1. The voice of the child, and

2. The decision of this Court that the loss of the option for D. to have Ritulin or related drug treatment in order to achieve his full potential or avoid the worst consequences of ADD is so important.

The Voice of the Child

32. Professor K reported under s. 47 in relation to the stated preferences of D. which were to live in Ireland with his mother, taking up residence in a house which she says (and I accept) that she sold to her parents, taking L. with her. Professor K remarked that if this solution was not possible, then he thought the decision for the court and for him was very difficult if not well nigh impossible. He stated that from his speaking to D. it appeared that he was equally torn between strong loyalties to both parents. Professor K stated that this was potentially very damaging psychologically for D. and suggested that after he had asked the questions about preference for country or residence, that such questions ought not to be asked again. Counsel for the father suggested that as Professor K's report had become somewhat dated that I should speak to D. again for the purpose of updating the voice of the child, and counsel for the mother did not object. I, therefore, spoke to D. in accordance with the *P.O'D v. S.O'D* procedure without the presence of solicitor and counsel but with the benefit of the presence of the registrar and the digital audio recording system.

33. D. was led into the interview room by his step-mother, his father's wife, who while young and as yet without a child of her own, is an extraordinarily generous, mature and loving woman and most particularly suitable as a step-mother for any period of residence contemplated for D. in Ireland. He had her smartphone with a gallery of photographs on it, many of which I had seen while his father showed the blue album thereof to me for the purpose of showing the wonderful activities which he has had with D. in Ireland. D. showed great skill and alacrity in working the smartphone to enlarge the components of the gallery to demonstrate his account of the wonderful times and life he had with his father. The smartphone picture gallery was a tremendous opportunity for us both to build up a rapport and talking points (which I used, hopefully, in a non-directive way) to hark back with questions in relation to whether he had experienced any activity in Germany of a comparable nature to the photograph being demonstrated. His response to these promptings was generally courteous but not so positive or descriptive and he always veered back to introducing another Irish photograph with an enthusiastic description of its implications. Eventually this repeated prompted comparison between Irish and German experiences led to him telling me that it was my business as a judge to hear his preferences in relation to where he would live. He more or less described his ideal position in the same fashion as he described it to Professor K with his father and mother living in close proximity in Ireland so that it could be "just like it was before I left". He had other proposals that he would be able to keep in touch with his friend in Germany by letter and that he would look forward to visiting Germany for access to his mother and to see L. if his mother was not able to come back to Ireland. When I asked him whether he would he see any difficulty with going back to school in Germany, he rather philosophically said that when one changes school, there are always initial difficulties, and then one adjusts.

34. He filled out his own preferences by apparently mentally referring to a list that he had made of matters which he felt he should tell the judge, and when I asked him were there any other matters that he had in mind to tell me, he said no, that that was all.

Decision on the Voice of the Child

35. While D.'s preference for his mother to move back with L. to live in Ireland so that he can live here too, is not possible by reason of the employment and marital intentions of his mother in Germany, this does not mean that the court is to discount the value of the voice of the child in this instance by reason of such impossibility. I got a strong sense from D. that even if his mother could not come back to live in Ireland his preference would still be (albeit reluctantly) to live with his father in Ireland. This was a preference he expressed to the German judge in the Hague proceedings in 2008 also.

Conclusion and Weighting of Factors

36. Having regard to the overall preferences of D., his age, and obvious insights in relation to the situation, I find that his voice should be given considerable weight and, were it not for the fact that my decision that his Ritulin type treatment possibilities are best served by being in Germany and being so important to him, I consider that even his "residual" voice of the child choice should be given such weight as to override the small balance of other factors in favour of a return to Germany. This is so because I consider that, although there were suggestions that there was a degree of alienation by the mother against the father and vice versa, this amounted more to a lobbying of D. to say things which were favourable to one side or another to the judge or expert making inquiries, rather than to "poison" him against the other parent, such as would occur in the classical alienating position. Like Professor K, I found D. to be refreshingly independent of such influences however described. When considerations relating to future Ritulin related medical treatment options are brought into account, I find that these are of such weight and importance, and of such urgency in terms of timescale that the balance in favour of remaining in Ireland is tipped back in favour of Germany in a strong and decisive fashion. While Professor K said in his report that he did not envy the court in having to engage in what he considered was an evenly balanced decision making process, I find that the ultimate decision now made in this case to have D. returned to Germany was not so difficult by reason of the strong weight I give to the Ritulin issue. However, the order made herein in providing for as generous and accommodative access and contact between father and son as possible is recognition by the court that in this case the son has an exceptionally loving father, whose only error of substance was to delay the day offinal decision by obsessive litigation. I have already given reasons for costs issues as described in the order.

37. Finally, D. is an extremely lucky boy, insofar as he has two loving parents, a step- mother, two grandmothers of both nationalities, a German grandfather and an intended German step-father all of loving, devoted and exceptional character together with similar aunts and other relatives to support him into the future as the truly unique bi-lingual international child that he is.

38. I order as follows:-

(CIRCUIT APPEALS)

2011 No 93 CAF

Monday the 20th day of August 2012

BEFORE MR. JUSTICE ABBOTT

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT, 1964 (AS AMENDED)

AND IN THE MATTER OF THE FAMILY LAW (MAINTENANCE OF SPOUSES AND CHILDREN) ACT, 1976

ANDINTHEMATTEROFTHEFAMILYLAW ACT, 1995

BETWEEN

J.G.

APPLICANT/RESPONDENT FATHER

AND

V.K.

RESPONDENT/APPELLANT MOTHER

The Mother's Appeal pursuant to Notice dated the 10th day of August 2011 (filed the 11th day of August 2011) from the Order of the Circuit Court for the County of the City of Dublin made herein on 4th day of August 2011 (Family Law) (Her Honour Judge Heneghan) having been at hearing before the court on the 23rd, 24th 25th and 26th days of April 2012 the 15th, 16th and 17th days of May 2012 the 18th, 19th 20th and 21st days of June 2012

And upon reading the said Notice the Orders made herein including the said Order dated 4th day of August 2011 and the Order of the District Court dated the 6th day of December 2005 the pleadings herein the written legal submissions on behalf of the parties and the documents exhibited and adduced in evidence

And on hearing the oral evidence of Professor K the person appointed herein to prepare a Section 47 Report for the court and of the witnesses adduced on behalf of the parties whose names are set forth in the ***First Schedule*** hereto (including the witnesses on behalf of the Mother whose evidence was given by Video Link from Germany - marked with an asterisk on the said list)

And upon hearing said Counsel respectively And the court having heard the submissions on behalf of the parties on the 27th day of June 2012

The Court was pleased to reserve Judgment herein on the said 27th day of June 2012

And this matter coming into the list for Judgment on the 20th day of August 2012 in the presence of Counsel for the Father and the Solicitor for the Mother

And the decision of Court being pronounced accordingly on this day

And on hearing said Counsel respectively

And the court being informed that D the child of the parties (d.o.b.) is currently with the Mother in Germany and is due to return to this jurisdiction on the 29th day of August 2012

IT IS ORDERED as follows: -

1. That the said Appeal be allowed

2. An Order directing the return by Mother of the child D to the jurisdiction of this Court on or before the 29th day of August 2012 where he is to remain until the Order provided for hereinafter at 3. becomes operative

3. An Order directing the handover by the Father of the child D to the Mother so as to allow him to be brought by her to the jurisdiction of Germany ("I") no later than two days prior to the date of the due start date for his school in Germany

4. An Order directing the Mother to make all appropriate travel arrangements for the return of D to Germany

5. An Order that the Mother travel to Ireland to accompany D on his return journey to Germany

6. An Order that D commence school in Germany with effect from the commencement of the new school term in September 2012 in the school which he previously attended there

7. An Order restraining the Father from preventing the return of D to Germany in accordance with this Order

8. An Order restraining the Father from removing D from the jurisdiction of the German Court without the permission of that Court save and except as access orders of this Court so provide or by written agreement between the parties.

9. An Order that D is to remain in the joint custody of the Father and the Mother and both shall remain his guardians, provided, however, that the Mother shall be responsible for the day- to- day care of D when he is not on access visits,

with, or in the care of the Father; and the Father shall be responsible for the day-to-day care of D when he has him on such access visits

10. An Order reinstating the Order of the District Court dated the 6th December, 2005 (maintenance) (A copy of which Order is appended as the ***Second Schedule*** hereto)

11. An Order that D do have access with the Father as follows:-

(a) from the 28th December, 2012- 6th January, 2013 and from 20th December 2013 to 28th December 2013 - these access periods to rotate in two year cycles thereafter

(b) ten days at the Easter holidays 2013 and annually thereafter

(c) three weeks in summer 2013 and annually thereafter to end not later than three days prior to D returning to school

(d) weekend access in Germany in one out of four weekends if the Father wishes to travel to Germany, and the Mother shall ensure (as so undertaken by her on oath before this Court on the hearing of this Appeal) that he shall be entitled to stay at the Mother's sister's accommodation in "I" and, in the event of this arrangement breaking down for whatever reason, the Mother shall be responsible for bearing the cost of the Father's accommodation in Germany at Gasthof level at least

(e) Access to D shall be available in Ireland to the Father for the duration of the Winter holidays, Whitsun holidays and Autumn holidays, including such weekend or weekends as may constitute a continuous period with such weekend or such holiday (e.g. if the holiday is from Tuesday to Friday and the weekend prior to Tuesday is a German access period should the Father choose to exercise such access or if the holiday is from Monday to Friday, then D may travel to Ireland for access on the Friday before that Monday or Tuesday and return then on the Sunday the week thereafter)

(f) Telephone/skype/email access shall take place affording D as much independence as is appropriate. Skype contact to take place on Sunday, Tuesday and Thursday of each week from 7-8 Irish time, subject to the following proviso: the mother can cancel such contact on not more than 6 occasions per year, if she furnishes to the father reasonable advance notice in writing by text or email.

12. An Order that the Mother shall install and maintain at a functional level such Skype service in D's home within one calendar month.

13. An Order that further in respect of the maintenance arrangements between the parties in respect of D

(a) Credit is to be given to the Father in respect of such maintenance payments for a period of 52 weeks from the date hereof

(b) in the event of the Mother's share of outstanding fees to Renee Canavan amounting to €1,470 remaining outstanding for a period of 52 weeks from the date of this Order then the Father to receive an additional credit in the said sum of €1,470 in respect of maintenance payments

(c) the Father is to have a further credit of one week's maintenance for each weekend that he travels to Germany for access visits

14. An Order affirming and directing the continuance of the arrangements now in place in compliance with Paragraph 11 of the Circuit Court Order dated the 4th day of August 2011 (a copy of which Order is attached as the ***Third Schedule*** hereto) relating to the specific account to be designated to cover the cost of Danny's travel to and from Germany

15. An Order that the Father shall co-operate with the Mother in respect of the necessary arrangement for those flights and vice versa. The father to provide an indicative flight timetable to the mother at least three months in advance of each flight.

16. An Order that the Mother at her own expense is to travel with D to Ireland for access visits

17. An Order that the Father is to travel to Germany with D at the end of each access period at his own expense

18. An Order that the treatment of D under the direction of Dr. Barnard shall continue as heretofore subject to such holidays from medication as shall be allowed by Dr. Barnard with particular emphasis for the desirability of such holidays being available to D when in the day to day care of the Father subject to the Father's agreement to such treatment holiday

19. An Order that the Father and Mother shall consult jointly with Dr. Barnard m relation to the treatment and monitoring of the ADD and Dyspraxia of D

20. An Order that the parties or either of them do furnish Dr. Barnard or any other treating or consulting medical experts dealing with D with the original English text of the occupational therapist's Report (Stephen Oakes) dated the 3rd day of April2012 together with a translation thereof in German with the expense of such translation to be borne by both parties equally

21. An Order that the parties or either of them do furnish the school authorities with similar English and translated copies of the occupational therapist's report

22. An Order that the Father do furnish to the Mother by way of e-mail copied to the Mother's Solicitor a list of measures and practices taken by him in response to the said occupational therapist's report and that the Mother is to continue such practices while D is in her day- to -day care insofar as is feasible

23. An Order that the Father is entitled with the Mother to all school reports of D and to attend such parent/teacher or educational consultations and in this regard the Mother shall use her best endeavours to identify a member of the teaching staff in D's school possessing a good knowledge of English to assist the Father in understanding the contents and intent of all school reports and discussions arising from such meetings

24. That there be no order as to the costs in either the Circuit Court or this Court

25. That the said Order of the Circuit Judge dated the 4th day of August 2011 be varied and affirmed accordingly

26. That there be liberty to apply herein (in the period prior to the 5th October 2012 AND IT IS ORDERED that this matter be adjourned to Friday the 5th day of October 2012 for mention and additionally for the purpose of giving written reasons for the decision of the court this day

A. Condon

REGISTRAR

The 10th day of April 2013

Finglas law Centre

Solicitors for the Applicant/Respondent Father

Brunswick Street Law Centre

Solicitors for the Respondent/Appellant Mother