

THE HIGH COURT

Record No: [2016/16HLC]

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT, 1991

AND

IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

AND

IN THE MATTER OF COUNCIL REGULATION 2201/2003

IN THE MATTER OF A., D., AND N. (MINORS)

BETWEEN:

A.S.

APPLICANT

AND

S.S.

RESPONDENT

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 29th day of July, 2016.

1. This case concerns an application for the return of the children, A. and K. born on 14th July, 2006 and N. born on 20th June, 2010 to the jurisdiction of Germany pursuant to Article 12 of the Hague Convention on the Civil Aspects of Child Abduction 1980. The application is set out in the special summons issued 29th June, 2016. Germany is subject to both the Hague Convention and Council Regulation 2201/2003.

2. The applicant father and respondent mother were married to each other on 6th August, 2005. The children were born in Ireland. The applicant is a German citizen and the respondent is an Irish citizen. The applicant and respondent moved with their children to Germany on 19th June, 2011.

3. On 13th July, 2016, this Court ordered that Ms. Clodagh Higgins, Psychologist, do interview and assess the children, the subject matter of these proceedings pursuant to Article 11(2) of Council Regulation 2201/2003 in order to give an opportunity for the voices of these children to be heard. The report was dated 25th July, 2015 and set out the views of the three children. They express a preference for living in Ireland although the assessor states that, at first, they were surprised by their move to Ireland. Their preference for remaining in Ireland may be influenced by their mother's expressed wish to stay in Ireland. It is clear from the report that the children have good relationships with both their mother and their father although they have been exposed to a level of conflict between the parties. Ms. Higgins was of the view that the children were mature enough to express a view although they would have no difficulties re adapting to life in Germany if that was the order of this Court.

4. The applicant father asserts that the children were wrongfully removed from the jurisdiction of Germany on 26th February, 2016 within the definition of Article 3 of the Hague Convention 1980:-

"The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

5. It is accepted by both parties that on the date of the removal of the children from the jurisdiction of Germany, 26th February, 2016, they were habitually resident in Germany. It is not disputed that the applicant has rights of custody as the father of the children and that he was exercising them at the time of their removal. This case is focused on the issue of consent. A deed known as a "Aufenthaltsbestimmungsrecht" or, in English, "Right to Determine the Place of Residence" was signed on 26th February, 2016 at approximately 4.45 pm by the applicant and the respondent, however, the meaning of that deed is disputed.

6. The Family Matters Division of the Local Court in Germany made an order dated 7th June, 2016 that the removal of the children was wrongful within the meaning of Article 3 of the Hague Convention because there was no prior consent for the removal of the children. The German Court further held that the deed did not have any legal impact as decisions concerning child custody cannot be made by notarial declarations or private agreements in Germany but come under the exclusive jurisdiction of the competent family court. The German Court further held that it has jurisdiction to deal with any matters concerning these children and that it is not bound by any decision passed by an Irish court. This order was before this Court along with a certified translation. The respondent mother herein is appealing said order of the German Court and it is listed before the German appeal court on 1st August, 2016.

7. The applicant filed affidavits and also gave oral evidence upon the request of the Court on 25th July, 2016. It is his case that after the signing of the deed on Friday, 26th February, 2016 he returned to the family home in Germany by bus while the respondent

returned with her brother by car. When he arrived at the family home he found that the respondent and the children were not there and he believed that the respondent may have taken her brother to the airport for him to return to Ireland. It was put to him in cross examination that his expectation that the respondent and the children would still be in the family home in Germany after he had signed the deed was so unrealistic that it was unbelievable but he firmly stated that he thought they would be there. That evening he received a text message from the respondent and he believed that the respondent and the children were staying in a friend's house and that the children would be back on Sunday as they had school on Monday. On Saturday, 27th February, 2016, the applicant spoke to his daughter, A. and learned that they were in Ireland but understood that they would be returning to Germany for school. This did not occur and the children remain in Ireland. The applicant has been on two subsequent visits to Ireland to have access with his children in March and again in April, 2016. After receiving a letter from the respondent's lawyer in Germany, the applicant has been paying the respondent €950 per month towards the maintenance and support of the children since 8th March, 2016.

8. The contested deed is before this Court. The translation of which, along with its intentions are contested. A translation of the deed on behalf of the applicant states that the parties agree that the right to determine the place of residence of the three children "shall be awarded to the children's mother". A translation of the deed completed on behalf of the respondent states that the parties agree that the right to determine the place of residence of the three children "is transferred exclusively to the children's mother".

9. The applicant first saw the deed on the morning of 26th February, 2016. The applicant stated in evidence that his understanding of the deed was that he was reassuring the respondent and her brother that he would not remove the children from her care. He understood that it allowed the respondent to move the children to another location within the jurisdiction of Germany. He further understood that it allowed her to take the children on holidays to visit her family who live in various other countries. He stated in evidence before this Court that he never intended for the deed to allow the respondent mother to move the children to Ireland. He also stated that the respondent never told him that she intended to move the children to Ireland and that she was not really speaking to him in the week leading up to the removal of the children. The applicant sought a two year limit on the effects of the deed and this was put in place, however, the applicant gave evidence that the respondent was not happy with this limit and he had it removed.

10. On 22nd April, 2016 the respondent instituted proceedings under the Guardianship of Infants Act 1964 in the Irish District Court. However, upon being informed of the German court order, the District Court adjourned the proceedings generally with liberty to re-enter.

11. The respondent filed an affidavit dated 14th July, 2016 and also gave oral evidence on 25th July, 2016. It is the position of the respondent that the deed signed on 26th February, 2016 amounted to a consent for her to take the children out of the jurisdiction of Germany. The respondent mother made various allegations against the applicant father in relation to his behaviour towards her, however, this Court is not being asked to consider a defence of grave risk and therefore will not make any decision in relation to these allegations. A particular incident is alleged to have happened on 19th February, 2016 after which the respondent averred that she became firm in her desire to return to Ireland and she made this clear to the applicant. She stated in evidence that she felt that going to Ireland was the only viable option for her. She stated that the option of living somewhere else within Germany had been discussed and she looked for another apartment. However, she stated that she did not have access to finances and that she found it difficult living in Germany as she does not have fluent German. The respondent stated that there were heated discussions in the week prior to the departure from Germany and that she made it clear to the applicant that she wanted to return to Ireland with the children.

12. The respondent mother sought advice from a German lawyer and was advised that she would need the applicant's consent before she could return to Ireland with the children. She stated that she sought to move with the children to Ireland in a legal manner. She believed that the applicant knew that it was her intention to move to Ireland and that was the purpose of the signing of the deed. Her German lawyer drafted the deed and it was the respondent's understanding that the deed would allow her to legally leave the jurisdiction of Germany.

13. The respondent exhibited an email from the applicant to her dated 26th February, 2016. The email stated that the applicant would sign the deed "out of free will and without admitting any wrong doing". He further stated that the deed would mean that only the respondent mother "can decide where the kids can be". It is further stated in this email that the deed would mean "if you want to go anywhere in the world with the kids I have no say in the matter". When asked about this email in oral evidence the applicant stated that his intention was that the respondent mother could choose where the children would live in Germany and that she could take the children on holidays anywhere in the world but that there was no intention that she would move permanently to Ireland. This email was not with the original German Court that made orders outlined above, however, it is part of the ongoing appeal.

Summary of legal submissions on behalf of the applicant

14. Counsel for the applicant set out his case to be that the children are habitually resident in Germany, that he has custody rights and that he was exercising those rights prior to the removal of the children on 26th February, 2016. It is further his position that he did not consent to the children being removed from the jurisdiction of Germany and therefore that the removal was wrongful within the meaning of Article 3 of the Hague Convention. It was submitted that the principle issue before the Court is to determine whether the signing of the deed dated 26th February, 2016 amounted to an agreement on the part of the applicant that the children could move permanently to Ireland. Counsel for the applicant emphasised that this was never his intention and that this was set out in his evidence. It was further noted that the children did not know they were leaving and that they left without saying goodbye to their father or their paternal grandparents.

15. Counsel for the applicant cited the Supreme Court case of *S.R. v. M.M.R.* [206] IESC 7 in which the principles set out by Hale J. in *Re K. (Abduction: Consent)* 2 F.L.R. 212 in relation to the defence of consent under Article 13(a) were endorsed:-

- "(i) the onus of proving the consent rests on the person asserting it; and
- (ii) the consent must be proved on the balance of probabilities; and
- (iii) the evidence in support of the consent needs to be clear and cogent;
- (iv) the consent must be real; it must be positive and it must be unequivocal;
- (v) there is no need that the consent be in writing;
- (vi) it is not necessary that there be proof of an express statement such as 'I consent'. In appropriate cases consent may be inferred from conduct but where such is alleged it will depend upon the words and actions of the allegedly

consenting parent viewed as a whole and his or her state of knowledge of what is planned by the other parent.”

16. Counsel for the applicant emphasised that it is for the respondent to prove that there was a consent. It was submitted that a consent must be clear and unequivocal and further submitted that this is not the case with the deed in question. Counsel for the applicant submitted that the applicant has been consistent in his evidence that he signed the deed to reassure the respondent's brother and that he believed he was consenting only to the respondent moving the children within the jurisdiction of Germany. It was also submitted that the respondent was inconsistent in her evidence. It was further noted that the applicant did not receive independent legal advice prior to the signing of this deed and it was not explained to him that the effect could be that the children would be moved permanently to Ireland. Counsel for the applicant submitted that the parties were never *ad idem* as to what was agreed or consented to.

17. Counsel for the applicant noted the importance of the German Court order dated 7th June, 2016 which ruled that the deed could not be construed as allowing the respondent mother herein to move the children to Ireland. Counsel for the applicant further cited the *S.R. v. M.M.R.* [206] IESC 7 case as authority that the habitual residence of the children could not be changed unilaterally by the mother. It was further submitted that the defence of “grave risk” under Article 13(b) has a very high threshold and that has not been reached in this case. Counsel for the applicant further raised the issue that if the children were allowed to remain in Ireland there would be under the influence of the respondent mother and that this may prejudice proceedings in Germany. It was further stated that remedies are available to the respondent in the German Courts.

Summary of legal submissions on behalf of the respondent

18. It was submitted on behalf of the respondent that the applicant consented to the removal of the children from the jurisdiction of Germany. It is asserted that, given the children's previous strong association with Ireland and that the move back to Ireland was with the applicant's consent, the children acquired habitual residence in Ireland prior to the issuing of these proceedings. Counsel for the respondent outlined the case of *Re. J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562 and stated that while a child cannot have two places of habitual residence at the same time, they can have two places of habitual residence one after the other. Counsel for the respondent set out three approaches which have been taken in relation to habitual residence. The first approach focuses on the intentions of the parents. The second approach places great weight on the perspective of the child as an autonomous person. The third approach is one which blends together the previous two and has recently been approved by the Court of Appeal in *D.E. v. E.B.* [2015] IECA 104. It was submitted that the children have significant links with both Germany and Ireland and that this Court should find that their place of habitual residence reverted to being Ireland shortly after their arrival here in February.

19. It was submitted that it is a matter for this Court to determine whether the applicant consented to the children moving to Ireland and any view expressed by the court in Germany is not determinative. Counsel for the respondent outlined that an appeal is to be held in relation to this order and that further evidence has been sought by the appeal court in Germany to be heard on 1st August, 2016. This further evidence is available to the Irish High Court in these proceedings. This Court must also consider the defence of consent in the context of the Hague Convention and not German Law. Counsel for the respondent further questioned the appropriateness of the spontaneous declaration of wrongful removal issued under Article 15 of the Hague Convention considering the wording of said article requires as follows:-

“The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.”

20. Counsel for the respondent submitted that this Court should look to both the deed and the email from the applicant to the respondent in deciding whether there was a consent for the respondent to remove the children from the jurisdiction of Germany. Counsel for the respondent also cited the Supreme Court decision in *S.R. v. M.M.R.* [206] IESC 7. Counsel for the respondent further cited the case of *Re C. (Abduction: Consent)* [1996] 1 F.L.R. 414 where the English Court stated that consent should be viewed in the context of “a parent's words and actions as a whole and his state of knowledge of what is planned by the other parent”. The case of *In Re K.* [1997] 2 F.L.R. 212 was also cited to indicate that any consent must be real, positive and unequivocal. Counsel for the respondent further submitted that there is an element of reliance in the defence of consent and that the respondent relied on the deed when she removed the children from the jurisdiction of Germany believing that there was a consent. It was submitted that the applicant in this case signed the deed understanding that it was the intention of the respondent to return to Ireland on the basis of that deed. It was further submitted that there was no immediate demand directly from the applicant to the respondent for the return of the children to Germany upon the respondent realising that they had been moved to Ireland. It was further submitted that the Supreme court in this jurisdiction have held that consent is an Article 13 defence and it was accepted that if a consent is found to exist, the Court has a residual discretion to decide whether or not to return these children.

21. It was submitted that, if the removal of the children is found by this Court to have been wrongful and if an order for return is issued then adequate and appropriate undertakings as within Article 11(4) of Council Regulation 2201/2003 would be required to prevent the children being put in an intolerable situation within the meaning of Article 13(b) of the Hague Convention. Counsel for the respondent further indicated that if the Court were to order the return of these children, a stay should be put on the order so that the potential moves between jurisdictions would be limited.

Supplemental Evidence

22. Considering the fact that this case turns on the issue of the deed and whether it constituted a prior consent for the removal of these children, this Court requested that the respondent's brother who was present during this critical time period give evidence and he did so on 29th July, 2016. An affidavit was sworn by the respondent's brother dated 27th July, 2016. The respondent's brother gave evidence that he travelled to Germany with another sister to see the respondent after the alleged incident and it is accepted by all that this witness was attempting to help the family and prevent a break down. He had several conversations with the applicant during that week including in relation to the signing of the deed. The respondent's brother was firmly of the view that the applicant understood that he was signing the deed in order to give the respondent consent to travel to Ireland with the children. The respondent's brother was also present for the signing of the deed and gave evidence as to the fact that the parties originally signed the deed with the two year limitation condition and that there was then an argument in the car and they returned to the notary's office in order to sign a fresh deed that had no two year limitation clause. The respondent's brother gave evidence that, after the signing of the deed, he and the respondent spoke to the respondent's German lawyer and it was their understanding from her that she was legally allowed to go to Ireland with the children on the basis of the deed.

Conclusions

23. It is accepted by both parties that the children were habitually resident in Germany on the date of their removal, 26th February,

2016.

24. The issue for this Court to decide is whether there was a prior consent such that the removal of the children was not wrongful within the meaning of Article 3 of the Hague Convention. This Court applies the principles in relation to consent as set out above at para. 15 of this judgment from the Supreme Court decision in *S.R. v. M.M.R.* [206] IESC 7.

25. This Court finds the evidence of the respondent more credible than that of the applicant having carefully observed their demeanour in court.

26. This Court finds the evidence of the respondent's brother very credible and accepts that he went to assist a reconciliation if that were possible and his evidence of continuous discussion with the applicant over a number of days. His honest belief was that full consent was being given by the applicant as set out in the deed. The email of the 26th February, 2016 is very telling, clear and unequivocal when read in conjunction with the deed. Also, the applicant went back to change the deed to delete the two year time frame of his own accord and this Court believes that his consent to them leaving the jurisdiction was clear. Therefore, this Court refuses the order to return the children to the jurisdiction of Germany.

27. This Court fully recognises that the German Court will proceed to decide on custody and access issues.

28. No order as to costs