

THE HIGH COURT

FAMILY LAW

[2014 No. 2 HLC]

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

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

AND IN THE MATTER OF COUNCIL REGULATION 2201/2003

AND IN THE MATTER OR S. C-T. (A CHILD)

BETWEEN

M. J. T.

APPLICANT

AND

C. C.

RESPONDENT

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 9th day of April, 2014.

1. This judgment concerns the question as to whether the applicant is obliged to put before the court *prima facie* evidence that he was actually exercising rights of custody in relation to the child at the date of the alleged wrongful removal and if so, whether he has done so on the evidence now before the Court.

Background/Facts

2. The applicant is the father of the child named in the title to whom I will refer as Sue (not her real name). The respondent is the maternal grandmother of Sue. The mother of Sue ("the Mother") unfortunately died in late 2012. Under her will she appointed the respondent as guardian of Sue. The Mother was the daughter of the respondent whom she had adopted at age six weeks. The Mother and Sue had contact also with the biological mother of the now deceased Mother.

3. Sue was born in England in April, 2005. The applicant and the Mother were then in a relationship. Both are named on the birth certificate of Sue. The relationship between the applicant and the Mother appears to have broken down by 2007. Subsequent to the breakdown, Sue and the Mother resided with the respondent in England.

4. The respondent deposes she decided to move to Ireland in 2008 and sought accommodation. Ultimately she obtained this and in August 2011, Sue, the Mother and the respondent came to live in Ireland. The biological grandmother who had previously lived in England also came to live in Ireland. Sue spent every Friday night with the biological grandmother until April, 2013. The Mother became ill in December, 2011 and sadly died in December, 2012.

5. The affidavit grounding the application sworn by the solicitor for the applicant states that the applicant learnt of the death of the Mother in January, 2013; that on 5th May, 2013, he sought assistance from the Central Authority for England and Wales and was advised to seek certain documentation and that he made the formal application to the English Central Authority in November, 2013.

6. These proceedings were issued on 14th January, 2014. The respondent has filed a replying affidavit sworn on 4th February, 2014. The Court has been informed by counsel for the applicant that he has been furnished with the replying affidavit and that he is not intending to file any affidavit in response in the proceedings. Nevertheless he has instructed counsel to continue the proceedings as he wishes Sue to be interviewed and assessed and given an opportunity to be heard pursuant to Article 11(2) of Council Regulation 2201/2003 of 27 November, 2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

7. Counsel for the respondent sought the determination of the Court, as a preliminary issue, that the applicant has not put before the Court *prima facie* evidence that the rights of custody which, it is accepted he held were actually being exercised in the period prior to Sue leaving England and coming to live in Ireland in August, 2011. She submitted that on the facts set out in the respondent's affidavit in relation to the impact on Sue of her mother's death in December, 2012 and an incident in April 2013, during a regular Friday visit to her biological grandmother, that it was in the interests of Sue that the proceedings are resolved on such a preliminary issue. The respondent deposes that Sue came home extremely distressed as during the visit she was asked to speak on the telephone to the applicant whom she reported to the respondent told her "that he was her daddy and he was coming to Ireland to bring her back to England with him". It appears to be common case that there had been no contact between the applicant and Sue between August, 2008 and the phone call in April, 2013.

8. Counsel for the applicant also sought to have this matter heard and determined as a preliminary issue by reason of the potential consequences of a full hearing and a decision of the Irish Courts to make a non-return order pursuant to Article 13 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the Hague Convention"). Counsel for the respondent submitted that on the undisputed facts before the Court at the date of commencement of these proceedings, Sue had resided in Ireland for a period in excess of one year and the applicant should have had knowledge that she was in Ireland for a period well in excess of one year prior to the commencement to the proceedings. She submitted that on those facts the courts of England and Wales no longer retained jurisdiction pursuant to Article 10(b)(i) of Regulation 2201/2003, in relation to any custody dispute

concerning Sue, even if there was a wrongful removal of Sue to Ireland in August, 2011. Whilst the Court does not have to determine that issue in this application, the position contended for is clearly arguable.

9. Counsel for the respondent further submitted that notwithstanding that the courts of England and Wales no longer retained jurisdiction pursuant to Article 10 in relation, *inter alia*, to disputes in relation to custody of Sue, if this Court were, to make an order of non-return pursuant to Article 13 of the Hague Convention then the Court would be obliged to notify the courts of England and Wales (being the courts of the Member State in which the child was habitually resident before the alleged wrongful removal) pursuant to Article 11(6) of Regulation 2201/2003. Those courts would then be obliged to examine the question of custody of Sue, pursuant to Article 11(7).

10. Again, that position is arguable. Nevertheless it must be pointed out that where, as on the undisputed facts, these proceedings commenced in excess of a year after the date of the alleged wrongful removal, this Court would have jurisdiction in accordance with the second indent of Article 12 of the Hague Convention to refuse to make an order for the return of the child if it is demonstrated that the child is now settled in its new environment in Ireland. If the Court refuses to make an order for return pursuant to Article 12 of the Hague Convention then the provisions of Article 11(6) to (8) of Regulation 2201/2003 do not apply. Those provisions only apply where the non-return order is pursuant to Article 13 of the Convention. Such an approach is consistent with the transfer of jurisdiction to the courts in this jurisdiction pursuant to Article 10(b)(i) of the Regulation.

11. Nevertheless, it remains the position that this Court is obliged, pursuant to Article 11(2) when applying either Article 12 or Article 13 of the Hague Convention, to ensure that the child is given an opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity.

12. That being so, in circumstances where the facts before the Court indicate a possible adverse impact on Sue of the continuation of these proceedings and her vulnerability to an interview conducted to enable her to be given an opportunity to be heard in the course of these proceedings, it appears desirable that the court should entertain and decide as a preliminary issue whether the applicant is obliged to and if so whether he has put before the Court *prima facie* evidence that the removal of Sue to Ireland in August 2011, was a wrongful removal within the meaning of the Convention.

The Law

13. Article 3 of the Hague Convention provides insofar as is relevant:-

"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 other 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 removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

14. Article 5 defines 'rights of custody' for the purposes of the Convention as including "rights relating to the care of the person of the child, and in particular, the right to determine the child's place of residence".

15. As appears, the definition of a wrongful removal has two aspects, sometimes referred to as the juridical and factual aspects, *i.e.* that the applicant held rights of custody under the law of the State of habitual residence and as a matter of fact was actually exercising those rights of custody at the time of the removal.

16. It is not in dispute that the applicant, being the father of Sue named on her Birth Certificate, has parental responsibility in relation to Sue pursuant to Children Act 1989, in England, and that the rights thereby held constitute rights of custody for the purposes of the Convention. What is in dispute is whether he was actually exercising those rights of custody between approximately August, 2008 and August, 2011.

17. The question as to whether there is an onus on an applicant to establish, at least with preliminary or *prima facie* evidence, that the removal of a child is a wrongful removal for the purposes of Article 3 is complicated by reason of Article 13(a) of the Convention which gives the court jurisdiction to refuse to order the return of a child where the person who "opposes its return establishes that... the person ... having the care of the person of the child was not actually exercising the custody rights at the time of removal...". Where such a defence is raised, the onus of proof is on the respondent.

18. The interplay between these aspects of Article 3 and Article 13 of the Convention and the obligations imposed on an applicant were considered in the Explanatory Report by Elisa Pérez-Vera (1982) at paras. 72 and 73. Earlier at para. 64, she explains that the duty to return a child "arises only if its removal or retention is considered wrongful in terms of the Convention". Further she explains that the relationship which the Convention seeks to protect is based upon the existence of two facts: the existence of rights of custody and the actual exercise of such custody rights prior to the child's removal. Having dealt with the juridical element of rights of custody, then, at para. 72 and under the heading 'The Factual Element', she states that the "second element characterizing those relationships protected by the Convention is that the custody rights which it is claimed have been breached by the child's removal were actually exercised by the holder". She explains the rationale in terms of the Convention protecting the stability of a child's life. In para. 73, she refers to some proposals to delete from Article 3 the reference to actual exercise by reason of the burden it might place on an applicant and to the complications of the provisions of Article 13 already referred to and then states:-

"Now it is indeed by considering both provisions together that the true nature of the conditions set forth in article 3 can be seen clearly. This condition, by defining the scope of the Convention, requires that the applicant provide only some preliminary evidence that he actually took physical care of the child, a fact which normally will be relatively easy to demonstrate."

19. An applicant for an order for the summary return of a child to its State of habitual residence pursuant to the Convention must, in my judgment put before the Court *prima facie* or preliminary evidence that the removal or retention of the child was wrongful within the meaning of the Convention. This follows from the purpose and wording of the Convention and underlined by the above explanations. Where the allegation is that the removal was in breach of the applicant's rights of custody (as in these proceedings), Article 3 requires such evidence of the applicant's *de jure* rights of custody and also that, as a matter of fact, the applicant was actually exercising his rights of custody.

20. There appears to have been limited consideration by the courts of this issue and as to what facts will be considered as preliminary

evidence of the actual exercise of custody rights for the purposes of Article 3(b) of the Convention. Nevertheless, it is possible to discern from the decisions to which my attention was drawn by counsel and one other that, firstly, the courts take a very liberal view as to what will constitute the exercise of custody rights, and, secondly, that it does require the demonstration by an applicant/parent that he either did or attempted to maintain contact or a relationship with his child.

21. In *Re H.; Re S. (Minors) Abduction: Custody Rights* [1991] 2 A.C. 476, Lord Brandon observed at p. 500:-

"In my view article 3(b) must be construed widely as meaning that the custodial parent must be maintaining the stance and attitude of such a parent, rather than narrowly as meaning that he or she must be continuing to exercise day to day care and control."

22. In *Re W. (Abduction: Procedure)* [1995] 1 F.L.R. 878, Wall J. in the context of considering a defence raised pursuant to Article 13(a) of non-exercise of rights of custody, rejected a contention that the agreement of a mother who held sole rights of custody that the child live with his father was not a continuing exercise of the mother's rights of custody. He considered that the approach he took was supported by the observation of Lord Brandon to which I have referred.

23. In *Friedrich v. Friedrich* 78 F. 3d 1060 (6th Cir. 1996) in the U.S. Court of Appeals for the Sixth Circuit, Boggs J. put it thus:-

"Enforcement of the Convention should not to be made dependent on the creation of a common law definition of 'exercise'. The only acceptable solution, in the absence of a ruling from a court in the country of habitual residence, is to liberally find 'exercise' whenever a parent with *de jure* custody rights keeps, or seeks to keep, any sort of regular contact with his or her child."

24. In this jurisdiction, McGuinness J. in the Supreme Court again considered the actual exercise of rights of custody in the context of a defence raised pursuant to Article 13(a) of the Convention in *M.S.H. v. L.H.* [2000] 3 I.R. 390. The applicant father in that case had been imprisoned in England. During the period of imprisonment, the children had been brought to see the father from time to time. In upholding the High Court Judge's conclusion that the respondent had not established that the applicant was not exercising his rights of custody at the time of removal of the children to Ireland, McGuinness J. at p. 403, stated:-

"Whether or not the plaintiff was seeing his children at the highest frequency permitted by the prison authorities (a matter on which this court has no evidence either way), it is clear that he was exercising his right to see them and to maintain his relationship with them. In addition his application to the Oldham County Court to obtain a prohibited steps order was a clear exercise of his right of custody."

Evidence of Exercise of the Applicant's Rights of Custody

25. The applicant, in his application to the English Central Authority, states that he paid maintenance through the Child Support Agency (CSA) in England in the period prior to Sue leaving England and coming to Ireland and it is agreed that he continued to make such maintenance payments through the CSA until shortly after the Mother's death. He ceased making them in January, 2013.

26. The further relevant evidence before the Court is from the affidavit of the respondent, not disputed by evidence from the applicant that since August 2008, the applicant did not seek to exercise access to Sue or otherwise make any contact with Sue with a view to maintaining a relationship with Sue. It appears that the respondent, after the breakdown of the relationship between the applicant and the Mother, brought Sue on access visits to the applicant. Subsequently, the Mother was advised that contact between the applicant and Sue should take place on a supervised basis at a Contact Centre in England. There has been exhibited correspondence in August, 2008 between the solicitors for the applicant and the Mother in which in default of contact being arranged, proceedings were threatened on behalf of the applicant. The respondent deposes that a contact session was arranged for 16th August, 2008, at the Contact Centre but she was informed that the applicant had made no arrangement to have the visit supervised and that the contact did not take place. There is no evidence of any proceedings having been commenced by or on behalf of the applicant for contact with Sue and the respondent avers that he did not do so. The respondent deposes that she informed the applicant on the last access visit facilitated by her that access with Sue it would thereafter be at a named Contact Centre with supervised access. The respondent deposes to a bad reaction by the applicant to this information.

27. The evidence is that this exchange occurred three years prior to the removal of Sue from England *i.e.* in August, 2008. The applicant has not put before the Court any evidence of any attempt made by him to contact Sue or any step taken by him to maintain a relationship with her during that period. The respondent has deposed that the applicant did not, during that three-year period, exercise rights of access and did not seek to exercise rights of access to Sue.

Conclusion

28. The applicant has adduced evidence that he was the holder of rights of custody in relation to Sue when she was removed to Ireland in August, 2011. However, on the evidence herein, I cannot be satisfied that the applicant put before the Court *prima facie* or preliminary evidence that he was exercising the rights of custody he held in relation to Sue as the holder of parental responsibility in accordance with the laws of England during a significant period of time prior to the removal of Sue to Ireland.

29. The authorities to which I refer simply require him to show that he kept or sought to keep regular contact or a relationship with his child. There is no evidence he did this during the three years prior to Sue's removal from England. In circumstances where the applicant was living in the same country as Sue, the payment of maintenance through CSA does not in my judgment suffice. In the words of Lord Brandon in *Re H.* he was not maintaining the stance and attitude of a custodial parent. The definition in Article 5 of the Convention of rights of custody as including 'care of the person of the child' [emphasis added] underlines the requirement for personal contact or seeking to maintain contact or a relationship as part of the exercise of rights of custody. There may, of course, be factual situations where there is evidence that personal contact is precluded by court order or other reason, despite attempts made. There is no such evidence herein.

30. Accordingly, I have concluded that there is not *prima facie* evidence before the Court that the removal of Sue from England in August 2011, was a wrongful removal within the meaning of the Convention and it follows that the application must be dismissed.

Addendum

31. It is important to emphasize that this decision under the Convention is not a decision on either custody or access in relation to Sue. The applicant is the father of Sue. He has rights and duties in relation to Sue and Sue has a right to a relationship with her father. Regrettably, it appears that this relationship has been severely fractured. It may take time and careful help and support for Sue to enable a relationship be gradually re-established.

32. It appears probable that the Irish courts have jurisdiction to hear and determine any dispute in relation to custody, access or welfare of Sue, in proceedings, pursuant to the Guardianship of Infants Act 1964 (as amended),. It would obviously be in the best interests of Sue if the applicant, the respondent and other relevant persons who have Sue's best interest at heart could agree how the relationship between Sue and her father might be gently and gradually restored.