Neutral Citation Number: [2006] IEHC 10

THE HIGH COURT
FAMILY LAW

2005 No. 18 HLC

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT, 1991
AND IN THE MATTER OF COUNCIL REGULATION 2201/2003
AND IN THE MATTER OF K. V. R. AND K. M. R., CHILDREN

BETWEEN

S. R.

APPLICANT

AND
M. M. R.

RESPONDENT

Judgment of Ms. Justice Finlay Geoghegan delivered the 25th day of January, 2006.

1. The applicant is the father of the two children named in the title of these proceedings. The father and mother were married to each other in June, 1997, in Massachusetts, USA.

2. The elder child, K., was born in August, 2000, and the younger, K., born in December, 2002. Both children were born in Massachusetts and lived in Massachusetts until January, 2005. The father seeks an order for the return of the children pursuant to Article 12 of the Hague Convention as implemented in Ireland by the Child Abduction and Enforcement of Custody Orders Act, 1991.

3. It is alleged that they were brought to Ireland by the mother with his consent, for a holiday of approximately three and a half weeks, in January, 2005, but that they were wrongfully retained by the mother in Ireland in February, 2005.

4. It is common case that the father has rights of custody and was exercising those rights of custody within the meaning of Article 3 of the Convention prior to the alleged wrongful retention. It is also common case that the habitual residence of the children from the date of their birth until the date upon which they left the U.S. in January, 2005, was that of Massachusetts.

5. On behalf of the mother four defences are raised to the application for an order for the return of the children. These are:

(i) That the father consented to the children moving to live in Ireland in January, 2005.

(ii) In the alternative, that the children had acquired a new habitual residence in Ireland prior to the date of the alleged wrongful retention.

(iii) In the further alternative that the father, subsequent to the alleged wrongful retention acquiesced in the children being retained in Ireland.

(iv) That there is a grave risk that the return of the children to Massachusetts would expose them to physical or psychological harm or otherwise place them in an intolerable situation within the meaning of Article 13(b) of the Convention.

Background facts

6. The father is a U.S. citizen and during any relevant period has been resident in Massachusetts. The mother is originally from Ireland and, prior to January, 2005, had spent approximately twelve years in the U.S. Since June, 1997 she has been married to the father.

7. The father was employed in the financial services sector but was made redundant in June, 2004. The father also appears to have had part-time evening work in bars. Difficulties appear to have arisen in the marriage at latest in 2004. The mother alleges that the father suffers from both alcohol and drug addictions.

8. It is common case that in the middle of December, 2004 the mother told the father that she had received a present of tickets to Ireland for herself and her children from her parents. There is dispute between the parties as to the basis upon which or period for which the mother informed the father she was going to Ireland. The father contends that he was informed that the mother and the children were going to Ireland for a vacation of approximately three and a half weeks duration and would be returning to the U.S. at the end of the vacation. He agrees that he consented to the children travelling to Ireland on this basis. The mother's case is that he knew prior to January, 2005, that the mother intended moving with the children to Ireland and staying there indefinitely and that he consented to the move in the sense that he did nothing to prevent the mother taking the children to Ireland.

9. It is common case that the father drove the mother and the children to the airport in the U.S. in January.

10. The mother and the children have remained in Ireland. Initially they stayed with the mother's parents, then with her sister and are now residing in a separate house.

Consent

11. I have been referred to a number of authorities including *Re K. (Abduction: Consent)* [1997] 2 F.L.R. 212, a decision of Hale J. (as she then was) in the Family Division of the High Court of Justice in England and Wales. From these I would conclude that the relevant principles to be applied are:

(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.

12. In this application I have had the benefit of both considering the affidavits of the parties and exhibits thereto and hearing oral evidence from the parties in cross-examination on their affidavits and re-examination by their own counsel.

13. I find that there is no clear and cogent evidence of any express statement of consent by the father to the children moving to live in Ireland in January, 2005. There is undisputed evidence that he consented to the children travelling to Ireland in January, 2005. Whether such consent was consent to the children moving to reside in Ireland depends upon the father's knowledge of what was planned by the mother in making the trip.

14. From my observation of the demeanour of the parties in the witness box and from a consideration of both the oral evidence and the affidavits sworn, I find that the information communicated by the mother to the father in relation to the proposed trip to Ireland was that it was a vacation and one of short duration in the order of three to three and a half weeks and that it was on the basis of such information that the father consented to the children travelling to Ireland. In making this finding I accept that the mother did not specify a precise return date but that does not appear to me of significance. In real terms there is a substantial difference between a vacation and a change of residence or move for an indefinite period. A vacation necessarily implies a return to the normal residence at the end of the vacation period. The latter two do not necessarily imply a return. I find that prior to leaving the US this trip was at all material times characterised by the mother to the father as being a vacation.

15. Even if the mother intended the trip to be one of a long or indefinite duration I find that she did not communicate that fact to the father by words or deeds prior to leaving the United States with the children in January, 2005. The mother and the children left with one suitcase each. I find that the father was not aware that the mother sent six boxes of belongings prior to leaving to Ireland.

16. Considering all the evidence, I have concluded that the mother has failed to discharge the onus of establishing by clear and cogent evidence that on the balance of probabilities the father consented to the children being taken to Ireland other than for a vacation which was to last approximately three and a half weeks.

Habitual residence

17. Counsel for the mother submits correctly that, in accordance with the decision of the Supreme Court in *The Minister for Justice, Equality and Law Reform as the Central Authority for Ireland, ex parte P.G. v. V.C.* (Supreme Court, Unreported, 24th January, 2002), this Court must make a finding of fact as to the date of alleged wrongful retention. It does not appear to me that the judgment of McGuinness J. (with which Denham J. and Murray J. (as he then was) concurred) in that case requires a precise date but rather the identification of an approximate date upon which the alleged wrongful retention began. The necessity for this finding is that under Article 3 of the Convention, the question of habitual residence must be decided at the point "immediately before the removal or retention". As appears from the facts of that case it was unclear whether the wrongful retention was considered by the trial judge to have commenced in January or July of the relevant year.

18. On the facts of this application I have found that the father consented to the children being taken to Ireland in January for a vacation which he believed to be of approximately three and a half weeks duration. As appears from the findings on acquiescence below the father was on the telephone regularly and objected to the children remaining in Ireland and sought their return once the perceived holiday period was over. Accordingly, I have concluded that the alleged wrongful retention commenced about February, 2005.

19. The issue, therefore, is whether immediately before that date the two children remained habitually resident in the state of Massachusetts or, as alleged by the mother, had acquired a new habitual residence in Ireland.

20. The two children were habitually resident in Massachusetts from the date of their births in 2000 and 2002 respectively, until January, 2005. The determination by the court of the habitual residence of a child for the purposes of the Hague Convention is a matter of fact to be decided on all the relevant evidence: see *M. v. Delegation of Malaga* [1999] 2 I.R. 363. In that case, McGuinness J. at p. 381, having reviewed a number of authorities, stated:

> "Having considered the various authorities opened to me by counsel, it seems to me to be settled law in both England and Ireland that 'habitual residence' is not a term of art, but a matter of fact, to be decided on the evidence in this particular case. It is generally accepted that where a child is residing in the lawful custody of its parent (in the instant case the mother), its habitual residence will be that of the parent. However, the habitual residence of the child is not governed by the same rigid rules of dependency as apply under the law of domicile and the actual facts of the case must always be taken into account. Finally, a person, whether a child or an adult, must, for at least some reasonable period of time, be actually present in a country before he or she can be held to be habitually resident there."

21. On the facts of this application the two children were, in January, 2005, in the joint custody of both parents. Immediately prior to February, 2005, they had been in Ireland for approximately four weeks. Having regard to my conclusion that the father consented to their travelling to Ireland only for a vacation, even if their mother had in January, 2005 a settled intention to return permanently to Ireland it does not appear to me that the two children can be considered, by the fourth week of February, 2005 to have lost their habitual residence in Massachusetts and acquired a new habitual residence in Ireland. Whilst I accept that a new habitual residence may be acquired is a short time, in the case of young children such as these where there is no agreement by their parents and joint custodians that they change their residence, I do not consider that they acquired a new habitual residence in approximately four weeks.

22. Accordingly, I conclude on the facts of this case that the two children remained habitually resident in Massachusetts in the last week of February, 2005.

Law on Acquiescence

23. Article 13 of the Hague Convention provides:

> "Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

(a) the person… [seeking the order for return].. had consented to or subsequently acquiesced in the removal or retention;"

24. It is submitted, in the alternative on behalf of the mother that on the facts of this case the father acquiesced in the retention of the children in this jurisdiction subsequent to February, 2005, i.e. the date of alleged wrongful retention.

25. There is no significant dispute between the parties as to the principles according to which this Court should determine whether or not the father acquiesced within the meaning of article 13(a) of the Hague Convention. The principles are those set out by the Supreme Court in its decision in *R.K. v. J.K. (Child Abduction: Acquiescence)* [2000] 2 I.R. 416. In that case judgments were given by all three members of the court (Denham J., Lynch J. and Barron J.).

26. In stating that this Court is bound by the decision of the Supreme Court in *R.K. v. J.K.* I do not wish to suggest that the concept of acquiescence in the Hague Convention as determined by the Supreme Court is an Irish national law concept. It is clear from those judgments that the Supreme Court agrees with the views expressed by the House of Lords in *re H. (Abduction: Acquiescence)* [1998] A.C. 72 through the speech of Lord Browne Wilkinson that the Convention must have the same meaning and effect under the laws all the Contracting States and consequently national law concepts have no direct application to the proper construction of article 13 of the Hague Convention. Having referred to this decision Denham J. at p. 431 stated:

> "I agree that it is necessary to ensure a common international approach to the interpretation of the terms of the Hague Convention. The concept of acquiescence in the Hague Convention should not be interpreted in a formalistic way or by reference to national law. Common sense should be applied to the facts of the case".

27. Both Denham J. and Barron J. cite with approval and consider as a point of departure in relation to the meaning of acquiescence the statement by Waite J. in relation to acquiescence in *W. v. W. (Abduction: Acquiescence)* [1993] 2 F.L.R. 211:

> 'The gist of the definition can perhaps be summarised in this way. Acquiescence means acceptance. It may be active arising from express words or conduct, or passive arising by inference from silence or inactivity. It must be real in the sense that the parent must be informed of his or her general right of objection, but precise knowledge of legal rights and remedies and specifically the remedy under the Hague Convention is not necessary. It must be ascertained on a survey of all relevant circumstances, viewed objectively in the round. It is in every case a question of degree to be answered by considering whether the parent has conducted himself in a way that would be inconsistent with him later seeking a summary order for the child's return.'"

28. All three judgments in *R.K. v. J.K.* refer extensively to the speech of Lord Brown Wilkinson in *re H. (Abduction: Acquiescence)* [1998] A.C. 72. Denham J. at p. 430 sets out the summary by Lord Browne Wilkinson in relation to acquiescence at p. 90:

> "To bring these strands together, in my view the applicable principles are as follows. (1) For the purpose of article 13 of the Convention, the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his actual state of mind. As Neill L.J. said in In *re S. (Minors) (Abduction: Acquiescence)* [1994] 1 F.L.R. 819 at p. 838: ... 'the court is primarily concerned, not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact.' (2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent. (3) The trial judge, in reaching his decision on the question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law. (4) There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced."

29. Both Lynch J. and Barron J. also refer with approval to the views expressed by Balcombe L.J. in what was subsequently stated by the House of Lords to be "a strong dissenting judgment" In *Re A. (Minors) (Abduction: Custody Rights)* [1992] 2 W.L.R. 536. In that case the issue was whether sentiments expressed by a father in a single letter should be regarded as being acquiescence to the wrongful removal by the mother of his two sons. The majority of the court so found but Balcombe L.J. dissented. He said at p. 544:

> "In my judgment this is to give 'acquiesced' far too technical a meaning for the context in which it is used. As I have already said, the main object of the Hague Convention is to require the immediate and automatic return to the state of their habitual residence of children who have been wrongfully removed. To this there are a limited number of exceptions, but it is apparent that the purpose of the exceptions is to preclude the automatic return of the children to the country whence they were removed, only if it can be shown or inferred that this could result in unnecessary harm or distress to the children. In other words, it is to the interests of the children that the exceptions are directed, not (except insofar as these directly affect the interests of the children) the interests of the parents or either of them. In my judgment, this requires the court to look at all the circumstances which may be relevant and not, as is here submitted, to the terms of a single letter.
>
> Added force is given to this view by the English and French dictionary definitions of 'acquiesce' which I have quoted above. 'Accept' and 'adhesion' to my mind connote a state of affairs which persists over a period. 'Acquiesce' is not, in my judgment, apt to refer to a single expression of agreement taken in isolation from all surrounding circumstances."

30. Barron J. having referred to the above then stated at p. 449:

> "I agree. In my view, acquiescence in the context of the Convention means an acceptance of the changed circumstances arising from the wrongful removal and/or the wrongful retention, as the case may be, by a parent in such circumstances that it is reasonable that he or she should be bound by it. It must be such that it would be inconsistent for the parent who has acquiesced to seek later to rely upon the rights given to such parent under the Convention to have the child or children returned summarily. The acceptance may be by words or conduct."

31. The above appears helpful in determining the level of acceptance of the changed circumstances which must be found by the court to form part of the subjective intention or conduct of the wronged parent. It appears from the above and in particular the observation of Barron J. that a finding of acquiescence should be made by the requested court, where having considered all the

relevant circumstances the court concludes that the wronged parent either actively or passively accepted the changed circumstances such that it is reasonable that s/he be bound by it and it would be inconsistent for that parent to rely upon his/her rights under the Convention to have the child or children returned summarily. The same considerations appear to underlie the exception envisaged by Lord Browne Wilkinson where even in the absence of any finding of acceptance by reference to the subjective intent of the wronged parent the conduct of that parent may be such that it has lead the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with a summary return of a child.

32. I would respectfully agree with the characterisation by Balcombe L.J. of an object of the Convention being the immediate and automatic return of children who have been wrongfully removed or retained to their State of habitual residence. Also, that the purpose of the exceptions are directed to the interests of the children as distinct from the parents. The object of an immediate return requires both that the wrong parent makes a prompt request for the return of the child and that the national authorities and courts adopt expeditious procedures. Whilst article 12 applies to proceedings commenced within one year this does not mean that a parent is permitted to await commencing proceedings until shortly before the expiry of the year. As is clear from the above decisions a parent may be found to have acquiesced within the meaning of article 13 through inactivity.

33. Further, it appears important to stress the consideration to be given by the court to whether the conduct, active or passive alleged to constitute acquiescence is inconsistent with a right to summary return under the Convention. Summary return as used in the above decisions appears to be the automatic return under article 12 where the requested court has no discretion to refuse by reference to the then circumstances of the child. The purpose of the exceptions is as stated by Balcombe L.J. to avoid distress to the child. Where a defence under article 13 is established it does not automatically follow that there will not be an order for return. Acquiescence or any other defence simply gives to the requested court a discretion as to whether or not to make an order for the return of the children in accordance with the decision of the Supreme Court in *B. v. B.* [1998] 1 I.R. 299. The creation of such a discretion by establishing a defence appears to me consistent with the above analysis of Balcombe L.J. of the purpose of the exception or defence of acquiescence in the context of the objects of the Convention. Acquiescence will normally mean that the child has been left in the country to which he or she has been wrongfully removed or retained for a longer period than is envisaged by the requirement for prompt applications and expeditious procedures under the Convention. The Convention, in the interests of the child in such circumstances gives the requested court a discretion which permits it to take into account the then position of the child albeit in a context of the objects of the Convention.

Conclusions on Acquiescence

34. On the facts herein the mother primarily relies upon delay and the fact that the father only made contact with the U.S. Central Authority to seek the return of the children by letter dated May, 2005. Further, that the confirmation from a lawyer in Massachusetts that the father had rights of custody to the children under the laws of Massachusetts required by the U.S. State Department was only forwarded by the father in August, 2005. Proceedings were commenced in September, 2005.

35. In accordance with the above law the burden of proof of establishing that there was acquiescence by the father is on the mother. Further, the subjective intention of the father is a question of fact for this Court to determine.

36. Having considered all the evidence and in particular the evidence given on affidavit and orally of disputed telephone conversations, and in relation to the delay by the father in contacting the US State Department I find that the father did not accept the changed circumstances of the children i.e. that they remain living in Ireland. I find that the father persistently telephoned the mother and both objected to the children remaining in Ireland and sought their return to the United States. I also find that in some of those telephone conversations between March and May that the mother did tell the father that she was only extending the vacation and would be returning with the children to the US. Inactivity may give rise to a finding of passive acceptance and acquiescence. There was delay in the father contacting the U.S. Central Authority. He did not do so for just under three months from the date of alleged wrongful retention. However, the father has explained his reluctance to do so both by reason of the representations being made to him by the mother that she was simply extending the vacation and was intending to return to the U.S. and also by reason of an anxiety by the father to permit, if possible, a voluntary return by the mother as he recognised that if he involved the U.S. Central Authority it would inevitably mean an end to his marriage. It is clear from the evidence that the father was and remains anxious to achieve a reconciliation of his marriage. Having regard to the forgoing explanations for the delay in contacting the U.S. Central Authority which I accept I have concluded that there was not passive acceptance by the father.

37. In the absence of a finding that the father either actively or passively accepted the retention of the children in Ireland acquiescence will only be found in accordance with the exception referred to by Lord Browne Wilkinson above. The evidence of the mother does not support such a finding.

38. Accordingly, I have concluded that the father did not acquiesce in the retention of the children in Ireland after February, 2005, within the meaning of article 13(a) of the Hague Convention.

Grave risk

39. The final defence raised on behalf of the mother is one of grave risk within the meaning of article 13(b) of the Convention. This provides that the court is not bound to order the return of the child if the person who opposes the return establishes that –

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

40. This exception to the obligation to make an order for return must be strictly construed. In *A.S. v. P.S. (Child Abduction)* [1998] 2 I.R. 244, Denham J. stated at p. 259:

> "The law on 'grave risk' is based on art. 13 of the Hague Convention, as set out earlier in this judgment. It is a rare exception to the requirement under the Convention to return children who have been wrongfully retained in a jurisdiction other than that of their habitual residence.
>
> This exception to the requirement to return children to the jurisdiction of their habitual residence should be construed strictly. It is necessary under the Convention that the situation be one of grave risk, an intolerable situation.
>
> The Convention is based on the concept that the children's interest is paramount. It is not in the children's best interest to be abducted across state borders. Their interest is best met by the courts of the jurisdiction of their habitual residence determining issues of custody and access."

41. The defence of grave risk and Article 13(b) of the Convention have been the subject of many decisions both in this jurisdiction and elsewhere. In *A.S. v. P.S.* Denham J. reviewed certain decisions in England and Wales. As appears from those decisions and the decisions in this jurisdiction there is a heavy burden on those seeking to make out a defence of grave risk under Article 13(b) of the Convention. This is primarily for two reasons. Firstly, one of the objects of the Convention is that children are returned to the country of their habitual residence for their future to be decided by the appropriate authorities there (if their parents or custodians are in dispute) as there is a presumption that those authorities are best placed to make such decisions in the interests of children. Where children have been wrongfully removed or retained in another jurisdiction it does not form part of the function of the courts of that other jurisdiction in an application for return under the Hague Convention to determine from a welfare basis where the children's best interests lie.

42. Secondly, unless it is proved to be otherwise, the courts of a requested jurisdiction, in this instance Ireland, should assume that the courts of the habitual residence of the child or children are capable of making appropriate orders or taking appropriate steps to protect the interests of children once within their jurisdiction. There is no suggestion made in these proceedings that the courts of Massachusetts do not have available to them the appropriate powers or means to protect them or that there is any real obstacle to the mother availing, if necessary of the protection of the courts of Massachusetts.

43. The mother in these proceedings has made a number of allegations of wrongdoing against the father in respect of the children. It is unnecessary for this Court to decide whether or not those allegations are well founded. The allegations must be viewed in the context of the fact that until 31st January, 2005, the mother and two children resided with the father in the family home in Massachusetts and it is not suggested that the mother at any stage prior to leaving the U.S. considered it necessary to seek help from any authority within the U.S. Even if the allegations made were well founded (which I am not holding) it does not appear in accordance with the authorities on article 13(b) of the Convention that a defence of a grave risk has been made out by the mother in respect of the situation to which the children will return in the U.S. If the mother is in need of protection by reason of the matters alleged, such protection is available from the courts of Massachusetts.

44. As I have concluded that no defence has been made out under Article 13 of the Convention, the Court is bound under Article 12 to make an order for the return of the children to the state of Massachusetts. It is permissible for this Court to make the order for return subject to undertakings by the father to this Court. Such undertakings have as their purpose to ease the return of the mother and the children to the U.S. and to provide for the well being of the children in the short term, pending the mother taking proceedings in the courts of Massachusetts if she considers it necessary to do so.

45. In the course of these proceedings the mother sought from the father multiple undertakings in the event that an order for the return of the children was made. Many of those are directed to the long-term solution of the unfortunate breakdown in the marriage of the parties. It is not appropriate for this Court to either seek undertakings or impose conditions which go further than seeking to achieve a smooth return for the children and their well being in the immediate period after return, pending an application to the courts of their habitual residence.

46. On the facts of this case and having regard to the undertakings offered to the Court by the father during his oral evidence and the concerns expressed by the mother, the Court is making the order for the return of the children to Massachusetts subject to the following undertakings from the father:

> (i) That the father will, pending any order of the Massachusetts courts, vacate the family home and permit the mother to reside there with the children.
>
> (ii) That pending any order of the Massachusetts courts, the father will continue to discharge the mortgage and utility bills on the family home.
>
> (iii) The father will pay to the mother a sum of $1,000 prior to her leaving Ireland, to cover the mother's and children's immediate needs on their return to Massachusetts.
>
> (iv) The father will produce confirmation in writing that he has in place health care insurance which includes the mother and the children for the year 2006.
>
> (v) The father will not pursue or facilitate a prosecution against the mother in the US or elsewhere arising out of the subject matter of these proceedings.

47. I will hear counsel on the timing of the order for return and the making of the payment referred to above.

48. There will be an order that this judgment and the order made herein be made available to any court of Massachusetts before which proceedings are commenced by either party in relation to the children named in the title hereof or their marital disputes and to any lawyers advising the parties in relation to such proceedings.