

THE HIGH COURT

FAMILY LAW

[2014 No. 7 HLC]

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT 1991 AND IN THE MATTER OF THE HAGUE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION AND IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964 (AS AMENDED) AND IN THE MATTER OF O. J. (A CHILD)

BETWEEN

E. J.

APPLICANT

AND

E. D.

RESPONDENT

Judgment delivered the 22nd day of October, 2014 with reasons of Ms. Justice Finlay Geoghegan for RULING given on the 30th day of July, 2014 on Respondent's Application for an Interview and Assessment of the Child

1. The applicant is the father ("the Father") and the respondent is the mother ("the Mother") of the child named in the title to the proceedings ("the Child").
2. The Mother, by notice of motion, sought an order that an appropriately qualified assessor interview the Child and report to the Court on the interview for the purposes of the Court ensuring that the Child is given an opportunity to express his views and be heard in the proceedings. On the 30th July, 2014, I gave a short ruling on the application in which I held that I accepted, in principle, that the Child should be given an opportunity to be heard in the proceedings; that the Court's discretion to make an appropriate order to achieve this should be exercised in the best interests of the Child, and that by reason of the unusual nature and potential issues in these proceedings, that I would adjourn the application to the hearing of the action and for determination in the discretion of the trial judge. I indicated that I would issue, in due course, my fuller reasons for the decision reached. This ruling contains those reasons.
3. In these proceedings, the Father, who is resident in the State of California, claims:
 - "1. An Order pursuant to the provisions of the Hague Convention and/or the 1991 Act directing the return of [the Child] to the jurisdiction of the State of California.
 2. In the alternative and without prejudice to the foregoing, an order pursuant to the inherent jurisdiction of the court for the return of [the Child] to the State of California.
 3. In the alternative and without prejudice to the foregoing, orders for the recognition and enforcement of the orders of the Californian Court pursuant to the inherent jurisdiction of the Court or otherwise and in such manner as to this Honourable Court shall seem fit.
 4. In the alternative and without prejudice to the foregoing, Orders pursuant to section 11 of the Guardianship of Infants Act, 1964 (as amended) in terms of the Orders made by Consent by the Superior Court of California on or about the 29th day of October 2010."
4. The background to the proceedings is that the Father and the Mother were divorced by decree of the Superior Court of California, County of Los Angeles, on or about the 29th September, 2010. The said decree includes what is termed a "stipulated judgment" to which the Father and the Mother consented in writing. The said stipulated judgment provided that physical custody of the Child was awarded to the parties jointly. It also provided that the Mother "shall be entitled to relocate with the minor child to Dublin, Ireland". It also made provision for the Child to spend time with the Father during holiday periods in the Irish school holidays, and in Ireland in the event that the Father travelled to Ireland.
5. The Mother and the Child relocated to Ireland in September, 2010.
6. In these proceedings, the Father alleges a series of breaches by the Mother of the Californian Court order. He further contends that by reason of the said breaches, it is clear that the Mother never had any intention of complying with the terms of the order of the Californian Court, and as a consequence, the removal of the Child to this jurisdiction was wrongful within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the Hague Convention") in that the Father's consent to the removal was vitiated by fraud. The alleged breaches are denied by the Mother, and it appears from preliminary submissions made that it is denied that there was a wrongful removal in September 2010, by reason of the terms of the order of the Californian Court.
7. Counsel for the Father has confirmed in preliminary submissions that the basis of the claim for an order for return pursuant to the Hague Convention as implemented in Ireland by the Child Abduction and Enforcement of Custody Orders Act 1991, is the alleged wrongful removal in September 2010.
8. Counsel for the Father has also submitted to the Court that insofar as an order for return is sought pursuant to the inherent jurisdiction of the Court, in the alternative, that the legal submission is that the Court has a jurisdiction which, in its discretion, it should exercise to make an order for the return of the Child without a full welfare assessment or inquiry. Similarly, counsel for the Father submitted that the orders sought at paras. 3 and 4 above are orders intended to be sought without the necessity of a full

welfare inquiry.

9. At the date of the hearing of the Mother's application for an interview with the Child for the purposes of giving him an opportunity to express his views, the Child was in California on holidays with his Father. The Child was due to return to Ireland at the end of the holiday period pursuant to specific undertakings given by the Father to this Court.

Hearing Children in Hague Return Proceedings

10. The jurisdiction and approach of the High Court in relation to hearing children in applications for the return of a child pursuant to the Hague Convention differs between those applications to which article 11(2) of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 O.J. L 338/1 23.12.2003 applies and all other applications. The former applies to applications from member states of the European Union with the exception of Denmark. Article 11(2) provides

"When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate, having regard to his or her age or degree of maturity."

11. In such applications, as determined in *S.R. v S.R. (Child abduction)* [2007] IEHC 423, [2008] 3 I.R. 117 and *M.N. v. R.N.* [2008] IEHC 382, [2009] 1 I.R. 388, unless this appears inappropriate, having regard to the age or degree of maturity of the child, the Court is under an obligation to give the child an opportunity to be heard in the proceedings. The current practice is that this is done by the child being interviewed pursuant to a Court order which specifies the matters about which the child should be asked and the report of the interview is given to the Court and, if necessary, supplemented by oral evidence from the interviewer. The interviewer will be a child psychologist or other person with appropriate experience.

12. In this application for the return to the State of California, the Court is not under an obligation to give the child an opportunity to be heard. Nevertheless, it has a discretion to do so and for some years has followed the approach of Baroness Hale of Richmond in *Re D. (A Child)(Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 A.C. 619 where having referred to article 11(2) of Council Regulation E.C. 2201/2003 at p.641 she stated (albeit *obiter*):

"Although strictly this only applies to cases within the European Union (over half of the applications coming before the High Court), the principle is in my view of universal application and consistent with our international obligations under article 12 of the United Nations Convention on the Rights of the Child. It applies, not only when a 'defence' under article 13 has been raised, but also in any case in which the court is being asked to apply article 12 and direct the summary return of the child - in effect in every Hague Convention case. It erects a presumption that the child will be heard unless this appears inappropriate. Hearing the child is, as already stated, not to be confused with giving effect to his views."

13. This approach has been endorsed by the Supreme Court. In *U.A. v. U.T.N.* [2011] IESC 39, [2011] 3 I.R. 683, Denham C.J. referred to the "growing understanding of the importance of listening to a child" and to a passage to that effect from Baroness Hale in *Re D. (A Child)(Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 A.C. 619 at para. 57. In the same judgment, Denham C.J. at para. 28 agreed with the view expressed by Baroness Hale in *In re M. (Abduction: Rights of custody)* [2007] UKHL 55, [2008] 1 A.C. 1288 at para. 46 that "Courts increasingly consider it appropriate to take account of a child's views". However, both point out that taking account does not mean that these views are always determinative or even presumptively so.

14. The Child, the subject of these proceedings, was born in 2006 and is now close to eight years old. There is nothing in the evidence before the Court which suggests that he has maturity less than his chronological age. He is now of an age where the Courts would normally give him an opportunity to be heard.

15. It must, however, be recalled that an application for the return of a child under the Hague Convention is in the nature of a summary application. There is no full welfare assessment of the child prior to the Court reaching its decision and making if so decided an order for return. The welfare assessment is a matter for the Court of habitual residence. This is an important underlying principle. It is therefore particularly important in such cases that a child is only required to be interviewed on one occasion, if at all possible. This is a relevant consideration to my decision not to make an order at this stage in these proceedings that the child be interviewed for the purposes of giving him an opportunity to be heard in the proceedings.

16. This application under the Hague Convention is highly unusual. First, the proceedings commenced in 2014 grounded upon an allegation that there was a wrongful removal in 2010. In the intervening period, the applicant has known exactly where the Child was and the Child has in fact visited the applicant in the State of California on each summer. The Hague Convention envisages an application for return being made promptly and all proceedings relating to the application being disposed of promptly as its purpose is to enable the child be returned to its state of habitual residence for the purposes of those courts determining any dispute in relation to the further care and custody of the child. This approach is emphasised by article 12 of the Convention which makes it mandatory to make an order for return where at the date of commencement of the proceedings "a period of less than one year has elapsed from the date of the wrongful removal or retention". After the expiration of the one year, the requested court is also obliged to order the return of the child "unless it is demonstrated that the child is now settled in its new environment".

17. The second unusual feature of this application is that the alleged wrongful removal is one which took place pursuant to the express terms of an order of the Californian Courts which remained in place at the date of commencement of these proceedings.

18. Thirdly, in addition to the reliefs under the Hague Convention there are additional reliefs sought on behalf of the applicant relating to the Child, some of which seek his return to California and others of which seek the enforcement of access and other provisions of the Californian Court order pursuant to which he came to Ireland.

19. It appears to me that if the applicant is successful in establishing that the Child was wrongfully removed from California to Ireland in September 2010, as more than twelve months had elapsed since that date prior to the commencement of the proceedings, the Irish High Court will, pursuant to article 12 of the Convention inevitably also have to consider the question as to whether or not the Child is settled in Ireland.

20. If the applicant does not establish that there was a wrongful removal then the Court will have to consider one or more of the other reliefs sought and determine the basis of its jurisdiction to make the order sought.

21. It appears to me that the matters upon which the Child should be given an opportunity to be heard will not be established until there has been some determination of one or more of the legal issues arising on the claims made and defences thereto. If I were now

to make an order for the interview of the Child and direct questions relating to what I would term "standard Hague issues", there is a considerable risk that these would not address matters which may form part of the consideration of a trial judge. As I have indicated if a wrongful removal is established it is inevitable that the question of settlement will arise and the trial judge may want to hear the Child on matters relating to his current life in Ireland. Similarly if the Court decides it has jurisdiction upon a basis other than the Hague Convention, to make,, without a full welfare assessment an order for the return of the child to California there may be matters in relation to which the trial judge would decide the Child should be given an opportunity to be heard. If, on the other hand, it is determined that there is no legal basis for an order for return without a full welfare assessment but the Court has a discretion to enforce the Californian order here, the Court may wish to give the Child an opportunity of being heard in relation to the matters concerning his contact with the applicant.

22. In all those circumstances to avoid the possibility of multiple interviews I decided it was in the best interests of the Child that the question of the Child being heard should be left over until the trial and until a trial judge has had an opportunity of considering at least some of the legal issues raised in these unusual Hague proceedings. At that time the Court will be able to identify the matters about which the Child should be heard and specify same in the order for interview.