THE HIGH COURT

FAMILY LAW

[2010 No 27 HLC]

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT CUSTODY ORDERS ACT 1991 AND IN THE MATTER OF THE HAGUE CONVENTION AND IN THE MATTER OF D.W., A CHILD

BETWEEN

G.W.

APPLICANT

AND

E.B.

RESPONDENT

JUDGMENT of Ms. Justice Dunne delivered the 15th day of March 2012

This is an application for the return of the child named in the title hereof, D.W. to the United States of America pursuant to the Hague Convention on the Civil Aspects of International Child Abduction 1980 (hereinafter referred to as the Hague Convention) as implemented in this jurisdiction by the Child Abduction and Enforcement of Custody Orders Act 1991.

The child in this case, D.W., was born on the 7th September, 1997 and is currently fourteen years of age. He will attain the age of sixteen years in 2013. The applicant is D.W.'s father and the respondent is his mother. The respondent has one other child who is younger than D.W. but no order is sought in respect of this child. The applicant is not the natural father of this child.

The Issues
There are a number of issues which need to be considered in this case. The first issue to be determined is whether the applicant enjoys rights of custody in respect of D.W.; secondly, if the applicant enjoyed rights of custody, was he exercising those rights at the time of the removal of D.W. from the United States; thirdly, given the age of the D.W., the question of the exercise of the court's discretion in relation to a possible return of D.W.. There is one further issue relating to the question of grave risk as a result of the making of an order by a court in Missouri on the 23rd September, 2011, which states on its face that the respondent has "wrongfully denied movant/respondent, G.W. his rights of specific contact and visitation".

Background
The parties to these proceedings are American citizens and they were married to one another in 1999. They divorced on the 15th August, 2003. D.W. was born on the 7th September, 1997. The divorce judgment provided that the applicant herein should have "sole parental rights and responsibilities with respect to the minor child. The primary residential care of the child shall be with the [applicant]". It appears that between the date of the divorce in August 2003, and November 2005, the applicant herein had physical custody of D.W. The applicant herein was jailed in November 2005, and D.W. was taken into care in the State of Missouri at that time. On the 15th November, 2005, D.W. was released into the custody of the respondent. Subsequently, on the 3rd February, 2006, custody was awarded to the respondent herein in Maine. An issue arises as to the status of that order in that it is the applicant's case that he was not served with the proceedings that led to that order being made in the State of Maine but even if those proceedings were served and that order was properly made it is contended by him that the order made at that time did not deprive him of rights of custody. The order provided that he was to have supervised rights of contact with D.W. "as per the plaintiff's discretion as to the choice of supervisor, frequency, length of time and all other terms". It was also provided in that order that the respondent was to give the applicant (or the court) 30 days notice of any intention to relocate. It appears that subsequent to that order the respondent and child lived in the State of Maine for a period of time and then returned to the State of Missouri in May 2009, where they stayed until December 2009 when they relocated to Oklahoma before the respondent and child left for Ireland in February 2010.

It is the position of the respondent that the applicant does not enjoy rights of custody under the Hague Convention by virtue of the order of the 3rd February, 2006. This is disputed by the applicant who states that the order giving him a right of notice of relocation and placing the obligation on the respondent to provide such notice gave him rights of custody. At this point, it would be useful to set out the terms of Article 3 of the Hague Convention which states as follows:-

> "The removal or the retention of a child is to be considered wrongful where –
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> (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
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> (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."
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> Article 5 of the Hague Convention provides as follows:-
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> "For the purposes of this Convention-
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> (a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

(b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence."

It will be seen from the above that the applicant must therefore prove that he was exercising his rights of custody, if, in fact, he had such rights of custody.

A request was made by the High Court (Finlay Geoghegan J.) for answers to a number of questions arising in this case and an expert declaration was furnished to the questions posed by the High Court by Christopher J. Schmidt dated the 19th July, 2011. The questions posed were based on agreed facts submitted to Mr. Schmidt. It is apparent from the letter of instructions to Mr. Schmidt that the relevant law applicable to this matter is the law of Missouri. In his expert declaration, Mr. Schmidt pointed out that all States of the United States have adopted a common position on dealing with jurisdiction in custody matters through the Uniform Child Custody Jurisdiction Act or its updated version, the Uniform Child Custody Jurisdiction and Enforcement Act which has been adopted by Maine and Missouri. Mr. Schmidt described the nature of the parental rights acquired by the applicant over D.W. at the date of his birth. One of the questions posed raised the issue as to whether the applicant either at the time of D.W.'s birth or the date of the marriage of his parents, acquired the legal right to determine where D.W. should live or the right to object to his change of State/country and the answer given to this question was yes. It was stated that "one right of custody of a natural parent is the right to object to the relocation of their natural child, as memorialised in Missouri's child abduction statute". He was then asked about the order of 3rd February, 2006, and its effect on the applicant's parental rights. There is an issue between the parties as to the validity of that order and a number of assumptions had to be made by Mr. Schmidt in relation to the validity of that order. He concluded that, assuming the 3rd February order was ultimately valid, the Missouri courts would have enforced the terms of the order.

Given that the terms of the order of 3rd February, 2006, provided that the respondent was to give 30 days notice to the applicant if she intended on relocating with the child, Mr. Schmidt was asked the following question, what is the effect, if any, on the father's legal status of the mother having failed to comply with the legal obligation to give the father or the court 30 days notice of any move from the State of Missouri or any other State? It is common case that the respondent did not give the applicant or the court 30 days notice of any move from the State of Missouri or any other State. Mr. Schmidt responded to this question as follows:-

> "Based on the stipulated facts, the failure of the mother to comply with the obligation to give 30 days notice of any move violated the father's rights, as they existed pursuant to 3rd February, 2006, court order. Maine Law states:
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> 'A child custody determination made by a court of this State that had jurisdiction under this chapter, binds all persons who have been served in accordance with the laws of this State or notified in accordance with s. 1738 or who have submitted to the jurisdiction of the court and who have been given an opportunity to be heard. As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified' me.rev.stat.ann.tit.19/A.1736.
>
> Since, based on the stipulated facts the determination was not modified, and the mother submitted to the jurisdiction of the Maine court by applying for an order in that court, the mother was bound to abide by the terms of the order, and thus, was required to give the 30 days notice"

Mr. Schmidt went on to say that as a matter of Missouri law and regardless of whether the 3rd February, 2006, order in Maine was valid and enforceable against the father, under Missouri law, the respondent was required to give the father notification of any proposed relocation of D.W.. He quoted the relevant statute in that regard. He went on to note that Missouri law provides remedies for the failure to provide notice of a proposed relocation as follows:-

> "5. The court shall consider a failure to provide notice of a proposed relocation of a child as:
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> 1. A factor in determining whether custody and visitation should be modified;
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> 2. A basis for ordering the return of the child if the relocation occurs without notice; and
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> 3. Sufficient cause to order the party seeking to relocate the child to pay reasonable expenses and attorney's fees incurred by the party objecting to the relocation."

The question arose in the course of submissions as to whether the effect of the order made in Maine was such as to confer rights of custody on the applicant. It was contended on behalf of the applicant that the order amounted to a right of veto while counsel on behalf of the respondent contends that it was merely a right to object to relocation. In this context I was referred to a number of authorities on the nature of the right of the applicant to object to the removal of the child from the United States of America and whether that right amounted to custody rights under the Convention. The first of those is the decision in the case of Re. *D. (Abduction: Rights of Custody)* [2007] 1 F.L.R. 961, a decision of the House of Lords in which it was held that the right to insist that a parent did not remove the child from the home country without first obtaining either consent from the other parent or a court order, the "right of veto", amounted to "rights of custody" under the Hague Convention. Baroness Hale in that case stated at paras. 37 and 38 of the judgment of the House of Lords as follows:-

> "37. Therefore, in common with the understanding of the English and Scottish courts hitherto, and with what appears to be the majority of the common law world, I would hold that a 'right of veto' does amount to 'rights of custody' within the meaning of article 5(a). I see no good reason to distinguish the court's 'right of veto', which was recognised as 'rights of custody' by this House in *In re H (A Minor)(Abduction: Rights of Custody)* [2000] 2 AC 291, ... from a parental right of veto, whether the latter arises by court order, agreement or operation of law.
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> 38. I would not, however, go so far as to say that a parent's potential right of veto could amount to 'rights of custody'. In other words, if all that the other parent has is the right to go to court and ask for an order about some aspect of the child's upbringing, including relocation abroad, this should not amount to 'rights of custody'. To hold otherwise would be to remove the distinction between 'rights of custody' and 'rights of access' altogether. ..."

I was also referred to the more recent case of Abbott v. Abbott 560 U.S. [2010] a decision of the Supreme Court of the United States in which it was held that a *ne exeat* right, granting a right to consent to the removal of the child from the jurisdiction, was to be considered to be custody rights for the purposes of the application of the Hague Convention. That was a case in which a married couple moved to Chile and separated. The Chilean courts had granted the respondent's wife daily care and control of their son. The petitioner husband was granted visitation rights. Under Chilean Minor's law 16, 618, Article 49, the husband had a *ne exeat* right to consent before the child could be taken out of Chile. The mother brought the child to Texas without permission from the father or the

family court in Chile and it was in that context that it was held that the *ne exeat* right did constitute a right of custody under the Convention.

Ironically, the mother in that case had become concerned that the father would take the boy from Chile as he was a British citizen and had obtained a British passport for the child. She had therefore sought and obtained a "*ne exeat* of the minor" order from the Chilean Family Court, prohibiting the boy from being taken out of Chile, yet it was she who removed the boy from Chile without permission from either the father or the court while proceedings were pending before the Chilean court. It was in that context that it was held that a parent has a right to custody under the Convention by reason of that parent's *ne exeat* right.

The applicant herein relies heavily on the consequences in American law as stated in the expert declaration of Mr. Schmidt of failure to give notice and specifically on the fact that failure to give notice can form the basis of an order for "ordering the return of the child if the relocation occurs without notice". Thus, it is contended on the part of the applicant that he enjoys more than a mere right to receive notice or as it was put by counsel on behalf of the respondent, a right to object, rather, it is contended on behalf of the applicant that he has a right of veto over any proposal to remove the child.

At this point it would be useful to refer to a decision of the High Court in the case of *Nottingham County Council v. B.* [2010] I.E.H.C. 9 in which Finlay Geoghegan J. made it clear that it is for this Court to decide the issue of the existence or otherwise of custody rights when considering the question of whether or not to order a child's return. In that case it was stated as follows:-

> "It is well established, in this jurisdiction and others, that it is for the requested Court, in this case the Irish High Court, to determine whether or not there was a wrongful removal from the State of habitual residence within the meaning of Article 3. Further, that such question potentially requires a determination, *inter alia*, of the following questions:
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> (i) What rights did the relevant person hold under the law of the State of habitual residence?
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> (ii) Are those rights, however described, 'rights of custody' within the meaning of Article 5 of the Convention?
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> Whilst each of the above questions are for determination by the requested Court, the first question is one which must be determined in accordance with the laws of the State of habitual residence; whereas the second question is determined in accordance with the Convention, as implemented into the law of the requested State i.e., in this instance, Ireland. Further, the term 'rights of custody' within the meaning of Article 5 of the Convention must be given an autonomous meaning in accordance with the case law on the Convention."

Bearing in mind those comments it is necessary to refer to further orders obtained by the applicant herein in relation to the question of custody. The first of those was a declaration from the Circuit Court of Webster County, Missouri, dated the 12th April, 2011. That was an order obtained *ex parte* in circumstances where the applicant was unable to locate the respondent for the purpose of service with the application then before the court. It was declared in that order that the applicant herein had "rights of custody" as defined by Article 5 of the Convention on the Civil Aspects of International Child Abduction (Hague Convention), "with regard to his minor son ... , as set forth in the judgment of divorce and amended judgment of the party herein". Reliance was placed on that order by the applicant and the order goes on to state that the applicant had been exercising or attempting to exercise his custody rights before the child was removed to this jurisdiction. It was submitted on behalf of the applicant that the order is valid and should be taken into consideration by this Court in the determination of the issues herein. A further order was made by the Missouri court on the 23rd September, 2011, in which it was stated that the respondent had "wrongfully denied [the applicant] his rights of specific contact and visitation". It was indicated at the outset of this hearing that the applicant was not relying on that order as it was made at a time when he knew that the applicant was no longer in the jurisdiction of the courts of Missouri. In support of the submission made that the order of the 12th April, 2001, should be regarded as valid, reference was made to the decision in the case of *Re. D (Abduction: Rights of Custody)* [2007[1 F.L.R. The judgment in that case was quoted with approval in the case of *Nottingham County Council v. B.* [2010] I.E.H.C. 9 in which Finlay Geoghegan J. stated at paras. 44 and 45 as follows:-

> "... [EU] ultimately, therefore, the decision is one for the courts of the requested state, those courts must attach considerable weight to the authoritative decision of the requesting state on [the issues]. ... But we still have something to learn from the requesting state's characterisation of the position."

Finlay Geoghegan J. also referred to the judgment of Carswell L.J. in *Re. D.* where he said at para. 71 as follows:

> "The synthesis in English law is to be found in the practice, exemplified in *Hunter v Murrow (Abduction: Rights of Custody)* [2005] EWCA Civ 976; [2005] 2 FLR 1119, of regarding the foreign court's determination of the content of a parent's rights as binding, but not necessarily accepting as definitive any conclusion whether those rights amounted to rights of custody in the autonomous Hague Convention sense. I think that it is desirable that the courts of the requested state should be able to reach their own decision on the latter issue, which they will wish to ensure is consistent with the proper interpretation of the Convention."

The final authority to which I wish to refer is one relied upon by the respondent in the Supreme Court decision in the case of *H.I. v M.G.* [2001] I.R. 110. Keane J. in that case stated at p. 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 a child to another jurisdiction while the proceedings are pending would, absent any legal excusing circumstances, be wrongful in terms of the Hague Convention. The position would be same, even where no order for custody was being sought by the dispossessed party, if the court had made an order prohibiting the removal of the child without the consent of the dispossessed party or a further order of the court itself. 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 custody or to prohibit the removal of the child necessarily involves a determination by the court that, at least until circumstances change, the child's residence should continue to be in the requesting State ... it is going significantly further to say, however, that there exists in addition, an undefined hinterland of 'inchoate' rights of custody not attributed in any sense by the law of the requesting State to the party asserting them or to the court itself, but regarded by the court of the requested State as being capable of protection under the terms of the Hague Convention. I am satisfied that the decision of the majority of the English Court of Appeal in *Re. B. (a minor) (Abduction)* [1994] 2 F.L.R. 249 to that effect should not be followed."

Counsel on behalf of the respondent pointed out that although the applicant sought to rely on the decision in the case of *Nottinghamshire County Council v. K.B. and K.B.* [2010] I.E.H.C. 9, as to the effect of a declaration by the US court, it was pointed out that the declaration in that case relied on by the court was one sought by the Irish court. Finlay Geoghegan J. stated at p. 9 of her judgment in that case as follows:-

> "Accordingly, where the requested Court has asked for an Article 15 determination, it appears appropriate, save in exceptional circumstances, including those referred to by Baroness Hale, that it should accept, as conclusive, the determination of the Court of habitual residence, as to rights which exist under the law of that State."
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> She continued:-
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> "... part of the reason for which I requested an Article 15 determination was the existence of disputed facts between the applicant and the respondents relevant to the determination as to whether or not the Courts of England and Wales had rights of custody within the meaning of the Convention prior to the removal of the children."

The first question to be determined by me is the question as to whether the applicant herein has "rights of custody". That is a matter that has to be determined by this court. Regardless of the declaration and order of the Court of Missouri of the 12th April, 2011, the order of the 6th February, 2003 made in Maine seems to me to provide the applicant with "rights of custody", in that it required the respondent to give 30 days notice to the applicant if she intended to relocate. I draw some support for this conclusion from the expert declaration of Mr. Schmidt referred to above. He describes the right to object to the relocation of the child as a right of custody. He also set out the relevant provisions of Missouri law in relation to the remedies for the failure to provide notice which include the proposition that the court shall consider a failure to provide notice of a proposed relocation of a child as a basis for ordering the return of the child if the relocation occurs without notice. The decision of the Supreme Court of the United States of America in the case of *Abbott v. Abbott* referred to above, is also of some assistance. Kennedy J. giving the decision of the court in that case stated at p. 9 as follows:-

> "In cases like this one, a *ne exeat* right is by its nature inchoate and so has no operative force except when the other parent seeks to remove the child from the country. If that occurs, the parent can exercise the *ne exeat* right by declining consent to the exit or placing conditions to ensure the move will be in the child's best interests. When one parent removes the child without seeking the *ne exeat* holder's consent, it is an instance where the right would have been 'exercised but for the removal or retention'.
>
> The Court of Appeals' conclusion that a breach of a *ne exeat* right does not give rise to a return remedy would render the Convention meaningless in many cases where it is most needed. The Convention provides a return remedy when a parent takes a child across international borders in violation of a right of custody. The Convention provides no return remedy when a parent removes a child in violation of a right of access but requires contracting states 'to promote the peaceful enjoyment of access rights'... For example, a court may force the custodial parent to pay the travel costs of visitation, ... or make other provisions for the non custodial parent to visit his or her child ... But unlike rights of access, *ne exeat* rights can only be honoured with a return remedy because these rights depend on the child's location being the country of habitual residence."

Finally the passage referred to above from the judgment of Keane J in *H.I. v. M.G.* is also of relevance and I will refer to it again briefly. Keane J. said:

> "The position would be the same, even where no order for custody was being sought by the dispossessed party, if the court had made an order prohibiting the removal of the child without the consent of the dispossessed party or a further order of the court itself. 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 involves a determination by the court that, at least until circumstances change, the child's residence should continue to be in the requesting state."

Accordingly, without reaching any conclusion on the status of the order of the 12th April, 2011, I am satisfied that the applicant herein had rights of custody in respect of D.W.

Defences

In circumstances where the applicant has satisfied this Court that he does have custody rights in respect of D.W., it follows that the child has been wrongfully removed from the United States of America and must be returned there, pursuant to the provisions of Article 13 of the Hague Convention unless one of the defences provided for in Article 13 arises. Article 13 provides as follows:-

> "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 ... which opposes its return establishes that-
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> (a) the person ... having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
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> (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.
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> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views."

Thus, it will be seen that a number of potential defences are open to a respondent. In this case the respondent submits that the applicant was not exercising his custody rights, something which is hotly disputed by the applicant herein. It appears from the applicant's affidavits that he made several attempts to contact D.W. and find out his whereabouts. He went so far as to hire a private investigator in 2009.

The respondent has stated in her affidavit of the 7th November, 2010, that she refused to provide the applicant with the address at which she and D.W. were residing after she left his home in January, 2009. There was telephone contact between the child and his father, but this was stopped by the respondent when D.W. expressed a reluctance to speak to his father. There was a period of extended access in the spring of 2009, with D.W., although there is some disagreement as to the precise time when this took place. Finally, the applicant issued proceedings on the 25th January, 2010, but had difficulty in relation to those proceedings as he did not

know the whereabouts of the respondent and he was unable to serve the proceedings on her. During the submissions in relation to this issue I was referred to the Supreme Court judgment in the case of *M.S.H. v. L.H. (Child Abduction): Custody* [2003] I.R. 390 which was relied on by the applicant in relation to the issue of the exercise of custody rights. Having referred to the Perez-Vera Report, McGuinness J. went on to quote from the High Court judgment in that case with approval:-

> "I do not understand Professor Perez-Vera in these paragraphs or in any part of her report to be advancing the proposition that it is not sufficient for persons seeking relief under Article 12 of the Hague Convention to establish that the particular custody right upon which reliance is placed and which is alleged to have been breached by the other party was exercised by them but that such persons must in addition in every case establish that they were to some extent taking immediate care of the person of the child at the date of the alleged wrongful removal.
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> Should this be the case, then persons under a disability, for example, a person serving a term of imprisonment, persons incapacitated by sickness or accident and persons whose occupation necessitates long absences from home such as mariners would all be deprived of the benefits of the Hague Convention in the case of an unauthorised removal of their children. In my judgment, this could hardly have been the intention of the contracting states in entering into this agreement on the Civil Aspects of International Child Abduction."
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> McGuinness J. continued at p. 403 of the judgment:-
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> "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. Failure to exercise rights of custody must be clearly and. unequivocally established. In my view the defendant has not discharged the burden of proof required and I consider that Article 13(a) does not apply in this case."

Adopting the principles set out in the passages to which I have just referred and bearing in mind the onus of proof on this issue, I would have to say that the respondent herein has not discharged the burden of proof required to show that the applicant herein was not exercising his rights of custody. On the contrary, the evidence discloses that D.W. stayed with the applicant for a period, albeit short, in 2009. There was telephone contact between the applicant and D.W. as described previously until such time as that was stopped. Further, it is beyond doubt that the applicant had commenced proceedings in Missouri in relation to seeking custody of D.W. On the basis of these facts, I have no doubt whatsoever that the applicant herein was exercising his rights of custody.

The next matter raised by way of defence related to D.W.'s objections. The child in this case is fourteen and half years of age and absent any exceptional or unusual circumstances is of an age and maturity at which it would be appropriate to take account of his views. Most recently the Supreme Court in the case of *U.A. v. U.T.N* [2011] I.E.S.C. 39 considered the circumstances in which the views of children should be taken into consideration. That was a case in which Birmingham J. in the High Court took into consideration the views of "bright children with clear views and firm views" aged seven and eight in refusing to order their return to the United States of America. Denham J. in the Supreme Court stated that:-

> "The trial judge was entitled to have regard to the children's stability and contentment in determining what policy of the Convention should prevail. The policy of the Convention should be viewed in the context of the totality of the evidence and in the best interests of the children. This policy includes the general principle that the issue of the custody of the children be determined by the country of their habitual residence. However, also included in the Convention's policy is Article 13 wherein it states that the judicial authority may refuse to return a child if it finds that the child objects to being returned and has reached an age and degree of maturity at which it is appropriate to take account of its views."

A number of other paragraphs from that judgment commencing at para. 36 may be of assistance where it is stated:-

> "As Article 13 states, in considering the circumstances in which an exception may be made to returning a child to such country, the court may take account of information provided to it from a competent authority concerning the child's social background. As was pointed out in the case of *R.M. (Abduction: Zimbabwe)* 1 AC 1288 the extent to which the child's objections 'coincide or are at odds with other considerations' which are relevant to his or her welfare are also relevant. ...
>
> The balance between the policy of summary return and the operation of the exception may alter with time. In this case the children have been in Ireland for a considerable time. I would endorse the acknowledgment of Baroness Hale in *Re. M.* [2008] 1 AC 1288, where she states at paragraph 43:
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> > 'But the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be.'
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> A court should at all times seek to expedite cases arising under the Hague Convention, but circumstances such as have arisen in this case are the exception.
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> In this case the learned High Court judge was entitled to conclude, in the light of all the evidence before him, that the objections of the children to being removed from their stable home in Ireland, with the respondent, and to being moved to New York, were strong; that the two children had the requisite age and degree of maturity; that the learned trial judge could attach weight to the views of the children; and that it would not be in the best interests of the children that they be returned to New York. I endorse the conclusion of the learned High Court judge that it would be in an exceptional case that the views of children of eight and seven years would result in a refusal to return the children under Article 13, but that this is such an exceptional case."

The principles set out in the passages referred to above are a useful summary of the matters to be considered by the court in relation to the defence under Article 13 of the Hague Convention.

I was also referred to the judgment of Peart J. in *G. v. R.* (Unreported, High Court, 12th January, 2012), where it was stated at para. 54 as follows:-

> "I am satisfied from her evidence and report that C.R.s objections are deeply and genuinely held and that he has attained

> an age and level of maturity at which it is appropriate to take account of his views. That is what I am to be satisfied of before deciding how to exercise my discretion."

Thus, it will be seen that in the present case one has to consider the age and maturity of the child concerned. There is no dispute between the parties that, as a fourteen and half year old boy, the child in this case is of an age and maturity such that it is appropriate to take his views into account.

The court has had the benefit of three psychological reports prepared by Anne O'Connell", consultant clinical neuro psychologist. Those are dated the 25th November, 2010, the 7th October, 2011, and the 8th of December, 2011. It is interesting to compare the development of the child between the first and second report. In the first report, it was noted that he separated readily from his mother. He presented as a quite shy teenager who was slow to respond to questions and his speech was difficult to understand at times. It was also indicated that rapport was established during the assessment and it was the belief of Ms. O'Connell that he provided honest and full answers to the questions asked. She was satisfied as to his degree of maturity in dealing with the issues before the court.

By the time of the next report, it was stated that he had made good eye contact and established rapport more easily than at his last assessment. His mood was positive and he often laughed or smiled when recounting incidents from school. His articulation was clearer and overall he impressed as more confident, happy and grounded than in November 2010. In the conclusion to that report it was noted that he had settled well into school, friendships and a more mature way of relating to adults over the past year. He was happy in school and developing genuine relationships with peers. He has begun to re-establish telephone bonds with his father and this has gone well. He was willing to meet him later that month without supervision and was willing to commit to a visit to the United States the following year without the presence of his mother. However, at that stage he was very clear as to the fact that he felt established in Ireland and wanted to stay in his current living environment.

Subsequently an issue arose by virtue of the fact that it transpired that D.W., together with the respondent and his half brother, had spent a period to time in a women's refuge subsequent to their arrival in this country. The issue that arose was why he had not mentioned the fact that he had lived in a refuge prior to moving to his present home. His response was that "it didn't occur to me". Ms. O'Connell in her report described this as being part of his general presentation of passive but open, responding to questions. By way of background to this aspect of the matter it is to be noted that the respondent moved with her two children to this jurisdiction on the 10th February, 2010, with her then husband. Initially they lived with his parents but at the end of December 2010, as a result of difficulties between the respondent and her husband, the respondent, D.W., and his half brother moved to a refuge. They stayed there until the beginning of July 2011, when they moved to their current address. Although the residence of D.W. changed at this time, he continued to attend the same school. In the assessment on the 8th December, 2011, D.W. described himself as happier, given that there is peace and predictability in the home. He described his life in America prior to the move as "war" between members of his father's family and stated that he is much happier in Ireland and is enjoying school. He described issues in relation to the visit of his father in October 2011. There were concerns prior to the visit as to the father's comments about getting him home and during the course of the visit, unfortunately he hurt his leg badly and this curtailed the activities that could be undertaken by him and his father. An issue arose subsequent to his father's return to the United States in relation to material allegedly placed on a "friend's website" which were lies about D.W. and his mother. This led to a row between him and his father and he now has no interest in "upholding his father's rights to access and wishes only to stay in Ireland with his mother and [half brother]".

In the conclusion of her report, it was stated by Ms. O'Connell that D.W. has had a history of multiples moves of home and school and periods of non attendance at school while in America. Since moving to Ireland with his mother and half brother he has lived with her husband's family, with her husband, in a women's refuge and more latterly with his mother and brother. This does not seem out of the ordinary to him, and "he expresses an opinion that his life has been far more stable in Ireland than heretofore. He is enjoying school and friendships and is happier without his mother's husband in the house". Ms. O'Connell went on to describe his situation as currently a relatively stable and nurturing one.

The applicant has in the course of his submissions expressed concern as to the fact that D.W. did not mention the fact that the respondent was obliged to move from her husband's parents' house into a refuge in the interviews with Ms. O'Connell. On that basis it was submitted by the applicant that he "is not in a position to exercise independent judgment, or base his objection on cogent reasons and that he should be returned to the United States.

Reference was also made in the course of the applicant's submissions to the decision in case of *T.M.M. v. M.D.* [2002] 1 I.R. 149, in which it was held by the Supreme Court that:-

> "It will usually be necessary for the judge to find out why the child objects to be returned. If the only reason is because it wants to remain with the abducting parent, who is also asserting that he or she is unwilling to return, then this will be a highly relevant factor when the judge comes to consider the exercise of discretion."

Thus it was submitted that the court should also consider whether the objection of D.W. to returning is because he wants to remain with his mother, the abducting parent. The fact that he failed to mention the living situation in which he found himself, after his mother had left the house she shared with her husband has caused concern for the applicant. It is clear that the onus is on the respondent to prove that the child's views are independently formed. The applicant has submitted that the only reason for D.W. not mentioning the issue relating to the safety of his mother was because he was trying to assist her in her bid to defeat the application for his return. However, it must be borne in mind that the report of Ms. O'Connell of 25th November 2010, states that, in her opinion, the views reflected in that report by D.W. had been independently formed and were not as a result of influence of either parent. Ms. O'Connell noted that the non-disclosure by D.W. as to moving to the refuge fitted with his general presentation of passive but open responding to questions.

Finally, reference was made to the recent judgment of Finlay Geoghegan J. in *P. v. P.* (Unreported, High Court, 7th February 2012) in which there was a discussion of the concept of placing a child in an "intolerable situation", if an order was made to return the child to the United States. The applicant has made the case that the decision to return the child to the United States would not necessarily mean a return to living with his father and that if he were returned, the father would not seek an order custody without the participation of the respondent. The respondent rejects this submission. The respondent contends that the effect of an order to return to the United States would mean that the child was placed in the custody of his father. The applicant has obtained an order for custody in the United States dated the 23rd September 2011 which grants him full custody. It must be remembered that that order was made at a time when the applicant knew the respondent was out of the jurisdiction. When this matter was heard before me, the applicant was not present in court. It had been anticipated by his representatives that he would have been present at the hearing. In his absence it was indicated to the court that counsel on his behalf had no instructions to respond to a point raised in relation to grave risk and likewise had no instructions to offer any undertaking not to pursue the possibility of the arrest of the

respondent if she returned with D.W. to the United States.

It is clearly a matter for the court to decide whether returning the child to the United States is returning him to an intolerable situation. It was stated in the case of *P. v. P.* referred to above by Finlay Geoghegan J. that:-

> "Intolerable" is as has been stated a "strong word". And when applied to a child must mean a "situation which this particular child in these particular circumstances should not be expected to tolerate" in re *D.* [2007] 1AC 619 at para 52. In re *E.* [Children Abduction: Custody Appeals 2011 U.K. SC 27] the Court, at para 34, having referred to this definition observed, "every child has to put up with a certain amount of rough and tumble, discomfort and distress. It is part of growing up. But there are some things which it is not reasonable to expect a child to tolerate. Amongst these, of course, are physical or psychological abuse, or neglect of the child herself. I respectfully agree with this observation and would add in relation to the fact that this case that discomfort and distress may be almost inevitable for a child if the parents are in dispute."

In *P. v. P.* the intolerable situation envisaged was the return to the Poland of a child the particular consequence of which was returned to the care of her mother against whom there were allegations of abuse. The child's father, who had removed her from Poland was living in Ireland prior to the abduction, was employed here and could not be expected to leave to return with his daughter to Poland. That was contrary to many instances, according to the High Court at para 48, where "the parent who removed the child will have travelled to this country with the child, and on order for return, it can reasonably be expected that such parent will return with the child to the country of prior habitual residence and provide appropriate protection for the child pending an" order of the courts of the State of habitual residence".

It has to be said that in this case the child, the subject matter of these proceedings has not enjoyed a stable background with either parent. For example Ms. O'Connell in her reports describes the early childhood of the child when he was living with his father as being a time when "they travelled around and he hardly ever went to school". When he was in the custody of his mother in the United States, the family also moved around. Further it is quite clear that the circumstances in which the respondent lived with her husband in this jurisdiction was such as to necessitate the removal of herself, D.W. and his half brother to a refuge. The circumstances in which the respondent and her children came to Ireland were that she was accompanying her Irish husband (who, apparently, had been deported from the United States). The respondent and the two children now reside together. She has stated on affidavit that it was her intention at the time of her departure from the United States to stay permanently in this country and that intention has not changed. Therefore the effect of returning the child to the United States would be to return him to the care of his father, with whom he does not wish to live.

Decision
There are a number of issues to be considered at this point. First of all, I am satisfied that D.W. at the age of fourteen and half is of an age and maturity at which his views can be taken into consideration. I accept that his views are independently informed as the report of Ms. O'Connell makes clear. It seems to me that, unfortunately, the views of D.W. towards his father have become entrenched and hostile following the visit from his father to this country in October 2011. Events relating to posts on the internet made by the father after his visit seem to have brought about that result.

It is quite clear that for much of his young life, D.W. has had little or no stability in his home life. Following his parents' divorce, he lived initially with his father. That arrangement came to an end when D.W. was taken into care as a result of his father being in jail. He then lived with his mother. There has to be a question mark over the level of stability provided by his mother after she took over his day to day care and custody. Many allegations have been made about the respondent and her husband by the applicant and it does appear that the husband was deported from the United States. It should also be said that a number of counter allegations were made by the respondent against the husband. Without attempting to resolve all of those issues, it can be said that the net effect of the lifestyle of both parents meant that D.W. has had little or no stability in his home life. It is also the case that having left the jurisdiction of the United States in circumstances which amounted to a clear breach of the court order made in Maine, there were difficulties in terms of providing a stable home for D.W. for a period of time. That situation now appears to have been remedied and I think it is notable from the reports of Ms. O'Connell that D.W. is currently in a stable and nurturing situation with his mother, the respondent. He is integrated into school, well settled and happy in the area in which he lives. Again it was noted by Ms. O'Connell that "it is unfortunate that the contact with his father has not gone better. It is symptomatic of D.'s disjointed emotional upbringing that he was unable to connect with his father on any real level, or ask him important questions about their future and then fell out with him so strongly on his return to the States."

Taking all these matters into account I have come to the conclusion that this is an appropriate case in which to take into account the views of D.W. in relation to the question of returning him to the United States. He clearly objects to returning. That being so, it is appropriate to carry out the balancing exercise necessitated by a consideration of the aims and objectives of the Convention on the one hand as against the extent of the objections on the other hand. One of the matters raised in this regard was the fact that it is now two years since D.W. left the United States for this jurisdiction. It was submitted on behalf of the respondent that on that basis, the speedy return envisaged by the Convention cannot be achieved. To that extent I think it is useful to refer to the judgment of the Supreme Court in the case of *Youth Care Agency v. V.B. and C.B. (A minor) and HS.E.,* (Unreported, Supreme Court, 18th August 2010) in which it had been submitted that the lapse of time between the abduction and the High Court order being a period of two years had the consequence that the Convention objective of the prompt return of the child could no longer be achieved and that the period of delay had to be viewed in the light of the objection made by the child pursuant to Article 13. Fennelly J. at para 38 stated:-

> "It is clear, however, that Article 12 applies in this case. The proceedings were issued promptly, certainly within one year of the abduction. Accordingly, the obligation to return "forthwith" applies".

In the circumstances of this case, the two year delay between the abduction and the date of making this order is not something to which I feel I should attach any weight as an independent factor in reaching a conclusion on whether to return D.W. or not given that these proceedings were issued promptly by the applicant. The time factor does fall to be considered in regard to the effect that the period of time has had on the stability achieved in D.W.'s life during that time. Bearing in mind the clearly expressed views of D., the strength of his views, the degree of his maturity and the independence of his views as expressed by Ms. O'Connell, I am satisfied that this is a case in which I should exercise my discretion not to return D.W. I do not think it would be in his interest to uproot him once again given that he now has stability in his life.

There is one further aspect of the matter to which I should briefly refer. Reference has been made previously to the order granting sole parental rights of custody of D.W. to his father. This order was made in September 2011. The position in regard to that order is that counsel on behalf of the applicant indicated that they were not relying on the making of that order for the purpose of seeking the return of D.W. Having said that, it was stated that there were no instructions from the applicant to offer any kind of undertaking

to the Court not to pursue the possibility of the arrest of the respondent should she return to the United States with D.W. It was submitted on behalf of the respondent that the applicant by his actions in obtaining the sole custody order in respect of the child had placed the child in an intolerable situation. The point was made on behalf of the applicant that in so far as the child was placed in an intolerable situation, this was brought about not by his actions but by the wrongful actions of the respondent in removing D.W. in the first place. It was suggested that in so far as this constituted a dangerous position for the respondent that it would be appropriate to make an order returning D.W. to the United States but to put a stay on that order until the order of September 2011 was set aside.

There seems to be little doubt that the respondent is at risk of being arrested if she returns to the U.S.A. with D.W. There is no undertaking from the applicant to have the order of September 2011 vacated. It is not necessary for me to reach a conclusion that this gives rise to a situation of grave risks for D.W. or that it amounts to an intolerable situation for him given that I have already decided not to return D.W. but there would be a genuine and real concern as to what would happen to D.W. if, on returning with the respondent, she was to be arrested. In the absence of any suitable undertaking from the applicant, I would be reluctant to make an order for the return of D.W. It may be the case that where such concerns arise, the matter could be dealt with by making an order for the return of a child with a stay pending the vacation of any relevant order but as I have decided not to order the return of D, it is not necessary to elaborate on this issue any further.

In conclusion, I will refuse to make the order sought herein.