

**THE HIGH COURT  
FAMILY LAW**

**[2005 No. 21 HLC]**

**IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT, 1991 AND  
IN THE MATTER OF THE HAGUE CONVENTION AND  
IN THE MATTER OF L.D. AND C.A.D. CHILDREN**

**BETWEEN**

**T. D.**

**APPLICANT**

**AND  
A-M P. AND J. R.**

**RESPONDENTS**

**Judgment of Ms. Justice Finlay Geoghegan delivered on the 8th day of March, 2006**

1. The applicant is the father of the two children named in the title. The first named respondent is the mother of the two children. The second named respondent is the maternal grandmother of the two children.

2. The applicant seeks an order pursuant to Article 12 of the Hague Convention as implemented in this jurisdiction by the Child Abduction and Enforcement of Custody Orders Act, 1991, for the return of the children to the place of their habitual residence, being the State of Michigan, USA.

3. The proximate facts giving rise to this application are undisputed. The elder child T.L. was born on 3rd March, 1998. The second child C.A. was born on 18th December, 2001. Each lived at all times in Michigan USA and were habitually resident there until on or about 23rd July, 2005.

4. On 23rd July, 2005, the two children were brought to Ireland by the second named respondent at the request of and on behalf of the mother who had been residing in Ireland since September, 2004. The children were brought to Ireland without the knowledge or consent of the father.

5. At the commencement of the hearing I was informed that no relief was now being sought against the second named respondent, the maternal grandmother. It was believed initially that the children were residing in the care of both respondents in Ireland.

**Issue**

6. The father and the mother are not and were never married. It is undisputed that the children were habitually resident in Michigan prior to 23rd July, 2005. It is further undisputed that they were brought from Michigan to Ireland without the knowledge or consent of the father. The father asserts that the change of residence of the children from Michigan to Ireland on 23rd July, 2005, without his consent was in breach of his rights of custody within the meaning of Article 5 of the Convention and therefore a wrongful removal within the meaning of Article 3 of the Convention. In the alternative he submits that the removal was in breach of rights of custody of the Michigan courts.

7. The mother asserts that at all material times she had sole custody of the children. She denies that the father or courts of Michigan had rights of custody within the meaning of the Convention on or before 23rd July, 2005. She asserts that she was entitled to decide that the children should come to Ireland without any necessity of obtaining the consent of the father or the courts of Michigan to their change of residence.

8. This is a summary application. The parties have sworn affidavits. In addition affidavits of laws have been filed by each of the parties. On behalf of the father, three affidavits of laws have been filed from Ms. Dianne Longoria, an attorney licensed to practice law in the State of Michigan, who has acted for the father before the Michigan courts. On behalf of the mother two affidavits of laws were filed from Ms. Lori Zellers, also an attorney licensed to practice in the State of Michigan. She has not acted for the mother in Michigan.

9. Whilst counsel acting for the parties in this jurisdiction recognise that there is a dispute on the affidavits between the Michigan lawyers on certain issues potentially relevant to this Court's determination of the issue in the proceedings as to whether or not on the facts of this case there was a wrongful removal of the children on 23rd July, 2003, within the meaning of Article 3 of the Convention, they requested that this Court hear the application for the purpose of determining certain issues of fact in dispute between the parties and for the purpose of ascertaining whether this Court could determine the legal issues arising without further assistance as to the law of the State of Michigan. Counsel for the applicant submitted that in the event that the Court considers it could not determine the legal issues without further assistance that it would be preferable that an opportunity be given to the applicant to obtain through the Central Authority an affidavit of laws as envisaged by Article 8 of the Convention rather than requesting the applicant to obtain a declaration pursuant to Article 15 of the Convention. It was submitted that this might be achieved in a shorter timescale. Counsel for the mother submits that in the event that this Court cannot resolve the issue on the affidavit of laws already sworn that the appropriate procedure is to request the applicant to obtain a declaration pursuant to Article 15.

**Facts**

10. The facts in dispute relates to the manner in which the children were cared for in Michigan between the end of August, 2004 (or early September, 2004) and 23rd July, 2005. Those facts may be relevant to whether the father had rights of custody within the meaning of the Convention prior to 23rd July, 2005. I propose therefore setting out my findings of fact on this issue and also setting out the relevant undisputed facts.

11. Since the birth of the children until the end of August, 2004 the father and the mother lived together and the children lived with them. The father and mother were never married to each other. The father and the mother made and appear as a matter of probability to have registered affidavits of parentage in respect of each of the children. By August, 2004 the mother appears to have been unhappy in this relationship. She makes allegations against the father. It is not relevant for this Court to consider or resolve those allegations. The mother states that she left her home in Michigan on 8th September, 2004, and subsequently came to Ireland. She had no prior connection with Ireland. The father thinks it might have been slightly earlier. Nothing turns on this.

12. Prior to leaving her home the mother appears to have taken the following steps:

1. She wrote a letter dated 30th August, 2004, to the "Friend of the Court" in the relevant county of Michigan. The "Friend of the Court" appears to be an official within the Michigan State Court System dealing with family matters. In that letter she stated, *inter alia*:

"I expect my children's father, [T] [name and address], to charge me with abandonment and apply for sole custody in the next few weeks. I am leaving our 2 boys with him for the duration of a job offer I have which will last approximately 6 weeks to 3 months beginning September 5, 2004.

...

I will apply for and offer shared custody to [T] upon my return.

I have held full custody for both sons from their birth. [T] refuses to go to the F.O.C., to establish shared custody. He blames his inability to verbalize and has made me do all the business.

[T] never finished the 8th grade and believes himself to be dyslexic. His mother has been told by the social Security Officer that she has a 3rd grade comprehension.

[T] has told me repeatedly that he will file for full custody, due to my abandonment, with financial help from an uncle.

I have given my mother a power of attorney to provide the things that [T] is incapable of such as dealing with the school and doctor visits."

2. She gave to her mother a general power of attorney for temporary care of the minors which was subscribed before a notary in the State of Michigan on 4th September, 2004, for the duration of her stay in Ireland estimated "from September 1, 2004 through January 1, 2005" for the following purposes;

"My agent shall have full powers and authority to do and undertake all acts on my behalf and I could do personally, with full power of substitution and revocation, including but not limited by said authority the right to attend school conferences, including parent teacher conferences, speech therapist conferences, and other conferences, and for medical care, including making appointments and attending the Doctor's office or hospital and authorizing medical treatment of any kind for the various known reasons of asthma and allergies, and any other need for treatment as well any situation requiring a decision for the safety and well being of both my sons.

SPECIAL DURABLE PROVISIONS:

This power of attorney is necessary because the children's father does not have the mental comprehension to follow doctor's orders or school directions and may be revoked by the Grantor giving notice of revocation to the agent. This power of attorney provides that any party relying in good faith upon this power of attorney shall be protected unless and until said party has either (A) actual or constructive notice of revocation, or (B) upon recording of said revocation in the public records where the Grantor resides."

3. She left for the father a handwritten note headed "read *slow* every word" in which she stated *inter alia*:

"I'm not coming back for 2 months. Consider it the same as if I had full custody and you got them all summer, call this the start of your summer.

...

I left my mom a note too and am calling her 2 say where it is like I'm doing you.

I went to the Friend of the Court in [ ] on Tuesday and signed papers stating I was going on vacation for two months and had reason to think you might try to say abandonment. *They said* that now that they know my intent you cant even get a court date until *after* the two months have passed. I also stated to them that we've always agreed on joint custody and no child support. They said fine, don't matter to them, but you cant do anything against me til I'm back to defend myself. And they said what I was doing was perfectly fine since you ARE AFTER ALL THEIR DAD.

My mom will watch them still for you I'm sure and ... The kids love going there, she loves having them and its free. Keep it up. You can work and deal with the kids, I DID! Either keep L. after school at the shop or take L. 2 my moms and pick them both up after work, let L. on the bus and then take C. to my moms.

...

I wouldn't leave them in your care for a minute if I didn't know you could handle it. You will be fine. And you will finally know how I feel every day, have felt for 2 years. You are lucky to have my mom to help for free. For both kids' sake and hers, please let them keep doing that. It's been one of the most stable factors in their daily lives."

13. None of these three documents is disputed by or on behalf of the mother. However, in her first replying affidavit in these proceedings, prior to any of the above documents being exhibited, the mother stated at para. 17:

"I say that I left the children in the care of my mother when I came to Ireland. I say that I gave my mother written permission to act in my absence as the children's legal guardian during my absence from Michigan".

14. The fact that the mother left the children in the care of their maternal grandmother is disputed by the father in his next affidavit. He exhibits the handwritten note already referred to and states that the children lived with him; that the mother left the children with him and suggested that he accept assistance from her mother (the grandmother). He further states that the grandmother did provide

day care for the children until October, 2004 while he was at work but that he took the children home when he finished work each evening.

15. I find that the mother left the children in the care of the father when she left Michigan in August/September, 2004. I also find that she gave to the maternal grandmother a power of attorney in the terms exhibited in her affidavit to enable her take decisions in relation to the children and deal with matters which the mother perceived the father incapable of dealing with.

16. There is a further dispute as to the living arrangements for the children from September, 2004 until July, 2005. The father in his affidavit states that they lived with him. He acknowledges the assistance of and time spent with the maternal grandmother. He exhibits letters from the elementary school attended by the elder child confirming that the elder child's address on his emergency card at school was that of his father and that the bus garage verified that this was the address at which he was picked up and dropped off whilst attending school. The first grade teacher also confirmed the elder child's good attendance and progress at school and the father's involvement during the school year. No objection was made to the admissibility of those documents in support of the father's averment.

17. This averment of the father was made in response to the following statement by the mother in her first affidavit.

"I say and believe that the children's normal routine from September 2004 until July 2005 was as follows, my mother collected the children from school each Monday, the children resided in my mother's home each night and were driven to school each morning by my mother with the exception that on Saturday's my mother brought the children to their paternal grandmother's house where they stayed overnight. I say and believe that on Sundays the children were brought by their paternal grandmother to the Applicant's home where they stayed overnight. I say and believe that there were only temporary exceptions to the said routine. I say that I spoke with the children on a daily basis while they were with my mother and I say that they were at all times aware that they would be joining me in Ireland when I had appropriate accommodation and a regular income."

18. Whilst the mother was not cross-examined on her affidavit, counsel for the father submits that I should not accept this statement as credible and that it is inconsistent with certain contemporary documents of the mother.

19. I accept this submission and find that in the period between September, 2004 and July, 2005 as a matter of probability the children lived with their father and spent time with their maternal grandmother who assisted in caring for them. I have rejected the sworn testimony of the mother on this issue as credible for the following reasons:

1. It is only hearsay evidence. The mother was not present in Michigan in the relevant period.
2. It is inconsistent with the arrangements envisaged by the mother and instructed to the father in her handwritten note of August, 2004 referred to above.
3. When these facts were disputed by the father's affidavit the mother did not seek to adduce evidence from the maternal grandmother. She did exhibit in one of her subsequent affidavits, a short affidavit from a person living in the same apartment building as the maternal grandmother who had only known her for one year and who stated that she had seen the grandmother "babysitting her grandsons...at least six days a week before her daughter [A] took them to Ireland". Babysitting is not normally a term used where children are actually living with the person in question.
4. In the Spring of 2005 the father appears to have commenced proceedings in the Michigan courts seeking child support from the mother. A letter dated 1 April, 2005, from the mother to the Friend of the Court has been exhibited and is not disputed. In that letter in the opening paragraph the mother stated:

"To whom it may concern:

I have been notified through my mother, [Name], of pending child support actions taken against me in your jurisdiction. I am forwarding a copy of my wage statement for this purpose. I absolutely have no problem paying my fair share, as determined by you. I have agreed with my children's father, [Name] to take both children for the entire summer break from school, and again for two week periods over Christmas, Easter, and for two weeks in February, until which time I am again in a close proximity to enjoy equal, joint-custody with [T]".

20. In that letter the mother goes on to bring certain matters to the attention of the Friend of the Court in relation to the amount of the child support which she should pay. Essentially the point made was that the father was seeking payment for a person stated by the mother to be his fiancée and to be living in the house with him and the children and that it was not appropriate to pay someone who is also living with the children. In the course of this objection the mother stated "I call and talk to my children and her also".

21. If, as averred by the mother in her first affidavit the children at this stage had been living with the maternal grandmother, it appears to me that this would have been the first point made by the mother in response to the claim for child support. Further it is inconsistent with her statement that she calls and talks to her children and the person who she states is living in the house with the father and the children.

22. Accordingly, in these proceedings I find that the father has established that in the period between August/September, 2004 and July, 2005 the children lived with the father. Further, that they were in his care and control. He obtained assistance in their care from the maternal grandmother. The maternal grandmother held the power of attorney from the mother.

23. On the affidavits I also find that the only proceedings commenced by the father in relation to the children before the courts of the State of Michigan prior to 23rd July, 2005, was the application for child support from the mother. From a copy document exhibited this appears to have been in existence at latest on 11 April, 2005. Whilst I note that the letter from the mother to the Friend of the Court is dated 1st April, 2005, it is not clear to me whether a procedure with the Friend of the Court predates the actual claim before the Court. Nothing turns on this.

24. Subsequent to the children leaving Michigan and coming to Ireland, an application for custody of the children was filed on behalf of the father before the courts of Michigan on 1 August, 2005.

## Wrongful removal and rights of custody

25. Articles 3 and 5 the Convention, insofar as relevant provide:

“Article 3:

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

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

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

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 5:

For the purposes of this Convention:

(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;”

In this case the children were habitually resident in Michigan immediately before their removal to Ireland. I find that such rights as the father had were actually being exercised by him at the time of their removal. It is undisputed that if the father had rights of custody within the meaning of Articles 3 and 5 that to take the children to Ireland without his consent was in breach of the rights of custody. The only issue in relation to the father is whether the rights which he had in relation to the children in accordance with the law of the State of Michigan prior to 23rd July were rights of custody within the meaning of the Convention.

26. Counsel for both parties were in substantial agreement as to the principles to be applied by this Court. Rights of custody under the Convention must be given an autonomous meaning. The Court is not concerned either with rights of custody so called either in the State of Michigan or under the law of this State. Rather, what this Court must determine is whether the rights which the father enjoyed in relation to the children in accordance with the laws of the State of Michigan in 2005 are rights of custody within the meaning of the Convention. Lowe, Everall and Nicholls: *International Movement of Children* (Jordan, 2004) at p. 260 put it succinctly where they state:

“It is clear that what matters is the nature and quality of the rights in the state of the child’s habitual residence rather than how those rights are described or labelled.”

27. In considering what constitutes rights of custody within the meaning of the Convention for the purposes of an application for return pursuant to the Convention as applied by the Child Abduction and Enforcement of Custody Orders Act, 1991, this Court is bound by the decision of the Supreme Court in *H.I. v. M.G. (Child Abduction: Wrongful Removal)* [2000] 1 I.R. 110. In that decision Keane J. (as he then was), who delivered the majority judgment, set out the approach in this jurisdiction to the construction of the Hague Convention as implemented by the Act of 1991 where, at p. 123, he stated:

“It has been pointed out that, since the Hague Convention is an international treaty applying to states with different legal systems, it is desirable that it be construed in the same manner by the courts of the various states who have ratified or acceded to the Hague Convention: *Re H (Minors) (Abduction: Acquiescence)* [1998] A.C. 72 and the observations of Lynch J. in *K. v. K.* (Unreported, Supreme Court, 6th May, 1998).

However, since the Hague Convention has the force of law in this State solely by virtue of the Act of 1991, and not by virtue of its being an international treaty, the first task of the court must be to ascertain the meaning of the Hague Convention, as enacted, in accordance with normal rules of statutory construction and, accordingly, to ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context. To that general principle there are two qualifications. First, the Hague Convention, being an international treaty to which the State is a party, should, if possible, be given a construction which accords with its expressed objectives and, secondly, the *travaux préparatoires* which accompanied its adoption may legitimately be used as an aid to its construction. (See the decision of this Court in *Bourke v. Attorney General* [1972] I.R. 36.)”

28. In that decision the Supreme Court was considering alleged rights of custody of the courts of New York State and of an unmarried father.

29. He next considered whether the rights of custody within the meaning of article 3(a) of the Hague Convention were confined to rights established by one of the methods referred to in article 3 under the law of the state of habitual residence. He rejected this narrow interpretation in reliance in particular on para. 67 of the explanatory report of Madam Elisa Perez-Vera, and said at p. 125:

“The language of the concluding paragraph of art. 3 – the use of the words ‘may’ and ‘in particular’ – would suggest that, while emphasis was laid on the three specified sources, it was not intended to be an exhaustive statement of the legal origin of rights of custody under the law of the state of habitual residence. As Madam Elisa Perez-Vera pointed out:-

‘... In this regard, para. 2 of article 3 takes into consideration some – no doubt the most important – of those sources, while emphasising that the list is not exhaustive. This paragraph provides that ‘the rights of custody mentioned in sub-para. (a) above may arise in particular’, thus underlining the fact that other sorts of rights may exist which are not contained within the text itself ... These sources cover a vast juridical area, and the fact that they are not exhaustively set out must be understood as favouring a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration.’

[Explanatory Report para. 67]”

30. Applying this non-exhaustive statement of rights Keane J. determined that there could be circumstances in which the court of the habitual residence of the child prior to the alleged wrongful removal by reason of proceedings before it or orders made would be regarded as having a right of custody within the meaning of the Convention at the date of the alleged wrongful removal. On the facts and evidence in that case he rejected any such right as having been established for the courts of New York State.

31. In *H.I. v. M.G.* Keane J. then considered in some detail the question as to whether an 'inchoate' right of custody under the law of the State of habitual residence constitutes a right of custody within the meaning of the Convention. In doing so, he referred to several of the then decisions of the courts of England and Wales and of the Supreme Court of Canada. The sense in which 'inchoate' rights is used may be gleaned from an extract cited by Keane J. from the judgment of Waite L.J. in the English Court of Appeal decision in *Re: B (A Minor) (Abduction)* [1994] 2 F.L.R. 249.

"The difficulty lies in fixing the limits of the concept of 'rights'. It is to be confined to what lawyers would instantly recognise as established rights – that is to say those which are propounded by law or conferred by court order: or is it capable of being applied in a Convention context to describe the inchoate rights of those who are carrying out duties and enjoying privileges of a custodial or parental character which, though not yet formally recognised or granted by law, a court would nevertheless be likely to uphold in the interests of the child concerned?"

32. Keane J., ultimately determined that rights of custody within the meaning of the Convention did not include such 'inchoate' rights and that the decision of the majority of the English Court of Appeal in *Re B (A Minor) (Abduction)* should not be followed. At p. 132 in his conclusions in that case, he stated:

"It is sufficient to say, in the context of the present proceedings, that, giving the Hague Convention the purposive and flexible construction which it should be given, circumstances can arise in which a removal can be 'wrongful' within the meaning of art. 3 because it is in breach of rights of custody, not vested in either of the parents but in the court itself.

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"

33. That decision is binding on me. Accordingly, any right upon which the father in this application relies must be a right which was recognised in accordance with the law of the State of Michigan prior to 23rd July, 2005, and capable of then being upheld and enforced by the courts of Michigan without the necessity of any intervening order of those courts such as an order granting custody to the father. On the facts of this case, counsel for the father submits on two alternative bases that the father had what does constitute a right of custody within the meaning of the Convention enforceable in accordance with law of the State of Michigan prior to 23rd July, 2005.

34. The first submission is that by reason of the affidavit of parentage and the agreement of the mother in writing in her handwritten note made in August, 2004 addressed to the father, expressly leaving the children in his care and custody for an undetermined period and as further evidenced in her letters of 30th August, 2004, and 1st April, 2005, to the Friend of the Court in the State of Michigan that the father had acquired a right which is recognised both as a right of custody in the law of the State of Michigan and is a right of custody within the meaning of the Convention prior to 23rd July, 2005. Further it is submitted that such right of custody gave to the father a right to be consulted in relation to any proposed change of residence of the children from the State of Michigan to Ireland and a right to object to such change of residence.

35. In response, the submission on behalf of the mother is that the father did not have a right of custody so called in accordance with the law of the State of Michigan prior to July, 2005. On the submissions made I did not understand it to be disputed that if there was a right of custody in accordance with the law of Michigan that such right of custody is a right of custody within the meaning of the Convention and further, that the removal of the children without the consent of the father was in breach of such right.

36. The Michigan lawyers are in dispute as to whether or not the father had acquired a right of custody within the meaning of the law of Michigan prior to July, 2005. They appear to be in agreement that the making of the joint affidavit of parentage did not of itself confer a right of custody on the father, though Ms. Longoria does state in her first affidavit "When an affidavit of parentage has been signed by the parents of a child that the father has equal rights as if the parents were married at the time of the birth". However, she appears to be stating this in reliance upon the statute MCL 722.1004 which she quotes and which provides that:

"... the child who is the subject of the acknowledgment shall bear the same relationship to the mother and the man signing as the father of a child born or conceived during a marriage and shall have identical status, rights and duties of a child born in lawful wedlock effective from birth."

37. She also elsewhere refers to the presumed custody of the mother unless otherwise agreed by the parties in writing. She appears to be of the view that the writings of the mother relied upon by counsel in this jurisdiction constitute such an agreement.

38. Ms. Zellers at one point appears to be opining that "in all cases a person seeking custodial rights must petition the court for custody rights". (See para. 3 of the affidavit of 16th January). However, in the same affidavit in the preceding paragraph she states "The father does not automatically have rights of custody of the child unless the mother voluntarily allows him to have custody of the child or, when the court orders custody after an action has been initiated in the court." However, she also appears to be of the view that any agreement in writing must be what is known as "a stipulation" and form part of a court order.

39. A further difficulty arises in that it appears that a distinction is made between physical custody and legal custody and it is not clear exactly what rights flow from one or other. Also, Ms. Longoria places some reliance on the establishment of "a custodial environment" which she considers has been established in the year 2004/2005 which the children spent with the father but it is unclear what import this has where there are no proceedings pending relating to a claim for custody.

40. In making these observations I do not wish to appear critical of the Michigan lawyers. They have been attempting to answer differing questions put to them and which in part were based upon the differing facts put forward by the parties. Nevertheless, the Court cannot resolve on the affidavits filed herein whether the father, as a matter of probability, had a right of custody to the children within the meaning of the law of the State of Michigan prior to 23rd July, 2005.

41. The second and alternative submission is that the father had, prior to 23rd July, 2005, in accordance with the law in the State of

Michigan, a right to object to a change of residence of the children to a place outside of the State of Michigan or the U.S. and that such a right is a right of custody within the meaning of the Convention.

42. In making this submission, counsel seeks to rely upon the approach of Lord Donaldson M.R. in the English Court of Appeal to the meaning of rights of custody within the Convention in *Re C (A Minor) (Abduction)* [1989] 1 F.L.R. 403. That case concerned an alleged wrongful removal of a child from Australia to England. At p. 412, Donaldson M.R. stated:

"We are necessarily concerned with Australian law because we are bidden by art. 3 to decide whether the removal of the child was in breach of 'rights of custody' attributed to the father either jointly or alone under that law, but it matters not in the least how those rights are described in Australian law. What matters is whether those rights fall within the Convention definition of 'rights of custody'. Equally, it matters not in the least whether those rights would be regarded as rights of custody under English law, if they fall within the definition.

'Custody', as a matter of non-technical English, means 'safekeeping, protection, charge, care, guardianship' (I take that from the *Shorter Oxford English Dictionary*); but 'rights of custody' as defined in the Convention includes a much more precise meaning which will, I apprehend, usually be decisive of most applications under the Convention. This is 'the right to determine' the child's place of residence'. This right may be in the court, the mother, the father, some caretaking institution, such as a local authority, or it may, as in this case, be a divided right, in so far as the child is to reside in Australia, the right being that of the mother; but, in so far as any question arises as to the child residing outside Australia, it being a joint right subject always, of course, to the overriding rights of the court. If anyone, be it an individual or the court or other institution or a body, has a right to object, and either is not consulted or refuses to consent, the removal will be wrongful within the meaning of the Convention. I add for completeness that a 'right to determine the child's place of residence' (using the phrase in the Convention) may be specific, the right to decide that it shall live at a particular address, or it may be general, e.g. 'within the Commonwealth of Australia'."

43. Whilst a 'broad connotation' to the word custody forms part of the reasoning of Waite L.J. in the majority decisions in *Re B (A Minor) (Abduction)* [1994] 2 F.L.R. 249 which the Supreme Court declined to follow, it does not appear to me that it is in any way inconsistent with the Supreme Court decision in *H.I. v. M.G.* for this Court to follow the approach of Lord Donaldson M.R. to the meaning of rights of custody under the Convention. On the contrary, it appears that it would be giving to the Convention as implemented in this jurisdiction a meaning "which accords with its expressed objectives" as is mandated by Keane J. at p. 124 in the extract cited above. Accordingly, it appears to me that the question which this Court must determine on the second submission made is whether or not prior to 23rd July, 2005, the father, in accordance with his rights under the law of the State of Michigan, had a right to object to the children's place of residence being changed from Michigan to Ireland, which right was then capable of being upheld by the courts of Michigan. The distinction between such a right which is a right of custody and the inchoate right which, in accordance with the Supreme Court decision, is not considered to be a right of custody, is that it must be a right then capable of being upheld by the courts of Michigan without the necessity of any intervening order such as an order granting custody (within the meaning of the law of Michigan) to the father.

44. I cannot resolve this issue on the affidavit of laws filed at present. Those affidavits of laws are primarily concerned with whether or not rights of custody so-called in accordance with the law of Michigan were vested in the father prior to 23rd July, 2005. They do not both expressly consider the potentially separate and distinct issue which arises as to whether or not a right to object to a change in the children's place of residence to a place outside of the State of Michigan or outside of the U.S. (i.e. a right of custody within the meaning of the Convention as distinct from the law of the State of Michigan) vested in the father prior to 23rd July, 2005.

45. The reason for which I refer to a change outside of the U.S. is that Ms. Longoria, in the affidavits sworn on behalf of the father, appears to assert that in accordance with U.S. federal law the father's consent is necessary for the issue of a passport for a child under the age of fourteen. However, the position is not at all clear at present.

#### **Rights of custody of the Courts of Michigan**

46. Counsel for the father submitted that, whilst she was not abandoning a submission that the courts of Michigan may have had a right of custody within the meaning of the Convention prior to 23rd July, 2005, she accepted that on the evidence presently before the court no such right was established as a matter of probability and that if she had to rely on such a right further clarification was needed. The affidavits of the parties and the affidavits of laws sworn by the lawyers appear to establish the following:

(1) The only proceedings pending before the courts of Michigan in relation to the children prior to 23rd July, 2005, was a claim filed by the father prior to or in the month of April, 2005 claiming child support from the mother.

(2) Section 10 of the "Acknowledgement of Parentage Act" (Act 305 of 1996) of the State of Michigan provides:

"Except as otherwise provided by law, a mother and father who sign an acknowledgment that is filed as prescribed by section 5 or consenting to the general, personal jurisdiction of the courts of record of this state regarding the issues of the support, custody and parenting time of the child."

(3) There was no order of the courts of Michigan either granting custody to the father or expressly prohibiting the mother from removing the children from the State of Michigan prior to 23rd July, 2005.

(4) The courts of Michigan have jurisdiction over children whilst living in the State of Michigan and for six months thereafter. [722.1201]

47. If, prior to 23rd July, 2005, the father did not have a right of custody within the meaning of the law of Michigan nor had a right to object to the change of residence of the children from Michigan to Ireland then capable of being upheld by the courts of Michigan, a further issue may arise for resolution as to whether, in accordance with the law of the State of Michigan and the facts found herein, the courts of Michigan had a right of custody in relation to the children within the meaning of the Convention. In accordance with the decision of the Supreme Court in *H.I. v. M.G.* referred to above, a right of custody in a court will only be considered to exist where by reason of existing proceedings or the law of the State of habitual residence the courts of that state are considered to have reserved to themselves the right to decide whether the children should be permitted to change residence to outside the state or, to put it another way, the mother's position under the law of the State was such that, in the absence of the consent of the father to the change of residence, she was obliged to obtain leave of the courts of Michigan to change the residence of the children from Michigan to Ireland.

**Conclusion**

48. This Court is regretfully unable at present to determine the question as to whether or not the father or the courts of Michigan have rights of custody within the meaning of the Convention in relation to the children prior to 23rd July, 2005. It needs further assistance in relation to the law of Michigan. I have prepared a draft of those issues of the law of Michigan in relation to which the Court appears to need further assistance in the light of this judgment and propose allowing counsel to consider same prior to finalising them.

49. I have also considered the request from counsel for the father that he might be permitted to obtain through the Central Authority a further affidavit of laws pursuant to article 8 of the Convention. Article 8(f) provides that an application for the return of a child may be accompanied or supplemented by:

"(f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State."

50. The only order which this Court could now make in relation to article 8(f) would be to adjourn this application and permit the applicant father to seek a further affidavit from the U.S. Central Authority or other competent authority in Michigan on the law of Michigan relevant to the issues which this Court has to determine. Unless there is agreement with the respondent mother that the additional assistance in relation to the law of Michigan be obtained in this manner, it appears that such an affidavit would be an affidavit filed by the father. Fair procedures may then require that this Court permit the mother to obtain an affidavit of laws on the same issues. This might well result in a further dispute between U.S. deponents as to the relevant law of Michigan which is not easily resolved in this jurisdiction.

51. If, however, this Court now makes a request pursuant to article 15 of the Convention, there are also certain procedural difficulties. Article 15 of the Convention provides:

"Article 15. - The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination."

52. At present this Court has no evidence or information that such a declaration or decision may be obtained in the State of Michigan. Even assuming this to be so, it is clear on the decided authorities that a decision by the courts of Michigan as to whether or not the removal of the children was a wrongful removal within the meaning of article 3 of the Convention is not determinative of these proceedings. This Court must decide in accordance with the law of this jurisdiction whether the removal was wrongful. Accordingly, whilst such a decision may well be of assistance to this Court, it would only potentially help this Court resolve all the issues in this application if, in the course of the decision, the Court was able to address and determine the relevant issues of law of the State of Michigan which would permit this Court then to determine whether either the father or the courts of Michigan had a right of custody within the meaning of the Convention in relation to the children on or before 23rd July, 2005.

53. Accordingly, I will hear counsel prior to determining how the further assistance now required by this Court in relation to the law of Michigan should be obtained.