

## THE HIGH COURT

## FAMILY LAW

[Record No.: 2015/33 F.J.]

IN THE MATTER OF CHAPTER III OF COUNCIL REGULATION 2201/2003

AND

IN THE MATTER OF THE FOLLOWING PROCEEDINGS BEARING RECORD NO. SA15C00289

AND

IN THE MATTER OF M., H. AND A. (CHILDREN)

BETWEEN

SWANSEA COUNTY COUNCIL

APPLICANT/RESPONDENT

AND

M O

RESPONDENT/APELLANT

**JUDGMENT of Mr. Justice Henry Abbott delivered on the 12th day of December, 2017**

1. This judgment relates to an appeal by the respondent named in the above entitled proceedings against an order made by the Master of the High Court in Dublin on the 3rd day of June, 2015 whereby an interim care order and recovery order made by Swansea Family Court dated the 20th day of May, 2015 was ordered to be enforced within the State immediately with liberty to notify the respondent of the making of the order by telephone, email and by personal service in accordance with the Rules of the Superior Courts.

**Background of the Case**

2. The applicant is a statutory body having responsibility for the care of children in the Swansea area in the jurisdiction of England and Wales. At all times relevant to this judgment the applicant had and continues to have responsibility for the care and protection of the children named in the title of this judgment. The respondent is the mother of these children. Their ages are as follows: M. born in 2008, H. born in 2010 and A. born in 2012.

3. Issues arose in relation to the care of the children and the respondent agreed to the children being placed in voluntary care pending the outcome of proceedings. This agreement took place after a meeting between the applicant and the respondent on the 23rd day of February, 2015. On the 23rd of March, 2015 the applicant commenced proceedings for a care order in respect of the children. On the 16th of May, 2015 when the respondent turned up for supervised contact with the children she informed the contact worker that she was withdrawing her consent to the care/fostering arrangement and took the children away with her in a waiting car.

4. On the 18th of May, 2015 the applicant sought an interim care order which was granted and the case was made returnable for the 20th day of May, 2015. In view of the danger for the children in coming back into the care of the respondent the interim care order was made *ex parte*. The respondent's solicitor was present in court on the 18th day of May, and photostated the order of that date and sent it via private Facebook message to the respondent.

5. The applicants believe that the respondent's solicitors also informed the respondent that she must return the children to the applicants' care by 1:30pm on the 20th of May, 2015 and that she must attend court at 2:00pm on that day. Enquiries made with the police have indicated that the respondent removed the children to Ireland with the aid of a third party on the sea ferry on the evening of the 16th of May, 2015.

6. On the 20th of May, his Honour Judge Sharpe made an order in respect of each of the children declaring that they remained in the care of the applicant pursuant to interim care of the 18th of May. He also issued an order directing An Garda Síochána (the Irish police force) to have liberty to search for and recover the children and requesting that they be delivered to an authorised representative of the applicant. A certificate referred to in Article 39 concerning judgments on parental responsibility prescribed by Annex 2 of Brussels II bis Regulations was signed by his Honour Judge Sharpe in respect of the said order of the 20th of May, 2015.

7. The applicant continued to have concern for the welfare of the children and as a result made contact with Tulsa, the Irish Child and Family Agency. As a result, Tulsa applied for and obtained an emergency care order pursuant to s. 13(1) of the Child Care Act 1991, in the District Court in Ireland in respect of each of the three children. This order directed that each child be maintained under the care of Tulsa for a period of eight days from the day upon which the child was delivered into the custody of Tulsa, and made a further order in each case pursuant to s. 13(7)(a) of the said 1991 Act that the location of the foster placement be withheld (from the respondent).

8. Tulsa located the respondent and children on the 28th of May 2015. At that stage the respondent was on the side of the road trying to hitch a lift with children and she managed to abscond with the youngest child A. for a period, before being located by An Garda Síochána. Tulsa made appropriate arrangements for the care/fostering of the children in Ireland and proceeded to make an application to the Master of the High Court in Ireland in the above entitled proceedings for an order pursuant to O. 42A, r. 4-8 of the Rules of the Superior Court 1986 as amended, and Chapter III of Council Regulation (EC) 2000/2001/2003 for the enforcement of the interim care order of the 18th of May, 2015 of his Honour M. Sharpe in Swansea Family Court being the order hereinbefore referred to in this judgment and for an order pursuant to O. 42A, r. 4-8 of the Rules of the Superior Court 1986 as amended, and Chapter III of Council Regulation (EC) 2000/2001/2003 for the enforcement of the recovery orders of the 20th of May, 2015 made by his Honour Judge M. Sharpe in Swansea Family Court relating to the three children being the orders here and before referred to in this judgment.

**Emergency Hearing**

9. The respondent attended at the offices of the High Court after hours where she met the Family Court registrar on the 4th of June,

2015. The registrar endeavoured to contact a judge to enable the respondent to apply for a stay on the order of the Master with a view to appealing same.

10. While I was contacted by telephone, I was unable to discover that this was the matter of concern insofar as there was no reply from the number when I immediately returned the call. It was against this background that I acceded to the application of the respondent to have the solicitors for the applicant notified of her intention to seek a stay of the order of the Master of the High Court in relation to her appeal of same.

11. The appellant served a notice of appeal dated the 5th day of June, 2015. Upon being informed by the applicant's solicitor who attended at an adjourned hearing at 2:30 in the afternoon of the 5th day of June, 2015 the court adjourned the hearing of the appeal to the 15th day of October, 2015 having informed the respondent that there were limited grounds of appeal, - including incompatibility with public policy, - and that the court would not make an order for the return of the children to Ireland by reason of the fact that the court was not satisfied that the children had or had acquired habitual residence in Ireland.

12. It should be noted that from the morning of the 5th of June, 2015 to the afternoon of the same day this Court ordered a stay on the order of the Master but as appears from the order of this Court of the 5th of June, the stay was deemed to have lapsed by reason of the fact that the children had on the information given to the court by the solicitor for the applicant being returned to Swansea on the previous evening/night.

13. The respondent delivered and filed two affidavits in support of the appeal. The first sworn on the 5th day of June and the second on the 12th day of June, 2015.

### **Consideration of the Case**

14. The court is bound to consider the case in accordance with the provisions of Article 31 of Brussels II bis which provides as follows:-

"Decision of the Court

1. The court applied to shall give its decision without delay. Neither the person against whom enforcement is sought, nor the child shall, at this stage of the proceedings, be entitled to make any submissions on the application.

2. The application may be refused only for one of the reasons specified in Articles 22, 23 and 24.

3. Under no circumstances may a judgment be reviewed as to its substance."

15. Having regard to the prohibition of review of jurisdiction of the Court of Origin contained in Article 24 which provides:-

"The jurisdiction of the court of the Member State of origin may not be reviewed and that the test of public policy referred to in Articles 22(a) and 23(a) may not be applied to the rules relating to jurisdiction set out in Articles 3 to 14," -

the court proposes to take the grounds of non-recognition for judgments relating parental responsibility as provided in Article 23 coupled with the operation of the test in Article 24 regarding jurisdiction as to be the appropriate tests for grounds of non-recognition.

16. I propose to set out the grounds of each paragraph of Article 23, and the conclusions of the court in relation to same *seriatim* as follows:-

*(a) If such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child.*

17. On the basis that the court can take judicial notice of the fact that the child protection measures in England and Wales serve the same objectives of public policy it would be very difficult to find that recognition of the judgment in this case is manifestly contrary to public policy of this State.

18. In times past, it had been suggested that the tendency of the child protection policies in England and Wales to free up children for adoption without consent of their parents was inconsistent with Irish public policy insofar as the Irish policy towards adoption in non-consensual case was to establish a very high bar of proof in relation to abandonment/dereliction of parental duties. This approach has ceased having regard to the recent decisions of the Irish Supreme Court and in any event the respondent has not raised that issue as a ground of her defence in either of her affidavits.

19. Accordingly, I do not accept para. (a) as a ground for non-recognition.

*(b) If it is given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought.*

20. The respondent has raised the issue of non-hearing of the children especially in relation to the oldest child who was seven and would be in a position to express her wishes in relation to the matter.

21. I am satisfied that even if the child had not been heard in a manner in which it would have been appropriate that as the order sought to be recognised was made in circumstances of urgency and involved reaction to the taking of the children out of care/foster care in Swansea. The exception to the requirement of the voice of the child would be heard envisaged by para. (b) would apply.

22. In any event the affidavit grounding the application before the Master adduced evidence exhibited of report of a contact worker that the views and wishes of the two eldest children were sought in relation to the placement in care with the eldest child voicing opposition and the second child expresses a preference for the foster placement, with the third youngest child being far too young to have its voice heard or considered at all.

23. I note that the certificate used in this case does not contain any record of the voice of the child being heard as no place is prescribed for same. This does not vitiate the efficacy of the certificate, but the consideration of para. (b) would indicate that parties seeking to use such a certificate, might, in the event of an appeal, be challenged on this ground.

24. It should be noted in this context that since the coming into force of Brussels II bis and, certainly, since the coming into force of the Children's Referendum, and the coming into force of the Child and Family Relationships Act 2015, that it is part of the fundamental principles of procedure in Ireland that the children to whom an order relates should be given an opportunity to be heard.

*(c) Where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with the equivalent document and sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally.*

25. I am satisfied on the basis of the grounding affidavit filed on behalf of the applicant that the solicitor for the respondent was in a position to flash photo the interim order and to notify the respondent of the further hearing.

26. The respondent was sufficiently notified of the proceedings to comply with this test.

*(d) On the request of any person claiming that the judgment infringes his or her personal responsibility, if it was given without such persons having been giving an opportunity to be heard.*

27. Having regard to the format of Article 22 of which Article 23 criteria are overlaps, I am satisfied that the person envisaged in para. (d) is a person other than the respondent who may be claiming parental responsibility.

28. While a person other than the respondent did appear with the respondent from time to time before this Court, that person never claimed parental responsibility, and hence para. (d) did not present any ground for non-recognition.

*(e) If it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought.*

29. There is no such judgment.

*(f) If it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.*

30. No such judgment exists in this case.

#### **Non-Review as to Substance**

31. Article 26 of Brussels II bis provides that:-

"Under no circumstances may a judgment be reviewed as to its substance."

This Court has not proposed to undertake such a review, the court has only considered the facts and arguments set out by the respondent in her two affidavits as to the substance of the matter and the many ways in which she was dissatisfied with same, to the extent that it was necessary to consider such objections as she may have, for the purpose of examining any grounds of non-recognition for the judgment as envisaged by Article 23 when considered in conjunction with Articles 22, 23 and 24.

#### **Conclusion**

32. There are no grounds of non-recognition of the judgment in this case and accordingly, the appeal is dismissed, and the order of the Master of the High Court is affirmed.