Neutral Citation Number: [2011] IEHC 304

THE HIGH COURT

FAMILY LAW

2011 2 HLC

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT 1991, AND IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION AND IN THE MATTER OF K. McC (A CHILD)

BETWEEN

G. R. AND B. R.

APPLICANTS

AND

D. Mc C.

RESPONDENT

JUDGMENT of Ms. Justice Irvine delivered on the 19th day of July, 2011

1. The applicants are the maternal grandparents of K., the minor named in the title to these proceedings and they reside in a town in South Carolina, USA. K. was born in South Carolina, on 21st January, 2001, and her father is the respondent to the present proceedings. Her mother E. was tragically killed in a road traffic accident in March, 2003. All of the aforementioned are citizens of the U.S.A.

2. It is common case that the respondent removed K. from South Carolina on 22nd June, 2010. For several years prior to that date K. had resided with her father at Jefferson Drive, Westminster, South Carolina. Having initially contended in these proceedings that he had notified the applicants of his intention to take K. to reside in Ireland, he belatedly, at the commencement of the hearing before me, conceded that his removal of K. from her then place of habitual residence in South Carolina was without the consent or knowledge of the applicants and in particular was wrongful within the meaning of Article 3 of the Hague Convention ("the Convention") by reason of rights enjoyed by the applicants on foot of an Order of the family court of the Fifth Judicial Circuit of South Carolina made on 16th August, 2004.

3. Based upon lengthy and at times very controversial affidavits, the applicants instituted the present proceedings on 26th January, 2011, seeking firstly a declaration that K. was wrongfully removed from the jurisdiction of the courts of South Carolina within the meaning of Article 3 of the Hague Convention and secondly an order pursuant to Article 12 thereof that K. be returned forthwith to her place of habitual residence in South Carolina, United States, to enable them to enforce their rights of custody over K.

4. The applicant's right to the first of the aforementioned reliefs is conceded. Accordingly, the only issues for this Court's consideration on this application are those matters raised by the respondent in his defence. These are:-

> (1) Has the respondent established under Article 13(b) of the Convention that there is a grave risk that the return of K. to South Carolina would expose her to physical or psychological harm or otherwise place her in an intolerable situation?
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> (2) Has K. reached an age and degree of maturity such that the court should take account of any objection on her part to an Order returning her to the place of her habitual residence? If so, should the court exercise its discretion to refuse to grant the Order to which the applicants would otherwise be entitled?

5. In order to consider the defences raised it is necessary to consider the facts of the case in some greater detail. The first named applicant has sworn a number of affidavits in support of the present application. The applicants have also produced a number of testimonials regarding their character and also letters verifying the apparently very close relationship which they enjoy with K. as her maternal grandparents. Further, the respondent's mother, B. McC., who resides in Westminster, South Carolina, has also sworn an affidavit in support of the applicant's claim.

6. The respondent has delivered a number of replying affidavits and his defence to the present application is supported by an affidavit of his fiancée, P.G. I will summarise briefly the most relevant aspects of these affidavits.

Background

7. The respondent and K's mother E. were married to each other albeit that the date of this event is not clear from the evidence. It is accepted that at various stages of her life, E. had problems with drug abuse and the applicants maintain that the respondent was also a drug user. Following the death of her mother, K. resided exclusively with the applicants for a short period and they brought legal proceedings seeking her custody in the Family Court in South Carolina. Those proceedings were resolved and the agreement reached with the respondent was approved by the court on 16th August, 2004. That agreement provided that the applicants and the respondent would initially enjoy joint legal custody of K. and that for the remainder of 2004, K. would primarily be placed with the applicants but would spend approximately half of each week with her father. For 2005, it was agreed that K. would primarily reside with her father and that the applicants would have physical custody of K. every second weekend. From 21st January, 2006, the Court Order provided that the respondent would assume sole custody rights over K. with the applicants retaining a range of significant rights including generous access. In particular, the respondent was required, *inter alia*, to keep the applicants appraised about important aspects or occurrences in K's life; to advise them of any illness that she might sustain and give the applicants 45 days advance notice of any intention to relocate his place of residence to another state.

8. The applicants say that in June, 2010, the respondent advised them that he intended taking K. on a surprise vacation to the mountains in North Carolina. Contrary to this representation, the respondent took K. to Ireland. Since that date the respondent and K. have been living in Skerries, Co. Dublin, with a woman, P.G. whom the respondent met on the internet and with whom he appears to be in a committed and loving relationship. P.G. is now his fiancée.

9. Having been advised by the respondent's mother in July, 2010, that the respondent had no intention of returning to the U.S., the applicants instituted proceedings against the respondent in the Fifth Judicial Court in South Carolina. Following an uncontested hearing that court made an order on 18th November, 2010, whereby the applicants were granted sole legal and physical custody of K. until further order and the respondent was further ordered to return K. to the custody of the applicants. The respondent was also committed to prison for a period of one year for his breach of the order made by agreement on 16th August, 2004, and he was directed to pay the applicants a sum of US$4,888.

10. B. McC, K's paternal grandparent, in her affidavit of 25th May, 2011, has taken the somewhat unusual step of supporting the present application stating that in her opinion K. would be better cared for by the applicants than by her son who, along with K., lived with herself and her husband, except for short periods, between January 2005, and June 2010. She states that he has left a number of his creditors in the U.S. unpaid; that he was not financially able to support K. when living in South Carolina and that she believes him to be incapable of earning sufficient funds from the construction industry in Ireland to allow him adequately maintain K. in this jurisdiction. She refers to the respondent as a habitual and pathological liar and says she does so with regret but in the belief that the applicants are best placed to care for K. until she reaches adulthood. She further supported the applicant's assertion that the respondent did not tell them of his intention to take K. to Ireland stating that it was she who advised them that K. and the respondent would not be returning to South Carolina.

11. The respondent initially maintained that he did not believe that he was precluded by the court order of 16th August, 2004, from relocating his residence without giving 45 days notice to the applicants. He stated that he believed that the relevant clause in the court order did not apply once he assumed sole legal custody of K. on 21st January, 2006, and asserted that he had been advised by his lawyer that he was entitled to decide where they would live. He further contended that he had informed the first named applicant by telephone in April 2010 that he intended to relocate with K. to Ireland, a position he has now resiled from.

12. As to the contempt proceedings before the court in South Carolina in November 2010, the respondent maintains that he engaged with the offices of the relevant court asking for an adjournment of the proceedings so that he could obtain the services of a lawyer but that for some reason the court did not appear to have received his request.

13. The respondent contends that the applicants have tried to purchase K's loyalty by buying her expensive gifts and making promises to her as to the life she will enjoy if she returns to live with them. He states that when the applicants recently came to Ireland to see K., they behaved badly towards his fiancée with whom K. has formed a particularly close bond; they upset K. by arguing about her future in her presence and that they were physically unable and did not have the stamina to enjoy outdoor activities with K and her dog.

14. The respondent maintains that the applicants are too elderly to have custody of K. and that the first named applicant has recently been treated for cancer. K, he states, has fully bonded with P.G., she is now part of a stable and loving family unit, she is fully integrated into the local community and she is well established and has lots of friends in the local school which she has been attending since September 2010. In support of these assertions P.G. has delivered a substantive affidavit setting out her relationship with the respondent and with K. and exhibiting a number of character references. P.G. states that she hopes to marry the respondent in early course, that she is very close and has a loving relationship with K. and believes that she and the respondent can give K. a wonderful life. She asserts that the respondent is a very good father and that he is fully involved in all of K's activities including her schooling and extracurricular activities. She feels that she is in effect K's stepmother and she believes it would be devastating to all concerned if K. was to be returned to the U.S. She deposes to the fact that K. is very upset about the prospect that she might have to reintegrate into life in the U.S. now that she is so happy here.

Court Order

15. As is customary in cases of this nature, the High Court by Order made on 25th March, 2011, directed that K, be interviewed by Dr Anne Byrne-Lynch, a clinical psychologist, with a view to answering the questions raised therein which were: the degree of maturity of K; whether K. is capable of forming her own views and if so a general description of the type of matters about which she appears capable of forming her own views; whether K. objects to being returned to South Carolina; if K. objects to being returned to South Carolina, (i) the grounds of such objection and in particular whether it relates to an objection to living in and/or a desire to remain in Ireland or whether it relates to an objection to living with or in the vicinity of one of the parties hereto and/or a wish to live with one of the parties hereto; (ii) whether any objections expressed have been independently formed or result from the influence of any other person or party hereto; and finally, any other matters which K. wishes to bring to the attention of the Court in relation to (i) the circumstances in which her family was living prior to their departure from South Carolina in June, 2010; (ii) the circumstances in which they came to Ireland in June, 2010; and (iii) her wishes in relation to future care and living arrangements; and any other information she may wish the Court to take into account when deciding the application for an Order for her return to South Carolina.

16. Dr. Byrne-Lynch interviewed K. on 11th April, 2011 and 13th April, 2011, following which she submitted a report to the Court dated 13th April, 2011. Her conclusions may be summarised as follows:-

> (i) K. is an intelligent, articulate ten year old child who is capable of expressing views about her everyday life and with whom she wishes to live. She expressed her views in a manner which would suggest that she had not been subjected to any undue influence from the respondent or his fiancée.
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> (ii) K. expressed a very clear and consistent wish to live with her father who appeared to be her primary attachment figure and in whom she reposes great trust.
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> (iii) K. has a strong preference to continue to live in Ireland in her newly constituted family comprising her father and his fiancée with whom she has formed a strong attachment. She stated that she would be very distressed at any attempt to separate her from her father.
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> (iv) Whilst K. spoke positively about her paternal grandmother, she was adamant that she did not wish to live with her grandparents and that she wanted to remain living in Ireland with the respondent and his partner, P.G.

Conclusions

1. The Child's Objections
17. Article 13 provides that the court may 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 his or her views. Accordingly, the onus of proof is on the respondent to satisfy the Court as a matter of fact on each of these two issues. Only then does the court have discretion to refuse to return the child.

18. Having considered the evidence of Dr. Byrne-Lynch , I am satisfied as a matter of fact that K. strongly objects to returning to South Carolina and further that she has attained an age and maturity sufficient that the court should take her views into account. K. is reported as having been adamant about the views she expressed to Dr. Byrne-Lynch and is particularly opposed to returning to South Carolina to live with the applicants.

19. In the case of *T.M,M. v. M.D.* [2000] 1 I.R. 149, at p. 161, Denham J. stated that "(t)he child's views alone are sufficient basis to refuse to return her". The learned judge observed, however, that "this is an area where the exercise of the discretion of the judge must be done with great care". In saying this, Denham J. relied on and affirmed the decision of *S. v. S. (Child Abduction) (Child's Views)* [1993] 1 Fam. 242 where Balcombe L.J. held, at p. 500, that "(t)he questions whether: (i) a child objects to being returned; and (ii) has attained an age and degree of maturity at which it is appropriate to take account of its views; are questions of fact which are peculiarly within the province of the trial judge". Denham J. in *T.M,M. v. M.D.* [2000] 1 I.R. 149, at p. 162, held that the trial judge in that case did not err "in relying, as she did, upon the interview with the child. The Convention is quite clear on its face that a child who objects to being returned and who has attained an age and degree of maturity is entitled to have his or her view taken into account". Denham J's decision in *T.M,M. v. M.D.* makes clear that a trial judge is entitled to rely on the child's views. In making this point, Denham J. emphasised that "… a decision not to return a child to the country of its habitual residence is a decision of the court and care should be taken, as here, that it is not, nor does it appear to be, the decision of the child".

20. Having regard to the aforementioned decisions I think it is appropriate to first of all examine the substance of the objection made by K. It is clear that if I make an order for her return to South Carolina, K. will not be returning to the life and surroundings which she enjoyed prior to her wrongful removal to this jurisdiction. The applicants, by maintaining their right to rely upon the Order of the South Carolina Family Court granting them sole custody of K., are seeking an Order the effect of which would be to transfer custody of K. from the respondent who is her sole parent and has been her primary carer for the last six years of her short life, to the sole custody of the applicants. Of necessity, that custody will separate K. from her father in whom she appears to have very significant trust and send her to live with her grandparents who live in a town substantially removed from where she formerly resided in South Carolina. There she would have to restart her education in the new school, try to make new friends and would have to do so without the support of any sibling or other relatives that might otherwise somewhat ameliorate the effect of such dramatic change.

21. Whilst the applicants have stated that they would facilitate an application on the part of the respondent to vacate the order of the South Carolina Court imposing the custodial sentence and fine to which I have earlier referred, , it appears likely as things stand that if I were to make the Order sought, the respondent, if he returns to the U.S. with K., as is his stated intention, will be imprisoned for some period of time until the Order can be vacated, with unknown but likely adverse consequences for K. If the respondent remains here, for fear of potential imprisonment, until such time as the committal order can be set aside, and I have no idea how long that might take, K. will be handed into the custody of the applicants who, she was adamant when discussing her situation with Dr. Byrne-Lynch, she does not want to live with. Simultaneously, K. will be confronted with her biggest fear namely separation from her father whom Dr. Byrne-Lynch described as her primary attachment figure.

22. For the aforementioned reasons, I believe there is real substance to K's objections and further because of the fact that she has lived for the past six years in the custody of her father subject only to the access rights enjoyed by the applicants. In the context of K's age, six years is to all intents and purposes the whole of her cognitive life. The applicants were not K's primary careers during any of that period and she is not their child, regardless of how well motivated they may be in maintaining the present proceedings.

23. Whilst the policy of the Convention might favour the return of K. to South Carolina if she was to go back there in the custody of her father and resume life in the town where she lived prior to her wrongful removal, it seems to me that having regard to the nature and substance of K's objections to her return, given the most unusual circumstances of this case, that I should give substantial weight to K's objections and exercise my discretion by refusing to make the order sought. To make the order would be to punish K. for the wrongdoing of her father in taking her from South Carolina without notification to the applicants whose voices when considered in terms of the child's objections to returning to South Carolina, cannot carry the same weight as the voice of a primary carer with whom a child was living at the time they were wrongfully removed from their place of habitual residence.

24. If it were not for the existence of the order of the family court made in November last granting sole custody of K. to the applicants and which order they refuse to relinquish, I would find myself obliged, notwithstanding the objections of K., to make an order for her return to South Carolina where she could live in the custody of the respondent pending any further application to the relevant court in respect of her custody, care or welfare. To make the order sought under Article 12 of the Convention, having regard to her objections to her return to South Carolina, her objections to living with the applicants and her fear of being separated from her father, would be so inimical to the interests of K. that I have concluded it would be contrary to the objectives of the Convention to grant the relief sought. However, if the applicants were to procure the setting aside of the court order made on 18th November, 2010, in its entirety, I would make the order sought. In those circumstances the weight to be attached to K's present objections to returning to South Carolina would be substantially diluted. It is nonetheless necessary to say that in circumstances where K. has been residing in this jurisdiction for over a year, such an application would have to be made with immediate effect. By taking this approach, the objectives of the Convention would be upheld insofar as the respondent would not benefit from his own wrongdoing and the future custody and care of K. would be decided by the South Carolina courts that would then be best placed to consider her welfare.

25. Because of my conclusions on the defence raised based on K's objections to returning to South Carolina, I do not intend to consider at length the alternative "grave risk defence" raised under Article 13(1)(b) namely, that the Court should not direct the return of K. to the applicants as to do so would expose her to physical or psychological harm or otherwise place her in an intolerable situation. In the case of *E (Children) (FC)* [2011] U.K.S.C. 27, the U.K. Supreme Court held, at para 35, that "…article 13b is looking to the future: the situation as it would be if the child were to be returned forthwith to her home country. More importantly, the situation which the child will face on return depends crucially on the protective measures which can be put in place to secure that the child will not be called upon to face an intolerable situation when she gets home".

26. Applying those legal principles to the facts already referred to, I am satisfied, as a matter of fact that if the court were to direct

K's return to South Carolina whilst the Order of the South Carolina Court of 18th November, 2010, stands, the same would create an intolerable situation for her. Her position would not be intolerable if she could return to South Carolina in her father's custody until any continuing concerns held by the applicants regarding her care and welfare can be resolved by agreement or if necessary by court application. In this regard it is to be noted that K. reported to Dr. Byrne-Lynch that whilst strongly wanting to remain in Ireland, she would, if necessary, return to South Carolina, once she was not separated from her father.

27. For the reasons set out above I will decline the relief sought but I will grant the applicants liberty to re enter these proceedings within 6 weeks from the date hereof in the event of their having obtained an Order vacating the Order of the Family Court of South Carolina made on 18th November, 2010, in its entirety. Clearly the applicants will be in a position to rely on the time limit provided for in this judgment to achieve a speedy outcome on this issue. I will in any event give them liberty to apply to the court even outside the time frame just mentioned. However, the longer that K. remains in this jurisdiction the less likely it will be that the court will direct her return to South Carolina.