

**THE HIGH COURT**

**FAMILY LAW**

**[2011 No. 10 H.L.C.]**

**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 COUNCIL REGULATION 2201/2003**

**AND**

**IN THE MATTER OF P.H.L.**

**BETWEEN**

**M.L.**

**APPLICANT**

**AND**

**J.L.**

**RESPONDENT**

**JUDGMENT of Ms. Justice M.H. Clark, delivered the 28th day of July, 2011**

1. These proceedings concern a fourteen year old child, P, who currently resides in Dublin with his mother, the respondent. The applicant is the child's father who resides in the United Kingdom. He is seeking *inter alia* an order pursuant to Article 12 of the 1980 Convention on the Civil Aspects of International Child Abduction (the "Hague Convention") that the child be returned to his place of former place of residence in England for the purpose of enforcing the applicant's rights of custody with respect to the child. Both parents and the child are all British nationals.

**Background**

2. The applicant (Mr. L) and respondent (Mrs. L) were married in 1995. Their son P was born in July 1997 and the couple subsequently divorced in 2001. Thereafter the child continued to reside at Towbridge in Wiltshire, England with his mother. The father continued to reside separately in the area and for some time had access to the child pursuant to a contact order that had been granted to him by Trowbridge County Court. The parties are in dispute as to the access and contact during this period. Allegations of alcohol abuse were exchanged as were mutual allegations of violent behaviour.

3. Mr. L gave evidence that in 2004 Mrs. L sought permission from him to move to Australia with P, which he refused. He says that after this, Mrs. L made it impossible for him to see his son as allegations of sex abuse against his son were made. Mr. L says that while he did consult his solicitor on the matter he was advised that the allegation would make matters difficult. He chose not to enforce his contact order through the courts because he had no faith that Mrs. L would comply with any court order and the ordeal would be unfair on P, as well as the fact that the process would be financially draining for him. Since 2004, Mr. L says he has followed developments regarding his son through occasional glimpses, meetings with the child's General Practitioner, the child's schools, Mr. L's legal representative, social services and other relevant authorities.

4. The police investigated the sexual abuse allegation but no further action was taken.

Mr. L emphatically denies the allegation.

5. Mrs. L says that her ex-husband never paid maintenance for P until late 2010 after the involvement of Wiltshire social services. She says that Mr. L has not made any present or contribution in respect of his son since 2004. Mr. L's version of events is that all cards and letters are returned, family presents are put unopened in the bin. Since he became unemployed in 2009, this maintenance payment has taken the form of a modest deduction from his unemployment benefit.

6. Mrs. L removed P from school in February 2008 because she says she wanted to protect him from bullying by home schooling him. She also says that P was not being educated properly in formal education and that one particular member of the school's teaching staff was shouting at him. The home schooling became non-existent in the last 18 months before she left for this jurisdiction because - according to Mrs. L - Wiltshire social services made "inordinate" demands on her which involved non-stop harassment. Mrs. L says that as a result of this harassment, P was too upset to learn and she had no time to teach as every single day she had to attend appointments which were set up for her to see social workers, doctors, nutritionists, etc.

7. The files from Wiltshire social services indicate a heightened level of concern for P's emotional welfare, in particular for his faltered education, his physical lack of development and his social isolation. P was placed on the Child Protection Register. Mrs. L's cooperation was conditional and uncommitted. P was not in the educational system at home or in school. Matters came to a head when a pre-proceedings meeting was arranged by social services for the 11th February 2011, the purpose of which was to determine

whether an application for a child assessment order should proceed in respect of P. Mrs. L failed to attend this meeting on the 11th February, and it would seem that some three days earlier she had taken P to Ireland without notifying Mr. Lor seeking his consent, and without notifying any of the relevant authorities. The child was reported missing and British police began investigating his whereabouts. The mother and child were eventually tracked to Dublin and the mother made herself known to Gardaí on the 28th February 2011. As far as can be ascertained, Mrs. L was unemployed in Wiltshire and remains unemployed in this State. She has currently no means and has been living in emergency accommodation provided by the HSE, who have been in contact with Wiltshire social services.

8. Mrs. L is critical of the Wiltshire social services for what she describes as the "intimidating nature" of their investigations. She says that the "aggressive" conduct of Wiltshire social services caused serious anxiety to P, culminating in what she describes as "a full breakdown". The fear that he may be taken into care was too much for him to bear. Her decision to flee to Ireland with P was not, she says, motivated by a desire to avoid the investigation underway but rather to alleviate the stress on P and to "give him his life back". She says that social services are determined to take her child away from her and that P would inevitably be put into foster care should they return to England.

9. Since coming to Ireland the mother and child have been engaging with the HSE to a reasonable extent. P has been enrolled at a school in Ballymun, where he is due to commence in August/September 2011. Mrs. L declined the school principal's advice to have P enrolled in primary school in April 2011. The HSE provided 9 hours of home tuition to P during the month of May and his tutor reported him to be coping well with first year primary school work which he found challenging. P has also been involved in some education activities as part of a local youth organisation, although his attendance has been poor. The mother attributes this to her inability to pay the bus fare and because he has to accompany her to meetings with her solicitors. Mrs. L maintains that P strongly objects to returning to England and that he is happier and more relaxed since coming to Ireland and that she intends to stay here.

10. Mr. L contends that Mrs. L has no intention of remaining in Ireland and that she is committed to relocating with P to Australia, where she has a sister and a relationship with a man who she knows through the internet and who appears to act as a benefactor to her at times.

### **Reports Furnished to the Court**

11. A number of reports were exhibited to the Court. These included reports by medical and mental health professionals as well as a number of reports compiled by various officials from Wiltshire Council and the Wiltshire Local Safeguarding Children Board, the first of which dates back to March 2010. Amongst the concerns raised in these reports were the following:

- P is underweight and small for his age (in March 2010 he was recorded as weighing just 29 Kg and measuring 134.7 cm in height) although it is difficult to determine definitively whether this is due to him not getting enough nourishment or a genetically inherited small frame. There was concern from Mrs. L's family for her mental wellbeing and the impact of her mental state on P.
- P is isolated in the family home with his mother very controlling and P is not socialising to an appropriate extent.
- The family home has been neglected at times.
- Mrs. L is in financial difficulties and experiencing high levels of debt.
- Mrs. L is not cooperating properly with social services and other relevant authorities, missing appointments (including with doctors and mental health professionals) and restricting access to P.
- Although P's home schooling was initially deemed acceptable, it was later referred to as inadequate and lacking in structure or for many and various reasons was unavailable for audit. Reference is made to unannounced visits by officials where Mrs. L and P were found wearing dressing gowns. As a result of these concerns, Mrs. L was served with a school attendance order.
- Reference is also made to an incident where Mrs. L is said to have told her family that P had died following complications from swine flu (Mrs. L strongly denied this in her evidence to the Court).
- One social worker's report from October 2010 describes Mrs. L as possessing a "distorted view of reality that has manifested itself in the form of paranoia towards professionals which has severely impacted on [the social worker's] ability to build a relationship with her or [P]."

12. In a report dated the 1st September 2010 by consultant child and adolescent psychiatrist Dr. Cornel van der Merwe, P was described as presenting as someone who "definitely didn't look depressed", who was "quite an articulate young person" and seemed to be "wise beyond his years". According to Dr. van der Merwe, P "did not look anxious at all", was "very vague" about the sexual abuse allegations against his father and "didn't look disturbed by it at all." P complained to him that he and his mother were being harassed by social services. He said he did not want to see his father and wanted his father to permit him to get a passport so that he could move to Australia with his mother. As regards P's relationship with his mother, Dr. van der Werwe said it "seemed to be natural, although probably too much like a friendship rather than a parent-child relationship."

13. By order of this Court (Finlay Geoghegan J.), an independent assessment of P was carried out by Ms. Anne O'Connell, a consultant clinical psychologist. Ms. O'Connell elicited a number of views from the child. P told her that after the stresses of the past few years he is now starting to relax in his new environment. He spoke tearfully of his low mood in 2010, when he felt suicidal and depressed due to the stresses on him and his mother. He said he does not wish to return to England or to see his father; he feels that he would be happy in Dublin. P's intellectual ability was found to be top of the average age of functioning and he was described as cognitively mature and able to process information regarding his living arrangements. However, on academic tests P fell far short in terms of the skills expected for someone of his age- he has the reading age of a six year old and his spelling is at a similar level.

14. Ms. O'Connell described P as "emotionally immature, due to his restricted social environment and his over-reliance on his mother to provide most sources of support and stimulation for him." The final portion of Ms. O'Connell's report reads as follows:-

"At the same time [P] is adamant that his views are his and not those of his mother. His experience of the world is so narrow and specific that he cannot, in my view, be said to have an informed choice regarding his future living conditions. (Emphasis added)

He is fearful of the future and clinging to the security with which he is familiar, *i.e.* his mother. He is happy with his mother, and his negative feelings for his father are so strong that it may well be too late to salvage this relationship. He is afraid of the power of social services in his life, and is stressed at the recent changes in his life, which he considers them to have caused, although now he is starting to experience a calmer period.

P is a vulnerable child, from a broken home, who has had a very close bond with his mother throughout his life. He is physically small and frail and has reportedly been picked on in many situations, leaving him still more reliant on his mother. He urgently needs psychological support to engage appropriately with the educational system, to detach to a normative extent from his mother at this crucial period of puberty, and to address his extremely negative feelings about his father. In light of the unhappy history with UK social services, it will be difficult for them to offer a service which P will be able to engage with. At this stage he speaks more positively of the Irish social workers and other personnel he has met since February."

15. On the direction of this Court, an affidavit was sworn by a social worker employed by the HSE and assigned to P's case here in Ireland. Concerns were raised by the social worker regarding the extent to which P was being exposed by his mother to matters relating to these proceedings and the anxiety this was causing him. Another concern was that in the event that Mrs. Land P remain in Ireland they will be homeless and Mrs. L will not be entitled to any social welfare payments because she does not meet the habitual residency requirement for same (she is presently entirely reliant on emergency financial assistance provided by the State). In the result, steps would have to be taken to have P put into HSE care on the grounds that he lacks basic resources. The social worker avers that since coming to the attention of the Irish services, Mrs. L has continually presented as chaotic and stressed, which in turn has a similar effect on P. She has shown little or no initiative in terms of securing schooling for P or engaging with the medical centre. She asserts that P is bullied and uses this to justify withdrawing from schemes drawn up to assist P to integrate. P is described as presenting as socially isolated.

### **The Law**

16. By virtue of s. 6 of the Child Abduction and Enforcement of Custody Orders Act 1991 the Hague Convention has the force of law in the State and the Court must take judicial notice of it. The provisions of the Hague Convention have to be read and applied in conjunction with Council Regulation 2201/2003 of the 27th November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, commonly referred to as the Brussels II Regulation.

17. Article 1 of the Hague Convention sets out the objects of the Convention as follows:-

"(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."

Article 2 requires contracting states to take all appropriate measures to secure within their territories the implementation of the objects of the Convention as set out in Article 1. Article 3 provides as follows:-

"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 12 concerns orders for return:-

"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child."

Of central relevance to this case is Article 13, which provides for what are sometimes referred to as "defences" to an application for a return order:-

"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, institution or other body which opposes its return establishes that -

(a) the person, institution or other body 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

(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.

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.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

18. It is common case that this case turns on whether the respondent has a "defence" to the application for a return order under Article 12 of the Convention on the basis that: (i) there is a grave risk that the return of the child would expose him to physical or psychological harm or otherwise place the child in an intolerable situation (the burden of proof for which rests with the respondent); and/or (ii) 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 views.

19. As MacMenamin J. observed in *R.T. v. S.M* [2008] I.E.H.C. 212 the test for a grave risk is an extremely high one and there is a high evidential threshold that must be met. In *A.S. v. P.S.* [1998] 21.R. 244, the Supreme Court ordered the return of children to England and Wales notwithstanding an issue that the father had abused one of the children. The court held that although there was a grave risk of danger to the children if returned to the care of their father, there was no such risk in returning them to the jurisdiction of England and Wales, where there are well developed protection mechanisms. Denham J. observed at p. 259:-

"The law on 'grave risk' is based on article 13 of the Hague Convention, as set out earlier in this judgment. It is a rare exception to the requirement under the Convention to return children who have been wrongfully retained in a jurisdiction other than that of their habitual residence. This exception to the requirement to return children to the jurisdiction of their habitual residence should be construed strictly. It is necessary under the Convention that the situation be one of grave risk, an intolerable situation. The Convention is based on the concept that the children's interest is paramount. It is not in the children's best interest to be abducted across state borders. Their interest is best met by the courts of the jurisdiction of their habitual residence determining issues of custody and access."

## Conclusions

20. In the present case the alleged "grave risk" to the child emanates not from the father but rather the Wiltshire social services. There would seem at present to be no question of the child returning to reside with his father upon a return to England, although the father who was present for the hearings does say that he would like to rebuild a relationship with his son with the assistance of social services.

21. Although it does certainly seem that Mrs. L's lack of cooperation with the authorities has been a major hindrance, Wiltshire social services do seem to have dragged their feet in ensuring schooling for P, who has not been attending formal education for over three years now. While there have been many meetings, assessments and reports on P's welfare not one hour of effective home tuition has been provided. The Court is unimpressed at the slow pace of any decisive intervention.

22. Having made those observations, the information furnished to the Court and the evidence heard overwhelmingly leads to the conclusion that the concerns raised by Social Services are well-founded and Mrs. L has made life very difficult for them and indeed for herself. There is no evidence whatsoever to corroborate Mrs. L's allegation of a witch hunt against her or any *mala fides* on the part of the authorities. Even if this Court is correct regarding the slow rate of decisive action on the part of Wiltshire social services, it must be borne in mind that it is ultimately only for a court of law in England to decide what orders if any, which must be made for the child welfare. This Court has the utmost confidence such local court will discharge its functions appropriately. The Court is therefore not satisfied that there is any grave risk to P should he be returned to his former place of habitual residence.

23. As regards P's wishes, it has already been noted that he says he wants to remain in Ireland. However, the Court must consider whether it is appropriate to take his views into account. Because of his young age, his lack of education and social integration and his hot house relationship to his mother and virtual non-relationship with his father, the Court cannot be satisfied that P has attained the necessary level of maturity to know with the appropriate degree of objectivity where his best interests lie.

24. Referring to the relationship between Mrs. Land P, a Core Assessment report by Wiltshire Council from November 2010 states:-

"The parent-child relationship is incredibly controlling, it would appear from my involvement with [P] he has been unable to form relationships other than with his mother. He is under constant scrutiny which prevents him from developing independent thoughts and views and reduces his confidence. In making and taking decisions for him every time, [P] fails to develop the ability to take decisions on his own. Such children lose the sense of what is wrong and what is right for them. Instead of being responsible individuals, they end up looking for someone else who would take all decisions for them."

Having considered all of the testimony, reports and other documents, it seems to the Court that this is an accurate summary of P's maturity at present. While he is clearly a bright boy with plenty of potential, and while he manifests maturity in certain respects, he also comes across as a child whose views are heavily influenced by his almost exclusive relationship with his mother and in his seeking to please her. Accordingly, the Court is not satisfied that P possesses the requisite emotional maturity and capacity for independent thought to express his own views.

25. In making its decision the Court is mindful of the paramount importance of the child's interests. In the case of P, it is in his best interests to return to England with his mother, who must work in cooperation with the authorities as a matter of urgency to ensure that P's basic needs are met, in particular in terms of his education and social exposure.

26. For all of these reasons the Court concludes that the removal of P from the United Kingdom was wrongful within the meaning of the Hague Convention. The Court is not satisfied that there is any grave risk to the child and notwithstanding the child's objections to being returned, the Court is of the opinion that he has not attained a level of maturity such that it would be appropriate to take account of his views.

27. There will be an order pursuant to Article 12 of the Convention directing that the child be returned to his place of habitual residence in England. I will hear counsel on the precise terms of the order and the ancillary undertakings necessary so as to ensure that an adequate care plan is in place for P upon his return to England.

