THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA

Record Number: 2018/413

Edwards J.
Whelan J.
McCarthy J.

IN THE MATTER OF GUARDIANSHIP OF INFANTS ACT 1964 (AS AMENDED)

AND IN THE MATTER OF I., A CHILD

BETWEEN/

S.K.

APPLICANT/RESPONDENT

- AND –

A.L.

RESPONDENT/APPELLANT

JUDGMENT of Ms. Justice Máire Whelan delivered on the 3rd day of July 201

1. This is an appeal against orders made by Mr. Justice McGrath in the High Court on the 27th of July, 2018, and perfected on the 14th of August, 2018, granting liberty to the respondent mother, S.K., ("the mother") to remove the parties' 10 year old daughter I. (referred to as Isobel to protect her identity) from the jurisdiction and relocate to the USA. He refused various reliefs sought pursuant to motion by the appellant father, A.L., ("the father"). The orders are considered hereafter. The father is a litigant in person.

2. The process of establishing harmonised legal principles for the substantive determination of trans-national custody issues has not yet found expression in an international convention or protocol. There are material differences between states in the manner in which courts deal with applications concerning relocation where parents live apart and take differing views regarding the optimum place of residence for a dependent child. In a world where mobility is increasingly necessitated to pursue specialist work or study opportunities, there is a need for clarity in regard to the principles that govern an application for relocation of a child.

Background

3. The circumstances of this application exemplify the welfare issues involved. The parties cohabited and their daughter Isobel was born in England in August, 2008. At all material times they resided within the jurisdiction of the Courts of England and Wales and are British Citizens. The relationship between the parents ended when she was about eighteen months old and thereafter Isobel resided in the primary care of her mother.

4. In December, 2012 when Isobel was four years old, she moved permanently to this jurisdiction with her mother who at that time was relocating here with her fiancé for work purposes. Isobel became habitually resident in Ireland. Subsequently, the mother married her partner in August, 2013. The father, who at all times has resided in England, married and now resides in the south of England with his wife and two children.

English Court Order of April 2013

5. The relevant order of the Courts of England and Wales, which authorised the mother to relocate with Isobel to this jurisdiction, was made on 29th of April, 2013, by District Judge MacGregor. The order was made pursuant to s.8 of the Children Act (England and Wales) 1989 and records on its face that from the 30th of December, 2012, with the father's consent the mother relocated with Isobel to Ireland to reside here on a permanent basis. The order sets out in detail the access and contact provisions between Isobel and her father. The consent orders reflect a high degree of co-operation between the parents at that time in relation to the fine detail of contact. Following her taking up residence in this jurisdiction the mother subsequently married her partner and two daughters were born of the marriage, now aged about 5 and 3 years old.

Departure to the United States

6. The position from the mother's perspective appears to be as follows: From the time she moved to Ireland with Isobel in December, 2012 access under the English court order of 29th April, 2013, had been substantially complied with and worked reasonably well. In early 2017 the mother informed the father that her husband would be working in the US West Coast for six to eight weeks from August, 2017 and that she proposed to move the family to be with him for that duration. His field of expertise appears to be highly specialised with significant work opportunities in the US West Coast. The father exercised summer access in 2017 in accordance with the 2013 English court order. Thereafter, the mother and children, including Isobel, aged 9, travelled to the United States on the 4th of August, 2017. Given the different school terms, Isobel was enrolled in a school in the United States on a temporary basis. The mother's position is that shortly after they travelled to the US, a significantly enhanced work opportunity presented to her husband and the family made a decision to move permanently to the West Coast of the United States to avail of that. In September, 2017 the mother informed the father that she wished to remain with her husband and children, including Isobel, in the US at least until the

summer of 2018 and requested his agreement to modify the access arrangements having regard to the United States school calendar. The father did not agree to this arrangement.

7. The father disputes the mother's version of events and he questions her *bona fides*. He surmises it is more likely that she had formed an intention to permanently reside in the United States before August, 2017. Once it became clear to him that the mother was intending to permanently relocate to the United States, he indicated his disagreement and his insistence that the mother and Isobel reside in Ireland for the purpose of facilitating the exercise of his rights of access pursuant to the English orders of April, 2013.

Child Abduction Proceedings in California

8. In December, 2017 the father sought the assistance of the Irish Central Authority to secure the summary return of Isobel to the jurisdiction of the Courts of Ireland under the Hague Convention on International Child Abduction ("the Hague Convention"). That request was transmitted to the US Central Authority.

Guardianship of Infants proceedings in Dublin

9. The father and mother were unable to reach agreement for the permanent relocation of Isobel with her mother to the jurisdiction of the Courts of California. In February, 2018 the mother instituted the within proceedings by way of special summons pursuant to the provisions of s.11 of the Guardianship of Infants Act 1964 (as amended) seeking an order of the High Court granting her liberty to relocate with Isobel to the United States. The proceedings also sought orders regarding access by the father. The father required that the mother and child would return to Ireland pending the hearing of her special summons application to permanently relocate under the Guardianship of Infants Act.

10. Meanwhile, concurrently the Hague Convention process continued in California for the summary return of Isobel to the jurisdiction of the Courts of Ireland on the grounds that she had been wrongly removed from Ireland in breach of the father's rights of custody. A hearing took place in May, 2018 in the Superior Courts of the State of California seeking a summary return pursuant to the Hague Convention. It appears Isobel, then aged nine, was taken from her school in California by two police officers to the court hearing. That court ordered the return of Isobel to the jurisdiction of the Courts of Ireland. The mother consented to the orders on a without prejudice basis.

11. The mother and Isobel returned to Dublin on the 18th of May, 2018, and remained in this jurisdiction thereafter pending the conclusion for leave of her application to relocate to the USA which was before the High Court on the 27th of July, 2018. During that time Isobel attended for two scheduled periods of one-week holiday access with her father in England.

Motion issued by father

12. Also before the Court for hearing on the 27th July, 2018, was a motion which was issued by the father on the 19th of June, 2018, wherein he sought, *inter alia*, a declaration pursuant to s.34 of the Child Abduction and Enforcement of Custody Orders Act 1991 that the wrongful retention of Isobel in the United States by the mother was unlawful and he also sought an order pursuant to s.11 of the Guardianship of Infants Act 1964 granting him primary custody of Isobel to reside with him in the United Kingdom. The High Court made no order upon the said motion. The father's grounds of appeal appear to include an appeal against the refusal of the said orders.

Evidence before the High Court

13. The affidavit evidence which was before the High Court judge included: -

(i) affidavit sworn by the mother on the 15th of February, 2018;

(ii) affidavit sworn by a solicitor on behalf of the father on the 28th March, 2018;

(iii) affidavit of the mother sworn 11th April, 2018;

(iv) affidavit of a solicitor sworn on behalf of the mother on the 10th May, 2018;

(v) affidavit of a solicitor sworn on behalf of the father on the 28th March, 2018;

(vi) affidavit of the father sworn on the 20th April, 2018;

(vii) further affidavit of the father sworn on the 20th April, 2018;

(viii) supplemental affidavit sworn by the father on the 27th of April, 2018 (which said affidavit includes as an exhibit an affidavit sworn by the mother previously on the 3rd February, 2015 in respect of maintenance proceedings brought before the Circuit Family Court in Dublin seeking child support in respect of Isobel from the father);

(ix) affidavit of the father sworn 30th of May, 2018;

(x) affidavit of the father sworn on the 19th June, 2018;

(xi) a court-ordered report from an expert consultant clinical psychologist.

Decision of the High Court

14. At the conclusion of the hearing of the application which took place throughout the day and was based on affidavit evidence together with the cross-examination of the consultant clinical psychologist Dr. A.B-L, and the arguments and submissions of the parties, in an *ex-tempore* judgment delivered on the 27th of July, 2018, the High Court judge refused the reliefs sought in the father's motion. The Court noted that the father felt somewhat misled by the mother in relation to what her intentions were at the time she initially travelled to the United States in August, 2017. The Court concluded that once Isobel had been returned to this jurisdiction on the 18th of May, 2018, "Any court order in relation to wrongful retention would effectively be moot…", and it did not propose to make any order in respect of the claim of wrongful retention in the United States.

15. The Court noted that the father's motion sought custody of Isobel. The Court observed that the most important factor was the best interests and welfare of Isobel and considered the evidence of the consultant clinical psychologist in concluding that it was in her best interests that she remain in the custody of her mother. The *ex tempore* judgment then proceeded to consider the substantive application of the mother for leave to relocate with Isobel. The Court noted it was disposed in the circumstances to make an order for relocation pursuant to s.11 of the Guardianship of Infants Act 1964 (as amended), granting the mother liberty to relocate Isobel to the United States. The Court observed that the father had a degree of distrust as to what the mother's intentions were in respect of Isobel "going forward".

16. The Court then proceeded to engage with various logistical issues arising in regard to maintaining contact between the father and his daughter. He declined to follow the access recommended by the psychologist and made orders granting greater contact between the father and Isobel, with a direction that the matter should be reviewed after two years. He stated a review was warranted by reason that she was, at the date of the hearing, about ten years old. He also had regard to the concerns and uncertainty articulated by the father in regard to visas and the long-term rights of residency of Isobel in the United States and concluded, "… all of those things, it seems to me can be revisited in two years' time should there be a change in circumstances."

High Court Orders 27 July, 2017

17. The High Court on the 27th of July, 2018 made an order pursuant to s.11 of the Guardianship of Infants Act 1964 (as amended) granting the mother liberty to remove Isobel from this jurisdiction and relocate to the West Coast of the United States. The Court directed that the mother provide to the father reasonable notification of any anticipated change in her residency or work which would change the home address of the said child in the United States. Further detailed orders were made in respect of access including: -

> (i) Summer access between the father and Isobel for two periods of fourteen days each (which include the travelling dates).
>
> (ii) The father and child to have access for one week each Christmas.
>
> (iii) The father to have one-week access during Easter.

The Court noted that the parties were at liberty to agree access visits outside of the designated periods if the father wished to visit Isobel in the United States on giving eight weeks' notification to the mother and the mother to reimburse the father's reasonable flight costs. It was further provided that the order be enforceable for the years 2019 and 2020 and be reviewed after two years.

The appeal

18. The father appeals to this Court under the following grounds: -

> (1) The father contends that since child abduction is an offence in this State pursuant to s.16 of the Non-Fatal Offences Against the Person Act 1997 and that Isobel was wrongfully retained in the United States against his wishes from September, 2017 the mother committed an offence pursuant to s.16. Thus, the decision of the High Court judge that the issue of the offence of child abduction was now moot was "wrong in law".
>
> (2) The father sets out details of additional access he seeks over that provided in the order of the High Court.
>
> (3) He seeks a declaratory order pursuant to s.34 of the Child Abduction and Enforcement of Custody Orders Act 1991 that the retention of Isobel in California was wrongful and in breach of his rights of custody in accordance with the said statutory provision.
>
> (4) He seeks that the orders for contact should mirror as close as may be the orders made in the English proceedings on the 29th of April, 2013.
>
> (5) He raises a wide range of other issues, contending that he did not receive a fair trial, including due to a last minute change of judge and asserts that notwithstanding that there were ten affidavits before the Court in the proceedings that the trial judge "only read the appellant father's final affidavit dated 26th July, 2018". He contends that he is entitled to an order returning Isobel to the jurisdiction of the courts of this State.

Position of the mother

19. It was contended on behalf of the mother that the written submissions and arguments of the father went entirely outside the matters raised in his notice of appeal. It was argued that the orders for relocation and custody made in the High Court were not the subject of this appeal and had they been, this Court would have granted an expedited hearing. It was contended that the arguments of the father that he did not receive a fair trial due to a late change of judge and based on the allegation that "Justice McGrath only read the appellant father's final affidavit…" and other such grounds are not properly the subject matter of appeal and cannot be entertained by this Court now in circumstances where the father failed to comply with the clear procedural directions of this Court and in particular, failed to take up a transcript of the DAR in relation to the hearing of the 27th of July, 2018.

20. The mother contends that the appeal insofar as it is based on s.34 of the Child Abduction and Enforcement of Custody Orders Act 1991 is wholly misconceived.

It was further argued that issues raised in the appeal concerning an alleged offence of child abduction in this jurisdiction was not a matter which could be considered either by the High Court or this Court. It was contended that in the absence of the transcript, the Court cannot consider the evidence of the child psychologist who was cross-examined at great length by the father in the High Court. It was contended that "The father now wishes to re-run the relocation/custody issues and exclude the evidence of the child psychologist with whom he did not agree".

21. It was argued that there was no basis for making a mirror order of the April, 2013 English order. It was never sought by the father in the High Court, nor specifically sought in his notice of appeal and was not a matter properly before this Court.

22. With regard to the issue of costs, it was contended that no valid issue regarding costs arises in circumstances where the father was self-represented at the High Court and in this appeal. The mother had paid for the s.32 report and the attendance of the consultant clinical psychologist at the hearing before the High Court. Insofar as the father had submitted draft orders whereby he

sought to have contact varied, it was contended that almost one year having now elapsed since the orders were made in the High Court, which orders were predicated on there being a full review of access after two years, this Court ought not on appeal consider effecting variations in relation to access, there being no evidence before this Court that it is in her best interests at this time.

Consideration of the issues

i. Alleged unfair hearing

23. At a directions hearing before this Court on the 30th of November, 2018, the father was advised that should he wish to pursue an allegation of an unfair hearing or issues as to the manner in which the motion or the summons were dealt with by the High Court it was necessary for him to take up the DAR transcript of the hearing and identify all matters he was relying upon in support of such a contention. He did not do so. In such circumstances this Court has no copy of the DAR. It appeared that the case before the High Court proceeded on the affidavit evidence apart from the child psychologist who was cross-examined by the father on her report.

24. It is not now open to the father to attempt to pursue any element of his appeal contending that he did not receive a fair trial, whether due to a last minute change of judge or the manner in which affidavits were considered or for any other reason. The directions of this Court were required to be complied with, and in the absence of an independent record of what transpired at the hearing, it is not possible for this Court to reach any determination on that specific issue and accordingly these aspects of the appeal must be treated now in substance as having been abandoned by the father.

ii. Alleged criminal offence

25. The appellant raised at the hearing in the High Court and in this appeal the provisions of the Non-Fatal Offences Against the Person Act of 1997. The said Act provides that: -

> "16-(1) A person to whom this section applies shall be guilty of an offence, who takes, sends or keeps a child under the age of 16 years out of the State or causes a child under that age to be so taken, sent or kept—
>
> (a) in defiance of a court order, or
>
> (b) without the consent of each person who is a parent, or guardian or person to whom custody of the child has been granted by a court unless the consent of a court was obtained."

It appears from the affidavits, exhibits, documentation and papers, including the transcripts of Hague Convention proceedings before the Courts of the State of California, that the mother voluntarily consented to the making of an order directing the return of the minor to the jurisdiction of the Courts of Ireland in circumstances where she was asserting that the father had either consented or otherwise acquiesced in the removal of the Isobel to California. She returned to Ireland with Isobel on 18th May, 2018. Three months previously, she had instituted proceedings before the High Court in Dublin pursuant to the Guardianship of Infants Act 1964 (as amended) seeking liberty to remove and relocate the minor to the United States.

26. The proceedings before the High Court on the 27th of July, 2018, were exclusively brought pursuant to domestic child welfare law. They were civil proceedings. It will be recalled that s. 16(5) of the Non-Fatal Offences Against the Person Act of 1997 provides: -

> "Any proceedings under this section shall not be instituted except by or with the consent of the Director of Public Prosecutions."

It would appear on the basis of the available evidence that no issue pursuant to s.16 of the Non-Fatal Offences Against the Persons Act 1997 was validly – or could properly have been – before the High Court on the said date and it was not open to the High Court to entertain an application that encompassed any determination material to s.16 of the of the Non-Fatal Offences Against the Persons Act 1997.

Issues raised by the father pertaining to the Non-Fatal Offences Against the Persons 1997 Act were not properly before the High Court.

iii. The Hague convention

27. Aspects of this appeal based on comments made by a judge in the State of California appear to be substantially misconceived. The High Court, within the ambit of the proceedings and applications which were before it, did not "have the jurisdiction to answer the case of child abduction" in the manner as is contended for by the father. The Courts of the United States, and in particular the State of California, were the courts seized of the child abduction proceedings and it was a matter for the judge in those proceedings to make such order as was considered fit in all the circumstances.

28. Criminal proceedings alleging child abduction under Irish law, as outlined above, are primarily a matter for the Director of Public Prosecutions. The primary objective of the Hague Convention as set out in Art. 1 is to secure the prompt return of children wrongfully removed to or retained in any contracting State. If, as the father contends, there was a wrongful removal or retention the matter was addressed and the engagement with the Hague Convention was substantially at an end at the point when the summary return of the minor to this jurisdiction occurred on 18th May, 2018. Upon her arrival in this jurisdiction, the prompt return of the child under the Hague Convention had been secured. The mother at that point was in a position to pursue her existing proceedings seeking liberty to remove and relocate the child to the United States which case was pending before the High Court. The mother had consented to return to this jurisdiction on a without prejudice basis. She at no time made an admission that she had wrongfully removed or retained Isobel outside the jurisdiction of the Courts of Ireland.

29. In reaching a determination as to whether or not to make the orders sought pursuant to s.11 of the Guardianship of Infants Act

1964 the High Court judge was governed by domestic law in regard to the best interests and welfare of a minor. Orders in regard to welfare and best interest of a child cannot be made by a court as a reward for good behaviour on the part of a parent.

iv. s.34 of the Child Abduction and Enforcement of Custody Orders Act 1991

30. The father appeals the refusal of the High Court to grant a declaration pursuant to s.34 of the Child Abduction and Enforcement of Custody Orders Act 1991. S.34(1) provides: -

> "Where a court in the State makes a decision relating to the custody of a child who has been removed from the State that court may also, on an application made by any person for the purposes of Article 12 of the Luxembourg Convention, make a declaration that the removal of the child from the State was unlawful if it is satisfied that the applicant has an interest in the matter and that the child has been taken from or sent or kept out of the State without the consent of any of the persons having the right to determine the child's place of residence under the law of the State."

Section 34 of the 1991 Act has no relevance whatsoever to the proceedings. The father never invoked the provisions of the Luxembourg Convention, to which the United States is not a high contracting party. Mindful that the father is a litigant in person, it is noteworthy that Art. 15 of the Hague Convention and s.15 of the Child Abduction and Enforcement of Custody Orders Act 1991 have provisions similar to s.34 regarding cases which are subject to the provisions of the Hague Convention.

31. Article 15 of the Hague Convention provides: -

> "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."

32. However, the provisions of Art. 15 of the Hague Convention and s.15 of the 1991 Act were never engaged in the within proceedings. Art. 15 is availed of in circumstances where uncertainty surrounds the rights of an applicant who seeks to invoke the Hague Convention, for instance, where there is dispute or doubt as to whether the left-behind parent is the holder of rights of custody which are capable of recognition and enforcement under the provisions of the Hague Convention. In such circumstances, the State which is requested to effect the summary return of a child under the Hague Convention is entitled to request a decision from the courts of the child's habitual residence to confirm that the removal or retention (as the case may be) was wrongful within the meaning of Art. 3 of the Hague Convention.

33. In the instant case, the mother at no time disputed that the father was the holder of rights of custody. There was no dispute between the parties in regard to that issue. A separate issue arose between them, namely whether the father had consented and/or acquiesced to the retention of Isobel within the jurisdiction of the Courts of the United States. That point became moot and entirely academic when the mother returned to Ireland with Isobel in May, 2018. Accordingly, the Courts of the United States never required a declaration pursuant to Art. 15. There was no basis upon which such a declaration could be required. The contentions of the father in this regard are misconceived. The arguments advanced before the High Court in regard to same were unstateable. This ground of appeal is unsustainable.

v. Status of English Order – mirror orders

34. The father contends that in the event an order permitting relocation of the minor was granted "albeit without his consent" he believes that the High Court should have enforced the access rights enjoyed by him "as closely as possible to the original residence and contact order agreed in 2013". He argues that the residence and contact order made by the Courts of England and Wales in April, 2013 should be "included in the Order of the Irish Courts".

35. Isobel, the subject of these proceedings, was four when the initial orders were made by the Courts in England. She is now almost eleven years old. The High Court made very detailed orders in July, 2018 in regard to contact in the context of: -

> (a) granting liberty to remove the minor to the United States, West Coast; and
>
> (b) having heard at length evidence from Dr. A.B-L who had furnished a detailed written report to the court.

Access and contact and orders in relation to same are in this jurisdiction always interlocutory in nature and are open to being varied whenever the best interests of a child warrant it in light of changing circumstances, such as where the circumstances of one or other of the parents is altered or the circumstances of the child changes over time. It is less than realistic to expect that the access arrangement which operated heretofore where the parents lived a relatively short distance away from one another could continue unchanged given the significant distance away the minor will live for the foreseeable future. No evidence was put before this Court that would satisfy it of any error in principle on the part of the trial judge in relation to the access orders made.

36. There were significant material changes in circumstances ensuing from the granting of an order to remove the minor and relocate which necessitated modifications to the access provisions of the 2013 English decision. There is no basis identified for the making of "a mirror order". It would be oppressive and unrealistic to do so on the facts as disclosed in the affidavits and report. It is noteworthy that the High Court judge did not adhere to the recommendations of the psychologist but gave more generous access to the father.

The High Court made express reference to the best interests of Isobel in making the access orders. They are bespoke to the changed circumstances of the minor and are welfare- oriented. There is no valid basis to interfere with them identified.

vi. Order granting leave to relocate

37. It is difficult to be definitively certain as to whether, in substance, the father appeals the order of the High Court granting liberty to the mother to relocate with Isobel. In his notice of appeal, he recites that he filed a motion requesting custody of Isobel and sought a ruling that the retention of the minor in the United States was unlawful. The latter aspect has been addressed above. As outlined above, the Court in making the order took into account the expert evidence before the Court and the submissions and arguments advanced by both parents. The Courts' focus was on the best interests of Isobel, and that was reiterated by the trial judge throughout.

The law

38. In an application by a parent seeking liberty to remove a minor who is habitually resident within the jurisdiction of the courts of this State for the purposes of relocation to another state where the other parent or holder of rights of custody does not consent to such relocation, the approach of the court is governed by the provisions of the Constitution, the Guardianship of Infants Act 1964 (as amended) and the jurisprudence governing the best interests of the minor in question.

39. In the instant case it is of relevance that the proposed relocation was to a non-EU State – a so-called "Third State". Significant distance can impact on the frequency and modalities of contact and generally can be a relevant factor in judicial consideration of the minor's best interests in the context of such an application.

40. In any trans-national child relocation case there are a variety of conflicting or competing interests potentially engaged, including the best interests of the child in question, the rights and interests of the parent who proposes to relocate and including their circumstances *vis-à-vis* any spouse, partner or family and the rights and interests of the left-behind parent and his or her spouse, partner or family. Such an application frequently, if not invariably, brings into stark relief the conflicting aims and objectives of the parent who proposes to relocate and who is usually the primary carer of the child with the rights of the left behind parent to maintain a relationship with the minor.

41. Whilst in the English case of *Payne v. Payne* [2001] E.W.C.A. Civ. 166 Thorpe L.J. observed that the refusal to recognise the right to freedom of movement beyond the jurisdictional boundary of a parent's own country is "a stance of disproportionate parochialism" (pg. 487) such an approach does not reflect the law in this jurisdiction where the application falls to be determined in light of the Constitution having due regard to the best interests of the child concerned.

No presumption for or against relocation

42. In this jurisdiction, having regard to the constitutional mandate and the clear provisions of the relevant legislation, including the Children and Family Relationships Act, 2015, Part 4, and the Guardianship of Infants Act 1964 (as amended), in any application to relocate a child there can be no presumption in favour of or against either the applicant parent or the remaining parent. It is purely an exercise in welfare assessment.

Article 42A of the Constitution

43. As is clear from Art. 42A of the Constitution, the best interests of Isobel was required to be the paramount consideration when the High Court determined the application for liberty to remove and relocate. Article 42A.1 provides: -

> "The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights."

44. Article 42A.4.1 provides: -

"Provision shall be made by law that in the resolution of all proceedings –

> (i) ….
>
> (ii) concerning the adoption, guardianship or custody of, or access to, any child,
>
> the best interests of the child shall be the paramount consideration."

Article 42A.4.2 provides that: -

> "Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child."

Relevance of prior child abduction claim to relocation application under Guardianship of Infants Act 1964 (as amended)

45. At the level of principle it must be borne in mind that in circumstances where a wrongful removal or retention of a minor occurs which has resulted in the making of orders pursuant to the Hague Convention for the summary return of a minor to the State of her habitual residence, it remains open to the parent who is the subject matter of such an order of return, whether made on consent or otherwise, to bring an application before the courts of the state of habitual residence of the minor seeking leave to temporarily or permanently remove the child and liberty to relocate to a new jurisdiction.

46. The latter proceedings, such as in the instant case, are brought pursuant to domestic legislation governing child welfare. In determining an application pursuant to the Guardianship of Infants Act 1964 a judge is unfettered by any order, be it interim or otherwise, direction or step taken or as may have occurred in the context of the Hague Convention proceedings.

47. The functions of a judge dealing with any aspect of an application pursuant to the Hague Convention or the Child Abduction and Enforcement of Custody Orders Act 1991 are wholly distinct from the functions of a judge dealing with issues of custody, welfare and the best interests of a minor. In making determinations concerning a minor pursuant to the Guardianship of Infants Act 1964 (as amended), no breach of any principle of comity can arise since the functions of the judge under each regime are wholly distinct and different. The best interests of the minor is the paramount consideration in all determinations of welfare pursuant to the Guardianship of Infants Act 1964 (as amended). However, the best interests of a minor are not paramount pursuant to the Hague Convention since the purpose of that instrument is to achieve restoration of the *status quo ante* leaving all considerations of welfare and best interests to the courts of the habitual residence of the minor in question.

Relevance of parent's conduct

48. It is noteworthy that in making a determination on an application pursuant to the Guardianship of Infants Act, 1964 (as amended), the trial judge is expressly limited in considering the conduct of either parent. S.31(4) provides: -

> "For the purposes of this section, a parent's conduct may be considered to the extent that it is relevant to the child's welfare and best interests only."

Part V of Guardianship of Infants Act 1964

49. In light of the constitutional provisions, the Children and Family Relationships Act 2015, section 63, inserted Part V into the Guardianship of Infants Act 1964.

50. Section 3 of the Guardianship of Infants Act 1964 (as amended) now provides: -

> "(1) Where, in any proceedings before any court, the—
>
> (a) guardianship, custody or upbringing of, or access to, a child, or
>
> (b) ….
>
> is in question, the court, in deciding that question, shall regard the best interests of the child as the paramount consideration.
>
> (2) In proceedings to which subsection (1) applies, the court shall determine the best interests of the child concerned in accordance with Part V."

51. Part V of the Act in particular includes s.31 which is of relevance in the instant case and which informed the determination of the trial judge as the applicable law governing the application of the mother seeking liberty to remove and relocate. It provides as follows: -

> "(1) In determining for the purposes of this Act what is in the best interests of a child, the court shall have regard to all of the factors or circumstances that it regards as relevant to the child concerned and his or her family.
>
> (2) The factors and circumstances referred to in subsection (1) include: -
>
> (a) the benefit to the child of having a meaningful relationship with each of his or her parents and with the other relatives and persons who are involved in the child's upbringing and, except where such contact is not in the child's best interests, of having sufficient contact with them to maintain such relationships;
>
> (b) the views of the child concerned that are ascertainable (whether in accordance with section 32 or otherwise);
>
> (c) the physical, psychological and emotional needs of the child concerned, taking into consideration the child's age and stage of development and the likely effect on him or her of any change of circumstances;
>
> (d) the history of the child's upbringing and care, including the nature of the relationship between the child and each of his or her parents and the other relatives and persons referred to in paragraph (a), and the desirability of preserving and strengthening such relationships;
>
> (e) the child's religious, spiritual, cultural and linguistic upbringing and needs;
>
> (f) the child's social, intellectual and educational upbringing and needs;
>
> (g) the child's age and any special characteristics;
>
> (h) any harm which the child has suffered or is at risk of suffering, including harm as a result of household violence, and the protection of the child's safety and psychological well-being;
>
> (i) where applicable, proposals made for the child's custody, care, development and upbringing and for access to and contact with the child, having regard to the desirability of the parents or guardians of the child agreeing to such proposals and co-operating with each other in relation to them;
>
> (j) the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and his or her relatives;
>
> (k) the capacity of each person in respect of whom an application is made under this Act—
>
> (i) to care for and meet the needs of the child,
>
> (ii) to communicate and co-operate on issues relating to the child, and
>
> (iii) to exercise the relevant powers, responsibilities and entitlements to which the application relates."

52. The objectives underpinning the legislative approach is to direct the focus of the enquiry away from recriminations, blame or fault finding with regard to the past conduct of either parent unless it is "relevant to the child's welfare and best interests only" (s.31(4)). Thus, for instance, it was not open to the trial judge to engage with speculation and surmise advanced by the father as to whether conduct of the mother in deciding to remain in the United States, in pursuance of enhanced economic security or arising from the advantageous opportunity available to her husband was premeditated or merely reflected short-term intentions which may have subsequently metamorphosed into more long-term prospects. There was no evidence adduced that any conduct on the part of the mother was adverse to Isobel's welfare and best interests and accordingly the trial judge correctly disregarded such allegations as he

was obliged to do.

Ascertainable views of minor

53. In an application of this nature it is imperative that the views of the child are considered and taken into account as they clearly were. The s.32 report records two interviews with Isobel and details of same are set forth. The author of the report was cross-examined at length by the father at the hearing.

54. The constitutional mandate to obtain the ascertainable views of the child was met in my view on the facts of this case. It is clear from s.31(6) of the Guardianship of Infants Act 1964 (as amended) that: -

> "In obtaining the ascertainable views of a child for the purposes of subsection (2)(b), the court—
>
> (a) shall facilitate the free expression by the child of those views and, in particular, shall endeavour to ensure that any views so expressed by the child are not expressed as a result of undue influence, and
>
> (b) may make an order under section 32."

In the instant case an order pursuant to s.32 was made. Therefore, the consultant clinical psychologist was a witness of the courts and not a witness for either party.

55. In carrying out a Best Interests Assessment in the context of a proposed relocation particular factors may be of relevance including: -

> (a) The minor's emotional and/psychological dependency upon the primary carer.
>
> (b) The relationship between the child and the remaining parent.
>
> (c) The relationship between the child and his or her extended family, including siblings, step-siblings, step-parents and grandparents and the extent to which the dynamics of those relationships that operate positively and beneficially for the minor may be affected by the relocation, and considerations as to how such changes might be ameliorated or addressed.
>
> (d) The reasonableness of the proposed relocation and, so far as relevant, the motivation of the parent who proposes to relocate which is required to be objectively assessed.
>
> (e) The practical consequences of a refusal of the application for all of the directly concerned parties and in particular the minor, the directly concerned parents or guardians.

Balancing the rights of the parties

56. Parents in relocation proceedings may invoke rights, including freedom of movement under the EU treaties and Protocol 4, Art. 2 of the European Convention on Human Rights which provides, "Everyone shall be free to leave any country, including his own." In the case of a remaining parent, Art. 8 ECHR rights to family relations may also be invoked.

However, the paramount consideration in an application seeking leave to relocate must always be the best interests of the child. The High Court correctly applied the relevant legal principles to the facts and made his decision based on the best interests of Isobel.

Access

57. In evaluating the right of a parent to access, it is to be borne in mind that not alone is access a right of the parent, particularly a non-custodial parent, it is also a right of the child and is, in the absence of evidence to the contrary, presumed to be in the best interests of the child that they maintain a constructive relationship with the non-relocating parent. Care must be taken, accordingly, to structure contact arrangements so as to preserve and vindicate the child's relationship with the non-relocating parent so as to minimise disruption to same and ensure so far as practicable that the relationship is maintained in such a manner as operates in the best interests of the minor.

Washington Declaration

58. Whilst no international convention or protocol at this time governs international family relocation, in March, 2010 following a conference considering issues arising in the context of international family relocation, the Washington Declaration on International Family Relocation was published with the support of the Hague Conference on Private International Law International Centre for Missing and Exploited Children.

The said declaration provides, *inter alia*: -

> "Factors Relevant to Decisions on International Relocation
>
> ……..
>
> 3. In all applications concerning international relocation the best interests of the child should be the paramount (primary) consideration. Therefore, determinations should be made without any presumptions for or against relocation.
>
> 4. In order to identify more clearly cases in which relocation should be granted or refused, and to promote a more uniform approach internationally, the exercise of judicial discretion should be guided in particular, but not exclusively, by the following factors listed in no order of priority. The weight to be given to any one factor will vary from case to case: -
>
> i) the right of the child separated from one parent to maintain personal relations and direct contact with both parents on a regular basis in a manner consistent with the child's development, except if the contact is contrary to the child's best interest;
>
> ii) the views of the child having regard to the child's age and maturity;

iii) the parties' proposals for the practical arrangements for relocation, including accommodation, schooling and employment;

iv) where relevant to the determination of the outcome, the reasons for seeking or opposing the relocation;

v) any history of family violence or abuse, whether physical or psychological;

vi) the history of the family and particularly the continuity and quality of past and current care and contact arrangements;

vii) pre-existing custody and access determinations;

viii) the impact of grant or refusal on the child, in the context of his or her extended family, education and social life, and on the parties;

ix) the nature of the inter-parental relationship and the commitment of the applicant to support and facilitate the relationship between the child and the respondent after the relocation;

x) whether the parties' proposals for contact after relocation are realistic, having particular regard to the cost to the family and the burden to the child;

xi) the enforceability of contact provisions ordered as a condition of relocation in the State of destination;

xii) issues of mobility for family members; and

xiii) any other circumstances deemed to be relevant by the judge."

59. The Washington Declaration has no legal effect and can be characterised as "soft law". Neither was Ireland represented at the conference where the declaration was drafted. At most, it is merely representative of international juristic thinking in an area concerning children which is increasingly litigated. It does appear to resonate with the provisions of the Guardianship of Infants Act 1964 (as amended).

UN Convention

60. It will be recalled that pursuant to Art. 3 of the UN Convention on the Rights of the Child the best interests of a child shall be a primary consideration and further, pursuant to Art. 12, the child's views must be considered and taken into account in all matters affecting him or her.

Conclusions

61. The Court makes the following findings: -

(1) The appellant father has not made out any basis for a claim for custody of Isobel nor does it appear that such an application was meaningfully pursued at the hearing in the High Court on the 27th of July, 2018.

(2) The High Court was correct to make no order on the father's motion pursuant to s.34 of the Child Abduction and Enforcement of Custody Orders Act 1991 since no legal basis or justification for such an order was established. The Child Abduction proceedings were litigated to a conclusion before the Courts of the State of California with final orders made in May, 2018. Such an order was neither requested nor necessitated in the context of that litigation. The mother never disputed that the father was the holder of rights of custody. Given the autonomous nature of custody rights for Hague Convention purposes, such a declaration could never be made outside the context of child abduction proceedings. The application was wholly misconceived.

(3) The High Court did pay due attention to the difficulties in regard to contact arising from relocation and had regard to the contents of the report of the court-appointed consultant clinical psychologist and granted more access to the father with his daughter than the expert recommended. Furthermore, the Court appears to have considered issues such as costs and travel arrangements and internet contact given the challenges arising in framing a comprehensive access order.

(4) The within proceedings were brought pursuant to the provisions of the Guardianship of Infants Act, 1964 (as amended). As such, the Court was mandated to have due regard to the best interests of the minor, Isobel, as the paramount consideration. This contrasts significantly with the scheme of the Hague Convention. Hence, the father's complaints that the trial judge did not have regard to the provisions of the Hague Convention are misconceived and erroneous.

(5) It is not appropriate for this Court to make any orders varying the very detailed trans-frontier access and contact provided for in the High Court order. Any such variation would be required to be based on up-to-date relevant evidence demonstrating that the proposed variations are warranted in the best interests of the minor. There is no information before this Court as to the current circumstances and the High Court order was made almost ten months ago. It would be inappropriate for this Court to make any variations in the access provisions.

(6) There is nothing to suggest that the High Court made its determination granting liberty to the mother to remove and relocate Isobel to the USA otherwise than in accordance with the paramount consideration that the said order was in the best interests of the minor pursuant to Art. 42A of the Constitution, and with due regard to the provisions of the Guardianship of Infants Act, 1964 as amended.

(7) The father's motion seeks to impermissibly circumvent s.16(5) of the Non-Fatal Offences Against the Persons Act 1997 and could never have been the subject of valid orders by the High Court judge. This ground of appeal is not maintainable.

(8) Claims that the father did not receive a fair hearing and other complaints advanced regarding the conduct of the hearing are not maintainable for the reasons outlined above.

I would dismiss the above appeal on all grounds, there being no valid grounds identified for interference with the orders of the High Court.