Neutral Citation: [2015] IEHC 181

THE HIGH COURT

FAMILY LAW

Record No. 9804 P

IN THE MATTER OF I.H. (A MINOR) BORN ON THE 27th OCTOBER 2014 AND IN THE MATTER OF THE CHILDCARE ACT, 1991 (AS AMENDED) AND IN THE MATTER OF COUNCIL REGULATION (EC) NO. 2201/2003 OF THE 27th NOVEMBER 2003 CONCERNING JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN MATRIMONIAL MATTERS AND MATTERS OF PARENTAL RESPONSIBILITY AND IN THE MATTER OF THE INHERENT JURISDICTION OF THE HIGH COURT

BETWEEN:

THE CHILD AND FAMILY AGENCY

PLAINTIFF

AND

G. H AND P.H

DEFENDANTS

JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 5th day of March, 2015.

1. The plenary summons herein was issued on the 19th November, 2014.

2. The infant "I.H.", a minor was born to the first named defendant on the 27th October, 2014. The plaintiff's case is that the infant "I.H." has a particular connection with the United Kingdom within the meaning of Article 15(3) of the Council Regulation (EC) No. 2201/2003 of the 27th November, 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility("Brussels II *bis* Regulation"). Further submissions were made that the courts of England and Wales are better placed to hear this matter. In addition, it was submitted that it was in the best interests of the aforesaid infant, that any further proceedings concerning his placing into public care be heard before the courts of England and Wales within the meaning of the Child Care Act 1991 (as amended) and within the meaning of Article 15 the Brussels II *bis* Regulation.

3. The defendants being the natural parents of the infant "I.H." are married. They resided in England until October 2014 when they travelled to Ireland immediately prior to the birth of "I.H.". The infant has an older brother "T.H." who was taken into care in England in July 2012. The first named defendant, the mother of "I.H." herein, has two older children who are not in her care. The first named defendant was deemed by the English local authority, on foot of reports shared with the Child and Family Agency in this jurisdiction, to suffer from an emotionally unstable personality disorder, and the second named defendant was deemed to suffer from a dissocial personality disorder.

4. The defendants travelled to Ireland to avoid the infant "I.H." being taken into care in England, and this was deposed to by the first named defendant in her affidavit and was confirmed to the court by counsel. The first named defendant was aware of the local authority's intention in England, to take "I.H." into care at birth, prior to her departure from the U.K. The first named defendant appears to have travelled to Waterford, Ireland on the 18th October, 2014 and was visited on the 26th October, 2014 by An Garda Siochana, at which point she was transferred to a hospital in Waterford where the infant was born in the early hours of the 27th October, 2014. The position of the plaintiff is that the first named defendant does not have any particular connection with Ireland, and Counsel for the plaintiff referred to para. 14 of the first named defendant's affidavit, where she sets out that she did not deny that her decision to travel to Ireland was influenced by her wish to avoid the involuntary adoption of her then unborn child. The first named defendant asserted her connection with Ireland as based on her naming a couple whom she describes as friends and indicated that her husband, the second named defendant, worked for an Irish person some years ago. The first named defendant asserted that her benefits in the U.K had stopped as a result of her being reported missing, and indicated that her husband had returned to the U.K after the birth of their infant "I.H.", where he sold their possessions and surrendered her tenancy. He remained there from the 30th October to the 11th December, 2014 in order to collect welfare payments and sell the couple's possessions.

5. Since her arrival in Ireland, the first named defendant insists that she is on a waiting list for family counselling services and has made contact with a G.P for the purposes of linking in with the local psychiatric services in Ireland. She averred further that she has obtained a P.P.S. number, and will be applying for job seekers benefit. She also asserts that herself and her husband are now residing in a rented flat in Waterford, but the basis of this tenancy is not set out.

6. While the first named defendant in her affidavit submits that a relatively limited quantity of documentary and oral evidence will be required regarding any care hearing concerning "I.H.", she also avers that she has limited contact with social services in Tameside, England.

7. On full consideration of all of the evidence and submissions in this case, it is clear that the plaintiff sets out its understanding that the English authorities and medical and healthcare professionals have had extensive involvement with "I.H's" family, across multidisciplinary headings, and involving numerous different services. The first named defendant avers in her own affidavit that she has been engaged with care authorities in the U.K since a young age which covered three different U.K local areas there including Cheshire Children's Services, Northumberland County Council and Tameside Metropolitan Borough Council.

8. It is clear that Article 15(1) of Brussels II *bis* provides that by way of an exception to the general rule, jurisdiction derives from habitual residence:

> "1. By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed

to hear the case, or a specific part thereof, and where this is in the best interests of the child:

a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or

b) request a court of another member state to assume jurisdiction in accordance with paragraph 5."

9. This court follows the consideration of Article 15 in the Supreme Court in *HSE v. MW & GL* [2013] IESC 38, [2013] 2 ILRM 225. The plaintiffs in this case say that the question of whether or not the infant herein has "a particular connection" with the relevant other member state is a question of fact. Moreover, the Court also has to evaluate, in the light of all the circumstances of the particular case, whether the court of that other member state "would be better placed to hear the case or a specific part thereof". In addition, the Court must determine if a transfer to the other Court "is in the best interests of the child", which again involves, in the evaluation undertaken, in the light of all the circumstances of the particular child. In this case, the plaintiffs hold that there is a particular connection established through the fact of the infant's nationality, pursuant to Article 15(3)(c). In the alternative, the plaintiff's assert that the defendants' habitual residence remains in the United Kingdom on the grounds that the manner of their departure from the United Kingdom, and their declared purpose in moving to Ireland coupled with their tenuous connection with this jurisdiction, requires that their habitual residence cannot have shifted from Ireland to the United Kingdom.

10. On the question of the nationality of the child, the first named defendant was born on the 17th January, 1985 in the Macclesfield area of Greater Manchester. Her husband was also born in Manchester.

11. Reference is made to *HSE v. MW & GL* [2013] IESC 38, [2013] 2I.L.R.M 225, where a British mother presented at an Irish hospital heavily pregnant and had subsequently delivered the child. In that case, the conclusion of the Irish court was that under English law, a child born in Ireland, as this child is, (to a mother who is a British citizen otherwise than by descent) is automatically a British citizen. This does not take away from the fact that such a child may also be entitled to Irish citizenship. Therefore the particular connection "is clearly established" as being sufficient for the purpose of Article 15(3)(c) of the Regulation. The above case was appealed to the Supreme Court where the mother argued that the court below had not given sufficient weight to the fact that the minor was also entitled to Irish citizenship in deciding that the test of a particular connection had been satisfied. McMenamin J. noted in his judgment that the child acquired British citizenship automatically by operation of British law and that accordingly, Article 15 was engaged, notwithstanding that the minor was also entitled to Irish citizenship. The plaintiff submits that "I.H." in these proceedings was born in exactly the same circumstances as in the above case, and that in those circumstances the requirement under Article 15 (3)(c) is met.

12. It is quite clear in relation to the "better placed court test" that the first named defendant has a very extensive history with UK social services and medical professionals, as seen in the extensive volume of documents exhibited in this case. The first named defendant disputes the contents of several of social services reports and assessments, and claims that another report, which is not in the custody of the plaintiff, is relevant. As such documentary evidence is dispute, it is necessary that the current proceedings be transferred to England where the evidence can be tested, witnesses compelled and decisions made.

13. As recently as the 15th May, 2013, a "children's permanence report" was prepared by Northumberland County Council in relation to the older brother of "I.H." the infant herein with whom he shares both parents. A prior care application was made in respect of this older child, and it is therefore the conclusion of this court that the courts of England and Wales are better placed than those in this jurisdiction to determine I.H.'s future care status, and to adjudicate on what it appears will be the substantial factual disputes that will arise in the course of these proceedings.

14. It is quite clear from the authorities open to this court, that the best interest test contained in Article 15 is not a substantive welfare question, but rather a question of appropriate forum. This is quite clear from the judgment of McMenamin J. in *HSE v. MW & GL* [2013] IESC 38, [2013] 2I.L.R.M 225. This court finds therefore, that it is in this infant's best interests that his eventual care status be determined in the jurisdiction, which has a long and multidisciplinary history of engagement with the defendants herein. This court finds therefore that the "best interest test" and the "court best placed test" is overlapping in this jurisdiction, and accepts the submissions made on behalf of the plaintiff that it is overwhelmingly in the best interests of the infant that his care proceedings be conducted in England.

15. This infant has a particular connection with the United Kingdom. Thus, the courts of England and Wales are better placed to hear his application, and it is in his best interests to have the question of his care status determined there.

16. This Court notes that both defendants have indicated, through their counsel, that they do not intend returning to the jurisdiction of England and Wales, regardless of the outcome of this case. Notwithstanding the very comprehensive submissions of both counsel representing each of the defendants respectively in this case, this Court rejects their submissions. In particular, the argument that reliance was made on previous reports rather than on an in depth examination of "I.H.", vis-à-vis his parents, is rejected by this Court. The argument was made that the parents had entered and resided in this country lawfully. The submission was that it was possible under Article 15 for the Court to exercise its discretion as to whether it is in the best interests of the child to transfer that child back to the Courts of England and Wales. The submission was made that the local authority in England had not obtained a care order at the point at which the parents left the country and that it was not the same as one parent leaving a country to come to Ireland without the consent of a holder of parental responsibility as in a child abduction case. This was countered by submissions made on behalf of the plaintiff, that habitual residence was entirely irrelevant for the issue and that the infant "I.H." is a British national and citizen. Counsel stressed that one could not ignore the motivation behind the defendants moving to Ireland. It was stressed on behalf of the defendants that they had co-operated with Waterford Social Services, and a number of indicators of this co-operation were pointed out. It was further pointed out that certain assessments had been ordered by the District Court in this jurisdiction.

17. On the issue of the habitual residence of the child, it was submitted that this child had never resided anywhere else. This argument was countered on behalf of the plaintiff who argued that the basis of habitual residence was entirely irrelevant for this issue.

18. This Court accepts the submission of the plaintiff that the Supreme Court decision of *HSE v. M.W & G.L* [2013] IESC 38, [2013] 2I.L.R.M 225 and the Court of Appeal of England and Wales in *In Re T* [2014] Fam. 130 (at para. 26) both ruled explicitly that Baroness Hale's remarks in *Re I (A Child)* [2009] UKSC 10 in respect of Article 12 applied equally to the question of the "best interest test" contained in Article 15(at para 36):

"The final requirement in article 12(3) is that the jurisdiction of the English courts should be in the best interests of the

> child. Nothing turns, in my view, on the difference between 'the best interests of the child' in article 12(3) , 'the superior interests of the child' in article 12(1) and 'the child's interest' in article 12(4) . They must mean the same thing, which is that it is in the child's interests for the case to be determined in the courts of this country rather than elsewhere. This question is quite different from the substantive question in the proceedings, which is 'what outcome to these proceedings will be in the best interests of the child?' It will not depend upon a profound investigation of the child's situation and upbringing but upon the sort of considerations which come into play when deciding upon the most appropriate forum. The fact that the parties have submitted to the jurisdiction and are both habitually resident within it is clearly relevant though by no means the only factor."

19. This Court concludes that the infant "I.H." has a particular connection with the U.K, and in turn, the Courts of England and Wales are better placed to hear this application. Thus, it is in the "I.H.'s" best interest to have the question of his care status determined in that jurisdiction.

20. Therefore, this Court holds that the three "cardinal" questions posed by Article 15 may all be answered in the affirmative in this matter. This Court therefore grants the order sought in the notice of motion herein.

21. This Court holds that the plaintiff is entitled to the relief sought, and will hear submissions in relation to the form of the order required.