Neutral Citation: [2014] IEHC 510

THE HIGH COURT

FAMILY LAW

[2014 No. 12 HLC]

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT 1991 AND IN THE MATTER OF THE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (THE HAGUE CONVENTION) AND IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964 AND IN THE MATTER OF A.M. (A MINOR), B.M. (A MINOR) AND C.M. (A MINOR)

BETWEEN

D.F.

APPLICANT

AND

E.M.

RESPONDENT

JUDGMENT of Ms. Justice Marie Baker delivered on the 9th day of September, 2014

1. The applicant is the mother and the respondent the father of the three minor children named in the title to these proceedings, two girls, B., now aged 13, C, now aged 9, and a boy, A., now aged 15 years. For convenience, I will refer to the parties as the Mother and Father, respectively. I do so, in particular, because the parties have commenced proceedings in the United States of America in State of Rhode Island and Providence Plantations, and they are variously described as plaintiff or defendant, and applicant or respondent in those and these proceedings.

2. The Mother is a nurse and was born in Ireland. The Father is a doctor and was born in the USA, where he now resides. The Mother and Father married in Ireland on 15th August, 1996. Their two eldest children were born in the State of Connecticut in the USA. C., the youngest daughter, was born in China and was formally adopted by the Mother and Father in 2006, when she was a year and a half old. At the time of the hearing before me, the two younger children are living with the Mother in Ireland, and the son, A., is with the Father in Connecticut. All of the children are attending school; the two girls attend school in Ireland and A has commenced school in Connecticut, albeit that this may be a temporary measure.

3. The Mother and Father took up residence in the USA for the purposes of the employment of the Father as a consultant gastroenterologist. Unhappy differences arose between the Mother and Father while they were resident in the USA and they were granted a decree of divorce on 15th February, 2008 by the Family Court of the State of Rhode Island and Providence Plantations. As a result of the divorce order, certain agreements and provisions were made with regard to the dependent children. The relevant ones are as follows:

> (a) The Mother and Father were granted what was called joint custody of the children and physical placement of the children was to be with the Mother, who was declared to be responsible for choosing the schools, doctors and day-to-day decisions regarding the children.
>
> (b) The Mother and Father were directed to confer with regard to all major decisions of health, education and general welfare.
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> (c) The Father was to be afforded access to school and medical records and teachers' written comments.
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> (d) It was noted in the order that the Father had no visitation rights at the date of the making of the order.

4. On consent and by order of the Court, the children were relocated to Ireland and this occurred after the conditions for such return were met in January 2009. Once this occurred, the Court order provided that the Father have visitation rights in Ireland during Christmas and Easter vacation and visitation rights in Rhode Island for two weeks each summer.

5. It was on the last such summer vacation that the incidents the subject matter of the within proceedings, and the proceedings in being in Rhode Island have been instituted and are ongoing.

The Irish Proceedings

6. The Mother instituted a special summons under Irish domestic legislation and under the Hague Convention, which issued following an order of the Court made on 30th July, 2014, whereby the Mother was given liberty to serve notice of the summons on the Father, the form of the order taking account of the fact that the Father is a citizen of the USA.

7. The special summons pleads for extensive relief, including a declaration that Ireland is the place of habitual residence of the children, and that the Irish Court has jurisdiction in all matters pertaining to their welfare, custody and access. Other relief is sought pursuant to the Hague Convention, in particular, for a declaration that the Father has wrongfully retained the children from the place of their habitual residence, pleading it to be Ireland, and that he has so retained them in the jurisdiction of Rhode Island in the USA.

8. The special summons pleads that jurisdiction arises having regard to the domicile of the children, which it is pleaded is Irish, and their habitual residence, which is pleaded to be Ireland for the purposes of the Hague Convention and Brussels II bis Convention.

9. By order of the High Court made on 30th July, 2014, the special summons was made returnable to 3rd September, 2014, before the judge designated to hear Hague and Luxembourg Convention matters, and on that date, it was adjourned before me for hearing to 4th

September, 2014. On the evening preceding the hearing, the solicitors acting for the Father wrote to the Mother's solicitors, indicating that it was their intention, through counsel, to make an application before the Court to stay any further hearing of the special summons proceedings pending the determination by the Court of Rhode Island and Providence Plantations of the matter adjourned before that Court to Friday 12th or Monday 15th September, 2014. When the matter came on before me, counsel for the Father sought an adjournment of the entire matter and I refused to make an order for an adjournment on the basis that an adjournment would, effectively, stay these proceedings and this might have the indirect effect of achieving the result which the Father sought. Accordingly, I directed that I would hear the motion for a stay, and at that point, counsel for the Father indicated that she was not ready to proceed and wished an opportunity to consider the law on the jurisdictional question for the purposes of arguing the stay application. The matter was then adjourned before me to 9th September, 2014 when I entered upon a hearing of the application for the stay. Legal submissions were directed to be furnished to me and exchanged between the parties, which was duly done on the evening of 8th September, 2014.

10. This judgment is given on the motion of the respondent for a stay of any further hearing in this jurisdiction of the reliefs sought in the special summons, and I have accepted jurisdiction to hear the motion for a stay, notwithstanding that no formal motion paper has been lodged in this Court.

The Proceedings in the Court of Rhode Island and Providence Plantations

11. While the children were on vacation with the Father at the agreed time and place in July 2014, the Father made an emergency *ex parte* application to the Court of Rhode Island, and an order was made on 9th July, 2014, that he be granted custody and placement of the three children pending further order of the Court, and that the three children should remain under his care, custody and control until such further order. The matter was adjourned for hearing to 29th July, 2014.

12. The Mother then brought a cross-motion, also by way of *ex parte* emergency motion, to vacate the order of 9th July, 2014. On 15th August, 2014, the Mother's motion was granted and the *ex parte* order giving custody and placement of the children to the Father was vacated. The Court made it clear that it did not believe that an emergency order was warranted in order to protect the children at that time. Following the making of this order, the Court in the State of Rhode Island engaged with the Child Protection Services in Ireland.

13. In the course of the hearing of the application by the Mother, the parties entered into certain agreements relevant to the matters before me. As part of these agreements, the minor child, C., was directed to be returned to Ireland on 18th July, 2014, and she duly did return to Ireland with her Mother on that date. An agreement was reached that the minor child, B., should have extended summer visitation with her Father until 10th August, 2014, after which she was to be returned to Ireland. B. did not return to Ireland until 21st August, 2014, and this was done following a further Court order. Both C. and B. have now returned to school in Ireland.

14. By agreement, the son, A., was afforded an extended stay with the Father until 12th September, 2014. An order was made that he be enrolled in school in Connecticut, albeit that this order was made on a temporary basis to ensure that A. did not lose out on his schooling.

15. The matter was adjourned to 12th September, 2014 and given specific hearing dates of 12th and 15th September, 2014. The Mother was ordered to appear at the hearing and the Father directed to meet her travelling expenses.

16. I have been furnished with an order dated 18th August, 2014, and with other orders made in the Court of the State of Rhode Island, directing the Mother to inform the Court in Ireland of the adjourned hearing on "pending motions", which indicated that the Court would "consider issues of jurisdiction and forum first". An issue of controversy between the parties is the precise matters that are adjourned for hearing before the Court in Rhode Island on 12th and 15th September, 2014. I have had the benefit of reading the transcript of the hearing before the Hon. Associate Judge Sandra A. Lanni on 18th August 2014. I note, in particular, at p. 41 of the transcript that the Court made it clear that "we are going to address jurisdiction before we address anything else. I am hearing jurisdiction". Later on in the hearing, the Court identified eight factors which the Court regarded as relevant for the purpose of hearing the issue of jurisdiction. It seems to me that what the Court intends hearing on 12th and 15th September, 2014 is the preliminary question of whether the Court in Rhode Island has jurisdiction to hear an application in regard to these children. It is in that context that the application for a stay comes before me. Such an interpretation is consistent with the jurisprudence of this Court and other courts with regard to the purposes and procedures under the Hague Convention. I note that Judge Lanni made express reference to the Hague Convention in the course of the hearing before her on 18th August, 2014.

Matters of Note

17. At the time of the making of the order for divorce, the parties agreed, and this is contained at para. 17 of the judgment of the Court, that jurisdiction should remain within the jurisdiction of the PKPA UCCJEA and that of the Rhode Island Family Court, and should be reviewed by that Court within 30 days of the date of the order. The mutual agreement between the parties that jurisdiction should lie in the Court of Rhode Island, may or may not have been varied, either expressly or by implication between them once the children came to reside in Ireland with their Mother following the performance of the conditions for that return in January 2009. I am not advised of any further order made by the Court of Rhode Island which might affect the question of jurisdiction.

18. The Father made an *ex parte* application on 9th July, 2014. The Mother makes a strong objection to this Court, and this objection is found also in her affidavits before the Court of Rhode Island, that there was no rational basis why the application was made *ex parte* as the Father knew she was in the jurisdiction of the Rhode Island Court at the time of his application. Notwithstanding this, the Mother commenced proceedings to vacate the order made *ex parte*. That matter came on for hearing on 17th July 2014. Both the Mother and the Father fully engaged with the Court in Rhode Island at the two substantive hearings on 17th July, 2014 and 18th August, 2014, and each were represented by counsel and solicitors.

19. Certain agreements with regard to the arrangements for the children were agreed between the parties. At all stages, it seems to me, these agreements were reached pending further order of the Court of Rhode Island, and arguably, pending further order of the Court of Ireland, should this be the appropriate jurisdiction.

20. Application was made before Judge Lanni that she should prevent the Mother from commencing proceedings in Ireland. Judge Lanni, having considered the matter, gave a reasoned refusal for making such an order, taking the view that she had no jurisdiction to prevent the Mother from filing papers in any other jurisdiction. This refusal is consistent with her decision to enter upon a hearing of the issue of jurisdiction on the adjourned dates. Judge Lanni took the precaution of directing the Mother to notify this Court of the adjourned hearing on 12th and 15th September 2014, and this was duly done.

Is this a Hague Convention Matter?

21. Counsel for the Father argues that this application, at present, is not properly characterised as an application under the Hague

Convention as there has been no wrongful removal or retention of any of the dependent children. There is no doubt that the children were brought to the USA by their Mother pursuant to a Court order entered into between the parties at the time of their divorce. No wrongful act occurred at that stage. It is argued by counsel for the Mother that the Father wrongfully retained the children, and that he did so by seeking the order of 9th July, 2014 *ex parte*, and/or by indicating that he would not return the children to Ireland. The Mother sought an order in the Court of Rhode Island setting aside the variation of custody and placement order, and two of the children have now been returned to Ireland following the Court order. There is, at present, no unlawful retention of the children, and insofar as there might have been an unlawful retention of the children, that matter was dealt with by the Court of Rhode Island to the satisfaction of the Mother. With regard to the son, A., the situation is somewhat different, in that he remains in the USA pursuant to the Court order made on consent between the parties. While it might be said that A. has been retained in the USA, there is no sense in which it can be said that he is being unlawfully retained in that jurisdiction by his Father, the continued presence of A. in that jurisdiction being pursuant to Court order made on consent.

22. Accordingly, for the present purposes, it seems to me that the proceedings brought by the Mother are not properly characterised as Hague Convention proceedings. Insofar as the Mother might have had an application under the Hague Convention, she is continuing to prosecute this in the Court of Rhode Island.

23. The Court order made in Rhode Island, granting, what in Ireland would be termed sole custody of the children to the Mother, and giving the Father access, was made following extensive investigation by the relevant Child Protection Services in Rhode Island. The Irish Child Protection Services have communicated directly with the Court in Rhode Island.

24. It is noted that the order of the Court made on 18th August 2014, to a large extent on consent, should not be considered a waiver by either party of any jurisdictional issue raised by them in the course of the hearing.

The Application for a Stay
25. The Irish Court has an inherent jurisdiction to stay proceedings, which is exercised in the interests of justice. This jurisdiction is founded in s. 27(5) of the Judicature (Ireland) Act 1877. It is clear from the legislation that the Court has a discretion whether to stay proceedings. The application to stay proceedings is made on a number of grounds, the relevant one being, in this case, that the doctrine of *forum non-conveniens* applies.

The Present Application
26. The present application before this Court is that I should stay any further hearing of the special summons proceedings in this jurisdiction pending the hearing due to take place on Friday 12th and Monday 15th September, 2014 in the Court of Rhode Island. That hearing is a hearing at which the Court of Rhode Island will determine whether it has jurisdiction to hear the matters before it relating to the custody, access and living arrangements of the children. The Court of Rhode Island may, following the hearing of the application before it, decline jurisdiction. The inevitable result of such a determination by that Court would be that the proceedings commenced in Ireland would proceed to be heard and determined in the present proceedings. Should the Court of Rhode Island accept jurisdiction, the matter does not end there. This Court may, following such a determination and assumption of jurisdiction by the Court of Rhode Island, take a view that it continues to have a discretion and that it is more suitable for the matter to be dealt with in Ireland.

27. The jurisprudence with regard to the stay of proceedings is well established. In *Sim v. Robinow* [1892] 19 R. 665, Lord Kinnear identified the test as:

> *"[T]he Court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice."*

28. It is only if the Court of Rhode Island does accept jurisdiction that the issue will properly arise before this Court as to whether this Court should try the case. It is only at that stage that the Court may be asked to grant a stay on the basis that a more convenient forum has *seisin* of the case and that that forum is competent to determine the matter.

29. The application before me is to stay the Irish proceedings pending the determination of the jurisdictional issue in the Court of Rhode Island. It is not properly characterised as an application to stay the Irish proceedings indefinitely, or pending any hearing or determination of the substantive issues relating to the custody, access and living arrangements for the three children. So characterised, it seems to me that from a practical point of view, this Court ought to stay the Irish proceedings, at least until it is clear whether there is a genuine dispute with regard to the appropriate forum. If the Court of Rhode Island declines jurisdiction, it seems clear that the dispute will be played out in Ireland. It is only if the Rhode Island Court accepts that it has jurisdiction, that there is a genuine or real jurisdictional dispute which will or may come to be heard in Ireland.

30. The correct approach, however, is not merely a practical one. Having regard to the difficult and somewhat uncertain jurisprudence on the question of whether the doctrine of *forum non-conveniens* survives the enactment of the Brussels II *bis*, I consider that the practical answer is also the correct legal answer and I turn now to consider the legal position. This involves me in a consideration of the nature of the jurisdictional dispute in this case.

31. The Father has commenced proceedings in the Court of Rhode Island and the Mother has engaged with those proceedings and has not, as yet, brought a motion to stay those proceedings in Rhode Island. The Mother has brought proceedings in Ireland and the Father has entered, or is about to enter, a conditional appearance to challenge jurisdiction. The Court of Rhode Island has not yet assumed jurisdiction, and there are no circumstances which gave rise to the application of the doctrine of *forum non-conveniens*. There is no extant forum which could be said to be more convenient, and equally, no extant conflict between the courts of two jurisdictions.

32. I invited counsel to address me on the specific question of whether there was an extant jurisdiction in Rhode Island which is now challenged before the Court. Counsel had furnished me with extensive written legal submissions, and having read these before the hearing on 9th September, 2014, I queried whether the case law addressed in the submissions had answered this question which I regard as logically prior.

33. Following a short adjournment, counsel for both parties accepted that the recent decisions in both Ireland and the courts of the United Kingdom, had, in all cases, proceeded on an assumption that there were two competing and established *fora* in which the issues were being litigated, and in all cases, the competing courts had each assumed or accepted jurisdiction.

34. In particular, in the recent Irish case of *O.K. v. A.* [2008] 4 I.R. 801, Sheehan J. did not address the question that I am now asked. The husband had issued proceedings in Florida after he had been served with proceedings issued in this jurisdiction by the

wife. No doubt was raised in the course of the hearing as to whether the Florida Court itself was properly *seised*. Sheehan J. held that the doctrine of *forum non-conveniens* did not survive the implementation of the Brussels II *bis* Convention, and that the Irish courts had exclusive jurisdiction to hear the case. Sheehan J. refused the application by the husband for a stay of the Irish proceedings pending the determination of the substantive matters in Florida.

35. In the case of *J.K.N. v. J.C.N.* [2010] EWHC 843 (Fam.), the English High Court asked the question whether "any proceedings in respect of the marriage in question, or capable of affecting its validity or subsistence, are continuing in another jurisdiction", and referred specifically to the English statutory provisions in that regard. The Court took the view that while there remained issues in that case regarding jurisdiction and procedure in the New York Court where proceedings had been instituted by the husband, they remained valid until a motion to dismiss was made and succeeded. The Court did stay the English proceedings, having come to the decision that the New York Court was the more appropriate forum.

36. In the recent decision of the Court of Appeal of England and Wales in *Mittal v. Mittal* [2013] EWCA Civ. 1255, Lord Justice Lewison took the view that the Court had a power to stay the proceedings commenced by the wife in England, pending the determination of proceedings commenced by the husband in India. What is clear from that case is that there was no dispute that the courts in India had jurisdiction to determine the proceedings instituted by the husband and to make consequential financial orders. It was further not disputed that the courts in India were willing to exercise their jurisdiction and that the orders would be enforced and recognised in England. Lewison L.J. took the view that what he was deciding was the question concerning "a stay in favour of prior competing proceedings in a non-Member State" which he identified as an application of the test of *lis alibi pendens*. It is clear that there was no issue in that case as to whether there were extant and competing proceedings in another jurisdiction.

Conclusion
37. The jurisdictional question is to be decided by the Court in Rhode Island at the end of this week. That Court has set aside Friday 12th September, 2014 and Monday 15th September, 2014 to determine the question. The Court of Rhode Island is first seised. If it declines jurisdiction, the Irish proceedings will progress. If it assumes jurisdiction, the question of a stay of the Irish proceedings, pending a determination of the substantive matter, may come to be made in Ireland, and a consideration of that application will undoubtedly involve the complex questions of law identified by counsel in their submissions, in particular, the question of whether this Court has a jurisdiction to refuse to hear a case in the light of the implementation of Brussels II *bis*. A consideration of that substantive application for a stay must await the answer by the Court of Rhode Island of the jurisdictional question now to be considered by it. That question is logically prior to the hearing of the application to this Court for a stay, whether that application will be made under the inherent jurisdiction of the Court, under Brussels II *bis* or under the Hague Convention.

38. There is at present no interlocutory application before this Court which is now to be stayed. What is sought is that the Mother be precluded from further progressing the proceedings in Ireland.

39. For the reasons above, I make an order staying any further proceedings in the Irish courts pending the determination by the Court of Rhode Island and Providence Plantations of the question of whether it has and will assume jurisdiction to hear the issues relating to the custody, access and living arrangements of these children. Only after that matter has been determined can the Court in Ireland properly know whether there is a genuine and extant dispute between competing jurisdictions. The Court expresses no view as to whether this Court has a jurisdiction to stay the proceedings pending a determination of the substantive case. This application is made in the unusual circumstances where the jurisdictional question has yet to crystallise.

40. In the circumstances, the order I make is limited in time and effect and the parties have liberty to bring a motion for a permanent or indefinite stay, depending on the conclusion of the jurisdictional issue before the Court of Rhode Island.

41. I adjourn the matter for mention accordingly. Each party has liberty to apply for the purposes of further directions, if necessary.