

**THE HIGH COURT**

**FAMILY LAW**

**[2013 No. 35 HLC]**

**IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT 1991 AND IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION**

**IN THE MATTER OF S. J. (A MINOR)**

**BETWEEN**

**A. J.**

**APPLICANT**

**AND**

**L. J.**

**RESPONDENT**

**JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 26th day of February, 2014.**

1. The applicant is the father ("the Father") and the respondent is the mother ("the Mother") of a child, Sue (not her real name) born in the United States of America in July, 1998. The Father, the Mother and Sue are citizens of the U.S. The Father and the Mother married in State A in January, 1992. Sue was born in State B.
2. In October 2012, the Mother brought Sue to Ireland. She states that she did so with the knowledge and consent of the Father and the stay was to be for approximately two years in connection with the Mother's employment. The Father on affidavit now disputes he agreed to a stay in Ireland of that length. The Mother's stated plan is to return to the U.S. with Sue in the summer of 2014.
3. By special summons issued on 16th July, 2013, the Father primarily seeks an order pursuant to Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 ("the Hague Convention"), for the return of Sue to State A in the U.S.A. upon the ground, inter alia, that State A was the place of habitual residence of Sue prior to her coming to Ireland.
4. There are a number of other relevant matters in dispute between the parents. Ultimately, on the affidavits, there is no dispute between the parties as to the primary facts in relation to where and in what circumstances Sue lived since birth and where the parents each lived at relevant times.
5. Sue has also been interviewed for the purposes of these proceedings pursuant to an order of the Court made on 9th October, 2013, by Dr. Colm O'Connor, clinical psychologist, who has reported to the Court on the interview.
6. On 12th February, 2014, the Court directed a modular trial of the issues in the proceedings and that there be determined as the first issue, the issue of whether or not, as contended by the Father, Sue was habitually resident in State A immediately prior to what is alleged in the proceedings to be a wrongful removal on or about 10th October, 2012.
7. Counsel for both parties prepared short outline legal submissions and the matter was heard on the affidavits filed in the proceedings and the oral and written submissions made by counsel.

**The Law**

8. The purpose of the Hague Convention is to ensure the prompt return of children, who have been either wrongfully removed or wrongfully retained, to the State of their habitual residence. As the Father seeks an order for the return of Sue to State A, the onus is on the Father to establish, on the balance of probabilities, that Sue was habitually resident in State A immediately prior to coming to Ireland. In the United States, each individual State is solely competent to decide issues such as custody and access relating to children: Lowe, Everall & Nicholls, *International Movement of Children: Law, Practice and Procedure* 1st Ed. (Bristol, 2004) at page 79. Hence, applications pursuant to the Hague Convention for the return of children to the United States are and must be for their return to a specified State.
9. The Hague Convention is implemented in Ireland by the Child Abduction and Enforcement of Custody Orders Act 1991, which provides in s. 6 that it has the force of law in the State. It is well established that the courts in Ireland will interpret the Hague Convention harmoniously with the interpretation adopted by the courts of other Contracting States: *S. (P.A.) v. S.(A.F.)* [2004] IESC 95 per Fennelly J. In the same judgment, Fennelly J., having referred to this principle, stated also that "it has to be recalled that, by universal accord, the issue of habitual residence is essentially one of fact".
10. It is settled law for many years in this jurisdiction and other jurisdictions, including England and Wales, that the determination of habitual residence for the purposes of the Hague Convention is a matter of fact to be decided on the evidence in the case (*C.M. and O.M. v. Delegacion Provincial de Malaga & Ors.* [1999] 2 I.R. 363 at p. 381). Habitual residence is not a legal concept such as domicile. This was recently expressly stated by Baroness Hale in the U.K. Supreme Court in the matter of *A(Children)(A.P.)* [2013] UKSC 60, [2014] 1 A.C. 1, where, having considered the prior law in relation to habitual residence, at p. 23, para. 54 of the judgment, Baroness Hale sets out a series of principles (not all relevant to this judgment) in the first of which she stated:

"All are agreed that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes the domicile of his parents."

11. Subject to the fundamental principle that habitual residence is a question of fact, the courts in England and this jurisdiction have set out certain principles in relation to the determination of habitual residence, particularly of young children. One such principle is that the habitual residence of young children in the care of parents who are living together is the same as the habitual residence of the parents themselves and neither parent can change it without the express or tacit consent of the other or an order of the Court: per Waite J. in *Re B: (Minors: Abduction)*(No. 2) [1993] 1 F.L.R. 993 at p. 995 and cited with approval in this jurisdiction in *S.(P.A.) v. S. (A.F.)* and *A.S. v. C.S.* [2009] IESC 77, [2010] 1 I.R. 370. However, it is important to emphasise that these are not legal principles, but rather, are, as put recently by Baroness Hale to be regarded as “a helpful generalisation of fact, which will usually but not invariably be true, rather than a proposition of law . . .” see: *Re L (A Child) (Custody: Habitual Residence)* [2013] UKSC 75, [2013] 3 W.L.R. 1597 at p. 1607, para. 21.

12. The caselaw also discloses that the Court’s approach to determining the habitual residence of a child will vary depending upon the age of the child: In *re L.C. (Children)* [2014] UKSC 1, [2014] 2 W.L.R. 124. In the case of all children, where the evidence discloses where a child has been resident in a particular country, the Court must then consider whether that residence has acquired the necessary degree of stability or integration to become habitual. The Court will look at the integration of the child in a social and family environment in the relevant country or State. There is potentially a further relevant matter in relation to adolescent children such as Sue, who is 15, namely, the state of mind of the child. This issue is considered in the judgments given in the matter of L.C. by the U.K. Supreme Court. It is unnecessary on the facts of this application for the Court to consider whether or to what extent the Court should take this into account in deciding upon habitual residence.

### **The Facts**

13. The affidavit evidence discloses the following undisputed facts. The Father and the Mother lived in State A from 1989 to 1996. They married in State A in 1992. Their son was born in State A in 1991.

14. The Father, Mother, Sue and her brother moved to State B in 1996. They subsequently purchased a house there in the name of the Father in which they lived. Sue was born in State B in 1998. She resided with her parents in State B until 2003.

15. In 2003, the Father, the Mother, Sue and the elder brother moved to State C and resided there until 2010. Between June 2008 and December 2008, the Mother worked in Brazil. and the remaining members of the family continued to live in State C. The Mother travelled back and forth for visits during the six-month period.

16. The Father and the Mother and Sue moved to State D in 2010, and continued to reside there until the Mother and Sue came to Ireland in October 2012. From 2010, the Father travelled regularly for periods to Nigeria. and was out of the country in N. when the Mother and Sue came to Ireland. He returned to State D after they left and, thereafter, appears to have gone to live in State A.

17. The moves by the family to State C and State D related to the Mother’s employment.

18. Sue has spent holiday periods in State A. She was baptised in State A during a holiday period with her parents when a year old. In subsequent years, she has spent holiday periods of two to three weeks in State A with members of her extended family including her paternal Grandmother. She has attended summer camp in State A. Save for such holiday periods, she has never resided in State A.

19. Whilst living in State C, Sue attended school in State C and since the move to State D, went to school in State D and engages in extracurricular activities there. She is also registered with a doctor and dentist there.

20. Sue’s elder brother is currently living in State A where he is attending college since September, 2012. That fact is not relevant to the determination of habitual residence of Sue.

### **Conclusion**

21. The only issue before the Court is whether Sue was habitually resident in State A in October 2012. On the undisputed facts set out above, Sue never resided in State A prior to October 2012, save for short holiday periods. She had never resided with her parents in State A in a settled home environment since birth and never went to school in State A, save summer camp. Since birth, Sue resided with her parents in a family unit in State B, State C and State D and attended school in the latter two States.

22. On those facts, applying the principles set out above the Court finds as a fact that Sue was not habitually resident in State A in October, 2012.

23. Whilst the Court has reached its conclusion on the question of the habitual residence of Sue on the undisputed facts set out above, it is appropriate to record that the conclusion is consistent with the state of mind of Sue as disclosed in the report of the interview conducted by Dr. O’Connor if that is a relevant matter for the Court to take into account. It is not a matter which the Court took into account in reaching its conclusion on the facts herein.

### **Finding on Preliminary Issue**

24. The child named in the title to these proceedings was not habitually resident in State A in October, 2012. The summons is listed before the Court for further directions on Wednesday 5th March, 2014. The Court will hear counsel for the parties on that day as to the orders to be made in the proceedings consequent on this determination of the preliminary issue.