THE HIGH COURT

FAMILY LAW

[2023] IEHC 184

[2023 No. 3 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

AND

IN THE MATTER OF ALICE, A MINOR

(CHILD ABDUCTION: CONSENT, ACQUIESCENCE, VIEWS OF THE CHILD)

BETWEEN:

B.E.

APPLICANT

AND

R.E.

RESPONDENT

Judgment of Ms. Justice Mary Rose Gearty delivered on the 17th of April, 2023

1. Introduction

1.1 This is a case in which the teenager concerned was the subject of proceedings in Northern Ireland wherein custody and access were determined by court order. Notwithstanding this, and in circumstances

where the child herself had expressed a wish to move, the Respondent removed his daughter without the written consent of the Applicant.

2. Factual Background

2.1 The parties separated a number of years ago and their daughter, who will be referred to as Alice for the purposes of this judgment, lived with her mum, the Applicant, until her removal from Northern Ireland late last year. Alice has siblings who have special needs. The family home was always in Northern Ireland and there is no issue as to habitual residence or exercise of custody rights at the time of removal. The application was made within a year of the child's removal. The Respondent raises the defence of consent and also relies on the views of the child to argue that, in the circumstances, the child should not be returned to Northern Ireland.

2.2 Access orders were made in Northern Ireland in March of 2020. The Applicant was the primary carer for the children, all resided with her in Northern Ireland and access arrangements were made for the Respondent. This access order was varied in April of 2022.

2.3 In December of 2022 the Respondent removed Alice from her home. She has not returned to live with the Applicant and her siblings in Northern Ireland since then. These proceedings commenced that month and the first court date was in January of 2023. The hearing began with an offer by the Applicant to consent to a stay on the order for return, to permit a relocation application by the Respondent. The Respondent opted to argue that the Court should refuse to return the child.

3. Consent

3.1 In the case of *R v. R* [2006] IESC 7 the Supreme Court set out the principles governing the issue of consent in this context, adopting a test proposed by Hale J. in *re K* [1997] 2 FLR 212:

(i) The onus of proving consent rests on the person asserting it;

(ii) Consent must be proved on the balance of probabilities;

(iii) The evidence in support of consent must be clear and cogent;

(iv) Consent must be real, positive and unequivocal;

(v) There is no need for the consent to be in writing;

(vi) An express statement of consent is not necessary. Consent may be inferred from conduct but this will depend upon the words and actions of the person said to be consenting viewed as a whole and her state of knowledge of what is planned by the other parent.

3.2 The Respondent relies on what he submits was an oral agreement between the parties on the 24th of October 2022, reminding the Court that consent need not be in writing. He supports his argument with an email to the Respondent's solicitor on the 26th of October in which his solicitor refers to the meeting two days earlier and to the alleged consent. The Applicant denies that any such agreement was reached in that meeting and relies upon text communications exhibited.

3.3 The Respondent argues that the Applicant cannot show any written consent because she did not consent. Her submission is that he hears what he wants to hear and, in a case in which there is a legal separation agreement

confirming access arrangements, this is a case in which supporting evidence of consent to a move of habitual residence is necessary.

3.4 The Respondent's solicitor did write an email to the effect that the parties were consenting to the move to Ireland but it is significant that there was no reply to this. There is no evidence that the Applicant ever saw it. As the law requires a positive consent, the fact that this email was not contested is not sufficient to convert it to a positive consent on the part of the Applicant.

3.5 In similar vein, the Respondent relies on submissions made by his lawyers in the proceedings in Northern Ireland. In that case, the parties were litigating their financial arrangements and not childcare issues. However, in the middle of a relatively lengthy document headed '*Position Paper*', which was otherwise concerned with finances, the Respondent's lawyers included a reference to the Applicant mother having consented to the child living in her dad's home in Ireland. The Applicant avers that she did not see this paragraph, that she received the document very shortly before the hearing and had no opportunity to discuss its contents with her lawyers. It is dated the day before the hearing. Again, there is no evidence of her having consented or agreed to the contents of the document and custody does not appear to have been raised during a short, online hearing. The fact that there was a written reference to an oral agreement in legal submissions by one party which was not contested by the other at the time is not sufficient to prove real consent, in the circumstances outlined.

3.6 The Applicant's solicitor wrote directly to the Respondent's solicitor on the 5th, 8th, 9th and 12th of December 2022, making clear that the Applicant was not consenting to the removal of Alice to the Republic of Ireland and requesting her return. The Applicant texted similar objections on the 12th of

December. All these exhibits point to the same conclusion, which is that the Applicant did not consent to this move.

3.7 This conclusion is supported by the situation in respect of the child's school. The application form for the school in Ireland was filled out in early September, before any alleged agreement that Alice would move. The Applicant avers that she rang the school in Ireland requesting information and was told on the phone that the child would not be registered there without the consent of both parents.

3.8 In the report by the independent assessor, Alice is reported as saying that her father did not want to tell the Applicant about the plan for her to move to Ireland until he had a school: "*Me and dad were talking for a while, he said he didn't want to tell school and mum about the move until he was 100% sure he had a school for me. Eventually the school said yeah, so dad talked to mum.*"

3.9 This evidence of secret plans and a September application directly contradicts paragraph 9 of the Respondent's affidavit in which he swears that the parties discussed the proposed move in October, that the Applicant was in complete agreement with him and that he only then started to look for schools. It also casts a different light on the Respondent's averments about bringing the child to counselling in order to help her with issues at home. The single session of counselling took place in mid-September, after he had applied to this school.

3.10 Further, in February of 2023, when the Applicant sought details of correspondence with the school in Ireland and Alice's application form, which request is exhibited, there was no reply to this. It is not clear how the school was persuaded to accept and enrol the child without her mother's written consent. This correspondence is a key proof for the Respondent as, if he is correct, it would show that the Applicant consented to the move. It

is not available to the Court and there is no reason why it could not have been exhibited. This also tends to support the Applicant's case that there was no real consent. The Applicant speculates that he may have forged her signature but there is no evidence of forgery and no reason for the Court to make a decision of fact in that regard. Consent is a matter for the Respondent to prove and there is no written support for his position.

3.11 The text messages exhibited by the Respondent (exhibits 6 and 8) do not prove consent. The Respondent texted on 26th of October that he was waiting to hear from schools and asks if she has discussed "*anything*" with their other children and the Applicant replies that she has not "*spoken to anyone.*" She adds Alice is "*doing very well here at school*", which is not the response of a mother consenting to the child moving to another school. When he asks why she has purchased a pet for the child, the Applicant does not respond at all. Neither message constitutes positive consent to a move. The picture consistently painted is one in which the Respondent acts to pursue his plan that the child will move in with him and interprets failures to respond and equivocal messages as consent.

3.12 The circumstances of this family, including the ongoing court proceedings in Northern Ireland, require either written consent to the removal of one child and her resettlement in another country, a court application in Northern Ireland or at least evidence of some active consent on the part of the mother if the Respondent was to establish that she had verbally consented to the move in the meeting on the 24th of October, as alleged.

3.13 The sole factual evidence in support of the thesis that the Applicant did, at any stage, consent to her daughter leaving home is the understanding of the child herself, as recounted to the assessor. Since this is not evidence of a view held by the Respondent, it was still incumbent on him to obtain

consent from the Applicant before moving the child to Ireland. As there is no text or message to support this view, what the Respondent said to the child could range from wanting her to be happy generally to a specific consent to this move, at this time. There is a big difference between the two ends of this spectrum. All communications from the 5th of December, before Alice's removal, made it clear that there was no consent to removal or, if there had been, that it was withdrawn. As the findings above set out, this Court takes the view that there is insufficient evidence of consent in this case, and this is more likely on the evidence available to the Court than that it was given and then withdrawn.

4. Acquiescence

4.1 The test in this regard, quoted with approval by Denham J. in *R.K. v. J.K. (Child Abduction: Acquiescence)* 2000 2 IR 416, was set out in *re H (Abduction: Acquiescence)* [1998] A.C. 72, by Lord Browne-Wilkinson at p. 90:

> *"To bring these strands together, in my view the applicable principles are as follows. (1) For the purpose of article 13 of the Convention, the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his actual state of mind... (2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent. (3) The trial judge, in reaching his decision on the question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law. (4) There is only one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent*

to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced."

4.2 Acquiescence is a question of fact arising after the removal of a child. This is clear from Article 13 of the Convention, which sets out that:

"*Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –*

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention…" [emphasis added]

4.3 Here, there was a clear lack of consent before removal. It is difficult, in those circumstances, to find evidence to support the Respondent's argument in respect of acquiescence in this regard. The height of this case is that the Applicant did not object in writing until what was described in submissions as the eleventh hour. Given that the alleged agreement was only reached in late October and the move planned over the course of about 7 weeks, to formally object on the 2nd of December, about 6 weeks later, is not at the eleventh hour. More fundamentally, there was no written consent in the previous 6 weeks. The fact that the Respondent continued to make arrangements does not constitute acquiescence on the part of the Applicant and his submission that it is unjust to allow the Applicant to object in the circumstances is not well founded.

4.4 The fact that the child returned home for a visit over Christmas does not establish acquiescence. These proceedings had commenced at that stage

and conduct indicating a clear abandonment of the Applicant's objections would have been necessary at that stage rather than merely allowing the child into her home to visit her siblings.

4.5 The key to proving acquiescence, as set out in *re H*, is establishing that the left behind parent clearly led the other parent to believe that she would not assert her rights. Considering the language of Article 13, this can only arise after removal or retention. There is ample evidence that this parent had not consented and acted swiftly to achieve the return of her daughter. The Applicant points to her having had a conversation with Alice but, even if it amounted to an agreement with her daughter, this is of much less significance than the other circumstances which show her mindset: texts in which she never acknowledges consent, failure to reply to key and clear statements about what has been agreed and, before removal, her specific written objections lest the Respondent has misinterpreted her silence.

4.6 This is the Court's impression of the contemporaneous exhibits. There was no positive consent, there was no clear signal to the Respondent that the Applicant would not assert her custody rights, either before or after the removal. The Court must order a return unless Alice's views require otherwise, when seen in the context of all the Convention objectives.

5. <u>Views of the Child</u>

5.1 The Supreme Court in *M.S. v. A.R.* [2019] IESC 10 held that the issue of the child's objections should be considered in accordance with the three-stage approach identified by Potter P. in the English Court of Appeal in *Re M. (Abduction: Child's Objections)* [2007] EWCA Civ 260. This approach involves ascertaining if a child does in fact object and, if so, what weight should attach to the objection, given the maturity of the child. Finally, if established

and when assessed in that way, the Court considers if an objection is sufficient to outweigh the counter-balancing objectives of the Convention.

5.2 In *A.U. v. T.N.U.* [2011] 3 IR 683, Chief Justice Denham commented that: "*A court, in deciding whether a child objects to his or her return, should have regard to the totality of the evidence."* The weight to be attached to views of a child increases as the child gets older, see for instance *M.S. v. A.R.* [2019] IESC 10, at paragraph 64.

5.3 In considering whether the child's objections are made out, the expression of a mere preference is not sufficient; the word "*objection*" imports strong feelings as opposed to a statement of preference, to use the words of Ms. Justice Whelan in *J.V. v. Q.I.* [2020] IECA 302 (at para. 69).

5.4 Article 13 requires the Court to take account of the views of the child. As has been confirmed many times, this does not vest decision-making power in the child; a child's objection is not the deciding factor as this would place an unfair burden on the child in question.

5.5 Alice has lived all her life in Northern Ireland and was still in her early teens when interviewed by the assessor. She has siblings who have special needs. Living with her family has been difficult, at times, for this young girl. It is only common sense to note that caring for her siblings, naturally, takes up a considerable amount of their mum's time. The Respondent has exercised access rights and has a very good relationship with his daughter. He is financially much better off than the Applicant. He does not have the same responsibilities as the Applicant. His partner has older children who live at their home. One can readily see how residing with him would appeal to Alice at this stage in her young life.

5.6 As recently as April of last year, the parties agreed access in relation to all of their children. Alice and her mum appear to have had several arguments

and the Applicant is said to have told the child to go and live with her dad in mid-argument, which probably was said at least once. By September 2022, she and her dad had discussed that she might move to Ireland but had not told her mum. Rather than going to court, the Respondent father met the Applicant to discuss the move, not mentioning that he had already found a school and not confirming any agreement or any of the details with her in writing. The Court does not have sufficient evidence to decide what, if anything, was agreed on the 24th of October and, as it is a matter for the Respondent to prove, there is insufficient evidence of consent here.

5.7 There is a further significant and complicating factor in that the Respondent does not exercise access with one other of his children. It is of minimal relevance why this is so, and the Court makes no finding of fact in that regard. However, it is not in dispute that this child has no access with dad, and this will affect whether Alice sees this sibling more than very rarely in future. Since this application was made, the child has had only one visit to her family and has not had any overnight access with her mum. This gives some indication as to the level of encouragement of access to her siblings on the part of both parties: this is not a decision for a young teenager to make and it is not fair to place this responsibility on her shoulders.

5.8 This is the context in which Alice has expressed the view that she would like to live with the other parent. The report from the assessor makes sad reading. It is clear that this child is objecting to a return but a large factor in that objection appears to be her relationship with her mum. There is no evidence that her views were unduly influenced by any party. All views are of course influenced by those around us but, in this case, the evidence suggests that these views are her own and the independent assessor so found. There is no evidence which leads me to a separate conclusion.

5.9 Her words were: *"I don't want to go back. I would be so angry at mum if I had to go back, angry that she agreed I could move here and then once I did and made friends here and did the hardest part, then she said no."* She went on to say that she could not stand the screaming at home. It is not clear if this is a reference to the Applicant or her siblings, or both. It should also be noted that even the factual premise of this statement is mistaken in that her mum had said no before the hard part of moving and making new friends arose.

5.10 Alice's views amount to an objection which is quite strongly expressed although it is based, in part, on a perception which is mistaken, as set out above. She is of an age and maturity that the Court must take her views into account. The other objectives of the Convention must be weighed in the balance while considering her objections. These are her best interests (which are not confined to her immediate wishes), the security of children everywhere from unilateral removal, the importance of comity between courts and trust in the institutions of other signatory states.

5.11 If this child is not returned, Alice will sever her relationship with at least one sibling and alter her relationship, in a fundamental and lasting way, with other members of her family. It is clear from the report that she has not seen one of her siblings, other than when collecting or returning another to the house, since she moved to Ireland despite the close proximity of the two towns involved. The only reference to the issue in her views as set out in the report is an acknowledgement that she misses her friends and sibling in Northern Ireland. It is not clear which sibling is referred to. Courts usually strive in such cases to ensure that siblings are not separated as these relationships are recognised as important to each child involved.

5.12 The difficulty of living with other children who have special needs is apparent from the papers in this case and from the child's own views,

although she maintains a clear focus on her mother's relationship with her and makes no criticism of her siblings whatsoever. It is natural that a teenager might wish to move to a more peaceful and comfortable environment, particularly as the primary carer is usually the one who sets rules and it can be attractive to move to live with the other parent, simply because that the other parent is not seen as the primary rule-maker and consequently is usually seen as being more lenient.

5.13 While this move may be the child's wish, it is not necessarily a move that is in her best interests. Significantly, this is not a welfare hearing. It is an abduction hearing. The best interests of this child are served by a court hearing in Northern Ireland where these issues can be teased out and her interests determined by a court in the country where she has resided all her life. Such a hearing will also be more appropriate to the needs of her parents and her siblings as it will examine all matters affecting where the child should live. This is also in line with the key objectives of the Convention identified above: security, comity and trust.

5.14 In *A.U. v. T.N.U.* [2011] 3 IR 683 Denham CJ held that the courts should "*not lightly exercise a discretion to refuse or to return a child to his or her country of habitual residence since that would risk undermining the effectiveness of the Convention in both remedying and deterring the wrongful removal of children from the jurisdiction of the courts in such country*" and that "*those courts are normally best placed to determine the respective rights of parents and in particular where the best interests of a child lie*".

5.15 In the same judgment, the Court relied on the following passage from the decision of the House of Lords in *R.M. (Abduction: Zimbabwe)* [2008] 1 AC 1288 (paragraph 46): "*In child objection cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into*

play when only two conditions are met: First, that the child herself objects to being returned and second, that she has attained an age and a degree of maturity at which it is appropriate to take account of her views. These days, especially in light of Article 12 of the United Nations Convention on the Rights of the Child, Courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that these views are always determinative or even presumptively so. Once the discretion comes into play, the Court may have to consider the nature and strength of the child's objections, the extent to which they are: "authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances."

5.16 The facts in *A.U. v. T.N.U.* can be contrasted with those in this case. The two little boys whose objections persuaded the Supreme Court to uphold a High Court decision refusing their return had been in contact with their father, the applicant, but had only supervised access with him. Even this was withdrawn by the courts in New York, because of the way he spoke about their mum during visits, before their mum removed them. Their expressed wishes, not to have any contact with their dad, arose from their concern to protect their mum whom they saw as being at risk from him. No such concerns arise here as there does not appear to be any allegation that the Applicant frustrates access for the Respondent or denigrates him. If anything, access with the Respondent appears to have been entirely uncontroversial while the child was living with her mum.

5.17 This is a case in which Alice will be entitled to make a decision for herself within the next 18 months. Despite this, it seems to the Court that she would

be better served at this time by a more carefully considered decision, taken in court proceedings if it cannot be agreed. In a mediation or a court case, all who are affected can take part and their views can be considered rather than the move being effected by the unilateral decision of a teenager, even when she is supported by her dad. To refuse this application would be the wrong precedent to set for future cases in which children want to move out of home for one reason or another and one parent acts to carry out that wish, without real and positive consent on the part of the other parent. A refusal would also be at odds with other considerations relevant to her welfare, in particular, her relationship with her siblings.

6. Other Arguments

6.1 Both parties raise matters which I have not addressed, including allegations of deceit, fraud and manipulation. It has not been necessary to address most of these allegations to decide this case. Further, some are serious allegations and, on the evidence before this Court in a hearing on affidavit only, they would be difficult to establish. The Court makes no finding as regards these matters as this is an urgent hearing for the summary return of a child and the decision, in the circumstances, does not require such findings of fact.

7. Conclusion

7.1 The Applicant has established a strong case for the immediate return of her daughter on the basis that there is insufficient evidence of consent to her removal and the objectives of the Convention weigh heavily in favour of the return of the child to the jurisdiction in which all relevant records are maintained. There, the courts are better equipped to make a welfare-based

decision in the interests of this child, as opposed to a swift, binary decision on whether or not to return her. This decision is based on the application of international law principles to the facts of the case which weigh heavily in favour of return, despite Alice's current view.

7.2 I will hear the parties on the manner and timing of her return.