

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

~E~ (Abduction: return order)

STEPHENS J

Introduction

[1] On 22 November 2010 Mr Justice McLaughlin made an order on consent providing for the return of ~E~ to Slovakia on or before Tuesday 28 December 2010. The order was made on foot of an application by ~E's~ father under Article 12 of the Convention on the Civil Aspects of International Child Abduction 1980, ("the Hague Convention") as enacted by the Child Abduction and Custody Act 1985. This is an application by the mother to set aside the order on the basis that there have been breaches of undertakings by the father and changes in the circumstances. Nothing should be published which would identify ~E~ or any member of her extended family.

The Order and the undertakings

[2] The order commenced with recitals and then as I have indicated at paragraph 1 ordered ~E's~ mother to return ~E~ to Slovakia on or before Tuesday 28 December 2010. Paragraph 4 of the order was in the following terms:

"The making of this order is subject to the undertakings attached hereto and which said undertakings shall form part of this order."

The undertakings are contained in Schedule 1 of the Order. That schedule contains undertakings by both the father and the mother. The duration of the undertakings given by the father can be discerned from the introductory paragraph to Schedule 1 which states:

"The plaintiff (that is the father) hereby gives this honourable court the following undertakings which

will be operative until these issues are resolved by the relevant court in Slovakia or the parties otherwise expressly agree in writing.”

The undertakings were to last not until a court in Slovakia was seized of the issues but until “these issues” were resolved by the relevant court in Slovakia. It is not immediately clear what were “the issues” which had to be resolved by the courts in Slovakia but in any event the duration of the undertakings were to be dependent upon a decision by the courts in Slovakia.

[3] The seventh undertaking given by the father was that he would not harass or molest the mother.

[4] In turn the mother gave undertakings, the duration of her undertakings were similar to the duration of the father’s undertakings. She undertook amongst other matters to return ~E~ as per the attached order. She also undertook to permit the father reasonable contact with ~E~ and to provide details of any change in her address or contact number to the father forthwith. It could be suggested that the undertaking to provide details of her change of address or contact number applied only to an address or contact number in Slovakia, but I consider that the proper construction of the undertaking is that she would provide any change of address or contact number. She also undertook not to molest or harass the father.

Events since the making of the order dated 22 November 2010

[5] In early December 2010 the mother returned to Slovakia without ~E~. She met with the father in the presence of his lawyer. She asked him to allow her and ~E~ to remain in Northern Ireland and the father refused. The father then recounts that she proceeded to go to the local police station and alleged to the police that the father was falsely accusing her of abduction. It is also alleged that she showed the police a letter which indicated that she was not required to return ~E~ until December 2011.

[6] The father purchased two plane tickets for the return of ~E~ so that she could be accompanied by the mother to Slovakia on 28 December 2010. He and his lawyer attended at the airport in Slovakia but the mother and ~E~ did not arrive. He then says that he phoned the mother’s father’s mobile but received no reply. Then he received a number of threatening and abusive texts. The texts stated “leave us alone, “you will not see the girl” and “I will kill you”.

[7] The next part of the sequence is that the father admits to being angry and upset by virtue of the fact that ~E~ had not been returned and he then sent text messages to ~E’s~ maternal grandfather’s phone. These text messages, one of which was sent on 30 December 2010 was in the following

terms: “You can move to prison and give birth to your baby in prison” and the second sent on 5 January 2011 was “just wait you’re going to be surprised”.

[8] The matter came back into my list on 14 January 2011 by which stage it was not known where the mother and the child were residing. They had moved house it now transpires on 7 January 2011. They had not informed the father or the mother’s solicitors as to the new address. I made a series of orders against various statutory bodies to determine the present address of ~E~ and her mother. It was not until Friday 4 February 2011 that it was discovered where they resided. I made an order requiring the mother to attend at 1.00 pm on Monday 7 February 2011. I heard evidence from a social worker as to the risk of further flight in Northern Ireland and in the light of that evidence I made a wardship order giving care and control of ~E~ to a Trust.

Breach of the undertakings

[9] There is an admitted breach by the father of the undertaking that he gave to this court. He undertook not to harass or to molest the mother. The text which he sent to ~E’s~ maternal grandfather was clearly in breach of that undertaking. Furthermore there was also a threat to breach an undertaking which he had given not to institute or voluntarily support any proceedings whether criminal or civil which might lead to punishment of the defendant in respect of the removal of ~E~ and her subsequent retention in Northern Ireland.

[10] I turn to consider the mother’s breaches of undertaking. There have also been clear breaches of undertakings by the mother. I consider that she has failed to return ~E~ as she undertook to do and she was ordered to do. That she also sent abusive text messages and that she changed her address and did not notify the father of the change of address. That she refused to allow contact between ~E~ and her father.

[11] In considering the breaches of the undertakings I would date the commencement of the father’s breaches of undertakings as after the failure of the mother to return ~E~ to Slovakia. The mother has alleged that he was in breach of his undertakings at an earlier date but I prefer the evidence of the father. I do so because the mother has not exhibited to any affidavit any text messages that she received at an earlier stage and also because I consider that she is the less credible of the two individuals by virtue of her attempts to breach court orders.

The issues

[12] Ms McBride who appears on behalf of the father contends that the order of 22 November 2010 was a final order and that the only continuing jurisdiction of this court is in relation to the implementation of the order. It is clear that this court has continuing jurisdiction in relation to a return order in order to implement the terms of that order, see for instance the case of *Re S (Abduction Sequestration)* [1995] 1 FLR 858 and also the passage in the case *Re M (A Minor) (Child Abduction)* [1994] 1 FLR 390 at 397E in which Lady Justice Butler Sloss stated “a decision to return children made on an application under the Convention procedure is in my view a final order not capable of variation save as to the implementation. An application to set aside an order to return children under the provisions of the Convention should in my view be by way of appeal to the Court of Appeal and the Deputy High Court Judge was right not to entertain the application.”

[13] Ms McBride submitted that the general purpose of undertakings is to make the return of children easier and to provide for their necessities. Such as a roof over the head, adequate maintenance etc. until, and only until, the court of habitual residence can become seized with the proceedings brought in that jurisdiction for which see *Re M (Abduction: Undertakings)* [1995] 1 FLR 1021. Ms McBride acknowledges that the parties could make the undertakings a pre-condition to a return order but she contended that clear words would be needed in order to elevate compliance with undertakings into pre-conditions. That the wording of paragraph (4) of the order of Mr Justice McLaughlin dated 22 November 2010 was not such as to make it clear that it was an agreed pre-condition of a return that there should be compliance with the undertakings. This case she submitted was different from the case of *Walley v Walley* [2005] 3 FCR 35 where the return order was made expressly conditional and was not to take effect unless and until certain conditions were fulfilled. If the order is conditional then any question as to fulfilment is a question of implementation which is to be determined by the trial judge.

[14] Mr Girvan who appeared for the mother stated that the order of Mr Justice McLaughlin was subject to the pre-condition of compliance with the undertakings but acknowledged that it was not every breach of undertaking that would lead to the order being set aside, that this court has discretion. I would add that the undertakings were given to the court so that the impact and effect of any breach is a matter for the court, especially bearing in mind the underlying purpose of the Convention which is to allow the courts of habitual residence to determine questions such as residence and relocation and to discourage abduction.

Construction of the order dated 22 November 2010

[15] Paragraph 4 of the order states that the making of the order is “subject” to the undertakings. I consider that “subject to” is used in the sense of subordinate to so that the making of the order is subordinate to or conditional upon the undertakings. Accordingly this court has jurisdiction by virtue of the fact that the order is not a final order, it is a conditional order.

[16] I also reject the contention that the order became final on 28 December 2010 when the return should have taken place. The undertakings to which the order was subordinate were to continue past that date and to last until a court in Slovakia had resolved various issues. Upon its correct construction I consider that the order could only become final upon a court in Slovakia resolving those issues.

Discretion

[17] I consider that there was a clear planned breach of the order and the undertakings by the mother; that she did not wish to comply. She deliberately moved house and failed to give any forwarding address. She enquired of the social worker when she was found how she was found. This was a most serious breach of the order and of her undertakings. The mother now says that she may not travel to Slovakia and is using that as means of suggesting that the order can no longer be implemented in that it was envisaged that she would be the primary carer in Slovakia. In effect she calls in aid her own reluctance to do what she agreed to do as a reason why the order should not now be implemented.

[18] I do not take lightly the abusive nature of the texts sent by the father. There has been a breach of his undertakings. I make it clear that for those breaches I impose the penalty of preventing him from ever seeking from the mother reimbursement for the costs of the air travel which he paid and which has been lost to him by virtue of the fact that she failed to return ~E~ to Slovakia on 28 December 2010. The father has made it clear that he now undertakes to take no action in Slovakia in relation to the mother’s breach of the order of 22 November 2010. I consider that unless and until the contrary is proved the courts and social services in Slovakia are able to deal with any issues in relation to ~E~.

[19] I do not accept the mother’s evidence that she cannot travel to Slovakia or that she will not travel to Slovakia. No medical evidence has been produced to me and on the basis of my assessment of the mother’s credibility I do not accept that evidence.

Conclusion

[20] I consider that to set aside the court order would not be commensurate with the breach by the father of his undertaking. I refuse the plaintiff's application and I will now give consideration to the manner in which I can implement the order of 22 November 2010.