

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION
OFFICE OF CARE AND PROTECTION

IN THE MATTER OF Q (A CHILD)

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985

Between

J

Plaintiff

and

G

Defendant

O'HARA J

Introduction

[1] This judgment has been anonymised in order to protect the interests of the child. Nothing must be published or reported which reveals the child's identity in any way.

[2] The plaintiff J is Canadian and is the father of Q who is three years old. The defendant G is Q's mother and is from Northern Ireland. In February 2014 she returned to this jurisdiction with Q. They have stayed here ever since. J now seeks an order that Q's removal to and retention in Northern Ireland are unlawful and in breach of J's custody rights. He also seeks an order for Q's return to Canada.

[3] Ms Cathy Hughes appeared for the father and Ms Lee Brown for the mother. I am grateful to them both for their helpful skeleton arguments and concise submissions.

[4] There is no disagreement on the legal principles which are to be applied so they can be summarised briefly. Both the United Kingdom and Canada are signatories to the Hague Convention on the Civil Aspects of International Child Abduction 1980. It is provided in Section 1(2) of the Child Abduction and Custody Act 1985 that the Convention shall have the force of law in the United Kingdom. In their judgment in Re E (Children) (Abduction: Custody Appeal) [2012] 1 AC 144 Lady Hale and Lord Wilson analysed the way in which the Convention operates and how the nature of cases has changed as society has changed in the last 30 years. One of the central themes is to prevent parents taking the law into their own hands and pre-empting the result of any dispute between them about the future upbringing of their children. Accordingly, if an abduction does take place the aim is to return the children as soon as possible to their home country so that any dispute can be determined there. This is on the basis that the “left behind parent”, in this case J, should not be put to the trouble and expense of coming to the State to which the children have been taken in order for factual disputes to be resolved there. The point is also made that if the Convention is applied properly there should be no violation of the Article 8 rights of the child or parents.

[5] In this case the parties have agreed the following:

- (i) The removal of Q was wrongful within the meaning of Article 3 of the Convention because it was in breach of J’s custody rights in Canada where Q was habitually resident, J being a father who was exercising those rights.
- (ii) Since Q was wrongfully removed and retained within the meaning of Article 3, and since proceedings for his return were brought within one year, I must order his return to Canada unless the mother proves one of the exceptions allowed for an Article 13.
- (iii) The mother has to prove either that the father consented to or subsequently acquiesced in Q’s removal or retention within Article 13(a).
- (iv) In the alternative the mother must establish that there is a degree of risk that Q’s return would expose him to physical or psychological harm or otherwise place him in an intolerable situation within Article 13(b).
- (v) Even if the mother proves either the 13(a) or the 13(b) exception, I retain a discretion as to whether Q’s return should be ordered.

The facts and the defences

[6] I did not hear oral evidence from either party nor is it generally appropriate to do so given the limited role of the court. I have affidavits from both parties together with exhibits, extensive police reports and many text messages. Those messages were especially instructive in that they were not written with a view to being relied on in legal proceedings. For the most part they were frank exchanges between two

people whose relationship has fallen apart. I accept that they do not paint a full picture of the events because there were other exchanges by way of phone and Skype. I also accept that not every point or allegation made is necessarily reliable but they give a valuable insight into what each parent was asserting or thinking or intending at any time. The exchanges are not to be read in an unduly formal or legal manner but some are particularly significant or were argued to be so by each party.

[7] The parents first met in Northern Ireland in 1999. In January 2000 G spent approximately one month in Canada. Soon after that she moved there to live with the plaintiff. Between 2002 and 2004 they lived back in Northern Ireland but they returned to Canada in or about May 2004. In 2007 they were married in Northern Ireland and then returned to continue their lives in Canada. They separated later in 2007 with G coming back to Northern Ireland but after a short time she returned once again to Canada. In 2008 G became pregnant – the couple separated during the pregnancy with G coming back to Northern Ireland. Unfortunately, she suffered a miscarriage after which she and J reconciled in Canada.

[8] G had a further miscarriage in 2009 but in spring 2011 she gave birth to Q. Regrettably their volatile relationship did not settle down. There were major ongoing tensions as a result of which G took Q in January 2014 to stay with her sister in the United States for approximately one month. She then returned to her husband with Q but within a week or two she left for Northern Ireland with Q and has not returned. She does not make the case that J consented to her taking Q away but she contends that he subsequently acquiesced to that state of affairs. She further contends that there is a grave risk to Q if he has to return to Canada and/or that his return would place him in an intolerable situation.

[9] The grave risk and/or intolerable situation asserted by the mother relates to the fundamental reason for the problems in the marriage and the volatility in the relationship – J's excessive use of and/or addiction to drugs and alcohol. While J has alleged that the mother has also abused drink and drugs, I am satisfied on the papers that if she ever did so, it was to a much lesser degree than him. I am also satisfied that there is no ongoing issue with either drink or drugs on the mother's part. The same cannot be said for the father.

[10] Examples of the husband's problems and conduct are available from police records:

- In November 2007 the mother called the police because she was concerned that her husband had stolen her three wedding/engagement rings to pawn in order to pay off a drug debt. As a result of their investigation the police found the husband at a strip club. He returned home to discuss the issues. He had consumed alcohol but was co-operative with police. The three rings were recovered at the family home and were not pawned.

- In June 2009 the police were called again. Both parties advised the police that there had been a breakdown in the relationship due to J's dependency on drugs. His father had been supporting J in order to help him with his drug addiction and had been supporting the couple with their bills because J had been spending his wages to support his drug addiction. On 1 June J was upset because his father was siding with his wife and as a result J wanted his father to leave their residence. That report also contains a reference to J having enrolled in a drug programme at a rehabilitation centre in 2008 but not finishing the programme.
- Later in June, the police were called again because G found that her wedding rings were missing. According to both parties G refused to give her husband the remaining amount of a pay check which she was saving to pay bills at the home. The police were able to mediate a resolution as a result of which G agreed to give her husband the balance remaining on his pay check in exchange for which the husband agreed to buy back the rings from the pawn shop.
- On another occasion at about the same time a police entry records that the husband was intoxicated, had two knives and did not care if he was shot.

[11] There seems to have been a period of relative calm after July 2009 but in July 2012 when Q was only about 15 months old G called the police again because J was very drunk. No assaults or threats were reported but social services were informed. Six months later J was in a serious car accident brought about by his own drunk driving. He suffered major injuries and spent much of 2013 in recovery, initially in hospital and then at home.

[12] On 1 December 2013 police were called to the family home. G was noted to have consumed only a small amount of alcohol and was regarded by the police as being fit to care for Q. The police note suggests that J had taken much more drink and that his yelling had led to an argument during which he locked G out of the house. Once again social services were informed. Regrettably they were informed again after an incident late on Christmas Eve when J rang the police to report that G was being "nasty" to him. The police found him drinking in the basement while J who was sober was upstairs sleeping with Q.

[13] G went away to her sister for about one month in January 2014. She contends that she did so because he had started using drugs again. During her absence he promised that he had stopped taking drugs. He asked her to come back to help him with surgery which he was scheduled to have on 14 February. When she did so she discovered that he was still taking drugs. After he came out of his operation she told him that she was leaving with Q. On 15 February she flew to Ireland on a return ticket with Q.

[14] On 13 February J had called the police to the family home. The police record describes him as “an admitted cocaine and alcohol user” who has “numerous arguments with family over his ongoing drug and alcohol use”. The reason for his call was to have his parents removed. By the time the police arrived they had in fact left. The record refers to J “clearly suffering from mental health issues” and to him stating that he blamed his parents for him being abused as a child. The note also states that he is “not currently seeking counselling”.

[15] This last police record is argued by the mother to be significant in an additional respect. It was obtained after the oral hearing in this case and only because it was specifically asked for. This raises concerns that the records which have been provided, extensive as they are, do not tell the full story of police involvement with this family. It is further relied on by the mother as supporting her case on grave risk by showing the police impression of J’s mental health issues, his erratic behaviour, his resistance to change and his estrangement from his parents who offered him support.

[16] There is one important allegation made by G which is not corroborated by police records. She claims that J has been physically violent to her eg by grabbing and bruising her and by dragging her. Her case is that she was ashamed to admit this to the police despite the many call outs. J’s case is that this never happened other than on two specific limited occasions which he has sought to explain.

[17] It has not been proved to my satisfaction that J has physically assaulted G. I would be more inclined to accept her suggestion that she did not report the physical abuse because she was ashamed of it and because she hoped that ringing the police would be have a “wake up” effect on her husband but for the fact that those police calls were so frequent. I do however accept that living with a man who the police have described in the terms set out above on 13 February 2014 inevitably brings with it a real and sustained fear of physical harm as a direct result of him losing self-control through drink and drugs. This harm might be caused either to the mother or to Q because on the evidence there must have been times when the father acted recklessly and dangerously as a result of his addictions. He could certainly not be relied on to care for Q or even to help him in an emergency.

[18] I also accept that living in this environment must have been psychologically damaging for Q. Instead of spending his formative infant years in a stable environment he lived in one in which his father’s abuses, his shouting, his arguing and his general behaviour must have been gravely upsetting to G and to Q himself.

[19] Before reaching any definitive judgment on this issue however it is necessary to summarise events from 15 February onwards because the mother contends that J has acquiesced in Q remaining in Northern Ireland. Her case is that their exchanges, including a number of statements by J, taken individually, and certainly taken collectively, amount to acquiescence. They also throw light on the issue of grave risk

because it is part of the father's case that they do not show that the mother took Q away because of violence.

[20] It is the mother's case that after she did not fly back to Canada on her scheduled return flight on 14 March she told J that she did not intend to return at all. His response in an email on 29 March was to suggest moving to "somewhere fun" like London or Rome. Similarly he said on 8 April that he did not want to live in her home town or his but that he would consider somewhere else. Neither of these responses suggests acceptance of the situation by J. On 9 April he emailed that "I am not having you deported and I am not selling the house". Within three weeks the house was sold. On 21 April he stated "I destroyed our family" but on 22 April he was talking about a fresh start.

[21] On 2 May J asked G to consider moving to somewhere other than her home town. Implicit in this message was that they might yet make a fresh start elsewhere. There were ongoing issues about him seeing Q on Skype but on 18 May he emailed that he was having Q brought back to Canada. On 28 May G emailed that she had taken Q "out of a very bad and dangerous situation" to give him a normal childhood. He replied that he had not pushed her to come back, he had only asked her to make a fresh start.

[22] None of these exchanges is sufficiently clear and unequivocal to support a case that J acquiesced in Q's retention in Northern Ireland. In fact some of them carry quite the opposite meaning. Even when he emailed on 3 June that he did not want to fight but just wanted to be able to start over as well as "have enough left over to visit" Q, I do not infer acquiescence on J's part, nor do I infer acquiescence from any of the later exchanges in June.

[23] The emails when taken with the affidavits do not make out a case of acquiescence by the father. It is of note however, that in them he refers to turning his life around. For example, he talks about going to AA meetings and on 31 May he said "I am going to be 90 days clean and sober tomorrow". As part of his case he provided a report dated 20 October 2014 from a doctor who had been his family physician from September 2010 to April 2014. Her report raises a number of concerns because:

- (i) She says that on 13 January 2014 "he again adamantly insisted he had not had any alcohol" when the police reports from Christmas Eve and from 1 December show conclusively that he had.
- (ii) She records him admitting drinking heavily again in February when his wife left.
- (iii) She records his apparent isolation and lack of support from family and friends.

- (iv) She refers to him visiting on 5 occasions in March/April 2014 for counselling and drug testing without disclosing the results of any of the tests which she surely would have done if they were negative.
- (v) She has not seen him since April 2014 and there is no up to date report from his new physician.

Conclusions

[24] For the reasons already stated I do not accept that acquiescence has been proved by the mother. That leaves the issues of grave risk and the exercise of my discretion. Ms Hughes for the plaintiff father emphasised that what is sought is Q's return to Canada, not to his father. What happens after his return would depend on the view taken by Canadian courts whose laws and procedures are at least as effective and reliable as those in Northern Ireland. To this end a series of undertakings has been offered on behalf of the father in order to establish an acceptable holding position until the Canadian courts have an opportunity to decide any applications for relocation, residence or contact.

[25] In many cases that would be an appropriate way forward. The importance of undertakings has been emphasised recently by the Supreme Court in Re E at paragraph 8 of the judgment in which reference is made to "a premium on the efficacy of protection measures which was not so apparent when the Convention was signed".

[26] During oral submissions Ms Hughes contended that J had sought help and that it was unknown what his relationship was with his parents but that at least they enjoyed a good relationship with G to the extent that the paternal grandmother had visited G and Q in Northern Ireland. Ms Brown distanced her client somewhat from the grandparents on the basis that while they had been helpful on some occasions they had also tried to minimise the conduct of their son at other times.

[27] I have no doubt on the evidence that since Q's birth his mother has done all that she can to raise him responsibly. I am also in no doubt that J has behaved outrageously and in the most damaging way. He has caused serious injuries to himself by his own drunk driving in December 2012. The available police reports (which are certainly incomplete) are only likely to cover a small proportion of his behaviour. Having the police call out twice in December 2013, including on Christmas Eve, when Q was about 2½ years old must have been enormously distressing and humiliating for G. It is also likely to have adversely affected Q as result of any awareness he had of his father's state and from the effect that had on his mother who he relied on for protection. The mother's story of J's fresh descent into drugs in December 2013-February 2014 is entirely consistent with J's history, with the December 2013 police reports and with the February 2014 police report which could hardly have been written in more worrying terms – see paragraph 14 above.

[28] The family physician's report is unreliable because J lied to her about his use of alcohol in December 2013, inadequate because it does not include the results of his drugs test and limited in value in any event because J has transferred to another doctor from whom he has not obtained a report.

[29] In all these circumstances I conclude that Q is at grave risk of physical or psychological harm or of being placed in an intolerable situation if his return to Canada is ordered. His father has been abusing drugs and alcohol for many years. There is no evidence that he has stopped beyond his own assertions which are extremely unreliable. I conclude that the grave risk is a direct one to Q from his father's conduct and an indirect one as a result of the effect which that pattern of conduct would have on his mother.

[30] The protections which have been offered by way of undertakings are relevant both to the issue of grave risk and to the exercise of my discretion. They are undertakings of a type typically offered in a Hague Convention case. The difficulty here is that they are offered on behalf of a deeply troubled and addicted man who cannot possibly be relied on to keep to them. Given the police records alone, J is not someone whose undertakings are of any value. For these reasons I exercise my discretion against the plaintiff and I dismiss his application.