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*(subject to editorial corrections)**

2014 No: 099276

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION
OFFICE OF CARE AND PROTECTION

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IN THE MATTER OF L (A CHILD)

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985

Between

W

Plaintiff

and

C

Defendant

_____

O'HARA J

Introduction

[1] I have prepared this judgment in an anonymised form. Nothing is to be printed or reported which identifies the child or the parents.

[2] The plaintiff, W, is Australian and is the father of L who is two years old. The defendant C is L's mother. She is from Northern Ireland. In December 2013 she returned here with W and L for a holiday. Since then she has stayed in this jurisdiction with L while W has returned to Australia. W now seeks an order that L's detention in Northern Ireland has been wrongful and in breach of W's custody rights. Furthermore, W seeks an order for L's return.

[3] Ms Mary McHugh appeared for the father and Miss Linda Robinson for the mother. I am grateful to them both for their helpful skeleton arguments and oral 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 Australia 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 of the Convention is preventing 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 W, 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 the parents.

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

(i) The removal of L was wrongful within the meaning of Article 3 of the Convention because it was in breach of W's custody rights in Australia where L was habitually resident, W being a father who was exercising those rights.

(ii) Since L was wrongfully removed from Australia and/or retained in Northern Ireland within the meaning of Article 3, and since proceedings for his return were brought within one year, I must order his return to Australia unless the mother proves one of the exceptions allowed for in Article 13.

(iii) The mother has to prove either that the father consented to or subsequently acquiesced in L's removal or retention within Article 13(a).

(iv) In the alternative the mother must establish that there is a degree of risk that L'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 L's return should be ordered.

The facts and the defences

[6] C went to Australia on a 4-year working visa in January 2011. She was sponsored by an area health service because of her qualifications. In February 2011 she travelled to a remote township. She and W met there and started dating in either March or September 2011 – it is immaterial whose version is correct on that point. By December 2011 she was pregnant. She and W cohabited from about

February 2012. In June 2012, by agreement, she flew to Northern Ireland to give birth. By the time she did so in August W had arrived to be with her.

[7] In October 2012, having obtained Australian citizenship papers for L, they all returned to Australia. They lived together as a family but with growing tensions and difficulties. In May 2013 C prepared a draft application for residency for herself but did not lodge or pursue it.

[8] In early December 2013 the family travelled together to Northern Ireland for a month long holiday. The problems between the parents continued. On 29 December C injured her foot in a fall in her sister's house. As a result of her injuries she was unable to fly back with W as planned on 8 January. Instead she and L stayed in Northern Ireland while W flew back to resume work. There is a dispute about when exactly she decided not to return to Australia and why but she has stayed here since then, obtained work in a professional post and settled L into a routine which is now well established.

[9] I did not hear oral evidence from either parent nor was I asked to do so. Even if I had been asked, I would not have acceded to that request because the authorities direct judges away from that course. In any event I had before me affidavits, exhibits and hundreds of pages of texts and Facebook messages. These messages show what the parties were saying to each other through different means in 2014. They are especially instructive because they were not sent with a view to being relied on in legal proceedings. For the most part they were frank exchanges between two people whose relationship was falling apart. They are not to be interpreted in a formal or legal manner. Their contents reflect the mixed emotions inevitably felt at different times by two adults who have enjoyed a relationship and who have a child together. I accept however that they do not tell a comprehensive story because there were some additional exchanges by phone and by Skype. I also accept that not every claim or point made in the messages is necessarily true or accurate but they give a valuable insight into what each party was thinking and intending at any time.

[10] It is not possible or necessary to analyse each exchange between the parties but it is relevant to emphasise some in particular. Part of C's case is that she cancelled the return flights for herself and L on 8 January rather than reschedule them and that W knew that she had done so. While he denied that, he stated in an affidavit that when he landed in Australia he received a text message sent by C which led him to think that she would not be coming back. By implication this would mean that L was not coming back either.

[11] W also accepted in his first affidavit that he received further messages on 15 and 17 January to similar effect. However, he did not consent to that course – see for example his text of 14 February to the effect that they had agreed that C and L would come back in a few weeks, not that they were staying in Northern Ireland permanently. I accept that by this point C had decided to keep L in Northern Ireland - the question is whether W consented to that or later acquiesced in it.

[12] W took a number of steps which are significant. According to his messages, he started to go to counselling and to parenting courses so that he would be a better partner and father. He also contacted International Social Services ("ISS") in February 2014 and invited C to engage in formal mediation to achieve a re-unification with him and the return of L. C was not interested in mediation, a fact that was relayed to W on 7 April. On 2 July W emailed a solicitor in ISS to see if there was anything which could be done to speed up an application to have L returned to Australia. The reply on 3 July was that ISS only had two lawyers at that point; for that reason they asked for W's patience. Ultimately, the application was issued in Northern Ireland on 6 October, having been received on 30 September by the Central Authority for Northern Ireland.

[13] One of the mother's more attractive arguments on consent/acquiescence was that W indicated that he would come to Northern Ireland after the harvest was complete, perhaps after April. To this end discussions took place about what contact he would have with L but when C made it clear that she herself would have no contact with W, W's visit was taken no further by him. On reflection I take the view that the fact that he was considering coming to Northern Ireland is simply an indication that different possibilities were being considered by him.

[14] There were inconsistencies in C's position. In or about October 2014 she sent W a message that while in Australia she had papers for permanent residence ready to send but that she had not done so "because my intent was to come home". This suggests very strongly that she had never intended to return in January 2014, a fact she had withheld from W.

[15] It is also notable that on 9 January she sent a message to the plaintiff's grandfather to say that she would not be home (ie to Australia) for about 6 weeks. She also advised her employer on 14 January that because of her foot injury she would not be able to work for a month. Then she wrote a letter of resignation in which she complained about the way she had been treated in her employment.

[16] On 21 May W sent C a message asking for reassurance that he was not wasting his time trying to put the family back together. To state the obvious, that message does not sit easily with the notion that he had consented to L's removal or had by them acquiesced in it.

[17] So far as any grave risk is concerned the allegations made by C can be summarised as follows:

(i) W handled L inappropriately – this includes an allegation that W smacked L and was especially rough with him on the December 2013 flight from Australia.

(ii) W caused L's foot injury by deliberately pushing her down the stairs in her sister's house on 29 December.

(iii) W had tried to punch C when she was pregnant.

(iv) Taken together these show physical and psychological abuse of L directly and of C his mother which would cause a grave risk to L if he was returned.

[18] For his part W accepts that he was sometimes insensitive and inappropriate in his handling of L but he contends that this does not remotely amount to placing L at grave risk of physical or psychological harm.

[19] So far as the allegations of physical abuse of C are concerned, I do not find them established. I accept that a woman who is so abused might not easily volunteer that fact to doctors treating her in a hospital. The absence of any relevant entry in the hospital records from 29 December is therefore not of prime significance. What is much more striking is the absence of any reference to this event in the hundreds of messages which were then exchanged.

[20] For the father, Ms McHugh emphasised the text message sent by the mother on 17 January in which she set out her reasons for not going back to Australia. She referred to her lacking support there, to her thinking that she could not give L a good life and to all the stress and pressures she was under because W left her to organise everything. Nowhere in that message is there a reference to physical abuse of her or L.

[21] I gave leave to C's sister to swear an affidavit about the December 2013 stairs incident which happened in her home. She herself did not see the incident and made no reference to C having alleged at any time that W had pushed her.

[22] I subsequently gave leave to C's mother to swear an affidavit about that incident and what C had said about it, if anything. Quite improperly an affidavit was filed in which the grandmother went through her personal analysis of the whole relationship between W and C. Not only was that improper because leave had not been granted but also because that exercise, if relevant at all, is only relevant to the court deciding on issues such as residence, contact and relocation. Even then much of what she said would be disregarded. In any event for the reasons already stated, I do not find physical abuse of C to have been established.

Conclusions

[23] I have not conducted an exhaustive analysis of all the facts in this case nor is it my function to do so. The onus lies on C to prove either consent or acquiescence by W in the removal of L or his retention in Northern Ireland. I am not satisfied that she has discharged that burden. On the authorities it is clear that I must focus on whether W consented or acquiesced in fact ie whether that was his state of mind. While some emails or messages taken in isolation point in that general direction, I find that on a fair and reasonable reading of the flow of messages read together W

did not consent to L's removal or at any later point acquiesce in him staying in Northern Ireland. It would be grossly unfair to hold otherwise on the basis that he was exploring the prospects of rehabilitation and reconciliation. It would also be contrary to policy to punish him for doing so.

[24] Ms Robinson relied on one recognised exception to the focus being on W's state of mind. That exception arises if it is proved by the mother that the father's words or actions "clearly and unequivocally" show and have led the mother to believe that the father is not going to assert his right to summary return and are inconsistent with his right of return. In fact this is really acquiescence by another name because it depends on W having acted "clearly and unequivocally" in a certain way. I do not accept that he did and I dismiss this aspect of the defence.

[25] On the grave risk issue, I find that the mother has also failed to establish this defence. The evidence comes nowhere near proving that L would be directly or indirectly at grave risk, either through his father's conduct towards him or through his father's conduct towards his mother. I also find that L would not be placed in an intolerable situation if required to return. For some time at least, until the Australian courts reached their decisions, L's life would be less settled than it has been since December 2013 but so are the lives of many children in Hague convention cases – that cannot be a reason for finding that an Article 13 defence has been made out.

[26] In their judgment in Re E, Lady Hale and Lord Wilson stated that the original thinking behind the Convention was to stop dissatisfied parents who did not have primary care from snatching the child from the primary carer. As time has gone on that has changed. They identified the fact that the most common case now is one in which a primary carer's relationship with the other carer has broken down with the result that she leaves with the children, usually to go back to her own family. In doing so she will often make allegations of domestic abuse or ill-treatment. In such circumstances there is a greater emphasis on the efficacy of protective measures which have to be put in place to hold a defined position until the courts in the country of habitual residence reach their decision.

[27] This case fits entirely within that description. It is entirely possible that the Australian courts will look favourably on any application which the mother makes for relocation or primary residence or limited contact but the point is that it is their decision to take. It is not a decision to be taken by a court in Northern Ireland. For all these reasons L is to be returned. I will hear the parties as to timescale and the precise form of undertakings.