

Neutral Citation no. [2004] NIFam 12

Ref: **MCLF5113**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: **9/11/04**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

IN THE MATTER OF C1 AND S (MINORS)

**IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT
1985**

BETWEEN:

JH

Plaintiff;

-and-

BH

Defendant.

McLAUGHLIN J

[1] The parties were married on 30 April 1992 in Belfast. Their first child, C1, was born on 14 October 1992 and twins, S and C2, were born on 4 November 1993. Soon after the birth of the twins the parties decided to move to Dublin and they resided there throughout the remainder of their marriage. JH, the mother of the children who are the subject of this application, continues to reside in Dublin but BH, their father, returned to Belfast in 2002.

During their time in Dublin they had two other children, R, born on 30 July 1996 and A, born on 10 November 1999.

[2] Difficulties arose in the marriage and they separated in 1998 for a time but were later reconciled. They appear to have separated finally in or around 2001. There is some dispute as to where BH went in the period following the separation but this is not particularly important in the context of the decision to be made at present. I shall assume that he is correct when he says that he finished off a term of employment with a company in Dublin for a period of about six months after the separation and returned to Belfast in 2002 where he has lived since.

[3] From the date of separation until 6 March 2004 all five children continued to live with their mother in Dublin. Again there is a dispute as to the extent to which BH had contact with the children post separation but I shall assume that his version is correct and that he maintained constant contact with all of his children during his remaining period in Dublin. I note however that JH insists that contact was sporadic and that on average took place only every six months by telephone. She also said that there were only two or three occasions when he had all five children with him together and that he had found it difficult to cope with them.

[4] It would appear that there was no contact at all between JH and any of the children between Easter 2003 and 6 March 2004. In or about February 2004 however he made approaches with a view to resuming contact. JH states in her affidavit that "it became increasingly clear that C1 and S wanted to see him" and that as a result she agreed they could have contact with him beginning on Saturday 6 March 2004.

[5] The children were handed over to their father at Connolly Street Station, Dublin that day and taken to Northern Ireland by him. They have not been returned to Ireland since that time.

[6] It is JH's case that the children were due to return to her on Wednesday 10 March and that she was not unduly alarmed initially when they did not come back. She now says that she assumed that her husband would rapidly tire of the responsibility of looking after the children and that she could secure their return voluntarily. It became clear to her however that he did not intend to return them particularly after she discovered they were enrolled in a school in Belfast.

[7] JH then began to seek legal advice and she avers that she applied to her local Legal Aid Centre for an appointment. This did not occur for some time as, due to her altered circumstances in that she had fewer children to look after, her welfare entitlements were being re-assessed. Once an appointment

was obtained she was advised that she should make contact immediately with the Central Authority for Child Abduction in the Department of Justice, Equality and Law Reform, and she did this on 5 July 2004. There was a delay therefore of just under four months between the expected date of the return of the children and the application to the Central Authority.

[8] The application was issued formally on 20 July 2004 and on that date JH also obtained orders from the District Court for the Dublin Metropolitan District granting her custody of all five children and prohibiting their removal from the jurisdiction of the court without prior authority. On the same date she also obtained a Barring Order from the District Court which appears from its terms to equate to a Non-Molestation and Occupation Order in this jurisdiction.

[9] The following facts are not in dispute:-

- (i) Each of the subject children resided with its mother from birth until 6 March 2004.
- (ii) None of the children of the family has ever resided in Belfast, save for the twins and C1 and in their cases the period of residence was for a relatively short period during their infancy.
- (iii) The habitual residence of each of the children is Ireland.
- (iv) Each of the relevant children is under 16.
- (v) Each of the children was in the lawful custody of their mother and they are away from their mother's custody at present without any court order sanctioning same. On the contrary an order of the District Court of Ireland has granted her a formal Custody Order and did so on the day this present application was commenced.

[10] In the light of those facts the mother of the children is entitled *prima facie* to an order for the return of the children to Ireland from this jurisdiction.

[11] BH has objected to the return of the children on the following grounds:-

- (i) The mother consented to his taking them to Belfast and to residing there with him.
- (ii) The mother acquiesced in his keeping of the children in Belfast.
- (iii) Each of the children objects to being returned to Ireland and has attained an age and degree of maturity at which it is appropriate to take account of its views.

[12] These grounds of objection are recognised in Article 13 of the Convention which is in the following terms:

“Article 13

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 has consented to or subsequently acquiesced in the removal or retention; or
- b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the children’s habitual residence.”

[13] The onus of proof is on the respondent to establish each of the matters which are sometimes referred to as Article 13 defences. This is something of a misnomer because it remains a matter for the discretion of this court whether to make a Return Order should one or more of these facts be established.

The issue of alleged consent

[14] BH has sought to make the case that JH was unable to cope with the demands placed upon her by five young children, that S in particular was very disruptive, that she was making demands of BH that he should take responsibility for S at least and that when he arrived at the railway station in

Dublin in March 2004 she presented him with both children. He claims that he then purchased a one way ticket for both children in the station and left with the understanding that he was to be responsible for the children full-time in future. JH has equally adamantly insisted that she left the children to the railway station on the assumption that they were going with their father for about four days and that the question of them leaving permanently was never an option and certainly not discussed between the parents.

[15] In this jurisdiction the understanding of the word “consent” is that described by Holman J in *Re C (Abduction: Consent)* [1996] 1 FLR 414. It is not a requirement that consent be in writing and it does not have to be express but may be inferred from the circumstances. At page 419 he stated:-

“If it is clear, viewing a parent’s words and actions as a whole and his state of knowledge of what is planned by the other parent, that he does consent to what is planned, then in my judgment that is sufficient to satisfy the requirements of Article 13. It is not necessary that there is an express statement ‘I consent’. In my judgment it is possible in an appropriate case to infer consent from conduct.”

Later he added:

“It needs to be proved on the balance of probabilities, but the evidence in support of it needs to be clear and cogent. If the court is left uncertain, then the ‘defence’ under Article 13(a) fails.”

[16] I am satisfied that each of these children left Dublin on 6 March on a temporary visit to their father. There had been no discussion of a permanent transfer of both children, simply a discussion about temporary care of S. No arrangements were made for them to withdraw from the schools which they were attending happily and successfully in Dublin and no arrangements for schooling were made in Belfast. No formal goodbyes took place either with their mother or their siblings and they left equipped only with some clothing packed in a ruck sack. There were no goodbyes to any of their friends and they left close to the end of a school term. There is nothing about the circumstances of their departure which bears any of the hallmarks of an intended permanent move and I am satisfied that no such understanding existed and therefore there is no question of JH consenting to them moving permanently to Belfast. In her affidavit JH stated that on departure BH stated that she would never see the children again. It was argued on his behalf that if he had said that one would have expected JH to have taken some immediate step to prevent the children leaving the country, or at least to have acted more promptly than she did in the circumstances. If I accept that the

remark was made I consider it shows BH was taking the children without consent; if it was not made she had no cause for alarm or taking emergency action. Either way it does not go to establish consent on the mother's point. I am satisfied that JH did seek legal advice promptly and I accept also her explanation that experience in the past had shown that their father would quickly tire of the responsibility of looking after the children. I do not consider that it can in any way influence my view of the issue of consent and it certainly does not discharge the onus of proof upon JH.

The issue of acquiescence

[17] Lord Browne-Wilkinson in *Re H* [1998] AC 72 stated that "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". It is clear from his speech that the court is concerned primarily with whether the wronged parent acquiesced in fact and that the perception of the conduct of the wronged parent by the abducting parent is irrelevant. The words and actions of the wronged parent must speak "clearly and unequivocally" so as to demonstrate that the other parent has been led to believe that he or she is not asserting, or will not assert his/her right to the summary return of the child and that the behaviour is inconsistent with such a return.

[18] BH relies heavily on the alleged delay on the part of JH in commencing proceedings under the 1985 Act. I have already explained why I do not consider there has been an unreasonable delay. There was a delay of approximately four months before the proceedings were actually commenced and therefore the defendant seeks to say that he perceived the mother to have acquiesced. Factually however I am satisfied that he is entirely wrong. The mother was attempting to obtain legal advice and did so after a period of time elapsed during which she hoped that he would tire of the responsibilities of looking after the children and seek to return them to Ireland voluntarily.

[19] It was also suggested that following his receipt of notice of the order of the District Court that he told JH to come to collect the children but that she failed to do so. Even if this is correct I take no account of it because on the same day as that order was made, proceedings under the terms of the Hague Convention were commenced to secure the return of the children. He could not possibly have considered that she had acquiesced in his keeping the children by reason of her alleged lack of response to his request when on the same day she commenced proceedings against him for their return to her.

The views of the children

[20] The provisions of Article 13 of the Convention confer a discretion upon the court before which an application for return of the children is made to refuse to do so if the child objects “and has attained an age and degree of maturity at which it is appropriate to take account of its view”. C is just over 12 years old and S is 11. They were both interviewed by Miss Siobhan Henning on behalf of the court and she gave evidence at the resumed hearing on 26 October 2004. She was quite satisfied that the children were of an age and degree of maturity to express their views. I am satisfied from her evidence that she is correct and indeed JH did not argue to the contrary. Although S has dyslexia this does not impair his capacity to express his views on this topic. I am satisfied also by Miss Henning’s evidence that they expressed their views strongly to her. As a result of her enquiries I am satisfied the children are well settled with their father in Belfast, they are happy at school and are secure in his care. There are no concerns about the level of care and attention given to them and they have a wide circle of family connections in Belfast. If this case was simply about their place of residence there would be a good argument that they should be allowed to continue to reside with their father. It should also be borne in mind however that, following a complaint by BH, an enquiry was carried out by social services in Dublin and it was concluded that there were no issues of concern raised about the life or circumstances of their mother or of her care of the remaining children. This is a good illustration of why it is important to ensure that the final place of residence of the children should be determined before the court where most information is readily available. Issues such as residence should be determined where ready access is available to school and medical records, where allegations of alleged mistreatment can be more conveniently investigated and where this can be done more quickly.

[21] The report of Miss Henning, as supplemented by her evidence, identifies three principle concerns of the children, namely:

- (i) The form and extent of chastisement by their mother.
- (ii) The role of her new partner in chastising them.
- (iii) Bullying at school.

[22] It is very important to listen to the voice of each child. Despite concerns on the part of the mother that they may have been coached, or otherwise encouraged to make allegations of this kind, there is no evidence to support this. Miss Henning was quite clear that she found no evidence of parroting adult words or descriptions. Their anxieties were expressed in age appropriate terms and they are sufficiently serious to warrant concern on the part of this court about ordering their return to her care. Those anxieties are very real because BH does not plan to return to Ireland with them as happens

often in cases of this kind. Return to Ireland will mean that they will live with their mother and her new partner.

[23] I am satisfied their anxieties can be communicated to relevant social services personnel in Ireland and that the situation will be monitored carefully. I am also reassured by other pointers. The school reports which I have, particularly in respect of C1, is very reassuring and does not contain any hint of bullying or domestic problems, indeed the report describes him as follows:

“A hardworking, diligent, conscientious, well mannered pupil. He has always shown the utmost respect for teachers and all of the staff. He mixes well with other students and is the type of pupil who always includes other in whatever he is doing. He is very popular with the other pupils in his class, both boys and girls.”

The headmaster continued by describing him as an asset to any school community and recommended him to any school to which he might apply for enrolment.

[24] The report from the school attended by S is much less detailed but contains no hint of any problem expressed by him or observed in respect of him.

[25] There is also a reassuring note from the co-ordinator of a women’s group attended by JH. It describes her as “a diligent, thorough, caring and dependable worker.” She related very well with her co-worker and the parents of the children. She had an excellent relationship with the children and ensured that they were safe and stimulated at all times”. The headmaster of C1’s school also commented on JH in complimentary terms stating that she had been extremely supportive and co-operative throughout the time C1 was at the school.

[26] I am satisfied that these reassures are of sufficient substance to be put into the balance when considering the anxieties expressed by both boys about a return to their mother’s care.

[27] A further matter of concern arises because the family has been split up by the retention of two children in Belfast. In the case of C2 and S, who are twins, a particularly significant relationship has been disrupted. The children were separated in circumstances where no preparations took place, where there has been almost no contact at all between the two sets of siblings since March and no thought appears to be have been given to the possible

psychological consequences for any of them of separation to date or in the future. Clearly this is something requiring urgent attention and assessment.

[28] The purpose of the Convention is to ensure that in the absence of any of the factors set out in Article 13 the children should be returned to the place of their habitual residence as soon as possible. I am satisfied that despite the clearly expressed views of the children they should be returned to Ireland so that their future place of residence may be determined. Ireland is clearly the appropriate jurisdiction for such work to be carried out. The children spent almost all of their lives there, they attended school in Dublin, their other siblings are there as well as their medical and welfare details: it is also the place where the concerns expressed by the children about their care can be investigated more effectively.

[29] The defendant has failed to establish any ground justifying a refusal of a Return Order and I do not propose therefore to exercise my discretion under Article 13 to withhold the making of a Return Order and direct that such an order shall issue. In order to ensure a smooth transition for the children and to minimise anxiety and disruption, I shall allow a short time to permit school arrangements and satisfactory contact arrangements to be put in place.

[30] After the conclusion of the hearing and after I had drafted this judgment I was informed by both counsel that JH was just about to leave Dublin and move the family to County Clare. I consider this move will further heighten the anxieties of C1 and S. I have considered the further submissions in writing made by each counsel and have concluded that I should still make the Return Order as all of the reasons for doing so remain valid and override the wishes of the children. The move means however that it is now more urgent than ever that their place of residence should be determined finally.

[31] Counsel have also provided me with a draft order in respect of contact arrangements which I approve. I wish to emphasise that JH is duty bound to fulfil the agreement in order to protect the welfare of C1 and S particularly. Any failure to do so would reflect badly on her ability to prioritise their needs. Although BH would have wished for more frequent contact I shall leave this to be decided by the courts of Ireland where the effects of the move to County Clare and the needs of the children can be assessed best.