

APPROVED

[2020] IEHC 541

THE HIGH COURT

2018 No. 38 HLC

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964
(AS AMENDED)

AND IN THE MATTER OF O'M (A MINOR)

BETWEEN

O'M

APPLICANT

AND

S

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 30 October 2020

INTRODUCTION

1. This matter comes before the High Court by way of an application for orders pursuant to section 11 of the Guardianship of Infants Act 1964 (as amended). In essence, the High Court is invited to make orders which mirror those previously made by the Family Court of Singapore (“*the Singaporean Court*”) in August 2020. The parties’ rationale for seeking these parallel orders is to ensure that the custody and access arrangements which have been agreed between the child’s estranged parents can be enforced, if necessary, before the Irish Courts when the child is present in this jurisdiction. The child is an Irish citizen but is habitually resident in Singapore.

NO FURTHER REDACTION REQUIRED

2. To preserve the anonymity of the child, the parties will be described simply as “*the father*” (the applicant in the title of the proceedings) and “*the mother*” (the respondent).
3. The application is made against the backdrop of a settlement agreement entered into between the child’s parents in May 2019. The settlement agreement had been reached in the context of protracted proceedings between the parties. In brief, the father had instituted proceedings in Singapore alleging that the failure of the mother to return to Ireland with the child in March 2017, following an agreed holiday abroad, constituted the “wrongful removal” of the child for the purposes of the Convention on the Civil Aspects of International Child Abduction (“*the Hague Convention*”).
4. The court of first instance in Singapore had made an order directing the return of the child to Ireland, but this order had been appealed. The appellate court then requested that the father, as applicant, obtain from the Irish Courts a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Hague Convention. This request was made pursuant to Article 15 of the Hague Convention (“*the Article 15 proceedings*”). At the relevant time, Ireland had been the child’s State of habitual residence.
5. The High Court was asked to address a number of matters including, *inter alia*, whether the mother and father were co-habitants for the purposes of section 2(4A) of the Guardianship of Infants Act 1964; whether the father had guardianship rights to the child; and whether the father had custody rights under Irish law within the meaning of the Hague Convention.
6. The Article 15 proceedings came on for hearing before the High Court (Ní Raifeartaigh J.) in May 2019. Happily, the parents were able, with the

assistance of their lawyers, to reach an agreement in respect of future rights of custody and access. The terms of settlement were reduced to writing on 22 May 2019. Thereafter, the terms of settlement were received and filed by the High Court (Ní Raifeartaigh J.) and made a rule of court on 19 June 2019. An order was also made on the same date declaring the father to be a guardian of the child pursuant to section 2(4A) and section 6(1)(a) and section 6F of the Guardianship of Infants Act 1964.

7. The following year, orders in almost identical terms to the terms of settlement were made, on consent of the parties, by the Singaporean Court on 7 August 2020. Relevantly, paragraph 14 of the order provided as follows.

“14. Parties agree that the orders herein shall be recorded as mirror orders in Ireland and both parties shall consent to an application in Ireland for such mirror orders to be made in Ireland.”

8. The parties duly made an application to the High Court for mirror orders. The application has been made in the context of the existing Article 15 proceedings. The application is made on consent, with both parties agreeing that this court has jurisdiction to make the requested orders pursuant to section 11 of the Guardianship of Infants Act 1964.
9. The application came on for hearing before me on 7 October 2020. Counsel for both parties made very helpful submissions to the court explaining the nature of the jurisdiction which the parties sought to invoke. In deference to the detailed submissions made, I indicated that I would reserve my judgment.

DISCUSSION AND DECISION

10. The child is an Irish citizen but is at present habitually resident in Singapore. The rationale for seeking orders from the Irish Courts which mirror those of the

Singaporean Court stems from the fact that the agreement reached between the parents on custody and access envisages that the child will spend extended periods of time in Ireland (and elsewhere in Europe). Both parents are anxious to ensure that the order of the Singaporean Court is capable of being enforced, if necessary, before the Irish Courts during those periods.

11. (It should be explained that Singapore is not a party to the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children (“*the 1996 Convention*”)).
12. The leading authority on the jurisdiction of the Irish Courts to make mirror orders is the judgment of the High Court (Keane J.) in *F. v G.* [2014] IEHC 152; [2014] 1 I.R. 417. In a careful and comprehensive judgment, Keane J. examines the nature of the jurisdiction, and the considerations to be taken into account by a court before making such an order. The judgment confirms that the High Court has jurisdiction to protect the rights and welfare of any child who is an Irish citizen (and who is not habitually resident in a contracting State to the 1996 Convention nor in a Member State under the Brussels II *bis* Regulation), regardless of where he or she may be living or present at the time of the proceedings. Keane J. suggests, however, that such jurisdiction should only be exercised with caution or circumspection.
13. As confirmed by Keane J., in considering an application for mirror orders, in the guise of an application for a direction (or directions) pursuant to the provisions of section 11 of the Guardianship of Infants Act 1964, the court is constitutionally and statutorily mandated to have regard to the welfare of the child as the first and paramount consideration. That principle applies not only in Irish cases involving

no foreign element but also in cases where one or both of the parties is of foreign nationality, domicile or residence, and even in cases where a foreign court has already made a guardianship or custody order. As set out at paragraphs 98 and 99 of the judgment, the correct approach is as follows.

“[98] The nature and scope of the jurisdiction to make ‘mirror’ orders, pursuant to the terms of s. 11 of the Act of 1964, falls to be considered by reference to first principles in the absence of any directly applicable governing authority. Of most obvious and direct relevance are the general legal principles governing the recognition or enforcement of foreign custody orders as a matter of private international law. The fundamental principle in that regard is that the existence of a custody order made by a court to which neither Brussels II bis nor any other international law instrument recognised by the law of the State applies does not prevent a court in this jurisdiction from making such orders in this jurisdiction as, having regard to the child’s welfare, it thinks fit.

[99] Subject to that general rule, a number of factors are relevant to the exercise of the court’s discretion in that regard. Those factors include the following:-

- (a) The custody order of a foreign court deserves grave consideration but the weight to be given to it must depend on the circumstances of the case.
- (b) An order made very recently, no relevant change of circumstances being alleged, will carry great weight. Its persuasive effect is diminished by the passage of time and by a significant change in circumstances, for example the removal of the child to another country or the supervening illness of one of the claimants.
- (c) The status of the foreign court and the nature of the proceedings in, and the legal approach taken by, the court, may all be taken into account. The effect of the foreign order will be at its weakest when it was made many years ago and has since been modified by consent and the child has nearly attained his majority and so can decide for himself with which parent he wishes to live.”

14. Applying these principles to the facts of the present proceedings, I am satisfied that this is an appropriate case in which to make a mirror order for the following

reasons. First, whereas the application is, in form, one intended to give effect to the orders of the Singaporean Court, the terms of the Singaporean Court's order merely reflect the terms of settlement which had previously been received and filed, and made a rule of court by the High Court (Ní Raifeartaigh J.) on 19 June 2019. Indeed, it could be said that there is a certain circularity about the application for the mirror orders. Crucially, however, this is not a situation whereby the Irish High Court is blindly following an order made by a foreign court. Rather, the access and custody arrangements agreed between the parties have *already* been endorsed by the High Court in its orders of 19 June 2019.

15. Secondly, the making of mirror orders is necessary to give practical effect to the access and custody arrangements agreed between the parties. The agreement envisages that the child will spend extended periods of time in Ireland, and the making of the mirror orders ensures that the agreement is enforceable before the Irish Courts. It is also envisaged that the parties would reside in the United Kingdom for a twelve-month period, and the existence of an order by an Irish Court will be of assistance in enforcing the agreement there if necessary. (The position would have been different had Singapore been a party to the 1996 Convention).
16. Thirdly, the making of mirror orders does not present any risk of inconsistent orders or otherwise cut across the comity of national courts. The order of the Singaporean Court expressly provides for the making of a mirror order by the Irish Courts. To borrow the language of Keane J. in *F. v G.*, the court is being asked to exercise a jurisdiction in support of, rather than in opposition to, the jurisdiction claimed by the court in the other jurisdiction concerned with the child's welfare.

17. In all the circumstances, I am satisfied that the making of the mirror orders is in the best interests of the child. Specifically, it is in the child's best interest that the agreed custody and access arrangements be given practical effect by ensuring that the terms of the agreement are enforceable when the child is present in Ireland.

PROPOSED FORM OF ORDER

18. Much of the content of the order of the Singaporean Court is directed to the regulation of custody and access during the summer of 2019. This is because the order reflects the terms of settlement dated 22 May 2019. I do not think that it is either appropriate or necessary to make an order in relation to these *historic* events. Instead, the order of this court shall be confined to the following.

WHEREAS the parties have agreed to foster and develop the relationship of the child with the other parent and cooperate and keep each other informed of any developments regarding the child.

WHEREAS the father intends to move to Singapore for a twelve-month period either in 2019 or early 2020 (with the twelve months to commence on the date of his arrival). During that twelve-month period, the parties will make arrangements to move at the same time with the child to live in the United Kingdom (the default arrangement) or such other third country as they may agree with the intention of moving to whichever country no later (unless agreed) than the expiration of the aforesaid twelve-month period.

WHEREAS for the purposes of the twelve-month stay in Singapore, the father may obtain a tourist visa for Singapore. In the event that the father travels out of Singapore, with each overseas trip being for a period of not more than 10 days to maintain the father's presence in Singapore for the twelve-month period referred to above or in the course of normal day to day living, be it recreationally or work-related, such overseas trips shall not constitute a break in the said twelve-month period the parties have agreed to live in Singapore.

It is hereby ORDERED pursuant to section 11 of the Guardianship of Infants Act 1964 that the mother and father are appointed as joint custodians of the child in accordance with the laws of Singapore and Ireland. Accordingly, the parties shall have joint custody of the child, with care and control to the mother and access to the father as provided for below.

It is FURTHER ORDERED pursuant to section 11 of the Guardianship of Infants Act 1964 that once the father travels to live in Singapore for the twelve-month period provided for in the recitals above, the mother and father agree that the division of exclusive parenting time shall be approximately 60% with the mother and approximately 40% with the father. It is intended that the father has exclusive parenting time on Thursday to Sunday (week one) and Tuesday to Thursday (week two). The parties may by agreement amend or alter the contact schedule.

The parties and the child will spend a two-week summer vacation in Ireland in 2020. The father will discharge the costs of the return flights of the parties and the child.

Each party to bear their own costs of the proceedings herein.

Liberty to apply.”

19. The parties are invited to agree the precise form of wording of the order between them, and to revert to the registrar in this regard within twenty-one days. In the event of any dispute as to the precise form of wording, the court will rule upon it as necessary.
20. No order for costs is required in circumstances where it has been agreed that each party will bear their own costs.

Appearances

Grainne Lee for the applicant father instructed by the Law Centre (Tralee)

Alex Finn for the respondent mother instructed by the Law Centre (Smithfield)

Approved
Garnett S. Mans