THE HIGH COURT

FAMILY LAW

[2023] IEHC 568

IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF CUSTODY ORDERS ACT 1991

AND

IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

AND

IN THE MATTER OF ESTHER, SAMUEL, AND OLIVA (MINORS)

(CHILD ABDUCTION: COSTS, BREACH OF COURT ORDERS)

BETWEEN:

O.S.

APPLICANT

AND

O.S.

RESPONDENT

Judgment of Ms. Justice Mary Rose Gearty delivered on the 19th of October, 2023

1. Introduction

1.1 The Applicant mother in this case seeks that the Respondent father pay part of the costs of the summary proceedings in which she successfully applied for the return of her children to their habitual residence in England.

1.2 The return of three children to England was ordered by the High Court, that Order was appealed, and the Respondent father lost his appeal. The following day, on 31st July 2023, he emailed the office of the Court of Appeal, saying that he would not be returning the children to England. The matter was listed urgently that day and this Court heard from both parties.

1.3 As was the case throughout the proceedings, the Applicant had the benefit of publicly funded lawyers, while the Respondent represented himself. As set out in the substantive judgment in this case, the Respondent father had contended that his children were at risk if they were returned to England, but the factual matters relied upon to substantiate this risk were not, even if taken at their height, sufficient to establish that the children were at risk, let alone at grave risk, if they were returned. Family law proceedings had commenced in England, yet the Respondent brought the children to Ireland and then decided to stay here, without the consent of their mother. Due to this wrongful retention, in contravention of the custody rights of the Applicant mother, the Respondent was ordered to return to England, with his children. His appeal of this Order was unsuccessful.

2. Procedural History post judgment

2.1 On the 31st of July, the Respondent told this Court that, while he had initially intended to respect the Orders of the Courts involved, he had flashbacks of what he described as "the situation" and told me that he "*would not like for them to be back there*", referring to England. I ordered that he either return the children himself on or before the 8th of August or produce them on the 9th of August so that their mother could bring them to England.

2.2 On the 8th and 9th of August, the Respondent failed to return the children or to produce the children as directed. On the 9th of August a motion for attachment and committal was heard by Simons J. The Respondent joined

that hearing by telephone, not by video link. He later sent emails to the Applicant's lawyers in which he asked for a copy of the Order made that day and asked for time to comply with that Order. The following day, 10th of August, he proposed flying to England. His e-mail, sent at 11:18am, reads: *I have decided to fly today and ask that the matter be settled as soon as possible I don't want to stress out again. I want the safety of my children*.

2.3 Told of this development on the 11th of August, Mr. Justice Simons took the view that this was too little too late, the Respondent had chosen to breach the Order at that point, and it was appropriate to avail of the Amber Alert system to ensure the safety of the missing children. Later that day, it became clear that the Respondent and the children were all on a ferry from Belfast to Liverpool which had left at 10:30am on the morning of the 10th of August. In other words, the family was en route to England as the Respondent typed an e-mail saying that he hoped to fly to England later that night.

2.4 One might have some sympathy for an argument which rests on the inability of a litigant in person to understand some of the nuances or legal language used in court. Here, there was no room for error or misunderstanding. The email amounted to a deliberate attempt to mislead the lawyers, the police, and the Judge as to where he and the children were.

2.5 On the 5th of September, the case was listed before me for mention. On that date I was told that the Respondent had sought to impose preconditions on the return of the children, including requiring notice that the English courts had varied or revoked his rights of custody before he would agree to return them. He did not appear on that date. The Applicant sought an order for costs in respect of all court dates since the unsuccessful appeal. I adjourned the matter to allow the Respondent to appear if he wished to contest this.

2.6 On the 5th of October, the case was listed again. The Respondent attended via phone from a location in England which he would not reveal. He submitted that he should not be ordered to pay any costs of the proceedings.

2.7 The costs of the case now include three court dates after the Respondent had notified the Court of Appeal of his intention to ignore the Court Orders in this case. He not only ignored the Orders, but he also acted so as to frustrate the Orders. The Applicant submits that this Court should award costs against the Respondent personally as the tax-payer should not bear the burden of paying for his refusal to abide by the relevant Orders.

3. <u>The Relevant Law: Costs</u>

3.1 S.169 of the Legal Services Regulation Act 2015 [the 2015 Act] provides that costs follow the event, that is, the loser in each case pays the legal costs. If a different costs order is made, according to the Act, a court must set out reasons as to why it has so ruled.

3.2 The High Court Practice Direction Number 51, 'Family Law Proceedings', provides, at paragraph 25, that a court exercising its discretion as to whether or not to make an order for costs shall consider the general reasonableness of each party's behaviour in the conduct of the litigation in question.

3.3 Section 33(2) of the 1995 Civil Legal Aid Act [the 1995 Act] makes it clear that the fact that a party is legally aided is effectively irrelevant in considering costs. It reads:

> *"A court or tribunal shall make an order for costs in a matter in which any of the parties is in receipt of legal aid in like manner and to the like effect as the court or tribunal would otherwise make if no party was in receipt of legal aid and all parties had respectively obtained the services of a solicitor or barrister or both, as appropriate, at their own expense."*

3.4 Despite what appear to be definitive statements that costs usually follow the event and s.33 of the 1995 Act confirming that legal aid should not affect this position, it is clear that this rule does not apply in family law cases.

3.5 *D. v. D.* [2015] IESC 66 is authority for the proposition that the parties should usually bear their own costs in family law proceedings. There, Clarke and MacMenamin JJ pointed out that family law proceedings often involve a decision in which there is no winner. Instead, future provision is made for the parties or, as they still are, the family. This complicates the task of locating what exact 'event' costs are to follow. Therefore, MacMenamin J. in *CFA v. O.A.* [2015] IESC 52 adopted the phrase 'costs follow the outcome' in childcare proceedings. In *D. v. D.,* MacMenamin J. also commented on the effect on the joint assets of the parties should costs orders be made, bearing in mind that the same pool of assets was used by the family, whether for the purposes of maintenance or paying legal costs.

3.6 In the family law context, however, the issue of whether awarding costs against a party was appropriate was also considered in *D. v D.* Here, MacMenamin J. emphasised the "*vital distinction between what is reasonable and what is unreasonable conduct by an opposing party*", noting that a trial judge was particularly well-placed to determine whether conduct had gone beyond reasonable parameters. In each individual case, it was:

> "*the duty of the Court to make such order is just in the circumstances. In some circumstances, this may warrant a court ordering each party to bear its own costs ... In other cases, especially where there has been serious misconduct, obstruction or hindrance of court orders, as a result of which significant further proceedings are necessary, a full order for costs may be both just and fair without it becoming a sanction.*"

4. Submissions and Response

4.1 The Applicant submits that, due to the Respondent's deliberate breaches of Court Orders in this case, he should bear the costs of all subsequent court hearings involved, including the hearings in relation to costs. The Applicant relies on the law outlined above in respect of the conduct of parties and the role of the courts in sanctioning those who act so as to increase legal costs unnecessarily. In terms of his ability to pay, counsel for the Applicant submitted that this was irrelevant as the point of principle was an important one. Making an order in respect of costs is one part of the legal process, enforcing such an order is a separate step. His client might not go to the expense of pursuing such a litigant, but it is important to have such an order, to be enforced if it becomes necessary or more realistic to do so. The Applicant submitted that the Respondent himself was responsible for the costs of the proceedings since the final Orders had been made and that no act of the Respondent, or of the duty Judge, had contributed to these costs.

4.2 The Respondent made three points in response: firstly, he submitted that as the Government was paying for the case, there was no need for him to pay. His precise words were "*there is a government who support everything*". Secondly, he submitted that he was not in a position to pay and that the state should continue to pay all costs. Finally, the Respondent argued that he was not responsible for the outcome of the case. He told me that the Applicant "*used my position as lay litigant, my non-representation to hold everything against me*." He suggested that he wanted to bring a motion and that the Applicant had prevented him from doing so. He also blamed the duty judge, Simons J., stating "*I know how the court works, my word was not listened. Everything was taken for granted*." Where I use quotation marks, I refer to my contemporaneous note of the Respondent's submissions.

5. Public Legal Aid Funds and Misconduct

5.1 The availability of publicly funded legal aid is to assist those who need legal advice and not to provide free legal advice to those who decide to launch frivolous or groundless applications or subsidise those who persist in ignoring Court Orders, thereby increasing legal costs. It is important that this publicly funded system does not facilitate those who ignore the outcome of legal proceedings and take the law into their own hands, when such a person should pay any costs arising due to his conduct. The patience of the Court and that of the tax-payer is quickly exhausted by such a litigant.

5.2 It is unfair to suggest that the citizens of this jurisdiction should pay the costs of the Applicant who had to continue her legal battle due to this Respondent's refusal to abide by Court Orders. The legal aid system should not be abused or taken for granted.

6. Responsibility of the Litigants and of the Court

6.1 There is no basis for the Respondent's suggestion that he had intended to bring a motion and that it was somehow the fault of the Applicant that he had not done so. His being unrepresented was irrelevant to this argument. I accept the submission on behalf of the Applicant that there was no request to list a motion on his behalf and even if there had been such a request, it is the responsibility of the Respondent to put forward his own case, not the duty of his opponent or her lawyers. The Respondent was, at all times, competent to address the court, to identify the issues and to make his own applications throughout these proceedings. If a motion was intended but never brought, only the Respondent bears responsibility for that omission.

6.2 Having reviewed a note of the digital audio recording of the hearing before Simons J. on the 10th of August, the Respondent's submission that he was not listened to in that Court or that everything was taken for granted was

entirely misconceived. The Respondent repeatedly explained that he did not want to breach any Order but that he could not return the children to their mother. In fact, he was being asked to facilitate the return of the children to England so that the English courts could determine where they would live. At no point did Mr. Justice Simons refuse to hear him but he did prevent the Respondent from repeating the submission that he was not breaching the Court's Order; clearly he was, although he was trying to characterise it as a situation in which he was preventing the children from being returned to the Applicant. This was not a matter for the Respondent but for the English courts to determine.

6.3 The objective of the Order was clear from the judgment of this Court, [2023] IEHC 421, in which I described the limits of the jurisdiction to return in detail, confirmed the necessity for this family to engage with the social workers in England and even expressly referred to the Respondent's option of applying to relocate the children instead of acting unilaterally. The Order to return the children was upheld by the Court of Appeal. There was no order or direction that they live with their mother or that they go directly into care and this re-stating of the argument appears to form the core of the Respondent's attempt to argue that everything was taken for granted.

6.4 Simons J. took nothing for granted, to use the Respondent's words, but had uncontroverted evidence that a High Court Order had been made and upheld, and this Respondent was proposing to re-argue the substantive case instead of abiding by that Order. Nothing that the Respondent said about the substance of the case could have changed the position that he was in breach of the Order. He was treated with respect and patience by Simons J. and there was no question of not being heard, other than that he was not permitted to re-open the case, which would have been wholly inappropriate. The case had ended at that stage and final Orders made.

7. Conclusions

7.1 Any court is reluctant to make a costs order in family law proceedings where one or both sides are struggling financially and where such an order may work to the disadvantage of the children. The recognised exception to this rule is where one party conducts himself in such a way as to make it necessary for a court to award costs against him. To use the words of MacMenamin J., the Respondent has ignored Court Orders and obstructed and hindered their operation. He continues to do so, to the detriment of his children and ignoring their views in respect of their mother. Each child wants contact with her, according to the court-ordered assessments.

7.2 The courts operate, in large part, on the basis of social consensus. If the tax-payer is required to pay for a litigant who has created unnecessary legal work due to a refusal to abide by Court Orders, this will quickly erode public confidence in the legal system and that consensus may break down.

7.3 The Respondent refused to produce his children, refused to bring them home and pretended to be in Ireland when he was already on a boat to England so that he could hide them from the authorities in both countries.

7.4 The Respondent has actively thwarted the Court Orders made in this case. The application is for costs for the proceedings since the final Order of the Court of Appeal. All court applications since then were made by the Applicant, and all were successful. All were necessitated by the actions of the Respondent in refusing to abide by Orders of the Irish Courts.

7.5 Applying s.33 of the 1995 Act in respect of legal aid, the question of costs must be approached as though the Applicant had funded her own case. The Applicant is entitled to an Order requiring the Respondent to pay all legal costs arising since the proceedings in the Court of Appeal concluded.