

Neutral Citation No: [2019] NIFam 4

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

Delivered: 26/03/2019

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985

Between:

B

Plaintiff

and

V

Defendant

SIR REG WEIR

Anonymity

[1] This judgment has been anonymised to protect the identity of the child concerned. Nothing may be published concerning this matter that would lead to the direct or indirect identification of the child or her parents.

The nature of the proceedings

[2] The plaintiff brings this application under the Child Abduction and Custody Act 1985 seeking an order requiring the return of P, her child, to Spain.

Background

[3] The child concerned in these proceedings is some 9 years old so that the provisions of the Act plainly apply to her. It has not been disputed that prior to her removal to Northern Ireland by her father, V, in August 2018 she was habitually resident in Spain. Further, it has not been disputed that she is presently being

retained in Northern Ireland by her father against the wish of her mother, B, who continues to reside in Spain. Nor is it disputed that the mother has joint rights of custody with the father acquired by operation of law. The matters which are in dispute are:

- (i) Whether the mother consented to or has acquiesced in the child's retention in Northern Ireland by the father.
- (ii) If not, whether there would be a grave risk that the child would be exposed to physical or psychological harm if she were returned to Spain or would otherwise be placed in an intolerable situation.
- (iii) Whether the child objects to being returned to Spain and has attained an age and degree of maturity at which it is appropriate to take account of her views.

I will deal with each of these questions in turn.

Has the mother consented to or acquiesced in her daughter's retention in Northern Ireland?

[4] The father has failed to satisfy me (and when I speak of being satisfied I mean on the balance of probabilities) that the plaintiff mother either consented to or has acquiesced in the retention of her daughter in Northern Ireland. Indeed, the evidence points in the opposite direction. The child ought, according to her mother, to have been returned to Spain from what she understood to be a summer holiday in Northern Ireland with her father so as to begin the new school term in September 2018. The mother says that while the child was in Northern Ireland, and not before, the father told her during a telephone conversation that he did not intend to return the child to Spain. She waited to see whether he would in fact do so but when he had not by the start of the Spanish school term on 12 September she went the next day to the police and on the following day to the Ministry of Justice requesting advice and assistance. It is in my view significant and corroborative of the mother's account that her application through the Central Authority of Spain was completed on 28 September, only some two weeks after the child had failed to be returned. Thereafter, the matter proceeded with all possible dispatch and was delayed only by confusion as to the defendant's precise address which meant that he could not be served with these proceedings until 25 February 2019. In short, there is nothing in the behaviour of the mother to suggest that she has either consented to or acquiesced in the child's retention, quite the contrary. I find that the child has been wrongfully retained in Northern Ireland without consent or acquiescence.

Does a grave risk exist that to return the child to her mother's care in Spain would expose her to physical or psychological harm or otherwise place her in an intolerable situation?

[5] The defendant father makes a number of largely non-specific allegations about the child's care or lack of care while living with her mother in Spain and says that her education there was being neglected. He also says that she is thriving with him in Northern Ireland and that she is happy to be living here with her full sibling J who is only a year older than her and with her two half-siblings aged two and 10 months born from the father's present relationship.

[6] On 11 February 2019 O'Hara J made orders that the child be confirmed as a Ward of Court, that the Official Solicitor be invited to act for the child and be asked to lodge with the court a report of the child's wishes and feelings. The Official Solicitor accepted the invitation and on 7 March 2019 an experienced solicitor from that office, Ms Coll, interviewed the child and has provided the court with her customary careful and detailed report. Unfortunately, her conversation with the child had to be conducted through an interpreter as the child's English proficiency is not yet sufficiently developed and Ms Coll has recorded that she feels that the fluency of the interview was naturally hindered by the need for and use of an interpreter. With that caveat in mind it was established by Ms Coll and I am satisfied:

- (i) That the child is attached to and wishes to see both her parents. She presently has regular, almost daily, contact with her mother using "Facetime".
- (ii) That she likes living at her father's home in Northern Ireland with him, her stepmother, her full brother and half-siblings and that, while she liked living in her city in Spain, it is "better here".
- (iii) She enjoys her school where she has good friends and where she feels she is learning more than she did in Spain and finding it easier to learn. There are lots of activities there and she feels well-treated. She is getting extra help with her English lessons. Her brother J is in the same class and there is another child who speaks Spanish.
- (iv) The child would miss her stepmother and stepsister and her school if she had to return to Spain and if she had the choice she would prefer to stay in Northern Ireland "because I have more fun here". She explained that she has more company in her father's house with her sibling and half-siblings and she enjoys this more than living in Spain with only her mother and an older half-sibling who is aged 22.
- (v) The child was clear that she would like to see her mother as much as possible adding "yes and if she could be here it would be even better".

[7] What I draw from these salient features of the interview with Ms Coll is that the child's desire to remain in Northern Ireland is motivated not by a preference for either one of her parents over the other but by the company of other children within the family who are available to her in her present home as compared with her more isolated situation in Spain, the fact that she is able to be at the same school class as her brother and the happiness she derives from her school here; her school friends, the varied activities and her opinion that she is learning more at her school here than she would be in Spain. There is no sense from the interview or from any other evidence that the child would be at risk, let alone grave risk, of physical or of psychological harm if she returned to Spain or would otherwise be placed in an intolerable situation. I hold that the father has entirely failed to establish this ground of objection to the child's return. It is noteworthy that there is no allegation by him that the care of the child by her mother warranted any intervention by the Child Protection Authorities in Spain or that he himself ever complained to anyone of her treatment there. The child herself gave Ms Coll no hint of complaint about the care she received from her mother.

Does the child object to being returned to her mother?

[8] The child has made no such objection. As earlier described, she would plainly *prefer* to stay here for the understandable reasons that any child of her age and family circumstances might have given, but she also said that she liked living with her mum, she liked her mum's present partner and described playing with her cousins and her friends. Her position is therefore one of preference and not one of objection. She agreed with Ms Coll when the latter summarised her position as being that she would prefer to live here but see her mother as often as possible. There is no sense of objection to returning to her mother in Spain. Accordingly, I hold that this ground of objection cannot succeed.

General Observations

[9] This is an unfortunate case of a young child caught between two parents, each of whom wishes to have their own way over the place of residence of their child and each caring little for the feelings of the other or, more importantly, for those of the child. The child in turn, being plainly aware of the animosity between the two adults, is anxious to emphasise her love for both of them. Before the hearing I had encouraged the parents to put the child's interests first but this they seem at the moment unable or unwilling to do. If I were deciding upon the better place of residence of the child by applying a welfare test it is likely that I would decide that in all the circumstances the child has described its welfare, happiness and best interests, at least for the present and the foreseeable future, would be best achieved by her remaining here in the family with the other children and with the undoubted advantage of learning another language at school while being able to maintain her Spanish at home. That however, as all counsel agree, is not my task in a case such as this where the firm principles of the Hague Convention on abduction are to be applied. The father has behaved badly by removing the child to Northern Ireland

under the false pretext that she would be returned following a holiday in Northern Ireland in time for the new school year in Spain. No doubt his deceitful behaviour has influenced the mother in her resistance to the child remaining here. However, there still exists the opportunity for the parents to agree to put themselves to one side and focus on the reasonable wishes of their daughter expressed with tact and an admirable and mature concern for the feelings of both her parents.

Conclusion

[10] For the purposes of the present proceedings I hold that the child, being subject to the provisions of the Convention, is wrongfully retained in Northern Ireland and that none of the defences contended for by the defendant has been made out. Accordingly, an order for the child's return to her habitual country of residence, namely Spain, at the earliest practicable opportunity must follow and I so order.