[2019] IEHC 945

THE HIGH COURT
FAMILY LAW

[2018/62 M]

AND IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT, 1964 (AS AMENDED)
AND IN THE MATTER OF THE FAMILY LAW ACT, 1995
AND IN THE MATTER OF M., A CHILD

BETWEEN:

L.C.W.

APPLICANT

AND

K. C.

RESPONDENT

JUDGMENT of Mr. Justice Jordan delivered on the 31st day of July, 2019

1. The applicant is the mother of M., born on the 30th September, 2016, who is now nearly three years old. The respondent is the father. The applicant and the respondent were never married to each other and had a relationship (the duration of which is in dispute). The pregnancy was not planned.

2. The applicant is a law graduate and has worked as an executive assistant in various companies. The applicant is now married to a career officer, M.W. of the United States Army since the 17th November, 2017 and they have one child, H., born on the 17th October, 2018. This pregnancy was planned. Due to Orders detailed below, the applicant has resided in Ireland since June 2018, at her parents' address in X. Thus, H. was born in the Republic of Ireland. Her husband is based in the United States of America.

3. The respondent is a business account manager and occasional long distance lorry driver and resides in L. He is now in another relationship and he and his partner are expecting their first child.

4. The parties had continued to reside together in Dublin for the duration of the applicant's pregnancy and resided for a time in a property owned solely by the respondent in L. after the applicant gave birth in September, 2016. At times also she and M. resided with her parents in X.

5. The applicant left this jurisdiction with M., on the 28th August, 2017 without notice to the respondent or any advance warning to him. She went to Atlanta, Georgia. The applicant informed the respondent on the 31st August, 2017, by text, that she was going on a last minute holiday with M.

6. The applicant later moved from Atlanta, Georgia to Louisiana without notice to the respondent and after she was located in Atlanta by the Gardaí, with the assistance of Interpol. It does however appear that this move was as a result of her new husband's re-assignment and there is no evidence that she endeavoured to change or conceal her identity at any stage.

7. The respondent discovered the applicant had moved from Atlanta to Louisiana in April 2018 via the applicant's U.S. attorney.

8. The respondent did not have access and/or contact with his son, M. for just over 9 months.

9. From the 24th June, 2017 until the applicant left the jurisdiction with M. on the 28th August, 2017, the respondent had regular access. He would drive from L. to X. to see M. for a number of hours.

10. The respondent sought legal advice in late September, 2017 from a solicitor.

11. On the 2nd October, 2017 the respondent attended at the District Court in L. before Judge Kilrane seeking to regulate the issues of guardianship, custody and access. Judge Kilrane made orders appointing the respondent as a joint guardian pursuant to the provisions of s 6 a. of the Guardianship of Infants Act, 1964 (as amended). The respondent was also granted access every second weekend from Friday to Monday. The applicant was not present or legally represented at the hearing on the 2nd October, 2017. She was in the United States of America.

12. On the 19th October, 2017, the respondent was informed by the Gardaí that they believed the applicant to be in Atlanta in the United States of America with M.

13. On 9th November, 2017 the respondent contacted the Central Authority with a view to seeking their assistance to institute Child Abduction proceedings, in accordance with The Hague Convention for the return of M. to Ireland.

14. By letter dated the 28th December, 2017 the United States Department of State (WEP Abductions) requested the return of M. to Ireland on a voluntary basis.

15. By letter dated the 11th January, 2018, Ms. Carla Stern of Stern & Edlin, Attorneys informed the U.S. Department of State that the applicant wished to resolve the matter without engaging in litigation.

16. The respondent's US attorney, Mr. Matt Dowell of Alston & Bird, LLP replied to that letter requesting that the applicant voluntarily return M. to Ireland so that custody and access matters could be determined by the court in Ireland.

17. A letter of reply was received from Ms. Stern's associate, Kyle A. Ference, dated the 12th March, 2018 seeking an extension of time to respond to the request as Ms. Stern was on vacation.

18. On the 23rd March, 2018, a letter was received by Mr. Dowell stating that the applicant would facilitate access between the respondent and M. in the United States of America.

19. The respondent instituted Child Abduction proceedings pursuant to The Hague Convention in Atlanta, Georgia in March, 2018.

20. On the 5th April, 2018 the respondent was informed that the applicant was no longer residing in Atlanta in the State of Georgia and had moved to Louisiana.

21. The respondent then had to issue further Child Abduction proceedings in the State of Louisiana.

22. In the meantime, on the 6th February, 2018 the respondent, having been advised by his solicitor, attended in person at the District Court Office in L. for the purposes of re-entering the issue of guardianship to have Judge Kilrane clarify that the order for guardianship was on the basis of the automatic guardianship rights afforded to the respondent on the basis of fulfilment of the cohabitation requirement pursuant to Section 2(4) of the Guardianship of Infants Act, 1964 (as amended). The respondent also sought clarification as to the operation date of the said declaration of guardianship.

23. The application was listed for hearing on 5th March, 2018. Again, the respondent attended in person and the applicant was not present nor represented. I am satisfied that the Applicant would have had a solicitor there to contest the application had she appreciated the far reaching impact of the Order actually being sought. That she may have realised had the application been made properly. The events are clearly set out in the judgment of MacGrath J. in the Judicial Review proceedings referred to below. Judge Kilrane made an order declaring the respondent to be a guardian as and from the date of birth of M. and on the basis that the cohabitation requirement of the Act had been fulfilled.

24. The applicant lodged a Notice of Extension of Time to appeal the Order of the 5th March, 2018 on the 27th March, 2018. The delay involved can best be measured in days.

25. On the 17th April, 2018 the applicant instructed a solicitor to attend L. District Court for the purposes of seeking an adjournment of the application to extend time to appeal the order of 5th March, 2018. Judge Kilrane refused the application for an adjournment and refused the relief sought by the Applicant. Judicial Review proceedings were already in train on her behalf.

26. The applicant sought to appeal the refusal of Judge Kilrane to grant an extension of time to appeal and this came before Judge Aylmer on the 10th May, 2018 in the Circuit Court sitting in L., just over two months after the making of the order of the 5th March 2018. The application was made to Judge Aylmer and the appeal was refused. This is how it came to be that the applicant never had an opportunity to present her side of a case in which a far reaching order was sought and granted, although the application for it was not properly made in the first place.

27. On the 16th April, 2018, the applicant wisely brought an application for leave to seek Judicial Review of the decision of Judge Kilrane dated the 5th March, 2018. The applicant was granted the application for leave, including a stay on the order.

28. Ultimately, the Judicial Review proceedings were heard over two days before MacGrath J. who delivered judgment on the 14th January, 2019. The applicant was successful in her application to quash the order of the 5th March, 2018.

29. The High Court, MacGrath J. in the Judicial Review proceedings entitled "Record No.; 1018/287JR, The High Court L C Applicant and K C Respondent"

(i) quashed the decision and Order of District Court Judge Kilrane made on the 5th March, 2018 appointing the Respondent joint guardian of M. with effect from the 30th September, 2016 pursuant to the Child and Family Relationships Act, 2015;

(ii) [this provision in the perfected order appears to be an error as it does not accord with paragraph 107 of the written judgment] ;

(iii) declared the Determination and Order of the District Court made on the 5th March, 2018, null and void; (iv) declared the Order made on the 5th March, 2018, was made unlawfully and in excess of jurisdiction of the District Court or any Court; (v) made no order as to costs and (iv) granted a stay in the event of an appeal until the first direction hearings before the Court of Appeal. No appeal was lodged.

30. The Respondent instituted and maintained proceedings in the United States District Court Western District of Louisiana, Lake Charles Division pursuant to The Hague Convention on the Civil Aspect of Child Abduction 1980 ("The Hague Convention") and Council Regulation (EC) No. 2201/2013 ("Brussels II bis Regulation") seeking the return of M. on the basis that he had been wrongfully removed from his habitual residence and that he had rights of custody by way of guardianship entitling him to relief.

31. The trial was held on the 30th and 31st May 2018. Judge Kathleen Kay accepted the application and arguments on behalf of the Petitioner, K.C., and directed the immediate return of M. to Ireland. As MacGrath J. points out, while Judge Kay did not regard the District Court Orders made in Ireland as having preclusive effect, it does appear from the text of her judgment entitled '*Court's Ruling'* that she found the impugned decision and order persuasive.

32. Since her return to Ireland the applicant has resumed residing with her parents in X. and has operated the access in accordance with the Order of the 2nd October, 2017. The Order entitles the Respondent to access every second weekend commencing Friday at 5.00p.m to Monday at 10.00a.m.

33. The Order appointing the Respondent a guardian from the date of the Order on 2nd October, 2017, is not in dispute.

34. At this point I should observe that the Respondent's written submissions filed in advance of this hearing includes a paragraph on the second last page in which:

> *"…the Respondent seeks that it be declared by this Honourable Court that he is an automatic guardian of the infant, M., in accordance with provisions of Section 6 F of the Guardianship of Infants Act, 1964 (as amended) on the basis that he satisfies the criteria as set out in Section 2 (4A) of the 1964 Act."*

35. Despite the history, no Notice of this application was served on the applicant nor even a letter to advise of it. It is wrong of the respondent to seek to proceed in this way. It is wrong that the Court be pressed to entertain such an "Application" when one has regard to the clear judgment of MacGrath J. and the pleadings and affidavits actually filed in Court and served by both sides in this matter. It is simply unacceptable. I declined to entertain the proposed Section 6 F "Application" which in my view ought to have been brought and served and filed properly before now if being considered at all. Such an application was not in fact before the court.

36. As the applicant was found by the United States District Court to have abducted M., the respondent's application for his return to Ireland was granted. M. was placed in the respondent's care on the 1st June, 2018 pending the return to Ireland. The respondent stayed in a hotel with M. in Lake Charles, U.S.A. until he returned to Ireland with M. on the 7th June, 2018.

37. When the applicant returned to Ireland, M. was returned to her care on the basis that the District Court Access Order would be complied with. M.'s passport was retained by the respondent's solicitor.

38. The applicant lodged an appeal against the decision of Judge Kay to return M. to Ireland. However, she withdrew the appeal (on a without prejudice basis) in November, 2018 and instead issued these relocation proceedings. Under the laws of the United States of America, an appellant can re-instate an appeal withdrawn on a without prejudice basis within 180 days. Thereafter, the appeal becomes withdrawn with prejudice. Therefore, there is no extant appeal before the U.S. Court pertaining to The Hague Convention proceedings and the finding of child abduction as against the Applicant remains. The respondent's costs of the U.S. hearing were awarded to the respondent and amount to $55,000.00. The applicant gave evidence that she has yet to pay this bill and does intend to do so. In addition she has no doubt legal costs on her own side as American attorneys represented her at the hearing. I mention the costs simply to observe that litigation expense is a real practical consideration in terms of the family finances upon which the welfare of M. is so dependent.

39. Of some relevance and significance also are the criminal proceedings which are current. On the 11th July, 2019, the applicant was charged under s.16 of the Non-Fatal Offences Against the Person Act, 1997. Her solicitor did shortly before then provide the Gardaí with the judgment of MacGrath J. in the High Court and asserted that the alleged child abduction charge had no basis since the District Court Order of the 5th March, 2018 had been quashed. Although the respondent had been in contact with the Gardaí in March he had not given them a copy of the judgment of MacGrath J. He indicated in evidence that he was not asked for it. The applicant who has been charged is the primary carer and full time mother of two boys under the age of three. It is worth observing that this prosecution on foot of the complaint of the respondent will, if it results in a conviction, probably prevent the return of the applicant to the United States of America by reason of the conviction. In evidence the respondent acknowledged that he is and has been for

some time aware of this potential consequence. I find this troubling given the actual circumstances at the time of the applicant leaving Ireland with M. It concerns me in particular because of the pursuit of the complaint by the respondent and I find he is pursuing it. This is against the backdrop of what Dr. Byrne-Lynch described as his tenaciousness and the unusually stressful situation that she noticed existed. She noted high stress and high pressure when dealing with both the applicant and the respondent. She was careful to avoid any emotive language. Listening to the applicant give evidence and observing her in court over two days I am left in no doubt but that she is a frightened young mother who is at her wits' end and struggling to cope with huge pressure and fear for her and her family's future. The manner of the pursuit of the criminal complaint by the respondent and the added pressure of this on the applicant when she is the primary carer for M. and when the decision to pursue the matter is clearly for the strategic purpose of having a second string to his bow in preventing the relocation of M. (i.e. a conviction preventing the Applicant re-entering the United States and thus compelling her to remain with her children in Ireland) is in my view lamentable behaviour.

The Law

40. The law governing this application is clear. It is the position that the respondent is a guardian of M.

41. The applicable principles to be applied in the context of relocation applications have been considered by the Irish courts in a number of decisions. In *E.M. v. A.M.* (Unreported, High Court, 16th June, 1992), Flood J. identified the following criteria as being relevant:

> *"(1) Which of the two [hypothetical outcomes] will provide the greater stability of lifestyle for [the child].*
>
> *(2) The contribution to such stability that will be provided by the environment in which [the child] will reside, with particular regard to the influence of his extended family. (3) The professional advice tendered ….*
>
> *(4) The capacity for, and frequency of, access by the non-custodial parent.*
>
> *(5) The past record of each parent, in their relationship with [the child] insofar as it impinges on the welfare of [the child].*
>
> *(6) The respect, in terms of the future, of the parties, to orders and directions of this Court."*

42. The applicable principles were further considered by MacMenamin J. in *U.V. v. V. U.* [2011] IEHC 519 and the criteria set out by Flood J. were referenced with approval. It was a marital case in which the High Court was assessing the relocation to Spain by two children, aged twelve and six years respectively. The applicant mother was a Spanish native. Refusing the application to relocate, MacMenamin J. rejected the suggestion that there was a presumption in favour of the custodial parent and he pointed out that:-

"The fundamental constitutional and legal principle applicable here is the children's right to have decisions taken as to their welfare with that welfare being the prime concern."

43. This Court must also have regard to the decision of the Court of Justice of the European Union of the 5th October, 2010, in *J. McB. v. L.E.*, Case C-400/10 PPU, where, referring to Article 7 of the Charter of Fundamental Rights (respect for private and family life, home and communications), that Court observed at para. 60 of the judgment, that the Article must be read in such a manner so as to respect the obligation to take into consideration the child's best interest, and the fundamental right of the child to "maintain on a regular basis personal relationship and direct contact with both of his or her parents, stated in Article 24(3)" (see, to that effect, Case C-540/03 *Parliament v. Council* [2006] ECR I-5769, at para. 58;

> "The Charter likewise recognises, in Article 7, the right to respect for private or family life. This provision must be read in conjunction with the obligation to have regard to the child's best interests, which are recognised in Article 24(2) of the Charter, and taking account of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both his or her parents." *Parliament v. Council* [2006] ECR I-5769.

44. I accept these principles should be respected and indeed they accord with the basic welfare considerations which apply under Irish Law.

45. In the Court of Appeal decision in *SK v. AL* [2019] IECA 177, Whelan J. clearly and comprehensively sets out the law pertaining to relocation of children. The following extract from the judgment is worth quoting in full; -

'The law

38. In an application by a parent seeking liberty to remove a minor who is habitually resident within the jurisdiction of the courts of this State for the purposes of relocation to another state where the other parent or holder of rights of custody does not consent to such relocation, the approach of the court is governed by the provisions of the Constitution, the Guardianship of Infants Act 1964 (as amended) and the jurisprudence governing the best interests of the minor in question.

39. In the instant case it is of relevance that the proposed relocation was to a non-EU State – a so-called "Third State". Significant distance can impact on the frequency and modalities of contact and generally can be a relevant factor in judicial consideration of the minor's best interests in the context of such an application.

40. In any trans-national child relocation case there are a variety of conflicting or competing interests potentially engaged, including the best interests of the child in question, the rights and interests of the parent who proposes to relocate and including their circumstances vis-à-vis any spouse, partner or family and the rights and interests of the left-behind parent and his or her spouse, partner or family.

Such an application frequently, if not invariably, brings into stark relief the conflicting aims and objectives of the parent who proposes to relocate and who is usually the primary carer of the child with the rights of the left behind parent to maintain a relationship with the minor.

41. *Whilst in the English case of Payne v. Payne [2001] E.W.C.A. Civ. 166 Thorpe L.J. observed that the refusal to recognise the right to freedom of movement beyond the jurisdictional boundary of a parent's own country is "a stance of disproportionate parochialism" (pg. 487) such an approach does not reflect the law in this jurisdiction where the application falls to be determined in light of the Constitution having due regard to the best interests of the child concerned.*

No presumption for or against relocation

42. *In this jurisdiction, having regard to the constitutional mandate and the clear provisions of the relevant legislation, including the Children and Family Relationships Act, 2015, Part 4, and the Guardianship of Infants Act 1964 (as amended), in any application to relocate a child there can be no presumption in favour of or against either the applicant parent or the remaining parent. It is purely an exercise in welfare assessment.*

Article 42A of the Constitution

43. *As is clear from Art. 42A of the Constitution, the best interests of [I] was required to be the paramount consideration when the High Court determined the application for liberty to remove and relocate. Article 42A.1 provides: -*

> *"The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights."*

44. *Article 42A.4.1 provides: -*

> *"Provision shall be made by law that in the resolution of all proceedings –*
>
> *(i) ….*
> *(ii) concerning the adoption, guardianship or custody of, or access to, any child,*
>
> *the best interests of the child shall be the paramount consideration."*

Article 42A.4.2 provides that: -

> *"Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child."*

Relevance of prior child abduction claim to relocation application under Guardianship of Infants Act 1964 (as amended)

45. *At the level of principle it must be borne in mind that in circumstances where a wrongful removal or retention of a minor occurs which has resulted in the making of orders pursuant to the Hague Convention for the summary return of a minor to the State of her habitual residence, it remains open to the parent who is the subject matter of such an order of return, whether made on consent or otherwise, to bring an application before the courts of the state of habitual residence of the minor seeking leave to temporarily or permanently remove the child and liberty to relocate to a new jurisdiction.*

46. *The latter proceedings, such as in the instant case, are brought pursuant to domestic legislation governing child welfare. In determining an application pursuant to the Guardianship of Infants Act 1964 a judge is unfettered by any order, be it interim or otherwise, direction or step taken or as may have occurred in the context of the Hague Convention proceedings.*

47. *The functions of a judge dealing with any aspect of an application pursuant to the Hague Convention or the Child Abduction and Enforcement of Custody Orders Act 1991 are wholly distinct from the functions of a judge dealing with issues of custody, welfare and the best interests of a minor. In making determinations concerning a minor pursuant to the Guardianship of Infants Act 1964 (as amended), no breach of any principle of comity can arise since the functions of the judge under each regime are wholly distinct and different. The best interests of the minor is the paramount consideration in all determinations of welfare pursuant to the Guardianship of Infants Act 1964 (as amended). However, the best interests of a minor are not paramount pursuant to the Hague Convention since the purpose of that instrument is to achieve restoration of the status quo ante leaving all considerations of welfare and best interests to the courts of the habitual residence of the minor in question.*

Relevance of parent's conduct

48. *It is noteworthy that in making a determination on an application pursuant to the Guardianship of Infants Act, 1964 (as amended), the trial judge is expressly limited in considering the conduct of either parent. S.31(4) provides: -*

> *"For the purposes of this section, a parent's conduct may be considered to the extent that it is relevant to the child's welfare and best interests only."*

Part V of Guardianship of Infants Act 1964

49. *In light of the constitutional provisions, the Children and Family Relationships Act 2015, section 63, inserted Part V into the Guardianship of Infants Act 1964.*

50. *Section 3 of the Guardianship of Infants Act 1964 (as amended) now provides:*

"(1) Where, in any proceedings before any court, the—

(a) guardianship, custody or upbringing of, or access to, a child, or

(b) ….

is in question, the court, in deciding that question, shall regard the best interests of the child as the paramount consideration.

(2) In proceedings to which subsection (1) applies, the court shall determine the best interests of the child concerned in accordance with Part V."

51. *Part V of the Act in particular includes s.31 which is of relevance in the instant case and which informed the determination of the trial judge as the applicable law governing the application of the mother seeking liberty to remove and relocate. It provides as follows: -*

"(1) In determining for the purposes of this Act what is in the best interests of a child, the court shall have regard to all of the factors or circumstances that it regards as relevant to the child concerned and his or her family.

(2) The factors and circumstances referred to in subsection (1) include: -

(a) the benefit to the child of having a meaningful relationship with each of his or her parents and with the other relatives and persons who are involved in the child's upbringing and, except where such contact is not in the child's best interests, of having sufficient contact with them to maintain such relationships;

(b) the views of the child concerned that are ascertainable (whether in accordance with section 32 or otherwise);

(c) the physical, psychological and emotional needs of the child concerned, taking into consideration the child's age and stage of development and the likely effect on him or her of any change of circumstances;

(d) the history of the child's upbringing and care, including the nature of the relationship between the child and each of his or her parents and the other relatives and persons referred to in paragraph (a), and the desirability of preserving and strengthening such relationships;

(e) the child's religious, spiritual, cultural and linguistic upbringing and needs;

(f) the child's social, intellectual and educational upbringing and needs;

(g) the child's age and any special characteristics;

(h) any harm which the child has suffered or is at risk of suffering, including harm as a result of household violence, and the protection of the child's safety and psychological well-being;

(i) where applicable, proposals made for the child's custody, care, development and upbringing and for access to and contact with the child, having regard to the desirability of the parents or guardians of

the child agreeing to such proposals and co-operating with each other in relation to them;

(j) the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent, and to maintain and foster relationships between the child and his or her relatives;

(k) the capacity of each person in respect of whom an application is made under this Act—

(i) to care for and meet the needs of the child,

(ii) to communicate and co-operate on issues relating to the child, and

(iii) to exercise the relevant powers, responsibilities and entitlements to which the application relates."

52. The objectives underpinning the legislative approach is to direct the focus of the enquiry away from recriminations, blame or fault finding with regard to the past conduct of either parent unless it is "relevant to the child's welfare and best interests only" (s.31(4)). Thus, for instance, it was not open to the trial judge to engage with speculation and surmise advanced by the father as to whether conduct of the mother in deciding to remain in the United States, in pursuance of enhanced economic security or arising from the advantageous opportunity available to her husband was premeditated or merely reflected short-term intentions which may have subsequently metamorphosed into more long-term prospects. There was no evidence adduced that any conduct on the part of the mother was adverse to [I]'s welfare and best interests and accordingly the trial judge correctly disregarded such allegations as he was obliged to do.

Ascertainable views of minor

53. In an application of this nature it is imperative that the views of the child are considered and taken into account as they clearly were. The s.32 report records two interviews with [I] and details of same are set forth. The author of the report was cross-examined at length by the father at the hearing.

54. The constitutional mandate to obtain the ascertainable views of the child was met in my view on the facts of this case. It is clear from s.31(6) of the Guardianship of Infants Act 1964 (as amended) that: -

"In obtaining the ascertainable views of a child for the purposes of subsection (2)(b), the court—

(a) shall facilitate the free expression by the child of those views and, in particular, shall endeavour to ensure that any views so expressed by the child are not expressed as a result of undue influence, and

(b) may make an order under section 32."

In the instant case an order pursuant to s.32 was made. Therefore, the consultant clinical psychologist was a witness of the courts and not a witness for either party.

55. *In carrying out a Best Interests Assessment in the context of a proposed relocation particular factors may be of relevance including: -*

    (a) The minor's emotional and/psychological dependency upon the primary carer.

    (b) The relationship between the child and the remaining parent.

    (c) The relationship between the child and his or her extended family, including siblings, step-siblings, step-parents and grandparents and the extent to which the dynamics of those relationships that operate positively and beneficially for the minor may be affected by the relocation, and considerations as to how such changes might be ameliorated or addressed.

    (d) The reasonableness of the proposed relocation and, so far as relevant, the motivation of the parent who proposes to relocate which is required to be objectively assessed.

    (e) The practical consequences of a refusal of the application for all of the directly concerned parties and in particular the minor, the directly concerned parents or guardians.

Balancing the rights of the parties

56. *Parents in relocation proceedings may invoke rights, including freedom of movement under the EU treaties and Protocol 4, Art. 2 of the European Convention on Human Rights which provides, "Everyone shall be free to leave any country, including his own." In the case of a remaining parent, Art. 8 ECHR rights to family relations may also be invoked.*

    However, the paramount consideration in an application seeking leave to relocate must always be the best interests of the child. The High Court correctly applied the relevant legal principles to the facts and made his decision based on the best interests of [I].

Access

57. *In evaluating the right of a parent to access, it is to be borne in mind that not alone is access a right of the parent, particularly a non-custodial parent, it is also a right of the child and is, in the absence of evidence to the contrary, presumed to be in the best interests of the child that they maintain a constructive relationship with the non-relocating parent. Care must be taken, accordingly, to structure contact arrangements so as to preserve and vindicate the child's relationship with the non-relocating parent so as to minimise disruption to same and ensure so far as*

practicable that the relationship is maintained in such a manner as operates in the best interests of the minor.

Washington Declaration

58. *Whilst no international convention or protocol at this time governs international family relocation, in March, 2010 following a conference considering issues arising in the context of international family relocation, the Washington Declaration on International Family Relocation was published with the support of the Hague Conference on Private International Law International Centre for Missing and Exploited Children.*

The said declaration provides, inter alia: -

> *"Factors Relevant to Decisions on International Relocation*
>
> ……..
>
> 3. *In all applications concerning international relocation the best interests of the child should be the paramount (primary) consideration. Therefore, determinations should be made without any presumptions for or against relocation.*
>
> 4. *In order to identify more clearly cases in which relocation should be granted or refused, and to promote a more uniform approach internationally, the exercise of judicial discretion should be guided in particular, but not exclusively, by the following factors listed in no order of priority. The weight to be given to any one factor will vary from case to case: -*
>
> i) *the right of the child separated from one parent to maintain personal relations and direct contact with both parents on a regular basis in a manner consistent with the child's development, except if the contact is contrary to the child's best interest;*
> ii) *the views of the child having regard to the child's age and maturity;*
> iii) *the parties' proposals for the practical arrangements for relocation, including accommodation, schooling and employment;*
> iv) *where relevant to the determination of the outcome, the reasons for seeking or opposing the relocation;*
> v) *any history of family violence or abuse, whether physical or psychological;*
> vi) *the history of the family and particularly the continuity and quality of past and current care and contact arrangements;*
> vii) *pre-existing custody and access determinations;*
> viii) *the impact of grant or refusal on the child, in the context of his or her extended family, education and social life, and on the parties;*

ix) the nature of the inter-parental relationship and the commitment of the applicant to support and facilitate the relationship between the child and the respondent after the relocation;

x) whether the parties' proposals for contact after relocation are realistic, having particular regard to the cost to the family and the burden to the child;

xi) the enforceability of contact provisions ordered as a condition of relocation in the State of destination;

xii) issues of mobility for family members; and

xiii) any other circumstances deemed to be relevant by the judge."

59. The Washington Declaration has no legal effect and can be characterised as "soft law". Neither was Ireland represented at the conference where the declaration was drafted. At most, it is merely representative of international juristic thinking in an area concerning children which is increasingly litigated. It does appear to resonate with the provisions of the Guardianship of Infants Act 1964 (as amended).

UN Convention

60. It will be recalled that pursuant to Art. 3 of the UN Convention on the Rights of the Child the best interests of a child shall be a primary consideration and further, pursuant to Art. 12, the child's views must be considered and taken into account in all matters affecting him or her"

46. In this case, as in most relocation cases, the primary carer and indeed sole custodian seeks to relocate to the United States of America to live with her husband and so that M. can be brought up with his brother, H. Although a long distance away, America is now well served by air transport from Ireland, with fares increasingly affordable, particularly when one can plan and book in advance.

47. In this case it is submitted on behalf of the applicant that the provisions of Article 41.1.1 and 41.1.2 and Article 41.3 apply to this case where the applicant is part of a Constitutional family possessing inalienable and imprescriptible rights and which is guaranteed the protection of the State. The applicant is the wife of the father of her second child, H., and they form a family within the meaning of the Constitution. H. in this regard also has family rights as well as his own rights as a child to the enjoyment of his mother's company and that of his brother and father. The applicant's husband, M.W., also has a right to the company of his wife and child.

48. In *E.M. v. A.M.* (unreported, High Court, Flood J., 16th June 1992), the Court decided, where the couple were a marital couple, that certain factors applied in a balancing exercise to decide the issue of relocation in favour of the applicant mother. This was despite her having been returned to Ireland from the United States on foot of an Order under the Hague Convention. In particular he looked at the issues of stability, influences on the child, professional advice, access, the past and the future issues relating to the welfare of the child.

49. In *K.B. v. L.O'R*. [2009] IEHC 247, Murphy J, in a non-marital case, applied the principles of the English Court of Appeal in *Payne v. Payne* [2001] EWCA Civ. 166. The Court applying those principles (which are discussed below) found as an important factor of that that the mother had established a new relationship in England and permitted her to relocate there with the three children (two primary and one secondary school going). In the *U.V*. decision MacMenamin J. found, *inter alia*, of significance that the parties in *K.B*. were not married and therefore did not constitute a marital family (p.27, para. 23).

50. The summary of the criteria as set out by Butler-Sloss P. are as follows:-

"(a) The welfare of the child is always paramount.

(b) There is no presumption…in favour of the applicant parent.

(c) The reasonable proposals of the parent with a residence order wishing to live abroad carry great weight.

(d) Consequently, the proposals have to be scrutinised with care and the court needs to be satisfied that there is a genuine motivation for the move and not the intention to bring contact between the child and the other parent to an end.

(e) The effect upon the applicant parent and the new family of the child of a refusal of leave is very important.

(f) The effect upon the child of the denial of contact with the other parent and in some cases his family is very important.

(g) The opportunity for continuing contact between the child and the parent left behind may be very significant."

51. In *S.P. v J.E*. [2013] IEHC 634, White J. in the High Court referred to the legal principles and recent caselaw at para. 19. This case dealt with the relocation of a non-marital child who was four years old at the time of the appeal. In a decision in which he considered all of the caselaw set out above he found that it was a matter where balancing factors applied in relation to the child's welfare and that past failures or conduct were not an issue. This was a case where the mother had removed the child to England and was then directed to return. The Court found itself guided by the best interests and paramount welfare of the child. The Court granted relocation and made detailed orders as to access.

Analysis

52. In terms of the current situation, the following facts and circumstances are clear;-

(a) The Applicant's husband, as a career officer in the Army has both security of income and pension as well as substantial child-care, health-care and educational benefits for his dependants as well as himself. The applicant's husband's position also comes with comfortable and serviced family accommodation. He is entitled to retire on full pension with benefits at a young age, some nine years from now. Were he to seek to quit the army now, he would have to serve out three and a half

years due under his contract, and he would also lose his pension. In those circumstances the applicant's husband is not in a position to move to this jurisdiction. The applicant has obtained a legal right to live and work in the United States of America by virtue of a Green Card and M. is also entitled to one.

(b) The applicant's home life is stable and she has chosen to stay at home for the sake of her young children at this time. Her husband is very supportive of her decision in this regard. The two brothers are extremely close in age and already have formed a strong attachment to each other which can only deepen. The applicant's husband will, I believe, support her in complying with any orders of this Court in the event that leave is granted to relocate.

(c) M. has a very strong attachment to his mother and is an integral part of the family unit although he also has good bond with the respondent.

(d) The respondent works full time and is not in a position to care full time for M. or to offer him that same level of comfort, care, security and stability as the applicant. Although the respondent is in a new relationship little is known of this. The s.32 assessor was not told of it by the respondent and could not therefore enquire about it.

(e) The applicant is also M.'s primary attachment figure.

(f) The applicant has the security which her marriage affords to her and to M. but the family unit is tied to America at present and for years to come. If M. must stay in Ireland then the family unit is in grave peril.

(g) The respondent has not addressed the practical difficulty of M. having to stay in Ireland. If he must stay the reality is that his mother and H. must also. What then becomes of their family on which the welfare of M. is so dependent. How does the applicant fund the extra home required in Ireland. Is it that the respondent considers she can maintain the current arrangements while he continues to pay €210 per month to her in respect of maintenance for M.

(h) The respondent has expressed concern about any Court Orders being or remaining effective in America. This concern is difficult to understand given the experience he had in that jurisdiction with his application under The Hague Convention. Mirror orders can be made in the United States of America to protect his position.

(i) To his credit and despite his staunch opposition to M. moving to America the respondent did tell Dr. Anne Byrne-Lynch that he was willing to visit M. in the U.S. as part of an overall access pattern. He expressed understanding of the importance of becoming familiar with his everyday life and his school there as far as possible. He expressed recognition that he had to consider the prospect of M. being raised with his brother in the U.S. and visiting him for access in a court ordered arrangement. This recognition is important.

(j) The Applicant has been very open to making proposals to facilitate access if she is allowed relocate to America. I believe she now accepts that she must facilitate the Respondent in the exercise of his rights and I believe she will respect all court orders made in that regard.

(k) I am satisfied that the application of the mother to relocate is for substantive reasons namely to live with her husband and have the two brothers grow up together in a family unit.

(l) It is not reasonable or practicable for the Applicant's husband to relocate to Ireland.

(m) The effect upon the Applicant parent and the new family of the child of a refusal of leave is very important. The effect of a refusal of leave will in practical terms mean that the Applicant either (i) cannot live with her husband or (ii) that the children who are extremely close will be separated and/or (iii) H. would be deprived of the care and company of his mother if he goes to the United States to his father or (iv) that her husband who has already been deprived of the company of his marital child cannot be reunited with H. and/or (iv) H. would be deprived of the company and care of his father. The impact of a refusal of leave would impact significantly and disproportionately on all members, including M., of this family. This must be weighed in the balance along with the fact that if leave is granted there will be an impact on the respondent's access with M. which can be ameliorated if an appropriate access Order is made with a mirror order in the United States of America.

53. I wish to turn now to s.31 and to a consideration of the best interests of M. by reference to s.31 of the 1964 Act. It is worth pointing out again that the Act requires that in determining for the purposes of the Act what is in the best interests of the child this Court shall have regard to all of the factors or circumstances that it regards as relevant to the child concerned and his or her family. I have already dealt in some detail with some of the factors and circumstances which I regard as relevant to M. and to his family.

54. Turning then to s.31(2) of the 1964 Act it is worth referring to each of the factors and circumstances included in that sub-section: -

(a) It is undoubtedly the position that there is a benefit to M. in having a meaningful relationship with the respondent as well as with the applicant and with the other relatives and persons who are involved in his upbringing. It is essential that the court makes every effort to create a framework which will allow the respondent in particular have sufficient contact with M. to maintain the meaningful relationship which he has already established with M.

(b) Insofar as the views of M. are concerned the position is that he is not yet three years of age but I have available to me a comprehensive report from Dr. Anne Byrne-Lynch, Consultant Clinical Psychologist which I directed be obtained pursuant to s.32 of the 1964 Act.

(c) The physical, psychological and emotional needs of M., taking into consideration his age and stage of development and the likely effect on him on any change of circumstances are addressed comprehensively in the s.32 report and are matters which I am having regard to in light of that evidence and the other evidence available to me. It is in my view critical that this young boy has stability and structure in his life and within the family unit which presently, when united, consists of his mother, his step-father (Mr. W.) and his younger brother H. This is clearly a loving and supportive environment. Equally, it seems to me that it is important that the framework exists to allow the continuation of the relationship which he has established with the respondent and which is an important aspect of his life.

(d) Insofar as the history of the upbringing and care of M. is concerned, including the nature of the relationship between M. and both of his parents and the other relatives and persons referred to in para. (a) above, and the desirability of preserving and strengthening such relationships, the framework is equally important. The adults involved in the life of M. at present are the applicant, the respondent and Mr. W. In addition, there are adult family members on the applicant's side and the respondent's side who are involved in his upbringing. It is important that access arrangements be such as to facilitate the preservation and strengthening of the relationships on both sides.

(e) The child's religious, spiritual, cultural and linguistic upbringing and needs. While a factor to be taken into consideration, this is a factor which has not evoked any evidence of concern.

(f) The social, intellectual and educational upbringing and needs of M. M. is not yet three years of age. Insofar as this factor is concerned it seems to me that the safe, comfortable and secure environment of the family unit which is comprised of the Applicant, her husband Mr. W., M. and his younger brother H. is an environment which allows me to be confident in terms of the social, intellectual and educational upbringing and needs of M. That is not to say that the respondent does not have a contribution to make in respect these matters. He does and he will through an appropriate access framework.

(g) The age of M. and any special characteristics. As I have already said M. is a young boy. Happily, it seems clear that he is a healthy and thriving young person without any special characteristics identified.

(h) This is not a concern.

(i) I am impressed by the fact that the applicant is now quite open and generous in terms of facilitating access for the respondent. It is encouraging that the current access arrangements pursuant to the original District Court Order do work.

(j) Insofar as the willingness and ability of the applicant and the respondent to facilitate and encourage a close and continuing relationship between M. and the other parent and to maintain and foster relationships between M. and his relatives is concerned it does seem to me that the willingness and ability to do so does exist.

(k) Insofar as the capacity of the applicant and the respondent to care for and to meet the needs of M. are concerned it is a fact that the applicant is the primary carer of M. and has been since he was born. It is also a fact that she is better placed to care for him and to meet his needs. Insofar as the parents' ability to communicate and cooperate on issues relating to M. are concerned it is encouraging that access, albeit pursuant to Court Order, does work. One would hope that the position will improve going forward when certainty and hopefully finality is introduced to the equation. Insofar as the ability of the parents to exercise the powers, responsibilities and entitlements to which this application relates are concerned it does seem to me that the applicant now appreciates the fact that the respondent is entitled to be part of the life of M. It does seem to me that she is likely to respect any Court Order made in her favour and which allows her to remove M. out of the jurisdiction to America.

55. Section 31(5) does provide that the Court shall have regard to the general principle that unreasonable delay in determining the proceedings may be contrary to the best interests of the child. This application was made as an urgent application and did receive priority in the list. For a number of reasons, many of which I have identified above, the final outcome insofar as the dispute between the applicant and the respondent is concerned is in my view imperative if adverse impact of that dispute on M. is to be kept to a minimum. Custody disputes such as this have the potential to create enormous suffering and financial destruction in families and on both sides. At ground level every effort has to be made to expedite a final outcome and minimise, insofar as that can be done, the financial cost involved. That said, achieving this outcome is largely in the hands of either one or both of the opposing parties.

56. I turn now to s.31(4) which provides that "*for the purposes of this section, a parent's conduct may be considered to the extent that it is relevant to the child's welfare and best interests only*". In this regard, it is a fact that the applicant behaved poorly in leaving the country with M. without telling the respondent. In this regard, her poor behaviour continued after she left and had the significant adverse consequence of depriving the respondent of access to or contact with his infant son for a long period of time. It is understandable that the respondent would be very angry at the conduct of the applicant and tenacious in pursuit of M. It is clear to me that the respondent loves M. dearly and missed him greatly. He explained this in evidence. Somewhat clumsily in articulating his feelings he referred to M. by saying: "*A man can only have one first born child*" and later: "He's a man's first born son" when voicing part of his reason for opposing the application. He did articulate when fleshing out his reasons the important bond between himself and M. and his fear that things might 'fizzle away' if M. was allowed travel to the United States of America. It seems to me that the respondent adopted a very human and

understandable position in terms of his pursuit of his rights in respect of his son M. I have earlier in this judgment expressed in strong terms my concern about the criminal investigation which is being pursued by the respondent. I am concerned about the effect that criminal prosecution is having on the applicant and is ultimately having and likely to have on M. Nonetheless, it is a fact that there has been poor conduct on both sides. It is not to the credit of the respondent that the poor conduct on his part in pressing and pursuing the criminal prosecution is current given that the mother of his child M. now has another young son to look after as well as M. I have however decided in the exercise of the discretion afforded to me under s.31(4) to disregard the conduct of both the applicant and the respondent in arriving at my decision. I think that it is appropriate to do so and it might hopefully help make my decision more acceptable to the respondent.

57. I have decided, having assessed the evidence and having regard to the law, that it is in the best interests of M. that the relief claimed at paras. 1 and 2 of the Special Summons be granted and I will make: -

(1) An Order pursuant to the provisions of s.11 of the Guardianship of Infants, 1964 granting the applicant liberty to remove and relocate the child, M., to the United States of America on or after Thursday the 29th day of August, 2019.

(2) An Order pursuant to the provisions of s.11 of the Guardianship of Infants Act, 1964 granting the applicant sole custody of the infant, M.;

(3) An Order pursuant to the provisions of s.11 of the Guardianship of Infants Act, 1964 granting access to the respondent in accordance with the access system recommendations set out at para. 2 of the recommendations on pages 12 and 13 of the report of Dr. Anne Byrne-Lynch dated 23rd July 2019 but with the following additions/variations: -

(a) The first bullet point is to be amended to read:

> The child M. to remain in Ireland into the month of August to allow his father three further access weekends on the same terms as currently exist under the District Court Order from Friday to Monday. The respondent is to nominate before 5pm today which of the three weekends (commencing 2nd August 2019, 9th August 2019, 16th August 2019, 23rd August 2019 he wishes to select).

(b) The second bullet point is to be amended to read:-

> "Mr. C. to have the facility to take M. for weekend access in the USA from Friday at 10am to Tuesday at 6pm on any weekend designated by him 3 weeks in advance in the months of September, October, November or December 2019 or January or February 2020."

(c) The following bullet points should be added after the last bullet point on p.13 : -

"The Court Order made herein is to be registered and/or converted into a mirror Order in the United States where the applicant is currently resident at her expense and on notice to the respondent in accordance with American law. Insofar as it is required by American law similar registration or mirror Orders should be made in any new place of residence in the United States. In the event that the applicant travels outside of America and takes up resident elsewhere (other than Ireland) then this Court Order is to be registered or made a mirror Order or likewise in accordance with local law at the expense of the applicant and on notice to the respondent."

(d) "In the event that the respondent initiates any further court proceedings against the applicant and/or concerning M. then same must be managed in such a way that any court hearing and/or proceeding in relation to same or touching upon or concerning same shall take place within a period that Mrs. C.W. is in Ireland with M. as stipulated in the access order."

58. In addition, if the solicitor for the respondent still has possession of the passport of M. it is to be handed over forthwith to the applicant's solicitor and the applicant's solicitor is to provide it to the applicant in time to facilitate the applicant and M. travelling to the United States as permitted by this Court Order.

59. I will hear from counsel for both sides as to the form of the order when they have had an opportunity to consider this judgment and also in relation any other matter arising and in respect of the costs of these proceedings.