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[14/04/2000; Supreme Court of Ireland; Superior Appellate Court]  
W.P.P. v. S.R.W [2001] ILRM 371

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**W.P.P. v. S.R.W. [2000] IESC 11 (14th April, 2000)**

**THE SUPREME COURT OF IRELAND**

**KEANE C.J.  
McGUINNESS J.  
HARDIMAN J.  
36 of 2000**

**IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF  
CUSTODY ORDERS ACT 1991  
AND IN THE MATTER OF THE HAGUE CONVENTION AND THE CIVIL  
ASPECTS OF INTERNATIONAL CHILD ABDUCTION  
AND IN THE MATTER OF THE MINORS J. P. W-P. AND N. W-P.**

**BETWEEN:**

**W. P. P.  
Plaintiff/Appellant**

**AND**

**S. R. W.**

**Defendant/Respondent**

**JUDGMENT delivered the 14th day of April 2000 by Keane C.J. (nem. diss.)**

**This is an appeal from a judgment and order of the High Court (Kearns J.) of the 27th January 2000 refusing to grant an order for the return of the minors named in the title to the proceedings to the jurisdiction of the Courts of the State of California in the United States of America pursuant to Article 12 of the Hague Convention.**

The facts, in so far as they are not in dispute, are as follows. The plaintiff is the father and the defendant is the mother of the minors who were born on the 2nd September 1989 and the 16th November 1990 respectively and, accordingly, are now aged 10 and 9 respectively. The plaintiff and the defendant were married to one another but the marriage was dissolved by an order of the Superior Court of California for the County of Santa Barbara made on the 16th December 1994. The petitioner in those proceedings was the defendant, they were not contested and the plaintiff was not present when they were heard.

In addition to the order dissolving the marriage, the court also made other orders which are set out in an attachment to the order and which, it is not in dispute, reflected an agreement entered into between the parties prior to the court proceeding but not reduced to writing. They are as follows:

**"Child Custody and Visitation:**

*Petitioner shall have sole legal and physical custody of the minor children of the parties, J W-P. (Birth date 9/2/89) and N. W-P. (Birth date 11/16/90). Respondent shall be allowed reasonable visitation with children as follows: children will be in respondent's care from Saturday mornings at 9.00 a. m. until Monday mornings when respondent will take children to day care, beginning 5/22/93 for every other weekend. One child will spend a Wednesday night overnight with respondent each week. Both agree to give the other at least forty-eight (48) hours' notice of any changes in the schedule. Both also agree to discuss with each other any out of State trips with the children.*

**Child Support:**

*"Child support has been awarded to petitioner in Santa Barbara Superior Court case No. 200860. This court reserves jurisdiction to modify that order. Until further court order, the child support awarded in Superior Court case No. 200860 shall remain in full force and effect.*

**Spousal Support**

*"Spousal support has been waived by petitioner and the court hereby terminates jurisdiction therein."*

These follow lists of "**COMMUNITY PROPERTY AND OBLIGATIONS**" and "**SEPARATE PROPERTY**" which are not material to these proceedings.

The order also stated that

*"jurisdiction is reserved to make other orders necessary to carry out this judgment".*

As appears from that order, the defendant had been granted a decree of child support by the court in Santa Barbara in August 1994 in the sum of \$1,063 per month. As of the month of November 1997 there was outstanding a sum of \$45,794.90 on foot of that order and in the month of March 1998 the defendant was granted an attachment of earnings order. The plaintiff says that this was due to the failure of a business he was engaged in and health problems. The defendant, as a result, was in serious financial difficulties and filed for bankruptcy in 1995. On a number of occasions she informed the plaintiff that, because of the financial difficulties she was in, she thought that she would have no alternative but to return to Ireland.

On the 3rd September 1999 the plaintiff saw the two minors, presumably on foot of the access arrangements set out above. Two days later the defendant left for Ireland with the children and, since then, has been living in Ireland. She informed the plaintiff by telephone of her arrival in Ireland after the event, but had not told him on the 3rd September that she was leaving for Ireland almost immediately. On the 24th September 1999, the court in Santa Barbara ordered the District Attorney's office to

*"take all reasonable actions necessary to locate the minor children named above and to return them to either the respondent's custody; the court's jurisdiction; or Santa Barbara County Child Protection Services, as determined by the District Attorney Office Agent(s) to be in the best interest of the aforementioned minor child(ren).*

On the 30th September, 1999, the plaintiff made an application under the Hague Convention on the Civil Aspects of International Child Abduction (hereafter "the Convention") for assistance and proceedings were then instituted in this jurisdiction by way of special summons in the High Court under the Child Abduction and Enforcement of Custody Orders Act, 1991 (hereafter "the 1991 Act"). The plaintiff sought an order for the return forthwith of the minors to the jurisdiction of the Californian Court and a notice of motion was also brought seeking that relief and orders restraining the removal of the minors from this jurisdiction. Affidavits were filed on behalf of the plaintiff and the defendant including affidavits giving evidence as to the relevant law in the State of California sworn respectively by Aimee M. Libeu, an attorney at law of the State of California who had been appointed by the Superior Court to locate the minors, and by William Q. Liebmann, an attorney at law of the State of California, on behalf of the defendant.

The matter having come on for hearing before Kearns J., as already noted he refused to make the order sought, giving his reasons in a brief extempore judgment. From that judgment, an appeal has now been brought on behalf of the defendant/respondent. On Friday, March 31st, this court gave liberty to the plaintiff to file a further lengthy affidavit as to the law of California. The appeal was heard by the court on the following Tuesday, April 4th.

The submissions made on behalf of the respective parties can be briefly summarised. The plaintiff says that, although the defendant was, under Californian law, solely entitled to the legal and physical custody of the minors, the defendant in removing the minors from the jurisdiction of the courts of California without first seeking the leave of the court in Santa Barbara or, at the least, notifying the plaintiff of her intention to remove the minors from that jurisdiction, thereby effectively frustrating him in the exercise of the rights given to him under the order of that court, acted in breach of a right of custody vested either in him or in the court of Santa Barbara and that, in these circumstances, the removal of the minors was "*wrongful*" within the meaning of the Convention and the 1991 Act. The defendant says that as the person entitled to the legal and physical custody of the minors under Californian law she was also the person who was entitled to determine where they should reside and that, accordingly, their removal was not "*wrongful*" within the meaning of the Convention and the 1991 Act and that, if the plaintiff wished to enforce the right of access granted to him under the order of the court of Santa Barbara, he should have applied under the appropriate provisions of the Convention, but had elected not to do.

It is necessary at the outset to refer to the relevant provisions of the Convention, the text of which is set out in the First Schedule to the 1991 Act. The preamble reads as follows:

*"The States signatory to the present convention*

- *firmly convinced that the interests of children are of paramount importance in matters relating to their custody,*
- *desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,*
- *have resolved to conclude a convention to this effect, and have agreed upon the following provisions... "*

Article 12 provides that:

*"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith."*

Article 3 provides that:

*"The removal or the retention of a child is to be considered wrongful where:*

- *it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and*
- *at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.*

*The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."*

Article 21 under the heading "RIGHT OF ACCESS" provides that:

*"An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the central authorities of the contracting States in the same way as an application for the return of a child.*

*"The central authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The central authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights.*

*"The central authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject."*

The meaning of the expression "rights of custody" in Article 3 of the Convention was recently considered by this court in H.I. v. M.G.(1999) 2 ILRM 22. In my judgment in that case (with which Hamilton C.J., Denham and Barrington JJ. agreed), I said:

*"Even where the parent, or some other person or body concerned with the care of the child, is not entitled to custody, whether by operation of law, judicial or administrative decision or an*

*agreement having legal effect, but there are proceedings in being to which he or it is a party and he or it has sought the custody of the child, the removal of the child to another jurisdiction while the proceedings are pending, would, absent any legally excusing circumstances, be wrongful in terms of the convention. The position would be the same, even where no order for custody was being sought by the dispossessed party, if the court had made an order prohibiting the removal of the child without the consent of the dispossessed party or a further order of the court itself. In such cases, the removal would be in breach of rights of custody, not attributed to the dispossessed party, but to the court itself, since its right to determine the custody or to prohibit the removal of the child necessarily involves a determination by the court that, at least until circumstances change, the child's residence should continue to be in the requesting state."*

In the present case, there were no proceedings in being, at the time of the removal of the minors, in which the plaintiff was seeking the custody of the minors. Nor was there any order prohibiting the removal of the minors without the consent of the defendant or a further order of the court itself. Accordingly, that passage would be of no assistance to the plaintiff in the present case. However, I went on to say:

*"It could even be that an order by the court granting a right of access to the dispossessed parent might, by implication, be treated as prohibiting the removal of the child without the consent of the dispossessed parent or a further order of the court. That would fall to be determined in accordance of the law with the state of the habitual residence at the time of the removal. A further question could then arise as to whether, in any event, the appropriate machinery for enforcing the access rights in that case was under Article 21 rather than Article 3, which is invoked in the present case. Since, however, at the time of the allegedly wrongful removal in the present case, no rights of access had been granted by the court in New York, it is unnecessary to express any conclusive (sic) view on that question. It is sufficient to say, in the context of the present proceedings, that, giving the Convention the purposive and flexible construction which it should be given, circumstances can arise in which a removal can be 'wrongful' within the meaning of Article 3 because it is breach of rights of custody, not vested in either of the parents but in the court itself."*

In the present case, unlike H.I. v. M.G., the dispossessed parent, i.e. the plaintiff, had, at the time of the removal of the minors, a right of access to them granted by the Californian court. Accordingly, the first question that falls to be determined in this case is whether, under the law of California, the granting of the right of access, by implication, prohibited the removal of the child without the consent of the plaintiff or a further order of the court.

The first affidavit of Ms. Libeu did not address that matter, although it did point out that the removal of the minors was in breach of the Californian penal code, para. 278.5 which provides that:-

*(a) Every person who takes, entices away, keeps, withholds, or conceals a child and maliciously deprives a lawful custodian of a right to custody, or a person of a right of visitation, shall be punished by imprisonment in a county jail not exceeding one year, a fine not exceeding one thousand dollars or both that fine and imprisonment..."*

In his affidavit, Mr. Liebmann referred to the fact that a trial court did have authority to enter a specific order restraining a parent from relocating with the child without prior agreement or court approval, such authority being contained in Family Code para. 3024. However, he said that it was his opinion that a custodial parent, such as the defendant, was entitled to move without prior court approval, unless a specific order was entered under para. 3024. He added that there appeared to be a conflict between the civil code and the penal code in this context, having regard to para. 278.5 of the penal code. He said that he

was not aware of any cases which discussed an application made to a court in the United States to return a child to another jurisdiction in circumstances where the party seeking such return had rights of access only and not a right of custody.

In the further affidavit filed with the leave of this court, Ms. Libeu referred to the provision in the order under which the parties agreed to discuss with each other any *"out of State trips with the children"*. She said that, since the defendant never discussed any out of State trip with the plaintiff, she deprived him of a most important right under Californian family law. She cited in support of this proposition the decision of the Californian Supreme Court in a case of In re Marriage of Burgess(1996) 13 Cal. 4th 25, 51, Cal. RPTR 2D444; 913 p. 2D473. However, that decision, which is annexed to the affidavit, determined one matter only, i.e.

*"whether a parent seeking to relocate after dissolution of marriage is required to establish that the move is 'necessary' before he or she can be awarded physical custody of minor children."*

In that case, a parent with temporary physical custody of two minor children had sought a judicial determination of permanent custody and expressed the intention to relocate with the children to another town, approximately 40 miles away. The Supreme Court concluded that a custodial parent seeking to relocate did not bear the burden of establishing that it was *"necessary"* so to do. Instead, he or she had the right to change the residence of the child

*" subject to the power, of the court to restrain a removal that would prejudice the rights or welfare of the child."*

The decision gives no guidance as to whether a parent, who has, as in this case, not merely the temporary, but the permanent legal and physical custody of the child, is obliged to notify the other parent or the court before relocating the child in another jurisdiction.

The affidavits as to Californian law, accordingly, do not afford any conclusive guidance as to whether the granting of rights of access to the plaintiff by implication prohibited the removal of the minors to another jurisdiction, whether in the United States or elsewhere, without the leave of the court or the consent of the plaintiff. Mr. Liebmann did not, in his affidavit, address the question as to whether the provision in the attachment to the order that the parties agreed to discuss any *"out of State trips"* meant that the relocation of the minors in another jurisdiction was, in this case, a breach of the court order. Nor could he be expected to do so, since it was raised for the first time in the affidavit filed immediately before the hearing of the appeal. It is sufficient to say that the undisputed facts in this case are that the defendant informed the plaintiff on a number of occasions that she proposed to return to Ireland with the children and that the plaintiff, for whatever reason, did not apparently think it necessary to apply to the court for an order restraining her from so doing. Whether in these circumstances the removal of the minors without the leave of the court or the consent of the plaintiff was in breach of the order of the court in Santa Barbara must be at least doubtful.

In these circumstances, the question arises in this case, which did not arise in H.I v. M.G., as to whether, even assuming that the granting of the rights of access by implication prohibited the removal of the minors without the consent of the plaintiff of a further order of the court, the appropriate machinery for enforcing the access rights is under Article 21 rather than Article 3.

In the course of her explanatory report on the Convention, Madame Elisa Perez-Vera said (at para. 65):-

*"As for what could be termed the juridical element present in these situations, the Convention is intended to defend those relationships which are already protected, at any rate by virtue of an apparent right to custody in the state of the child's habitual residence, i.e. by virtue of the law of the State where the child's relationships developed prior to its removal. The foregoing remark requires further explanation in two respects. The first point to be considered concerns the law, a breach of which determines whether a removal or retention is wrongful, in the convention sense. As we have just said, this is a matter of custody rights. Although the problems which can arise from a breach of access rights, especially where the child is taken abroad by its custodian, were raised during the 14th Session, the majority view was that such situations could not be put in the same category as the wrongful removals which it was sought to prevent.*

*"This example, and others like it where breach of access rights profoundly upsets the equilibrium established by a judicial or administrative decision, certainly demonstrates that decisions concerning the custody of children should always be open to review. This problem, however, defied all efforts of the Hague conference to co-ordinate views thereon. A questionable result would have been attained had the application of the Convention, by granting the same degree of protection to custody and access rights, led ultimately to the substitution of the holders of one type of right by those who held the other."*

**In Thompson v. Thompson (1994) 3 SCR 551, La Forest J., speaking for the majority of the Canadian Supreme Court, said that it was clear from the wording of the preamble and Article 3 of the Convention that the primary object of the Convention was the enforcement of custody rights. By contrast, the Convention left the enforcement of access rights to the administrative channels of central authorities., designated by the States who were parties to the Convention. He also said:-**

*"It is clear also from the definitions of custody and access in Article 5 that the removal or retention of a child in breach merely of access rights would not be a wrongful removal or retention in the sense of Article 3.*

*"The Convention contains no mandatory provisions for the support of access rights comparable with those of its provisions which protect breaches of rights of custody. This applies even in the extreme case where a child is taken to another country by the parent with custody rights and has been so taken deliberately with the view to render the further enjoyment of access rights impossible."*

**Counsel for the plaintiff cited in support of his arguments Article 5 of the Convention which provides that:**

*"(a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence..."*

**Accordingly, he said, the right which he submitted the plaintiff had to be notified of the decision of the defendant to alter the minor's place of residence was itself a "right of custody" within the meaning of the Convention. I am unable to accept that proposition. No doubt a parent who has the right to determine the child's place of residence but who may not have the right to the physical custody of the child is regarded, by virtue of that article, as having a "right of custody" which is protected by the Convention. The affidavits as to Californian law do not suggest that the plaintiff enjoyed any such right: on the contrary, they proceed on the basis that the defendant, as the parent having custody, was entitled to determine the minors' place of residence. The issue was as to whether the defendant could unilaterally exercise that right in circumstances where the court had already awarded the plaintiff access rights.**

**The exercise of the right to determine a child's place of residence may, of course, be restricted by the order of the court awarding custody to one parent by prohibiting the**

removal of the child from the jurisdiction of the court without the further leave of the court or the consent of the other parent. In such a case, as already indicated, the removal of the child, without such leave and without the consent of the other parent may constitute a breach of a right of custody vested in the court. In this case, however, we are concerned with an order which gave the plaintiff rights of access only. It is clear, in my view, that the appropriate machinery for enforcing such rights is Article 21 of the Convention. To order the return of children and their custodial parent to the jurisdiction in which they were formerly habitually resident merely so as to entitle the non-custodial parent to exercise his rights of access is not warranted by the terms of the Convention.

In reaching that conclusion, I have not lost sight of the fact that the more appropriate course for the defendant to have taken in the present case would have been to inform the plaintiff that she intended to bring the minors to Ireland, thereby enabling him to make an application, if he wished, to the Californian court prohibiting her from removing the minors from the jurisdiction of the court. Whether such an order would have been granted by the Californian court having regard to the undisputed facts of the present case is another matter entirely. It is sufficient to say that the removal of the minors was not in breach of any rights of custody attributed to either the defendant or the Californian court and, accordingly, was not wrongful within the meaning of Articles 3 and 12 of the Convention.

I would dismiss the appeal and affirm the order of the High Court.

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