

THE HIGH COURT

1985 No. 815 Sp Tt 5

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964 AND  
IN THE MATTER OF ~~XXXXXXXXXX~~, AN INFANT

BETWEEN:

(D) (A) D

2.

PLAINTIFF

AND

(P) (J) D

DEFENDANT

Judgment of Mr. Justice Blayney delivered the 7th day of February  
1986

The parties to these proceedings are husband and wife. They were married in Birmingham on the 3rd March, 1979, and there are two children of the marriage - Kelly Anne (with whose custody these proceedings are concerned) born on the 12th August, 1980, and Michelle Christina, born on the 18th May, 1982. The wife is English and the husband is Irish.

On the 21st May, 1984, the wife instituted divorce proceedings against the husband in the Worcester County Court seeking a dissolution of the marriage and an Order for the custody of the two children. The grounds upon which dissolution was sought were that the marriage had broken down irretrievably and that the husband had behaved in such a way that the wife could not reasonably be expected to live with him.

Prior to the institution of the divorce proceedings, the husband had, in April 1984, returned to Ireland, bringing Kelly Anne with him, and had gone to live with his parents in Bray ~~XXXXXXXXXX~~, Co. Wicklow. He would appear to have done this with the consent of the wife.

On the 24th May, 1984, the husband returned to England, leaving Kelly Anne in Ireland with his parents, and on going to the matrimonial home, found the wife in bed with a man called Stephen S . The wife complains that she was the subject of a violent assault by the husband and that she was forced to leave the matrimonial home.

The wife applied in the divorce proceedings for custody of the two children and on the 27th July, 1984, the County Court Judge, upon the husband undertaking to use his best endeavours to ensure that the child of the family, namely Kelly Anne D , was returned to the jurisdiction of the County Court within fourteen days from the date thereof, ordered by consent, inter alia, that:

"The child of the family namely Kelly Anne D do remain in the care and control of the Respondent (i.e. the husband) until the hearing of the application for custody of that child, or further Order."

In the early part of August 1984 the husband, in compliance with his undertaking, brought Kelly Anne back to England and the wife saw her on a few occasions between the 5th and 8th August, 1984. However, the wife became apprehensive that the husband intended to bring Kelly Anne back to Ireland again and she made a further application in the divorce proceedings in order to prevent this happening. On <sup>that</sup> this application coming before the County Court, the County Court Judge, on the 16th August, 1984, made an Order restraining the husband from removing Kelly Anne from the jurisdiction of the Court until the hearing of the wife's application for interim custody of the two children of the family or until further Order.

The husband claims that this Order was not served on him

and that he was not aware that it had been made, but I am satisfied that it was served on him. There is clear evidence of the service of the Order in the affidavit of Nicholas John S sworn on the 17th August, 1984.

In breach of this Order the husband returned to Ireland with Kelly Anne on the 15th September, 1984, and the wife thereupon made a further application to the Worcester County Court and on this application the County Court Judge made two Orders as follows:

1. The children Kelly Anne D and Michelle Christina D do remain in the interim custody of the Petitioner until further Order and it is directed that the said children be not removed from England and Wales without leave until they respectively attain the age of 18 years but provided that if either parent do give a general written undertaking to the Court to return the said children to England and Wales when called upon to do so, and, unless otherwise directed, with the written consent of the other parent that parent may remove the said children from England and Wales for any period specified in such written consent.
2. The Respondent do, within fourteen days of the date of service of this Order return the child of the family Kelly Anne D to the jurisdiction of this Court and then do forthwith deliver the said child into the custody of his wife Deborah Anne D

The husband failed to comply with this Order. Kelly Anne continued to live with the husband and the husband's parents at the latter's house in Bray where the husband's five brothers and sister also reside. The house in which they live is a three bedroomed house, though the husband states that a fourth

bedroom has now been added on, and the wife claims that this is an unhealthy environment for her daughter.

The wife consulted her Solicitor about enforcing the Order of the 29th November, 1984, and while he appears to have got in touch with an Irish Solicitor in Limerick, nothing in fact was done at this time. In June 1985 the wife obtained a certificate from the Civil Legal Aid Board to enable her to bring proceedings in this country, and the Special Summons instituting these proceedings was finally issued on the 25th October, 1985. In the Summons the wife claims an Order pursuant to the Guardianship of Infants Act 1964 restoring Kelly Anne to her sole care, custody and control, and claims in addition certain ancillary relief.

On the same date as the Summons was issued, the wife applied ex-parte to this Court and Mr. Justice Lynch made an Order, that the husband should forthwith restore Kelly Anne to the sole care, custody and control of the wife with liberty to the wife to seek and obtain the services of the Garda Síochána for the purpose of enforcing the said Order and in serving the necessary Court documents, that the Defendant be restrained until further Order from in any way interfering in the care, custody and control to be exercised by the wife over Kelly Anne and that the wife be at liberty to remove Kelly Anne to England where Kelly Anne normally resided prior to being taken out of the jurisdiction by the husband contrary to the Orders of the English Court. This Order was served on the husband on the 30th day of October, 1985, by the wife's Solicitor who, accompanied by the wife's father and Sergeant Noel White of the Bray Garda Station went to the house of the husband's parents in Bray where the husband was residing. The effect of the Order

was explained to the husband and he refused to comply with it.

Following the husband's refusal to comply with the Order made by Mr. Justice Lynch, the wife on the 31st October 1985, brought a Motion on Notice to the husband (to which I shall refer as "the wife's Motion") seeking an Order directing the husband and his mother to produce Kelly Anne before the Court on the 1st November 1985; directing that Kelly Anne be handed over forthwith to the wife's Solicitor; restraining the husband from interfering with the sole care, custody and control to be exercised by the wife, and attaching and committing to prison the husband and his parents for contempt of Court.

The wife's Motion came before Mr. Justice Barr on the 4th November 1985 and the husband and his parents attended. Mr. Justice Barr adjourned the Motion so as to enable the husband to be legally represented. The husband gave an undertaking on oath that he would attend at the Ormond Quay Law Centre on the following Monday morning and that he would not take Kelly Anne from his parents home in Bray and would bring her to Court on the 8th November 1985 and on any other day on which the case was on.

The wife's Motion was adjourned on a number of occasions and finally came before me for hearing on the 28th January 1986. In the meantime the husband had, on the 20th January, 1986, issued a Motion ("the husband's Motion") seeking an Order pursuant to Order 52, Rule 3 of the Rules of the Superior Courts setting aside the Order of Mr. Justice Lynch made on the 25th October, 1985, which Order had been made on the ex parte application of the wife.

I heard submissions first on the husband's Motion and having done so I decided that I should discharge the Order of the 25th October, 1985, as I was not satisfied that the affidavit on

which the application for the Order had been grounded had disclosed to the Court every material fact relating to the application.

The matter to be decided now is accordingly whether the wife is entitled to the relief sought in her Motion. Four items of relief are specified, but the first is no longer necessary, as Kelly Anne has been produced before the Court, and also the attachment of the husband and his parents for contempt, is not being proceeded with. This leaves the second and third items, but the third, which seeks an injunction, is merely ancillary to the second, so in effect there is a single item of relief to be considered, namely, whether the wife is entitled to an Order directing that Kelly Anne be handed over forthwith to the wife's Solicitor. Miss Dunne, appearing on behalf of the wife, said that what she was seeking was a Peremptory Order directing that Kelly Anne be handed over to the wife's Solicitor so that she could be brought back to England and the question of her custody determined there. She contends that I should make such an Order without making any enquiry as to how the infant would be affected by it.

It seems clear that I would have jurisdiction to make the Order sought, but there does not appear to be any case in this country in which a Peremptory Order of this nature was in fact made.

In O'D infants, O'D .v. O'D (unreported: June 1979 summarised in 73 Incorporated Law Society Gazette Number 6 July/August 1979 and reproduced in a case book on Irish Family Law, by William Birrell at page 468) a decision of the President of the High Court, the mother of three infant children was on the 2nd December 1974 granted a decree of judicial separation by the Supreme Court of Alberta and was granted custody of the three children. On the 16th March 1979 the father of the children intercepted them

on their way to school in Calgary, drove them across the border into the United States of America and later that month brought them to Ireland. Their mother followed them to Ireland early in June, and having applied for an Order of Habeas Corpus ad subjiciendum subsequently instituted proceedings under Section of the Guardianship of Infants Act 1964. Mr. Justice Hamilton held that the proper forum to decide questions concerning the custody of the children was the Supreme Court of Alberta and that, provided the Irish Court was assured that no direct harm would come to the children thereby, they should be returned to the control of their mother. In order to ascertain whether any direct harm would come to the children through their being returned to Alberta in the custody of their mother, the Court directed a psychiatric examination of the children and of both parents.

In Northampton C.C. v. A.B.F. and M.B.F. 1982 I.L.R.M. 164, also a decision of Mr. Justice Hamilton's, an infant was wrongfully and illegally removed from the jurisdiction of the English Courts and brought within the jurisdiction of our Court by her lawful father. It was the intention of the applicants, the Northampton C.C., to have the child adopted in England even though her father was opposed to this. Mr. Justice Hamilton held that there would have to be a full plenary hearing of the application for the purpose of ascertaining whether the child's rights were being protected, before any final Order could be made.

In Kent County Council v. C.S., an infant's father who, though Irish, was domiciled in England, and had obtained a divorce there from the infant's mother, brought the infant to Ireland in breach of an Order of the English County Court, which had directed that the infant should remain in the care of the Kent

County Council. The Kent County Council applied for an Order under the Habeas Corpus Act 1872 seeking the return of the infant to their custody. The case was heard by the Chief Justice (then the President of the High Court) and with the consent of the parties was treated as an enquiry as to the legality of the detention of the infant by her father under Article 40 of the Constitution. The Chief Justice made an Order directing the infant to be returned to the custody of the Kent County Council but he did so only after hearing the father give oral evidence and being cross-examined.

This case goes some way towards supporting Miss Dunne's submission, but it is distinguishable in view of the shortness of the period - three months - that elapsed there between the child being brought to this country and the application being made to the Court. In the present case the period was eighteen months, if one counts from the date the husband brought the infant to Ireland in April 1984, or thirteen months, if one counts from the time the husband brought her back to Ireland in September 1984 after she had been in England for a little over a month. And almost another three months elapsed before the hearing on the 26th January, 1986.

The fact that there is no clear precedent for the making of the Order sought does not necessarily mean that it could not or should not be made. It seems to me that what the Court has to do is to ascertain the principle by which it is to be guided and to decide the issue in the light of that principle.

This type of case is what has become known as a "kidnapping" case. The three Irish cases which I cited all fall into this category, and there have been a number of similar cases recently in England.

Were this not a "kidnapping" case there is no doubt to my mind as to the principle to be applied. This is a proceeding in which the custody of an infant is in question and Section 3



of the Guardianship of Infants Act 1964 requires that in deciding the question the Court shall regard the welfare of the infant as the first and paramount consideration. Does the fact that this is a "kidnapping" case mean that a different principle is to be applied? In my opinion it does not. The circumstances in which the infant happened to come within this jurisdiction do not alter the duty placed on the Court by Section 3, though obviously they may affect the view which the Court will take of what course of action will be most conducive to the welfare of the infant.

I find support for this view in the decisions of the Court of Appeal in England in the cases of Re L. Minors 1974 1 All E.R. 913 and Re C. Minors 1978 All E.R. 230. In the former case, Buckley L.J. in the course of a judgment with which the other two judges hearing the appeal agreed, said at page 925 e

"How, then, do the kidnapping cases fit these principles? Where the Court has embarked on a full scale investigation of the facts, the applicable principles, in my view, do not differ from those which apply to any other wardship case. The action of one party in kidnapping the child is doubtless one of the circumstances to be taken into account, and may be a circumstance of great weight; the weight to be attributed to it must depend on the circumstances of the particular case. The court may conclude that notwithstanding the conduct of the "kidnapper" the child should remain in his or her care (McKee .v. McKee 1951 1 All E.R. 942, Re E. (an infant) 1967 2 All E.R. 881 and Re T.A (infants) 1972 116 Sol. Jo 78, where the order was merely interim); or it may conclude that the child should be returned to his or her native country or the jurisdiction from which he or she has been removed (Re T. (infants) 1968 3 All E.R. 411). Where a Court makes a Summary Order for the return of a child to a foreign country

without investigating the merits, the same principles, in my judgment apply, but the decision must be justified on somewhat different grounds."

And further in his judgment at page 926 c:

"As citations which I have already made disclose, judges have more than once reprobated the acts of 'kidnappers' in cases of this kind. I do not in any way dissent from those strictures but it would, in my judgment, be wrong to suppose that in making orders in relation to children in this jurisdiction the court is in any way concerned with penalising any adult for his conduct. That conduct may well be a consideration to be taken into account but, whether the court makes a summary order or an order after investigating the merits, the cardinal rule applies that the welfare of the infant must always be the paramount consideration."

The former passage was cited with approval by Ormrod L.J. in *Re C Minors* in a judgment with which the other two Judges hearing the appeal also agreed.

As to how Section 3 of the Guardianship of Infants Act 1964 is to be applied, in the case of *J. v. C.* 1969 1 All E.R. 788 at 820, Lord MacDermott expressed the effect of the corresponding identical English provision (Section 1. of the Guardianship of Infants Act 1925) as follows:-

"Reading these words in their ordinary significance, and relating them to the various classes of proceedings which the section has already mentioned, it seems to me that it must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of

the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules on or determines the course to be followed."

But this interpretation of the section must be read in the light of Mr. Justice Walsh's definition of the word "paramount" in his judgment in G. .v. An Bord Uchtala 1980 I.R. at page 76:

"The word "paramount" by itself is not by any means an indication of exclusivity; no doubt if the Oireachtas had intended the welfare of the child to be the sole consideration it would have said so. The use of the word "paramount" certainly indicates that the welfare of the child is to be the superior or the most important consideration, in so far as it can be, having regard to the law or the provisions of the Constitution applicable to any given case."

In the light of these principles it seems to me that before I could make the Order sought I would have to be satisfied that the welfare of the infant required that such an Order should be made.

On the evidence before me at the moment I could not be satisfied of this. Kelly Anne has now been living in this country with her father, and his parents, since April 1984 (apart from being in England for about six weeks in the Summer of 1984) and neither side has produced any independent expert evidence as to how she might be affected by returning to England to live with her mother. It may be that the change would have no harmful effect, but on the evidence before me, I do not know. The wife says in one of her affidavits that it would be in the best interests of Kelly Anne that she should reside with her, while the husband says that he considered that it was in her best interests to return to this country and reside with his mother. It is not possible for me to decide on this motion which of them is right, and so I must refuse to make the Order sought.

This does not mean that I am deciding that Kelly Anne should stay in this country with her father. All that I am deciding is that there must be a full investigation of every aspect of the case before a final Order can be made.

*K. L. ...*  
7. 2. 1986.