

THE HIGH COURT

[2019 No. 7 FJ]

**IN THE MATTER OF THE COUNCIL REGULATION (EC) No. 2201/2003 CONCERNING  
JURISDICTION AND THE RECOGNITION OF JUDGMENTS IN MATRIMONIAL MATTERS  
AND MATTERS OF PARENTAL RESPONSIBILITY**

– AND –

**IN THE MATTER OF ORDER 42A OF THE RULES OF  
THE SUPERIOR COURTS OF IRELAND**

**BETWEEN**

**R**

**APPLICANT  
(HERE RESPONDENT)**

– AND –

**W (NO. 2)**

**RESPONDENT  
(HERE APPELLANT)**

**JUDGMENT of Mr Justice Max Barrett delivered on 11th December 2020.**

1. This is an application for costs following on the judgment of the court in *R v. W* [2020] IEHC 580. In *X v. Y (No. 2)* [2020] IEHC 579, this Court revisited the rules as to costs in family law cases, following on the enactment of s.169(1) of the Legal Services Regulation Act 2015 and in light of applicable case-law, concluding, at para. 3, that the usual position taken in the family law context, having regard to the very particular nature of family law proceedings, is that “*if a case, or the parties, or the conduct of the parties merit the making of an order as to costs, such an order can be made. But if it does not the implicit assumption seems to be that no such order will typically be made in family law proceedings*”.
2. In this case Ms W’s appeal was successful. However, it seems to the court that in these family law proceedings very particular circumstances present which yield the conclusion that it should make no order as to costs. With his legal advisors, Mr R obtained a court order in another EU Member State in circumstances where he considered (and the court of that member state appears to have accepted) there to have been a breach by Ms W of an agreement as to where the children were to live and be reared. Mr R then came to Ireland where, acting with his legal advisors, he – in good faith – obtained an order of the Master of the High Court. That order was entirely deficient and ought not to have been granted as a matter of law for the reasons stated by the court in the principal judgment.
3. Everything that went wrong in these family law proceedings from an Irish-law perspective stems from the fact that the order that issued from the Master’s Court ought never to have issued and could not issue as a matter of law. Mindful that these are family law proceedings and that Mr R was a ‘stranger in a strange land’ who thought he had obtained and was acting on foot of a lawful Irish court order, the court does not see that, in that context, the conduct of Mr R in these proceedings merits the making of an order as to costs against him. This is not a family law case where a father ‘swooped’ into the jurisdiction and abducted a child without care for the law. Nor is it a family law case where a father knew himself to be acting in breach of a court order. It is, as the court

indicated, a family law case where the father (Mr R) sought to conduct himself in accordance with law, and at all times thought himself to be acting in compliance with a court order that ought not to have issued and which, on its face, appeared to allow him to do as he did. The court does not consider that there is anything in this family law case or the conduct of the parties that would merit the making of an order for costs against Mr R, having regard to all the circumstances presenting.

4. The above is the court's conclusion as to costs. However, it would make the following two *obiter* observations, albeit that it has not factored these into its reasoning on costs. First, it is perhaps unfortunate for the respondent's solicitors that by the time of the appeal the respondent had run out of cash, it seems because of a Covid-related downturn in his businesses; had they been in court they could perhaps have provided good answer as to why matters unfolded as they did. That said, it is important to emphasise that those solicitors are not before the court, they have not been heard, and the court neither seeks to nor does make any finding of any form of wrongdoing against them. Second, this whole area of when and how properly to remove a child from the jurisdiction is very complex. It was for this reason that the court observed in the principal judgment that:

"64. *Ms W has suffered a grave wrong as a result of the errors that present in this case. She, a mother who was living with her two children in Ireland for some years, has for now lost physical custody of those children, without her side of matters ever having been heard by the Irish courts. Perhaps, had she been heard, Ms W might have succeeded in resisting the removal of the children, perhaps she might have failed – the court has no view in this regard – but that she was not even heard on the issue is a grave wrong.*

65. *Are there any systemic lessons can be taken from all that has occurred in order to ensure that there is not a repeat occurrence of what transpired here and that affected parents (and their children) are adequately protected? Such lessons do not help Ms W but maybe they might help others. This judgment seeks to take a first step in this regard by setting out the (not uncomplex) applicable law in what it hopes is a clear manner. However, three further possibilities occur:*

- (i) to take the Regulation, Order 42A and the 2005 Regulations, put them in brochure form and (i) annotate them so that practitioners have a 'one stop shop' in terms of knowing what to do, and (ii) explain the provisions in simple Citizens Information Board-type language so that everyone can understand them. No area of law is so complex that it cannot be deconstructed into something simpler, even if the detail of the law remains the same.*
- (ii) re-visit the standard template of the ex parte order that issues when a declaration of enforceability is sought so as to ensure that all the necessary detail which such order is required to contain appears in the precedent template and thus features in the order.*

*(iii) given the particular risks which present for professional lawyers in terms of inadvertently facilitating the removal of a child from the jurisdiction on foot of an ex parte order and before the service of the proceedings on the affected parent/s, perhaps the two legal professional bodies might usefully prepare a list of 'dos' and 'don'ts' for their members in this regard."*

**TO THE APPELLANT/RESPONDENT:  
WHAT DOES THIS JUDGMENT MEAN FOR YOU?**

Dear Appellant/Respondent

I have dealt in the preceding pages with various issues presenting in this appeal. Much of what I have written might seem like jargon. In this section, I identify briefly some key elements of my judgment and what it means for each of you. This summary is not a substitute for what is stated in the preceding pages. It is meant merely to help you understand some key elements of what I have stated.

To preserve your confidentiality I refer to you below as 'Mr R' and 'Ms W'.

This was an application in which Ms W sought that Mr R should pay the costs of her recent successful appeal.

As you know, these were family law proceedings. In Ireland, the usual position taken in the family law context, having regard to the very particular nature of family law proceedings, is that if (i) a case, or (ii) the parties, or (iii) the conduct of the parties merit the making of an order as to costs, such an order can be made. Otherwise no such order is typically made in family law proceedings.

Mindful that these are family law proceedings and that Mr R was a 'stranger in a strange land' who thought he had obtained and was acting on foot of a lawful Irish court order, I do not see that, in that context, the conduct of Mr R in these proceedings merits the making of an order as to costs against him. This is not a family law case where a father 'swooped' into the jurisdiction and abducted a child without care for the law. Nor is it a family law case where a father knew himself to be acting in breach of a court order. It is, as I indicated, a family law case where Mr R sought to conduct himself in accordance with law, and at all times thought himself to be acting in compliance with a court order that ought never to have issued and which, on its face, appeared to allow him to do as he did.

I do not consider that there is anything in these family law proceedings or the conduct of the parties that would merit the making of an order for costs against Mr R, having regard to all the circumstances presenting.

Yours faithfully

Max Barrett (Judge)