

THE HIGH COURT

FAMILY LAW

[2024] IEHC 43

**IN THE MATTER OF THE CHILD ABDUCTION AND ENFORCEMENT OF
CUSTODY ORDERS ACT 1991**

AND

**IN THE MATTER OF THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF
INTERNATIONAL CHILD ABDUCTION**

AND

IN THE MATTER OF R. AND I., MINORS

(CHILD ABDUCTION: CONSENT, VIEWS OF THE CHILD)

BETWEEN:

K.

APPLICANT

AND

E.

RESPONDENT

Judgment of Ms. Justice Mary Rose Gearty delivered on the 1st of February, 2024

1. Introduction

1.1 This is a second application to this Court by a father for the return of two children, called Rachel and Isobel for the purposes of both judgments. The girls are already the subject of family law proceedings in Sweden. The defences of consent, acquiescence and grave risk are raised. The Court is also asked to consider habitual residence and the views of the children, who object to returning to Sweden.

1.2 The same girls were wrongfully retained by the same Respondent in Ireland in 2022. A return Order was made by this Court in December, and they returned to Sweden. See *J.K. v. L.E.* 2022 IEHC 733. In that first case, the Respondent had brought the girls to Ireland for a holiday and then refused to return them to their home. She relied, in large part, on the Assessor's report in respect of the eldest girl, Rachel, who objected strongly to being returned to Sweden and referred to specific acts of self-harm in this context. I had concerns for her mental health and noted a more mildly expressed objection from her sister. Having balanced the objectives of the Convention with the competing views of these children and considering the treatment being afforded to Rachel in Sweden, this Court was obliged to return the children to their habitual residence in all of the circumstances.

1.3 After the case concluded, having noted the comments made by their children as set out in that judgment, the parties considered moving from Sweden to Ireland but could not agree financial terms. Having agreed to live in Town A, the Respondent settled in Town B. During these negotiations, the girls were in Ireland, hoping to stay. Having changed her focus to Town B, the Respondent then refused to sign a document which may have helped to make the move financially viable. Messages from the Applicant made it clear that any move to Ireland depended on the viability of the plan. The Respondent has not proved that the Applicant unequivocally consented to, or acquiesced in, a permanent move to Ireland.

1.4 The views of the children have been ascertained again. The primary message reported by the Assessor in respect of Rachel is as follows: "*she believed that neither*

of her parents were listening to her plight and, instead, spent their time arguing". Rachel is correct. She refers again to self-harming. As outlined in the first judgment, continuing care and professional help will be needed for Rachel. This had been in place at her home in Sweden, where her medical, educational, and social welfare records are kept and where trained professionals are familiar with the family.

1.5 The Respondent submitted that both children were receiving psychological help here, but she made no averment to this effect and no reports were provided to the Court. The Applicant did not put this in issue; he accepts that both children are receiving some care here. However, he is not aware of the identity or the credentials of the counsellors in question, if they have any, nor is the Court. The Assessor referred specifically to concerns about the mental health of the children.

1.6 In my view, both children have been wrongfully retained here for the second time in two years. While there may be treatment for them here, the Court cannot assess its value or impact. The Respondent appears not to have understood the significance of Rachel's report to the Assessor that her last attempts at self-harm were in April or May of 2023. This was at a time when the Respondent submits that the family had decided to move to Ireland. Her daughter's statements to the Assessor undermine the Respondent's position to a significant extent. The message from the assessments is clear: it does not matter as much where the parties live as how their parents behave. The girls object to Sweden and would prefer to be in Ireland but what affects them most is that their parents cannot agree on anything.

For example, in exchanges about schooling, the form of textbook that their child uses is a matter of dispute, let alone where they go to school or where they live.

1.7 If children are to be moved, permanently, to another country, this can only be done with the consent of both parents or by court order. The history of chronic conflict between these parties remains a major cause of distress, to Rachel in particular. This comment is addressed to both parents and the Court does not accept that it is a particular country that is causing anxiety for either child but the high level of parental conflict, and both parties' inability to protect their children from the effects of this conflict. The crux of Rachel's objection appeared to be contained in this statement: *"It's harder to deal with my parents fighting in Sweden. Here I have supports if they fight. I feel alone there. They fight often. I'm the only one dealing with it-in between, I'm always in the middle of everything. They complain about each other."*

1.8 No matter where the children live, the reality is that they will need help from mental health professionals. This is particularly worrying given the Respondent's sharing of inappropriate information with Rachel and her inability to link her child's anxiety with her own behaviour. She has assured the Court, even as she arranges for both girls to have counselling in Ireland, that there are no mental health concerns for her daughters as long as they remain in Ireland. This is clearly incorrect, as the Assessor has noted. The Respondent enrolled her children in schools without advising the schools of any concerns about mental health, despite clear requests that parents alert the school to these issues, and despite Rachel's requests for help which, Rachel reports, she has discussed with the Respondent.

1.9 As noted, both children have objected, once again, to being returned to Sweden.

Despite the force of their objections on the first occasion, I was obliged to return the children. Following that return, the relationship between the parties appears to have deteriorated, but both children remain on excellent terms with their parents despite this. There were no obvious physical effects on the children after that return, but the ongoing parental conflict has clearly had continuing effects. Further, the lack of evidence in respect of treatment arranged by the Respondent, for the children, means that the reassurance which it should provide is minimal.

1.10 For the reasons outlined in more detail below, on this occasion and taking into account the very significant change in approach by the Applicant, I am even more concerned about these children than on the first occasion when the Respondent abducted them. While they have been wrongfully retained here for a second time, a factor which weighs strongly in favour of an immediate return, the complicating factor which has affected my approach to that mandatory return order is the agreement, in principle, that the whole family would move back to Ireland and the possibility that this is a likely outcome for the family in the medium term.

1.11 This agreement, while it eventually broke down, changes the context in which the second abduction occurred. The agreement led the Applicant to give up his job in Sweden and led to both girls being enrolled in Irish schools. Tenants in a property in Town A were given notice to vacate (and have done so). Arrangements were made in respect of a second property in the same town to reduce mortgage repayments, in order to reflect the fact that the owner now intended to be the

occupier. This was all done in the expectation that the family would live in Town A for the foreseeable future. However, these arrangements were set at naught when the Respondent decided that she would not live there, settled elsewhere, and refused to sign a form applying for a mortgage reduction in Town A.

1.12 In that very specific set of circumstances, where the girls must have felt an element of security that had been absent for some time, and clearly hoped that they were in Ireland to stay, but where there has been no change in habitual residence, where the Applicant has no means of remaining in Town B and few work prospects there, the girls continue to be at risk as the Assessor has noted, and given that I have very little reassurance as to their welfare in Town B, I will make the mandatory return order required by the Convention but will stay that Order as set out below.

1.13 I have taken into consideration their strongly voiced objections and the changed circumstances of the family, which prompts me to direct a stay on that Order to allow the parties to arrange for accommodation in Town A which will provide more security for the children. It appears to me to be unnecessary to uproot them once more if they will not be staying in Sweden in the long term and I have weighed the competing interests very carefully in that regard. It is untenable to suggest, as the Respondent does, that it is immaterial where the Applicant lives but equally it is unfair to move them back to Sweden immediately if the reality is that the Applicant intends to settle in Ireland in short or medium term.

1.14 It is important to the children that they have access to both parents and no court can order that families live in a particular town or country. Here, a town had been agreed upon and the children registered in schools there. The Respondent changed her mind and began to argue for settlement in a second town. This blocked the move, despite all members of the family apparently wanting to return here.

1.15 The Respondent's case in this application was based, largely, on arguments appropriate to a welfare-based custody hearing, not a Hague Convention case. Further, her conduct was such that in any other circumstances, I would not hesitate to return the children immediately. She had already been the subject of a similar order and sought to repeat, less than a year later, exactly the wrongdoing she had already perpetrated, leading to further upheaval and conflict in the girls' lives.

1.16 The children object to returning to Sweden. But more importantly, they want their parents to stop fighting. One of the reasons Rachel stated for preferring Ireland was that she has family support from extended family here. The focus of the parties on their finances suggests that these parents are not prioritising the children's welfare but are more concerned about who will get what property in the pending divorce case. The girls are aware of these disputes and the nature of them. The Assessor has made this point with even more force on this occasion than on the last. Unless the parties can learn to set aside these differences in matters of custody and access, they are creating a serious risk that their daughters will suffer the life-long effects of living with chronic conflict. They must arrange for assistance with a parenting plan as a matter of urgency.

2. Objectives of the Hague Convention

2.1 The Hague Convention was created to provide fast redress when children are moved across state borders without the consent of both parents (or guardians) and to mitigate the damage sustained to a child's relationship with the "left-behind parent" by returning the child home. There, the courts where the child lives and where social welfare, school and medical records are held and witnesses are available, can make decisions about the child's welfare with the best and most up to date information. The Hague Convention not only vindicates the rights of children and ensures comity between signatory states but bolsters the rule of law generally, providing an effective, summary remedy against those who seek to take the law into their own hands.

2.2 The Convention requires that signatory states trust other signatories in terms of the operation of the rule of law in their respective nations. This international agreement, to apply the same rules in signatory states, addresses issues arising from the normal incidence of relationship breakdown which, given the relative ease of global travel and employment, can also lead to the re-settlement of parents in different countries. It is recognised as an important policy objective for signatory states that parents respect the rights and best interests of the child and the custody rights of the co-parent in deciding to move to another jurisdiction, taking the child from her habitual residence and, potentially, from social and familial ties in that jurisdiction and from daily contact with the other parent.

2.3 The Convention requires an applicant to prove, on the balance of probabilities, that he has rights of custody, that he was exercising those rights and that the child was habitually resident in the relevant country at the time of retention. If he establishes these matters, the burden shifts to the respondent who must establish a defence and persuade the Court to exercise its discretion not to return, as a result of the defence.

2.4 The Respondent invited the Court during oral submissions to consider Article 8 of the European Convention on Human Rights ('ECHR'), namely the right to respect for family life. The issue was not raised in written submissions. There was no case law to augment the oral submission. No argument was directed at how, if at all, the ECHR might complement, or even trump, the objectives of the Hague Convention. The overarching purpose of the Hague Convention is compatible with Article 8: both vindicate the rights of children in significant respects, and both ensure that there is stability for families and respect for parents' and guardians' rights. Given that the purposes of the Hague Convention was the subject of all written submissions, I will not embark on a consideration of Article 8 unless the matter is raised and argued in full before me.

2.5 As these introductory comments should make clear, the Court is not required to consider where the children will be happiest, although their welfare is a primary consideration. The Court is deciding whether or not to return them to Sweden.

This is a binary choice and not one that permits nuanced approaches, orders about access rights or directions as to where the children or their parents should live.

2.6 The defences are consent, acquiescence, grave risk and the views of the child. There is a related argument that the children are no longer habitually resident in Sweden. If, having found as fact that Rachel or Isobel, or both, objects to being returned and is mature enough that the Court should afford weight to her objection, the Court retains a discretion on the question of whether to return the children, bearing in mind all the circumstances, including the objectives of the Convention.

3. Prejudicial Evidence

3.1 The Respondent argued that the Court should not attach weight to contemporaneous text messages between the parties, submitting that this was prejudicial evidence. Her argument was not expanded beyond this submission so it was not clear if the Respondent considered the messages to be ill-thought out and therefore that they might create an impression that was not fair in that it would not reflect the true facts. Even if this was her view, the common thread through the multiple messages, across many months, suggests otherwise. As stated, the argument was simply that the messages were prejudicial, presumably to her. This is an argument often heard from litigants and, sadly, from some lawyers. All evidence is prejudicial to one side or the other. The kind of prejudicial evidence a court should be wary of accepting is evidence that is unfairly prejudicial in the sense that its introduction might affect the fairness of the decision. To take an

example that does not arise in this case, a text in which expletives are used is rarely necessary evidence, particularly if the point can be made using messages couched in more temperate language. It would be unfairly prejudicial to select a text using bad language as an example of the correspondence as it might tend to create a bad impression of the sender, on a matter of minimal relevance to the issues.

3.2 A court may rely on contemporaneous messages sent or received by a party to litigation, once those messages are relevant to the subject matter of the case. In a case such as this, the Respondent rightly predicts that the messages are prejudicial in that they reflect badly on her. The impression created by the messages is that she is not a reasonable person. There may be good reasons for the acrimony between the parties, on either or both sides, to which I am not privy. I can only comment on the messages exhibited, most of which were unreasonable. The Respondent appears to have been particularly difficult to engage with and her texts directly contradict some of her averments in the affidavit she swore for these proceedings, but neither party emerges well from the exhibits, and the exchanges are indicative of a highly combative relationship.

4. A Challenge to the Marriage Certificate

4.1 The Respondent raised a preliminary point to the effect that she and the Applicant were never married. This was because, she submitted, the Applicant made a false declaration that he was living in Cork at that time and this incorrect address is now stated on the marriage certificate. The Respondent accepted that she knew, at the

time, that this address was not where he was living as it was in fact her grandmother's address. The Registrar, she confirmed, also knew that the Applicant did not live there. She argued that the ceremony was invalidated by the false basis on which he entered into the contract, which rendered the marriage invalid. The incorrect address amounted to what she called "false pretences."

4.2 It was not disputed that the Applicant made this misstatement, but neither the Respondent nor the Registrar who recorded the marriage was misled by it. No logical or legal argument addressed how an incorrect address could invalidate a marriage. No law was cited to support this proposition.

4.3 The Plaintiff in *B. v R.* [1995] 1 ILRM 491, claimed that he was no longer married to his wife because the ceremony had been conducted in a church in Ireland and the parties had recorded in the marriage registration book that he was a bachelor and she a spinster. This was technically incorrect as both had been married previously in a separate ceremony: to each other. Costello P. reviewed the law in relation to civil marriage, concluding that the law renders invalid a marriage by one who is already married to a third party, not one who is already married to the same spouse. Perhaps unsurprisingly, he held that a false statement as to their status was no bar to a valid marriage here. The penultimate paragraph of his short judgment reads:

It would appear virtually certain that the formalities required by s. 11 of the Registration of Marriages (Ireland) Act 1863 were not properly complied with when

the parties married each other in this country... But this [false statement] would not invalidate the marriage ceremony itself...".

While the relevant Act here is the Marriages (Ireland) Act of 1844, the same principle applies. Section 32 of the 1844 Act, which supports this view, reads:

"Proof of residence of Parties, or of Consent, &c. not necessary to establish the Marriage.

XXXII. And be it enacted, That after any Marriage shall have been solemnized it shall not be necessary in support of such Marriage to give any Proof of the actual Dwelling of either of the Parties previous to the Marriage within the District or Presbytery (as the Case may be) wherein such Marriage was solemnized for the Time, required by this Act, or of the Consent of any Person whose Consent thereunto is required by Law; and where a Marriage shall have been solemnized in a certified Presbyterian Meeting House, it shall not be necessary to prove that either of the Parties was a Presbyterian, or, if the Marriage was by Licence, that the Certificate required to be delivered to the Minister granting such Licence had been so delivered, or, where the Marriage was by Banns, that a Certificate of the Publication of Banns had been produced to the Minister by whom the Marriage was solemnized, in Cases where such Production is required by this Act; nor shall any Evidence be given to prove the contrary of any of these several Particulars in any Suit touching the Validity of such Marriage, or in which such Marriage shall be questioned.

[emphasis added]"

4.4 This section may explain why there was no authority touching on the same impediment to a valid marriage: there is no such impediment. The Civil Registration Act of 2004 repealed the 1844 Act but was not commenced until the 5th of November 2007 and this marriage predated that Act.

4.5 It is not controversial to suggest, as the Applicant did, that the party who argues for nullity bears the burden of proof. Indeed, the marriage certificate enjoys a presumption of validity unless and until challenged in proceedings against the relevant Registrar. In this case, rather than directly challenging the marriage, the

challenge is a collateral one which arose as the Respondent read the exhibits and noticed the incorrect address. She now claims the Applicant has no custody rights to their children because he did not validly marry her.

4.6 The Applicant referred me to a case in which a marriage was challenged *ab initio*, or from the outset, noting that such cases were rare since the introduction of divorce here in Ireland. The case, *McG. v N.K.* [1995] 5 JIC 2301, was an unreported decision of Morris J., dated 23rd of May 1995, dealing with the application of a man who claimed he was too drunk to remember his wedding. The evidence proved otherwise, and the case is of minimal relevance to this technical argument, but it shows how difficult it is, and was, to obtain such an order. The judgment describes the principle of approbation. This confirms that parties may, by their acts over time, prove that they considered the marriage a valid one. This leads to the conclusion that, despite a legal impediment, if parties act as though they are married, each such act lends further weight to the conclusion that they are.

4.7 The Applicant has exhibited his marriage certificate and there is ample evidence that the parties are married, given the years since the registration of the wedding, the previous case in which this marriage was not challenged, the two children born to the marriage and their birth certificates which list the two parties as their parents. The parties are currently in the middle of divorce proceedings, which would not be necessary if there never was a valid marriage. The Swedish courts have made numerous orders in the proceedings, all predicated on the fact, never before questioned, that the parties are married. This being the case and noting that

the Respondent is the party who challenges the *status quo*, the burden is placed on her to prove that there was no marriage: it is she who argues for a position contrary to all the evidence. As noted, she offered no legal support for her submission.

4.8 The issue is dealt with in various legal textbooks, but it is unnecessary to go into more detail given that no law was cited to support the argument and the above legislation and various authorities make clear what a lawyer would instinctively know: an inaccurate address on a form is unlikely to invalidate a contract, let alone a marriage. It is very unusual to assert that a marriage during which two children were born, after many years together, and a formal divorce sought, is invalid. The marriage has been relied upon for years and there has been no evidence of incapacity or of other legal impediment to their marriage.

4.9 This dispenses with the argument and this Court need not consider whether the Swedish court orders granted the Applicant custody rights in the event that he was never married, or any other arguments in respect of custody rights or parental responsibility in the various relevant countries based on the premise that the children's father was not married to their mother. He was.

5. Exercising Rights of Custody – Confined by Time and Place?

5.1 The last of the preliminary arguments raised by the Respondent is that the Applicant was not exercising his rights of custody because he missed an appointment for the children to be handed over to him in Arlanda airport in July of 2023. She made similar claims regarding his exercise of custody rights in text

exchanges between the parties when directing where and when other handovers would take place and how long each party was entitled to spend with the children.

5.2 One of the requirements under the Convention is that the Applicant must be exercising his rights of custody, in other words, he is not just entitled to decide where the child lives and to have access to her, he must be engaging actively in his rights of access. The case law makes it clear that the engagement expected is minimal. To take an extreme example, the prisoner who cannot exercise custody rights due to his incarceration is, nonetheless, exercising custody rights once he shows an interest in maintaining a relationship with his child.

5.3 These parties have an agreement, effected by a Swedish court order, requiring that handovers of the children take place in Arlanda airport, in Sweden. Notwithstanding this written agreement, I was told that handovers had rarely happened at the airport. Instead, the parents had usually, sensibly enough, agreed a more convenient location for the handover.

5.4 In June and July of 2023, as is outlined in more detail elsewhere, the plan to move to Ireland fell through. The Applicant was in Ireland at that time, as was the Respondent with the two girls. When the Applicant had decided that a permanent move to Ireland was no longer feasible, the Respondent insisted that the handover in July happen in Arlanda, although all parties were in Ireland. She travelled to that airport, ostensibly to hand over the girls, and then travelled back to Ireland. The Applicant did not follow to meet the girls at the airport with their mother.

5.5 The Respondent now complains that, because the Applicant did not attend the airport in Sweden for that formal handover, he has forfeited his custody rights. This is a misconception of the requirement that parents must be exercising custody rights in order to avail of the Hague Convention. The proof that a parent is exercising custody rights does not require proof that he is exercising every such right, on every occasion and exactly as the other parent directs or as an agreement or court order directs. *N.J. v. E.O'D* [2018] IEHC 662 confirms, as Ní Raifeartaigh J. put it, that the Applicant must seek to maintain a relationship with his child.

5.6 There is ample evidence that this Applicant wants to maintain a relationship with both children, not least his speedy applications under the Convention on both occasions when the Respondent refused to return them. He has joint custody of the children, has enjoyed relatively equal time with them when they were living in Sweden, and it has never been suggested, other than on occasions such as that in Arlanda or when the Respondent has sought to persuade him to spend his time with them at a place more convenient to her home, that he was not spending time with them. Their affectionate accounts in the Assessor's reports, in addition, confirm that he certainly is exercising his custody rights.

5.7 The Respondent, at paragraph 21 of her affidavit, swears that she returned to Ireland with the girls after her attempt to hand them over to their father at Arlanda failed and that "*there was no requirement for me to inform him of our whereabouts*" but that despite this, she told them where they were. This is a misstatement of the law. Both parents have rights of custody in respect of these girls and are entitled to

know, broadly speaking, where they are. It is difficult to believe this statement from the Respondent. She has already been party to proceedings in which the Applicant's rights in respect of his children were outlined in detail. She must know that both parents are entitled to make decisions in respect of where the girls live or whether they are removed from any country; a parent may not make such decisions unilaterally. Her averment to the contrary is not only wrong, this Respondent must know that it is wrong and yet she persists in stating this view.

6 Acquiescence and Clear and Unequivocal Consent

6.1 Article 13 of the Hague Convention provides that where a party who wrongfully removed a child establishes that the person seeking her return has consented to or subsequently acquiesced in the removal or retention, the trial judge retains a discretion as to whether to return the child or not.

6.2 The test in respect of acquiescence was adopted by Denham J. in *R.K. v. J.K. (Child Abduction: Acquiescence)* [2000] 2 IR 416, as set out in *re H (Abduction: Acquiescence)* [1998] A.C. 72, by Lord Browne-Wilkinson. Acquiescence arises after the fact and is subjective, in other words, the Respondent who raises the issue must show that the Applicant actually accepted the new living arrangements (not that she thought he had done so) or that his words or acts, in the words of Browne-Wilkinson L.J.:
"clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return."

6.3 The Respondent has provided no specific example of acquiescence on the part of the Applicant, indeed the exchanges between the parties appear to rebut this suggestion. His repeated position was that the move could only happen if the family could agree terms, including, significantly, the town in which they would live. The date on which the children moved here was the 12th of June, the parties were engaged in litigation talks which broke down in July, and the first steps to apply under the Convention were made in August. There does not appear to be any evidence to support an acquiescence argument in those circumstances.

6.4 The Respondent argued strongly that the Applicant consented to a permanent move to Ireland but then changed his mind. The Supreme Court set out the relevant principles in *R v. R* [2006] IESC 7, and, briefly summarised: the onus is on the Respondent to establish consent. It need not be in writing, but it must be real, positive and unequivocal. The consent must be proved on the balance of probabilities and, while there need not be an express written statement of consent, the fact of consent must be supported by clear and cogent evidence. The Court may, in an appropriate case, infer consent from conduct.

6.5 In 2022, when the previous case began, the couple had been living in Sweden for some years, but the Respondent had recently moved to Ireland. The children spent time with both parents. In mid-2022, the Respondent wrongfully retained the children here and raised the defence of grave risk, but this Court found that the risk, if any, was best mitigated in Sweden for the reasons set out in that judgment. Both children returned to Sweden where the courts, the schools and the relevant

authorities had all the relevant records and were looking after the needs of both children. While the older child objected, her objections did not outweigh the Convention objectives in the circumstances as they then were.

6.6 Their parents, I am told, as a result of comments in the judgment, almost immediately began negotiations about moving permanently back to Ireland. The children have spent many of their holidays here but have been in school in Sweden and have spent most of their time in Sweden over the past few years. When the school year ended in Sweden in June of 2023, they came to Ireland, as usual. However, what was unusual was that their parents were now actively considering staying in Ireland and had been discussing a plan to move for months.

6.7 The Respondent submits that the Applicant consented to a permanent move to Ireland and that when she and the girls flew to Dublin in June of 2023, they became habitually resident here due to that consent. The consent of the Applicant is put forward both as a defence to the abduction proceedings and as an argument that the habitual residence of the girls changed as a result, such that there is no requirement to return them, which argument is considered separately, below.

6.8 The Respondent avers that the Applicant told the girls that they would be moving to Ireland permanently over Christmas in 2022, immediately after the last abduction proceedings. In the report of the independent Assessor, the two girls do indeed confirm that they expected to move home. However, the exchanges between their parents do not support this conclusion.

6.9 I am satisfied that there was no decision to move to Ireland permanently; this was never finally decided. There are multiple contemporaneous texts to that effect from the Applicant to the Respondent. Rather than supporting her argument that he consented, contemporaneous messages indicate the opposite, including a message that she never thought he was serious about the plan.

6.10 Leaving aside that she now argues that he did consent to move here permanently, in contrast to what she texted him at the time, I note the following: the Applicant consistently told the Respondent that unless they could afford to live in Town A, he could not move back here. Despite his reservations about the financial viability of the plan, as this depended to some extent on the Respondent, he gave up his job and consented to both children being enrolled in schools in Town A. They were registered in early 2023. This was before any property was designated as a family home in that, or any, town. School registration was a sign of both parties' intention to make progress, but this did not constitute a final decision as they had yet to identify a place to live.

6.11 The family had property in Town A and arranged for the tenants of one premises to be given notice to quit, and they have now left that property. Despite this, there was still no decision about where the girls would live and talks broke down, finally, in July. The Respondent characterised this as the Applicant withdrawing his consent to the move. This appears to be what she told her children also. In fact, it appears to me that it remained possible for either party to have ensured or facilitated a successful move, even after July of 2023.

6.12 The Respondent avers that the parties had agreed a move, agreed schools and accommodation and that, unilaterally, the Applicant withdrew the girls from their schools in August of 2023. This general statement is misleading. Many events led to the withdrawal of the girls from schools in Town A and the Respondent had several opportunities to confirm that they could still attend that school and live in Town A with or near their father, but instead she began to argue for a different plan: that they would settle in Town B near her family. This is a significant change of position between January and August of 2023.

6.13 The Respondent did not just bring the girls to Town B to visit her family, she bought property there, and intends to live there with her children. The Applicant always said he would not live in that town. His job prospects are very different in Town B and there is no property of the marriage or property belonging to the Applicant there. He maintains that he cannot afford to move to that area and must stay in Sweden if the Respondent insists on living there.

6.14 The Applicant has consistently argued that the family finances must be resolved for the family to make this change in their circumstances. The Respondent replies that she does not want to be tied, financially, to the Applicant and does not care where he lives, she has opted to live in Town B. In June, she describes him putting her under pressure to sign a form, tying her to him, as she put it. She states that she has always objected to signing this form.

6.15 I have examined the text messages between the parties very carefully. The Respondent submitted that she had hoped for a letter saying that the Applicant

would live in Town A but that he “*threw the baby out with the bathwater*” and withdrew the girls from their school places. This is not what the messages suggest. From the contemporaneous texts, both parents appeared to be planning a move to Town A, school places were accepted, and a home for the Applicant identified. She had confirmation from January that the Applicant would live in Town A; but only if he could afford to move there.

6.16 The Respondent told me that all Summer until August of 2023, the possibility of the girls going to school in Town A existed. They had been with her in Town B since June. Both parents had agreed as early as January to a place in a mixed gender, publicly funded school in Town A for one girl and by March the other had a place in a school in Town A, if the move was going ahead. In April, the Applicant confirmed to the school principal that he wanted this place to be held for his daughter. By May, he had confirmed in a message to the Respondent that he had quit his job in Sweden. By June, he was packing up the house. On the 10th of June, he told her he couldn’t afford to move as she wouldn’t agree to sign a mortgage rate reduction form. This exchange is in the Respondent’s exhibits, number 14.

6.17 At page 25 of this 60-page exhibit, in June, the Respondent proposed a new school in Town A, a fee-paying school, to which the Applicant objected on grounds of cost. As he points out, he has already agreed that the girls can go to an agreed school in that town but the Respondent, referring to named private schools, is no longer agreeing that they attend at the original school. The exchanges about the newly proposed schools took place on the 21st of June.

6.18 The Applicant responds in this regard: *“But I have a challenge in that you do not feel you need to respect either agreements with me or decisions of the courts. This makes it near impossible to enter into any future arrangement with you, without extraordinary assurances that you would follow them. How do you suggest we address this?”* There is no response to this question, and it is not an unreasonable one. The whole exchange was about Town A and, while the plan had not been finalised it was well advanced. At a late stage, the Respondent made other proposals, changing both the town and the schools and, at around that time, refused to sign a form.

6(A) Consent: The Mortgage Reduction Form

6.19 The exchanges of messages exhibited include many which involve disputes about property in Ireland and in Sweden. Many texts refer to the proposal to live in Ireland, all referring to Town A in this context. Others show that the Respondent claims to be entitled to a house in Sweden, or at least to a significant repayment to one of her family for contributing to its purchase price.

6.20 Leaving aside persistent and various disputes, mainly about property, these facts are established by the exhibits constituting texts, emails, one letter and various averments: the parties own property in Town A. It is one of at least three properties, all of which are the subject matter of legal proceedings. The mortgage re-payments are ongoing and both are named on the mortgage documents. The payments would be reduced if this was the Applicant’s dwelling home. The

Respondent has refused to sign a document which would allow the Applicant to avail of this reduced mortgage.

6.21 Despite the Applicant's repeated, written confirmation that he will move to Town A and facilitate the girls going to school there if he can live in this property, the Respondent refuses to sign this form. She has offered two reasons: one is that she says this means she is tied to the Applicant. This is not necessarily so, as the property is one of those being fought over in court proceedings between the two. Her signature in this regard is unlikely to affect the situation and a court will decide to whom the property belongs. A signature about a rate change will not affect the ultimate decision as to how the property is divided.

6.22 The second reason offered for her refusal to sign appears to have more force. This is that she cannot sign a document which suggests the Applicant is the owner occupier of the premises in Town A, as he still lives in Sweden. She uses the word "*fraud*" to describe the suggestion, although this appears to be unnecessarily pejorative. Central to understanding this objection is timing: while the Applicant seeks this signature in order to move into the property, the Respondent refuses to provide it on the basis that he has not yet moved into the property. She rejects his argument that he will only submit the form when he is in residence when, along with sending copy utility bills, he will have to prove to the bank's satisfaction that he lives there. This exchange is on page 2 of her 60-page exhibit, number 14.

6.23 It is difficult to understand how the parties have not been able to resolve this issue in a lawful way which would allow the Applicant to make the proposed

move. The Respondent's argument about timing can be resolved by taking pragmatic steps. Her submission that the signature would tie her to the Applicant or to the property appears to have a much weaker foundation. Her interest in the property is being determined by the legal proceedings already in being. Her refusal, reading chronologically through all the exchanges between the parties, is treated by the Applicant as a significant obstacle in finalising arrangements to live in Ireland. There has been no offer to sign the document once he is in residence. His calculations were that he would need a reduced mortgage rate to move. Instead of facilitating that, the Respondent thwarted it and vacillated between insisting that the girls move to where members of her family live, in Town B, or that they be enrolled in more expensive schools in Town A. I note that both options are very different to the premises on which negotiations to move to Ireland began and both were first mooted after the Applicant gave up his job in Sweden.

6.24 The Respondent sought to persuade me that if she signed this form, she would be responsible for the mortgage if the Applicant were to die suddenly. But either that is currently the case, or it is not. Her signing a form about the mortgage rate is unlikely to be the determinative factor if the bank is considering such an event.

6(B) Consent: School Forms and the Forged Signature

6.25 There is a further issue with the consent forms signed in respect of schooling in Town B. The relevant principal received a consent form signed by both parents.

The Applicant never signed such a form. The Respondent claims that it is perfectly normal for one member of a family to sign for another.

6.26 I am satisfied that the Respondent probably forged the Applicant's signature on the relevant forms. She has sufficient integrity not to claim directly in her affidavit that she didn't forge his signature, but when she claims this is a formality that is normal in families, she is either lying to the Court or to herself. It is difficult to know, and unnecessary for me to decide, whether she has persuaded herself that forging another person's signature in circumstances of acute conflict is ever appropriate. Whatever her rationale, it is hard to repose trust in the Respondent in the circumstances and it is worrying that she seeks to justify this action.

6.27 It emerged at the hearing that the Applicant now knows, as the girls have told him, where they are attending school. In her affidavit, the Respondent averred that she did not tell him where they are in school as he would, to use her phrase at paragraph 41, bombard the school. She submits that she has a constitutional right to home school her children. The impression created by these submissions is that this Respondent has little respect for the rights of the Applicant to make significant decisions in relation to his children, even as she insists on her own rights.

6.28 I am acutely conscious of the grievances outlined by the Respondent in this regard. I note that the Applicant has reported her to An Garda Síochána in respect of the forgery, that he has contacted TUSLA seeking information on the children and the Respondent was aggrieved that the gardaí called to her family home at the initial stages of this application. While I share some of the Applicant's concerns,

particularly about the welfare of Rachel, it is rarely a wise course to report the mother of your children to the police in circumstances such as these. This is not a case in which physical violence has been alleged, nor have there been any of the classic indicia of coercive control, although the Respondent makes allegations of attempts to control her finances. It is impossible for this Court to identify what substance, if any, there is in such allegations but neither party appears to have worked at reducing conflict. All of the exchanges I have read, on both sides, inflame the situation rather than addressing the needs of the children who are caught in the middle of their parents constant and persistent arguments.

7 Habitual Residence

7.1 While consent is a specific defence under the Convention, a related question is whether or not the children changed their habitual residence in June of 2023. This is a question of fact and the factors which the Court must consider have been canvassed in many recent cases and are authoritatively listed in *Mercredi v. Chaffe* (Case C-497/10 PPU) [2010] E.C.R. 1-14309. Following this case, Whelan J. in *Hampshire County Council v. CE and NE* [2020] IECA 100, at paragraph 77, suggested a non-exhaustive list of factors identifying where a child is habitually resident, referring to the linguistic, social and familial circumstances in each case and the nationality of the child, along with the stability of the child's environment. The

intentions of the parents are, of course, relevant though they may not be definitive.

This is where consent arises again.

7.2 The habitual residence of the girls has not changed. While they are undoubtedly happy in Ireland, there was no agreement to move here permanently. There can be no question of the children experiencing a stable environment when they were moved three times in two years, enrolled in 2023 in schools in two different parts of the country, one with, and the other without the consent of their father, and when they finally began the school year in late 2023 in circumstances where their father was not told, initially, which school they were attending. At no point had they been reassured that they were to settle in Ireland permanently and this is clear from the independent Assessor's reports on their views.

7.3 The Respondent submitted that habitual residence can be changed in a day, which is the case. But this has occurred in families where there was unequivocal consent, at least initially, and where the children were either so young as to immediately adopt the habitual residence of their primary carer or where they were old enough to understand that they were moving permanently. None of these factors arises in this case. The girls are old enough to understand that. As one child told the Assessor in January, 2024, "*she wished to go home but ... she did not know where home was.*" This is the antithesis of settling into a new country and mirrors what is set out in the parties' exchanges throughout 2023: a failure to settle on a plan.

7.4 The Respondent's contemporaneous messages make it clear that there was no consent to any move to Town B and no expectation that the Applicant would ever

agree to that. The element of subterfuge attached to the Respondent's actions, including forging his signature so that the schools in Town B would enrol the children, and messages referring the Applicant to the GDPR consequences of revealing basic information about his children, create the impression that the Respondent acted in defiance of a joint plan and not in furtherance of that plan.

7.5 Even if these factors were not decisive in respect of habitual residence and consent, it must be recalled that the Respondent not only referred to the fact that the Applicant could not remove the girls from Sweden without her consent – how could this consent be necessary if they were resident in Ireland? – she also insisted as late as July 2023 that the formal handover of the girls take place in Sweden. Her own actions contradict her argument that this family had moved to Ireland as their habitual residence from the 12th of June. Her messages confirm that she and the girls knew that talks were ongoing and that the return to Ireland was temporary unless their plans worked out. Their plans did not work out.

7.6 The girls, when asked about their lives here and in Sweden, were still reciting details of activities and friends in both countries when assessed in January of 2024. Without the consent of their father that they could remain here, which they knew he had not given, their habitual residence was not in Ireland. I am conscious that both children had packed boxes and no doubt hoped to move here. However, they did not have the stability of a home where, crucially, they would be attending school and staying for more than a holiday, before they were wrongfully retained in August. Their stay here has been marked by instability and conflict.

8 Grave Risk

8.1 The Hague Convention provides, at paragraph 13(b), that:

“the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that ...

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”

8.2 Ms. Justice Finlay Geoghegan set out the legal test for grave risk in *C.A. v. C.A.*

[2010] 2 IR 162, at paragraph 21: *“[T]he evidential burden of establishing that there is a grave risk ... is on the person opposing the order for return ... and is of a high threshold.*

The type of evidence which must be adduced [must be] ‘clear and compelling evidence’.”

8.3 Case law establishes the kind of risk that has persuaded a court to refuse to return

a child; a risk of violence to the child (usually based on evidence of previous violence), a risk of suicide to the child or to the respondent, or evidence of an event such as famine or war which would render the child’s position unsafe, as set out by Fennelly J. in *A.S. v. P.S. (Child Abduction)* [1998] 2 I.R. 244, paragraph 57.

8.4 The defence of grave risk was argued in the previous proceedings and there has

been a modest change in the circumstances of the children since then. While Rachel refers again to her unhappiness and to instances of self-harm, this appears to relate as much to her parents’ conflict as to the country in which she is living. The quotations from Rachel, in section 9, below, support this finding.

8.5 Perhaps more significantly, any risk that presents for Rachel can be met by the relevant professionals in Sweden. It is difficult to change my view on this issue given the resources still available to Rachel there. While the Applicant has arranged counselling in Sweden, Rachel did not attend more than once. However, there is no evidence at all addressing the treatment being afforded in Ireland. Despite my concerns for this child, to refuse to return a child requires a finding that the perceived risk cannot be accommodated by the country in which she is habitually resident.

8.6 One area in which conditions in Ireland support Rachel better than those in Sweden is the extent of family support here, which she herself recognises. There is no evidence to support an argument that this addresses the risks to her health but I am conscious of the practical benefits of such support and this issue is referred to below and is a crucial factor in considering the exercise of the Court's discretion.

8.7 For many of the reasons set out in the first judgment, including that those findings appear to have been borne out by events since then, the Respondent has not proven that there is a grave risk to either child which cannot be met in Sweden if the children are returned there. The risk that persists in respect of Rachel emanates, in part, from the Respondent and this is noted by the Assessor who comments on Rachel's history of self-harming, her low motivation to engage with services and the inability of her parents to allow adult matters to remain in the adult domain. I repeat my concern that the latest reference to such self-harm was as late as April

or May of 2023 and thus at a time when Rachel knew that her parents were actively considering a move to Ireland, long before talks broke down completely in July.

9 Views of the Child: Relevant Law

9.1 The argument is also made that the children object to being returned, that they are old enough for the Court to consider and act upon their views and that, accordingly, they should not be returned, even after balancing their views against the main objectives of the Convention, which favour immediate return.

9.2 The three-stage test applicable is one articulated by Potter J. and involves ascertaining if a child does in fact object and, if so, what is the weight of the objection, given the maturity of the child. Finally, if established and when assessed in that way, the Court considers if an objection is sufficient to outweigh the counter-balancing objectives of the Convention. Article 13 requires the Court to take account of the views of the child. It does not vest decision-making power in the child, and it would be wrong to treat a child's objection as the deciding factor; apart from anything else, this would place an unfair burden on the child in question. Nonetheless, it is important to consider the views of the children and whether they persuade me to take the exceptional step of refusing to return them.

9.3 In *A.U. v. T.N.U.* [2011] 3 IR 683, Denham C.J. commented that: "*A court, in deciding whether a child objects to his or her return, should have regard to the totality of the*

evidence.” The weight to be attached to her views increases as the child gets older, see for instance *M.S. v. A.R.* [2019] IESC 10, paragraph 64.

9.4 In considering whether the children’s objections are made out, the expression of a mere preference is not sufficient; the word “*objection*” imports strong feelings as opposed to a statement of preference on the part of the child, to use the words of Ms Justice Whelan in *J.V. v. Q.I.* [2020] IECA 302 (at para. 69).

9.5 Donnelly J. reviewed the law in this regard in *D.M. v V.K.* [2022] IECA 207, a case with some similarities to this one. As here, the respondent had removed her children without their father’s consent and had done so for a second time. As set out in that judgment, at paragraph 106 in particular, this Court is required to balance all of the circumstances of the case and to be vigilant to view the policy of the Convention in light of the best interests of the children rather than as a mechanism to punish a parent who has wrongfully removed or retained a child.

Views of the Child: Evidence and Reports

9.6 This issue was raised in the last case and the details are set out in that judgment.

Both children attended an independent clinical psychologist, the Assessor, for the purposes of this case. Their views are similar to those expressed in the last case.

9.7 The Assessor met the children in January of 2024 and referred to the responses of each child being as expected for a child within the relevant age range. Both have excellent verbal ability in English; they speak Swedish as a second language.

9.8 Rachel remained negative regarding her school experience in Sweden referring, specifically, to a fellow pupil who picks on her. She also spoke of her family circumstances, stating: *“It’s harder to deal with my parents fighting in Sweden. Here I have supports if they fight. I feel alone there. They fight often. I’m the only one dealing with it- in between, I’m always in the middle of everything. They complain about each other.”* The Assessor stated that: *“[Rachel] shared that she wished to go home but that she did not know where home was.”* She told the Assessor: *“If I was holding a knife, what would I do with it? Stab myself? I speak to Mum about it. I told Dad and he doesn’t seem to care. Does not think I’m serious, but I was cutting myself”*, before going on to state that she did not believe that her parents listened to her problems and argued with one another instead. Later in the report she stated that *“they don’t communicate.”* She told the Assessor that the last time she self-harmed was in April or May of 2023.

9.9 Rachel stated that she did not socialise much in Sweden and was *“excited and happy”* at the prospect of moving back to Ireland with her father. She then stated: *“I spent some time with Mum and then Dad said he couldn’t move to Ireland because he and Mum couldn’t agree about stuff.”*

9.10 Rachel told the Assessor that she loved her first school in Town B before being *“kicked out because my Dad did not consent”*. She said she did not know the name of her new school, which seems highly unlikely, but that she prefers the teachers to those in Sweden. She mentioned not having friends in the new school. The issue of not telling the Applicant which school the girls might be in has been mentioned

above. This appears to have dictated the child's response that she could not name her own school.

9.11 Rachel stated: *"I would like to live in [Town B] with both my parents. To go to [X school] and to have my own room"*. Regarding a return to Sweden, she stated: *"I don't want to go back to Sweden. My worst nightmare. I don't want to relive my horrible experiences. I want to stay where I feel safe and stable... I am worried about my mental health."* She later stated in reference to a return: *"In a hundred years. Never. But if I had to maybe in two years, so I can return to a safe state of mind."*

9.12 Isobel again reported that she liked both Sweden and Ireland. She stated that before Summer they were thinking of moving to Ireland and that she *"really wanted to live here (Ireland)"*. However, she also stated that school in Sweden *"was good"* that she had friends and *"liked it"*. She went on to state that she and her sister *"were very upset"* when they were told that they were no longer moving. According to Isobel *"There are two properties in [Town A], a house and an apartment. They couldn't agree who would stay where, so the plan fell through."*

9.13 Isobel has friends in her new school and has had a positive experience in Ireland, while still staying in contact with her friends in Sweden. When asked about her wishes for her future care Isobel stated: *"To stay in Ireland. I don't really want to go back to Sweden. I want my parents to stop arguing. I want half the month with Mom and half with Dad. I don't want to go back to Sweden."* She would be *"very, very upset"* if she had to return to Sweden due to her family being in Ireland and her feeling like an *"outsider"* in Sweden, whereas Ireland *"feels like home."*

9.14 The Assessor concludes that the relationship between both parents “*continues to be characterised by chronic conflict*”. He notes that the core of the dispute revolves around the resolution of property interests and that further disputes have arisen regarding where the children should live and what schools they should attend. It is clear from the assessments that both girls are aware of their parents’ property disputes and the dispute regarding where they should attend school.

Conclusions in respect of the Views of the Children

9.15 Both children have, in my view, objected to being returned. Their language could not be more plain. The weight of their objections is different in that Rachel is not only older, but expresses her views in much stronger language. The children are clearly old enough and mature enough for me to take their views into account.

9.16 The question of how to exercise my discretion in the case is a difficult one: Rachel has already referred to the risks to her mental health in the previous case, which risks had to be mitigated. Insofar as the Court could assess matters in a Hague Convention case, the place in which she could best be treated was Sweden. Not much has changed in that regard in that she is currently being seen by a counsellor but no evidence was adduced to the Court so it is difficult to assess what weight can be attached to this new approach. Further, I have no details as to when treatment started and whether it pre-dated the reported self-harm in 2023.

9.17 The Applicant has been told nothing about this treatment, other than by his children. This too is a matter of concern. He is entitled to know this and I accept

that he is concerned about Rachel's health, despite her impression to the contrary. The Respondent appears to base her decision not to tell the Court or the Applicant any details on the basis of her distrust of the Applicant and she also referred to Rachel's privacy. Given the findings of the Court in the previous case, to the effect that the Respondent shares information with Rachel that is inappropriate for her to hear, this argument based on her privacy does little to assuage fears about Rachel's mental health. It is difficult to understand this reasoning from an adult parent. Rachel is still a child. It is a matter of concern to the Court that one parent has assumed responsibility for a child's mental health to the exclusion of the other parent and indeed, it appears, to the exclusion of the Court.

9.18 While there is little difference between the views expressed now and the views expressed in 2022, the girls have drawn my attention more emphatically than before to the ongoing chronic conflict between their parents. This is a notable feature of the reports. While their objections remain clear in terms of their wanting to remain in Ireland, the real problem for both children appears to be parental conflict and not the fact that they were living in Sweden.

9.19 This does not end the matter, however. While the overarching objectives of the Convention are to prevent child abduction, to encourage comity between courts and to return children swiftly to their country of habitual residence, there are countervailing arguments in this case. These are that the welfare of the children is being seriously affected by the chronic conflict that they witness between their parents. They have a sufficiently good relationship with both evidenced by the fact

that the girls want to see both parents as much as possible. That is also very clear.

I have already noted the support Rachel receives from her extended family in Ireland. This has helped to inform the exercise of my discretion in this case.

9.20 The Court cannot dictate where the parties will live, nor can the Court make a detailed access order of any kind. What the Court can do, however, is to order the return that the Convention makes mandatory but seek to hear the children and to mitigate the potential harm to them by putting a stay on that Order and requiring undertakings from the parties as to how and when a move to Ireland will take place. Failing that agreement, the children will be returned to Sweden.

9.21 I expect that the parties may require the help of a mediator but whether they do or not, it is also clear to me that this is a family with the financial means to make a home in Ireland if both parties make an effort to ignore the history of conflict between them and make some compromises for the sake of their daughters.

9.22 This is an unusual step but one which is warranted by these facts. It appears that the medium to long term future of the family will be in Ireland. Bearing in mind how close they came to moving here, and how likely it is that a move will follow in the coming year, I am willing to put a stay on my return Order to allow the parties to resume making those arrangements. This should not be understood as an Order which approves of the current situation, given the reservations of the Assessor, the opposition of the Applicant to the current arrangements and with no evidence of the quality of treatment available to either child nor of the willingness of the Respondent to acknowledge the rights of the Applicant.

10 Contempt of Court and the *in camera* rule

10.1 The Applicant sent a copy of the first judgment to a school principal. The identities of the parties and their children were thereby revealed to the recipient, who knew some of the family background. As the principal commented, reasonably, the judgment added nothing to her understanding of the issues insofar as the girl's schooling was involved. The Respondent submits that the Applicant is in contempt of court having so done. This argument was not repeated in oral submissions and was not replied to.

10.2 I will not deal with the issue of contempt in this judgment but will invite submissions when delivering judgment and will arrange for a hearing of the issue if that becomes necessary. The orders in Hague Convention cases are that the cases shall be heard *in camera*, or otherwise than in public, which order is directed to the parties as well as members of the press and which means that the papers may not be published to another party without the permission of the relevant court. It is routine to be asked to lift the order to a limited extent to allow relevant papers to be shared with lawyers or courts in another country. It is not fair to dispose of the issue without affording a right of reply or, if the Applicant accepts the evidence that he has breached the Order, affording him an opportunity to explain this action and to provide reassurances to the Court.

10.3 Whether or not the Applicant has deliberately disobeyed an order of the Court is a serious matter but, in the context of this case under the Hague Convention, even if the breach has occurred, I am not satisfied that it should determine the

outcome of the case. While I have yet to hear from the Applicant on this issue, the affidavit evidence suggests that he did send a copy of the judgment to a third party. This is a case in which a relative of the girls has already received an anonymous copy of the same judgment, a fact that the Respondent brought to my attention in a previous hearing. While there was no evidence that the Applicant sent the earlier copy to a third party, the fact of the issue being mentioned means that all parties knew how serious this issue was.

10.4 The background to this case, however, also includes the situation in Sweden.

There, the children in such applications are routinely identified. This fact, that the Court's previous judgment is available along with details which identify all the parties, emerged when the Respondent asked this Court to make an Order directing the Swedish courts not to identify the children. The courts in Sweden are entitled to make their own rules of practice and the legislators there are entitled to protect identities, or not, however they see fit. This is not a matter for this Court. It is relevant to note that the privacy afforded by an Irish court hearing is lost when the same children are habitually resident in Sweden where the related facts must, necessarily, be heard also.

10.5 The point of the *in camera* rule in this context is to protect children and to avoid making details of their personal lives known to any person, whether they have a connection with the parties or not. There was no warning alerting the recipient principal to the fact that there was a Court Order protecting the identities of the

girls and, to make that effective, also protecting the identities of the parties. I note also references to the health of the Respondent in the judgment that was shared.

10.6 However, even if the sharing of the document was malign and done to harm any of the family, and I can make no finding of fact in that regard as yet, such a finding does not mean that the Applicant has forfeit his right to custody of his daughters or that I must allow this to affect my view of the case. This case was about where the girls were habitually resident, whether that changed, or whether the Applicant's consent amounted to a defence to their removal and, if not, whether their views should require that I refuse to return them.

10.7 If one party here has acted to the detriment of the children, in publishing the details to a third party, that is unlikely to be the deciding issue in the circumstances of this particular case and it does not help to determine where the children should live. They have already been identified in other, related proceedings in Sweden so to that extent, the horse has bolted. The Court does not condone such action but seeks to assess its consequences for these children.

10.8 The Respondent emphasised this breach. She has accused the Applicant of perjury and, as set out above, of entering into a marriage under false pretences. On the other hand, the Applicant has reported the Respondent to the police in Ireland and has contacted TUSLA, which body is now actively involved with the family.

10.9 The Respondent has encouraged her eldest child not to speak Swedish in school, seeking to explain this to the Court as a sensible means of protest to persuade her father to move back to Ireland. In fact, this has affected her

daughter's school life, relations with teachers and progress in her schoolwork. The Respondent has also, as set out above, repeatedly shared the details of her disputes and of the preceding case with her daughter Rachel.

10.10 These are all matters that affect my view of the reliability and credibility of the parties. If the Applicant has deliberately breached an Order, in spite of the potential damage to his daughter, this is an issue which must be addressed before final orders are made in this case, but given the various difficulties presented by the Respondent's conduct, listed above, even such a breach would not prevent me from entrusting the girls to the Applicant's care. The conduct of both parties causes me serious concern when considering the wellbeing of the girls.

11 Conclusions

11.1 The girls the subject matter of this application were wrongfully retained here in August of 2023. Their parents discussed moving here permanently but never reached an unequivocal agreement and the Respondent effectively changed the goal posts at a late stage in these negotiations.

11.2 As a result, the children remain habitually resident in Sweden. The views of the children are that they object to returning to Sweden. I am very conscious of their strong objections but equally conscious that their views mirror, closely, the views of the Respondent. The child with the strongest objections also appears to envisage that the two parents will live in proximity in Ireland and share the parenting load.

The parties' actions are making that less likely, including the actions of the Respondent, though this child appears to believe that the Applicant alone is preventing their move to Ireland.

11.3 Taking all of this into account, including the objectives of the Convention (to prevent the abduction of children generally and to vindicate the rights of parents and children), and the context in which the children's views have been expressed (they have been moved three times in the past year and were led to hope that they would remain here) and taking into account that their father does appear serious about his intentions to move in the longer term, the Court is not inclined to return the children to Sweden immediately without giving the parties a final opportunity to arrange for suitable living arrangements for their daughters.

11.4 This decision has been informed by the similar circumstances of the children in *D.M. v V.K.* [2022] IECA 207. While this case is different in that these children were habitually resident in Sweden at the time they were retained here, and they have not been in Ireland for as long as the children in that case, there may be a logistical solution to the family's problems if they can identify a place to live in Ireland. If so, the return Order will be stayed. If this is no longer possible, as the Court has continuing concerns about the current circumstances of the children, they will be returned forthwith to Sweden but it appears to me that this will be a damaging result for the future relationship of the Applicant with his children.

Addendum

1. Functus Officio: “Abduction” and New Evidence

1.1 Judgment in this case was circulated to the parties on Thursday, 1st February 2024. I received an email on 2nd February asking me to permit the Respondent to share a copy of the judgment with her solicitor and counsel for the purposes of taking legal advice in relation to the case. I replied, through the registrar, lifting the *in camera* rule to permit this.

1.2 A second email was received from the Respondent on the 9th of February alerting me to two issues. One was in respect of a finding of fact by the Court and the other in respect of alleged new evidence. I sent that email to the Applicant’s legal team and replied, through my registrar, saying that it had been forwarded to them and that I would hear the parties on the issue of the stay on my Order as directed on the 13th of February. Later that day, I received draft motion papers, which my registrar sent to the Applicant’s legal team. The Respondent asked whether she could raise the issues as my judgment had not been perfected.

1.3 This reveals a misunderstanding of terminology: my judgment is final. The court’s order is pronounced in the courtroom. It is “perfected” when the order is recorded by the registrar and sent as a formal, written document to the parties. A judgement is not perfected. The word does not mean “perfected” in the sense of being made perfect in that it contains no errors, and it does not refer to the judgment but to the Order.

1.4 Most of the issues raised were matters for the Court of Appeal, in the event that an appeal is lodged. There was one matter I clarified immediately and this was the Respondent's request that I remove the word "abduction" from the description of her actions as she had retained, not removed the children. I explained that abduction was the correct term. In respect of the other matters, there was no capacity for me to revisit my judgment or consider new matters or evidence.

1.5 The judgment is in draft form for the parties, but will not change in any material way – if both parties had noted a simple error or typo, that might be dealt with but for more substantial amendments, for example, if either party thinks there is an error that could change the substance of the order, if they have new evidence to offer, or even if they want to appeal simply because they disagree with the outcome or any of my conclusions, these are all matters for the Court of Appeal. I have delivered my judgment, my role in fact-finding is at an end and once the stay is amended, I am *functus officio*: my role in the case is at an end.

1.6 The stay ordered was to facilitate settlement talks as it seemed to me that there was potential for the parties to reach an agreement even at this late stage. However, when I read the emails sent last week, it appeared that the time afforded to the parties, instead of being used to settle on a mutually satisfactory basis in line with what might benefit the children, is more likely to be used to continue the conflict between them.

1.7 The Order was perfected on the 9th of February and a 28-day stay had been directed to facilitate mediation. There being no point in a further stay, that Order was amended on the 13th of February. I made the more usual Order on that date, namely, confirming that the children should be returned and granting a stay of 10 days after which the question of any stay can be addressed by the Court of Appeal. The usual direction was made, in that the stay is contingent on the Respondent filing any notice of appeal within that time. If an appeal is lodged within 10 days, the stay extends to the first return date in the Court of Appeal.

2. Contempt of Court hearing

2.1 In this case, the Applicant sent a link to the *in camera* judgment in the first of these two cases to a school principal in circumstances where I had already addressed all parties about how serious it was to breach that rule. There was an admitted breach of the relevant Court Order and therefore there was no need for a separate court to conduct a factual hearing. I heard submissions from both sides on the 13th of February.

2.2 The Respondent submits that the Applicant has done this before, but she refers to the fact that a family member received a copy of the earlier judgment in this case. The Applicant denied responsibility for that disclosure of the judgment, which was publicly available and could be linked to the case by that family member in the circumstances. There was no evidence before me to confirm who the sender was on that

occasion, and I could not make any such finding. The Respondent's submissions included allegations that the Applicant shares inappropriate information, such as court dates, with the children. Her argument has less force in circumstances where I found as a fact in both cases that the Respondent shares inappropriate information with the children, particularly Rachel.

2.3 The Applicant apologised and acknowledged his breach of the *in camera* rule. The breach was not a trivial one, but it was limited in its scope. An issue was made in respect of the email address to which the link to the judgment was sent but I accept that the Applicant was replying directly to the principal of a school and not intending to distribute the link more widely. It is not clear if anyone else was privy to the information. The Applicant argues that he sought to inform the school that he had not consented to his child being registered there. This was the registration form in respect of which the Respondent forged the Applicant's signature. The link was to an unrelated judgment, however, so this is a poor justification for sending the link to the document.

2.4 I accept that he sent the link to a specific person who knew the importance of the privacy of the child – a professional in the responsible position of school principal. I accept that there was no intention to publish the link widely or to bring a sense of scandal to the children.

2.5 The key aspects to my decision are the extent of publication, the identity of the person who received the link, and what appears to me to be the Applicant's response: he has taken the matter seriously. He flew from his home to be in Ireland to address the issue in court and offered appropriate undertakings. In line with the judgment of Birmingham J. in *HSE v L.M.* [2013] 4 IR 49; [2012] IEHC 611, a court should be lenient in a situation where the contempt is accepted, an apology is offered, and assurances are given that there will be no repetition. I accepted the Applicant's apology and his sworn undertaking not to repeat any similar breach by publishing information about his children in connection with this case, without the prior leave of the Court.

3. The Application for Access

3.1 The Applicant then requested access to the children for a holiday booked in the anticipation that they would be returning to school in Sweden and planned for a week during their mid-term break. This was declined by the Respondent on the basis that the school term in Ireland is different and the girls would have missed a week of school.

3.2 I made no Order in this respect.