



THE COURT OF APPEAL

APPROVED

Neutral Citation Number: [2022] IECA 246

Court of Appeal Number: 2021/255

**Edwards J.
Whelan J.
Collins J.**

BETWEEN/

D.K.

**APPLICANT/
RESPONDENT**

- AND -

P.I.K.

**RESPONDENT/
APPLICANT**

JUDGMENT of Ms. Justice Máire Whelan delivered on the 28th day of October 2022

1. I am in agreement with the Orders proposed in the judgment of Collins J. I agree with the reasoned basis identified by him in the said judgment which warrants the making of the proposed Orders. I wish to add a few brief observations.

Introduction

2. Each case seeking the removal of children from the jurisdiction of habitual residence for the purposes of taking up permanent residence in an external location will turn on its own particular facts. Outcomes in such litigation are invariably fact-dependent. The

circumstances of the individuals within families and their internal dynamics *inter se* vary endlessly.

3. The choices confronting the court in a relocation application are binary. The primary aim must be to minimise, in so far as practicable, the rupture in the unsuccessful parent's relationship with the children and to establish measures to secure, so far as practicable, the maintenance of a relationship between the children and the left-behind parent.

4. Ultimately in such applications the burden rests with the moving party to demonstrate to the satisfaction of the court the benefits to be conferred on the child or children by the proposed move abroad, while satisfying the court that the relationship of the child with the left-behind parent can and will be maintained over time by the constructive ongoing operation of sufficiently comprehensive and extensive contact and access with the left-behind parent.

5. Regard should also be had to the relationship between children and their extended families on both sides, insofar as relevant, and the extent to which such relationships are likely to be maintained, particularly if the children enjoy a close relationship with relatives such as grandparents. Particular vigilance should be exercised in evaluating whether an applicant parent is shown to have taken steps in the past to limit contact with the other parent in a manner as could potentially undermine or weaken the latter's relationship with the children. There ought to be demonstrable evidence adduced by the applicant to satisfy the court that an applicant is willing and able to constructively support the maintenance of the relationship between the children and the left-behind parent. In that regard, whilst the focus of the court's consideration is to neither award nor punish a parent but rather to find a solution that meets the best interests and the welfare needs of the children involved, the court must ultimately aim for a solution that it considers, in the context of the entirety of the

evidence before it, best meets and satisfies the best interests and welfare needs of the children.

Proposed relocation

6. The facts as understood and presented in this case indicate that the mother wishes to remove the children from country X where they have at all material times, for upwards of nine years, been resident and attending school. She wishes to do so for the purposes of exercising her general right for freedom of movement pursuant to European Union law and thereby to reside in country Y - another EU Member State. It is to be noted that the decision to move and bring the children to reside with her is not necessitated by any specific employment offer or other immediate domestic or professional exigency. The application arises in this instance in the context of the mother's entitlement to exercise her EU Treaty Rights to free movement.

7. As the jurisprudence makes clear, the fundamental principle informing the exercise of its jurisdiction by a court in considering such an application is that the welfare and best interests of each of the children in question is the court's paramount consideration. Where there are a number of children of different ages and in different educational contexts, the court will have to have due regard to the age and circumstances of each individual child, as well as the importance of relationships between the children *inter se*. The court will have regard also to the extent to which the Order sought risks potentially adversely impacting on each aspect of the family dynamic. Some of the authorities make reference to carrying out "*an holistic evaluative analysis*" which I understand to mean no more than the carrying out by the trial judge of a proper welfare analysis of all the viable options considered to be available for the child/children in question.

8. As was observed by Black L.J. (as she then was) in her judgment in *K. v. K.* [2011] EWCA Civ 793, [2012] F.L.R. 880, at para. 141:

“The first point that is quite clear is that, as I have said already, the principle – the only authentic principle – that runs through the entire line of relocations authorities is that the welfare of the child is the court’s paramount consideration. Everything that is considered by the court in reaching its determination is put into the balance with a view to measuring its impact on the child.”

Being a decision of the courts of England and Wales, *K. v K.* is of persuasive authority only, however it accords with the jurisprudence in this jurisdiction and it is noteworthy that Black L.J. otherwise observed, at para. 142 of the said judgment in that context that “*valuable guidance*” was to be found in the relevant jurisprudence which “*must be heeded*” and ought not be ignored.

No Presumption in favour of primary carer

9. In circumstances where children have been reared in a household with both parents present - or otherwise actively involved in their upbringing - and perhaps one being the primary financial provider to the household, care must be taken not to automatically assume, without an appropriate assessment and evaluation, that a parent who has primarily worked within the home ought to be assumed as such to be automatically best placed to have custody of children in a proposed relocation context where the contemplated outcome is that the parents will be residing in different jurisdictions. Generally speaking, where parents reside together and childcare and parenting is shared rather than reasonably being capable of characterisation as undertaken by one sole primary carer, neither enjoys any implicit presumptive advantage in the context of a relocation application. Rather, all factors that are considered by the court in reaching its determination should be put into the balance with a view to measuring each factor’s impact on the individual child.

10. Concerning a primary carer, it is noteworthy that in *K. v. K.* (ante) Black L.J. counselled against privileging or preferencing the application of such a parent at para. 143:

“...Even where the case concerns a true primary carer, there is no presumption that the reasonable relocation plans of that carer will be facilitated unless there is some compelling reason to the contrary, nor any similar presumption however it may be expressed. Thorpe L.J. said so in terms in Payne and it is not appropriate, therefore, to isolate other sentences from his judgment, such as the final sentence of paragraph 26 (“Therefore her application to relocate will be granted unless the court concludes that it is incompatible with the welfare of children”) for re-elevation to a status akin to that of a determinative presumption. It is doubly inappropriate when one bears in mind that the judgments in Payne must be read as a whole, with proper weight given to what the then President said.”

Analysis of Impact of Relocation Order on relationship between children and left-behind parent

11. A court entering into a determination must exercise vigilance in carrying out an evaluation as to whether that proposed relocation will have a deleterious impact on the relationship between the children and the left-behind parent. In this context, past conduct by the applicant parent can be of great importance and the extent to which the applicant parent has thwarted, impeded or undermined the relationship between the proposed left-behind parent and the children must be considered and weighed in the balance by the trial judge.

12. If there is evidence of stresses in the relationship between a left-behind parent and one or more of the children, the precise circumstances and causative factors for this, insofar as reasonably ascertainable, ought to be established.

13. My understanding of the evidence, having duly considered the transcripts of the hearing and the affidavits of the parties together with expert reports, suggests that all material

times the upbringing of the children was shared between the father and the mother who resided under the same roof for a substantial period of time and accordingly, there was shared care of the children. At a time when they resided in Ireland, the mother did from time to time work outside the family home in her professional field. She did not work outside the family home in country X. Nevertheless, having due regard to the very active role carried out by the father in the family and in the upbringing of the children, there was evidence that on balance, both parents shared in the care and upbringing of the children and continued to do so at the date of the hearing.

Future access

14. It is for the High Court to evaluate the various welfare factors in connection with the application. Any proposed arrangement that involves relocation engages issues concerning children's long-term welfare and an applicant ought of necessity provide clarity to the court and certainty with regard to the fostering and maintenance of meaningful relationship between each child and the left-behind parent.

The abduction

15. An expert report was obtained in this case pursuant to statute. It was available to the High Court. It was authored following the expert having met with the mother on five separate occasions and with the father on four different occasions. The children were observed twice in the company of the mother and once in the company of the father. In the context of the facts and evidence, it is surprising that the word "abduction" appears nowhere in the lengthy report prepared for the court.

16. The evidence suggests that the mother abducted the three children at the end of their summer holidays in the month of June 2019 and failed to return them to country X where they were due to go on holidays with their father. That abduction took place without notice to the father. No explanation or valid justification for same was offered. The children were,

apparently, not facilitated in making any contact with their father thereafter. The involvement of the police was necessitated to ascertain the whereabouts of the children who were found to be in country Y. The father instituted proceedings pursuant to, *inter alia*, the 1980 Hague Abduction Convention for the summary return of the children. The proceedings were fully contested by the mother, as she was entitled to do. She was unsuccessful in that regard and the return of the children was ultimately ordered by the courts of country Y.

17. She appealed against that Order, as she was entitled to do. On appeal, the courts in country Y declared that her removal of the children was wrongful and in breach of the rights of custody of the father, upheld the lower court and ordered the summary return of the children. She failed to comply with that Order and failed to return the children to country X. That development necessitated a further round of litigation to secure the enforcement of the Orders and to compel the mother to comply with same.

18. It will be a matter for the High Court to evaluate the circumstances surrounding the abduction and, more importantly, the circumstances and events surrounding the apparent non-compliance with not alone the orders for summary return but also the enforcement of the final Orders of the courts of country Y directing the return of the children where police intervention arose in two jurisdictions. The conduct of parents in the context of abduction is not *per se* an impediment to a subsequent application for relocation to another jurisdiction (see *S.K. v A.L.* [2019] IECA 177). However, the nature and extent of the relevant conduct differs in each case. The extent to which a parent saw fit to comply with orders concerning children or elected not to comply with them or took steps to defeat or undermine the enforcement of orders are relevant factors and offer at least potential indication as to the likelihood of such an applicant's ability and willingness to constructively comply with contact provisions *in futuro*.

19. Stability and certainty in connection with access and contact arrangements are especially important where a significant change is in contemplation and where children may have to adjust to living in another jurisdiction away from one parent and, perhaps, learn a new language. It is for the court to assess the *bona fides* of an applicant parent who seeks to relocate and whether, in light of the evidence, there is a likelihood that an applicant will have due regard to the rights and welfare of the children, bearing in mind the importance for a child's welfare of the maintenance of an ongoing constructive and positive relationship with the left-behind parent.

20. In evaluating an application for relocation to another jurisdiction, particularly to a location which may present logistical or other difficulties concerning the exercise of access, as appears to be possibly emerging in the instant case, it is for the trial judge to carry out an assessment as to whether he or she can confidently assume that the applicant parent will actively and constructively engage in respecting the autonomy of the child or children in question and ensuring their long-term welfare and interests by agreeing to necessary and appropriate access and demonstrating a willingness to ensure that the relationship with - and appropriate and adequate access to - the left-behind parent is actively and constructively facilitated.

Article 8 Rights

21. Article 8 (1) of the European Convention on Human Rights provides:

(1). *“Everyone has the right to respect for his private and family life, his home and his correspondence.”*

A proportionality evaluation is necessitated on the facts of the instant case in light of Article 8 of the European Convention on Human Rights, and the rights of the children and their father to have a relationship with each other in the context of family life in the private sphere where the court can assess, in the light of objective available evidence, the risks and

likelihood of disruption to or injurious impact on the family relationship between the left-behind parent and the children. Such a proportionality assessment is warranted, not just from the perspective of the Article 8 rights of the left-behind parent, but also of the Article 8 rights of the children in question. Relocation will inevitably give rise to an interference with the family life and private life of the left-behind parent and the children and their relationships *in futuro*.

22. The proportionality analysis to be carried out by the High Court judge will have regard to the proposed interferences with the Article 8 ECHR rights of both the children to a relationship with their father and of the father to a relationship with the children. Ultimately there is a balancing exercise to be carried out and the court must have confidence before an external relocation is authorised that the least harm and risk of undermining of the relationship between the children and their respective parents will ensue in light of the proposed order.

23. Of course, in the instant case the assessment of the application for relocation to country Y must be carried out afresh for all the reasons identified by Collins J. in his judgment, having due regard to the welfare of each individual child and the views of each child. Circumstances within families vary radically and the views of individual children may differ or alter over time.

Assessment of realistic options

24. It is necessary for the court to engage with and evaluate each realistic option or proposal advanced by the respective parties. Having identified each of the options presented to the court by the respective parties in relation to the proposed external relocation, it is then necessary for the court to evaluate each in turn, giving particular consideration to what it identifies, on the basis of available evidence, as the realistic options. An analysis of the best

interest of each child in the welfare context under each option should be engaged in and determined.

Role of maternal parents

25. An unusual feature in the instant case concerns the role and activities of the maternal grandparents. It would appear that the maternal grandparents reside in the United Kingdom and have lived there for upwards of 35 years. They have a holiday home in Spain. The evidence suggested they spend part of the year in country X and part in country Y. The material before the court suggests that the maternal grandparents may have instituted proceedings against the father and the mother claiming an interest in or ownership of the family home of the parties in Ireland. That litigation appears to be in progress before the courts in this jurisdiction.

26. Separately, it would appear that around the time of the wrongful abduction of the children by the mother from country X to country Y in 2019, the maternal grandparents purchased a dwelling house in country Y. The evidence suggests that the maternal grandparents put the mother into occupation of that dwelling house purchased in country Y. It is asserted that the mother pays a rent to her parents in respect of that property. It is, apparently, proposed that the mother would reside in that dwelling house with the children if the relocation order is granted. It will be for the trial judge to evaluate whether, in all the circumstances, and having due regard to the evidence on affidavit and otherwise adduced regarding the role and conduct of the maternal grandparents as exemplified, *inter alia*, in the context of the enforcement of court orders in country Y for the summary return of the abducted children, whether any role and involvement of the maternal grandparents is of relevance to the relationship between the children and their father – and its likely future trajectory - in the event that an order granting relocation to country Y.

27. In acceding to an application for relocation of children by a parent to an external jurisdiction, the court must be mindful of the practical safeguards necessary to guard against the risk of non-compliance with any terms of leave or conditions considered necessary in the interests of the welfare of the children in question. A history of non-compliance with or defiance of orders of the courts is a serious matter. Depending on the facts presenting in any given case, it is open to a court to consider such conduct to amount to misconduct in the context of abduction. It is noteworthy that in the case of *Al-Khatib v. Masry* [2002] I FLR 1053, Munby J. found on the specific and somewhat extreme facts of that case that the previous abduction of the children in contempt of court amounted to “very grave” misconduct.

Prospect of Enforcement of contact orders – 2022 Regulation

28. The prospect of speedy enforcement of orders in the country of proposed relocation is also of relevance. In this jurisdiction, the Provisions of the Protection of Children (Hague Convention) Act 2000 as revised and amended governs the position. It is at least noteworthy that Council Regulation (EC) No 2201/2003 (Brussels II *bis*) of the 27 November 2003, which ceased to be operative and was repealed with effect from the 31st July 2022, had governed the recognition and enforcement of judgments and orders in respect of matrimonial matters and in particular, including areas of parental responsibility, custody and contact. It will be recalled that country Y did not participate in the adoption of the said Regulation and was never bound by it nor was it ever subject to its application.

29. On the 1st August 2022, Council Regulation (EC) 2019/1111 (Brussels II *ter*) came into force. It now governs the recognition and enforcement of parental responsibility orders within the EU in respect of legal proceedings commenced after the 1st August 2022 and agreements concluded after that date. It is noteworthy that pursuant to the terms of the said Regulation, country Y is again not taking part in the adoption of the Regulation and is not

bound by it or subject to its application. Hence, in the event that relocation is authorised, the simplified procedures to be found in Clause 2 of the Regulation will not be available to the father in the event of non-compliance with conditionality and terms of leave, particularly around access and contact. That factor may or may not be a relevant consideration, depending on the evidence as unfolds at the hearing before the High Court.

30. However, the 1996 Hague Convention, like the Brussels II *ter* Regulation, contains a regime for the mutual recognition and enforcement of 'measures directed to the person or property of the child', as Article 3 provides. The Convention entered into force in Ireland on 1st January 2011. All EU Member States (including country Y) are now Contracting States to the 1996 Hague Convention.

Views of the child

31. Article 12(2) of the UN Convention on the Rights of the Child provides:

“(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

Similarly, Article 24(1) of the Charter of Fundamental Rights of the European Union provides: *“...[Children] may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.”*

32. The rights of the child are very significant in relation to proceedings affecting them and generally decisions concerning the future of a child and her relationships with parents and others are crucial considerations in determining the best interests of the child. These factors apply to children and adolescents of all ages.

33. Children of the ages of the minors the subject matter of these proceedings, who are now adolescents, who are capable of forming their own views must be given a genuine and

effective opportunity to express those views. The position is prospectively governed by Brussels II *ter* (Recitals 2, 39, 57, 71, Articles 21, 26, 39, 47, 68(3)). Irrespective of which statutory or regulatory framework is found to govern an application for relocation, the rule of law in this State encompasses the right of the minor in question to participate in same to the extent of having his or her views heard and considered by the court. Such an approach is mandated by the Constitution (Article 42A) and is consistent with the State's international obligations pursuant to Article 12 of the UN Convention on the Rights of the child.

34. The function of the court-appointed expert is to assist the court in the difficult and complex undertaking involved. The 2022 Regulation is directed towards ascertainment of the child's "views" and thus entails an exercise anchored in and directed towards an ascertainment, in light of the age and degree of maturity of the child and his/her understanding of the potential options and proposals under active consideration concerning his/her immediate future and his/her attitude to each option under consideration and her stated reasons for same. The child's focus should first and foremost be directed towards a consideration of the practical consequences for him/her under each alternative proposed scenario and might encompass factors such as her perspective of the likely impact on his/her lifestyle, education, friends and relationship with the left-behind parent or prospective non-custodial parent, as the case may be. Ascertainment of views is an exercise in establishing the key facts and factors which exercise and concern the child in connection with proposed changes in their location and/or the extent to which they will spend time with or be in the presence and company of one parent.

35. From a child's perspective, "wishes" are aspirational and precatory. Wishes encompass hopes, desires, dreams and ambitions. Most children the subject of relocation proceedings wish, first and foremost, that their parents would reconcile and that they could live in harmony with both in a stable environment, safe, secure and loved. The exercise of

determining a relocation application does not allow for a judicially-directed quest to realise a child's expressed wishes. In part the trial judge in this case fell into error because she sought to detect the subject children's wishes and, believing that she had done so, impermissibly crafted an outcome which purported to give effect to same. Were the focus of the meetings held by the judge with each child directed towards eliciting the views of each child on the key options actually under consideration, the outcome of her encounters with the children might well have been different.

Expert reports

36. The expert should perform the assessment and express opinions confined to the particular area of her expertise. It is for the judge to decide particular issues in individual cases based on all of the evidence, including that of the expert. Ultimately it is for the judge to decide the case based on an evaluation of a wide range of factors, including the relevant evidence of any competent witness given in a field in which they are clearly expert. Where a judge rejects recommendations of the expert, it is desirable that clear reasons for disagreeing with recommendations or conclusions are clearly set forth and any perceived deficits are identified. At all times it is open to the judge to evaluate the evidence of an expert and indeed it is desirable in an application of such gravity to subject the same to careful and logical analysis. Where, as here, the children were treated by professionals in country X it is desirable that to court has available to it relevant expert evidence from such professionals where it is capable of shedding light on any underlying issues which subtend the child's views. There are sometimes real risks that communications between experts transnationally may lead to material factors being "lost in translation" or overlooked in the context of ascertaining the views of a child and the underlying considerations which animate same. I am in agreement with the observations of Collins J. in relation to the decision of the Supreme Court in *McD. v L.* [2009] IESC 81 particularly with regard to the desirability of identifying

reasons why the court considers it appropriate to deviate from the opinions of an expert appointed by the court pursuant to statute.

37. Inevitably, where an assessment is directed towards future care and future prospects involving a child, it is to be borne in mind and the court is entitled to have regard to the fact that to some extent, an expert's views involve conjecture and surmise rather than certitude. Where an apparent disparity emerges between the approach adopted by an expert to one parent over another and as to the analysis of their motives and intentions, a judge is entitled to exercise caution in assessing what weight to attach to expert views expressed in such a context. Overly dogmatic or enthusiastic views expressed with regard to the social desirability of having children reside in one EU democracy over another may require to be treated with a high degree of circumspection unless such views are the conclusions of the expert in a field of demonstrated expertise and are supported by comprehensive evidence properly ascertained and evaluated by the expert. It is not an expert's function to merely recount selective views submitted to them by or on behalf of one party or the other and the incorporation of such material into an expert report risks debasing its worth and undermining its value to the court or otherwise leaves it open to a perception of dilution by an apparent "scientific prejudice" or, worse still, confirmation bias which detracts from the value and benefit of an expert report in matter of such consequence to the parties.

38. It is noteworthy that the expert report put before the High Court does not appear to engage with or explore to any extent the abduction or the significant lack of contact between the children and their father following the abduction and the various apparent issues presented in connection with enabling contact between the father and the children pending the conclusion in late 2019 of the abduction proceedings in country Y. Neither is there any exploration of the reasons for non-compliance with the enforcement process in country Y and other conduct engaged in surrounding the ultimate return of the children to country X,

nor an evaluation of the appropriateness of same. This is surprising. The extent to which it may or may not have impacted on the said children has relevance to the prospects of any future orders being complied with and the relevance of same for the children's relationship being maintained with the left-behind parent, should the order sought be granted.

39. A surprising and somewhat difficult to understand aspect of the expert report in this case was the somewhat extravagantly positive language used to describe country Y when, apparently, compared with either Ireland or country X. The basis for an analysis that conferred an inherently superior ethos on one EU country over two other EU countries was nowhere identified. Neither did the expert divulge what expert knowledge, if any, she had in relation to the "ethos" ascribed to country Y. The expert appears to have accepted evidence from the mother that she could obtain a part-time flexible position in her chosen field of expertise in country Y. There was no adequate assessment or enquiry as to whether a like position could be obtained by her in either country X or, insofar as relevant, Ireland. The clear evidence before the court was that the mother had worked in her chosen field of expertise in Ireland in the past.

40. The report makes continuous reference to the superior quality of life, the superior educational system and so called "family orientated nature" of society in country Y. These subjective norms were not at any point explained as to their basis or definitional parameters and it is noteworthy that under cross examination the expert appears to have accepted that she did not have any independent knowledge about country Y. The report to that extent appears to have been based on a wholesale acceptance of a series of assertions concerning life in country Y, its societal norms and educational system as posited by the mother and accepted without question by the expert and thereafter presented as findings to the court.

41. It would have been helpful to the court if the expert in her assessment had carried out a comprehensive stress testing around the abduction of the children in 2019 and the

significant events that occurred towards the end of that year in country Y and Scotland surrounding the summary return of the children to country X. The affidavits in the case suggested a series of events that appears to have caused trauma to the children, particularly the youngest child of the parties. Neither does there appear to have been any assessment by the expert of the assertions, apparently made by the mother to the youngest child, that the father had been guilty of abduction. That assertion appears to have been without foundation.

42. Expert witnesses enjoy a privileged position in our courts and it is to be recalled that a misleading or selective opinion from an expert risks inhibiting a proper and comprehensive assessment of a particular case and does not assist a trial judge in the determination of a complex case which has significant and long term repercussions for the children involved and their parents.

Proportionality

43. Proportionality in the context of the ECHR rights of the parties and the children involves a consideration in the context of the rights of children to maintain personal relations and direct contact with both parents in accordance with Article 9 of the United Nations Convention on the Rights of the Child and Articles 6 and 8 of the European Convention on Human Rights. The court must also separately have regard to the Article 8 rights of the parents, albeit in the context of the competing rights and interest of the parties the children's Article 8 rights will rank in priority with those of the parents.

44. Where a diminution or reduction in the child's personal relations and direct contact with one parent is likely to ensue from a proposed removal abroad on a permanent basis, such that *prima facie* the children's rights are likely to be infringed, the court must give consideration to the issue of proportionality of the proposed interference in all the circumstances. Generally, that proportionality test is integrated into and will be subsumed within the overall assessment of the myriad of factors which the court takes into account in

light of the evidence and the particular facts when assessing the best interests of the children the likely effect of proposed changes and the risks of harm.

45. In that regard consideration must be given to, *inter alia*, the likely impact on each child of the change or diminution in their relationship to the left-behind parent, the nature and extent of the relationship between each child and the left-behind parent, how secure it is at the date of application and how likely it is, in light of the evidence and the history of the relationship between the parents, to endure, survive and flourish if the order sought is made permitting the removal of the children to a third country. The assessment by the trial judge involves the court evaluating the extent to which he or she can place reliance on proposals for the maintenance of contact and the obstacles - if any- legally, procedurally or otherwise in enforcing such rights in the foreign country in question. Relevant too in the context of proportionality is a consideration of the likely impact on the left-behind parent of the children departing from a country of habitual residence on foot of the order sought.

46. Risks identified in a proportionality assessment can potentially be alleviated. Much depends on the willingness and proven capacity of the applicant parent to address the issue in a manner that meets the needs and welfare of the children. It is for the trial judge to assess, in the light of the evidence and the historic conduct of the parties, whether the proposed relocation is likely to operate in a manner that meets the best interests and welfare needs of each of the children and ensures a constructive, sustained relationship will continue between the children and the left behind parent.

47. It is appropriate that the trial judge is in a position to assess the evidence and identify any risk that relocation is motivated either entirely or in part by a mere wish to exclude or delimit the left behind parent's role in the lives of the children. To that extent, proportionality does encompass taking into account the respective motives of the parents and the practical consequences of their proposed actions.

Judges meeting children

48. National courts develop and operate their own methodologies, procedures techniques and strategies for ascertaining the views of children of all ages. Some jurisdictions provide that the courts do so directly; others proceed by retaining special experts to ascertain the child's views and the reasoning expressed for same and who thereafter submit a written report back to the court.

49. There are some risks in being overly prescriptive as to the process to be followed by a judge who meets a child to ascertain his/her views in the context of a relocation application. As Tolstoy observed in 1878, *“each unhappy family is unhappy in its own way”* and the circumstances of each case will have truly unique elements. Whatever approach is opted for by the trial judge to ascertain the views of the child with regard to the viable options presenting in a proposed relocation application, it is a matter first and foremost for the court itself to decide whether or not to directly meet with the child or proceed to take and ascertain the views by some other mechanism such as by the evidence of an expert.

50. Preliminary to the ascertainment of views is the need to assess the child as to his/her age and degree of maturity which is the only criterion. Where a child is of sufficient age and maturity to express a view, the court is under an obligation to obtain her views whether directly or otherwise. In relocation proceedings those views are required to be heard.

51. In ascertaining the views of younger children, it is generally advisable that a court obtains expertise to assist with the process. The position is different with older children and adolescents.

52. Where a judge decides to ascertain the child's views directly, they should endeavour to ensure that the questions are practical to take account of the nature of the case, the ages of the children and the need to establish the child's perception of the relevant practical consequences that each of the options under consideration may give rise to in their life.

53. It is not necessary for the child's views to be heard in open court under national law in this jurisdiction. Such an approach risks drawing the child into opposition with one – or both parents - and is generally undesirable, save where the circumstances warrant it.

54. It goes without saying that however the views are ascertained, regard should be had to the risk that parents might seek to influence same.

55. The child should always know that the meeting with a judge in the absence of her parents is not confidential and that the full transcript of her views can be provided to both parents.

56. It will be for the courts on another day to determine whether the information gleaned by a judge in the course of ascertaining the views of a child in a family law context can properly be treated as evidence or relied upon as such.

Conclusion

57. As stated above, I am in agreement with the Orders proposed by Mr. Justice Collins in his judgement and in particular paragraphs 150 – 154 thereof. The above observations are made merely in the context of the large volume of material that was put before the court, the extensive corpus of authorities that were relied upon and furnished to the court and the submissions and arguments of learned counsel in the course of the hearing.

58. Edwards and Collins JJ. have indicated their agreement with this judgment.