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Comparative study on enforcement procedures of family rights

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Introduction

Some preliminary legal principles concerning guardianship or parental responsibility rights need to be outlined to appreciate how those rights can be enforced. Guardianship is the legal term used to describe both the rights and duties a parent possesses in relation to children. It is akin to the concept in English law of parental responsibility. All rights and duties arise where the person in question acquires the status of guardian in relation to a child. Normally the guardians of a child are the parents but other individuals such as relatives may be appointed a guardian either by provision in a will which takes effect after the death of the living guardian or by court order. Guardians appointed by court order can be removed by order of the court. Where an individual is a guardian of the child, the guardian has the right to take decisions in relation to the child's welfare and most importantly decide where and with whom the child resides. Decisions concerning education, moral, physical, emotional and social are also determined by a guardian.

Orders in relation to residence, contact and or access and supporting orders (maintenance) as the case may be, largely depend upon whether the parents of the child are married or not. Children born to a married couple are presumed in law to be the children born of the marriage and thus a presumption of paternity arises where the mother and father are married. Where the parents of a child marry subsequent to the birth of the child, the Legitimacy Act 1931 provides that the child is presumed to be a child born of that marriage.

In the case of married parents, each parent enjoys joint and equal rights in relation to the child. These rights derive from the Constitution in Article 41 and 42 which confer upon parents the right to educate their child. It follows that if a parent has the right to educate a child the parent has the right to custody (day to day control) of the child and thus has the right to make decisions concerning the child. This constitutional position is also reflected in statute law whereby section 6(1) of the Guardianship of Infants Act 1964 confers equal rights on the mother and father of a child where they are married.

Where the parents are unmarried, the mother is the sole legal guardian of the child and enjoys exclusive rights in relation to the child. This is provided for in section 6(4) of the Guardianship of Infants Act 1964, as amended by Section 5 of the Children Act 1997. The statutory position of the unmarried mother is strengthened by constitutional law in the case of *G. v. An Bord Uchtála* [1980] IR 32 which provided that an

unmarried mother possesses an unenumerated constitutional right to the custody and control of her child.

The basic position in Irish law regarding the unmarried father is that he possesses no automatic rights in relation to his child. He possesses no constitutional, statutory or other rights in relation to his child as recently provided for in *W'OR v. EH*¹. The unmarried father, however, can be liable for the payment of maintenance (financial support) for the support of his child where an application is brought by the mother under either under section 11(2)(b) of the Guardianship of Infants Act 1964 or Section 5 of the Family Law (Maintenance of Spouses and Children) Act 1976 as amended by section 16(a) of the Status of Children Act 1987. Section 11(4) of the Guardianship of Infants Act 1964 enables an unmarried father to apply for access / contact with his child. Otherwise the only right possessed by an unmarried father is the right to apply to be appointed a guardian of his child as provided for in section 6A of Guardianship of Infants Act 1964. Once appointed a guardian of his child, the father has a right to apply for custody, access and other matters affecting the child's welfare. An unmarried father may be appointed a guardian of his child by agreement with the mother in the manner set out in section 4(4) of the Children Act 1997. In addition the Adoption of Act of 1998 (sections 4 and 5) now confer important rights on the father where the mother intends to place the child for adoption. The father has a right to notification and involvement in the placement of the child and in the adoption process. The father also has a right to be informed of and apply for guardianship under section 6A of the Guardianship of Infants Act 1964. The placement for adoption must be suspended for a period of 21 days to enable the father to apply for the section 6A order.

¹ [1996] 2 IR 248.

Part 1. Enforcement in Domestic Cases

1.A. Procedures and practices for enforcement in domestic cases.

- 1..a, & b. *Description of the general law of enforcement of court orders in relation to residence (custody), contact and or access can be enforced through the following methods.*

Section 5 of the Courts (No.2) Act 1986 make it a criminal offence to fail to comply with an order for custody, access or contact. Potential liability can arise under section 16 and 17 of the Non Fatal Offences Against the Person Act 1997 which makes it a criminal offence for a parent and other persons respectively to remove a child from the jurisdiction either in breach of a court order or without the consent of the parent, guardian or person to whom custody of the child has been granted by court order. Failure to comply with a court order constitutes contempt of court.

2. a & b. *Decisions on residence of a child and orders on contact and or access*

Section 5 of the Courts (No.2) Act 1986 creates a criminal offence of deny a person entitled to custody (residence) or access and or contact. The offence is committed where the person alleged to have committed the offence has been shown a copy of the order relating to custody (residence), access and or contact and fails to adhere to a request by or on behalf of a person entitled to custody to give up the infant or alternatively to allow access to the child as the case may be. The alleged offender is deemed to have been shown a copy of the order in relation to custody (residence), access and or contact if that person was present at the time the order was made. The offence carries a punishment on summary conviction of €254.00 and or a term of imprisonment not exceeding six months.

Section 16 of the Non Fatal Offences Against the Person Act 1997 creates a criminal offence for a person who takes, sends or keeps a child under the age of 16 out of the State or causes the child to be taken, sent or kept out of the State which is in defiance of a court order or without the consent of each person who is a parent or guardian or person to whom custody of the child has been granted by court order unless the consent of the court was obtained. The section applies specifically to a parent, guardian or a person to whom custody has been granted by a court. The section does not apply to a parent who is not the guardian of a child which individual is the single father who has not been granted an order of guardianship under section 6A of the Guardianship of Infants Act 1964. The single father is, however, subject to prosecution under section 17 of the Non Fatal Offences Against the Person Act 1997. Two defences are provided in the legislation which operate where the person in question has been unable to communicate with the persons whose consent is required but

believes that the person concerned would consent if aware of the relevant circumstances. The other defence arises where the person in question did not intend to deprive others having rights of guardianship or custody in relation to the child of those rights. Upon conviction, a person faces a maximum fine of €1905.00 and or a term of imprisonment not exceeding 12 months on summary conviction. For conviction on indictment a fine and or a term of imprisonment not exceeding 7 years can be imposed. No prosecution for these criminal offences can be instituted without the consent of the Director of Public Prosecutions.

Section 17 of the Non Fatal Offences Against the Person Act 1997 creates a similar offence to that of Section 16. Section 17 applies to any person which includes the unmarried father of a child. The offence is committed where the person who without lawful authority or reasonable excuse, intentionally takes or detains a child under the age of 16 years or causes a child under that age to be so taken or detained so as to either remove the child from the lawful control of the child or so as to keep the child out of the lawful control of any person entitled to lawful control of the child. Only one defence is provided for in the section which arises where the person accused of the offence believed that the child had attained the age of 16 years. The same fines and term of imprisonment in section 16 apply on conviction (summary and on indictment) to section 17. There is, however, no requirement that the Director of Public Prosecution's consent be obtained to institute a prosecution under this section.

Where a party to proceedings concerning the custody (residence), access or contact of a child fails to abide by the order made by the court, that failure constitutes contempt of court. Contempt of court can be remedied by an order for attachment and committal. Attachment and committal is the arresting of the person in contempt of court and bringing that person before the court to give reason why an order imprisoning him or her should not be made. Order 44 of the Rules of the Superior Courts sets out the requirements for bringing a motion for attachment and committal for contempt of court in the High Court. Order 36 of the Rules of Circuit Court (SI 179 of 1950) set out the requirements for seeking an order for attachment and committal in the Circuit Court. Order 46B of the Rules of the District Court deals with the procedure for seeking an order for attachment and committal in the District Court. Where the Orders and Rules for a higher court prescribe procedures to be followed in that court and there is no equivalent provision for the same procedure in a lower court, then the rule as proscribed in the higher court prevails in the lower court.

The procedure for bringing a motion for attachment and committal requires the party seeking the order to first seek leave of the court to attach and commit the defaulting party by bringing a motion on notice

to the defaulting party.² The notice period is four clear days prior to the hearing of the motion.³ In the case of proceedings in the District Court the notice period is 7 days.⁴ Any affidavit (sworn statement in writing) to be relied upon by the party bringing the motion must lodge the affidavit in court four days prior to the hearing of the motion in the High and Circuit Court.⁵ In the case of the District Court, 7 days notice must be given.⁶ The motion must be served personally upon the defaulting party.⁷ All orders for attachment and committal must be directed to a member of the *Gárda Síochána* (police).⁸ An order seeking the attachment and committal must contain a penal endorsement warning the defaulting party that failure to attend at the hearing of the motion may result in a fine and or imprisonment.⁹ The usual punishment for failing to abide by an original order is committal to prison until such time as the defaulting party purges the contempt of court. The courts, however, have discretion in the matter of punishment.¹⁰ The court can discharge the attached (arrested) person on such terms and conditions as it thinks proper, including an award of costs or can direct the attached be committed to prison. Usually a person will avail of the opportunity to abide by the original order and avoid imprisonment.

3.a. *Supporting orders under domestic law.*

The primary method of making an order supporting a court order in relation to residence (custody), contact and or access is for a court to make as part of the court order that the child the subject of the proceedings is not to be removed from the jurisdiction without the prior consent of the court. The authority for making such an order or direction derives from Section 11(1) of the Guardianship of Infants Act 1964 which authorises the court to give any direction concerning the custody or access of a child. This has the effect of conferring upon the court rights of custody within the meaning of the Hague Convention thus rendering a return order more feasible. Otherwise there are no

² Order 44 Rule 3 of the Rules of the Superior Courts in the High Court, Order 36 Rule 1 of the Rules of Circuit Court (SI 179 of 1950) for the Circuit Court and Order 46B Rule 2 of the District Court rules for the District Court.

³ Order 52 Rule 6 of the Rules of the Superior Courts for the High Court and Order 51 Rule 2 of the Rules of Circuit Court (SI 179 of 1950) for the Circuit and District Court.

⁴ Order 10 Rule 20 of the District Court Rules.

⁵ Order 52 Rule 15 of the Rules of the Superior Courts for the High Court, Order 51 Rule 3 of the Rules of Circuit Court (SI 179 of 1950) for the Circuit.

⁶ Order 10 Rule 20 of the District Court Rules for the District Court.

⁷ Order 36 Rule 3 of the Rules of Circuit Court (SI 179 of 1950) for the Circuit and Order 46B Rule 1 of the District Court Rules for the District Court

⁸ Order 44 Rule 7 of the Rules of the Superior Courts for the High Court and Order 36 Rule 2 of the Rules of Circuit Court (SI 179 of 1950) for the Circuit and District Court

⁹ Order 37 Rule 1 of the Rules of Circuit Court (SI 179 of 1950) for the Circuit Court and Order 46B Rule 6(2) of the District Court Rules.

¹⁰ Order 44 Rule 4 of the Rules of the Superior Courts for the High Court and Order 46B Rule 4 of the District Court Rules for the District Court.

specific orders that exist that go to support a court order relating to residence (custody), contact and or access.

A court may also require that the passports of a child be surrendered thus preventing the practical removal of the child from the jurisdiction and thus supporting the order in relation to residence (custody), contact or access.

A court may also seek “undertakings” from the parties to the action which can ensure the enforcement of the order in relation to residence (custody) access or contact.

An order in relation to residence (custody) access or contact does not contain a penalty clause whereby a fine will be imposed in the event that the order is not complied with.

3.b. *Comments on legal practice in relation to supporting orders*

Failure to abide by a direction whereby a court’s consent is required before the child can be removed from the jurisdiction constitutes contempt of court. Such is enforceable in the manner set out at Part 1, A.2.a. & b.

Parents with orders for residence (custody), access or contact often inform the school authorities at which the child attends school that have in their favour an order for custody. It is the parent that has the right to determine the residence of the child that would inform the school that they possess the right to determine the child’s residence. There is no specific provision in law providing for informing school authorities about residence orders and such happens as a matter of practical consequence to assist in ensuring the order for residence is not interfered with by the parent who does not possess an order for residence in their favour.

1.B. Specific issues relating to the enforcement of family law judgements in internal cases.

1. *Organisation of organs and institutions involved in enforcement of family law judgements.*

1. a., b. & c.

There are no specific organisations or institutions charged with the responsibility of enforcing family law judgements unless the family law judgement in question involves the criminal law. Where a family law judgement, such as a barring order, is breached, then the breach of the order is a criminal offence enforceable by the Gárda Síochána (police) who can prosecute the accused for the alleged breach of the order. Otherwise, the person for whose benefit the family law judgement has been made is the person responsible for ensuring compliance with the judgement or order by enforcing the judgement or

order through the litigation process and invoking the courts jurisdiction. Family law judgements are primarily civil law matters and thus are generally governed by the laws applicable to private individuals for whom the responsibility to enforce the order in their favour falls. In this regard the primary method of enforcing a family law judgement relating to custody (residence), access and or contact is by bringing a motion for contempt of court seeking to have the defaulting party attached and committed for contempt of court.

The family law judgements which can be enforced by Gárda Síochána (police) are in relation to Section 5 of the Courts (No.2) Act 1986, Section 16 of the Non Fatal Offences Against the Person Act 1997 and Section 17 of the Non Fatal Offences Against the Person Act 1997.

2. *Time Limits relevant for enforcement proceedings.*

2.a. *Time limits for appeal of family law decisions.*

An appeal of a decision in relation to custody (residence) access and or contact from the District Court to the Circuit Court must be brought within 14 days of the District Court decision. The appellant must service notice of appeal on all other parties to the District court decision within fourteen working court days.¹¹

An appeal of a decision in relation to custody (residence) access and or contact from the Circuit Court to the High Court must be brought within 10 days from the date upon which the Circuit Court made the decision. The 10 day period is 10 working court days.¹²

An appeal of a decision in relation to custody (residence) access and or contact from the High Court to the Supreme Court must be served on the party to the High Court hearing within 21 days from the passing or perfecting of the judgement or order of the High Court. An appeal to the Supreme Court is initiated by a notice of motion of appeal and there must be 10 clear days notice of the date of the Appeal.¹³

In addition to the appeal of an order, an application to vary an earlier decision of the court may be made under section 12 of the Guardianship of Infants Act 1964. It is an abuse of process, however, to use the variation process under S 12 instead of an appeal to the circuit court or the relevant court as the case may be.¹⁴

¹¹ Order 101 Rule 1 of the District Court Rules.

¹² Order 61 Rule 2 of the Rules of the Circuit Court

¹³ Order 58 Rule 3(1) of the Rules of the Superior Court.

¹⁴ M.D. v. G.D. Unreported High Court, 30 July 1992, Carroll J..

2.b. *Other time limits affecting enforceability*

In the case of family law judgements breach of which amounts to a criminal offence a delay for a period of six months affects the prosecution of the offence. The relevant family law judgements which can attract criminal prosecution are Section 5 of the Courts (No.2) Act 1986, Section 16 of the Non Fatal Offences Against the Person Act 1997 and Section 17 of the Non Fatal Offences Against the Person Act 1997. Section 5 of the Courts (No.2) Act 1986 creates a summary or minor offence. Summary offences are prosecuted by the Gárda Síochána (police) by making a complaint to the District Court which then issues a summons directed at the accused alleged to have breached the order of the court relating to custody (residence), access and or contact. An application for a summons to the District Court must be brought within 6 months of the date on which the offence (breach of the court order relating to custody (residence), access and or contact) was alleged to have been committed. An application for a summons outside this period of 6 months is likely to be dismissed by the court hearing the prosecution for reasons of delay in the prosecution of the offence. In the case of the latter two offences under Sections 16 and 17 of the Non Fatal Offences Against the Person Act 1997 these offences can be tried as either summary (minor) offences to which the same 6 month time period relates to the prosecution of the offence or can be an indictable (serious) offence to which no specific time limit applies but which may still be the subject of an application to dismiss for want of prosecution within a reasonable time.

2.c. *The effect of the passing of time on the enforceability of family law judgements*

In general the passing of time has no effect on the enforceability of a family law judgement. Once a judgement is made it is good for all time unless appealed, varied or discharged the court. A change in circumstances would be necessary to vary or discharge an order for custody (residence). Access and or contact may be more easily varied where there is a change in circumstances. Variation and discharge of residence (custody), access and or contact is governed by section 12 of the Guardianship of Infants Act 1964.

3. *Coercive measures to ensure enforcement.*

3.a. *Measures available by law*

Section 5 of the Courts (No.2) Act 1986, Section 16 of the Non Fatal Offences Against the Person Act 1997, Section 17 of the Non Fatal Offences Against the Person Act 1997 and an order seeking the attachment and committal of the person in default of the court judgement as detailed above are the measures available to enforce a family law judgements.

3.b *Measures usually taken in practice.*

The measure most commonly resorted to enforce a family law judgement relating to custody (residence) access and or contact is an application for attachment and committal. It is often very common when obtaining orders or judgements in relation to custody (residence) access and or contact to also seek “liberty to apply”. “Liberty to apply” entitles either party to bring the matter back before the court in the event of some difficulty arising with the judgement as made. The matter can be re-entered into the court list with minimal formality. If one of the parties has persistently and consistently failed to abide by the original judgement, then an application for attachment and committal may be necessary to enforce the order. In this regard the application to attach and commit can be seen as a measure of last resort. Parties to family law proceedings are more likely to utilise this means of enforcement rather than the criminal sanctions provided for in Section 5 of the Courts (No.2) Act 1986, Section 16 of the Non Fatal Offences Against the Person Act 1997 or Section 17 of the Non Fatal Offences Against the Person Act 1997. These criminal prosecutions require the aggrieved party making a complaint to the Gárda Síochána (police) before any prosecution can commence unless the Gárda Síochána become aware of breach of any of these statutory provisions. This is evidenced by prosecution statistics over the past five years. 21 prosecutions were commenced under sections 16 or 17 of the Non Fatal Offences Against the Person Act 1997 between 2000 and 2004. 2 convictions on indictment (serious offence) and 5 convictions summarily (minor offence) were secured. 3 Nolle Prosequi (no intention to proceed with a prosecution) were entered. There were 2 acquittals, 5 prosecutions are awaiting trial and 1 charge was withdrawn.¹⁵

3.c. *Taking of coercive measure where the child objects.*

It is extremely rare for a child to be involved in proceedings where an individual is sought to be attached and committed or prosecuted under Section 5 of the Courts (No.2) Act 1986, Section 16 of the Non Fatal Offences Against the Person Act 1997 or Section 17 of the Non Fatal Offences Against the Person Act 1997. Children are rarely involved in court hearings to determine custody (residence), access and or contact. Where they are involved such is at the discretion of the court. There are no reported decisions where the objection of a child has affected the taking of enforcement proceedings.

4. *Other legal or practical conditions that form obstacles to enforcement.*

There are no other legal obstacles to the enforcement of family law judgements. There is no obligation to hear a child in enforcement proceedings. The views of the child can only be entertained in those

¹⁵ Gárda Síochána Reports 2000-2004

proceedings which deal with the issue of the child's welfare. Once that decision is made and judgement given on the matter that terminates the potential involvement of the child in the court process.

The major practical obstacle is the taking of proceedings by the aggrieved party. If the aggrieved party wishes to enforce the family law judgement, the primary responsibility lies with the aggrieved party to remedy the situation by commencing enforcement proceedings. This is both time consuming and expensive despite a court may order legal costs to be awarded in favour of the aggrieved party. Each time a family law judgement is not complied with, in theory, an application can be brought to enforce the failure. The common method to enforce the judgement is not to immediately commence enforcement proceedings but to write to the defaulting party stating that he or she is in breach of the judgement and requesting that the defaulting party comply with the judgement or order. The letter sent should also warn the defaulting party that continued failure to abide by the judgement may lead to a motion seeking to have the person in question attached and committed for contempt of court.

Part 2. Enforcement in Cross-Border Cases

2.A. Enforcement of Return Orders under the 1980 Hague Abduction Convention, and after 1 March 2005, Regulation 2201/2003

Legal Bases For The Enforcement Of Hague Return Orders and after 1 March 2005, Regulation 2201/2003

1. There are no specific legislative provisions concerning the enforcement of return orders under the 1980 Hague Convention.

The Child Abduction and Enforcement of Court Orders Act 1991 gives effect to the 1980 Hague Convention on child abduction. The Child Abduction and Enforcement of Court Orders Act 1991 does not contain any specific provisions relating to the enforcement of return orders.

The following domestic provisions may be relied upon to enforce family law judgements generally and where appropriate an order for return under the Hague Convention. Section 5 of the Courts (No.2) Act 1986 make it a criminal offence to fail to comply with an order for custody, access or contact (See Part 1.A.1.a. & b. and Part 1.A.2 a. & b.).

Potential liability can arise under section 16 and 17 of the Non Fatal Offences Against the Person Act 1997 which makes it a criminal offence for a parent and other persons respectively to remove a child from the jurisdiction either in breach of a court order or without the consent of the parent, guardian or person to whom custody of the child has been granted by court order (See Part 1.A.1.a. & b. and Part 1.A.2 a. & b.)

Failure to comply with a court order constitutes contempt of court (See Part 1.A.1.a. & b. and Part 1.A.2 a. & b.)

Statutory Instrument (S.I.) 112 of 2005 gives effect Council Regulation (EC) No 2201/21003 on Jurisdiction and the Recognition and Enforcement of Judgements in Matrimonial Matters and the Matters of Parental Responsibility. A Ministerial Regulation has the same effect in law as an Act of the Oireachtas (Parliament). S.I. 112 of 2005 contains provision relating to the recognition and enforcement of judgements in matrimonial matters and matters in relation to parental responsibility. Where an order for declaration of enforceability is granted the order has the same effect as if an order of the District Court (Article 5(1) of SI 112 of 2005) and the application for a declaration of enforceability is made to the High Court (Article 4(b) of SI 112 of 2005). S.I. 112 of 2005 expressly excludes from its operation in terms of recognition and enforcement matters concerning child abduction.

2. There are no specific judicial decisions, practice directions or guides in the area of family law that govern the enforcement of return orders under the 1980 Hague Convention.
3. Statutory Instrument (S.I.) 112 of 2005 gives effect Council Regulation (EC) No 2201/2003 on Jurisdiction and the Recognition and Enforcement of Judgements in Matrimonial Matters and the Matters of Parental Responsibility. The Minister for Justice expressly precluded Council Regulation (EC) No 2201/2003 on Jurisdiction and the Recognition and Enforcement of Judgements in Matrimonial Matters and the Matters of Parental Responsibility where such relate to the recognition and enforceability of return orders under the 1980 Hague Convention from operating under the rules of practice and procedure provided for in S.I. 112 of 2005.
4. No.

2. *Procedure and practice with regard to orders for the return of a child under the Hague Convention.*

There is no statutory obligation to engage in alternative dispute resolution in child abduction matters under the 1980 Hague Convention and such very rarely occurs in practice.

III A. Enforcement Procedure

1. b, the return of the child to State X, (usually to be accompanied by the defendant (respondent) until the matter is determined by the court of habitual residence
2. c, to ensure the child's return to his or her State of habitual residence
3. The abducting parent and or legal agent (solicitor) are involved in organising the repatriation of the child.

III.B. Actors involved in enforcement

1. No, most orders for return are obeyed. If the party refuses to obey the order then an application to attach and commit is necessary (See Part 1.A.2 a. & b.) to enforce the order
2. a, the applicant who must initiate attachment and committal proceedings
- 3.a.i) The person primarily responsible at law for the enforcement of a return order is the applicant. Some assistance of an administrative nature may be sought from the Central Authority. The involvement of any other agency may form part of the court order. The court may seek undertakings from one or both of the parties concerning the interim welfare of the child to be returned. The undertakings may, in exceptional cases, involve social workers and / or psychologists participating in the return process. Otherwise, there is no specific enforcement organ. The court plays no active role in the enforcement

of the return order. There is no legal obligation for social workers or psychologists to be involved in the enforcement procedure unless directed by the court ordering the return.

- 3.a.ii) In practice, the defendant (respondent) will comply with the order for return. Otherwise the position in practice reflects that of the position at law (See IIIB.3.a.i)
- 3.b. There are no specific social or psychological services available for the child or abducting parent (defendant / respondent) in preparation for return of the child or the defendant (respondent), unless specified by the court as apart of the return order of the court.
- 3.c. No, the presence of applicant in the enforcement proceedings is not required though such is desirable.
- 4.a. No. The Court, Central Authority or other State agency play no supervisory or controlling of the enforcement procedure.
- 4.b. The High Court is the Court of First Instance and enforces the order if necessary even if it has been appealed to the Supreme Court.

III.C. The actual enforcement procedure.

- 1. There is no specified timeline for enforcement. The return order will direct the immediate return of the child. In practice, the defendant (respondent) will agree a date and time on which the return will occur.
- 2. The Court will specify a date for return or such will be agreed between the parties. In this regard a period of time is allowed to make arrangements for the return of the child. The judge usually asks the lawyers involved in the return proceedings to agree a time and date for the return of the child.
- 3. There are no specific measures available but the court can seek the retention of passports which is usually sought once Hague proceedings are commenced. The court can direct that the child not be removed from the jurisdiction of the court pending the return.
- 4. The Gárda Síochána (police) can exercise their powers under Section 37 of the Child Abduction and Enforcement of Court Orders Act 1991 which entitles them to detain a child they suspect is being or is about to be removed from the State in breach of a return order. Section 36 of the Child Abduction and Enforcement of Court Orders Act 1991 authorises a court to make an order directing any person who it has reason to believe may have relevant information on the whereabouts of a child to disclose that information. There is no effect on the timeline for the enforcement of return orders arising from the hiding of a child.
- 5. A failure to abide by the order for return is contempt of court which is remedied by an application for attachment and committal of the alleged non compliant person (See Part I A 2 a & b on the procedure for initiating attachment and committal proceedings, which is subject to a requirement that notice of the application be served personally four clear days of the date on which the application is to be heard (Order 52 Rule 6 of the Rules of the Superior Courts. Order 52 Rule 3 allows the court to hear and grant ex parte relief in circumstances where irreparable or serious mischief will arise if the matter is to proceed by notice of motion in the ordinary manner). In other words, the

enforcement procedure can be speeded up by abridging (shortening) the time limits for service and notice of the enforcement procedure (attachment and committal)

6. The *Gárda Síochána* (police) can exercise their powers under Section 37 of the Child Abduction and Enforcement of Court Orders Act 1991 which entitles them to detain a child they suspect is being or is about to be removed from the State in breach of a return order. The police can physically detain the child and initiate the procedures to take a child into State care. The alternative enforcement methods are set out in Part I A 1 a – c, Part I A 2 a – b. The common method of enforcement is to apply to attach and commit the defaulting party. That party will be given an opportunity to abide by the return order. If the party fails to abide by the order, then the likely result is imprisonment until such time as the individual abides by the court order. The imposition of a fine is not common in such circumstances.
- 7.a. In the event of an application for attachment or committal, the court will specify the penalty to be paid. The *Gárda Síochána* have powers to detain a child under section 37 of the Child Abduction and Enforcement of Court Orders Act 1991.
- 7.b. The order for enforcement is likely to be for attachment and committal and the likely penalty a term of imprisonment if the individual continues to ignore the terms of the return order. Thus a higher level of sanction is unreal in these circumstances. If a lower form of enforcement is sought such as a fine, it is common to stipulate that failure to pay the fine will result in a term of imprisonment. The individual is usually given a period within which to pay the fine and failure to do so can result in arrest and imprisonment. Fines for failing to abide by a return order are extremely rare.
8. In the event of an emergency arising outside the normal working hours of the courts, a High Court judge is available to hear an emergency *ex parte* application in appropriate circumstances.

III.D Costs

1. Costs are incurred by the party seeking to enforce the order. The enforcement costs are separate from the costs incurred seeking the return. Costs are calculated according to the common rate for High Court proceedings. The costs are charged for professional legal services in obtaining the enforcement order.
2. In theory the defendant (respondent) can be liable for the cost of the enforcement proceedings but the usual position is that the Legal Aid Board will discharge the cost of bringing the application to enforce the return order if and when this arises (it has never arisen to date). The cost are payable to the Legal Aid Board which as a matter of course sometimes seek their costs which they are obliged to do so under Statute as section 33(4) obliges the solicitor acting on behalf of the Legal Aid Board to seek costs in an action in which civil legal aid has been provided. No advance payment is sought in the event that enforcement proceedings are necessary. No new application for legal

aid would be necessary in the event that enforcement proceedings had to be initiated.

3. The cost of repatriating the child is not part of the enforcement costs. Usually the parent seeking repatriation of the child pays the cost of repatriation. Advance payment is not a condition for enforcement.
4. Foreign applicants will usually be legally represented and thus advised by his or her lawyers that failure to abide by the return order will result in enforcement proceedings (attachment and committal proceedings) the costs of which they can be liable for. As the need to bring enforcement proceedings are rare, if non-existent, the need to provide information on enforcement costs is academic in nature.
5. There are no specific duties imposed nor is there any specific enforcement organ.
6. The Legal Aid Board always as a matter of practice automatically provides legal aid for all applicants in abduction cases. A defendant (respondent), may also qualify for legal aid but such is only provided in accordance with the legal aid scheme. The defendant will be means tested (income earning capacity) to assess whether the defendant qualifies for legal aid. Where the defendant qualifies for legal aid, then in theory, the defendant would be entitled to legal aid in the event that enforcement proceedings were taken against him or her.

3. Enforceability and legal remedies of return orders under the Hague Abduction Convention.

II. Enforceability and legal remedies.

- 1.a. Yes, a Hague return order is the subject of an appeal to the Supreme Court. This is the only legal challenge that can be made to the return order. The appeal must be in relation to a point of law. There is no re-hearing of the case and only in exceptional circumstances will the Supreme Court overturn a finding of fact (e.g. as to habitual residence or whether custody rights were exercised at the time of the wrongful removal). An appeal to the Supreme Court must be served within 21 days from the passing or perfecting of the High Court order directing the return. The appeal is initiated by serving notice of motion of appeal and there must be 10 clear days notice of the date of appeal.¹⁶ Extensions of time to appeal may be granted by the Supreme Court. Where an appeal is lodged to the Supreme Court, the matter is listed for the following Friday for mention as to when the appeal can be heard. This ensures that an early date can be given for the hearing of the appeal.¹⁷
- 1.b. Only one appeal can be made to the Supreme Court, which is the court of final appeal.

¹⁶ Order 58 Rule 3 (1) of the Rules of the Superior Courts.

¹⁷ Practice Direction SC04 of 17 July 2003.

- 2.a. There is no other authorisation or decision required to enforce a return order. There is no requirement to register, seek a declaration of enforceability or obtain an order of specific enforcement.
- 2.b. Not applicable as no such organ exists.
- 3. A return order made by the High Court takes immediate effect even if there is an appeal unless the High Court or the Supreme Court grants a stay on the enforcement of the order.¹⁸ It is common practice to grant a stay where the unsuccessful party intends to appeal the decision. Where a stay is granted it suspends the enforceability of the return order until the appeal is determined.
- 4.a. Not applicable as there is no such authorisation or further decision required for enforcement.
- 4.b. Not applicable as no such body or organ exists.
- 5. Not applicable as there is only one appeal body, the Supreme Court governed by the times specified in II.1.a & b.
- 6. No

2B Law and practice with regard to enforcement of family law judgements other than return orders

- 1. *Instruments and national legislation relevant for the enforcement of family judgements in cross-border cases.*

Luxembourg Convention of 20 May 1980 on Recognition and Enforcement of Decisions Concerning Custody of Children and on the Restoration or Custody of Children was brought into effect by the child Abduction and Enforcement of Custody Orders Act 1991.

Hague Convention of of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in respect of Parental Responsibility and Measures Operation in Respect of Parental Responsibility and Measures for the Protection of Children was brought into effect by the Protection of Children (Hague Convention) Act, 2000.

- 2. *National law relevant for cross-border enforcement of family law judgements under Brussels 2A*

Statutory Instrument (S.I.) 112 of 2005 gives effect Council Regulation (EC) No 2201/2003 on Jurisdiction and the Recognition and Enforcement of Judgements in Matrimonial Matters and the Matters of Parental Responsibility. The statutory instrument, however, does not apply to any case involving child abduction. An application to have recognised or not have recognised a judgement or for a declaration as to enforceability of a judgement is made to the High Court. Where a declaration of enforceability is granted, that declaration has the same

¹⁸ Order 58 Rule 18 of the Rules of the Superior Courts

force and effect as if it were an order of the District Court. Otherwise applications for enforcement or recognition or refusal to recognise takes place in accordance with the Regulation. There has been no relevant case law on the enforcement of family law judgements under Brussels 2A in relation to either decisions of the domestic court for enforcement in another member state or for the recognition or enforcement of a decision emanating from another member state in the domestic court.

3. *National practice with regard to the enforcement of family law decisions of your own courts in another member state.*

There are no specific rules or laws governing non Hague Convention or non Brussels 2A cases where issues as to the enforceability of a family law judgement arise. In non Hague or Brussels 2A cases, a domestic court will apply two fundamental principles in cross-border cases involving the issue of the residence (custody) access or contact with a child. The first principle is the “comity of the courts” which provides that a domestic court will recognise and enforce the order of a foreign court without question save where the foreign court has no jurisdiction in the making of the decision in the first place. The second principle is that even where there is no decision of a foreign court, the jurisdiction of the parties (or child’s) habitual residence is the jurisdiction which is best equipped to deal with any matters concerning the family law judgement (child’s welfare including such matters as residence / custody, access and or contact). These two principles are, however, subject to another principle which is that a court will not make an order that is futile (incapable of taking effect). This is best illustrated by the case of L.P. v. M.N.P.¹⁹ which was a return order under the Hague Convention but clearly highlights the importance of the role of undertakings in child abduction cases. The court ordered the return of the child to Italy in circumstances where the father was the subject of criminal investigation into sexual abuse of his daughter. Initially the court was reluctant to return the child in these circumstances but was prepared to do so provided the father gave certain undertakings in relation to the return of the child. On return to Italy, the father refused to abide by the undertakings given to the Irish court. The mother sought to have the undertakings enforced by the Italian Court which refused to do so as such a legal concept did not exist under the Italian Civil Code and was thus incapable recognition and thus incapable of enforcement. As a result the child was taken into State care whereby the mother has little contact with the child. In a judgement delivered after these events in Italy, the court indicated that if it was aware of the difficulty with the recognition and enforcement of the undertakings set, then it would not have ordered the return of the child. While this case relates specifically to the Hague Convention, the Convention does not expressly provide for the seeking of undertakings from the parties in abduction cases. The concept of an undertaking appears unique to the common law

¹⁹ Unreported High Court McGuinness J. 14 October 1998.

jurisdictions. They are sought and accepted as part of the court's discretion in hearing the matter. They have been endorsed by both the Irish Supreme Court²⁰ and the House of Lords²¹ as effective in securing the prompt return of children and ensuring their welfare is provided for pending the hearing by the court of habitual residence. Therefore, in non Hague or Brussels 2A cases, a domestic court is likely to resort to undertakings in deciding whether to return a child or in cases involving family law judgements that will have effect in another jurisdiction. Similarly in *T.M.M. v. M.D.*²², the court refused to accept the undertakings given by the mother in this case as a means of ensuring the return of the child as the mother was an alcoholic and thus considered incapable of satisfying the undertakings sought and thus the court refused to return the child under the Hague Convention. Thus it can be said that the enforceability and practical execution of undertakings which the domestic court considers essential to a family law judgement will influence the court in whether to make the decision in the first place. In most cases, however, the court will assume that the foreign court and relevant bodies are capable of enforcing the supporting aspects to the family law judgement. It is only where the court is not satisfied that there are adequate measures in place in relation to the family law judgement that such can affect the decision of the court. For example in *N.O.D. v. P.B.*²³ the mother alleged that a return to the UK would amount to an intolerable situation as the father of the child had been convicted of aggravated stalking. The court noted that if such were to re-occur, then the British authorities were well able to deal with such through the police arresting and prosecuting the offender. While these exceptions have arisen in abduction cases, these are general principles of law and in my opinion potentially applicable in non Hague Convention and non Brussels 2A family law cases. Otherwise, the jurisdiction of the habitual residence of the parties the subject of the family law judgement is considered the appropriate forum before which to litigate the matter. Ultimately, an Irish court will be guided by the welfare principle in taking decisions relating to the child. The welfare principle provides that in any matter concerning the custody, guardianship, upbringing or property of a child, the court is to consider the child's welfare as the first and paramount consideration. Thus if a decision of an Irish Court is to take effect in another jurisdiction, the Irish court will be guided by the welfare principle in making that decision. The issue has arisen in a couple of cases involving property held by an Irish court to which an infant resident abroad is entitled. In *Re Duddy*²⁴ suggests that no order will be made unless it will be of advantage to the child. A similar stance was taken in *Dharamal v. Lord Holmpatrick*²⁵ where the court refused to pay out monies in court to the father of a child resident in Central India. The father has been appointed guardian of child by an Indian court. The

²⁰ *C.K. v. C.K.* [1994] IR 250.

²¹ *Re C.* [1989] 1 FLR 403.

²² [2000] 1 IR 149.

²³ Unreported High Court, 31/7/98, Quirke J

²⁴ [1925] 1 IR 196

²⁵ [1935] IR 760

Irish court sanctioned only the payment of the income from the funds in court to the father of the child and refused to pay out the lump sum lodged in court as such would amount to a considerable fortune in the future which the court wanted to preserve for the benefit of the child. The court was not satisfied that appropriate safeguards were in place for the proper investment of the sum lodged in the Irish court.

4. *National Practice with regard to the enforcement of family law decisions of another member state in your own state.*

There is no legislation or domestic case law on whether an Irish court would amend the modalities of a family law judgement arising from police involvement or the practicality of the arrangements laid down by the foreign court. My view, however, is that such factors should not affect the original decision for enforcement but only to the extent that the court does not consider that the enforcement practicalities would be contrary to the best interests of the child. In the event that supporting measures or the practicality of the measures laid down by the foreign court would affect the child's best interests or welfare, then an Irish court might be inclined to amend the original decision of the foreign court when attempting to enforce it.

5. *Setting aside or amending of foreign judgements.*

Section 3 of the Guardianship of Infants Act 1964 provides "Where in any proceedings before any court the custody, guardianship or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of any income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount question."

This provision coupled with Article 41 and 42 are important factors in determining an issue relating to a child. These constitutional provisions confer important and significant rights on married parents and can be invoked where a parent has concern about the welfare of a child. Thus the combined effect of these statutory and constitutional provisions suggest that an Irish court could exercise jurisdiction in relation to a child even where there is a decision of foreign court which one of the parties wishes to enforce. An Irish court, if it considered that the child's welfare was at issue by enforcing the foreign court or that there was a change in circumstances since the making of the original order of the foreign court could set aside the original decision or amend the original decision as it considered appropriate. Before doing so, and there is no specific law on this issue in Ireland, my view is that an Irish court would first consider the terms of the original foreign order before making a decision to amend or set aside that order. My view is that the court would only set aside the original foreign decision if it was not in accordance with child's current welfare needs. For example, a child the subject of a foreign decision may

reach an age where their views on the original foreign decision should be entertained by the court being of sufficient age and majority. If the child was no longer happy with the terms of the original foreign order, a court would probably entertain the child's views in making a decision to set aside or amend the original foreign order. So for example, if a child was consistently absconding from the control of a parent who was awarded custody rights in relation to the child to the other parent who merely had rights of access and the child expressed the clear desire to reside with the non custodial parent, provided such was in accordance with the child's welfare, my view is that an Irish court would amend or set aside the original foreign order to reflect the reality of the current situation.

2C. Specific issues relating to the cross-border enforcement of family law judgements

1. The role of organs and institutions

There are no specific organs or institutions involved in cross-border enforcement of family law judgements. The party wishing to enforce the judgement must initiate legal proceedings to enforce the judgement where there is non compliance with the original judgement. Otherwise the position is as set out at B. 1 a-c.

2. Time limits relevant for enforcement proceedings and the effect of time.

There are no specific rules governing time limits for the enforcement of family law judgements. The position is as set out at B. 2 a-c. as is the position regarding the effect of time.

3. Coercive measures to ensure enforcement.

Again there are no specific rules governing coercive measures other than those as set out at B. 3 a-c.

4. Other legal or practical conditions that may form obstacles to enforcement.

Again, there are no specific legal or practical obstacles to enforcement other than those as set out at B. 4.

5. Issues of specific concern in cross-border cases

Decisions on parental responsibility or on access / contact rights are

Where the parent seeking to move the child to another jurisdiction has parental responsibility for the child and the other parent with parental responsibility does not object, then there is no need to obtain the approval

of the court, provided there is no order preventing the removal of the child from the jurisdiction without court approval. Where the other parent with parental responsibility objects to the removal of the child, an application can be made seeking a direction from the court that the child is not to be removed from the jurisdiction without the prior approval of the court. Where a court has made as part of a family law judgement a direction that the child is not to be removed from the jurisdiction without the court's prior approval, then the removal cannot occur without such approval.

A court will approve the relocation of a child to another jurisdiction where the court is satisfied that such is in accordance with the best interests of the child's welfare. In *E.M. v. A.M.*²⁶ the court identified a number of factors relevant to this particular case which authorised the relocation of the child to the United States after the break up of the parents' marriage. The stability afforded by the mother who was the custodial parent was noted first. Likewise the emotional and social environment of the child was secure as was the benefit to be derived from the extended family in the United States. The medical evidence (psychological) indicated that the child's welfare would not be affected by the relocation. The mother's record in relation to providing for the child's welfare was also noted. Significantly, the court noted that conditions attaching to the relocation could be enforced. Here the child was to be encouraged to maintain regular phone and written contact with the father, and the mother was obliged to keep the father fully informed of all educational aspects to the child's upbringing and all other matters relating to the child's development. The father, owing to the nature of his work, could avail of extended access periods in the United States during the summer. In addition, the maternal grandmother undertook to ensure that her daughter complied with the conditions set by the court in authorising the relocation of the child to the United States.

There are no specific issues arising in relation to the enforcement of foreign family judgement.

There are no specific conditions which form an obstacle to enforcement of a foreign family judgement.

There are neither bilateral nor regional conventions that are relevant to enforcement.

6. Mediation / Alternative dispute resolution.

There is no obligation to engage in alternative dispute resolution or medication in the enforcement of family law judgements. Such an obligation arises only in internal cases involving judicial separation, divorce and custody, guardianship and access applications.

²⁶ Unreported High Court 17 July 1992.

EMPIRICAL STUDY, Statistical information

Application Made	2004	2003	Court
Hague applications initiated	27	34	High Court
Hague applications granted	31	14	High Court
Parental responsibility non marital fathers applied for	1,237	1,276	District Court
Parental responsibility non marital father orders granted	862	960	District Court
Parental responsibility non marital father orders refused	38	39	District Court
Parental responsibility non marital father orders withdrawn / struck out	337	277	District Court
Custody (residence) and access applications made	715	280	District Court
Custody (residence) and access applications granted	455	516	District Court
Custody (residence) and access applications refused	35	55	District Court
Custody (residence) and access applications withdrawn / struck out	225	249	District Court
Custody (residence) only applications	792	690	District Court
Custody (residence) only applications granted	450	408	District Court
Custody (residence) only applications refused	34	35	District Court
Custody (residence) only applications withdrawn / struck out	308	247	District Court

Access only applications made	2,758	2,837	District Court
Access only applications granted	2,003	2,110	District Court
Access only applications refused	111	72	District Court
Access only applications withdrawn / struck out	644	655	District Court
Family law judgements with cross border element	No statistics available	No statistics available	
Average length of enforcement proceedings	Not available, but for internal cases, the waiting time is in Dublin area 9 weeks and in Cork 7 weeks. Other parts of the country there is no delay and cases are heard at the next sitting of the court. These times relate to family law applications in general and not to specifically enforcement proceedings		
Number of cases where enforcement achieved with difficulty	No statistics available	No statistics available	
Reasons for difficulty	Not available	Not available	
Role of mediation	Not utilised	Not utilised	
Reasons for prevention / abandonment of of enforcement	Not available	Not available	

Source: Annual Report of the Courts Service of Ireland 2004 available at www.courts.ie (publications). Phone: Courts Service Information at 00 353 1 888 6462 , email PublicationsUnit@courts.ie.