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[23/08/1994; Outer House of the Court of Session (Scotland); First Instance]
Murphy v. Murphy 1994 GWD 32-1893

OUTER HOUSE OF THE COURT OF SESSION

23 August 1994

Lord Cameron

Re M.

Counsel: Act: Ms Wyse Alex Morison & Co; Alt: Mrs Davie Robson McLean

LORD CAMERON: The petitioner resided in Ireland. He married the respondent at Kiltiernan, County Dublin, on 7 September 1990. They have two children, A born on 28 April 1992, and T born on 2 December 1993. The children are presently residing with their mother in Edinburgh. The petitioner seeks an order under the Child Abduction and Custody Act 1985 for their return to Ireland and the jurisdiction of the Irish Courts.

There is no dispute between the parties that prior to the marriage they had lived together, initially in Scotland for some months and then had moved to Ireland to live together there following a change in the petitioner's employment. In Ireland they had married. They had lived there together continuously after marriage until the events which give rise to this petition.

It is not disputed that until 28 March 1994 the children had lived all their lives in Ireland and that at least until that date they were habitually resident in Ireland. Nor is there any dispute that at that date each of the parties was, according to the law of Ireland, exercising a right of custody. On that date the respondent, together with the two children, flew from Dublin to Glasgow and have remained in Scotland since that date.

In the petition it is stated on the petitioner's behalf that on that date the respondent travelled to Edinburgh to see her ill father and to spend a short holiday there. There had been no dispute between the parties and the petitioner was led to believe that the respondent would return home after the short holiday. She took with her only the clothes necessary for a short trip. One day after her arrival in Scotland the respondent telephoned the petitioner and informed him that she did not intend to return to Ireland with the children. It is accordingly contended that the respondent has wrongfully retained the children in Scotland without the petitioner's consent since 29 March 1994. In his pleadings the petitioner represents that he reluctantly agreed to the visit as the trip was inconvenient to him for business reasons and financially. The petitioner admits that there had been some difficulties in the weeks prior to the respondent's separation, as a result of the respondent's moody and erratic behaviour. This the petitioner attributed to post-natal depression. The petitioner admits that the respondent had raised the possibility of separation once or twice but later assured the petitioner that she would not leave. In mid-March 1994 the respondent had announced that

she wanted to go to Scotland to see her father who had had an operation for cancer. The petitioner avers that prior to her departure the respondent advised the organiser of the creche in Dublin, which both children attended, that they would be absent from the creche for a two-week period. She had booked a return flight for herself and her children. She had told her general practitioner, Dr Patrick Feeney, that she was going to Scotland for a short visit. She explained the purpose of her trip to Scotland with the petitioner's parents. At no time did the petitioner consider that the respondent was separating from him by her departure.

On the other hand in her Answers, the respondent's position is that the parties had been discussing for several weeks prior to 28 March 1994 the practicalities of separation. The petitioner had agreed that on separation she should return to Scotland with the children. She had agreed that she would transfer her interest in the business which she ran in conjunction with the petitioner, to him. There had been agreement also on the matter of her joint share in the matrimonial home and on certain items of furniture which the petitioner considered that the respondent should have. The parties had discussed the mechanics of access and the role of the petitioner in the lives of the children once the separation had taken effect. The petitioner had advised the respondent that he would instruct his solicitor, a family friend, to formalise agreement between the parties since the petitioner was likely to be far too generous. The petitioner's anxiety was that the respondent should not make a final decision regarding separation until she had been apart from the petitioner for some weeks and he had asked her to delay her final decision until after she had been in Scotland for one month. The respondent goes on to aver that on or about 14 or 15 March the respondent advised the petitioner that she was clear in her mind that the separation was final and that she was moving to Scotland with the children permanently. The petitioner initially accepted this fact. It was intended that the respondent would leave around the end of April. At that time the respondent advised him that the over-riding reason for the break down of the marriage was the petitioner's sexual deviance. He accepted that he could not change and that his sexual proclivities were an increasingly important and necessary part of his life. His attitude changed. He became very unpredictable. He alternated between feelings of self-loathing and guilt to feeling aggressive and abusive. One minute he would be reasonable and maintain his previous attitude with regard to the separation, and the next he would threaten the respondent that if she came crawling back in a few weeks time it would be on his terms. She would no longer have any interest in the parties' jointly owned business and she would have no financial independence. Relationships between the parties were extremely strained. It was agreed that in the circumstances there was no point in the respondent delaying her departure. The actual dates for leaving were discussed several times before flights were finally booked and paid for. The respondent goes on to state that she was due to leave on Monday 28 March. As on Saturday 26 March the petitioner was still unable to cope with her decision and was extremely upset, the respondent became concerned about his state of mind. As her departure coincided with the end of the financial year of the business which both parties ran, she offered to stay and assist the petitioner with the administration of the business during the financial year end. He became aggressive and advised the respondent that if she was going, she should go. The petitioner continued to be angry and upset throughout the weekend. Accordingly, when the respondent left on Monday 28 March it was with the petitioner's full knowledge and consent.

It is necessary in order to set the scene for the departure of the respondent and the two children on 28 March 1994 to examine in a little detail the evidence adduced bearing upon the parties' relationship, one with another. The petitioner said that at that date he thought that he had a happy marriage with a wife and two young children, a business and a job that was doing well, and a new house into which the parties had moved less than a year before. He spoke of the romance between the parties surviving, though more muted, following the

birth of the children. He appreciated that the respondent did not get on well with his mother and sister, although she got on all right with his father. On the other hand, the respondent complained to him about her own family in Scotland as being boring and aggravating to her, and although she kept in touch with them by letter and telephone, and visited them three or four times a year, she always appeared anxious to return to Ireland as soon as possible. He said that his wife was subject to what he described as "mood swings". She had at least a year before spoken of the parties separating. He did not disguise the fact that the parties had indulged in cross-dressing and in sexual fantasising as part of their sexual relationship, but they had done so even before marriage. His position was that any sexual practices were consented to by the respondent, and indeed on occasion instigated by her. At most, the occasions on which any such practices had been indulged in during maritial intercourse had amounted to some three or four times in the year prior to March 1994.

The petitioner's father in his evidence agreed that there had been difficulties involving his own wife and the respondent. These had arisen particularly when the parties had for a time lived with him and his wife for a period prior to moving into their new house. The respondent could not accept what the witness called his own wife's "old fashioned ways" and friction had developed. As a consequence, as the witness put it, the respondent and his wife were careful of one another. At one point in his evidence he made reference to his impression of unhappiness on the respondent's part as being sad in herself. He made reference to a physical disability from which she suffered following upon a car accident and the stress of bringing up two young children. Against that he noted an ambition on the part of both parties to get on and build up a business.

The outward appearance of a normal married couple on the parties' part was amply spoken to in affidavit evidence produced on behalf of the petitioner.

On the other hand, the respondent spoke to her increasing repugnance and concern with the sexual side of the marriage. It is not necessary, nor indeed appropriate, to reach a concluded view as to the nature and full extent of the conduct. It suffices to say that I found the respondent's description of it more credible than that of the petitioner. It seemed to me from hearing evidence given by each party, that the petitioner, while accepting that it formed a part of the marital relationship, appeared anxious to play down its extent and thus to emphasise that it could have played no part in the separation or the reasons for it. On the other hand the respondent's evidence was supported by affidavit evidence from her relationship and sexual guidance counsellor. Significantly, according to this evidence, it was the respondent's general practitioner who had referred the respondent to the witness. The respondent explained in evidence that she had been unwilling to reveal the nature of her concern to third parties and rather wanted to keep it secret, as was the wish of the petitioner. This unwillingness was not only spoken to by her counsellor, but was also consistent with affidavit evidence from her own mother that the respondent had hinted that during the time that the parties were living together, that there was an area of the marriage which she could not discuss, but that she had not been aware of this fully until after the separation and the respondent's return to Scotland on 28 March 1994. In addition, there was support in the affidavit evidence of the respondent's sister, Mrs S., who spoke about being told of this matter during the journey from Glasgow Airport to Edinburgh on 28 March 1994 while she was bringing the respondent and the two children in a car to the home of the respondent's parents. The respondent herself described in evidence her distress at having to make this matter known to her sister in the course of the journey.

I also accept the respondent's evidence that she had tried to communicate to the petitioner her concern about this aspect of their marriage, but that she had been sworn to secrecy. The petitioner accepted that in about June 1993, while the respondent was already pregnant with

the parties' second child, there had been some talk of splitting up. This date relates clearly to the time when the respondent was referred by her general practitioner for counselling. Her increasing unhappiness in general in the marriage was also spoken to and supported in affidavit evidence given by D.G., who ran the creche which was attended by the two children of the marriage, and from a close friend, L.F

The petitioner laid stress in his evidence upon the terms of letters faxed by the respondent to her family in the latter stages before the separation, as exhibiting a happy and relaxed attitude on the respondent's part to the marriage. While it is true to say that there is nothing in those letters which suggests any undue stress between the parties, I accept the respondent's evidence that she was not expressing her real feelings at the time in these letters. Significantly her mother stated on affidavit that the respondent was more open in the course of telephone calls when she was not inhibited by the prospect that what she said could be known to the petitioner as with faxed letters.

My clear impression of the petitioner's evidence regarding the period of his marriage before and after the birth of the parties' second child in December 1993 is that he was concerned to play down the fact that his marriage was in difficulties. I gained the view that while he was aware of that fact, he hoped that the move to a new house away from his parents and the arrival of the parties' second child would serve to stabilise the marriage and that with his improving business prospects, which were spoken to both by him and his father, who was employed part-time in the parties' business, *, he could provide a solid financial base for the marriage. It was my clear impression that he was anxious not to face the fact of the respondent's increasing unhappiness and sought to put it down to moodiness related to the birth of the child when he was aware that there were deeper currents in the relationship. I accept the respondent's evidence that within a few weeks of the birth of the second child her unhappiness with the marriage had reached the point at which she was prepared to raise again with the petitioner the question of separation.

On averment and in evidence the petitioner maintained the position that prior to 28 March 1994 there had been no serious attempt on the part of the respondent to make clear that she was intent upon a permanent separation. In evidence in chief he said that he became aware of an intention to go to Scotland on the respondent's part about 15 March 1994. A day or so before an arrangement had been made for a gathering with his parents and sister which had been cancelled when the respondent had said that she was unhappy, fed-up with his family and that she wanted to go and see her family, particularly as her father was ill. They had gone out together and in the course of the evening, while they were conversing in a maudlin way, there had been talk of separation and what he would do in such an event. He had been frustrated by the respondent's attitude because she had said the same in the past. The next day the respondent had said that she would hate it for the parties to split up, and so the question of separation was put to rest. However, later in the week the respondent had said that she wanted to go over to Scotland for two weeks to see her father, that she was homesick and wanted two weeks to clear her head. He thought that it was a good opportunity for her to have a change as she was tired from looking after the children. He had agreed to this although it was a bad time for the respondent to go. It was a busy month. The parties had already spent money going to Scotland for their christening of their second child in January. However it was agreed that arrangements would be made to maintain the books of the business which were kept by the respondent, until she returned. It was also agreed that a new computer would be installed while she was away. In addition, the petitioner was to re-insure the respondent's car in her absence. He was told that the respondent had booked a return flight with Manx Airlines. He agreed that in the final few days their relationship was a bit strained. However, on Friday 25 March his parents had phoned to say that they were back from a short holiday and wished to come up to visit them. It was agreed by the parties

that they should do so. The respondent had been responsible for arranging for wine and snacks to be available. In the course of conversation the respondent had told his parents that she was just going over for two weeks or so. She had made the same statement to a next door neighbour, J.F. on her departure on 28 March. He had made arrangements within the parties' business to cover the period while the respondent was away for two weeks. He advised employees that they were to hold over things which the respondent dealt with for two weeks, but that if they were important they were to give them to him. On Monday 28 March he had taken the respondent to the airport. Her luggage contained enough clothing for a two week visit. Prior to going, the respondent had mentioned that she had been to her doctor and said that she was depressed. Mention was made by the respondent of a further course of treatment if she was still depressed on her return. At the airport he had waited with the respondent and kissed her goodbye as normal. It was arranged between the parties that they should keep in contact by telephone and there was discussion about the petitioner coming to pick the respondent up on her return. That same evening the respondent had telephoned and described the journey. The following day the petitioner had found a message for him on his answering machine. There had then followed a telephone call in which there had been strange talk about how was the petitioner and how would he be whatever happened. The next day in the course of a telephone call the petitioner had asked if the trip was turning into something different. The respondent had then said that she was planning on not returning. The parties had remained talking for some one and a half hours. The petitioner had pleaded with the respondent. The respondent however had replied that she was more relaxed in Scotland and had been under too much pressure. The petitioner had suggested that he might himself move to Scotland, but her response had been that she was very comfortable about her future and that she would get money out of him. She appeared to be very cold towards him and an entirely different person. He was shocked but hoped that this was just a brain storm. She denied that she had planned matters in that way and said that it had only occurred after she had settled in following her arrival to Scotland when she discovered that she missed Scotland so much that she did not wish to return. The petitioner believed that she meant this. He told both his father and a friend, D.L., the following day about the respondent's decision. Although the respondent had suggested that the parties should leave matters for a few days, he had phoned the next day but there was no change in the respondent's attitude. On the Friday of the same week, which was Good Friday, he had phoned and said that he would have to come over. The respondent replied with effect that he should not do so as her father was ill and it would do no good. He was threatened with the police and told that it would be upsetting to her father. It was agreed that he should leave the matter until the following weekend. During telephone conversations around this time he had told the respondent that she could take a month to think about matters if she had to as he did not believe that it was all over between the parties. The day before his planned visit on 8 April, he had gone to see his solicitor in order to discuss the matter. His attitude was that he did not wish to raise legal proceedings at that time as he did not think that the marriage was over. On 8 April he met the respondent at her sister's flat. He described the respondent's attitude as very cold. He had brought things over for the respondent in the way of a pushchair and clothes. She had then said that she wanted her own car and money. The following day the parties had met again. He had suggested that the petitioner should come over on the Monday following and get the car. The respondent was not prepared to do so. Her attitude was that she wished parties to divide up their assets and in particular to sell the matrimonial home. In the course of the discussion the respondent had got very annoyed and suggested that he should cut short his trip. He had then got in touch with the respondent's father. The latter had said he would phone back. However the respondent then phoned. She was very angry and refused to let him come round to see her that night. The following day the parties again met. There was further discussion about money and cars. After the meeting he remained hopeful for reconciliation. On Tuesday 12 April 1994 he received a letter faxed by the respondent. This letter was produced. In it respondent made reference to a

requirement that both parties to aim to discuss their personal legal situation outwith "your weekends over here". She further made reference to her request for her car and the letter continues, "Should you decide not to drive my car over for Abbie's birthday(!) a reminder to book for Air Lingus flights tomorrow (two weeks in advance) and ask them also about £69 pre-June seats." The parties' daughter's birthday was 28 April. It had been suggested that the petitioner should come over for that weekend. The respondent had at this time advised his solicitor about what had happened and was told that he would have to stake his claim to his family. On Wednesday 13 April he sent a faxed letter to the respondent advising her that he was arriving in Edinburgh on Friday 15 and would be staying until Sunday 17. He indicated he was bringing some money over with him for the respondent. The letter continued, "I don't want a repeat of last weekend and I must insist on spending some good time with Abbie. I have every right to do this, she is my daughter too." He also indicated in the letter that he was intending to fly over on 28 April for the child's birthday. In connection with his promise to bring money, he had taken money out of the parties' joint account on the advice of his solicitor. There were no overdraft facilities on the account. In the course of a telephone conversation that week the respondent had expressed a concern that the petitioner wished to take the children back to Ireland. He had told her that he was not going to take them but that he did wish to see the child Abbie and wanted to spend time with the children. The petitioner travelled to Scotland on the Friday. When he called to see the respondent and the children he stated that he wanted to take the child Abbie for a walk. The respondent replied by refusing to allow him to do so. He was told that he could not take her out unaccompanied on the advice of the respondent's solicitor. However the petitioner had taken the child for a walk. The petitioner was arrested and spent the remainder of the weekend in police cells in Edinburgh. On the Monday he had returned to Ireland and had immediately made contact with his solicitor and instructed that steps be taken to have the children returned to Ireland. Subsequently he had initiated proceedings for the children's return to Ireland.

In cross-examination the petitioner denied that there had been any intensive discussion of separation with the respondent in the course of March 1994. On the evening of 14 March while out dining together there had been no discussion between the parties of the mechanics of separation. A question had been asked as to what he would do if the parties were separated and he had replied light heartedly that he would go back onto the road, meaning as a travelling representative. He denied that there had been any discussion of division of the parties' property or the future of their business. He said that when the respondent made clear that she had decided to go to Scotland at a busy time for the business, he had said that he would take it over and that she was to give back her twenty per cent share to him. There was no discussion on the matter as the petitioner said that she had no interest in the business. There was no discussion about what would happen if the children returned with the respondent to Scotland. Any discussion about his going over and visiting the children in Scotland had occurred after 28 March and was first raised in a telephone call. He agreed that on the day following their dinner together, the respondent had said that the parties would have to separate, but he understood that this was because she wanted to see her father and go for a break. He denied that he had been given any reason in relation to the parties' sexual relationship. He denied any change in his attitude towards the respondent, in particular that he had been suicidal or aggressive. He was adamant that he would not have accepted his children being taken away from him. With regard to the events following 28 March 1994, he agreed that he had received what he described as a strange phone call from the respondent on the day following, but it was not until the Wednesday that the respondent had told him that she was not returning. During the call on the Wednesday he had suggested that he might come to Scotland if it would make matters better. He explained that he had done so because he wanted to know whether the respondent's attitude related to him or to Ireland. He agreed that during the weekend of 8 April when he had seen the respondent he

had been told that she had received advice from her solicitor and that she had discussed with her solicitor various matters concerning division of property, the car and maintenance for herself and the children. His attitude was that he was not prepared to agree to a separation, that he was concerned for the two children, not least because the parties had a good house of their own. He was trying to get his wife to see reason. With regard to the weekend of 15 April, he had indicated earlier in the week that he was intending to come to Scotland, but had then received a telephone call from the respondent who was furious at having to hand money back to her bank which she had withdrawn from the parties' joint account after a stop had been placed upon the account. She had then said that the petitioner should not come since he would not let her have money. Up until the incident when he had been arrested and subsequently charged with breach of the peace, he had wanted the respondent and the two children of the marriage back in Ireland and wished to become reconciled with the respondent.

In re-examination he reiterated that there had been no discussion between himself and the respondent in mid-March concerning the parties' business except, as he put it, in the context of Saturday 26 March. She had then said that she was fed up with the long hours and that she was content that he had control of the business. She had spoken of having spent money wildly and that she was going to control the family budget. He had spoken to D.G. after the respondent had told him that she was not returning and she had said that she was surprised. It was the respondent who had told him that the children were only being taken away from the creche for two weeks. When he sent the fax message on 12 April he was still hopeful that he would be able to sort matters out between himself and the respondent.

The respondent on the other hand said that she had broached the subject of separation in late February and the matter had been discussed in depth in the first two weeks of March. She had been expecting the petitioner to be angry, but he had reacted reasonably. It was only after the upset in mid-March concerning the petitioner's mother and sister that she had told the petitioner the reason why she wished to separate. Prior to that she had said that her reasons related to unhappiness generally with the marriage and in particular a lack of time to look after the children because of her work with the business and a lack of a social life. However when she finally told the petitioner that she could not cope with the sexual side of the marriage, the petitioner had gone to pieces. He had been very upset. When she pointed out that they had agreed upon a mutual separation, he had spoken of calling a bluff. The following morning, however, he had said to the respondent that if she was going, she was to get out. Thereafter there were wide swings and moods on his part. It had been agreed that the respondent would leave before the end of April. In the interim the accounts for the business had to be finished. During that time it would be impossible to work out the legal aspects of the matter as the petitioner explained that he would require some time to organise everything. It had been agreed that he would leave the financial aspects of the separation to his solicitor. Accordingly the respondent had contacted her own solicitor about 23 March. It was following this that she had advised the petitioner of her concern about his sexuality. At the same time she was aware of her father's illness and that he was going in for an operation. She had enquired about tickets from a travel agent. When she had advised the petitioner he had told her to leave. The booking had been made at the last minute and was the only one that could be obtained. It has a special package and involved a return flight. The petitioner was acting in a somewhat irrational way at this time. He informed the respondent that if she crawled back to him after a period of three to four weeks she would have to take her signature off the parties' bank account and make over her directorships. In the light of his attitude the respondent decided that she would have to leave all her and the children's things in Ireland and that they could be sent over later. This would be possible because the business owned a van which could bring the respondent's possessions to Scotland. When the respondent had left it had been on the basis that the petitioner had asked her to get out but

had told her that he was prepared to wait three to four weeks for her decision and that she should delay doing so and then he would send her possessions over after that period of time. However, within two days of her return she felt that she should tell him that she was not coming back. It had always been the arrangement that the children should remain with the respondent. She regarded it important to persuade him that he could have a good relationship with them even while they were with the respondent. His attitude was that she could have the best of both worlds, a good relationship with the children and a husband. The respondent had made clear that she did not want a husband. There had however been daily contact after she returned to Scotland. There was no suggestion that she had acted wrongfully or that he was wanting the children back in Ireland. As regards the weekend of 8 April while she had been expecting his arrival she had asked the petitioner to delay his visit for a week so that she could find out about places for him and the children to go to. She agreed that over the weekend the relationship between the parties had been very bad. By this time she had no money. She also wanted her car because of the problems that she had without it. The petitioner had refused to let her have her car back. She had further been distressed by the fact that the petitioner had telephoned her father. In the course of the argument the petitioner had made mention of his having a right to take A and to remove her. This had given rise to her concern which prompted her to make contact with her solicitor. She agreed that in the course of the following week, she had informed the petitioner that she did not wish him to come over that weekend. She had thereafter received a faxed message that he was to come over. In cross-examination she said that originally she had told the petitioner that she would leave at the end of April. That had been before he had ordered her to leave. As regards her saying farewell to her next door neighbour, J.F., she agreed that she had not said that she was leaving the petitioner but she had indicated that she would contact the neighbour subsequently. She agreed that on 20 April she had written a letter setting out the items which she wanted. This had been because the petitioner was reneging on the original agreement that he would send everything over to Scotland. He had told her that she should leave quickly despite the fact that she had tried to persuade the petitioner to allow her to stay for a period of time to get the books of the business into order. He was insistent that she should leave quickly. She agreed that in the course of the telephone conversation on Wednesday 30 March the petitioner had been extremely angry. She set this down to the fact that the petitioner had thought that she would return to Ireland after a stay to Scotland. In re-examination the respondent stated she had consulted her general practitioner on the Friday before she left. At that time the child T was going in for immunisation. She had informed Dr Feeney that she was going to Scotland permanently and that she had advised her husband of that fact. On Friday 25 March when the petitioner's parents had visited the parties' house, she had considered it reasonable to put a face on matters. She did not intend to speak to his parents about the petitioner's sexual deviance. It was at his request that she did not tell them that she was to remain permanently in Scotland. As for her subsequent conversation with her neighbour, this had been conducted out of the window as the neighbour was in bed. If she had been intending to make her departure clandestine, she could have made a better job of it. The purpose of her subsequent telephone call was to indicate to the petitioner that there was no further point in having a period of grace, and that it was better to advise him then that there was no question of her returning after a period of three to four weeks. She denied that subsequently the issue of the sum of £1,000 withdrawn by him from the joint bank account had caused her to think differently from before. It had not influenced her discussion with her husband about their future.

It remains only to notice the terms of other evidence which bore upon the separation and parties' attitude to it. The petitioner's father said that the first he knew of the permanent nature of the separation was two or three days after the respondent left Ireland. At that time the petitioner had said that he had received a telephone call from the respondent. The respondent had said that she was happier to remain in Scotland and was not coming back.

His advice was to go over to Scotland and talk to her. He said that the petitioner was very upset and did not share the witness's view that the matter was not serious. He himself had received no indication to that effect from the respondent. On Friday 25 March he and his wife had visited the parties' house and there was no suggestion at that time that she was not returning at the end of the two weeks which he understood she was going to spend in Scotland while the respondent's father was in hospital. In conversation he understood that she would stay in the family home until the respondent's father returned when she was to go to her sister's house for the duration of the trip. At work he had told the employees that the respondent would be back in two weeks. He agreed in cross examination that on 13 March, Mother's Day, there had been an incident concerning the children and involving a dispute between the respondent, his own wife and his daughter, in which the respondent had been upset and agitated.

The petitioner's solicitor, Thomas Hayes, on affidavit stated that on 7 April the petitioner had called to see him by appointment. The appointment had been made on Tuesday 5 April. The purpose of the appointment was to discuss a situation which had arisen whereby the respondent had left with the children for Scotland and had indicated to him by telephone on the week previous that she did not intend returning with the children to Ireland. The petitioner had told him that he understood that his wife had gone to Scotland with the children for a short break, in particular to see her father who was ill. He said that he wanted his wife to return with the children and sought his advice as to how best that be done. He was advised as to his rights of custody in relation to the children, and in particular that it was open to him to bring an application under the provisions of the Hague Convention for the purposes of having the children returned to Ireland. The petitioner had told him that he did not wish to become involved in legal proceedings at that point as he hoped that he could persuade his wife to return with the children. The witness was advised that the petitioner intended travelling to Edinburgh the following day and that he would make contact again on his return. On 11 April the petitioner had telephoned the witness to tell him that he had had a most unsatisfactory stay in Edinburgh and that he had failed to convince his wife to return to Ireland with the children. He said that he was anxious not to aggravate the situation in any way, but was anxious that his marriage should not break up and that his family would stay intact. On Sunday 17 April he was advised that the petitioner had been arrested and was in custody in Edinburgh. The following day the petitioner telephoned him and made an appointment for the following day. The witness was then told had occurred in Edinburgh and he was instructed to take whatever steps were necessary to have the children brought back to Ireland. An application to the Central Authority of Ireland under the Hague Convention was then lodged on 4 May 1994.

An affidavit was produced from Dr Patrick Feeney. This said that he had received a telephone call on or about the end of May (sic) 1994 from the petitioner who is a patient. He said that his wife was staying in Scotland with their children and was not returning to Ireland. He judged that the petitioner was surprised by this news.

On affidavit the petitioner's mother confirmed her husband's evidence about the visit to the parties' house on 25 March 1994. Her understanding of the conversation that then took place was that the respondent envisaged staying in Edinburgh for about two weeks. At no time during the evening had there been any suggestion that the respondent intended to do anything other than return to Dublin with the children after her visit. Her clear impression when the petitioner subsequently informed her that the respondent had telephoned him and advised him that she intended to stay in Edinburgh permanently, was that her son had not foreseen this and was totally shattered at the prospect of losing the woman he loved and the children that he adored.

The witness J.F. on affidavit said that she recollected a day when she had seen the respondent at the door of her house with one of her children. She had explained to the respondent that she was ill. The respondent had then said that she had come around to say to her that she was going to Scotland to see her father as her father had not been well, and that she would probably stay for a couple of weeks. Sometime later the respondent had phoned and said that she had left the petitioner and was not coming back. The respondent had said that when she told her family why she had left, her family had given her their full support.

Affidavit evidence was also produced by the petitioner from D.D., a friend, who stated that he had been told a few days before the respondent's departure to Scotland, of the respondent's intention to visit her sick father for a week or so. He added that he had never seen the petitioner look so surprised and shocked as when he told the witness that the respondent was staying in Scotland permanently with the children.

Another friend, D.L., said that on 29 March 1994 he had visited the offices of the petitioner's business. He had been told then that the respondent and the children had left for Edinburgh the previous day for a fortnight's visit to her family. The petitioner had said that the respondent had wanted a break as relations between the respondent and the petitioner's parents had deteriorated and that in any case she wished to see her father who had recently been diagnosed as having cancer. He recollected the petitioner having said that the break would do the respondent good. He recollected the following day being at the same office and being told by the petitioner that he had received a strange and worrying telephone call from the respondent. The petitioner had indicated that there was something in the conversation which had caused him concern and from which there was an inference that the respondent wanted to stay in Edinburgh indefinitely. The following morning he was informed by the petitioner that the previous evening he had been told by the respondent that she disliked Dublin, that she disliked his parents, and that she wanted to separate. The petitioner had also said that the respondent had told him that even if he were to move to Scotland, she did not think that their marriage could continue.

Affidavit evidence was also produced for the petitioner from L.B., a photographer who worked for *, a company for which the petitioner worked, and in addition who also worked for *, the company in which both parties had an interest. He recollected being told by the petitioner in or around the end of March that the respondent was going on holidays to Scotland for two weeks and that the petitioner would have some free evenings. He also spoke to the petitioner being very shocked when it transpired that the respondent was not returning to Ireland with the children. He was unaware of any matrimonial difficulties between the parties.

The affidavit evidence of the respondent's counsellor, Mary, was to the effect that in around March, the respondent told her that she had decided to leave the petitioner and that at first it appeared that the parties were discussing the logistics of separation quite calmly and rationally. The respondent indicated that she had been surprised by the petitioner's calm reaction. The counsellor had suggested to the respondent that it was only fair that she should advise the petitioner of the overriding reason for her wish to separate permanently, being his sexuality. Her affidavit continues

"I understand that in the run up to J.'s departure from Ireland, things between her and Brian had become very tense. She did mention to me on the telephone that he had threatened to commit suicide."

The affidavit of the respondent's solicitor, Rhona Anne Cameron, includes a file note dated

23 March 1994 concerning a telephone call between the respondent and Miss Cameron. In it the witness was advised that the parties were contemplating separation, that they had been talking about it for some time, and that it looked as if it was going to come to fruition in about April. The witness had explained the manner in which a legal aid application would be made. The witness had discussed the rules concerning jurisdiction for divorce in a Scottish Court and had advised the respondent that it might be better to hold off any application for legal aid until she was over in Scotland and knew the terms of her separation. The respondent indicated that she would do that. In her affidavit the witness goes on to say that she received a further telephone call from the respondent prior to her return to Scotland. The respondent advised the witness that the parties were continuing to discuss the terms of their separation. They wondered whether there would be any difficulty in the children becoming resident in Scotland, given that they held Irish passports. Subsequently, on 31 March, she received a telephone call from the respondent advising of her return to Scotland with the children. An appointment was made for the respondent to attend the witness's office on 5 April 1994. At that meeting the witness understood from the respondent that custody would not be in issue as this was something which the parties had discussed and that it had been agreed between them that the upbringing of the children should be incumbent upon the respondent. This witness was the writer of a letter dated 15 April 1994 produced by the petitioner's solicitor with his affidavit. In it the writer states that she has been consulted by the respondent "in connection with your recent separation, which we understand from Mrs M. is to be of a permanent nature." The letter continues by indicating a wish on the respondent's part to have the matters outstanding resolved on an amicable basis and a desire to enter into a separation agreement regulating the arrangements for the upbringing of the children and division of joint property, and so on. The letter makes reference to an understanding that the petitioner was anxious to travel to Scotland at the weekends to have regular access to the children. It also sets out the respondent's concern that access should not be unsupervised. In the letter, confirmation is also sought that the petitioner was agreeable to the respondent recovering her Ford Fiesta car, by reason of the difficulty, as a result of her knee injury, in which the respondent was placed without it. It appeared from the evidence that this letter was not delivered to the petitioner until after the events of the weekend of 15 April.

The affidavit of L.F. set out that at the end of February or the beginning of March, she had been told over the telephone by the respondent that she intended to leave the petitioner permanently and returned to Scotland. Thereafter there were a number of telephone calls prior to the respondent's journey to Scotland at the end of March. In these the witness had been told by the respondent that the parties had discussed the separation and had talked about making it as amicable as possible. She understood from the respondent that the petitioner's attitude was variable, at times being reasonable and rational, on other occasions giving the impression that he did not seriously believe that the respondent would leave him. She also received reports from the respondent that he was angry, aggressive and refused to discuss the situation at all.

Affidavit evidence to similar effect was given by the respondent's sister, Mrs S. She recollected being told of an argument that occurred on 13 March which had finally made up the respondent's mind that there was no future in the marriage. Subsequently in telephone calls the respondent had asked her to make enquiries about a suitable creche in the Edinburgh area and to find out which benefits she might be entitled to from the Department of Social Security. Apparently the respondent had originally intended to remain in Ireland with the petitioner until the end of the tax year so that there was no difficulty in dealing with the books of the parties' business, but a few days before the respondent in fact returned, she was told that the petitioner had said that if the respondent intended to return to Scotland, she should leave immediately.

Affidavit evidence of D.G. set out that she and the respondent had, for a considerable time prior to March 1994, discussed in general the matter of separation from the petitioner. Her recollection was that something happened about 13 March 1994 which made the respondent decide that she was definitely leaving her husband on a permanent basis. The respondent had spoken to her the following day and said that the parties were getting on better after it had been agreed that they would separate, that they were discussing division of furniture and that the petitioner had informed the respondent that she would be all right financially. From what she was told by the respondent it seemed that the petitioner was rather amused by the whole thing and had suggested that he would enjoy a return to his bachelor days. She also stated that following the departure of the respondent she had been approached by the petitioner who had asked her to sign a statement indicating that she believed that the respondent had only gone to Scotland for a two week visit. She had refused to do so as she understood clearly that the respondent was leaving Ireland permanently.

In determining where the truth of the matter lies, it seems to me that there are a number of events which bear upon the separation which are not in dispute. In the first place, there was no doubt that on or about 13 March 1994 there had been a row concerning the children involving the respondent, the petitioner's mother and sister. Nor was there any dispute that this event took place against a background of general disagreement between the respondent and the petitioner's family. Both parties agreed in evidence that subsequently they had gone out for dinner and that mention had been made of a separation during the evening. Nor is it in dispute that the respondent raised with her solicitor the matter of separation and possible divorce in the course of telephone call on 23 March 1994. Furthermore, there is no dispute that when the respondent flew from Dublin to Glasgow on Monday 28 March 1994 she only took sufficient clothing to last her and the children for a short period of time. Nor was there any dispute that the petitioner visited Edinburgh on the weekends of 8 and 15 April and that his avowed purpose was to see and to take out the children. Finally there was no dispute that it was as a consequence of an angry confrontation between the parties on Friday 15 April concerning the removal of the child A by the petitioner and upon a complaint by the respondent, that the petitioner came to be arrested and taken into custody, where he remained over that weekend.

My clear impression of the evidence of the parties was that notwithstanding outward appearance to those who were friends of one or both of the parties, such as D.D., D.L., C.H. and L.B., there had been a significant deterioration in the parties' relationship following the birth of the second child. I see no reason to disbelieve the respondent's evidence that by the beginning of March 1994 she had been raising in discussion with the petitioner the possibility of a separation. This was consistent with the petitioner's admission that prior to mid-March there had been some discussion of separation, but that on such occasions the respondent had immediately withdrawn from the suggestion. I see no reason to disbelieve the tenor of the affidavit evidence from L.F. and others to whom the respondent was confiding, that at this stage the petitioner was giving the impression of acting reasonably in the matter and that the respondent was accordingly encouraged to think that he was well disposed to the thought of a permanent separation. This is also consistent with the affidavit evidence given by the respondent's counsellor as to the respondent's state of mind. My impression of the evidence given by both parties and others as to the events on about 13 March involving the respondent and the petitioner's family, was that this incident acted as a spur to the respondent to conclude matters regarding a permanent separation. I do not believe that at this juncture the respondent gave any reason for seeking a separation other than that she was generally unhappy in the marriage, and in particular was not getting on with the petitioner's family. I do not believe the petitioner's evidence that after the discussion about separation following the dispute between the respondent and the

petitioner's mother and sister, the respondent withdrew from her wish to seek a separation. The burden of the evidence from the respondent and those with whom contemporaneously she discussed the matter, such as D.G., her counsellor, Mary, and her solicitor, Rhona Cameron, satisfies me that after the events in mid-March 1994 the relationship between the parties became more strained, but that there was continuing discussion in more detail as to the means whereby the separation would proceed, and in particular an understanding between the parties that when the respondent left, which was agreed to be in a few weeks time, she would be going to Scotland with the children and that the separation was likely to be permanent. I also consider that at this stage the petitioner was still anxious to keep the door open for a reconciliation between the parties, and that this desire continued even after the respondent had gone to Scotland. I do not accept the petitioner's evidence that he remained before 30 March 1994 unaware of the respondent's desire for a permanent separation. I think however that because the reasons then given did not appear particularly strong to, or were not accepted by, him, he remained hopeful of persuading the respondent that she could overcome her apparent dislike of his family, and furthermore that she would not wish to remain in Scotland for any lengthy period having regard to her own views about her own family. In evidence it appeared to be suggested at one stage that the issue of the petitioner's sexuality arose in about mid-March 1994. I consider that the burden of the evidence is that while this issue was indeed raised by the respondent, this, as she accepted at one stage in her evidence, did not occur until after she had consulted Miss Cameron by telephone on 23 March 1994. My clear impression of the evidence is that it was late on that she was induced by her counsellor to make clear to the petitioner the underlying reason for her unhappiness. I do not accept the petitioner's evidence that this was not made clear to him. I accept the respondent's evidence that it caused great distress in the manner described by him and that it resulted in the petitioner changing his attitude to the respondent's departure so that he was then perfectly prepared and indeed anxious that she should go to Scotland as soon as possible with the children. My clear impression of the parties' evidence was that at that stage the respondent had been preparing for a permanent separation after full discussion of all that was involved and with provision made for agreement between the parties as to matters such as finance and division of furniture and the like as had been earlier discussed. I think that the fact that her father was ill, allowed the parties to give out as a reason for the respondent's early departure that it was for such reasons connected with the illness of the respondent's father that the respondent was going to Scotland. However I do not consider that the petitioner was under any illusion that the departure was taking place in the context of a general discussion concerning a permanent separation in which the full reasons for it had been explained to him, including in particular the respondent's unhappiness about the sexual relationship between the parties and her view that a separation was to be permanent. My clear impression of the petitioner's evidence was that he remained hopeful that a short period in Scotland would suffice to persuade the respondent that she should return to live with him in family and that he regarded the separation as one which might be resolved by a period of rest on the respondent's part. I do not however accept his evidence that at the time of departure he was unaware that leaving as she did and in the circumstances that had arisen between them, the respondent and the children might well not return to Ireland. In his own evidence the petitioner agreed that prior to the respondent's departure he had in fact suggested to her that she should make over her interest in the parties' business to him. This betokened a much more inflexible stand on the matter of the respondent's departure than he otherwise attempted to depict in evidence. I accept the respondent's evidence that she did indeed indicate that she was prepared to remain for a period in order to enable the books of the business to be settled, but that the petitioner latterly was insistent that she should go to Scotland as quickly as possible.

The substance of the respondent's case that she went with the agreement of the petitioner

that in the event of a permanent separation the children should remain with her in Scotland, is in my opinion borne out by events following the departure of the respondent on 28 March 1994. I found credible the respondent's evidence that she was concerned about the petitioner's reaction when the issue of his sexuality was raised by her very shortly before the departure for Scotland. I consider that the burden of the evidence suggests that she had been anxious that the matter should be kept private between them and that this accounted for her attitude towards the petitioner's parents on the evening of 25 March as explained by her. I do not find it surprising therefore that she maintained the face of a friendly departure, not merely to the petitioner at the airport, but also to her neighbour J.F. at the time of the departure. The impression that I got from the respondent's evidence and the affidavit evidence of her mother and sister was that when she told them of the problem of the petitioner's sexuality immediately upon her arriving in Scotland, this had confirmed her in her earlier decision to separate permanently from the petitioner and led her to underline that decision in the subsequent telephone calls immediately following her arrival in Scotland. I consider that the petitioner's reaction of surprise was triggered rather by the fact that she was indicating that she was not prepared to consider a period of grace such as had been in his mind in earlier discussion and that it was this surprise which gave rise to the expressions noted by witnesses to whom he spoke immediately following these telephone calls. This conclusion seems to me to be consistent with the attitude of the petitioner as retailed in particular by the witness D.L. His evidence in particular about the petitioner discussing with him the substance of a telephone call between the parties on 30 March is wholly consistent with the petitioner's view that there had been a period of grace discussed between the parties in which the petitioner would seek to dissuade the respondent from an irrevocable decision to separate permanently. Moreover, his attitude at that time towards visiting the children and access to them, more particularly as expressed in discussion with his solicitor Thomas Hayes on 7 April, suggests that he was content that the children should remain with his wife and that that had been his attitude prior to the respondent's departure on 28 March 1994. Clearly he was envisaging opportunities to have access to the children over an extended period of time as appears from the faxed letter of 13 April 1994 and its reference to the birthday of the child A. It is also consistent with the terms of the respondent's letter dated 12 April 1994 and that of her solicitor dated 14 April 1994. My clear impression of the petitioner's evidence was that the events of the weekend of 15 April 1994, and more particularly the indignity of being arrested and held in custody as a consequence of the respondent's complaint about his attempt to have unsupervised access to the child A, had precipitated a sea change in the petitioner's attitude to the children remaining in Scotland with the respondent on a long term basis. Up until that time his attitude, in my opinion on the evidence, was that he was content that the children should remain in Scotland with the respondent on the basis that the separation between the parties was permanent, but that he should be able to exercise reasonable access to the children in Scotland and that this attitude had been framed in discussion between the parties prior to the departure of the respondent from Dublin on 28 March 1994, at which time the petitioner was well aware that the respondent was contemplating a permanent separation from him.

In his averments in the Petition the petitioner in essence claims that the respondent had withdrawn the children from Ireland on the basis that her departure was for a limited period and that this fact had been announced not only to friends but also to her general practitioner, Dr Feeney, and at the children's creche. It suffices to say that the affidavit from Dr Feeney does not support the petitioner's averment on this matter and I accept the substance of L.G.'s affidavit that she was well aware that the respondent was to depart with an intention of a separation being permanent. The fact that the respondent took sufficient clothing only for a short stay is, in my opinion on the evidence, wholly consistent with the bringing forward of her departure at the behest of the petitioner, after it had originally been in mind that the departure would only take place after the parties had fully discussed the

arrangements for a permanent separation and the business books had been completed. I do not consider there is any foundation in a suggestion that the respondent took advantage of the petitioner's consent to her taking a short holiday, in order to remove the children and thereafter to announce to him that the separation was to be permanent. The contemporaneous accounts of what she said to others in conversation and in telephone calls during the period from late February onwards are entirely consistent in general with her evidence in the witness box as to how matters progressed between her and the petitioner. I am fully satisfied on all the evidence that the petitioner was well aware that the respondent on departure on 28 March had in mind a permanent separation and that he had agreed that in such an event the children would remain with the respondent. In these circumstances I am of opinion that there is not proved any wrongful removal of the children from Ireland. It follows that there was no wrongful retention of the children in Scotland.

In submissions on the evidence at the conclusion of the evidence, Counsel for the petitioner made reference to the case of Findlay v Findlay (unreported 10 January 1994) and in particular a passage in the Opinion of Lord Cullen where he says this,

"An examination of the Convention demonstrates that both 'removal' and 'retention' are events occurring on a specific occasion; and refer to removal from or retention out of the jurisdiction of the Courts of the state of the child's habitual residence (in re H 1991 2 AC 476 per Lord Brandon of Oakbrook on page 499-500). At page 499 Lord Brandon also said that a child could only be the subject of a wrongful retention,

'if it has first been removed rightfully (eg under a Court order or an agreement between its two parents) out of the state of its habitual residence and subsequently retained wrongfully (eg contrary to a Court order or an agreement between its two parents) instead of being returned to the state of its habitual residence.'"

On the evidence in this case and looking at matters in the round, I have reached the clear opinion that prior to the departure of the respondent with the children on 28 March 1994 there was an agreement between the two parents that in the event of a permanent separation the children were to remain with the respondent, and further that it was in the mind of parties that in the event of a permanent separation the respondent would move to Scotland with the children. Furthermore, I am of the clear opinion that the petitioner was well aware that the respondent had a permanent separation in mind when she departed with the children on 28 March 1994, but that he was hopeful that during the period thereafter he would be able to persuade her not to take a final decision in the matter and to return to live with him in family in Ireland.

Counsel for the respondent presented an argument on the basis that if the removal was wrongful the petitioner had acquiesced in the retention by the respondent of the children in Scotland thereafter by his actings in the period between 28 March and 15 April. She made reference to the fact that the petitioner had been clearly advised by his solicitor of the availability of rights under the Convention on Thursday 7 April and at that stage did not wish to pursue the matter. She also made reference to the case of Re A [1992] 1 All ER 929, [1992] 2 FLR 14 and in particular to passages in the judgments of Stewart Smith LJ at page 26 and Lord Donaldson MR at pages 29 and 30 concerning the matter of acquiescence. At page 29 Lord Donaldson said this,

"In context, the difference between 'consent' and 'acquiescence' is simply one of timing. Consent, if it occurs, precedes the wrongful taking or retention. Acquiescence, if it occurs, follows it. In each case it may be expressed or it may be inferred from conduct, including inaction, in circumstances in which different conduct is to be expected if there were no

consent or, as the case may be, acquiescence. Any consent or acquiescence must, of course, be real. Thus, a person cannot acquiesce in a wrongful act if he does not know of the act or does not know that it is wrongful. It is only in this context, and in the context of a case in which it is said that the consent or acquiescence is to be inferred from conduct which is not to be expected in the absence of such consent of acquiescence, that the knowledge of the allegedly consenting or acquiescing party is relevant and, to use the words of Thorpe J 'the whole conduct and reaction of the husband must be investigated in the round'."

Again at page 26 Stewart Smith LJ said this,

"Acquiescence means acceptance, and it may be either active or passive. If it is active, it may be signified by express words of consent or by conduct which is inconsistent with an intention of the party to insist on his rights and consistent only with an acceptance of the status quo. If it is passive, it will result from silence and inactivity in circumstances in which the aggrieved party may reasonably be expected to act. It will depend on the circumstances in each case how long a period will elapse before the Court will infer from such inactivity whether the aggrieved party had accepted or acquiesced in the removal or retention.

A party cannot be said to acquiesce unless he is aware, at least in general terms, of his rights against the other parent. It is not necessary that he should know the full or precise nature of his legal rights under the Convention: but he must be aware that the other party's act in removing or retaining the child is unlawful. And if he is aware of the factual situation giving rise to those rights, the Court will no doubt readily infer that he was aware of his legal rights, either if he could reasonably be expected to have known of them or taken steps to obtain legal advice.

If the acceptance is active, it must be in clear and unequivocal words or conduct and the other party must believe that there has been an acceptance."

These passages were also referred to by the Court in Re AZ 1993 1 FLR 682 to which Counsel also made reference.

These passages were cited by Counsel on the basis that there had been wrongful removal, contrary to the respondent's basic position. However they do underline the point which, in my opinion is determinative in the present case, namely that until 15 April 1994 the petitioner was content that the children should remain with their mother on what was plainly a long term basis so far as the parties were concerned, as judged by the correspondence and discussions between them up until that time. It was only the unforeseen events that occurred on 15 April that, in my opinion, caused the petitioner to change his mind and at that time to abandon any hope of persuading the respondent to return with the children to Ireland and accordingly caused him thereafter to devote his energies to recovering the children and bringing them back to Ireland. In my opinion the petitioner has failed to establish that the children were either wrongfully removed or wrongfully retained in the circumstances of the present case having regard to the terms of the Convention.

It remains only for me to note that at the conclusion of the case Counsel for the respondent abandoned any contention set out in plea-in-law 3 for the respondent that the return of the children would expose them to a grave risk of psychological harm or to an otherwise intolerable situation. Furthermore, it was clearly stated by both parties that in the event that an order was to be made in terms of the Child Abduction and Custody Act 1985 for return of the children to Ireland, the respondent was agreeable to returning with the children pending the determination of any legal proceedings concerning their status, while the petitioner, for his part, was prepared to make proper provision for their accommodation

and maintenance while in the care of the respondent in Ireland, it being understood that the parties would not resume cohabitation.

In the whole circumstances, however, I shall sustain the first and second pleas-in-law for the respondent and refuse the prayer of the petition.

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