‘GoFundMe’ does more harm than good HTD and HTE (Children), Re (Temporary Removal from Jurisdiction - Malaysia and Hong Kong) [2023] EWFC 227 (08 December 2023)

This was a private law matter in regard to the child arrangements to be made for the parties two children, HTD (a girl, aged 4 years and 3 months) and HTE (a boy, aged 15 months), known as the ‘the children’, following the breakdown of their parents’ relationship. The matter was to be determined by a judge authorised to sit in the High Court due to the complexity of the question around whether travel should be permitted to a jurisdiction which is not a party to the Hague Convention on the Civil Aspects of International Child Abduction 1980 ('the Hague Convention 1980'). Specifically, Hong Kong and, Malaysia.

**Applications**

The father’s making an application for a child arrangements order under s 8 of the Children Act 1989 (the 1989 Act) for a shared 'live with' order (50/50). The mother is opposed to that application and seeks that the children live with her and spend time with the father, but less than 50/50. These are the child arrangements applications.

The father also sought a prohibited steps order under s 8 of the 1989 Act, which would prohibit the mother from removing the children from the United Kingdom. The mother opposed that order and sought a specific issue order under s 8 of the 1989 Act permitting her to remove the children from the United Kingdom, temporarily, in order to visit maternal family members in Hong Kong and Malaysia. These applications are known as the travel applications hereafter.

**Background**

The parents met in 2010 and when the relationship broke down, at the end of 2022, it was amidst considerable acrimony between the parties. It was after a referral by a health visitor on 16 December 2023, following an allegation of domestic abuse by the mother, to which it was alleged the children had been exposed to, that the local authority became involved.

At this point, the parties were still sharing a home with the children, but just two days later on 18 December 2023 the father contacted the police to report that the mother had abandoned the children. Subsequently, the local authority initiated a s 47 investigation under s 8 of the Children Act 1989 (the Children Act) and on 6 January 2023 the mother and the children moved into the maternal aunt’s home. It was at this point, all contact with the father stopped. A child protection conference was held on 10 January 2023, where the mother’s allegations of coercive and controlling behaviour by the father were recorded, and the children were made the subject of a Child Protection Plan. For the sake of completeness, the mother did not pursue these allegations.

On the father’s application, on 1 February 2023, the Court made an interim prohibited steps order preventing the mother from removing the children from the jurisdiction. By the time the matter came back for directions on 3 February 2023, limited contact between the father and the children had resumed every Sunday. The mother was considered to have applied for a specific issue order allowing her to travel with the children to Spain, Malaysia and Hong Kong. The judge also directed that Cafcass file a risk assessment, which came back with the recommendation that contact between the father and the children be supervised. Subsequently, at the end of March 2023, the court ordered supervised contact between the father and the children at a contact centre once a week.

Between 21-30 May 2023 the mother took the children to Spain on holiday, which was without any issues. In regard to contact between the father and the children, on 19 July 2023 the court ordered this was to be increased to both children staying with the father from Friday afternoon to Sunday afternoon on alternate weekends. It is noted that that HTD also spends time with the father from Tuesday afternoon to Wednesday afternoon.

In its s7 report, completed on 31 August 2023, the local authority had ‘no objections’, in theory, to the father’s proposal for a 50/50 shared care arrangement although there were concerns as to how this would work in practice, particularly as to the disruptive impact on the children moving between their parents’ houses during school time. As a result, the recommendation was for the children to live with their mother but to have regular contact with the father, which was consistent with the order of 19 July 2023. Furthermore, the report found that the parents were ‘equally complicit’, in causing the children emotional harm as a result of the conflict that had characterised their relationship.

At a further hearing, on 4 October 2023, it was ordered that the child arrangements made on 19 July 2023 were to continue with the condition that only the father or paternal grandmother were to do the handovers. This followed on from the mother objecting to the father’s new girlfriend’s involvement in the children’s care. At the same hearing, the court also made directions for the final hearing of the substantive applications, including the instruction of experts as to Hong Kong and Malaysian law to give evidence for the court regarding the travel applications.

**The Hearing**

The applications were heard over two days, in which the mother was represented and the father was unrepresented. There were two key issues that became apparent to the court of the second day of the hearing, outlined below, which affected the course of proceedings and the applications.

**New allegations**

The court heard evidence from the previous social worker, who was not in a position to give up to date evidence as the family’s case had been transferred to another local authority, for which the new social worker was not able to attend given the time constraints. However, this became particularly problematic when on the second day of the hearing, the mother raised, through her representative that she had made *fresh safeguarding concerns* with the newly allocated social worker, who confirmed that these were indeed new allegations that required investigation.

**The ‘GoFundMe’ page**

It was also disclosed by the mother’s counsel, that the mother had set up a ‘gofundme’ internet page in an attempt to raise funds for these legal proceedings. The details were such, that the mother identified herself and the children by name and had also included a photograph of the three of them; the applications she was making in these proceedings as well as her accusations of coercive and controlling behaviour against the father although these were no longer being pursued. It is noted that the father is not named, but it is agreed that for anyone to whom the family is known, he would be easily identified based on the information provided.

The judge highlighted that such action *appeared to be a contempt of court under s 12 of the Administration of Justice Act 1960 ('the 1960 Act') and a breach of s 97(2) of the 1989 Act.* It was deemed that the two recent orders also made clear that such disclosure would be an offence.

Despite the above, it was submitted that the mother was not aware that the ‘gofundme’ page was prohibited. After the judge was sufficiently satisfied the webpage had been deleted on 1 December 2023, by which time there had been 37 donations totalling £3,350, a prohibited steps order was made in order to prevent the mother from making any further publications. Overall,the judge deemed this was a relevant factor in the court’s decision making as to the travel applicationsandwould therefore have to reflect on the implications, if any, of the mother’s actions.

Contempt in family proceedings – the law

There are three possible ways for the court to deal with the potential contempt issue:

1. The court could refer the matter to the Attorney- General to decide whether to bring contempt proceedings although the process is such that it may not be proportionate.
2. The father could bring contempt proceedings.[[1]](#footnote-1)
3. The Court could proceed of its own accord by issuing a summons.[[2]](#footnote-2)

Which, if any, route the court deemed appropriate to take, the mother would need to have the opportunity to take advice. The aforementioned potential breach would require an independent decision to prosecute and would proceed in the magistrates' court, both of which would be out of the current court's hands.[[3]](#footnote-3)

Outcome

In regard to how to proceed, the mother made an indication that she was sorry but was resolute that she was not aware her conduct, by way of setting up the ‘gofundme’ page was prohibited and the father was not minded to pursue any application for contempt. Ultimately, it was a decision for the judge as to whether it was appropriate to refer the case to the Attorney-General or for the court to initiate proceedings of its own by summons under FPR 37.6.

The judge was satisfied the matter could be dealt with immediately, given that there was a valid concern that if this should not be the case it could create an additional source of conflict between the parents, which would cause further harm to the children. Secondly, permission would not be granted under FPR 37.3(5) if an application was made. The relevant factors were considered in EBK v DLO, together with the best interests of the children.

On application of these criteria, there’s a strong prima facie case that the mother breached confidentiality orders and committed a statutory contempt.[[4]](#footnote-4) In addition to, committing an offence contrary to s 97(2). However, it is clear that the he overriding consideration should be that *committal proceedings would not be proportionate or consistent with the overriding objective* given that the mother had since apologised; web page was no longer in existence as well as the fact the father has no want to bring contempt proceedings.

**The child arrangements applications**

At the hearing, during the original social worker’s evidence it became clear there had been a marked change in the local authority’s risk assessment of the children. This was demonstrated at the Child Protection Review Conference on 2 October 2023 when the children were moved down from a ‘Child Protection Plan’ to a ‘Child in Need Plan’ as they were assessed as being at a lower risk of harm. During evidence, the social worker relayed that she had 'no safeguarding concerns' around the father having 50/50 shared care and there were none of the practical concerns left that were expressed in the s 7 Report which led to her original recommendation.

Outcome

In light of the new allegations that had been made since the s 7 report, which was now out of date, and so had not yet been investigated, the judge was unable to make a final order. The father's application for a child arrangements order was adjourned for six months. This was to ensure that an up-to-date s 7 Report, from the new social worker could be prepared and would give ample time for the new contact arrangements, as outlined in paragraph 12 of the judgment, to be trialled before a final decision would be taken on the care arrangements. Fundamentally, whether these arrangements should be on a 50/50 shared 'live with' basis, as per the father’s application, or a 'live with' the mother and 'spend time with' father basis, as per the mother’s application.

**The travel applications**

Originally, the mother applied for permission to travel to Spain, Hong Kong and Malaysia. At the time of the hearing, the trip to Spain had already taken place and had happened without incident. Therefore, the remaining proposed trips were to Hong Kong and Malaysia. The initial proposed trips were to visit family, for HTD to attend a bilingual summer school, and for the mother and children to attend the maternal uncle's wedding celebrations in October and November.

Given the father's objection to the trips it meant it was necessary for the court to resolve the dispute. However, the hearing could only be listed after events for the proposed trips had already taken place. In light of this, the mother amended the particulars of her application and sought the court's authorisation for a two-week trip to Hong Kong and Malaysia in the Spring of 2024 to visit family in both jurisdictions.

Fundamentally, the father was concerned that the mother may pose a risk of abducting the children once they were beyond the courts of England and Wales and given the mother’s strong family ties to Malaysia and Hong Kong.

The law

The father shares parental responsibility for the children, and there is an interim child arrangements order in place. The father objected to the children's removal outside of the United Kingdom to any jurisdiction, previously, Spain and now, Hong Kong and Malaysia.[[5]](#footnote-5) In such circumstances, where one person with parental responsibility raises a concern that another, who is named in a child arrangements order as 'a person with whom the child is to live', may abduct a child, the court must take that concern as serious and appropriately consider it. Therefore, it was a question for the judge to decide whether to give the mother even temporary leave to remove the children to Hong Kong and or Malaysia.

The Court of Appeal in Re. A (Prohibited Steps Order) [2014] 1 FLR 643, [23] and [25] (Re. A (Prohibited Steps Order) identifies the relevant principles to be applied by the court when resolving any dispute regarding whether such travel as proposed by mother.[[6]](#footnote-6)

***These same principles apply to removals to jurisdictions that are not signatories to the Hague Convention 1980****: Re. A. However, the key principles, if not all of them, undoubtedly also apply where the proposed destination is a Hague Convention 1980 jurisdiction.* ***In a Hague Convention 1980 case, there are clear legal safeguards in place that allow for the child's return in the event of abduction****. The Court is therefore* ***more likely to permit*** *the child to travel to such a jurisdiction. However, the Court must still resolve any dispute under s 13(1)(b) and, in doing so, must still be* ***positively satisfied that the travel proposal is in the children's best interests by reference to the three elements*** *identified in Re. A, [25], to which I now turn.*

*First element: the degree of risk of abduction*

In December 2022, the mother accepts she made a comment, under provocation, that she and the children 'did not need' the father and that they would leave to live in Malaysia, where the maternal grandmother lives. It was this comment that was at the root of the father’s concern about the mother being a ‘flight risk’. The mother pointed out that, even though she was born in Hong Kong, where the paternal grandfather still lives, she had strong ties to the United Kingdom where she had not lived outside of since 2000; attended school and college and is currently employed in a senior role, which she returned to after maternity leave. The mother strenuously denied any intention of leaving the United Kingdom permanently and was very much of the feeling that although she believes it is important the children are able to visit Hong Kong and Malaysia to build relationships with maternal relatives and deepen their cultural connection, she does not want to live in either.

Taking the mother’s assertions into consideration, the judge was still ultimately satisfied that the father’s concern was legitimate one in that if the mother were permitted to travel with the children to either jurisdiction she may not return to the United Kingdom. The judge was of the view that, even if it was not her immediate intention, the mother’s position may change once she was with her family.

***The risk is heightened by the fact that the mother has published details of the children and the allegations made about the father online on a 'gofundme' webpage in breach of court orders.*** *Even if she did not do so deliberately, the publication of those details without first checking with her legal advisers was a serious error of judgment. Either way, this* ***makes it difficult for the Court to trust that the mother will not breach a court order deliberately*** *or as a result of* ***another serious error of judgment*** *if she is permitted to travel with the children.*

Therefore, the judge concluded there to be, *a 'moderate' risk – a not insignificant risk - that the mother will abduct the children if she is permitted to remove them temporarily to Malaysia or Hong Kong.*

*Second element: the degree of harm to the children and the father as a result of their abduction*

As a result of the mother not returning the children to the jurisdiction, it had the potential to cause them harm. In particular HTD, in that she would be deprived from her friends, nursery as well home environment. All of which make the culture in which she has been raised. However, what would be most damaging, is that it would deprive both children of their relationship with their father. It is noted that any harm might be mitigated if the father were able to secure their return through the Courts of Malaysia or Hong Kong, the longer the process went on the more likely it would cause them harm and the more significant that harm. In turn, the conflict between the parents that has led to the current situation would be worsened, causing even more emotional harm to the children. The judge also noted, the monetary cost to the father of pursuing any legal remedies would be substantial and although not the primary concern would certainly have an impact.

*Third element: the available safeguards*

The mother put forward a number of safeguards that, she viewed, would heavily reduce the possibility of her retaining the children in Hong Kong or Malaysia. The mother offered to give undertakings or submit to orders that she:

1. will return the children, on the understanding that breach of such an undertaking or order could lead to her immediate imprisonment;
2. will pay security of £10,000 to a firm of solicitors that would be forfeit in the event she did not return and would be available to the father to defray the costs of any legal proceedings to secure the children's return;
3. will only travel on her British passport, leaving her Hong Kong passport and identity card with solicitors in the United Kingdom, and will not apply for any other travel documents for her or the children while abroad;
4. will lodge her and the children's British passports with the British Embassy or a firm of solicitors in the relevant jurisdiction for the duration of their stay;
5. will not travel to any other countries during any visit;
6. will provide full details of travel to the father 4 weeks in advance of the trip and daily updates (texts and images) in respect of the wellbeing and location of the children during the trip; and
7. will ensure indirect contact with the father twice a week.

Despite the mother’s proposed undertakings, the father was of the view that these would have little effect if the mother intended to leave without ever coming back to the United Kingdom. However, he did acknowledge the mother was likely to be put off keeping the children in Hong Kong or Malaysia by such undertakings. It was deemed that the risk in the mother’s case would not be deliberate planning to abduct the children, but that she would have the strong temptation to remain. It was raised that, *the mother's deliberate or careless breach of confidentiality orders by publishing the 'gofundme' page heightens that risk.* However, it was also noted that the mother was to retain the children in Hong Kong or Malaysia, there were also existing safeguards to assist the father in securing the children's return to the United Kingdom.

Expert evidence – Hong Kong

The expert explained that the Hague Convention 1980 is given effect in Hong Kong by the Child Abduction and Custody Ordinance (CACO).[[7]](#footnote-7) By s 3 of that Act, the provisions of the Hague Convention 1980 'shall have force of law in Hong Kong'. Therefore, if the mother was to retain the children in Hong Kong, the father would be entitled to make an ex parte application for a recovery order under section 16 and 17 of the CACO. The expert also reported there are certain exceptions to the duty of return under the Hague Convention 1980. The most relevant being, if 'there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation'.

The expert also relayed that although Hong Kong, like the United Kingdom, is a signatory to the Hague Convention 1980, that Hong Kong is not a *signatory to any of the international conventions on the recognition and enforcement of foreign judgments (the Hague Conventions 1971 and 2019). Furthermore****, there is no statutory regime for the making of a 'mirror order' in Hong Kong that would render an order of this jurisdiction directly enforceable***

Expert evidence – Malaysia

For clarity, Malaysia is a non-Hague Convention 1980 jurisdiction. However, the expert report outlined that there were very similar safeguards to those under the Hague Convention 1980, which would be available in the instance the mother were to retain the children there*. The Malaysian Courts have jurisdiction under s 101 of the Law Reform (Marriage and Divorce) Act 1976 ('LRA 1976') either to restrain a person from removing a child from Malaysia or to order the return of a child from Malaysia to another jurisdiction. An application for an injunction under s 101 may be made on the application of either the mother or the father.*

The report concluded that the expert had, ‘an enormous amount of confidence’, that if the mother in these proceedings *were to retain the children in Malaysia the father would be able to secure their return 'in the absence of proof of harm to them upon return'.*

Outcome

The judge dismissed the mother’s application for a specific issue order, which would permit her to travel to Hong Kong or Malaysia and allowed the father’s application for a prohibited steps order, to such a degree that the mother is prohibited from removing, even temporarily, the children to Malaysia and Hong Kong for the next 12 months.

Whilst the judge accepted *that the mother has not made repeated, unreasonable applications*, there was grave concern around the mother’s willingness to publicise details of the case on a 'gofundme' page, in which there were allegations of coercive control made against the father that the mother had not pursued to a fact-finding hearing. The judge deemed *it matters not whether that can be termed 'lawfare'. It was irresponsible, unreasonable and unlawful.* Notwithstanding those conclusions, the mother’s actions evidently served to further undermine the local authority’s concerted efforts to facilitate cooperation between the parents in looking after the children. Therefore, it was considered that any further applications to remove the children to Malaysia or Hong Kong during the next 12 months would only serve to reignite potential animosity during a period that was considered to be essential to allow the children some respite and gain some stability.

Ultimately, the judge was satisfied this was a case where it was appropriate to make an order under s 91(14), for a period of 12 months. Such an order would still allow the mother to seek the court's permission to bring a new application, should there be a material change of circumstances in the interim.

1. FPR r. 37(3); FPR r 37.3(5) [↑](#footnote-ref-1)
2. FPR r. 37.6(3). [↑](#footnote-ref-2)
3. s 97(2) of the 1989 Act [↑](#footnote-ref-3)
4. contrary to s 12 AJA [↑](#footnote-ref-4)
5. The exception in s 13(2) does not apply as there is currently no child arrangements order in place that names any person, whether mother or father, as 'a person with whom the child is to live'. [↑](#footnote-ref-5)
6. Re. H (A Child) [2014] EWCA Civ 989 and M (Children) (Non-Hague Convention 1980 State) [2020] EWCA Civ 277 and by Baker (then) J in Re. DO and BO (Children) (Temporary Relocation to China) [2017] EWHC 858 (Fam) and M v F (Removal from Jurisdiction: Practice) [2017] 4 WLR 149. [↑](#footnote-ref-6)
7. (Cap. 512 of the laws of Hong Kong). [↑](#footnote-ref-7)