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[29/04/1994; Court of Appeal (England); Appellate Court]
Re B. (A Minor) (Abduction) [1994] 2 FLR 249, [1994] Fam Law 606

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

29 April 1994

Staughton, Waite, Gibson LJJ

In the Matter of B.

J Munby QC for the mother

J Holman QC and D Taylor for the father

WAITE LJ: F, the 6 1/2-year-old boy who is the subject of this appeal, is Australian. He was born in that country on 21 August 1987, and was ordered to be returned there, on the application of his father under the terms of the Hague Convention, by an order of Connell J of 30 March 1994. His mother appeals on the ground that the judge had no jurisdiction to make a Convention order because neither the child's original removal to this country nor his retention here were, so she claims, wrongful.

F is illegitimate. He was born in Australia of an unmarried association between the mother, who emigrated to Australia with her parents at the age of 21 in 1982 and is now aged 33, and the father who is 40 and Australian-born. The relationship broke down when the parents separated in August 1990. The father remained in contact with F, and when the mother wished to take F together with her mother ('the maternal grandmother') to Britain in 1990 for a short holiday he contributed A$9000 to their expenses. Soon after their return to the home State of Western Australia in early 1991 it became apparent that the mother had become addicted to heroin. The father gave her A$38,500 to invest in a home for F and herself, but she did not apply the money for that purpose, and for the remainder of 1991 and the early part of 1992 the mother lived a chaotic existence as a result of her addiction.

Eventually in April 1992 the mother left Australia and returned to Britain. Her departure was in breach of bail conditions imposed as a result of pending charges for shoplifting. F was left to be cared for the maternal grandmother and the father. At first he spent the week with his grandmother and weekends with the father, but from February 1993 the roles were reversed, and F was with his father for weekdays and grandmother for weekends. From April 1992 onwards the social security payments payable to the person having the care of F were paid to the maternal grandmother, with the authority of a direction signed for that purpose by the father.

By the summer of 1993 the grandmother had made a plan to return to Britain for a long holiday and wished to take F with her. The father's response was that he would not be willing to allow F to leave Australia for anything longer than a holiday of 6 months, after which he would return with the grandmother. He insisted, moreover, that the arrangements for the child's return should be established with due legal formality.

Matters of guardianship and custody are regulated in Western Australia by a non-federal statute, the Family Court Act 1975 (Western Australia), to which I shall refer hereafter as 'the 1975 Act'. The jurisdiction which it confers or the Family Court of Western Australia (FCWA) is co-extensive with equivalent federal law, and there are cross-vesting provisions which enable all States to make orders valid within each others' jurisdictions. The term 'guardianship' is used in the 1975 Act to describe responsibility for the long-term welfare of the child, as distinct from 'custody', which is defined by s 34(2) as follows:

'A person who has or is granted custody of a child under this Act has --

(a) the right to have the daily care and control of the child; and

(b) the right and responsibility to make decisions concerning the daily care and control of the child.'

In regard to the children of unmarried parents, s 35 of the 1975 Act provides:

'Custody and guardianship

Subject to the Adoption of Children Act 1896 and any order made pursuant to this Division [meaning that part of the Act], where the parents of a child who has not attained the age of eighteen years were not married at the time of the birth of the child or subsequently, the mother of the child has the custody and guardianship of the child.'

Sections 36 and 36A enable orders with respect to custody or guardianship or access or welfare to be made in favour of a wide class of persons, including anyone who can demonstrate that his paramount interest is the welfare of the child. Section 41(1) and (2) and s 42(3)-(6) provide for a system of registration of agreements, including agreements relating to custody, with the court so as to make them enforceable as rules or orders of court. Section 42 provides:

'Agreements between parents

No agreement made between the parents of a child shall be held to be invalid by reason only of its providing that one of the parents shall give up the custody or guardianship of the child to the other.'

On 9 June 1993 the father and maternal grandmother attended a meeting with the father's solicitor Mrs Walter. According to MA Walter's evidence, which was accepted by Connell J. the maternal grandmother emphasized that she was simply taking the child to Wales (where the mother now lives) for a holiday, after which she and the child would return to Australia. As a result of that meeting Mrs Walter drew up a minute of a consent order of the FCWA ('the original minute'). It was headed in the matter of family proceedings between the father and the mother and provided as follows:

'In respect of the father's application filed contemporaneously herewith, the following orders may be made by consent:

1. The father and mother have joint guardianship and the father has sole custody of the child [F] born 21 August 1987.

2. That [the maternal grandmother] be and is hereby permitted to take the said child out of Australia for the purposes of traveling to South Wales only from 1 August 1993 up to and including 14 January 1994, by which date the said child is to have been returned to western Australia.

3. The mother be restrained and an injunction is hereby granted restraining the mother from having possession of the children's passports at any time.

4. The mother keeps the father advised at all times as to the telephone number and address at which the said child can be contacted.

5. During the time that the said child is absent from Australia pursuant to the order contained in para 2 hereof, the father have weekly telephone access with the child from 4 pm each Sunday (western Australia time) and the mother make the child available at that time.

6. That the mother be restrained and an injunction is hereby granted restraining the mother from removing the child from the care of [the maternal grandmother] during such time as the child is absent from Australia.

7. That if [the maternal grandmother] returns to Australia prior to 14 January 1994, the mother is to do all things necessary to ensure that the said child accompanies [the maternal grandmother].

8. For the purposes of ensuring the return of the said child to the State of Western Australia on or before 14 January 1994, the mother at least five (5) days prior to departure pay to the father the sum of $10,000 ('the bond') to be held in trust by the father on the following conditions:

(a) In the event that the child returns to Western Australia on or before 14 January 1994 the bond be refunded to the mother her nominee within 48 hours of his return.

(b) In the event that the child does not return to Western Australia on or before 14 January 1994 or when [the maternal grandmother] returns to Australia, whichever will first occur, then the bond be paid forthwith to the father to be used by him to take all necessary action to ensure the child is returned to Western Australia.

9. In the event of any contested litigation arising from the mother's failure to return the child in accordance with the orders contained in pare 2 hereof, and subject to any further order of this court, the forum for the determination of that dispute so far as is practical be the Family Court of Western Australia.

10. The order contained in para 9 hereof shall not prevent the father obtaining in some other overseas court an immediate order for the return of the child and shall not restrict in any way any application the father might bring for any breach of the order contained in pare 2 hereof.

11. Within 48 hours of the return to Western Australia of the said child, the child's passport be delivered to the father.

12. Upon the child's return to Western Australia, the father and mother be restrained and an injunction is hereby granted restraining each of them from removing the said child from Western Australia without the prior written consent of the other party.

13. Upon the return of the child to Western Australia in compliance with the order contained in para 2 hereof, the mother have reasonable access to the said child defined to include weekly telephone access.

14. That the father's application be otherwise dismissed.'

Provision was made at the foot of the original minute for it to be signed both by the mother and by the father.

On 16 June 1993 the original minute was sent by Mrs Walter to the mother at her address in Wales for signature. The mother did duly sign it and posted it back, but her letter was misdirected and as a result was never received by Mrs Walter. The mother later admitted in her evidence to Connell J that she signed the document without any intention of co-operating with its terms. There has been no challenge at the hearing of this appeal to the judge's consequent finding that the father's consent to F's travel to England and Wales was obtained by deception.

Arrangements were meanwhile made for the grandmother to be supplied with a passport for F to authorize his removal from Western Australia. The passport authorities required the relevant application to be signed by the father, and his signature was duly supplied for that purpose.

Arrangements were also made for a fresh copy of the original minute ('the second minute') to be sent to the mother for signature. She did not receive it until August 1993. By that time the starting-date for the proposed holiday had arrived and the maternal grandmother was anxious to go ahead with it. Her flight was booked for 25 August 1993. The father was still insisting that the child could not leave without the mother's signature on the second minute, early in August 1993 the father and the mother spoke on the telephone. The mother assured the father that she had already signed the second minute and the he would very shortly receive it, On 24 August 1993 the maternal grandmother deposited a bond of A$5000 with Mrs Walter's firm and signed an authority that the bond was to be used to take any action that might be required to recover custody of F in the event that the second minute should not be received back from the mother or be completed by her incorrectly.

The father was persuaded by the mother's assurance and by the grandmothers bond that they were sincere in their undertaking to return the child to Australia by the agreed date of 14 January 1994, and on 25 August 1993 he vent to the airport and saw off the maternal grandmother and F on their flight to Britain A few days later he received the second minute back from the mother with her signature, signed it himself, and handed it to Mrs Walter.

During that autumn a hitch occurred in the arrangements for completing the formal approval of the second minute by the FCWA. Mrs Walter took the view that once F had left Australia the FCWA no longer had jurisdiction to approve the order, and that the authority of the federal jurisdiction was required. She accordingly on 4 November 1993 filed an application ('the Adelaide application') to have the minute approved by the court in Adelaide. The return date was 5 January 1994. The Adelaide application was served on the mother in Wales on 21 December 1993. She consulted solicitors the next day, obtained legal aid, and on 4 January 1994 her solicitors issued an originating summons in Cardiff to have F made a ward of court.

Notice of the wardship proceedings was faxed by the mother's solicitors to Mrs Walter's firm, but as a result of the international time differences and those within Australia, it was not received by Mrs Walter until after she had obtained from the registrar in Adelaide at 9.45 am on 5 January 1994 the formal approval of the Adelaide application.

The father's response to service of the wardship proceedings was to write to the mother, telling her that she was not to go back on her word, and that he expected F to be returned to Australia on 14 January 1994 in accordance with the agreement. F was not returned, and the father's application to the English court for an immediate return order under Art 12 of the Hague Convention was accordingly issued in England on 21 January 1994.

The central issue

Her counsel, Mr Munby, has not sought to suggest that the mother's conduct, or that of the maternal grandmother, can be defended on any equitable or moral ground. The judge's finding that:

'the mother, assisted by her own mother, cruelly deceived the father; and she now seeks to profit by her deceit', is not challenged. The crucial issues are:

(l) did the father have 'rights of custody' within the terms of the Convention at the date of F's removal from Australia?; and, if so,

(2) does the fact that the father's consent to that removal was obtained by deception require him to be treated as though he had never consented at all, so as to render the removal a breach of his 'rights of custody'?

The terms of the Convention

The governing Articles are the following:

'Article l

The objects of the present Convention are --

(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and -

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where -

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that state.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting state immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention --

(a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

(a) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child , forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in th preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested States have reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that --

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of remove or retention, or had consented to or subsequently acquiesced in the removal or retention; or

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

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.'

The judge's conclusion

It was common ground before Connell J that the mere fact of his paternity of F as an illegitimate child gave the father no automatic custodial right of any kind under the law of Western Australia. The judge held, however, that he had acquired rights amounting for Convention purposes to 'rights of custody' -- first through his active role in the care of the child, secondly through the status which the mother and the grandmother had themselves accorded to him as a party whose consent was necessary before F could be removed from the jurisdiction or issued with a passport, and thirdly through the rights recognized or accorded to him when the mother signed the second minute. He held, further, that the father's consent to F's removal from Australia was not true consent -- it having been obtained by the deceit of both mother and maternal grandmother -- and that the removal was therefore without his authority and in breach of his 'rights of custody'.

The case-law

Counsel are agreed that the authorities establish that:

(a) The Convention is to be construed broadly as an international agreement according to its general tenor and purpose, without attributing to any of its terms a specialist meaning which the word or words in question may have acquire under the domestic law of England. ~

(b) 'Rights of custody' is a term which, when so construed, enlarges upon, and is not necessarily synonymous with, the simple connotations of 'custody' when that word is used alone Re C (A Minor) (Abduction) [1989] 1 FLR 403 per Lord Donaldson MR at p 413). It was found convenient in argument to refer to the rights so described as 'Convention rights'.

(c) The acts of removal or retention on which the jurisdiction to make a mandatory return under Art 12 is founded are mutually exclusive and involve a single act or event only (Re H; Re S (Minors) (Abduction; Custody Rights) [1991] 2 AC 476, [1991] 2 FLR 262).

The case of Re C (above) concerned the effect of an order of the Federal Family Court in Australia made at divorce. The Deputy Registrar in Sydney had made a consent order in November 1986 that the mother should have sole custody of the child of the marriage, and that she and the father should share joint guardianship. The order contained a direction that neither the mother nor the father should remove the child from Australia without the other's consent. In 1988 the mother removed the child to England without the knowledge or consent of the father, who applied for an Art 12 order under the Convention. Latey J refused it on the ground that since the father did not have custody under the law of the State of habitual residence in Australia, the removal was not in breach of any right of custody attributed to him and was not therefore wrongful within the terms of Art 3. It was held in this court, allowing the fathers appeal, that the terms of Art 5 have to be read into Art 3 and may in certain circumstances extend the concept of custody beyond the ordinarily understood domestic approach (Butler-Sloss LJ at p 407). The father's right of objection to a removal from Australia under the terms of the 1986 order was to be treated as conferring on him

'rights of custody' for the purposes of Art. 3 and Art. 5, ever though a limited power of veto of that kind might not normally be regarded as an attribute of custody.

In Re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562, the House of Lords was concerned, as in this case, with the law of Western Australia affecting the child of unmarried parents. It will be necessary to refer to the facts of that case, because in this appeal one side seeks to contrast them and the other to say they are indistinguishable. They were summarized by Lord Brandon of Oakwood (pp 575 and 576) as follows: -

'Both the appellant ("the father") and the respondent ("the mother") were born in England and are citizens of the UK. The father is 38 and the mother is 32. In 1969 the father and in 1978 the mother went to live and work in Australia. They met and in May 1978 began living together at a home in Western Australia. They did not marry, then or later. On 6 December 1987 the mother gave birth to a boy whom I shall call J. Both the mother and the father were registered as J's parents and J has dual Australian and British nationality,

The relationship between the mother and the father, following the birth of . was not an harmonious one. In 1988 there was a short separation between them when the mother left the joint home taking J with her. In about January 1989 there was a second and longer separation when the mother again left the joint home taking J with her. During this second separation both the mother and the father consulted solicitors. The father was made aware that under the law of Western Australia, since he and the mother were not married, the mother was entitled to the sole custody and guardianship of J. unless he applied to a court and obtained an order to the contrary. The father at one time indicated an intention to make such an application but did not do so. In May 1989 the moths and the father were reconciled and she went back to live with him bringing J with her.

In January 1990 the mother's parents, who live in Stockport, went out to Australia for a holiday. They stayed with the mother and the father at their jointly owned hose in Western Australia. The mother made a decision to leave the father and return to England with J to live there, initially at any rate at her parents' home. In February 1990 the mother's father returned to England, leaving his wife behind. At the beginning of March 1990 the mother, with financial assistance from her father, bought tickets for herself and J to travel on the same flight to England as that on which her mother was due to return. She succeeded by various subterfuges in concealing her intention from the father and on 21 March 1990 flew with J and her mother to England, arriving there on 22 March 1990. It was then, and has remained ever since, the settled intention of the mother not to return to Australia but to make a long-term home for herself and J in England.

On or about 26 March 1990 the father applied to the Supreme Court of Western Australia for the custody of J and other relief. His application was supported by two affidavits sworn by him. On 3 April 1990 Walsh J ordered the application to be transferred to the Family Court of Western Australia. On 12 April l990 Anderson J in the Family Court heard the application on an ex parte basis and made an order giving the father sole guardianship and custody of J. He also gave directions for the service of the order on the mother in England and this was effected shortly afterwards. Finally by an amendment to his order dated 26 April 1990 he made a declaration that the removal of J from Australia by the mother had been wrongful. It will be necessary to consider later whether this declaration was rightly made.'

The issue of alleged wrongful removal was dealt with by Lord Brandon (at p 577F) in these terms:

'I consider first the question whether the removal of J from Australia to England by the mother was wrongful within the meaning of Art 3 of the Convention. Having regard to the terms of Art 3 the removal could only be wrongful if it was in breach of rights of custody attributed to, ie possessed by, the father at the time when it took place. It seems to me, however, that since s 35 of the Family Law Act 1975-1979 of Western Australia, as amended, gave the mother alone the custody and guardianship of J. and no order of a coup to the contrary had been obtained by the father before the removal took place, the father had no custody rights relating to J of which the removal of J by the mother could be a breach. It is no doubt true that, while the mother and father were living together with J In their jointly owned home in Western Australia, the de facto custody of J was exercised by them jointly. So far as the legal rights of custody are concerned, however, these belonged to the mother alone, and included in those rights was the right to decide where J should reside. It follows, in my opinion, that the removal of J by the mother was not wrongful within the meaning of Art 3 of the Convention. I recognize that Anderson J thought fit to make a declaration that J had been wrongfully removed from Australia. I pay to his declaration the respect which comity requires, but the courts of the UK are not bound by it and for the reasons which I have given I not consider that it was rightly made.'

The opposing contentions

On the two crucial questions already mentioned the parties argue as follows

(1) Did the father have 'rights of custody' within the terms of the Convention at the date of F's removal from Australia? ,

Mr Munby accepts that the expression 'rights of custody' is wider in scope than the term 'custody' on its own, but submits that the crucial word is 'rights'. That term is only apt to describe the rights that flow from a legal status conferred by law or by order of a court of law. It has to be distinguished from de facto enjoyment of custody with the agreement of the person entitled to the sole right (properly so called) to enjoy custody. At the date of F's removal from Australia (25 August 1993) the father had no rights in that sense because they were denied to him by s 35 of the 1975 Act and no order of any court had yet been made in his favour. All he had enjoyed up to that point was de facto care of the child shared with the maternal grandmother. This case is therefore indistinguishable from Re J.

Mr Holman for the father submits that the regime in Western Australia after the mother left for Wales in April 1992 was one under which, even before any written agreement was brought into being, the father was functioning in the fullest sense as a parent. That status was assented to by the mother and maternal grandmother, and tacitly acknowledged by their acceptance that he had the right to object to F's removal from Australia, to give authority for the diversion of social security payments to the grandmother, and to give approval for the issue of a passport. His status was further reinforced when they acknowledged his right to insist on their acceptance of an order in the form of the minutes. It was a status, moreover, that the courts would have been astute to protect if it had ever been challenged. If, that is to say, the mother had chosen to return to Western Australia and had there sought unilaterally to determine the father's status by asserting her sole custodial rights under s 35 of the 1975 Act, the FCWA would have been certain to intervene to prevent her from doing so. This case, he argued, is essentially one of shared parenting between the father and the maternal grandmother in the complete absence from the. country of the custodial parent. It is therefore wholly distinguishable from the situation in Re J. where both parents were within the Western Australian jurisdiction and the father enjoyed no custodial status at all independently of his cohabitation with the mother. The situation here is much more akin to Re C in that the father has acknowledged rights of control over F's movements

in and out of Australia -- the only difference between that case and this being that the father here has rights which any court would be bound to recognize and enforce whereas the father in Re C had similar rights already formalized under court order.

Mr Munby's response to that is that if (contrary to his primary submission) the father was enjoying 'rights' in the sense contended for by Mr Holman they necessarily depended upon the agreement -- express or implied -- of the mother Any such agreement would be rendered invalid by s 42 of the 1975 Act.

(2) Does the fact that the father's consent to that removal was obtained by deception require him to be treated as though he had never consented at all, so as to render the removal a breach of his 'rights of custody' (assuming such rights to be established)?

Mr Munby contends that the father's consent to F's removal on 25 August 1993 was a genuine consent, however fraudulently obtained by the mother and maternal grandmother. The deceit may be reprehensible, but the fact that consent can given makes it impossible to say that the removal was wrongful in the sense of involving a breach of the father's rights of custody. Mr Holman submits that the judge was right to hold that a consent obtained by deceit is no consent.

Conclusion

The purposes of the Hague Convention were, in part at least, humanitarian. The objective is to spare children already suffering the effects of breakdown their parents' relationship the further disruption which is suffered when they are taken arbitrarily by one parent from their settled environment and moved to another country for the sake of finding there a supposedly more sympathetic forum or a more congenial base. The expression 'rights of custody' when used in the Convention therefore needs to be construed in the sense that will best accord with that objective. In most cases, that will involve giving the term the widest sense possible.

There is no difficulty about giving a broad connotation to the word 'custody'. Attention was drawn by Lord Donaldson in Re C to the width of its dictionary meaning, and by Sachs LJ in Hewer v Bryant [1970] 1 QB 357 at p 373 to the diversity of the 'bundle of rights' which it incorporates in legal terminology. The same is no doubt true of the word 'garde', which (in the phrase 'droit de garde') provides the translation for 'rights of custody' in the French language version of the convention. "

The difficulty lies in fixing the limits of the concept of 'rights'. Is it to be confined to what lawyers would instantly recognize as established rights -- that is to say those which are propounded by law or conferred by court order -- or is it capable of being applied in a Convention context to describe the inchoate rights of those who are carrying out duties and enjoying privileges of a custodial or parental character which, though not yet formally recognized or granted by law, a court would nevertheless be likely to uphold in the interests of the child concerned?

The answer to that question must, in my judgment, depend upon the circumstances of each case. If, before the child's abduction, the aggrieved parent was exercising functions in the requesting State of a parental or custodial nature without the benefit of any court order or official custodial status, it must in every case be a question for the courts of the requested State to determine whether those functions fall to be regarded as 'rights of custody' within the terms of the Convention. At one end of the scale is (for example) a transient cohabited of the sole legal custodian whose status and functions would be unlikely to be regarded as qualifying for recognition as carrying Convention rights. The opposite would be true, at the

other end of the scale, of a relative or friend who has assumed the role of a substitute parent in place of the legal custodian.

When that approach is applied to the particular circumstances of the present case, the answer reached by the judge was in my judgment unimpeachable. The father who saw off this young boy at Perth airport on 25 August 1993 was the child's primary carer, sharing his upbringing with the maternal grandmother as his secondary carer. It was a settled status which the absent mother, as the only parent with official custodial rights, had at first tacitly and later (by her acceptance of the father's right to insist on her signature of the minutes) expressly approved. I accept Mr Holman's submission that it was a status which any court, including the FCWA, would be bound to uphold; at least to the point of refusing to allow it to be disturbed -- abruptly or without due opportunity of a consideration of the claims of the child's welfare -- merely at the dictate of a sudden reassertation by the mother of her official rights. It was a status which falls properly to be regarded as carrying with it rights in the Convention sense, breach of which by unauthorized removal would be rendered wrongful within the terms of Arts 3 and 5.

As for the issue of consent, the question whether a purported consent to the child's removal obtained from the aggrieved parent was or was not a valid consent is similarly to be determined according to the circumstances of each case. The only starting-point that can be stated with reasonable certainty is that the courts of the requested State are unlikely to regard as valid a consent that has been obtained through a calculated and deliberate fraud on the part of the absconding parent. That applies in my judgment whatever the purpose for which the consent is relied on -- whether it be to nullify what would otherwise be considered a wrongful breach of rights of custody for the purposes of Art 3, or as a consent of the kind that is expressly referred to in Art. 13(a).

Here again, the judge in my view reached a conclusion that is unassailable. The father's consent to F's removal last August was indeed obtained through a cruel deceit. It was cruel, moreover, not only to the father but to the child. F is only 6, but he is old enough to understand the assurance given to him when he left Australia that he would be returned after an interval to the only country he had every known and the only parent who had given him continuous and consistent care; and vulnerable enough to suffer if that expectation is destroyed. The judge was right to hold that a consent so obtained was no true consent at all.

It follows that I would reject the submission that the present case is indistinguishable on its facts from those of Re J. Nor is there any principle to be deduced from the decision in that case which would require the father in the present case to be treated, notwithstanding his very different circumstances, as a party who had been merely exercising what Lord Brandon described as 'de facto custody'.

I reject, also, the argument that because the father's rights of custody derive from the agreement (tacit or express) on the mother's part that he should exercise them, they are vitiated by s 42 of the 1975 Act. Sensibly construed in its legislative context, that section amounts to no more than a saving provision, designed to spare agreements for the sharing of custody or care and control between parents -- which it is the evident purpose of the Act to encourage -- from possible attack by the technically (or historically) minded on the ground that they fell foul of the old common law rule (exemplified by Barnardo v McHugh [1891] 1 QB 194 and Walround v Walround (1858) Johnson 18) which treated agreements for the disposal of rights of custody as infringing public policy.

It was suggested, finally, by Mr Munby that the mother's agreement to the terms of the minutes of order falls to be treated as void for duress, on the ground that she gave her

agreement for the sole reason that she knew there was no other way of getting her child back. This submission must, in my judgment fall, both because it would involve an extension of the concept of duress beyond anything that has so far been recognized in the authorities and also because the premise on which it is founded is in any event unsound. Although success could not, of course, be guaranteed, there was always available to her, as a means of getting her child back, the facility of an application to a court in Australia for an order giving her care and control and regulating the father's rights of contact. It would then have been a matter for argument, and for decision by the court, as to whether or not she should be given leave to exercise her care and control outside Australia, so as to enable her to return to live with F in England or Wales.

It is unnecessary, in the light of these conclusions, to deal with the interesting arguments that were addressed to us on the alternative hypothesis that then falls to be treated as a case of alleged wrongful retention. Nor is it necessary to deal with the yet further hypothesis (raised by the father's respondent's notice) that F's removal (or retention) was wrongful because it was carried out in breach of the institutional rights of the relevant Australian court.

I would dismiss the appeal.

STAUGHTON LJ:

I agree that this appeal should be dismissed for the reasons given by Waite LJ. The one point on which I wish to add something is the effect of s 42 of the Family Court Act 1975 (Western Australia). For convenience I repeat the text:

'No agreement made between the parents of a child shall be held to be invalid by reason only of its providing that one of the parents shall give up the custody or guardianship of the child to the other.'

The first place where we should look for the meaning of an Australian status is in the expert evidence; strictly speaking, that should be the last place too. On the father's behalf there is an affidavit of Mr Truex, an Australian barrister and solicitor.

He says of s 35:

'15. This section means that in Western Australia the mother of a child born out of wedlock ordinarily has full rights of custody and guardianship to the exclusion of all other persons and the father of the child has no such rights in the absence of an agreement or court order conferring such rights on him.

21. By 7 September 1993 the minutes of consent order referred to previously in this affidavit had been signed by the parties. In my opinion, the minutes are written evidence of an agreement between the plaintiff and the defendant that the plaintiff would acquire joint guardianship and sole custody rights with respect to the child. It may be argued that the signing of the minutes by the parties was effective on the part of the defendant, to (in the words of s 42 of the Family Court Act 1975 (Western Australia1) "give up the custody or guardianship of the child to the [father]". However, I am unaware of any reported cases in Australia on this point and I am not able to offer a firm opinion as to whether this may have been the case.'

So far as the evidence goes, Mr Truex is uncontradicted; there is no expert opinion on behalf of the mother on this issue. But Mr Munby urges us to read the section as providing that other terms in an agreement shall not be invalid merely because it contains a term as to

custody or guardianship -- which will remain invalid at common law. I am not attracted by that argument, as it does not seem to me to reflect the natural meaning of the language used.

It was wisely suggested by Waite LJ in the course of the argument that we ought to look at s 42 in its context, and Mr Truex provided us with a copy of the Australian Family Law & Practice Reporter. That contains s 41, which is printed as follows:

'SECTION 41 REGISTRATION OF CHILD AGREEMENTS

41(1) [Agreement may be registered] A child agreement may be registered in any court having jurisdiction under this Act.

41(2) [Effect of registration] Where a child agreement is registered in a court --

(a) a party to the agreement shall not institute proceedings under this Division seeking an order in relation to child welfare matters;

(b) subject to subsection (4), the agreement, in so far as it relates to child welfare matters, is enforceable as if the agreement were an order of the Court; and

(c) the court may, by order, vary the agreement, in so far as it relates to child welfare matters, if it considers that the welfare of a child requires variation of the agreement.

42(3) [Where agreement confers custody etc] Paragraphs (a) and (b) of subsection (2) do not apply to a child agreement to the extent, if any, that the agreement purports to confer the custody or guardianship of the child concerned upon a person who in not a parent of the child.

42(4) [Enforcement] The court in which a child agreement is registered under subsection (1) shall not enforce the agreement, in so far as it related to child welfare matters, if it considers that to do so would be contrary to the best interests of a child. .

42(5) [Setting aside agreement] The court in which a child agreement is registered under subsection (1) may set aside the agreement if, and only if , the court is satisfied that -- ~

(a) the concurrence of a party was obtained by fraud or undue influence;

(b) the parties desire the agreement to be set aside; or

(c) the welfare of the child requires the agreement to be set aside.

42(6) [Relevant provisions] In exercising powers under this section, a court shall have regard to the provisions of sections 28(2) and 39A.'

It seems to me that those must all be subsections of s 41, and that there are misprints in attributing (3), (4), (5) and (6) to 42, which is printed subsequently.

On that material it seems to me highly probable that the law of Western Australia attributes some effect of some kind to an agreement between parents as to custody or guardianship. No doubt the courts retain ultimate control; and rights conferred by an agreement remain provisional, conditional or inchoate. It would not in my view be regarded as wholly ineffective. But my ultimate conclusion is that we ought to resist the temptation to make our own findings of Western Australian law. The point is not as simple and easy as Mr Munby suggests. We should stick to the expert evidence, tentative as it is. If we do that, we are left

with the view that an agreement can confer something properly described as a right of custody.

I do not share the view of Peter Gibson LJ that the agreement was to take effect if and when the Family court of Western Australia made the order. The circumstances surrounding its execution show in my judgment that the parties intended (objectively speaking, of course) to be bound forthwith, insofar as the law would afford the agreement binding effect without a court order.

DISSENT

PETER GIBSON LJ:

I have found this a difficult case. No objective observer can fail to regard as abhorrent the behaviour of the mother, and I have every sympathy with the father who was deceived by her when he gave his consent to the departure of his son from Australia to this country. I would gladly have decided in favour of the father if I could. But the issues to be resolved are questions of law to be answered in the light of the true construction of the Hague Convention, the terms of which have to be applied to the facts.

The first issue is whether the child was 'wrongfully removed' within the meaning of the Convention. For that meaning one looks to Art 3, containing as it does the Convention definition of a wrongful removal, The removal must be in breach of rights of custody attributed to a person (in this case, it is argued, the father). There is no dispute that if that condition is satisfied, the other conditions for a wrongful removal were satisfied. That the term 'rights of custody' is a broad term appears both from the widening of its meaning by Art 5(a) to include rights relating to the care of the person of the child and the right to determine the child's place of residence and from the decision of this court in Re C (A Minor) (Abduction) [19893 1 FLR 403. I accept therefore that the fact that custody is conferred on the mother by s 35 of the Family Court Act 1975 does not mean that the father could not also have rights of custody in the convention sense. Nevertheless the rights in question must be more than de facto rights (Re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562).

Mr Holman QC for the father relied on six matters as establishing that the father had rights of custody even without the agreement on the consent order which the parties had agreed should be made by the Family Court of Western Australia. All were matters to which Connell J had regard in reaching his decision. They were as follows:

(1) The mother had been absent for over a year.

(2) The father had day-to-day care of the child prior to his removal.

(3) The mother, the father and the grandmother all believed that the grandmother could not take the child out of Australia without the father's consent, and thereby the mother recognized that she had conferred rights on the father as the sole parent in Australia.

(4) The father delivered the boy to the grandmother to fly to England.

(5) The father's signature was required by the grandmother to enable her to obtain a passport for the child.

(6) The father nominated the grandmother to receive social security payments in respect of the child.

Of these matters the first two support the view that the father had de facto rights, but no agreement or other source of legal rights other than the agreed minutes of order is suggested by the father in the affidavits sworn by him or on his behalf or in his application to the Australian court, save for the tentative view expressed by the father's expert on Western Australian law, Mr Truex, in para 23 of his affidavit of 18 March 1994 when answering the question 'Under the law in Western Australia, who had the rights of custody in respect to the child before 5 January 1994?' Mr Truex said: 'The plaintiff may have acquired some custody or guardianship rights by agreement either in April 1992 or when the mother] signed the minutes before the child left Western Australia.' Earlier he had referred to the mother's statement in her affidavit of 22 February 1994: 'It was agreed at that time [April 1992] that . . . [the child) would be looked after by my mother in Australia', and he also referred to the evidence of the father's solicitor in Western Australia in her affidavit of 21 February 1994 that 'from April 1992 to February 1993 . . . [the grandmother] had the child most weeks and the father had him most weekends; from February 1993, the father had the child all week and [the grandmother] had him all weekend. . .' But this is hardly evidence of an agreement between the mother and the father, intended to confer rights on the father.

The third and fourth matters cannot have conferred legal rights. As for the fifth and sixth matters it is unfortunate that there is no evidence of Australian law on the rights of a father of an illegitimate child in relation to a passport application nor on the significance, if any, of the father nominating the recipient of social security payments, and it is not possible to draw safe inferences from these matters. Although the evidence of these facts is contained in the grandmother's affidavit of 14 February 1994, Mr Truex makes no comment on them.

As for the agreed minutes, the prefatory words, 'In respect of the father's application filed contemporaneously herewith, the following orders may be made by consent', show that the terms which then follow were intended to take effect only if and when the Family Court of Western Australia made the order. That court was not bound to make the order, nor was the Adelaide court which in fact made the order, the registrar having a discretion (see Ord 31, s 8(3) of the Family Law Rules referred to in para 14 of the affidavit of Mr Harp, the mother's Western Australian lawyer, of 15 March 1994, and para 11 of Mr Truex's affidavit). The position seems to me even clearer than that which obtains when a contract contemplates the execution of a further, more formal contract between the parties, it being in such a case a question of construction whether the further contract's execution is a condition of the bargain or a mere expression of the desire of the parties as to the manner in which an agreed transaction will go through (Von Hatafeldt-Wildenburg v Alexander [1912] 1 Ch 284 at pp 288, 289 per Parker J). Here the agreed terms cannot be said to have had legal effect before the order was made. What was agreed between the mother and the father wee only that she would consent to such an order by the Family Court of Western Australia in those terms. Accordingly at the time of the removal of the child, that agreement did not confer rights of custody on the father.

Mr Truex does not address this point in his affidavit and, because of doubts about the effect of s 42 of the Family Court Act 1915, was only able to express the tentative view:

'It may be argued that the signing of the minutes by the parties was effective on the part of the Mother) to . . . "give up the custody or guardianship of the child to the [father]".'

He frankly acknowledged that he was not able to offer a firm opinion as to whether this may have been the case, On the view that I take of the condition; effect of the agreement, it is unnecessary to essay an opinion on this Western Australian statute. .

I therefore regretfully conclude that the father did not have rights of custody in the Convention sense at the time of the child's removal and accordingly the removal could not have been wrongful in the Convention sense indicated in Art 3.

I turn to the alternative argument advanced by Mr Holman that there has been a wrongful retention by the mother in breach of rights of custody.

There must be a single occasion when the wrongful retention occurred (Re H. Re S (Minors) (Abduction: Custody Rights) [1991] 2 AC 476, [1991] 2 FLR 262) as it is necessary to consider where the child was habitually resident immediately before the retention. Various dates were canvassed in argument: 27 August 1993 when the child arrived in England; 2 December 1993, when the mother instructed her solicitor to pursue wardship proceedings; 4 January 1994, when the wardship proceedings were issued; 5 January 1994 when the father learnt of the wardship proceedings, and 14 January 1994, when the child should have been returned but was not returned to Australia. Only by the last of those dates had rights of custody been granted by the Adelaide court to the father, and there is at least a doubt about the validity of that order because the mother withdrew her consent before it was made (see para 11 of Mr Truex's affidavit) and her consent had if any event been given to an order in the Family Court of Western Australia (see paras 18-21 of Mr Karp's affidavit).

But whichever date is selected, a major difficulty in the way of the father lies in the test of habitual residence. In Re J (above) at pp 578, 579, Lord Brandon said:

(1) that the expression is not to be treated as a term of art with some special meaning but it is to be understood in accordance with the ordinary and natural meaning of the words; '

(2) that it is a question of fact to be decided by reference to all the circumstances of any particular case;

(3) that a person may cease to be habitually resident in a country in a single day; and

(4) where a young child is in the sole lawful custody of the mother, his habitual residence will be the same as hers. '

Accordingly, the House of Lords held that an unmarried mother, who took her child with her when she left Western Australia with the settled intention that neither she nor the child should continue to be habitually resident there, thereby caused her son not to be habitually resident in Western Australia immediately before she arrived in England, and, immediately before the time 3 weeks later when the Adelaide court gave the father guardianship and custody of the child, that position continued. Similarly the position here is that the child, having lost his habitual residence in Western Australia when he was brought by his mother to England, has never regained it.

For this reason, and without going into the other arguments advanced by Mr Munby QC for the mother, I must reject Mr Holman's argument on wrongful retention in breach of rights of custody attributed to the father.

Mr Holman made the further submission that there was a wrongful retention by the mother in breach of rights of custody held by the Adelaide court from 5 November 1993 when the proceedings there were commenced. He submitted that the court was an institution which had the right to determine the child's place of residence as soon as the father's application was filed. This submission was not based on the evidence of Australian law that had been deposed to by either side, and I am unable to accept it. In my Judgment Mr Munby was right to submit that a court does not have rights of custody merely because its jurisdiction

has been invoked or because it is seised of proceedings which may lead to the making of an order regulating such rights. The position would be different if the commencement of proceedings alters the status of the child and confers rights of the court, for example if the proceedings were wardship proceedings (Re J (A Minor) (Abduction: Ward of Court) [1989] Fam 85, [1990] 1 FLR 276). But that is not this case.

For these reasons I have, with regret, reached the conclusion that, with all respect to him, the judge erred, and for my part I would have allowed the appeal and looked to the English court in the wardship proceedings to give full weight to the meritorious claims of the father for his son's return.

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