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[23/11/1994; High Court (England); First Instance]
Re M. (Abduction: Acquiescence) [1996] 1 FLR 315

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

23 November 1994

Thorpe J

In the Matter of M.

Elizabeth Rylands for the father

Bernard O 'Sullivan for the mother

THORPE J: This is a Hague Convention application brought by the father for the return to Greece of the only child of the marriage between the parties, J, who was born in Greece on 23 April 1990. It is important to establish the facts. I take the history from the chronology, which has been helpfully compiled by Miss Rylands on behalf of the applicant. That shows that the parents met in the spring of 1988 and began to cohabit in the autumn. In the autumn of 1989 the mother discovered her pregnancy, and on 7 October 1989 the parties intermarried in Greece.

Following the birth of their son the accounts that each offers of the marriage could not diverge more startlingly. The mother alleges such a degree of violence and instability as falls outside the range of human passion and could only be explained by at least a disordered personality. The father alleges that their union was one of unbroken harmony and bliss such that he was not only distraught but amazed at the separation which occurred after only brief months of married life. The circumstances of that separation, as described by the mother, are dramatic. She says that, on 30 November 1990 during the course of an evening of domineering and violent anger, their only son, J, was quite seriously assaulted by the father. Following that assault, she says that she and their son were kept captive for a period of 7 days and were only released by the intervention of a friend. After that release the parties never cohabited again.

The father denies the assault and the imprisonment, although he accepts that the final separation occurred on or about 7 December 1990. The mother's account is corroborated by photographs of the injuries which she took apparently shortly after the assault and by medical reports which were obtained shortly after she and her son had left the matrimonial

flat. The father's limited response is to suggest that injury, if any, might have been caused by the child falling from his cot.

In the spring of 1991 the mother returned to this country for a period of about 4 months, during which she lived with J on the top floor of her parents' substantial home in Gloucestershire.

Following her return to Greece, in May or June 1991, there was some contact between the father and J, but all contact since 7 December 1990 has always been in the presence of the mother. In January 1992 these arrangements broke down. On 17 February 1992 the mother applied for a provisional order for custody and maintenance for J. The application filed on her behalf set out her version of the marital history and the circumstances surrounding separation in detail. It is consistent with the evidence which she has filed in response to this summons.

The father did not appear and was not represented at the hearing of her application, which resulted in findings and an order committing J's physical custody to her on a provisional basis, and ordering the father to make monthly payments for the support of the mother and of J.

On 14 April 1992 the mother issued a further application in Athens seeking a substantive order for parental care of J and maintenance. Again she set out her case in relation to her experiences in marriage and culminating in the assault of December 1990. The case is consistent with that presented in February 1992 and is consistent with the case that she presents in this court. It seems that the application for substantive order did not progress to a hearing since shortly after its issue the Athens lawyers went on strike. The business of the court ground to a halt, although apparently there were some arrangements that allowed emergency applications to be litigated. The lawyers' strike persisted for about 2 years, only ending in June 1994. The contact between the father and J was, however, resumed by mutual agreement in September 1992 and at about Easter 1993 increased in frequency from weekly to twice-weekly visits.

Between Easter and July 1993 the mother was endeavouring to negotiate the terms for the dissolution of the marriage with the father and his lawyer. The communication seems to have deteriorated sharply in July 1993. There were some angry exchanges during the course of which the father threatened to take J away from the mother. Accordingly, she decided to protect herself by arranging for her father to come to Athens and support her return to her family home. She and J left Athens on 30 July 1993 without any notice to the father of her intention so to do. However, he quickly discovered her flight and her whereabouts. Thereafter there were telephone conversations during the course of which she says that she made it plain that she had no intention of returning.

On 5 August 1993 she issued a petition for divorce and Children Act applications for residence and prohibited steps orders, all in the Gloucester County Court. On 12 August 1993 Judge Hutton granted her Children Act applications at an ex parte hearing.

The Children Act applications were personally served on the father on the day following the ex parte orders. The orders themselves were sent to the father by post on 19 August 1993. The affidavit sworn in support of the applications was not amongst the documents sent to him. On 5 October 1993 the county court served the divorce petition on the father by post. No acknowledgement of service was returned and accordingly the mother's solicitors arranged personal service on 12 January 1994.

Following the final separation on 7 December 1990 the mother had lodged a complaint with the police. As a result of her complaint the father had been charged with assault and imprisonment. Unbeknown to the mother the criminal charges came on for hearing over 3 years after the events, just before Christmas 1993. The record of proceedings shows that not only was the prosecutor without the complainant's evidence but he was also without the evidence of any other witness. It seems that witness statements and reports were read and the father than gave his version of events exonerating himself from liability. He was, not surprisingly, acquitted of the charges, the prosecutor himself having suggested that that was appropriate.

It seems that in the early part of this year it emerged that the personal service of the divorce petition on 12 January 1994 was flawed in that the documents had been served in English and without translations. Accordingly, steps were taken in May 1994 to have the documents translated and they were finally served on the father in his language on 4 August 1994. On 10 October 1994 the father filed his acknowledgement of service. That indicated an intention not to defend and, in consequence, the petition proceeded to decree nisi, which was pronounced on 9 November 1994.

On 19 October 1994 this originating summons was issued on the father's behalf.

Greece signed the Hague Convention on the Civil Aspects of International Child Abduction in June 1993 and I am told by Miss Rylands that applications under the Convention by Greek citizens are not initiated with a Central Authority in Greece and transmitted to the Central Authority in London for issue. The father followed a procedure which is apparently the recognised procedure for Greek citizens. He made contact with the consulate in London who referred him to the solicitors who instruct Miss Rylands. He had in August 1994 sought advice in Athens which led him to seek the help of the consulate in London. His case was supported by a statement dated 18 September 1994 and an affidavit of law by an expert, Mrs Kydonias. There was a directions hearing before Kirkwood J and the mother filed her affidavit and the affidavits of her parents in opposition on 9 November 1994. Further evidence came from the father, a second statement of facts and a further affidavit of law from Mrs Kydonias. On the date of the fixture Mr Lionis (the expert instructed on behalf of the mother) filed his evidence and Mrs Kydonias produced a third statement.

The issues that have been argued in front of me are fourfold. The first is whether or not the mother's action on 30 June 1994 amounted to a wrongful removal of J contrary to Art 3. The following three issues only arise if it did. The first of those subsidiary issues is whether, in view of the fact that the originating summons was issued more than a year after the removal, J is now shown to be settled in his new environment so as to open the door to the exercise of a judicial discretion. The second subsidiary issue is whether, under Art 13(a), the father has acquiesced in his son's removal. The third subsidiary issue is whether under Art 13(b) the return of J would expose him to physical or psychological harm or otherwise place the child in an intolerable situation.

The first and most important issue as to whether the removal on 30 June 1994 was a wrongful removal within the terms of Art 3 turns on the expert evidence of Mrs Kydonias and Mr Lionis. The removal of a child is to be considered wrongful where it is in breach of rights of custody attributed to a person either jointly or alone under the law of the State in which the child was habitually resident immediately before the removal or retention.

The succinct question is: what was the effect and extent of the provisional custody order made by the Athens court on 19 March 1992? Mrs Kydonias in her first report asserted that the order lapsed automatically on the expiration of 28 days unless extended or renewed.

That was challenged by Mr Lionis who said that only the provision for the payment of maintenance lapsed in that manner, and that the provisional order for the physical care of the child continued until further order. Following discussion at the door of the court Mrs Kydonias conceded that the order for 19 March 1992 was indeed in force as a valid provisional remedy on 30 July 1993. However, she asserted that the order did not permit the mother to remove the child from Greece, and indeed restrained her from so doing. Alternatively, Mrs Kydonias contended that if the order did not have that effect the father's parental right under Art 1510 of the Greek Civil Code prohibited that removal. Mr Lionis contended that the order of 19 March 1992 granted exclusively to the mother the care of the person of the child and gave her the exclusive right to determine the place of the child's residence. Accordingly, the removal from one European jurisdiction to another was clearly not wrongful.

In order to determine this question it is necessary to look, first, to the provisions of the Civil Code. Article 1510, in its agreed translation, provides that:

'That care for the minor child is a duty and a right of the parents, exercised by both of them. Parental care includes the care of the person of the child, the administration of his property, and the representation of the child in any matter, transaction or trial, related either to his person or his property. In a case where the parental care is terminated, either on account of death, judicial declaration of the person as missing or forfeiture of parental rights, then parental care belongs exclusively to the other parent.'

Article 1518 seems to be almost a definition section. It takes the phrase 'the care of the person of the child', which in Art 1510 is the first of the specific ingredients of parental care, and says:

'The care of the person of the child includes especially his upbringing, supervision, his education and training, as well as the determination of his place of residence.'

It is now necessary to look at the terms of the order of 19 March 1992 and of the application of 14 April 1992. The order of 19 March 1992 in its agreed translation provides, amongst other decisions of the court, for the award of the care of the person of the minor child of the parties temporarily exclusively to the applicant.

The application of 14 April 1992 sought at its conclusion:

'I request:

(1) The parental care of our son be awarded exclusively to me excluding the father, otherwise the custody be awarded to me as a more suitable person.

Contrasting the order with the application, it seems to me quite clear that what was granted to the mother exclusively on 19 March 1992 was the care of the person of J, which is one ingredient of the parental care exercised by parents jointly under Art 1510, unless terminated or frustrated by death or judicial order. The application of 14 April 1992 sought to extend the mother's exclusive rights and duties to cover the whole territory of parental care. Accordingly, prior to 19 March 1992, I conclude that the parents exercised Art 1510 parental care jointly. After 19 March 1992 the father's participation in the exercise of the rights and duties of parental care was limited by the exclusion of an important area of parental care, namely the care of the person of the child which was committed to the mother provisionally and exclusively by judicial order. So the crux question is whether the mother's exclusive rights and duties to the care of the person of the child defined by Art 1518 as including the determination of his place of residence extended to the selection of a place of

residence outside the jurisdiction of the Greek court. Mrs Kydonias contended that the right to determine the place of residence was a restricted right. Her evidence was not always consistent but at times she asserted that even within the jurisdiction of the Greek court the right of determination might be subject to a requirement to apply to the court for prior leave. At other times she asserted that, if there were a freedom of determination within Greece, it did not extend beyond the frontiers.

Mr Lionis contends that the right of determination of place of residence is unrestricted and the mother's action in determining to move J from Athens to Gloucestershire was lawful according to Greek law. When Mrs Kydonias was asked to substantiate her opinion with statutory provision or authority she accepted that there were no other relevant statutory provisions but contended that there were decisions of the Court of Appeal in Athens which plainly supported her opinion. When asked to produce such precedent she was unable to do so but asked for the opportunity to research the point overnight. Mr Lionis in his evidence said that Arts 1510 and 1518 were relatively recently enacted and that he did not believe there was any authority to support Mrs Kydonias' opinion. Obviously both experts were fully qualified and it was obvious that they got on well together. So I have absolutely no criticism of either. I am quite sure that each was doing their best to fulfil their responsibility to their respective client and to the court. I have a preference for the evidence of Mr Lionis who demonstrated greater consistency, greater clarity of analysis and reasoning, and greater lucidity of expression. But at the end of the evidence each accepted that the terms of Art 1518 did not expressly conclude the question and, therefore, in the absence of any decision of the superior courts in Athens, it must be taken that the point is as yet undecided in Greek law.

The opportunity given to Mrs Kydonias to substantiate her opinion with authority was until 12 the following morning, as she had asked. Nothing was forthcoming at that hour. It was not until the argument was almost concluded after 4 o'clock that she proffered the fruit of her research. She offered a case but it was agreed that the case had been decided prior to the enactment of the Articles with which I am concerned and related to some earlier Article of Greek law. She offered a textbook on Greek family law which supported her construction of the extent of the right to determine residence. But the author, in a footnote, acknowledged the existence of the contrary view. Accordingly, I can only reach the decision that the law of Greece remains uncertain in this area. It may be that the point will arise for decision in Athens. In that event it may be decided as Mrs Kydonias contends. Alternatively, the more liberal construction advanced by Mr Lionis may prevail. But, for the purposes of determining the father's summons of 19 October 1994, it seems to me that the onus must be upon him to demonstrate that the removal of 30 July 1993 was wrongful according to Greek law. The father has failed so to do and the conclusion must be that the summons fails on the crucial question.

However, since a good deal of time has been devoted to the trial of the subsidiary points, the three defences raised by the mother, I will shortly state my conclusion on those issues.

The first is the door to judicial discretion opened by the mother's contention that the summons is issued more than a year after the alleged abduction and J is now well settled in his new environment. It is common ground that the originating summons was issued some 15 months after the abduction. Mr O'Sullivan points to the extremely secure environment that the mother has created for J, with the aid of her parents. They have lived as a family in Gloucestershire and J has been given every opportunity to integrate socially amongst children of his own age. His Greek heritage has been nurtured in appropriate ways. The fact that the family has recently moved from Gloucestershire to Dorset does not interrupt the continuance of J's security. Miss Rylands relies heavily on the fact that only 6 weeks ago J

was introduced to a new home, a new community and a new prospective school. He is an only child. He is only 4. He has not yet embarked on education.

It is agreed that the relevant authority is a decision in the case of Re N (Minors) (Abduction) [1991] 1 FLR 413 which follows a decision of the Court of Appeal in Re S (A Minor) (Abduction) [1991] 2 FLR 1.

It seems to me that any survey of the degree of settlement of the child must give weight to emotional and psychological settlement, as well as to physical settlement. The distinguishing ingredient is the solidity and security of the arrangements that the mother has developed through taking advantage of family support. Her father is a recently retired land agent. Both he and his wife have been fully available to J as grandparents. In the perspective of a 4-year-old, 15 months is a very substantial experience of childhood and I am quite satisfied that the mother has demonstrated that J is now settled in his new environment within the terms of Art 12 of the Convention.

In relation to acquiescence, again it is agreed that the relevant authority is the comparatively recent decision of the Court of Appeal in Re S (Minors) (Abduction: Acquiescence) [1994] 1 FLR 819. The decision of Waite LJ reviews the earlier authorities, particularly the decisions of the Court of Appeal in Re A (Minors) (Abduction: Custody Rights) [1992] Fam 106, [1992] 2 FLR 14 and in Re AZ (A Minor) (Abduction: Acquiescence) [1993] 1 FLR 682. He concluded (at 831A-D):

'There is a common thread that runs through all those passages. It can be stated in this way. Acquiescence is primarily to be established by inference drawn from an objective survey of the acts and omissions of the aggrieved parent. This does not mean, however, that any element of subjective analysis is wholly excluded. It is permissible, for example, to inquire into the state of the aggrieved parent's knowledge of his or her rights under the Convention; and the undisputed requirement that the issue must be considered "in all the circumstances" necessarily means that there will be occasions when the court will need to examine private motives and other influences affecting the aggrieved parent which are relevant to the issue of acquiescence but are known to the aggrieved parent alone. Care must be taken by the court, however, not to give undue emphasis to these subjective elements: they remain an inherently less reliable guide than inferences drawn from overt acts and omissions viewed from the eyes of an outside observer. Provided that such care is taken, it remains within the province of the judges to examine the subjective forces at work on the mind of the aggrieved parent and give them such weight as the judge considers necessary in reaching the overall conclusion in the totality of the circumstances that is required of the court in answering the central question: has the aggrieved parent conducted himself in a way that is inconsistent with his later seeking a summary return?'

Applying that direction to this case it is to be noted that the father has not himself initiated any proceedings in Greece nor has he sought any relief within the proceedings initiated by the mother in the Greek family court. He was served with Children Act applications following the mother's arrival in this jurisdiction. He was served with Children Act orders. He has not sought to take any step within those proceedings. He was served with the petition for divorce. Eventually, he has filed an acknowledgement of service which has allowed the suit to develop to a decree nisi of dissolution. His case is that until he received the Greek translation on 4 August 1994 he was ignorant of the nature of the proceedings in this jurisdiction and that once he obtained that document he sought advice and, for the first time, learned of rights arising under the Hague Convention.

That is the subjective case that I am asked to evaluate. Miss Rylands says that she has found communication with the father in English difficult and unproductive. Mr O'Sullivan says that his instructing solicitor has had discussion with the father in the past and that it has not been particularly difficult. That he has some command of English is demonstrated by photographs which he sent to J in the spring of 1994 inscribed on the reverse in both English and Greek. I give due weight to the acts and omissions of the father objectively surveyed. It may be a finely balanced conclusion but I none the less am satisfied that the totality of the father's acts and omissions between 30 July 1993 and 19 October 1994 are inconsistent with an application for summary return and amount to acquiescence within the terms of Art 13 (a).

The final issue that has been argued is that there would be grave risk that J's return would expose him to physical or psychological harm or otherwise place the child in an intolerable situation. Obviously the case rests primarily on the evidence of physical abuse. The photographs illustrate very extensive bruising on both sides of the child's head. The medical reports are fully corroborative. Although obviously this issue has not been tried, I suspect that expert evidence would establish that the nature and extent of the injuries are inconsistent with the only innocent explanation that has so far been advanced by the father. Against that the injuries were sustained nearly 4 years ago and thereafter J has been properly protected by his mother either by establishing a residence in her homeland, alternatively by ensuring that contact in the father's homeland has always been in her presence. Accordingly, it seems to me that such risk as there may be of physical injury or psychological injury to J would be the consequence of unsupervised exposure to his father rather than of return to the father's homeland. Although final determination of the case raised under Art 13(b) would require a fuller trial, I would not be prepared to conclude that the case has been established on the documentary evidence so far submitted.

Looking to the realities, the future relationship between the plaintiff and J is likely to be dependent upon a proper investigation of the issue of risk and the consequent need for protection. For one reason or another there has been no inter partes investigation on oral evidence within the family justice system in either jurisdiction. The application of 21 February 1992 was a provisional order and resulted in a hearing which the father elected not to attend. Thus the provisional findings of fact were made without his case having been advanced. In this jurisdiction he has taken no part in proceedings other than to file the acknowledgement of service.

Whatever the outcome of this application, the father must surely have a natural desire to see his son, and it is perhaps surprising that he has not issued an application for contact in either jurisdiction. Heretofore, contact between the father and his son has either been on a voluntary basis or not at all. The father apparently relates financial provision to contact, making payments for maintenance only when contact is afforded. The father has been present throughout these proceedings. I imagine that it is not particularly easy for him to visit this country and I would hope that relationships between the parents would allow discussion to explore the possibility of him seeing his son before he returns home.

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