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[15/07/1994; High Court (England); First Instance]
Re G. (Abduction: Psychological Harm) [1995] 1 FLR 64, [1995] Fam Law 116

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IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

15 July 1994

Ewbank J

In the Matter of G.

Henry Setright for the father

David Harris QC and Edward Cross for the mother

EWBANK J: This matter was first before me on 24 March 1994. It is an application by a father under the Hague Convention on the Civil Aspects of International Child Abduction 1980 in relation to three children: A, who is 3 1/4, and twins, M and T, who are 1 1/4. The father and mother are English but went out to Texas soon after the marriage. The father and mother lived in Houston and the father is an assistant professor at the university there. The parties separated in November 1993. There was a petition for divorce issued by the father in December 1993. They reached an agreement in December 1993 that the mother would have the care of the children. She wanted to go back to England to see her family and agreement was reached that she should do that but return with the children on 7 February 1994. She did not return to the USA. The father issued an originating summons under the Hague Convention and that was the matter which came before me on 24 March 1994. It was conceded that the retention of the children in England was wrongful under the Hague Convention. It was the mother's case, however, that a return would expose the children to physical or psychological harm or place them in an intolerable position. She produced evidence from her doctor, who said that he found that there had been a deterioration in the time she had been in England. She was preoccupied by the thought of litigation and disruptive effects on her family and he thought that she had the biological signs of depression -- namely, poor sleep, poor concentration, poor appetite, variable bowel habit, and early and frequent waking. She saw Dr Caplan, who is a consultant child psychiatrist, at University College Hospital. He took the view that the mother was suffering from moderately severe reactive depression and he said in his report that if the mother were forced to return to the USA, her depression would be severely exacerbated.

I said in my judgment that the mother herself had caused the situation which now existed and although I did not doubt the view that the mother was suffering from a reactive

depression, I thought that she was unable to establish that the children would suffer harm if they had to return to the matrimonial home in Texas under the conditions that were being offered at that time. Therefore I made an order under the Hague Convention that the children should return to Texas.

The mother appealed against my order on various grounds. In addition she sought leave to put before the court a report from a consultant psychiatrist, Professor Cawley, who is a colleague of Dr Caplan. The Court of Appeal gave her that leave and read that report. Balcombe LJ, giving the leading judgment, quoted from Professor Cawley's report in these terms:

'The inference from my examination is that matters have deteriorated further since Dr Caplan's report of 22 March 1994. The mother is suffering from a severe agitated depressive state and she is now in considerable danger of becoming psychotic. That is to say, the balance of her mind is threatened by the conflicting emotions which I have described and there is a risk that her present understandable degree of depression and anxiety may switch into a state of frightening confusion and indeed loss of reason. In my opinion the mother is in urgent need of psychiatric treatment. I believe that such treatment should entail emphasis on skilled psychotherapy rather than drugs . . . I believe she is at the mercy of issues in her life over which she has no control, which are at the same time of high emotional intensity.'

In a later part of the report he said:

'She is severely depressed and agitated. Her mental health is at risk by the possibility of incipient psychosis. She needs psychiatric supervision.'

Balcombe LJ said this:

'One cannot ignore the fact that we are here dealing with a case of three very young children, the eldest of whom is only 3 years old and the two youngest are just over one year old, who are clearly both physically and even more emotionally dependent on their mother. If there is a degree of risk to the mother's mental health as expressed by Professor Cawley, then it seems to me impossible to say that there is not at least a case now for investigation under Art 13. There is a grave risk that the children's return would expose them to psychological harm or otherwise place them in an intolerable situation because of the risk that the mother may suffer a mental breakdown of the severity of which Professor Cawley speaks.'

They ordered that the mother could call one consultant to give evidence, that the mother should make herself available to a consultant psychiatrist nominated by the father and that the mother should be available to give evidence if the psychiatric reports seemed to require that that should be the case. They also ordered that there should be a rehearing by me on this issue, and that is the matter which has been dealt with yesterday and today.

In terms Balcombe LJ said that he allowed the appeal on the single issue of the possibility that the mother's return would expose the children to psychological harm or otherwise place them in an intolerable position. He said 'the mother's return' -- although the Hague Convention, of course, deals with the children's return -- because it is agreed and accepted that if the children go back, the mother will go with them.

Mann LJ said that he wanted to make it plain that if it were not for the letter from Professor Cawley, he, too, would have dismissed the appeal, but the letter in his judgment demonstrated a risk which needed investigation. Therefore I have heard the evidence of Dr

Isaacs, who is a consultant psychiatrist instructed by the father, and of Dr Caplan, who has come back in on behalf of the wife.

My attention has been drawn by Mr Harris to the earlier history of the mother, which he says indicates a psychological vulnerability to stress and problems. There was an occasion in 1989 when the father apparently knocked the mother down. The evidence about this is not very clear. However, it resulted, whoever was at fault, in the mother having panic attacks. The father says that at first he thought that it was just a depressive cycle, but upon consulting various medical friends they realised that it was agoraphobia. She refused to get proper treatment and had to cope with the problem alone. It seems now unlikely that it was agoraphobia, because it seems to be far more directed towards the father than to open places, but the fact is that she did have panic attacks, and the father and she were concerned about it.

Then after the twins were born, it was thought that she might have had post-natal depression. The father himself said that she needed urgent medical treatment and he describes her suffering from post-natal depression. Whether or not it was post-natal depression probably does not matter particularly. It is put by Mr Harris that these two incidents show a vulnerability in her mental state which leads her to be potentially liable to suffer.

The mother was seen by Dr Caplan for the second time on 27 April 1994 and by Dr Isaacs on 3 May 1994. Dr Isaacs has now retired as a consultant psychiatrist at the Maudsley Hospital where he was for some 30 years and he is in private practice in Harley Street. He describes how the mother found the situation in Texas increasingly difficult to tolerate. He says that she felt intimidated and threatened by her husband. When she came to England she welcomed the sympathetic support made available to her by her family, and he says that following her return to England she became increasingly anxious and apprehensive about being compelled to return to Texas. That, of course, is the basis of her case.

As far as the support from her family is concerned, the mother told me that her sister comes round every day to assist. Her own mother comes round every day at about 3.30 pm and her father comes round every day in the evenings. She said that she finds she needs their support in order to look after the children.

On examination, Dr Isaacs said that she was composed to begin with but she broke down showing signs of distress and tearfulness. He said that other than her obviously depressed moods there were no significant abnormalities and no features suggesting a psychotic disorder. He says that her depression is an understandable reaction to the difficulties which she has been experiencing. He points out that the basis of her claim in these proceedings is that her depression would become exacerbated and would have an adverse effect on the children's emotional development, and he says that he agrees that if the mother remains seriously depressed with sole responsibility for her children's care on a long-term basis, there is a theoretical possibility that this could have an adverse influence. But she gave the impression, he says, of being a caring, dedicated mother still able to provide more than adequate care, and he could see no medical contraindication to her returning to the USA. This, of course, is a very different view from the view expressed by Professor Cawley in his letter to the Court of Appeal.

Dr Isaacs agrees that the mother has now a moderately severe reactive depression, but he thinks that anybody in her circumstances would be likely to react in this way and he did not think that there was any justification for thinking that she might become psychotic. He felt that her depression was alleviated by the support from her family. He described her

symptoms as being lowness of feeling, lack of sleep, tearfulness, lack of concentration, weight loss, loss of self-esteem and irritability.

As far as loss of sleep is concerned, the mother's evidence was that she only sleeps some 2 hours a night. The doctors tend to think that that is a normal exaggeration of the lack of sleep which takes place when most people describe insomnia, but the fact is that she is still breastfeeding the twins on demand at night. They sleep in the same bed as her and she feeds them some four to six times a night. This in itself is abnormal and it is suggested that it may be a sign with the other signs of a troubled mind.

When the twins are asleep, she says that she often lies awake worrying about the children. She thinks that she has lost 2 stone in weight. She feels that she cannot go on. There is a reference to her seeing spiders in the night, or imagining that she sees spiders, and she told me in her evidence that things were worse than ever. She was a sad sight in the witness-box. She is very depressed and I had not any doubt when she said that she could not bear the thought of going back that she was being genuine. She told me that in the USA she was depressed and lonely and when she came back to England she was sleeping better and she found her own family a great support to her and enabled her to cope with the situation.

Dr Caplan saw the mother on 27 April 1994. This case really ought to have been heard in early May 1994 rather than the middle of July 1994; I am not really sure why it was not heard then. He found the mother to be not as bad as Professor Cawley found her to be, and it is said on behalf of the father that if one follows through the state of her depression and the state of litigation, there is a correlation between them - that is, just before the hearing before me she had a moderately severe reactive depression. She goes to the Court of Appeal not knowing what is going to happen but knowing that she has lost the case, and Professor Cawley finds her in a worse state. She wins in the Court of Appeal and then Dr Caplan finds her in a slightly better state. It is said that it is all to do with the litigation. I very much doubt if that is the correct analysis of the situation. What in my judgment is the distress causing this is the likelihood of having to go back to the USA, not the question of winning or losing cases.

Dr Caplan reported that he was of the view that the mother was suffering from a moderately severe reactive depression, slightly worse than he had seen before, but nothing like as bad as Professor Cawley reported. He said that Professor Cawley had found her to be in considerable danger of becoming psychotic and that he agreed with that view. Dr Caplan said that he was in complete agreement with Professor Cawley that should the mother be forced to return to Texas, there was not only a risk but the likelihood that she would become psychotic. Professor Cawley did not say that. What he actually said was that in his view there was a considerable danger of her becoming psychotic, but the difference in my view is insignificant. Dr Caplan stood by his view that there was a likelihood that she might become psychotic. By that he meant that the condition would become more severe and that the balance of her mind might be affected; it might be that she would be unable to look after the children. Dr Caplan takes the view that the exposure to seriously stressful situations and the removal of the support given by her family might cause a progression from the depression she suffers into a psychotic state. He thought that the closer and stronger the prospect, the worse she might become.

I have to consider the terms of Art 13. In the ordinary way the court would be bound to order the return of the children, but if the mother is able to establish that there is a grave risk that the children's return would expose them to physical or psychological harm or otherwise place the children in an intolerable situation, the court is not bound to order that.

It is necessary for her to establish a substantial risk of substantial physical or psychological harm.

Having heard Dr Capián and Dr Isaacs, I have to say that I find the evidence of Dr Caplan more convincing than that of Dr Isaacs. One is always concerned in a case of this sort as to what extent the court is being manipulated by a litigant who is determined to get her own way and will use whatever manoeuvres are available to try to force the court into a particular form of action. If I thought for a moment that that was this case, I would not, of course, pay any attention to the evidence that I received from the litigant in question, but I have to say that having seen and heard the mother and seen and heard Dr Capián, I am satisfied that this is a case where Art 13 does apply and that I am not bound to send these children back to the USA, and taking into account all the circumstances of the case, I do not propose to make an order that these children should go back to the USA. In my view, the effect of an order returning the children to the USA would be that there would be a serious deterioration in the mother's condition and the children would be affected accordingly.

There has been a final decree divorce in the USA dated 4 April 1994. It provided amongst other things, in effect, that the mother should have the custody or care and control of the children. The mother and father are English and the children have dual nationality. It is not as if I am forcing foreigners to come to England to litigate their disputes. The English court in my judgment is a perfectly satisfactory court to deal with English people with children of dual nationality. Accordingly the mother's application under Art 13 succeeds and the children will not be returned to the USA.

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