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[27/04/1989; Court of Appeal (England); Appellate Court]
Re G. (A Minor) (Abduction) [1989] 2 FLR 475, [1989] Fam Law 473

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

27 April 1989

Purchas, Croom-Johnson and Butler-Sloss LJJ

In the Matter of G.

John Griffith Williams QC and Debora Price for the mother

Anita Ryan QC and Anna Pauffley for the father

PURCHAS LJ: This is an appeal by the mother, by leave of the trial judge from an order of Thorpe J made on 17 April 1989. That order was made on the application of the father. It provided that upon certain undertakings being given by the father, to which it will be necessary subsequently to refer in more detail, a minor, the issue of the mother and father (to whom I shall refer as G) be returned to Australia as soon as arrangement can be made for such return. The undertakings, which are recorded in the order itself, were as follows:

(i) Not to enforce the order of the court of summary jurisdiction at Alice Springs, Australia dated 17 February 1989 pending the inter partes hearing in the Australian Family Court;

(ii) not to institute any contempt proceedings against the defendant on her return to Australia;

(iii) to make available to the defendant and the minor, G, the exclusive possession of the accommodation in the State of South Australia;

(iv) to pay the rent, electricity, gas, fuel costs and house and contents insurance on the said premises;

(v) to provide transportation for the said minor to and from his school;

(vi) to pay the weekly sum of $60 Australian to the defendant for food and household necessities;

(vii) to offer mirror undertakings to those herein in proceedings in South Australia;

(viii) not to remove or attempt to remove the said minor from the care and control of the defendant pending the determination of the issue in South Australia;

(ix) to take no steps to have the defendant's passport impounded in Australia;

(x) to use his best endeavours to ensure that an airticket to Australia is provided for the said minor.

On those undertakings the return of the minor to Australia was ordered, to be effected as soon as arrangements could be made for such return, and in any event within 10 days, together with an undertaking by the mother to file a notice of appeal within 48 hours, and to apply for an expedited hearing in the Court of Appeal. On those undertakings leave to appeal was granted.

For the purposes of this judgment I can deal with the history quite shortly. G was born on 28 March 1979. He was the child of the parties to the application, who were not, however, married at that time; they subsequently married on 28 October 1983. They lived in England for about a year until October 1984 and then emigrated to Australia; G would then have been about 5 1/2 years of age. After arrival in Australia the mother, the father and G lived at various addresses, starting off in Adelaide and then later they got employment together in Alice Springs where they established their final home.

There is evidence that in the autumn of 1988 the mother came to this country on holiday. Here she met a gentleman with whom she fell in love and with whom she wishes to live when these matters are resolved. She returned to Australia; she confided in her son, then aged 9, that she was going to leave the father without telling him, so the child then became privy to a conspiracy.

According to the mother's affidavit the marriage was not a happy one while the parties were in Australia. She deposes in her affidavit to a deterioration in the relationship between G and his father; she makes critical assertions of the father's behaviour, not only towards G but also towards herself which she alleges, in a petition which she filed in this country, led to the irretrievable breakdown of the marriage. The father has not had an opportunity - nor has there been any necessity for him to do so in these proceedings - either to refute or to agree with these allegations. As Thorpe J commented in one of his judgments, these are all matters which will have to be dealt with in a proper inter partes hearing.

The mother left, leaving a short note behind, taking G with her to the airport and, using funds which had been obtained by the gentleman to whom I have referred already, flew to this country. The note did not indicate where she was going; it merely said that after a lot of careful thought and consideration she felt that she could no longer spend the rest of her life with the father. That note must be read in the context of the events which I have related, which occurred during her visit in the autumn of the year before; but it is a note which says that she felt that there was no future, and she says:

'I am really sorry to take G away from you but I will make sure he stays in contact with you, I am also very sorry for the way I have had to do this but I really had no choice.'

To the father this came as a complete shock, but he acted quickly. I am citing now from the first judgment of Thorpe J delivered on 14 March 1989. He says that the return to this country

'was effected on 15 February 1989 when the wife flew to London with G. The plaintiff's reaction seems to have been immediate, for by 17 February he had obtained an order in the court of summary jurisdiction at Alice Springs, that he have the sole custody of G until further order.'

He obtained that order as a result of an affidavit which he swore on that date, 17 February 1989, and which was before Thorpe J and is before us today. He denies that there were any difficulties between G and himself, asserting that there was a close relationship between them. So those are matters which are all in issue.

Having obtained his order in the court in Alice Springs, the father sold the home there. He stayed first of all with relatives, but then acquired accommodation in South Australia which is referred to in the undertakings which I have recited. He issued an originating summons under the Child Abduction and Custody Act 1985, which was the basis of the proceedings which came before Thorpe J. The mother opposed the application on two general grounds, firstly that the order should not be made because there would be a grave risk of psychological harm to G in the event of his enforced return; and she relied upon the provisions of art 13 of the Hague Convention, which is incorporated in our law by the 1985 Act. Both the UK and Australia are contracting parties to the convention. The second ground was that the order should not be made if it is shown that G objected to his return and has attained an age and degree of maturity at which it was appropriate to take account of his views. That is another part of art 13.

After carefully considering the relevant features, Thorpe J ruled against the mother on both counts. However, his decision on the first ground, art 13(B), depended on certain undertakings being given in order to secure that G was not removed from the care of his mother in accordance with the course adopted by this court in the case of Re C (A Minor) (Abduction) [1989] 1 FLR 403. Mr Williams, who has appeared for the mother, has emphasised that that case, and therefore the possibility of giving undertakings, arose during the course of argument before Thorpe J, and therefore there was of course no opportunity to take instructions from the father, who has remained in Australia throughout these proceedings. So, Thorpe J having delivered his judgment, the matter was adjourned for the appropriate authority to be given for the undertakings to be offered to the court and for the terms of those undertakings to be worked out between the advocates representing the parties.

At this point, and before agreement could be reached, there was an intervention by the central authority in the form of the Attorney-General for Australia, who had, it is understood, been anxious about the course taken by this court in Re C (above) and, as a result of his attitude, those acting for the father, on the father's instructions, caused the advocates in this country to inform Thorpe J that the father was not prepared to give the necessary undertakings.

As a result of the father's decision, which was directly related to the attitude taken by the central authority in Australia, the matter came again before Thorpe J on 20 March 1989, when the position was outlined to the judge. He formed the view that: 'Were an order made without safeguards, the consequence would be that upon arrival in Australia G would have to cope with not only an immediate move from the daily care of his mother to the daily care of his father, but also adjustment to a new home in a new community approximately 2,000 km from his old home and school in Alice Springs. Contact with his mother pending further proceedings and orders might be limited or even non-existent.

Those possible developments, in my judgment, constitute a grave risk that return would expose G to psychological harm and accordingly, without assurances properly framed as undertakings to this court and reciprocally given to the appropriate court in Australia, I am not prepared to order his return.'

The matter did not end there. The order that was made at that stage reflected the view formed by the judge as the result of information which was given to him, that the Australian central authority seemed to see this case as a suitable vehicle for onward progress to the House of Lords, so that the course taken in the case of Re C could be investigated, or considered, in the highest court in this land. Accordingly, the order that Thorpe J made on 20 March 1989 provided that there should be no order for the return of G; he granted a certificate pursuant to s 12 of the Administration of Justice Act 1969, enabling the case to go immediately to the House of Lords, and he released the papers from privilege for the purpose of proceedings in the Australian courts.

After that order was made, it appears that the Attorney-General had a change of view, which was reflected by the attitude taken by the father in relation to the undertakings which had by then been formulated between the parties so as to achieve the wishes expressed by Thorpe J in his first judgment. The father then felt free and willing to give those undertakings and he remains of that mind today. Miss Ryan, who appears for him, confirms that he is prepared to honour the undertakings which he has given, and to offer equivalent undertakings, to the court in Australia.

As a matter of record, since the matter started in February 1989 in the summary court in Alice Springs, the case has been transferred to the Family Court in Adelaide which, without any criticism of the court in Alice Springs, I think would appear to be the appropriate and relevant court in Australia which should deal with the issues raised between the parties in relation to the child. It was therefore only the unfortunate delay, caused in the manner which I have described, which converted this case from what I would respectfully have said was a classic convention case, and indeed it was conceded on behalf of the mother before Thorpe J that it was such a case. She relied purely upon the provisions of art 13, which provides that the courts in this country are not bound to order the return of a child on the ground that 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 provisions of art 13 are clear. It is merely a discretionary release from an otherwise absolute obligation to return the child if the removal from his country of residence is, within the terms of the convention, to be described as 'wrongful', and that has not been an issue in this case; it is conceded that the removal was wrongful, but reliance has been placed upon art 13 to do two things, first of all, to relieve the court of the obligation to order the return, but also to submit to the court that in exercising its discretion it should avail itself of that release under art 13 not to order the return of the child.

When the matter came before Thorpe J again, there were five objections to the order proposed by the judge. I do not consider it necessary to consider the case presented on behalf of the mother in any detail at all, but merely to turn to the judgment delivered on 17 April 1989, which is the third and last judgment of Thorpe J with which this court is concerned. Amongst the submissions that were made was the submission that the father had been changing his position, not once but twice; that the court was functus officio and could not go back on the order which it had made on the second occasion, and that there were difficulties about the accommodation in Australia.

In dealing with these matters, Thorpe J said this:

'On 14 March 1989, this was not perceived as a test case. It emerged as a test case on or about 15 March. It blossomed as a test case at the hearing on 20 March. It withered as a test case on 30 March, and accordingly the application is renewed on precisely the same footing today, 17 April, as it stood on 14 March. That is to say, a straightforward abduction case

where the path of the child's return is smoothed by undertakings from the husband; that the ex parte order will not be enforced against the returning parent, that premises and finance will be made available to the returning parent to enable her to exercise her primary caring role in the foreign state.'

Then Thorpe J deals with the various objections, which number five, and as I have said I do not propose to go into those in any detail.

He came to his conclusion, however:

'I propose to order the return of G on undertakings which I require to be carefully drafted and incorporated in the order. I am told by Mr Clarke that the promises offered by the husband, he gives in Australia as well as England, and it is on this basis that I order his return. This is not a case in which the husband is saying one thing in this jurisdiction and cunningly preparing the opportunity to say something else in the other jurisdiction. His position will be consistent in both.

I accept that assurance, and upon that assurance the return should be as soon as arrangements can be made.

It is very unfortunate that policy considerations within the A-G's department have delayed what would otherwise be a return one side or another of the Easter holidays.'

I do not propose to read any further.

In this court Mr Williams has very ably and attractively argued under two main heads, although his notice of appeal contains more grounds. He summarised those grounds thus. The first submission was that the judge having found that there was a grave risk of psychological harm, it was wrong for him to rely upon the mitigating effect of undertakings being given which could not be enforced by this court in Australia. Secondly, that the judge was wrong not to have taken into account the expressed wishes of G not to return to Australia. It is convenient to deal with each of those submissions very shortly.

The submission that the undertakings are not a vehicle open to the judge in exercising his discretion to order the return of the child notwithstanding his finding that brings it within art 13 is a difficult submission to sustain. Mr Williams frankly accepted that once it was established that steps could be taken to ensure that the mother returned together with the child and retained the care and control of the child until the issues can be brought before the appropriate court in Australia, much of the force of his first submission was lost. To my mind the passage that I have just read from the third judgment indicates that this was precisely what Thorpe J had in mind. It is said, and I accept without reservation, that that was not the way in which the parties, having listened to the judgment, assumed Thorpe J's intentions, and that the possibility of a return of G separately from his mother was something that clearly was being discussed after the judgment had been delivered, between the parties. When delivering this third judgment, the judge had really returned to the matters that he had considered on the first occasion, which led him to take the decision of returning G together with those safeguards.

Thorpe J dealt with both aspects of the case as follows:

'I take those two submissions in turn [those are the two general heads] - first, the submission that there was grave risk of psychological harm to G in the event of his return. There can be no doubt, in my judgment, that this is precisely the sort of case that the international convention was designed to meet. The suggestion of psychological harm to G is the one that

is inevitably advanced by the abducting parent, in an endeavour to justify his or her course of action and in an endeavour to hold the fruits of their unilateral strategy. If I were to find psychological harm or the risk of grave psychological harm in this case, the whole thrust and purpose of the convention and the Act of Parliament would be effectively frustrated. The mother, it is true, asserts that G is essentially bonded to her. It is true that she asserts that the father has been violent as a husband and heedless as a father. It is true that she asserts that the husband has, as a result of her flight, liquidated the home. But those are precisely the sort of allegations that call for investigation in a merit hearing, and it is abundantly plain to me that any merit hearing should take place in the jurisdiction from which the abduction occurred.'

The cause of the judge's change of heart on the second occasion is to be laid at the door of the decision not to offer the undertakings which the judge considered were essential to ensure that any harm that would otherwise be caused to G by the separation from his mother in the circumstances which prevail in this case would be prevented. With respect to Mr Williams, I cannot follow his submission that the judge was not able to take this course - to take into account the presence or absence of the undertakings in deciding whether or not to order the return of the child to Australia notwithstanding art 13. I find no inconsistency of any kind on this aspect of the case between the judge's findings and attitude on the first occasion and those on the second occasion, and indeed his return to his original position on the third occasion.

Turning to the second of the submissions, the judge said this:

'The second matter upon which the mother seeks to rely is the wishes of G. I approach that line of argument with some caution. It seems to me almost inevitable that G must have been thoroughly upset by these dramatic happenings in his young life. I suspect that he may be thoroughly confused as well. It is well known that children are inclined to be supportive of a parent with whose aspirations they identify, and it is not unknown for children to say one thing to one parent and to express a different preference to the other. Any assessment of G's true wishes and feelings is better conducted in a calm and hopefully profound investigation by an experienced professional who would see him in the presence of each parent as well as on his own, and thus gain the opportunity of gauging his relationship with each and the independence of any view which he expressed on his own. I have to have regard to the fact that G's worldly understanding is the worldly understanding of a 9-year-old, and it must be very doubtful whether that is sufficiently broad to comprehend all the complex factors which will contribute to any decision taken at the end of a merit hearing as to where his interests lie and how his welfare is best promoted.'

Mr Williams submitted that the judge should have acceded to the request made by counsel appearing for the mother, either to interview the child himself, or to cause him to be interviewed by a court welfare officer either then and there or at a more leisurely pace, there being at that stage some time within the 6 weeks envisaged by the convention. In failing to do that, Mr Williams submits, as indeed he must submit in order to succeed in this court, that the decision not to investigate G's wishes was wrong in principle and a course which the judge was not entitled to take in all the circumstances of the case.

I would be reluctant to lay down any hard and fast rule relating the age of the child with the wording and requirements of art 13, which I cite for ease of reference:

'In considering the circumstances referred to in this Article the judicial and administrative authority may also refuse to order the return of a 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 his views.'

That is a very broad mandate in the exercise of discretion; it is quite clear that it is for the judge to assess from all the evidence available to him whether or not a particular child has attained the age and degree of maturity at which it is appropriate to take account of his or her views. That is precisely what Thorpe J has done; in the passage which I have just read, he has assessed not only the maturity and experience of the child, but he has also taken into account - as would be quite clear to him, a judge of very great experience in this field - that an interview with G would almost certainly be non-productive for the reasons that he has given in the part of the judgment that I have just recited. I find it quite impossible to accede to a submission that the judge can be criticised in his decision not to see the child himself, or indeed to cause him to be examined, or interviewed or assessed by a welfare officer. It would be quite wrong for this court to interfere in the exercise of the judge's discretion in circumstances of that kind.

So in my view, in the first judgment Thorpe J dealt accurately, skillfully and properly with all the aspects of the case which were in his charge for decision, and I can find no reason in principle which would enable this court to interfere with that decision.

We have, however, considered whether or not certain aspects of the order ought to be made more clear. In saying this, I am in no way critical of Thorpe J's order, but so as to make quite clear what I believe was always his intention, I would propose that certain adjustments should be made and other undertakings sought, certainly in two cases from the mother, so as to arrive at what I would feel is the correct method of achieving the return of the child and the mother to the jurisdiction of the court which should be seized of the problems arising in this family, namely the Family Court in Australia. In view of certain things that have been said, I am anxious to emphasise that nothing done in this court - nor indeed, as I understand the judgments and orders of Thorpe J - is directed to achieve anything other than the return at the earliest moment in time of the matter to the court which has, and which should have, jurisdiction to deal with the problem. The orders made by Thorpe J - and indeed, as adjusted in minor details in this court, as to which I shall come in a moment - are in no way in derogation of the jurisdiction exercised under the convention and according to the domestic law of Australia in the Australian Family Court. In my judgment it would be quite wrong for any order of this court to attempt to influence the proper resolution, as an inter partes matter between the parents, in the Australian court dealing with the future of G. In considering the welfare of the child in accordance with the requirements of art 13, the court must have regard to the ex parte nature of the proceedings in the court of summary jurisdiction in Alice Springs.

Having said that, I would support the undertakings which were received by Thorpe J and which have been re-offered to this court by Miss Ryan, subject to a minor adjustment in subpara (vii). With respect to the draughtsman (probably not Thorpe J) I would amend the words 'mirror undertakings' to 'the same undertakings'; and in sub-para (viii), in order to protect the position of the father, because we feel that the undertaking that was offered was too wide, add the words 'otherwise than in pursuance of an order of the Family Court in Australia'. The whole burden and purport of the order is to achieve the inter partes hearing in the court in Australia without previous prejudice ensuing from the order properly obtained and granted by the summary court in Alice Springs on the ex parte application without an opportunity for that court to hear the mother or consider the question in any detail.

We are not prepared to differ from Thorpe J's view that until the matter can be properly litigated before the Australian court the welfare of G demands that he should remain in the de facto care and control of his mother. That involves that they should travel on the same plane together to Australia. I understand that there are a number of solutions by which that objective can be achieved; it would not be appropriate in an order of this court to tie the hands of the parties involved, but to accept from the mother the undertaking which has been offered on her behalf by Mr Williams that she will return, and will accompany, the child to Australia. We are concerned with protecting the position of the child during the short period which is necessary to raise the funds and obtain the tickets for the two, and formally the mother undertakes, if it is open to her - and we believe it is - to issue an originating summons in wardship, since the issue under the 1985 Act has now been determined by this court, and that that application in wardship should seek, and hopefully be granted, that she should have the care and control of G until he and she board the aeroplane in compliance with the undertaking that she has given to travel to Australia and upon which occasion it would be appropriate for the order to provide that the child should forthwith be dewarded. In that way I hope that we shall be able to provide for the speedy resolution of this matter and for the return of G and his mother to the proper jurisdiction.

Subject to those minor adjustments, I would therefore dismiss this appeal.

I would add to the order that the father should have liberty to apply to a judge of the Family Division if there is any difficulty or delay in carrying out the orders made by this court under the 1985 Act.

Later:

I have omitted two matters from my judgment. First of all, I should say that the order must be amended in the way that we discussed earlier; subject to anything either of you might say, it should now read:

'It is ordered that the minor, G, be returned to Australia as soon as practicable, subject to arrangements being made for the passage of the minor and the defendant to Australia together.'

The other matter which I omitted is the undertaking which was offered and accepted, that those instructing Miss Ryan will co-operate in any reasonable manner that they can, to achieve the joint passage to Australia.

CROOM-JOHNSON LJ: I agree.

BUTLER-SLOSS LJ: I agree with the judgment of Lord Justice Purchas.

Thorpe J, at the end of his first judgment, said:

'I have reached the unhesitating conclusion that the mother's precipitate and unilateral actions are precisely the mischief at which the convention and the Act of Parliament are aimed, and that the order must be an order for return on a date which I will fix . . .'

In my judgment it is important that this child should return to Australia as soon as possible, since it is admitted that his retention is in contravention of art 3 of the Hague Convention. The only issue which arises is under art 13 on two grounds, the grave risk of psychological harm and the objection of the child to returning to Australia. The judge was entitled to come to the conclusion in the summary proceedings that the evidence before him of G's views was sufficient and that his worldly understanding was not sufficiently broad to comprehend all

the complex factors of this case. It is a sad fact that this 9-year-old boy was a party to the deceit on the father and the secret plan to flee to England. The value of his view while in his mother's sole care in these circumstances was a matter which the judge was entitled to take into account. This he did, and in my view in doing that he cannot be faulted.

I agree that the judge correctly exercised his discretion, being satisfied that on the giving of a suitable undertaking by the father, grave risk of psychological harm did not arise. As he found, the Australian Family Court is undoubtedly the appropriate court to decide the future of this boy. The undertakings given by the father, accepted by the judge and as amended by my Lord in this court, are not in any way designed to circumscribe or influence the hearing by the court of competent jurisdiction, the Family Court in Australia.

Since the purpose and extent of the undertakings which were given and accepted in the decision in Re C (A Minor) (Abduction) [1989] 1 FLR 403 in this court may have been misunderstood, I refer to two short passages from the judgments. On p 413F the Master of the Rolls said:

'Save in an exceptional case, our concern, ie the concern of these courts, should be limited to giving the child the maximum possible protection until the courts of the other country - Australia in this case - can resume their normal role in relation to the child.'

Then, from my own judgment, on p 409G:

'These undertakings cover, as far as I can see, all the entirely justifiable concerns of the judge. It will be a matter for the Australian Family Court as to with which parent in the future the child shall make his home, and nothing that I say in this judgment should be taken as in any way prejudging or affecting the decision that the Australian court may feel it necessary to make.'

In carrying out the Hague Convention, this court has the duty under art 13, as indeed the Australian court would have if a similar application were made to the Family Court, to consider the welfare of the child. The undertakings in this case are designed to protect the child from the grave risk of psychological harm as set out by Thorpe J in his second judgment until, and only until, an application can be made to the Australian court.

I agree that this appeal should be dismissed, upon the undertakings that have been given.

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