---

http://www.incadat.com/ ref.: HC/E/UKe 118
[29/07/1992; High Court (England); First Instance]
Re R. (Wardship: Child Abduction) (No. 2) [1993] 1 FLR 249, [1993] Fam Law 216

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

29 July 1992

Sir Stephen Brown P.

In the Matter of R.

Marcus Scott-Manderson for the mother

Philip Cayford for the father

SIR STEPHEN BROWN P: The court has before it an originating summons issued by the mother of a little girl 'E'. The mother and father of this little girl were never married. She was born on 9 June 1987 and is therefore now aged 5. The mother's application is brought before the court pursuant to the provisions of Sch 1 to the Child Abduction and Custody Act 1985, known as the Hague Convention. The mother seeks an order for the return of E to the jurisdiction of Ontario in Canada following her removal by her father from Ontario to England on 28 June 1992.

The circumstances which give rise to the present application are unusual in certain important respects. As I have said, the little girl was born on 9 June 1987. The mother and the father had, until at any rate last summer, both always resided in England. The mother, I believe, originates from Northern Ireland and the father from England. They had an association from about 1986 until the month of July 1991. They lived together in the father's home but never married and R was born on 9 June 1987.

The mother left the family home on 14 July 1991 and on 21 July 1991 she left with E to go to stay at the home of her sister in Ontario. She had plainly made preparations for going to Canada, it would appear, on a permanent basis.

On 15 August 1991 the father issued an originating summons in wardship in this jurisdiction in the Northampton District Registry. On 25 September 1991 his Honour Judge Crawford QC, sitting as a deputy High Court judge, made an order in wardship on the ex parte application of the father: (1) that the wardship should continue; (2) that the defendant, ie the mother (defendant in the wardship proceedings) should return the minor to the jurisdiction

of this court forthwith; (3) that the plaintiff father should have the care and control of the minor subject to the provisions stated in para (4) of the order. Paragraph (4) stated:

'Upon the plaintiff undertaking

(i) to provide the defendant and the minor with open return air tickets from Canada to England; and

(ii) to provide at his expense reasonable temporary accommodation for the defendant and the minor in Northamptonshire or Warwickshire permitting the minor to attend Holmfield School as already agreed pending the outcome of these proceedings;

And upon the defendant returning to England with the ward . . . within 28 days, then care and control to the defendant . . . [ie the mother] until further order.

(5) The plaintiff to have reasonable access to the minor while in England.

(6) No order as to costs.'

At the end of September 1991 the father visited Ontario and saw the minor on that visit. On 30 September 1991 the wardship proceedings were served upon the mother and on 31 October 1991, District Judge Goodman gave directions in the wardship summons at a hearing which was conducted inter partes, that is to say, the mother and the father both being represented, although the mother was not herself present. The district judge ordered:

(1) that a summons be relisted before his Honour Judge Crawford QC at the earlier available date, with a time estimate of one day;

(2) that both parties should attend to give evidence;

(3) that costs should be in the cause; and

(4) that the defendant - ie the mother to the wardship summons - should file a full affidavit within 21 days.

There were adjournments of the hearing of the summons on 19 November 1991 and on 23 December 1991. So that at the end of last year the wardship summons stood adjourned, meanwhile the orders made by his Honour Judge Crawford at the original hearing in September 1991 remained in force. They had not been set aside.

The mother then applied to discharge the wardship and her application came before Booth J sitting at Birmingham in February 1992. The mother herself was not present, but was represented by counsel. On 26 February 1992, Booth J gave judgment discharging the wardship and setting aside the originating summons. That decision was apparently based upon a finding that the minor was no longer habitually resident in England at the time when the wardship summons was issued in August 1991. Accordingly, Booth J discharged the wardship and dismissed the originating summons.

The mother, who was still in Canada with her daughter, then issued custody proceedings in Ontario on 27 March 1992. However, before that step was taken by her, on 19 March 1992 the father gave notice of appeal from the decision of Booth J of 26 February 1992. The Court of Appeal heard the father's appeal in June 1992 and on 4 June 1992 the Court of Appeal allowed the father's appeal. It set aside the order of Booth J and reinstated the wardship summons (see Re R (Wardship: Child Abduction) [1992] 2 FLR 481).

The mother's summons which she had issued in Ontario on 27 March 1992 came before the Ontario court (provincial Division) on 8 June 1992, 4 days before the Court of Appeal had allowed the father's appeal from Booth J's decision of 26 February 1992. This court has the advantage of having a transcript of the proceedings before His Honour Judge kent in Ontario on 8 June 1992. Both the mother and father were present at the hearing and were represented by counsel. The judge was informed of the circumstances which had given rise to the hearing before him and was told by counsel for the mother, at the outset, of the proceedings which had taken place in this jurisdiction in England and that the order, originally made by Booth J determining the wardship had been overturned and, as counsel said to him:

'Therefore, the ex parte wardship order has been reinstated. At this point in time, it appears that the merits of the wardship will be either dealt with in England and/or [the mother's] solicitors may attempt to appeal the last finding if that, in fact, is possible. In any event, [the mother] and her daughter have been residing in Ontario since July of last year. She is a resident now of Ontario. She's a landed immigrant. The child is enrolled in school and we now have a situation, we have a court in England that may take action in dealing with wardship and care and control issue of a child who has been here for approximately one year.'

The judge faced with this situation indicated that he felt some difficulty in not having before him a copy of the order of the Court of Appeal which had been made only some 4 days earlier, and, in the course of the reasons for judgment which are recorded in the transcript before me, he said:

'Again, the child does have a substantial connection with England. I'm not sure what the intention is in terms of when and what order we're looking at here, so I have some questions about that.'

Then he went on to say in para 4:

'That the child has a real and substantial connection with Ontario. I think over the expiration of a period of a year, during which the mother has established reasonably permanent presence in Ontario, that there is a real connection with Ontario. Is it substantial? I think on the affidavit evidence, it appears to be not insignificant and in that sense, substantial.

5. That on the balance of convenience, it's appropriate for the jurisdiction to be exercised in Ontario. Well, I'm certainly not prepared to conclude that the ultimate determination in this matter on the balance of convenience should be made in Ontario, but I am able to determine that for interim purposes of providing some kind of stability and ability as well, to defer to the ultimate decision being made in Great Britain. If that's the way the matter ultimately proceeds, then I think that isn't interfered with by an interim court order here.

So, I'm going to make an order for interim custody of the child in favour of the applicant [ie the mother] without intending to express an opinion on those matters which are at issue in the ultimate determination to be made. As well, as Mr Forman [ie counsel for the father] has pointed out, this would be subject to the clarification of the position which, in fact, has been taken by the English courts, since nobody has a copy of the decision. Again, I am satisfied, as well, that the father should have interim access.'

Then he went on to say:

'Now, I've been given an undertaking before the court that the father does not intend to remove the young person from the jurisdiction . . .', and he asked for confirmation of that position. In the result he then adjourned the hearing until 30 June 1992 and in the interim made what he termed an interim order for custody with access to the father and, as I understand it, he made an order that neither party should remove the 'young person', as he referred to the minor, from the jurisdiction. He had been asked to make an order rather than to accept an undertaking by counsel for the father. That was on 8 June 1992.

On 28 June 1992 it appears that the father did not return the minor to the mother after a period of agreed access, but in fact left Canada and came to this country via the USA.

The matter came back before Judge Kent on 30 June 1992 as he had ordered and on that occasion he was faced with a situation where the father had apparently disobeyed the order of or breached the undertaking, whichever it had been, made or given to the court and had left the jurisdiction with the minor. So the judge dealt with what he perceived to be a serious contempt of the order of the court, which he said was an attempt to maintain the status quo, an orderly situation providing the child with the essential security that the child required while the merits of the matter were determined:

'I think on its face this kind of kidnapping, there is no other word for it, was at least in potential very dangerous to the child's best interest and mental health.

It is obvious that if there is to be a change, and I would think the courts in the UK would feel exactly the same, the change should be done in an orderly and appropriate manner, not in this obviously calculated and perverse kind of way. So, the essential components of the order sought will be granted.'

He then ordered that the mother should have custody of the minor and also ordered that the father should return the child to the jurisdiction. He made other consequential orders and, furthermore, ordered that the father should show cause why he should not be committed to gaol for contempt of the order of this court. That was on 30 June 1992.

On 7 July 1992 the originating summons under Sch 1 to the Child Abduction and Custody Act 1985 was issued in this jurisdiction and pending the hearing of the summons Johnson J made an order prohibiting the father (the defendant to this summons) from removing the minor from England and Wales and also from removing the minor from the address where she was resident at the time of the service of the order. He also ordered him to deliver up any passport in respect of the child. The matter was then adjourned and came on for hearing before this court yesterday. The mother submits by counsel that this is a plain case of a breach of the provisions of the Hague Convention on the Civil Aspects of International Child Abduction 1980 and that, accordingly, this court should order the immediate return of the child to the jurisdiction of the court in Ontario. She contends that the removal by the father of the child from Ontario on 28 June 1992 was wrongful within the terms of Art 3 of the Convention. Article 3 provides:

'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 the 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 mother contends that the child was habitually resident in Ontario immediately before the removal. She relies upon the fact that the child had been granted immigrant status, a matter which is entered in the child's passport, and had in fact been in Ontario for about 11 months prior to her removal by the father to England.

She alleges that she had rights of custody which derived from the interim order made by the judge in the court in Ontario. She submits that there was a wrongful removal within the meaning of the Schedule and, accordingly, Art 12 applies. Article 12 provides:

'Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the 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.'

So it is submitted on behalf of the mother that the court is under a mandatory duty if there is established a wrongful removal within Art 3 to order the immediate return of the child to Ontario. That, it is acknowledged, is subject to the proviso, if I may so call it, contained in Art 13 to which I shall refer in due course.

However, the father submits that before the child went to Ontario and before the order was made by the court in Ontario as an interim order there was in existence the order of this court in wardship making this child a ward of court and ordering that the father should have the care and control of the child pending the substantive hearing of the wardship summons.

It is also contended that as a result of the order made by District Judge Goodman in October 1991 the mother was under a duty to attend the hearing to give evidence and to file a full affidavit. It is contended that the order made at the ex parte hearing by Judge Crawford QC on 25 September 1991 was still valid and outstanding. It provided that the mother was under a duty to return the minor to the jurisdiction of the court in this country forthwith.

There were, therefore, submits the father, not merely pending but in effect 'part-heard' wardship proceedings in this jurisdiction and, he submits, that it is quite inappropriate that an order for the return of the child to another jurisdiction should be made whilst the matter is within the purview of this court in the exercise of its inherent powers over its ward. Accordingly, he submits that it would be wrong to make an order for the return of the child to Canada.

He further submits that it is not established by the mother that the removal by him was 'wrongful' within the terms of Art 3. He submits that it was not in breach of rights of custody attributed to the mother under the law of the State in which the child was habitually resident immediately before the removal because the mother had no rights of custody at that stage following the order of the wardship court in England, but insofar as the order was made in Canada as an interim order, he submits that if that is sought to be relied upon within the terms of Art 3, this child cannot be considered to have been habitually resident at that time in Ontario.

He submits that although the child can be considered to have been ordinarily resident, that is to say having its day-to-day existence in Canada, nevertheless, it was not residence which could be considered to have any degree of permanency because the mother was subject to an order of the wardship court in England throughout the whole period after the Court of Appeal had set aside Booth J's judgment to return the child to England. So the father says it

is not possible to regard the child's habitual residence as being in Canada at this particular time.

On the face of it this court is confronted with an unusual situation. It is quite plain that the father broke a clear understanding to the judge in Ontario. This court is not directly concerned with the matter of that breach of undertaking. That is and will remain, a matter for the court in Ontario. It would appear that prima facie at any rate he is in contempt of the order of that court. This court has to consider the jurisdictional situation. The child is now within this jurisdiction. There are part-heard continuing wardship proceedings in being in relation to this child. It so happens that both the mother and the father are now present in England, but that in a sense is not determinative of the issue that I have to decide today. The question is: Has the wrongful removal been made out within the terms of the Child Abduction and Custody Act 1985 and ought this court to order the return of this child to the jurisdiction of Ontario?

I have come to the conclusion that the jurisdiction of this court must take precedence. This minor is a ward of this court. The wardship came into existence as long ago as August 1991. In breach of the order of this court this child had been allowed by the mother to remain in Canada and had not been returned to the jurisdiction. Can it then be appropriate for the mother to seek to rely on the provisions of the Hague Convention to overcome her own disobedience to the order of this court? It seems to me that that would be wholly wrong.

The judge in Ontario was faced with a difficult situation when he did not have before him the details of what had transpired in the court of Appeal 4 days before the hearing before him. He endeavoured to make a temporary settlement of the position. It is, to say the least, unfortunate that the father took matters into his own hands. That is a matter which he will still have to answer for in any event to the court of Ontario if and when he returns to Ontario. But the position in my judgment is that it is not established by the mother to my satisfaction that this child can be considered to have been habitually resident in Ontario immediately before her removal by the father. I say that, notwithstanding the documentation and notwithstanding the mother's intention to remain, if she can, in Canada with the child, for throughout the whole period since August 1991, the mother has been under a duty imposed by this court to return the child to this jurisdiction. It cannot therefore in my judgment be considered that the settled habitual place of residence of this child on 28 June 1992 was in Ontario.

I do not have to deal with the plea made by the father in the alternative under Art 13, but since it is raised I have to say that nothing in the evidence is sufficient to substantiate any of the requirements of Art 13. There is no evidence whatsoever that this child would be under a grave risk of harm, either psychological or physical, or would be placed in an intolerable situation if she were to be returned to Ontario. I do not propose to order the return of this child to Ontario. The wardship proceedings will continue.

I will now give counsel a moment to consider the matter. I propose to give directions in the wardship so that this matter can be resolved as soon as possible. If you would like to consider that position, I will rise for a few minutes.

I should tell you that I have it in mind to invite the Official Solicitor to act as guardian ad litem.

The court adjourned.

[http://www.incadat.com/] [http://www.hcch.net/] [top of page]

For questions about this website please contact : The Permanent Bureau of the Hague Conference on Private International Law