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[07/08/1991; High Court (England); First Instance]
P. v. P. (Minors) (Child Abduction) [1992] 1 FLR 155, [1992] Fam Law 197

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

7 August 1991

Waite J

In the Matter of P. v. P.

Catriona Murfitt for the father

Mark Everall for the mother

WAITE J: An unusual development has occurred in this child abduction case, with which I shall deal straight away. It was an application of what is now a familiar kind for a peremptory return order under the Hague Convention. I heard argument yesterday and, at the closing of the court, reserved judgment overnight. This morning Mr Todd, of counsel, who attended to take a note of the reserved judgment in the place of Mr Everall, the mother's counsel, felt it to be his duty (quite properly) to inform the court of the following instructions given to him by the mother. He told me that she was extremely upset because, as she asserted, the father had, a few moments ago, said to her outside this court that whatever undertakings were offered he would disregard them.

That assertion is wholly denied, also on instructions, by Mr Moor, of counsel, who, in place of Miss Murfitt for the father, has attended to take a note of the judgment. He states that the father, in fact, claims that he did not speak to the mother at all; that, unfortunately, relatives of hers were abusive to him in the corridor; but that in any event he said nothing to indicate the least intention to depart from his undertakings, which he once more, through his counsel, states he intends to honour.

It does not seem to me that it would be in the interests, either of justice or of the children concerned in these proceedings, that I should step aside and try to investigate the truth of these counter-allegations. One can understand that, in circumstances such as these, feelings run very high. One can understand also that it is fertile territory for misunderstanding. I propose to accept the assurances given by the father that he intends to honour his undertakings, and would remind the mother that those undertakings would, if I felt it right to order the children's return, be incorporated in the order of the English court, and could be referred to any judge in the USA who was concerned to deal with the problem. Any

breach of those undertakings, I am positive, would be viewed very seriously by any American judge. I will say no more about that aspect of the case, and I will now proceed to deliver the judgment which, as I say, was reserved overnight.

This if a father's application for a peremptory order under the Child Abduction and Custody Act 1985 for the return of his two children to the State of New Jersey in the USA, where proceedings are pending to determine issues of custody and visitation between the parents. The mother and the father, as I shall call them, were married in November 1981 in England, the mother being British and the father a USA citizen. They are now 32 and 29. Straight after the wedding, they went to live in the father's home State of New Jersey, where their children, R and W were born respectively on 2 February 1983 and 4 March 1990, so that they are now 8 years and 18 months old respectively.

Both parties worked throughout most of the marriage, and child care was provided during the day by a childminder. Differences arose during the autumn of 1990, as a result of which the father agreed to move temporarily from the matrimonial home, leaving the mother and children in occupation, but still seeing the children regularly. He had not at this stage despaired of keeping the marriage together.

On 4 February 1991 the mother took the children to England without the father's permission. It is not disputed that this was a wrongful removal within the terms of art 3 of the Hague Convention, and it is not alleged that the father acquiesced in it for the purposes of art 13(a). R was started in an English school. The mother began divorce proceedings in the Guildford County Court, in which she recently obtained a decree nisi. The father, in the meantime, had obtained an order from the New Jersey court for the children's return. He also invoked the jurisdiction under the Hague Convention, and the summons before me was issued on 19 July 1991.

The mother says in her evidence, resisting the application, that if she were to be forced to return to New Jersey with the children she would be lonely, isolated and unhappy. The depression and swings of mood which afflicted her at the time of the marriage breakdown would return, and all these feelings would be bound to rub off on the children. If, on the other hand, she is allowed to remain with them in this country, she will, she says, have here the support of her own parents and friends and family, and the children will enjoy a pleasant life with a happy mother. She offers the father as much access in the UK as he may reasonably ask.

Her affidavit contains the following passage dealing with R:

'R went to Raleigh County Primary School immediately after half-term in February. She enjoys living in England and does not wish to return to the USA, although she obviously misses her father and her grandparents. She has settled well, enjoys playing with and having the company of her cousins aged 9, 8, 6 and 5, and also benefits from seeing her uncles, aunts, great-uncles, great-aunts, grandparents and other friends, and she has altogether quickly adapted to life in England from which she benefits more than she did from life in the USA where she was cared for by a babyminder and occasionally the plaintiff's [that is the father's] parents. In England she has been invited to many parties. Her school is about a mile from our home, and W will go there eventually. I have booked him for the toddler group. I do not work now and I care full-time for both the children, which I intend to do indefinitely.'

The father, for his part, offers undertakings to allow the mother to return to live alone with the children in the former matrimonial home in New Jersey, to support the children and pay the mortgage on that home, until the future issues of custody and access are resolved by

what he claims is the proper forum to resolve them, namely, the New Jersey court. He also offers undertakings designed to ensure that the mother and he stand on an equal footing before the New Jersey court, and, in particular, to ensure that she is not put at risk of punishment for any default of hers in complying with the orders of that court.

Mr Everall, counsel for the mother, raised at the outset an important preliminary question. He relies on the evidence which the mother has given about R, and which I have just quoted, as establishing a case for inquiry by the English court into the nature and extent of R's objections to a return to the USA, and the degree of maturity which this child possesses. He submits that I am bound, not just as a matter of discretion but in law, to order an adjournment of this application in order that such an inquiry may proceed.

That submission is founded on a passage in art 13 of the Convention, to which it will be convenient to refer for brevity's sake as 'the objection clause', and which reads as follows:

'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.'

On the strength of those words, Mr Everall submits that in every case where the abducting parent asserts on oath that the child objects to a return to the requesting country, the courts of the requested State (in this instance England) are bound to make sufficient inquiry to enable a finding to be made as to whether or not the child: (a) does indeed so object, and (b) is of an age and degree of maturity making it appropriate for the court to take the child's views into account. If the answer to (a) and to (b) is 'yes', then, so Mr Everall submits, a discretion arises under art 13 to refuse the return which would otherwise be mandatory under art 12. The method of inquiry, he suggests, is a matter for the judge's discretion in each case. It may, and often will, involve investigation by a court welfare officer; or it may be sufficient to act only on the evidence of the parties and their supporting witnesses. That is, he concedes, entirely a matter for the judge. What the judge cannot do, so Mr Everall submits, is to say that there shall be no inquiry at all into the issue once it has been raised.

Looking at that submission without assistance, for the moment, from authority, I find its radicalism startling. The whole jurisdiction under the Convention is, by its nature and purpose, peremptory. Its underlying assumption is that the courts of all its signatory countries are equally capable of ensuring a fair hearing to the parties, and a skilled and humane evaluation of the issues of child welfare involved. Its underlying purpose is to ensure stability for children, by putting a brisk end to the efforts of parents to have their children's future decided where they want and when they want, by removing them from their country of residence to another jurisdiction chosen arbitrarily by the absconding parent.

It would be contrary to that underlying assumption and purpose to give the Convention an interpretation which allowed the absconding parent to insist, as of right, that the Convention's mandatory procedures for a child's return should be suspended while detailed investigation was made into the child's views, the terms and circumstances in which, and the persons to whom, they had been expressed, and - perhaps in borderline cases - the medical and psychological factors involved in gauging the child's degrees of maturity. Of course, there may be instances in which precisely such an investigation will be found necessary, but I suspect they will be rare. When they do arise, it will be because the judge, exercising his discretion in exceptional circumstances, thinks that such an investigation is necessary, and not because one or other parent has exercised any supposed right to insist upon it.

Are there any authorities to constrain me to take a different view of the objection clause from that? Mr Everall submits that there are. He relies, first, on Re C, an unreported

decision of Eastham J in proceedings CA281/1990. That was an unusual case of an English father who removed his children from their aunt and uncle in Norway, who had assumed care of them with social work support because of their Norwegian mother's problems of alcoholism. The children were 12 and 10, and they were seen and interviewed, not only by the court welfare officer but by the judge himself. The judge found that there was a grave risk, under art 13(b), of psychological harm and an intolerable situation if the children were to be returned to Norway. He also found that the children objected to such a return, and were of an age and degree of maturity at which it was appropriate to take account of their views. He accordingly held that he had a discretion to override the mandatory requirements of art 12, and he exercised it by ordering the children to stay in England.

In the course of directing himself as to the law under art 13, Eastham J said, after quoting the objection clause in full:

'That seems to me to impose a duty on the court to inquire or cause inquiries to be made, in the case of a child who is not a very young child, to ascertain the child's wishes and then to consider, either with the help of experts like a senior welfare officer, or by interviewing the children themselves, to come to a conclusion as to whether they have attained a degree of maturity at which it is appropriate to take account of the children's view. The age, of course, can be ascertained very easily by looking at the birth certificates; but the degree of maturity varies in children and the judicial authority is given the task of ascertaining whether they have the degree of maturity at which it is appropriate to take account of their views.'

Those words require, in my view, to be read in the context of a case in which there had already taken place, apparently without objection on the part of the requesting country, a full investigation within the requested State (England) by a court welfare officer, an investigation later supplemented by the judge's own personal interview with the children. I do not think it would be either a right use of authority or fair to the judge in that case to attribute to his remarks the full force which Mr Everall invites me to place on them. If I am wrong about that, and Eastham J's words have to to given the force of a dictum which persuades but does not bind me, then I would feel obliged, with the utmost respect, to decline to follow it.

The next authority on which Mr Everall relies is Re G (A Minor) (Abduction) [1989] 2 FLR 47. That was a case in which the trial judge had declined, on the basis of the evidence presented to him, to treat the child in question (who was 9) as possessing the required degree of maturity to state any objection which it would be appropriate for the court to take into account. One of the grounds of appeal was that he was wrong to have rejected a submission made to him at the trial that this was an issue which ought to be investigated by a court welfare officer. In rejecting that contention, Purchas LJ said at p 482, after reading the objection clause in full, the following:

'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.'

Mr Everall skilfully seeks to rely on that passage, not for what it says but for what it does not say. In defining the judge's discretion under the objection clause, he points out, the only reference made is to the depth of investigation. There is not a word to be found in the judgments of the Court of Appeal in that case indicating that the court's discretion goes as wide as directing that there should be no investigation at all.

Here again the context is, in my judgment, all-important. The courts must be vigilant, as it seems to me, in this jurisdiction, which is essentially pragmatic and designed to be enforced on similar lines by the courts of all the countries concerned, to avoid allowing the broad sweep of the Convention's functions to become hampered by an elaboration of case-law developed in the domestic courts of individual signatories, through an over-sophisticated approach to its construction. The Court of Appeal was dealing, in Re G (A Minor) (Abduction) (above), with a case where the issue of the child's objection had been investigated, and the only relevant matter to be considered was the judge's discretion as to the depth of investigation. It would be quite wrong, in my judgment, to read into the words of the Court of Appeal in that case any intention to cover the situation which was not before them, and is before me today, namely, the situation where a judge is being called upon to exercise a discretion as to whether there should be any investigation into the child's objections at all.

I hold, therefore, that there is no authority with constrains me from taking the view of the objection clause which I have already expressed, and which can, I think, be summarised in this way. It will, in every case, be a question of fact and degree for the judge in the requested State whether, on the evidence presented to him, a finding would be justified that the child objects to a return, and is of sufficient age and maturity to have its views taken into account. It will also, in every case, be a matter of discretion for the same court to decide, if the evidence presented to it appears insufficient to enable the court to make any finding one way or the other on the issue of objection, age and maturity, whether an investigation into that issue should be made or should not.

In the present case, I do not feel that any advantage would be gained, and much valuable time in the lives of these children might be lost, if there was to be any investigation by a court welfare officer into R's views and/or her maturity, with the inevitable adjournment which that would require.

That is not, however, the end of the mother's objections to the making of a return order. She relies also upon the submission that this is a case where there is a grave risk that the children's return would expose them to physical or psychological harm, or otherwise place them in an intolerable situation for the purposes of art 13(b). To support that, she relies upon the evidence I have already summarised to the effect that, if she was forced to return to the USA - and she has made it plain that if the children were ordered to return she would, without hesitation, accompany them -- she would become once again a deeply unhappy person. An unhappy mother means unhappy children. These children are still of an age when they are acutely sensitive to their mother's feelings. There must therefore be, so it is argued, an appreciable risk that they would suffer psychological harm or be placed in an intolerable situation if they were obliged to return with their mother to New Jersey.

Arguments of that kind are commonly raised within this jurisdiction. They are really, however, beside the point. That is not because the jurisdiction is inhumane. On the contrary, there is a humane purpose underlying it in ensuring that children are not subjected to

disruption through arbitrary movement by one parent or the other. The reason why evidence of that kind is beside the point at this stage is the underlying assumption of the Convention which I have already mentioned, that the courts of all its signatories are equally concerned to ensure, and equally capable of ensuring, that both parties receive a fair hearing, and that all issues of child welfare receive a skilled, thorough and humane evaluation.

If a return order is made, the mother will have the opportunity of urging upon the court in New Jersey all the considerations I have summarised, and they are powerful considerations. She can be assured that she will receive from a judge in New Jersey the same sympathetic and attentive consideration that she would receive from a judge in London. I am, therefore, bound to reject the submission that this is a case to which art 13(b) applies.

Those being the only objections to the making of a return order under art 12, and both of them having failed, it is accordingly my duty to make an order for the children's return.

Before I consider its terms, there is one other aspect of the case which I should mention. One of the factors sometimes relied on in these cases is that the absconding parent, precisely because he or she has absconded, frequently in defiance of local court orders of jurisdiction, may be at risk of being put at a disadvantage in the courts of origin when returning to their country. As I have already indicated, the father has, from the outset, proffered certain undertakings to ensure that the mother is not placed at any disadvantage in that regard. Those undertakings will be recited in my order. In summary, they promise the mother the right to return to live alone with the children in the former matrimonial home; to have the children supported by their father, and to have the mortgage payments made on the home - all during the pendency of proceedings in the New Jersey Court to settle the children's future. He also undertakes to pay their air fares for their return, and not to institute or support any proceedings to punish the mother for disobedience of orders of the New Jersey court, or to apply for any warrant to enforce those orders.

During the course of argument, it was accepted that one of those undertakings would require some amendment to ensure not only that the father refrained from applying for any warrant to enforce the New Jersey court's orders, but used his best endeavours to procure that if any warrant has been issued already, it is not enforced. I am satisfied that these undertakings do achieve their desired objective in ensuring that the mother will stand on an equal footing before the father in the face of the New Jersey judge, and I propose to accept those undertakings with the amendment I have just indicated.

There will therefore be, on those undertakings, a peremptory order for the children's return under art 12 of the Convention.

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