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[21/12/1990; Court of Appeal (England); Appellate Court]
Re A. and Another (Minors: Abduction) [1991] 2 FLR 241, [1991] Fam Law 423

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

21 December 1990

Fox, Balcombe, Stocker LJJ

In the Matter of A.

Hugh Bennett QC and Michael Phillips for the mother

Kay Jones for the father

FOX LJ: This is an appeal by the mother from an order of Booth J made under the Child Abduction and Custody Act 1985 for the return of two children of the marriage to the father. The Act gives the force of law in the UK to the Convention on the Civil Aspects of International Child Abduction, which was signed in 1980. The articles of the Convention with which we are primarily concerned are arts 3, 12 and 13. They can be found in Sch 1 to the 1985 Act as follows:

'Article 3

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 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 rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 12

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.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) 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 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.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.'

The parties were married in 1986 in Tucson, Arizona. The father is American and the mother is English. The two children of the marriage are aged 4 and 2 or thereabouts. At the time of the marriage, the father was a sergeant in the United States Air Force. The parties established their home in Tucson, Arizona and that remained their matrimonial home for some time.

The marriage got into difficulties in 1989. At the end of June 1989 the home in Tucson was sold. With the consent of the father, the mother came to England with the children in July 1989. It was intended that the mother should take the children to England for 3 months. She would then return to Tucson by herself and drive by car to Florida. She would, thus, have taken the children initially to England, and it was intended that ultimately the parties should find a home in Florida with the children and, when the home had been found, it was intended that the maternal grandmother would bring them out from England. Thus it was hoped that a home would be established in Florida, in Orlando.

Early in August 1989 the father telephoned the mother and told her that the Air Force was proposing to send him to Korea for a one-year posting. The father was keen to accept the posting, as the judge found, because, if he did so, although it would mean going to Korea for a year, he thought it was likely that he would then be able to obtain a follow-up posting of greater length to the UK. Accordingly, the proposal for the grandmother and the children to

fly out to the USA was cancelled, as was the plan for the mother to return to the USA with a view to finding and setting up the Florida home. The father's evidence was that the Korea posting would not take effect until May 1990. He wanted the mother and children to return to Tucson where they could obtain temporary accommodation and live there for whatever period was necessary, and until it was clear whether there was likely to be a follow-up posting to the UK, which would not be likely to be known until after he had gone to the Korea posting, if indeed he was posted there.

The mother's recollection was that the posting would be, if it took place, a good deal earlier than May, probably in September 1989, and that he would know about the follow-up posting after he got to Korea. She says that the plan was that she should remain in England in the hope that after Korea the father would come here and the family could all live together in England which, if he was going to Korea, involved the least disturbance to the family.

In general, I should say, as regards the evidence of the parties, the judge found that she preferred the evidence of the mother where there was a conflict between her and the father.

On 29 August 1989 the father telephoned the mother and told her that he had had a motor accident and was facing a charge for drunken driving, and he asked her to send him money for the purpose, in particular, of the legal proceedings with which he was faced. In the course of that telephone conversation there was a quarrel, and the mother seems to have thought that the request for money and the circumstances which gave rise to it were the last straw in a marriage which was already to some extent proving difficult, because she certainly was not happy in the USA. She decided that the marriage was over and she would not go back to the USA. The father, on the other hand, wanted the marriage to continue and he asked her to come back and talk things over. She refused.

Until the end of August the children were with the mother in England and with the consent of the father. The judge found that the father was agreeable to the children staying here in the first place until the end of August, or perhaps until the family could be together again.

When the mother decided that the marriage was at an end and that she would not return with the children to the USA, the judge found that there was a fundamental change in the situation, and it was a change with which the father was not in agreement. He had been in agreement with the children coming here and staying for 3 months, but the indication by the mother that she regarded the marriage as being effectively at an end and that she would not return with the children to the USA changed the position.

It was common ground that, under the law of Arizona, where the children were habitually resident within the meaning of the provisions of the Convention, the mother and father had joint custody rights. By her decision that the marriage was at an end and her refusal to return with the children to the USA, the judge found that the mother breached the father's rights within the meaning of art 3 of the Convention, which by the 1985 Act is given the force of law in England. There was, therefore, a wrongful retention of the children in the UK by the mother for the purposes of the Convention, and that occurred in August 1989. As I will mention later, the father appears effectively to have agreed to an extension because the mother asked to stay in England over her sister's birthday, which was about the end of October, and that consent continued effectively until the end of October.

On 15 November 1989 the father petitioned in Arizona, seeking divorce and an order for custody of the children. When the papers were served upon the mother, she entered an appearance but did nothing further about the proceedings. She told the father in a telephone conversation after the service of the proceedings that she did not agree to him having

custody of the children, and he said that he would not return and take away the children, but it was necessary that his rights should be, as he said, written down.

The mother appears to have been quite amenable to access early in 1990. The father came to England in March and the visit seems to have been a success. He stayed in the mother's home, and while in the USA he in fact arranged for a substantial amount of the children's toys and belongings to be sent to the mother in the UK, and he brought over toys with him for the children when he came here in March.

While in England, the father made a number of statements which the mother claims constituted acquiescence to the children being retained in England within the provisions of art 13 of the Convention.

The statements to which I have referred by the father as to his intentions, I shortly describe as follows. The mother's stepfather, who was, so to speak, the maternal stepgrandfather, said that, while the father was in the UK, nearly all their conversations together (I take that to be between him and the father) were about the children and his relationship with the mother, and the father said that he would never take them away from the mother. He appreciated that they had their maternal grandmother and the stepgrandfather and other relatives in England. That seems to have been his initial attitude. As time went on it was in fact changeable. He talked of taking the children away. That statement appears to have followed an argument between the father and the stepgrandfather. But, when things were calm, according to the stepgrandfather, the father's attitude was that he would leave the children with the mother. During the visit to the grandmother's sister in Norfolk, he said that he would leave the children here. In fact, he seems on the whole to have said one thing at one time and another thing at another.

Similar statements of intention were made by the father to the mother's brother. He said it would hurt him dreadfully to leave the children here, but he would never take them away because they were with their grandmother and their mother in England. He also said to the mother's brother that he wanted to do what was best for the children, and they ought to stay here with the grandmother and with their mother.

The father does not much dispute all that. He said that if the mother thought that he was trying to take the children away from her, she would probably stop access by him to the children altogether, and that great difficulties would arise about him continuing to see the children. He agrees that he talked of taking them back, but he thought that probably nobody on the family would take a great deal of notice of what he was saying.

The judge's finding about all this was that the father conceded that he willingly and freely made statements to the family to the clear effect that he would not take the children away from the mother, so that the mother and family would be reassured about his attitude to the continuing retention of the children in the UK. He also agreed that he told the mother himself that he would not remove the children, and that the judge thought that his reason for doing so was that he feared she would deny him access if he adopted any other attitude to the matter.

Just before the father left England, he and the mother had a quarrel. As a result of that he left the mother's home and stayed with her mother and stepfather for the remainder of the time that he was in England. The mother had again made it clear that the marriage was at an end during the course of the visit of the father to England. After that, no further discussions were entered into between the father and the mother as to the continuance of access to the children.

The judge accepted that the father returned to the USA, clearly intending to proceed with his application for custody of the children in the Arizona courts. He had by the time he returned to the USA learned for the first time about the Hague Convention. His lawyers in the USA had not told him anything about the Convention. When, on his return to the USA, he told his attorney about it, the attorney advised him to await the custody order from the Arizona court before doing anything further about the Convention, and the father accepted that advice.

On 16 March 1990 the father obtained a custody order, together with a decree of divorce. The following day, he instituted proceedings here under the Hague Convention. The mother acknowledged service of the divorce and custody proceedings in Tucson, but thereafter took no action in relation to them.

On 5 March 1990 her solicitors wrote, stating her view that the father was not a fit and proper person to have custody or care and control of the children, but she did nothing else.

On 10 March 1990 the mother instituted proceedings for divorce in the Bow County Court. On 25 March 1990 interim custody orders were made in respect of the children on the mother's application in England. The father took no part in those proceedings. It is not in dispute that the marriage was validly dissolved by the Arizona decree made upon the father's petition.

The mother's contention in this case is that the father acquiesced in her retention of the children in England within the provisions of art 13 of the Convention and that, therefore, it is not a case in which the English courts have to order that the children be returned to the USA.

Under art 12 of the Convention, where children are wrongly retained in England, the English court is bound to order their return to the USA as the place where they were habitually resident. That is the effect of the provisions of the Convention which are given legal force in England by the statute, and it is a matter in which the court has no discretion at all if the basic conditions are satisfied.

Article 13, however, provides that, notwithstanding art 12, the court is not bound to order the children to be returned to the person requiring their transfer if it is established that that party is not actually exercising custody rights at the time of the retention, or had consented to or subsequently acquiesced in the removal or retention of the children to the other country.

The judge found that the retention of the children in England was wrongful within the meaning of the Convention on or about 29 August 1989, and that acquiescence on the part of the father would provide an exception to the mandatory rule that the children would have to be returned.

Before the judge, and again in this court, the mother has relied upon the statements made to her, and to various members of her family while the father was in England in March 1990, as establishing the acquiescence which is referred to in art 13 of the Convention. The judge, in a full and careful judgment, rejected the submission based upon acquiescence, and held that the fact that the father was pursuing his application for custody of the children in Arizona, with the object of recovering the children and securing their return to the USA, was cogent evidence which negates the suggestion that there was acquiescence on the part of the father within the provisions of art 13. The judge specifically stated that she did not find that what the father had said to the mother or to her family, or the bringing of the toys and other belongings of the children to England, constituted an acquiescence on his part to their

staying here. She found that, while the father was ambivalent in some of his statements and in some respects had not been frank, the mother must show, in order to establish acquiescence, that by words or actions he had agreed to the children remaining here. The judge held that the mother could not succeed in establishing that. In the judge's view, it was not the case of a father who did nothing but sit back and let matters rest where they were. On the contrary, he pursued his intention to secure the children's return to the USA in the Arizona courts, and the judge regarded that as inconsistent with acquiescence. Accordingly, the judge made an order which, upon her finding that acquiescence was not established, she was bound to make. She made an order for the return of the children to the USA.

The mother now appeals and contends that the father did acquiesce. Mr Bennett QC, for the mother, points to the following circumstances as leading to the conclusion that there was acquiescence.

(1) In September 1989 the father was due to go to Korea. There was no home in the USA for the children to go to.

(2) In October 1989, when the father's posting to Korea had been cancelled, he told the mother that he was trying to secure direct posting to the UK.

(3) He was very short of money and was incapable of maintaining the mother or the children. Accordingly, there was nowhere where the children could be maintained, except with the mother and her family here.

(4) When the father was in England for about a month in March 1990, he repeatedly made the statements, to which I have referred, of intention to leave the children with the mother.

(5) The legal process in Arizona was irrelevant because of the statements of intention made by the father when in England in March 1990, and by the fact that he had indicated that the proceedings in Arizona were little more than formal.

(6) If the father had started proceedings under the Convention, his case was not at all unanswerable because, at the time of the proceedings in November 1989, the acquiescence would already have taken place.

For myself, I do not feel able to accept these circumstances as compelling. It is clear that the father gave his consent to the children visiting England for 3 months to the end of September 1989. But, on 28 August 1989, in the telephone conversation to which I have referred, the family situation changed radically. The mother, having decided that the marriage was at an end, made it clear that she was not going to return to the USA. The judge found that at that date the wrongful retention of the children began. When she decided that she had no intention of leaving the UK, it is clear that she also was not going to return the children to the USA and, accordingly, she was in breach of the joint custody rights of the parties which undoubtedly existed under the relevant law of Arizona. The father wanted to talk things over because he wanted the marriage to continue, and he wanted the mother to discuss it all, but she was not willing to do that and made it quite clear that really there was no room for discussion of the future. She was not coming back to the USA.

She did say that she wanted to remain until the end of October because of her sister's birthday at the end of October. The father, I think it can be accepted, agreed to that and, therefore, it can be said that he extended the period of proper retention until the end of October. But, even if one accepts that, there was wrongful retention from the end of October 1989 onwards, so that the date may possibly be brought forward to that extent as opposed to

the judge's finding relating to 29 August. But it is of no consequence in relation to the substance of this case.

After the end of October the father did not delay for very long in issuing proceedings in Arizona, and by December they had been started and the mother had been served. That was, I think, clear evidence that he was not acceding, at any rate after the end of October, to the retention of the children in England. He was asking for custody of the children, obviously with the intention of asserting his joint rights in respect of them.

Pausing here for a moment, the position seems to me to be as follows.

(1) The father consented to the children going to England for 3 months from July to September 1989. That was part of the family arrangements pending the acquisition of a new family home.

(2) The family situation, as it had previously existed, effectively came to an end at the end of August 1989 when the mother decided that the marriage was at an end and that she was not returning to America.

(3) The mother wrongfully retained the children in breach of the joint rights of custody after, at any rate, the end of October 1989.

(4) The issue is: was there acquiescence thereafter?

'Acquiescence' is defined in the Oxford English Dictionary as:

'1. The action or condition of acquiescing; resting satisfied; rest, quiet satisfaction. 2. Silent or passive assent to, or compliance with, proposals or measures.

The fact that the father was pursuing, and ultimately obtained, a custody order in Arizona is, taken by itself, quite inconsistent, it seems to me, with any assent to, or satisfaction with, retention of the children by the mother in the UK. There are, however, the statements undoubtedly made by the father to the mother and her family in March 1989 that he did not intend to remove the children from the UK. That the father made, and was likely to make, emollient statements about his intentions in relation to the children I do not doubt, and it seems very likely that he would indeed do so because he would inevitably be concerned that, if he took a belligerent attitude, there was an immediate risk that the mother would terminate all communication and would try to prevent further access to the children by him. The mother, no doubt, for her part was equally apprehensive that he might seize the children. (See, for example, the statements in para 6 of the mother's affidavit of 9 April 1990). The fact that the father was seeking a custody order in the USA can have given the mother no reassurance at all. The judge found that the mother feared the father's determination to get the children back. She also specifically stated that she did not find that the mother was persuaded, by what the father said, into believing that he meant what he said. That, it seems to me, was essentially a matter of fact for the judge who heard the evidence and, in my view, it was a conclusion to which the judge was perfectly entitled to come, upon the facts and evidence before her. If the mother did not believe that the father's protestations were genuine, it seems to me to be quite unreasonable to say that there was any acquiescence upon the father's part. The mother herself placed no reliance upon the father's statements. She did not trust him. The father was making statements in which he himself did not really believe, but felt it necessary to make them in order that his own position should not be prejudiced. Neither party trusted the other nor believed the other.

Accordingly, it seems to me that the judge was fully entitled on the facts to reach the conclusion that there was no acquiescence in this case. In my view, therefore, the judge had no choice but to make the order which she did. It was an order which she was bound to make under the express provisions of the Convention as incorporated into English law by the Act of Parliament.

An application was made by Mr Bennett, counsel for the mother, as soon as the appeal came on for hearing, to adduce further evidence. That application was not opposed and we admitted the evidence. It is evidence to the effect that the father has now been posted by the United States Air Force to Lakenheath in England for a 4-year posting from January next. He proposes to collect the children in England on 8 January 1991 and to return on 21 January 1991 to commence his tour of duty on 22 January.

The fact that the father had been posted to England is, in my view, quite irrelevant to the present proceedings. Booth J, it seems to me, had to decide two things:

(1) were the children wrongfully retained in England, and

(2) was there acquiescence within the provisions of art 13?

The judge answered the first of those questions in the affirmative, and the second in the negative. In my view, she was right to do so.

That being so, the judge, as I have said, was compelled to make the order for the return of the children which she, in fact, made under the provisions of the statute. She had no power to do anything else. The posting to England in 1991, in my view, has no bearing upon the case. The additional evidence, therefore, in my opinion does not affect the conclusion of the judge at all.

The fact of the posting is, I would hope, good news, however, for both sides, and it should give them an opportunity to put aside past disputes and disagreements so as to enable the children to have a stable relationship with both parents in the UK, and without the upsets that are likely to result from members of the family being in different countries. In the light of the posting, what there is in dispute in practice between the parties I am not sure, but I would hope that it will be very little indeed. But, for the reasons which I have already indicated, I would dismiss this appeal.

BALCOMBE LJ: Whether a person consents to, or subsequently acquiesces in, the wrongful retention of a child, within the meaning of art 13 of the Hague Convention, are primarily questions of fact. Unless, therefore, Booth J made an error of law - for example, as to the meaning of what constitutes acquiescence - or the evidence does not support her finding of fact, there is no basis upon which this court should interfere with her decision.

In my judgment, the judge made no error of law. I agree with her, and with my Lord, that, in considering whether the father acquiesced in the wrongful retention of the children, she had to have regard to the totality of the evidence, including, in particular, the mother's recognition of what was taking place. After all, the relevance of acquiescence, in the context of art 13, must primarily be its effect upon the person (in this case the mother) who was wrongfully retaining the children. The judge's finding on this issue is contained in the following passage from her judgment (at p 20 of the core bundle):

'The fact that the father was pursuing his claim for custody in the Pima County Court with the object of securing the children's return to Arizona is, in my judgment, cogent evidence which negates acquiescence to their remaining in England. Further, I do not find that the

mother was persuaded by what the father said, either to her or to her family, or by his sending the toys to the children, into believing that he did acquiesce in their situation. In February 1990 she feared his determination to get the children back, and on 4 April was in no doubt as to his intention.

Undoubtedly, the father was ambivalent in some of the statements he made to the mother and to members of her family. He was not frank. He may justifiably be said to have shown indecision. But in my judgment, the mother must go further than this if she is to establish acquiescence. She must show that by his words and actions he agreed to the children remaining here. In my judgment she cannot do so. This is not the case of the father who did otherwise nothing and let matters rest where they were. On the contrary, as I find, he pursued his intention to secure the children's return through the Arizona courts, an action which was wholly inconsistent with acquiescence within the meaning of art 13 of the Convention.'

In my judgment, this passage discloses no error of law, and there was evidence which entitled the judge to come to the decision which she did.

We admitted, without objection, evidence that the father is shortly to take up a posting in this country. In the light of this evidence, I am unclear what either party now seeks to attain by attacking, or defending, the judge's order. Nevertheless I am satisfied that this evidence can have no relevance to the outcome of the appeal. If wrongful retention under the Convention, without consent or acquiescence (no other exception having been suggested as relevant) is established, then the court has no discretion under the Child Abduction and Custody Act 1985, but has to order the return of the children. That applies as much to the position of this court, on an appeal by way of rehearing, as it did to the court below. Further, I do not accept Mr Bennett's submission that this new posting is somehow relevant to the question whether the father had previously acquiesced in the children's wrongful retention. I can see no inconsistency between the father's seeking the return of the children under the Convention, but at the same time pursuing an application for a posting to this country.

Accordingly, I agree with my Lord, and for the reasons which he has given, that this appeal should be dismissed.

STOCKER LJ: I agree with both judgments, and there is nothing that I would wish to add.

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