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[16/01/1990; High Court (England); First Instance]
Re H. (A Minor) (Abduction) [1990] 2 FLR 439

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IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

16 January 1990

Ewbank J

In the Matter of H.

Joanna Dodson for the father

Michael Warren for the mother

EWBANK J: This is an application by a father under the Hague Convention which was brought into force in England under the Child Abduction and Custody Act 1985. The child concerned is K, born on 11 May 1988 and who is now 1 3/4 years old. Her mother is Scots by birth. Her father comes from Northern Ireland but they both lived in Canada. They lived together there from about Easter 1984 until December 1988 and K was born in Canada.

In December 1988 the mother came to England, bringing K with her, and she stayed with her relations in England until June 1989. She then returned to Canada. When she returned, the father wanted to resume seeing K but there were difficulties and he made an application to the Supreme Court of Ontario.

On 19 September 1989 there was a consent order made by the Supreme Court of Ontario granting interim custody to the mother; also granting interim access to the father. Included in the order, but not necessarily by consent, was that the child was not to be removed from Ontario without the leave of the court.

There is some doubt whether the mother realised the significance and importance of that provision. I have seen a letter from her solicitor in Ontario to her, indicating that she is not sure whether the mother realised the full meaning of the order. In any event, after the order for interim custody to the mother, the mother on 28 September 1989 returned to England with K. She did not seek or obtain the leave of the court and she did not tell the father what she was doing.

The father made an application in the Ontario court and started these proceedings by originating summons of 6 December 1989. These proceedings are issued asking for the return of the child to Ontario on the ground that the removal of the child by the mother was

wrongful under art 3 of the Hague Convention. This article provides that the removal of a child is to be considered wrongful if it is in breach of rights of custody attributed to a person, an institution or another body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal. It is conceded that K was habitually resident in Ontario at the time the mother brought her to England. The issue, accordingly, is whether the removal by the mother was in breach of rights of custody attributed to a person, an institution or any other body either jointly or alone.

In *Re C (A Minor) (Abduction)* [1989] 1 FLR 403 it was held that the right of custody might reside in the court or in a mother or a father or some care-taking institution, and in that case where there had been an order where the child was not to be removed from Australia without the consent of both parents, it was held that the father had a limited right of custody in that, under art 5 of the Hague Convention, he had a limited right to determine the child's place of residence. In *Re J (A Minor) (Abduction)* [1990] 1 FLR 276 the right of custody in a wardship case was held to reside in the court and, accordingly, a removal without the court's consent was held to be a wrongful removal.

This case takes the matter a stage further. On behalf of the mother it is said that, although the mother's removal of the child was contrary to the order of the Ontario court, it could hardly be in breach of any rights of custody since the rights of custody resided in the mother. And it is boldly said on behalf of the mother that the words 'breach of rights of custody' in art 3 of the Hague Convention must mean breach of other people's rights of custody, not the breach of the mother's own rights.

When the matter first came on, there was no certificate of relevant law under art 8 (f) of the Hague Convention nor any expert evidence on the law of Ontario and I suggested that an application should be made under art 15 for a declaration that the removal of the child was wrongful according to the law of Ontario. In the short time available it has not been possible to obtain such a declaration but instead a certificate has been issued by the central authority of Ontario, dealing with the relevant law. This certificate is issued under art 8 (f) of the Convention, supplemented by an affidavit by the Crown Law Officer in the Crown Law Office at the Ministry of the Attorney-General of the Province of Ontario.

The affidavit states that it is the opinion of the Crown Law Officer that the mother's conduct in removing the child from the Province of Ontario constituted a wrongful removal within the meaning of art 3 of the Convention in that it was a breach of the rights of custody attributed to her under the law of the Province by reason of a judicial decision. Her rights of custody under the order of 19 September 1989 were rights of custody within the Province of Ontario which specifically provided by the order of the court that the child was not to be removed from Ontario, and in removing the child the mother was in breach of the rights of custody which she had been granted. The certificate from the central authority of the Province of Ontario is to the same effect.

There is nothing, in my judgment, in art 3 which indicates, as the mother asserts, that the breach of the rights of custody has to be a breach of the rights belonging to some other person. In my judgment, it is clear that the mother was in breach of her own rights of custody and that, accordingly, the removal of the child is to be considered wrongful and, accordingly, the child must be returned to the Province of Ontario.

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