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[04/02/1997; High Court (England); First Instance]  
Re B. (Abduction: Article 13 Defence) [1997] 2 FLR 573, [1997] Fam Law 780

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## IN THE HIGH COURT OF JUSTICE

### FAMILY DIVISION

#### Royal Courts of Justice

4 February 1997

**Johnson J.**

**In the Matter of re B.**

**Counsel: Kimn Foudy for the father; Jinder Boora for the mother**

**JOHNSON J:** These proceedings relate to a boy, B, who was born on 3 March 1991. He is one of the two children of Mr and Mrs L, who married in England in 1981. Their other child is C, who was born in England on 19 November 1985. The application presently before the court is brought on behalf of the father of the two boys under the Convention signed at the Hague in 1980, the Convention on the Civil Aspects of International Child Abduction.

The present situation of the family is that the father and C are living in the State of Michigan in the USA; the mother and B are living here in England at an address near Stoke-on-Trent.

The factual background to the application is that after the birth of C the family moved to the USA in March 1986 where it was believed that the prospects of the father, and so of the family, would be better than here in England. B was born in Michigan.

In April 1996, after a number of other moves, the family had specially built for them a home in Michigan and that is where the parents and the two boys were living until the summer of 1996.

The custom of the family was that each summer the mother and the boys would come over to spend time with her family, particularly her parents, who are still living here in England. They would come for a period of some weeks. That happened in June 1996. The mother came over with the boys and spent time, partly with her own parents and partly on holiday in Devon.

The mother says that by this time the relationship between the parents was at a very low ebb and that she was very unhappy. The father in his written evidence denies that and has put in evidence a message sent to him by the mother on the Internet on 20 June 1996 in which she

**expresses her love for him and says that she and the boys are missing him.**

**As was the custom, the father joined the family here in England for a period of a fortnight or so at the end of June 1996. He could not stay longer because of his work commitments. He went back to Michigan on 14 July 1996 and the mother and the boys returned there on 30 July 1996.**

**The mother says (and the father denies) that by this time the marriage was effectively at an end and, so the mother asserts, she had really made up her mind to part from the father and move to live in England. No explanation is given by her as to why she returned to the USA if that indeed was her intention. However, she says that when they were back together in Michigan there were discussions between them about the state of the marriage. Eventually it was agreed that the mother would go to the UK again and take B with her; the father and C would stay behind at the home in Michigan.**

**There is a dispute of fact as to the basis upon which the mother and B left the USA and came to England, which they did on 24 August 1996. The mother says that the father consented to her going on a permanent basis. The father says that he consented to her going on the basis that, as it is put, 'She needed to sort herself out', so that she would be having a time away from him to think about her own future and the future of the family. The father says that it was agreed that she would return to the home in Michigan with B by 19 November 1996, in time for C's birthday.**

**As is almost invariably the case, the court has to seek to resolve this issue on the basis of the written evidence. The mother, of course, is available here to give evidence; the father is not.**

**The mother has been represented at this hearing by Mr Boora, who has clearly prepared his submissions in an admirably structured manner and I seek to follow the order of his submissions. There are really four matters upon which Mr Boora relies in supporting the mother's case that the father consented to her removing B to the UK, not temporarily but permanently.**

**First, he relies upon the words that the mother says she used and the father used. The father denies much of what the mother says in this regard but even putting the mother's case at its highest it is not suggested that the father ever agreed in so many words that the mother and B could go to England permanently. She says that from what she said and the manner in which it was said, it should have been obvious to the father what she intended to do and that he did not resist or complain in any way about what he must have known she intended. She accepts, however, that she did try to mislead the father. The father describes the conversations, particularly the discussion they had about why the mother would take B and not C.**

**The father has put forward an affidavit sworn by Mrs R, who describes herself as a very close personal friend of the mother. The mother accepts the truth of what Mrs R says in that affidavit, namely:**

**'In the middle of August 1996, Mrs L advised me that she would be returning to England with her son B so that she may evaluate her marital status with Mr L. Prior to her leaving for England in August 1996 she clearly stated that she would be returning to the USA with B no later than November 1996.**

**On about 23 September 1996 I had the opportunity to speak with Mrs L by telephone, at which time she advised me that in fact she would not be returning to the USA and in fact**

would be remaining permanently in England with B. This struck me as a surprise.'

It seems to me that, if the matter depended solely on the words used by the mother and the father, the conversations that they had should properly be regarded as equivocal and falling short of what is necessary to establish consent under the Convention. However, there are other matters upon which Mr Boora relies.

Secondly, he relies upon the fact that when the mother and B came to England they came by air on single tickets, not return tickets. As to this, the father accepts that they came on single tickets but says that they were purchased not by him, as the mother asserted, but by her on their joint credit card account. He says that the reason for buying single tickets rather than return tickets was that there was no financial saving in buying the return ticket, and there is a document which suggests that the single fare was precisely half of the return fare. He says that as a matter of ordinary financial prudence it was sensible not to incur the charge for the return ticket until nearer the return date. He suggests there was no point in doing so and incurring the interest charges on the credit card account.

Here again, there are factual issues which it is not easy for the court to resolve on the basis of the information available. The fact that the plaintiff in a Hague case has bought single tickets for the defendant and the children is very often strong evidence of consent, but in the circumstances to which I have referred that does not seem to me necessarily to be the case.

The third matter upon which Mr Boora relies relates to the luggage taken by the mother. She says in her affidavit:

'The plaintiff could see that I was taking all of mine and B's personal belongings. I packed eight suitcases of clothes and not six as the plaintiff states in his affidavit. The fact that I was taking all of my belongings and had emptied my wardrobes would clearly have indicated to the plaintiff that I would not be returning.'

As to this, the father denies that the mother took, as she says, all her belongings and all B's belongings. In support of his denial, he has put in evidence a list in the mother's own hand in which the mother sets out in the three pages of the document the items which she wants him to send to her. The items listed included 'the rest of my things in the closet', 'bagged clothes, top shelf', 'boxed make-up, belts, all my T-shirts' and so on. That list was sent to the father by the mother on 4 November 1996 and a similar list was sent by her solicitors on 29 November 1996. It is true that eight pieces of luggage does seem somewhat inconsistent with a stay of only 3 months, but it is equally clear that the mother was not right in asserting that when she left she took all of the belongings of herself and B.

The fourth matter upon which Mr Boora relies relates to the accommodation in which he knew they were to stay whilst they were in England. The arrangement was not that the mother would stay with her family but that she would rent a property adjacent to her parents' home. That certainly suggests an element of permanence rather than a stay of a purely temporary nature, but here again the evidence is equivocal.

The father says that he was not at all surprised that the mother was proposing to rent a property rather than stay with her parents because, he says, he was aware that the mother did not enjoy staying with her parents in their house. In support of this assertion he relies upon a sentence in the letter which the mother had written to him in June 1996:

'The kids are fine. They seem to be happier when they are away from [the mother's parent's home], if you know what I mean.'

**In my judgment, the mother fails to persuade me that the father gave his consent to B being removed from the home in Michigan on the basis for which the mother contends.**

**Article 13 of the convention provides that the court is not bound to order the immediate return of a child if the person, here the mother, opposing the return of the child establishes any of the matters set out in Art 13. I hold that the mother has not established that the father gave his consent.**

**There was a brief discussion at the Bar as to whether this is properly to be regarded as a case of removal or retention. I do not find it necessary to resolve that issue. The basis for saying this is a case of removal would be that, although the father gave his consent to the removal of B, his consent was vitiated by the fraud of the mother in misleading him as to her intention whether to return by 19 November 1996 or to stay permanently in the UK. It seems to me more likely that this case is to be regarded as a case of retention. The understanding I find was that B would be back by 19 November 1996, he was not, so there was retention.**

**The evidence is that shortly after she and B arrived here the mother told the father on the telephone that she was not coming back and that she had consulted solicitors. He then consulted lawyers in Michigan and divorce and custody proceedings were filed on his behalf in the Circuit Court for the County of Oakland in that State on 25 September 1996. His lawyers took steps to initiate proceedings under the Hague Convention and his application was made here in England on 29 November 1996. Mr Boora sought to argue faintly that the father's delay, first in consulting lawyers in Michigan and then in initiating process both here and there amounted to acquiescence, but in my view there was nothing about the father's conduct which was inconsistent with his claiming a summary return of B.**

**The mother relies under Art 13 not only on her submission that the father consented to the removal or retention of B here in England but on her submission that there is a grave risk that an order for B's return would expose him to physical or psychological harm or place him in an intolerable situation. There is nothing said in support of that submission beyond the fact that the mother asserts that if B were to be ordered back to Michigan she would not go with him. Accordingly, she submits, B would suffer harm in being separated from her. She says:**

**'I will not return to the USA even if the court were to order that B return to Michigan. I cannot bear the thought of returning to a country full of such unhappy memories and experiences.'**

**She sets out the detail of those experiences and concludes: 'If B returns to the USA without me, I believe it will cause him a great deal of grief and anguish'.**

**In my view, there is nothing said in the mother's evidence which would establish to my satisfaction a grave risk of any of the matters set out in Art 13. Indeed, the matter was the subject of trenchant observations by Butler-Sloss LJ in *Re C (A Minor) (Abduction)* [1989] 1 FLR 403 where, at 410, she said:**

**'Is a parent to create the psychological situation, and then rely upon it? If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and four through the Convention, at least in respect of applications relating to young children. I, for my part, cannot believe that that is in the interests of international relations. Nor should the mother,**

by her own actions, succeed in preventing the return of a child who should be living in his own country and deny him contact with his other parent.'

The mother having failed to establish any of the matters set out under Art 13, it becomes my duty under Art 12 to order the return of B forthwith to the State of Michigan.

Had the mother established any of the matters relied upon by her under Art 13, then I would have had to consider the exercise of the discretion conferred upon the court under that article. In that regard, I have considered the nature of the evidence advanced by the mother and the reasons which she gives for having acted as she did and, in particular, her concerns about B. In my view, looking at the totality of the matter, it would not be appropriate here for the court to exercise its discretion not to order the return of B. In simple terms, B, like his brother C, is an American boy and decisions about his future should be made in the State of Michigan and not by the courts of the UK. I therefore order B's return forthwith to Michigan. In doing so, I record my acknowledgement of Art 19 of the Convention, which provides that an order for the return of a child shall not be determinative of questions of custody when that issue falls to be considered in the courts of the foreign State.

Article 12 imposes upon the court a duty to order the return of the child forthwith, but as is always the case I hope that discussions can take place between counsel and solicitors for the parties to lead to B's return being organised in a sensible way. I make an order for legal aid taxation of the costs of the parties who have certificates.

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