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[25/03/1998; Court of Appeal (England); Appellate Court]
Re D. (Abduction: Acquiescence) [1998] 2 FLR 335

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COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

25 March 1998

Butler-Sloss and Judge LJJ, Sir John Vinelott

In the Matter of D.

Allan Levy QC and Jeremy Rosenblatt for the appellant

Elizabeth Lawson QC and Jane Hoyal for the respondent

BUTLER-SLOSS LJ: This is an appeal from the order of the President of the Family Division, Sir Stephen Brown, made on 13 January 1998 in which he dismissed an application under the Hague Convention for the return of two children to Australia. The refusal to return the children was made on the ground of acquiescence under Art 13(a) of the Convention. The father appeals to this court.

The children are B, born on 2 October 1992, and C, born on 1 March 1994. There will be a restriction by way of direction that there should be no identification of any member of the family or of the children or of anything to lead to the identification of the children.

Their parents were both born in Wales. They met in 1981 and the father emigrated to Australia in 1982. He returned to Wales to marry the mother on 15 December 1984. The mother joined the father in Australia with M, her child of a previous marriage. They set up in New South Wales where B and were born. In December 1995 the mother and the three children returned to Wales for a holiday but they went back to Australia in February 1996. The mother became unsettled and wanted to return to live in Wales where her family were still living. She arranged to take the children back to Wales and travelled with them on 29 July 1997. The father believed that this was another holiday but the mother deceived him since she planned to make it a permanent return for herself and the three children.

The father was working away from home in August 1997 and on his return he found two letters from the mother's solicitors in Swansea notifying him that the mother did not intend to return to Australia and was seeking residence orders and asked for his consent. The mother had already issued a divorce petition and obtained interim residence orders from the Swansea County Court on 11 August 1997. The father got in touch with the mother's solicitors who informed him of the interim order and that the inter partes hearing was fixed for 3 September 1997. The father was very upset and arranged to fly to the UK. He made

inquiries of the Attorney-General's Department, the Department of Immigration and the Department of Foreign Affairs.

According to his Hague Convention application:

'Before he left Australia the father had telephoned the Immigration Department, Department of Foreign Affairs and the Attorney-General's Department. At this stage he cannot remember who told him but in one of these conversations he was told about the Hague Convention but on the basis that it was usually invoked when a father kidnapped his children out of Australia. The father did not see the removal of his children as kidnapping as he had agreed to them leaving and he did not think his case was one for the Hague Convention.'

On his arrival in Swansea, on 22 August 1997, he had a distressing time since he went straight to see the children and was not allowed to do so. He was advised by the police and consulted a solicitor immediately. Thereafter both mother and father were represented by Swansea solicitors. After discussions on the telephone and by exchange of letters contact was arranged between the father and the children. The father consented to the mother obtaining residence orders in respect of all three children. The hearing on 3 September 1997 was attended by the solicitor for the mother but not by the father or his solicitors, but the judge was shown a letter from the father's solicitors. The judge made a consent order.

The father returned to Australia on 12 September 1997. On 14 September 1997 he again inquired about his rights in respect of the children, this time by letter. His letter was passed to the appropriate department of the Attorney- General's Department, the Australian Central Authority for the Hague Convention. The application, the subject of this appeal, was issued on 20 October 1997 and his affidavit in support was sworn on 27 November 1997.

It is clear that the children were habitually resident in Australia and that their mother deceived their father into thinking that she was bringing them to Wales for a holiday and would be returning in September 1997. Their removal from Australia was therefore wrongful and the mother was in breach of Arts 3 and 5 of the Convention. Once a court has come to that decision, as the President did, it is the duty of the court to return the children to the jurisdiction of their habitual residence forthwith in compliance with Art 12 unless a ground under Art 13 is proved and the court exercises its discretion not to return the child. The mother raised the question of acquiescence under Art 13 which the President found proved and he refused to return the two relevant children. The appeal is against the finding of acquiescence but not against the exercise of discretion by the President.

Lord Browne-Wilkinson in his speech in Re H (Abduction: Acquiescence) [1998] AC 72, [1997] 1 FLR 872 set out the relevant considerations to be taken into account when the defence of acquiescence is raised in a Convention case. I read from 88D and 882D respectively:

'In my judgment, therefore, in the ordinary case the court has to determine whether in all the circumstances of the case the wronged parent has, in fact, gone along with the wrongful abduction. Acquiescence is a question of the actual subjective intention of the wronged parent, not of the outside world's perception of his intentions.

Is acquiescence a question of fact or law?

Once it is established that the question of acquiescence depends upon the subjective intentions of the wronged parent, it is clear that the question is a pure question of fact to be determined by the trial judge on the, perhaps limited, material before him.

In the process of this fact-finding operation, the judge, as a matter of ordinary judicial common sense, is likely to attach more weight to the express words or conduct of the wronged parent than to his subsequent evidence as to his state of mind. In reaching conclusions of fact, judges always, and rightly, pay more attention to outward conduct than to the possible self-serving evidence of undisclosed intentions. But in so doing the judge is finding the actual facts. He can infer the actual subjective intention from the outward and visible acts of the wronged parents. That is quite a different matter from imputing to the wronged parent an intention which he did not, in fact, possess.'

I then go to 89F and 883F respectively:

'Therefore in my judgment there are cases (of which Re AZ (A Minor) . . . is one) in which the wronged parent, knowing of his rights, has so conducted himself vis-a-vis the other parent and the children that he cannot be heard to go back on what he has done and seek to persuade the judge that, all along, he had secretly intended to claim the summary return of the children. However, in my judgment these will be strictly exceptional cases. In the ordinary case behaviour of that kind will be likely to lead the judge to a finding that the actual intention of the wronged parent was indeed to acquiesce in the wrongful removal. It is only in cases where the judge is satisfied that the wronged parent did not, in fact, acquiesce but his outward behaviour demonstrated the contrary that this exceptional case arises.'

Then he brings it into summary, which it is not necessary for me to read (at 90D-G and 884D-G respectively). He then deals with the one exception which covers the point that I have just read at 90F and 884G respectively. Those are the passages which I have taken as the principles which this court should apply in the present case.

The alternative possibilities submitted by Miss Lawson QC acting for the mother are (a) actual acquiescence to be inferred from the father's contemporaneous words and actions as set out in the exchange of correspondence between the mother's and father's solicitors and the attendance notes leading up to and immediately after the crucial decision of the father to consent to the residence orders made on 3 September 1997 in the Swansea County Court or (b) by the same words and actions the father clearly and unequivocally led the mother to believe that he was not going to seek the summary return of the children to Australia (otherwise the exception set out by Lord Browne-Wilkinson).

Mr Levy QC for the father submitted that throughout the period between the wrongful removal of the children at the end of July 1997 and the father's Convention application in October 1997 he always wanted a reconciliation and the return of the children to their home in New South Wales. He was distressed by their departure and the actions of the mother. He was initially refused contact since the mother feared he might secretly remove them back to Australia. He was under stress throughout his visit to Wales in August/September 1997 and his agreement to the consent order on 3 September 1997 has to be seen in the light of a man desperate to have contact with his children which he would not achieve without his agreement to a residence order. He was hoping throughout to achieve a reconciliation with his wife and somehow to take his entire family back home to Australia. Lord Browne-Wilkinson said in Re H, to which I have already referred, at 88G and 882H respectively:

'Although each case will depend on its own circumstances, I would suggest judges should be slow to infer an intention to acquiesce from attempts by the wronged parent to effect a reconciliation or to reach an agreed voluntary return of the abducted child.'

That is of course an important factor for the court to take into account in looking at all the relevant facts. Mr Levy submitted that there was clear evidence of the father's lack of knowledge of the Convention and of his rights compounded by the failure of his solicitors in

Swansea to give him appropriate advice. He submitted that the President failed to take into account these important considerations. He argued that there was no actual acquiescence to the children remaining in the UK and the exception referred to by Lord Browne-Wilkinson did not apply since the father did not have the requisite knowledge.

Miss Lawson pointed, however, to a somewhat different picture and submitted that the father decided in August 1997 to sell up in Australia and return to live in Wales with a hope of a reconciliation but in any event to live near the children. She pointed to the fact that he did not and does not seek the custody of the children in Australia. He wanted the mother and the children together. She submitted that the President was correct to come to the conclusion that the father did intend to return permanently to Wales while he was in the UK and changed his mind after his return to Australia. She suggested that the advice given by his solicitors might not have been incompetent but on the contrary focused on the situation as it was in reality; that he accepted that the children would have to live with their mother in Wales and he wanted to make suitable arrangements for contact with them. In the alternative she relied upon the consent order and the undoubted belief of the mother that the father was returning to live permanently in Wales to argue the father could not now argue to the contrary. She relied upon his failure to seek to appeal the residence order of 3 September 1997.

It is necessary in this case to look with some care at the contemporaneous documents which paint a picture which does not in a number of material respects support the case presented by the father in his affidavits and in his application under the Hague Convention compiled after the father's return to Australia and after he had sought specific advice from the Attorney- General's Department.

The father's case, which was presented in his Hague Convention application and supporting evidence, was that he was devastated by the removal of the children (as I am sure he was). Before leaving Australia he sought advice there how he might secure the return of the family. He was given incorrect advice which at one time he said in his various documents usually and at another time only applied to abducting fathers and that he believed it did not apply to him. He went to Wales and was denied access. He consulted solicitors. He was not advised about the Hague Convention, and he did not know of his rights under the Convention. In his affidavit in support of his application he said:

'At this time, I was extremely emotionally distraught, I was not advised by my solicitors of the Hague Convention. I was told that the only way to secure regular contact with my children was consent to a residence order. It was my clear understanding at that time, that if I did not agree to the residence order I would not be able to see my children.'

In order to have contact with his children, which he would not otherwise have obtained, he had to agree to the residence orders to the mother. At p 33 of the bundle there is a letter from his solicitors dated 7 November 1997 to the solicitors acting for him under the Hague Convention in which they said:

'At the time it was considered that this was the only way that our client could secure contact with his children was to consent to the residence order as he was shortly thereafter due to return to Australia. Without such consent it is our opinion that permission would not have been forthcoming.'

He consented to the order of 3 September 1997 under duress. At p 113 of the supplemental bundle in a letter of 12 October 1997 to his Swansea solicitor he said:

'The fact that I consented to the residence order I believe my wife can use this as a defence against returning of the children to Australia.

I wish to make it perfectly clear that I was under considerable duress at the time and would have agreed to any request, if the result was I would get to see my children.'

Then at p 122 of the supplemental bundle in a letter dated 7 November 1997, again to his solicitors in Swansea, he said:

'With regard to my consent to the residence order, I fully appreciate it was my decision at the time as I feared I would not be able to secure contact with my children if I did not agree.

My intention at the time was to return and reside in the UK hoping my marriage problems could be sorted out with my wife.

I wish to make it very clear I was under considerable duress at the time, and would have agreed to any request to gain contact with my children.'

In the stress of the refusal of his wife to be reconciled and the fear that he might not even see his children he briefly considered selling up in New South Wales and returning permanently to live in Wales and that is the case that he presented both to the President and to this court.

Looking at the situation which faced the father in August 1997 one must naturally have great sympathy with him. But from the contemporaneous correspondence and attendance notes the account I have set out above has to be considerably modified. I shall take it under separate headings.

(a) Knowledge of the Hague Convention

The father clearly knew of the existence of the Hague Convention before he left Australia. Although he was told that it usually applied to abducting fathers he did not inquire further at that stage. Nonetheless he was sufficiently aware of its existence and that it might apply to him that, without prompting from anyone else, he put into motion the inquiries about the Convention to the relevant Australian authorities on 14 September 1997 immediately after his return home. He did not in any correspondence or attendance note while he was in Swansea discuss the possibility of the return of the children to Australia. His solicitors have been strongly criticised by Mr Levy for their failure to advise him properly about his Convention rights. It may be they did not know of the Convention. It is equally likely, as Miss Lawson suggested, that the application of the Convention did not arise since the father recognised at the time that if he was to see his children regularly he would have to live in Wales.

(b) Return to the UK

The father is Welsh and has not taken Australian citizenship. He had family in Wales. There is no doubt on his own account that he was talking of returning to live permanently in Wales. Indeed that appears from the passage in the letter which I have just read. He told his own solicitors and the mother's solicitors and the mother clearly believed that this was the course he was intending to take. The arrangements for contact agreed before his return to Australia were made on the basis that he would continue to be in Wales. In his Convention application he said:

'He had told the mother that he would come back to Australia and sell everything up and return to live permanently in Wales. The father knew that the marriage was over but hoped that if he lived in Wales he would be able to see his children on a regular basis.'

In the affidavit he said:

'I love my children desperately, and cannot bear the thought of them growing up in another country. Their home and lifestyle is Australian. Whilst in the desperation of the abduction I considered plans to sell my family business and return to live permanently in Wales',

and see the letter which I have already read at p 122. Those documents, all of course written after his return to Australia, confirm the contemporaneous attendance notes and letters at, first, para 4 of p 54 (a letter from the wife's solicitors to the husband's solicitors in the Swansea area dated 5 September 1997):

'However we note that shortly your client intends returning to Australia. However it is hoped that he will soon then return to the UK to live on a permanent basis. We would wish to place it on record at this stage that when your client is back in the jurisdiction on a permanent basis, then our client would wish the contact to continue. She would wish your client to have regular contact with the children . . .'

and then the solicitors set out the form of contact that they suggest. At p 56 is an attendance note of the father's solicitors. DMJ (which is the initials of the father's solicitor) advises that nothing can be done and nothing can be said until after he comes back from Australia. At p 86 is the wife's solicitors' filed note of 28 August 1997 setting out the husband's solicitors' understanding of the position in the penultimate paragraph:

'He [that is the husband's solicitors] stated that his client's intentions in respect of remaining in this jurisdiction were as follows; He stated that his client intended returning to live in this jurisdiction on a permanent basis as he wanted to be near his family and children,'

Then at the hearing on 5 September 1997 and the attendance note at p 87 from the wife's solicitors who had attended before the judge (the judge was told about this) and in the penultimate paragraph at p 87:

'. . . [the wife] has explained to me that her husband is now going to go back to Australia and he wants to start selling off various assets etc.'

Also in a further paragraph up the page:

'Obviously once then her husband was in the jurisdiction on a permanent basis she was happy for him to have far greater contact ie for him to have the children say for one day on the week-end and also for a couple of hours during the week.'

(c) Refusal of contact

On his arrival in Swansea on 21/22 August 1997 the father went to see the children and was on that occasion denied contact. It was not surprising that the mother having herself removed the children feared the father might do the same. But in a letter written on the same day, 22 August 1997, the mother's solicitors in a letter at p 40 of the main bundle said:

'We would place it on record at this stage that our client is agreeable to you exercising contact with all three children. However before that contact takes place we would wish to know the following:

(1) Your intentions in respect of our client's application for a residence order.

(2) How long you are in the jurisdiction for.

(3) Your proposals for the days when contact should take place. Also your proposals as to where contact should take place.'

It is clear that the correspondence thereafter dealt with the arrangements for contact and obvious precautions to prevent a snatch-back. Once the precautions were in place the mother's solicitors wrote on 28 August 1997:

'Our client would be agreeable to your client exercising contact to the three children of the family on Saturday between the hours of 12.30 pm to 5.00 pm.'

Then the various arrangements were set out; then in para 2 the way in which the father would collect the children and then under para 3 the mother sought confirmation in a letter that there would be no removal from the jurisdiction and that the father's passports would be handed over while the contact was taking place. All of this is in line with standard arrangements made in these sorts of cases. The first contact took place on 30 August 1997 before the hearing on 3 September 1997. It is clear from the attendance notes that the father was objecting to the form of contact and not to refusal of contact. Contact was and could not have been successfully denied and there was no suggestion in the correspondence that the contact was contingent upon a consent to residence orders. The father had the right to attend and be represented at the hearing before the judge on 3 September 1997 which he chose not to exercise. That hearing would have been the opportunity for him to ask the judge to deal with any unsatisfactory elements of the contact arrangements. His solicitors gave him entirely correct advice on 4 September 1997, which is set out in their attendance note at p 52, explaining to him that the children would always be his and he would be allowed access. It is clear to me that his solicitors never advised him otherwise and that his statement in his affidavit in the paragraph I have already read at p 19, para 17 that he would not be able to see his children if there was no residence order cannot stand in the light of the contemporaneous documents.

(d) Consent order or duress

It has never been suggested by the father that he should care for the children or that he would make an application for their custody in the family court in Australia. At all times the children were obviously to remain in the day-to- day care of their mother. The father's primary objective was to effect a reconciliation and get the whole family back to Australia. On the mother's refusal to be reconciled, his next objective was to retain proper contact with his children. His next move therefore was to return to live in Wales and all the discussions were on that basis. Indeed that is clear from the file note of the wife's solicitors to which I have already referred at p 86, dated 28 August 1997. The relevance of the contact arrangements and the solicitors' advice was all on the basis of the family living in Wales and not on the basis of the father living in Australia. Once that position is reached the reason for the consent of the father to the order and to the arrangements becomes clear as does his true consent to the order. The suggestion of duress, which Mr Levy sensibly has abandoned, came first from para 3 of the letter of 18 September 1997 from the Attorney-General's Department to the father after his return to Australia:

'The fact that you consented to the making of a residence order for the children in the UK is a slight problem as it appears that you have acquiesced to the children remaining in the UK. Your wife can use this as a defence against the return of the children to Australia. In the affidavit which must be prepared to accompany your application, it should be made clear

that you were under duress to consent to the residence order in order to be able to see your children and to convince your wife to return with the children to Australia.'

It is then for the first time picked up by the father and indeed the word 'duress' can be seen in the various letters from the father thereafter to his solicitor in Wales. The Attorney-General's Department correctly anticipated that there would be difficulties in enforcing the Convention in the light of the residence order.

Looking, as Mr Levy asked us to do, at all the relevant facts surrounding the making of a consent order it stands out that the father consented and that at the time he genuinely intended to return to Wales and either effect a reconciliation or live near his children and retain a regular relationship with them. It was not until he went back to New South Wales that he had, as the President correctly found, a change of heart and sought to go back on the arrangements he had been party to during his stay in Swansea. I am satisfied that there was a genuine consent to the order and to the domestic Children Act jurisdiction. The rights and issues under the Hague Convention were not at that stage relevant. The lack of specific knowledge of the father was not at that stage of significance. I am however of the opinion that the father had a general understanding, despite his protestations to the contrary, of his rights under the Convention and its possible application to him. In the decision of this court, Re S (Abduction: Acquiescence) [1998] 2 FLR 115 which was drawn to our attention by Mr Levy, I said at 122B:

'In earlier decisions of this court the lack of knowledge and misleading legal advice have been considered relevant factors to which the court should have regard, see Re A . . . and Re S . . . In Re AZ . . . this court held that it is not necessary, in order for a defence under Art 13 to succeed, to show that the applicant had specific knowledge of the Hague Convention. Knowledge of the facts and that the act of removal or retention is wrongful will normally usually be necessary. But to expect the applicant necessarily to have knowledge of the rights which can be enforced under the Convention is to set too high a standard. The degree of knowledge as a relevant factor will, of course, depend on the facts of each case.'

That might have become of greater relevance in this case if it had not been for the fact that I am satisfied that the Hague Convention was not in anybody's minds because it did not apply to the situation which arose at that time. It was not therefore at the time in August/September 1997 necessary for the father to explore the rights under the Hague Convention further. This is a case where there was genuine acquiescence within the principles laid down in Re H, which I have already read. It is not therefore necessary for this court to go on to consider the application of the exception which was the alternative argument put forward by Miss Lawson and I would dismiss this appeal.

I would however refer briefly to one other argument raised by Mr Levy. In R v R (Residence Order: Child Abduction) [1995] 2 FLR 625 Stuart- White J gave directions in divorce proceedings where the Spanish father, who was unrepresented, had written to the district judge in answer to the divorce petition. In his letter the father asserted that the removal of the children from Tenerife was wrongful. In other words there was a stark, apparently unresolved, Convention issue. His Honour Judge Fricker was consulted and he wisely transferred the proceedings to the High Court in view of a possible breach of the Hague Convention. Stuart-White J held that where it appeared there had been a breach of the Convention it was the duty of the court to ensure that the parent in the State from which the child had been removed was informed of his rights unless there was clear evidence of acquiescence. He held that the English court should refrain from deciding the merits of rights of custody. In a case where one parent, who is from a State which is a signatory to the Convention, is a litigant in person and in touch with the English court, and it appears that he

has not withdrawn allegations which amount (if true), to a breach of his Convention rights, I agree with Stuart-White J that the proceedings should in principle be transferred to the High Court for suitable directions to be given. It may be that circuit judges and district judges should be alert to that possibility as were the district judge in Scarborough and Judge Fricker. That situation, as Mr Levy recognises, does not arise on the present appeal.

JUDGE LJ: I agree. I add only that the longer the hearing proceeded and the more closely the contemporaneous documents were examined, as they have been by my Lady in the course of her judgment, the clearer it became that this was a case of genuine acquiescence within Art 13 of the Hague Convention. As to the criticisms made of the father's former solicitors, I am unpersuaded that in the context of his apparent intention to return to live permanently in Wales during the critical period in August and September 1997 they were less than competent or in breach of their professional obligations to give him appropriate advice. As I have not heard any evidence from them, I shall simply record that I remain baffled by the comment in the letter dated 7 November 1997:

'. . . it was considered that this was the only way that our client could secure contact with his children was to consent to the residence order as he was shortly thereafter due to return to Australia. Without such consent it is our opinion that permission would not have been forthcoming.'

SIR JOHN VINELOTT: I also agree

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