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[29/11/1996; Court of Appeal (England); Appellate Court]
Re L. (A Minor), 29 November 1996, Court of Appeal

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

29 November 1996

Kennedy, Thorpe, Hutchison LJJ

In the Matter of re L.

Counsel: J Parker QC and M Page for the Appellant; The Respondent did not appear and was not represented

THORPE LJ: The defendant in child abduction proceedings CL met the plaintiff JL in July 1990. They married later that year and the defendant gave birth to a son, T, on 22 July 1991. She separated finally from the plaintiff on 25 September 1992, removing T from the matrimonial home in the United States of America without the knowledge or consent of the plaintiff. She returned with T to her own parents in Nottingham. Shortly after her return she filed a petition for divorce which was swiftly served on the plaintiff. His response was to issue an application under the Hague Convention for T's return to the USA. The mother sought to resist that application by filing expert evidence suggesting that separation between herself and T would result in psychological harm. That course seems to me to have been quite inappropriate since the father was not suggesting there should be a separation between T and his mother, but only that they should both return whence they had come. It is not surprising that Hollis J paid little heed to that line of submission when the case came before him on 24 February 1993. He made the order for T's return to the USA, and specifically to the State of Texas on what might be described as Convention undertakings, including the familiar provision that the mother and T should have exclusive possession of the former matrimonial home on their return and that the father should provide a weekly sum for their maintenance.

Unusually in this case, the father did not implement the order which he had obtained. It was incumbent upon him, and this was the subject of another undertaking, to provide airline tickets for the mother and T. But those airline tickets did not come. There was a certain amount of communication between mother and father. The father suggested tickets would be provided in May, but they were not provided and communication between the parents simply died away with the defendant and T remaining in Nottingham.

Three years later the mother initiated this appeal with the understandable objective of

correcting the record and removing from the record the stale order for return. By this stage she has no direct evidence of the whereabouts of the father. An order for substituted service on the father's sister was made by the registrar on 4 November. That service has not prompted any reaction from the father and so the strong inference is that he has no continuing interest in his order or its implementation or, indeed, in the future arrangements for his son.

The decision of this court in Re M (Abduction: Undertakings) [1995] 1 FLR 1021, [1995] Fam Law 350 makes it plain that an order under the Convention is a final order and there is no jurisdiction in the judge of first instance to entertain an application for variation in the event of a fundamental change of circumstances. The appropriate remedy is by way of appeal to this court.

Here, the order is so stale as to be dead. The whole purpose of the Hague procedure is to ensure the return of an abducted child by hot pursuit. Art 12 provides that the period of 12 months after the return is to be a watershed within the framework of the Convention. Here, where three-and-a-half years has elapsed since the order was made, it is manifest that the father would be quite unable to rely on the order were he to change his stance yet again and contend that T should be returned to Texas. Obviously, after such a passage of time the jurisdiction for investigation and merit determination has shifted across the Atlantic to this jurisdiction, the jurisdiction of T's residence over the course of the last four years. Were the father to revive his desire for T's return, it is obvious that he could not invoke the Hague Convention procedure. He would have to initiate an application in this jurisdiction under the Children Act 1989, seeking a residence order and leave to take T from the jurisdiction.

It is manifest to me that this application is a mere formality. It is a necessary formality under the decision of this court in Re M, but it remains a formality. I suspect that the factual situation, whereby a father obtains an order and then loses interest, is rare in the extreme. But should the situation recur, it does seem to me that the appeal to this court can be advanced on the basis that it is, more or less, a formal application, that it needs only the briefest of listing and very little argument in support.

For those reasons, I would allow this appeal.

HUTCHISON LJ: I agree.

KENNEDY LJ: I also agree.

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