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http://www.incadat.com/ ref.: HC/E/IL 242
[21/06/1993; The Supreme Court of Israel, sitting as a Court of Civil Appeals; Appellate Court]
L. v. L., 21 June 1993, The Supreme Court of Israel, sitting as a Court of Appeals
(Civ. App. 473/93, 47 (3) P.D. 63)

L. v. L.

The Supreme Court of Israel, sitting as a Court of Civil Appeals

21 June 1993

Before: Elon, J., Deputy President, Netanyahu, Maltz JJ.

Opinion: Elon, J.

(Summary of decision contributed to www.hiltonhouse.com by Edwin Freedman, Esq., Tel Aviv, Israel)

Reversal of the decision of the Tel Aviv-Jaffa District Court (J. Diamant) which had granted the request of the Respondent-father for the return of his minor son from Israel to California pursuant to the Hague Convention.

FACTS

The father and the mother were Israeli citizens who married in Israel and had subsequently changed their residence to Los Angeles, California. Their son was born in California in 1988. The father's parents and most of the members of both the father's and the mother's families remained in Israel. For business reasons and in order to visit his family, the father would spend extended periods of time in Israel where he stayed in a villa in Herzliya registered in his name,

In 1991, during one of the father's stays in Israel, the mother without the father's knowledge or consent, took the child to Israel and immediately initiated proceedings in the Israeli courts for custody and maintenance. The father, upon learning of the arrival, took measures to defend himself in these proceedings and initiated his own proceedings in the Rabbinical court for "shalom bayit" and to declare his spouse a"rebellious wife". He also maintained regular visits with his son.

In the context of the maintenance proceedings, the father also obtained an injunction against the departure of the child from Israel. On the other hand, while he fought for custody, he did not for 10 months initiate any proceedings pursuant to the Hague Convention for the return of the child to the United States. The father maintained subsequently that he had received poor legal advice and had been simply unaware that such a procedure to achieve the rapid return of the child to California existed. After ten months had elapsed - and after he had seen an article about the Hague procedures and had changed his legal counsel - the father did initiate a Hague proceeding.

The District Court granted the father's request and the mother appealed.

ISSUE

Although a variety of issues and contentions were raised before the court by the parties, the Supreme Court considered that only one essential issue lay before it: Did the father's actions and inactions in the ten-month period between the child's arrival in Israel and the initiation by the father of the Hague action constitute, within the totality of circumstances, an "acquiescence" in the removal of the child to Israel under Section 13(a) of the Hague Convention, thereby releasing the court from its automatic obligation to return the child (as required by Section 12 of the Convention) and allowing it to consider factors such as the child's best interests in determining whether he should be returned.

HOLDING

Reversing the District Court, the Supreme Court held that the father's actions and inactions, including his failure for 10 months to take any measures to procure the swift return of his child to California constituted,

within the totality of the circumstances, amounted to "acquiescence" to the child's removal under Section 13 (a). The court was therefore able to broadly consider the child's best interests in ruling on the Hague application. It concluded that it would be best for the child to remain in Israel, denying the father's application and granting the mother's appeal.

SUMMARY OF THE COURT'S ANALYSIS

1. The essential purpose of the Hague Convention is to permit a rapid and immediate transfer of the abducted child back to his country of residence so as to preserve the status quo that existed prior to the abduction. It is a form of legal "first aid", an emergency means of "putting out a fire".

2. "Acquiescence" under 13(a) refers to conduct by the parent demonstrating that he does not regard the immediate return of the child to the country of residence as a matter of urgency, that he has accepted the change in the status quo created by the child's removal, and that he is content to resolve the issues raised by the abduction through alternative means.

3. Relying upon the reasoning in the English cases of In re A (Minors) and In re A (A Minor) the Court held that acquiescence may be passive and/or active, express and/or implied. Where passive, it will consist of silence and inactivity in circumstances in which the aggrieved party might reasonably have been expected to act. The time period that must elapse before inactivity will be considered acquiescence will depend on all the circumstances of the particular case.

4. The parent must, of course, be aware of the unlawful removal of the child before he can be said to acquiesce to that removal, and he must be aware, at least in general terms, of his rights against the other parent. On the other hand, it is not necessary that he be aware of the specific legal procedures involved or even of the existence of the Hague Convention. Indeed, if the parent knows of his child's unlawful abduction, the court will usually infer that he is aware of his legal right to the child's return or, at the least, that he is aware that he should seek legal advice as to how to enforce his right to the child's return.

5. The Court rejected the Respondent's contention that the one-year period provided for in section 12 of the Convention should be construed to mean that irrevocable acquiescence cannot ever occur in a shorter period. On the contrary, the language of section 13, whose provisions apply "notwithstanding what is stated in the previous section" make clear that the question of acquiescence is not dependent on the passage of the one-year period in section 12. The Court further seems to indicate that once acquiescence occurs, the parent cannot seek, after the passage of time, to nullify that acquiescence for the period for emergency "first aid" measures will have passed.

6. While the subjective view of the parent is a factor in the question of acquiescence, the court can only ascertain that subjective frame of mind by considering his conduct in the circumstances of the case.

7. In this context, "the existence of acquiescence will be determined by whether or not, in the light of the totality of all of the circumstances, the parent acted like someone whose purpose was to immediately "put out the fire", and if he did not so act, the inference is that he acquiesced to the act [of removal]."

8. In the instant case, the father had become aware of his child's removal - and that such removal was unlawful - within two weeks after its occurance. He, indeed, immediately engaged in extensive litigation to seek to achieve custody of the child, as well as with respect to issues of maintenance, "shalom bayit", etc. Nevertheless, he took no action whatsoever for ten months to seek to effect the child's return to California. His actions and inaction both testify to the fact that he had acquiesced to the child's continued presence in Israel,

9. The Court did not accept the Respondent's explanation that his failure to previously proceed under the Hague Convention was due to the bad legal advice he had received and to his ignorance of the existence of the Convention and its procedures. (He claimed that it was only after seeing an article on the Convention, and after consulting other lawyers, that he knew that he could seek his son's immediate return from Israel.) The Court found that, at an early date, he had retained a lawyer expert in the area of personal status law and presumed that if the father's goal had been to achieve the immediate "first aid" return of his son, he would have pushed his lawyer to act accordingly. The court found it incredible that the lawyer would have been unaware of the existence of the Hague proceedings and, in any case, noted "mistaken ignorance of the law will not avail" the Respondent. Even aside from the Hague procedures, the court noted, the father might have attempted a habeas corpus proceeding or a request for the return of the child under the Legal Capacity and Guardianship Law. Neither, it noted, did the father take any action in the United States to get a court order for his son's return.

10. The father's conduct and the litigation avenues he pursued manifested opposition to many of the actions and positions of his wife but they also manifested an acquiescence to their basic fact of the child's removal to Israel and a willingness to litigate the disputes related to Israel in an Israeli forum and not to seek an immediate transfer of the child to the United States.

11. The New Jersey court decision in Becker v. Becker (New Jersey 1989), Docket No. FD-14-14-90, cited by the Respondent was found by the court to be not on point. In Becker it was held that the litigation by the parent of the issue of custody in the courts of the country to which the child had been removed did not constitute acquiescence in the child's removal. In Becker, however, this alternative litigation was conducted parallel to Hague proceedings initiated by the parent. In L., the father had for 10 months conducted only these local proceedings, with no attempt to litigate or move for the child's prompt return to the U.S.

12. The court inferred that the motives for the father's acquiescence related to his regular stays in Israel, his presence there at the time of the removal, his family's presence there and his greater comfort with the relevant legal procedures being conducted in Hebrew in the Israeli courts.

13. The lower court, it concluded, had erred in placing too great an emphasis upon the explanation of the Respondent that he had been ignorant of the Hague procedures, and in giving insufficient consideration to the totality of circumstances involved.

14. The Court's determination that the father had acquiesced in the matter of the child's removal allowed it to consider a broader range of considerations in ruling on the issue of his return to California. On the basis of its consideration of factors related to the child's best interests, it ruled that these factors favoured his remaining in Israel and granted the mother's appeal

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