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[14/02/2000; High Court (England); First Instance]
Re H (Abduction: Child of 16) [2000] 2 FLR 51; [2000] 3 FCR 404; [2000] Fam Law 530

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

14 February 2000

Bracewell J

In the Matter of re H. (Abduction: Child of 16)

Counsel: Michael Nicholls for the father; Roshanak Amiraftabi for the mother.

Solicitors: Heald Nickinson; Charles Platel & Partners.

BRACEWELL J: This is an application under the Child Abduction and Custody Act 1985 in respect of two children, K, who was born on 29 December 1983, and R, who was born on 18 January 1987. The plaintiff father seeks the return of the two children from this jurisdiction to the jurisdiction of Australia.

The relevant chronology, which I find, is that the mother was born in England in 1957 and the father was born in Australia in 1959. They married in Melbourne, Australia in 1983 and set up the matrimonial home in Australia where K was born in 1983. A second child, A was born in 1985 and then R was born in 1987. Some 9 months after the birth of R the parties separated and in March 1988 there was an order of the Family Court of Australia, at Dananong, upon the mother undertaking to keep the father advised of the welfare, address and telephone number of the children, it was ordered that the mother and father have joint guardianship of the children and the mother was permitted to take the children to Western Australia. Defined access was granted to father, together with some indirect contact.

In 1989 the mother and father divorced, as a result of which proceedings the children stayed with mother. Thereafter the mother married Mr MB.

In January 1995, by agreement between the parties, A was to live with the father and K and R were to stay with the mother. Since that time A has lived with his father.

There were some difficulties over contact and there were further proceedings in September 1996 when there were orders in the Family Court of Australia at Dananong for weekend contact between K, R and the father, and contact between the mother and A. The matter came back later that year before the Family Court of Australia. There were some continuing contact problems and the last contact that the mother had with A took place in January 1998.

In April 1998 the mother removed K and R from the jurisdiction of Australia. There is an issue thereafter as to whether the mother wrote to the father in May 1998 stating that she would be

returning in a few months. The mother's affidavit sets out her contention that she did so write, whereas the father states that he received no such communication and did not know until December 1998 where the children were staying because he then received a letter from K containing an address. By this time mother had decided to stay in England with the children and purchase a house.

On 31 March 1999 the father, who had previously sought legal advice which turned out to be inaccurate and wrong, wrote to his member of parliament. He did not receive a reply until September 1999. In the meantime the father had written to K and R at the address which had been provided by K but around that time the mother moved from that address to a different address which was not supplied to the father at that time. In September 1999 the father received correspondence from K setting out the new address and this was in the same month that a reply was received by the father from his Federal MP, who supplied an information pack about contacting the Central Authority for assistance under the Hague Convention. On 12 November 1999 the father completed the child abduction forms sent by the Australian Central Authority.

On 3 December 1999 the father swore an affidavit setting out his efforts to trace the children's whereabouts through local and Federal police, the immigration department and through the parents of the mother's husband. He set out further the attempts he had made to seek assistance from lawyers, who had wrongly advised him of the high costs involved in tracing and removing children, that the procedure would be slow and that there was no guarantee of success.

On 16 December 1999 the father issued an originating summons under the Child Abduction and Custody Act 1985 for the return of the children to Australia and certain ancillary directions. Thereafter the matter was timetabled for the hearing today and on 19 January 2000 there was evidence adduced before his Honour Judge Callman, sitting as a High Court Judge, dealing with the wishes and feelings and maturity of the two children.

The first question which arises for determination is whether K comes within the ambit of the 1985 Act at all and it is because of the question which arises that the father has issued alternative proceedings under the inherent jurisdiction. K was 15 years old when the father made his application, but she is now 16 years old, having had her birthday on 29 December 1999. It is extraordinary that despite the number of years that the Convention has had the force of law within this jurisdiction and in other jurisdictions, neither experienced counsel has been able to point to any authority, either in this jurisdiction or in any other, which gives guidance as to whether or not the court remains seized of an application once a child concerned attains the age of 16 years.

Article 4 of the Convention reads as follows:

'The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of sixteen years.'

It appears that this point has not before arisen for determination. Article 4 was referred to in the report of the Third Special Commission meeting to review the operation of the Hague Convention in March 1997 but the matters there set out indicate by inference that the age limit of 16 years has not given rise to any problems in practice.

I have been referred to a publication by the Honourable James D Garbolino, a judge of Orange County, California, who has written a guide to handling Hague Convention cases in US courts. At p 75 the publication refers to the provisions of Art 4 and concludes:

'Thus even if the child is under the age of 16 at the time of the wrongful removal or retention, if the child has reached 16 when return is requested, the Convention does not require the child's return.'

He then refers to the Perez Vera Report which states in terms that the Convention does not apply to children over the age of 16 and the judge queries that the provisions of the Convention may well be broad enough to authorise a court to order the return of the child over the age of 16 assuming that the court otherwise is inclined to do so under other laws, procedures or comity. He goes on:

'If those orders are valid until the child reaches 18, for example, the Convention ceases to allow courts the flexibility to enforce those orders to effect a return of a child or organise access rights. The 16 year old cut-off in the Convention has not posed any problem with regard to its application in case law. It has been noted, however, that this provision has posed some practical problems where one sibling is over the age of 16 and others are under that age. In such cases it would appear that a court might have alternative legal bases upon which to consider making orders with regard to returning siblings, one of whom is over the age of 16.'

The report of Professor Perez Vera to which I have been referred states in terms that once a child attains the age of 16, no action or decision based upon the Convention's provisions can be taken. It is plain that Professor Perez Vera considers that the court would no longer be seized of any application properly brought once the child reaches that cut-off age.

This is a difficult matter, which I have not encountered before and no research has thrown any illumination upon this topic in the case-law. I have concluded that the Convention must be construed at face value and that it does not apply to K, she having reached that defining age and I accept the opinion of Professor Perez Vera. It therefore is appropriate to consider the case of R under the Hague Convention and thereafter to consider the position of K under the inherent jurisdiction.

It is not disputed in this case by the mother that the removal of both children from the jurisdiction of Australia in April 1998 was wrongful within the meaning of Arts 3 and 5 of the Hague Convention. Both parties have parental responsibility for the children and at p 57 there is a letter in clear terms from the Australian Attorney-General's Department setting out that fact.

Under Art 12 the provisions which are relevant to this case read as follows:

'Where a child has been wrongfully removed . . . and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.'

It is the case, looking at the relative dates, that these proceedings were commenced after the expiration of the period of one year from the date of removal. It is, in my judgment, necessary to consider why the proceedings were so delayed. That, in my opinion, is relevant to the question of settlement because it was made plain in the case of Re L (Abduction: Pending Criminal Proceedings) [1999] 1 FLR 433, 441 that time in hiding cannot go to establish settlement and it is not good law for the abducting parent to be able to say 'well, I have managed to evade the wronged parent; I have managed to hide my address and whereabouts of the children and I am going to rely on that in advance of the argument that the children have been so long in the jurisdiction that they have now settled in that environment and the court should exercise a judgment not to return them to the original jurisdiction'. Further, in that context it is relevant to consider when the father knew of the whereabouts of the children.

I am satisfied that the father first knew of the children's whereabouts in December 1998 when he received a letter from K. Even if the mother wrote in May 1998 and whether or not the father received such a letter, it does not, in my judgment, affect this aspect of the case because the mother did not set out her address and indicated that she would be staying in England for at least a few months. At that date, on any view of the matter, the mother was making representations which did not constitute a determination to remain permanently in this jurisdiction. It was in fact misleading as far as the father was concerned, because I am satisfied that when the mother wrongfully removed the children she intended to stay permanently within this jurisdiction but had no intention of so informing the father. The mother in effect was playing ducks and drakes with the father. She did not disclose her address and she did not inform the school in Australia that she was removing the children. When K did inform the father of the address shortly thereafter there was a removal to another address, and plainly, on the totality of the evidence, the mother was unwilling to have any meaningful contact with the father or to give him any information which might assist him to take any proceedings in relation to the children. Having regard to the fact, as I find, that the father did not know the whereabouts of the children until December 1998, it follows that within 12 months of that time he did in fact bring proceedings. That is a relevant matter in considering whether or not the children had settled. I find that the mother cannot, in the circumstances of this case, rely upon the settlement of the children in this jurisdiction.

It is plain from the authorities what settlement consists of and, so far as these children are concerned, I do not find that they come into the ambit of the test in Re N (Minors) (Abduction) [1991] 1 FLR 413. Settlement has to be looked at at the date of commencement of the proceedings and it is to be given its ordinary meaning with two constituents, physical and emotional.

The next matter that arises is that of acquiescence. The father denies that he has acquiesced in the removal of the children. Acquiescence was considered in the leading case of Re H and Others (Minors) (Abduction: Acquiescence) [1998] AC 72, sub nom Re H (Abduction: Acquiescence) [1997] 1 FLR 872. The question whether the wronged parent has acquiesced in the removal or retention of the child depends upon his actual state of mind. Therefore the court is looking to the subjective state of mind of the wronged parent. The court is primarily concerned not with the question of the other parent's perception, nor that of the world in general, but with the question whether the applicant acquiesced in fact. The question which must be addressed is, has the wronged parent in fact consented to the continued presence of the child in the jurisdiction to which he has been abducted. The intention of the wronged parent is a question of fact for the judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent. In reaching a decision a judge will no doubt be inclined to attach more weight to any contemporaneous words and actions than to bare assertions in evidence of intention. But that is a question of weight to be attached to evidence and not a question of law. There is one exception. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or is not going to assert his right to a summary return and are inconsistent with such return, then justice requires that the wronged parent be held to have acquiesced.

Accordingly there are two elements: actual, subjective acquiescence and acquiescence deemed from behaviour.

Ward LJ in P v P (Abduction: Acquiescence) [1998] 2 FLR 835, 841B stated:

'What has to be established . . . is that one party had so conducted himself as to mislead the other party as to the true state of facts, for in such a case he might not be able subsequently to assert the true facts as against the other.'

In relation to the relevant matters for my consideration, the inactivity of the father up to December 1998 is wholly explicable because of the information from the relatives and from the

mother if she wrote in May 1998 that it was a temporary removal to the UK and not a permanent move. The father made efforts to find the children when the school telephoned him to ask why K had been absent. He inquired of relatives. He had no address or telephone number for the mother and the children. He sought legal advice, which was in fact wrong in law. He tried to obtain more information from the stepfather's relatives some months after the removal. He made active efforts to contact his member of parliament in March 1999. When he did not receive a reply he sent a reminder in July 1999 and having received a response containing appropriate information on 13 September 1999 he took steps and made a request on 24 November 1999.

The mother did not conduct herself in a manner which was consistent with any belief that the father was not going to seek a return of the children. The mother, in my judgment, tried to put spokes in the wheel by failing to inform the school of what she was about, failing to inform the father of her decision at Christmas 1999 to stay permanently and purchase a house, by failing to inform him of her move to a new address, by having an ex-directory telephone number, by failing to contact the child A and inform him of her decision to stay permanently, and her failure to provide the father with any information about the children in respect of their schooling, progress and health. The mother, in my judgment, did everything in her power to try to prevent effective communication between herself and her former husband. On the totality of the evidence I am satisfied that the mother has failed to discharge the burden of showing that the father acquiesced in the removal and retention of the child concerned.

A further matter arises under Art 13, which states as follows, so far as is relevant:

'. . . the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes [various offences].'

It goes on:

'The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.'

The court welfare officer, Mr Hartley, gave evidence before his Honour Judge Callman and reported the opinions of both children. It is apparent that any objection to return to Australia is based upon their feeling that their future is with their mother and stepfather and the mother has indicated an unwillingness or inability to return to the jurisdiction of Australia.

The mother, in my judgment, cannot rely on her own reluctance or refusal to return with the children, because that would be an attempt to obtain advantage from her own wrongdoing in removing the children in the first place. It is plain to me that the stated views of the children are no more than a preference for staying in England. They have no particular aversion to Australia and the wishes and feelings that they have expressed do not, in my judgment, amount to objections for the purposes of Art 13, having regard to the decided authorities.

The final matter that has been raised on behalf of the mother is that if these children are returned to the jurisdiction of Australia, it is a foregone conclusion that the Australian courts will permit children to be permanently removed from the jurisdiction and that therefore this is a flawed procedure which is wholly unnecessary because the result can be predicted. I find that the court cannot speculate what may happen in a requesting State and it would be quite wrong to seek to pre-empt in any way the decision of the court in Australia which would have many matters to take into account. This court is concerned with jurisdiction and not with outcome. I find, therefore, that the defences do not apply and the application for the return of R under the 1985 Act is established.

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