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[18/04/1997; Court of Appeal (England); Appellate Court]
Re B. (Abduction) (Rights of Custody) [1997] 2 FLR 594

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

18 April 1997

Hirst, Swinton Thomas, Phillips LJJ

In the Matter of B.

Allan Levy QC and Jeremy Rosenblatt for the father

SWINTON THOMAS LJ: This is an application for leave to appeal against an order made by Wall J on 7 March 1997. The judge dismissed an application for a declaration in this form:

(1) that the child J had been wrongfully removed from the UK within the meaning of Art 3 of the Hague Convention or within the wardship jurisdiction;

(2) that the father do have a parental responsibility order.

The declaration was sought with a view to obtaining the return of the child to this country.

JB was born on 18 August 1994 and is now 2 1/2 years old. The applicant, Mr B, is his father. His mother is called CS. The mother is Italian. The father was, we were told by Mr Levy, born in Italy but is now a naturalised British subject. The mother and the father were not married and J is illegitimate which is an important feature of the case. The mother and father commenced an intimate relationship in 1992. That relationship ran into difficulties. The mother and father separated towards the end of 1994. Thereafter, according to the father it is not disputed -- he had regular contact with J, save for a break of about 4 months. That is a matter which is stressed by Mr Levy on behalf of the father. Throughout his life J lived with and was cared for by his mother in London where he had lived since his birth. That is also an important factor in the application. The father did not at any time have a parental responsibility order. He had no legal rights vis-a-vis the child without an order. He had a high level of contact with his son which, it is submitted by Mr Levy on his behalf, would amount to a right of custody for the purposes of the Convention, to which I will refer in a moment.

In his affidavit sworn on 6 March 1997 in support of his applications, the father made certain criticisms of the way in which the mother had cared for the boy and in respect of the

way in which she had led her life. On 2 February 1997 he consulted solicitors. On 14 February 1997 his solicitors wrote:

'We have advised our client of his right to apply for a parental responsibility order in respect of J.'

The solicitors asked that there should be an agreement in relation to contact. On 19 February 1997 the mother's solicitors wrote making counter-proposals in relation to contact, saying:

'With regards to our client's intentions to remove J from the jurisdiction, our client assures us that at this present time she has no intention of returning with J to Italy, her home country, or anywhere else.'

Mr Levy submits that in writing that letter the father was being deliberately misled by the mother. The letter was answered on 24 February 1997.

Despite what had been said in that letter of 19 February 1997, on 3 March 1997 the mother took the child to Italy and she has remained there with him living with her parents in Savona.

In the meantime, on 17 February 1997 the father had issued an application for an order for a parental responsibility order in the Willesden County Court. On 6 March 1997, after the mother and the child had left for Italy, he issued an application in the Willesden County Court applying for a direction that J be returned to the jurisdiction of the courts of this country and that the matter be referred to the High Court. On 8 April 1997 the father issued his originating application in wardship asking for a declaration pursuant to s 8 of the Child Abduction and Custody Act 1985, and within the wardship jurisdiction that the removal of the child from the UK was wrongful within the meaning of Art 3 of the Hague Convention on the Civil Aspects of International Child Abduction.

Wall J refused to make the order. He did not, understandably in the context of the way in which the proceedings went, give a full judgment.

It is necessary then to turn to what passed between Mr Rosenblatt acting on behalf of the father and the judge. Wall J said this:

'It does seem to me you are in difficulty on the first aspect because your client does not have parental responsibility; therefore there is no breach of his parental rights in taking the child to Italy.'

The judge said:

'A right of custody given to him after the abduction does not make the abduction itself wrongful.'

He said:

'It is possible -- I am just thinking aloud -- that your client's only remedy is to take proceedings either in wardship or under the Children Act for an order either that the child be returned to England and/or that he have contact to the child in England. If the mother disobeys the subsequent orders of the English court having been notified of it, then the retention of the child might be considered wrongful if she was in breach of an English order.

But your difficulty remains in the fact that your client does not have parental responsibility in English law.'

Mr Rosenblatt said:

'My Lord, I am saying please make a declaration under the Child Abduction and Custody Act, pursuant to Art 3 because the Central Authority say they will assist even though my solicitor informed the Central Authority that there was no right of custody because they are concerned that cases should not be seen any more as black and white and the Convention should just exist to bring children back.'

Wall J said:

'I think in a broad sense one can attempt to take a broad view of rights of custody so if, for example, the position had been that your client had been looking after this little boy for 6 months or a year with his mother having contact to him without any formal English order and she had then removed him from the father's care I think one would have stretched every sinew to say by the de facto arrangement of care or residence he had acquired rights of custody under the Convention. I think there is an authority from the Court of Appeal which says in terms that rights of custody have to be given a broad interpretation. But at the moment, as the correspondence demonstrates, your client accepts he has not got rights of custody and it is a question of whether he can acquire them.'

The judge added:

'. . . but this little boy is 2 1/2, there is no question, I would have thought -- though you may seek to argue to the contrary -- he has always lived with his mother and although he is unhappy about the way she treats him, he lives with her. Is it appropriate for an English court to demand that she returns the boy to this country?'

Finally the judge said:

'I am bound to say, Mr Rosenblatt, I am not minded to make any order ex parte. I think what your client should do, if he thinks it appropriate, is to issue proceedings, serve them on the mother and come at short notice once she has been served for an appropriate order. I cannot see any basis upon which, at the moment, it would be appropriate for me to make a peremptory order on an ex parte basis. You know where she is, she is contactable and you can deal reasonably swiftly with these matters in the next few days or weeks. I do not think it would be appropriate in the circumstances to make ex parte orders,'

Accordingly, the judge refused to make the declarations which were sought or to make any order.

The relevant Articles of the Hague Convention provide by Art 1:

'The objects of the present Convention are --

(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.'

Article 2:

'Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.'

Article 3:

'The removal or the retention of a child is to be considered wrongful where --

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.'

Article 5:

'For the purposes of this Convention --

(a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence . . .'

The relevant Article for the purposes of s 8 of the Child Abduction and Custody Act 1985 is Art 3. It is important, in my view, in a case such as this, to have in the forefront of one's mind that the object of the Convention is to ensure the speedy return, without lengthy proceedings or inquiries, of children who have been wrongfully removed from the person having the care of them. In the present case the father did not have a parental rights order. He was not married to the mother and was not caring for the child on a day-to-day basis although he did have regular contact.

Bearing in mind the objects of the Convention, one has to pose the question, as Wall J did, what is the purpose in making a peremptory order for the return of the child? It is not suggested at the moment that the child would live with or be cared for by his father. Of course, that is something which could arise after a contested case. No one would doubt that it is extremely desirable that the father should continue to have contact with the child if possible.

As was pointed out by Wall J in the passages I have read from what transpired between himself and Mr Rosenblatt, there is a wide variety of orders which are available on application by the father after an inter partes hearing but that, in my judgment, is a long way from saying that there should be a peremptory order for the return of a child or a declaration made which would have that result, which must inevitably also involve the return of the mother to this country. In this case the child has always lived with and been in the care of his mother.

Mr Levy QC, in a powerful submission to us on behalf of the father, has placed reliance first of all on the case of Re B (A Minor) (Abduction) [1994] 2 FLR 249, in which Waite LJ said that the words 'rights of custody' in Art 3 should be given a wide meaning. The facts of that case were very different to the facts of this case and the court was able to come to a conclusion on those facts that the father himself had established a right of custody. Even on

those facts there was a strong dissenting judgment from Peter Gibson LJ. I am bound to say that on the facts of this case it would be impossible for a court to come to the conclusion that the father had rights of custody for the purposes of Art 3 of the Convention and the 1985 Act.

Mr Levy also placed reliance on Re B-M (Wardship: Jurisdiction) [1993] 1 FLR 979. Mr Levy was right in submitting that that case had some similarity on the facts to the present case. It was a case in which the mother, who was the custodian of the child, had removed the child from this country and taken her to Germany. The father sought a declaration under Art 3. Eastham J found that the mother and the father and the child were ordinarily resident in this country. The distinction between that case and this case is that on the day following the removal of the child from this country to Germany, the court had made an order that the child be a ward of court. No such order had been made in this case. Eastham J held that as a result of the wardship, custody of the child became vested in the High Court and the mother thereafter had no right to change the child's place of habitual residence. Accordingly, the mother was guilty of wrongfully retaining the child out of the jurisdiction after she was served with the wardship order and when she failed to return the girl in accordance with that order. Eastham J held that after the making of the wardship order, there was a wrongful retention of the child out of the jurisdiction and so it was right for the court to order the child's return.

In the present case, as I have already said, there was no wardship order. Furthermore, although he did not expressly say so because it was not necessary for the purposes of his decision, it is quite clear that Wall J took the view that it would be wholly inappropriate in this case to make a declaration under Art 3 in the wardship for a peremptory return of the child, although he certainly did not rule out the concept that such an order might well be appropriate after an inter partes hearing.

Mr Levy's final and perhaps his strongest submission was that the father is entitled to rely on rights of custody being vested in an English court, namely the Willesden County Court, and also the High Court once the father has started the respective proceedings in those courts. The courts, he then submits, are an institution or other body within the meaning of those words in Art 3 of the Convention.

In support of that proposition, Mr Levy places strong reliance on B v B (Child Abduction: Custody Rights) [1993] Fam 32, sub nom B v B (Abduction) [1993] 1 FLR 238.

The parents of a child were living in Ontario in Canada and the mother removed the child without the consent of the father. Divorce proceedings had been commenced in the Ontario court. On 2 July 1991 at an interlocutory hearing the judge gave directions for the substantive hearing to take place and granted the wife interim custody of the child with access to the father. The following day the wife left Canada with the child and came to live in England. Ewbank J refused to order the return of the child to Canada on the ground that the removal or retention was not wrongful within the meaning of Art 3 of the Convention because the father had no rights of custody.

The Court of Appeal held that the Ontario court was seized of the matter and had jurisdiction to determine the place of the child's residence and, accordingly, the court had rights of custody as defined by Art 5 of the Convention. Therefore, the mother's removal of the child from his habitual place of residence, being in breach of the court's rights of custody, was wrongful within the meaning of Art 3. That decision was therefore based on the concept that the court is an institution and that the court had rights of custody in the circumstances set out in Art 5 which I read earlier. In that case it was submitted by counsel

for the father that the court had rights of custody in the context of the Convention because it had made orders in the course of cross-motions which indicated that it was seized of the matter and that it had not determined either the father's or the mother's substantive applications and had adjourned the hearing of the mother's substantive application for custody and for leave to remove the child from the jurisdiction until a date of hearing fixed for August 1991. It was submitted that the court had the right to determine the child's place of residence and that it was in the process of exercising that right by adjourning the matter and by giving the directions. Sir Stephen Brown P, having referred to the submissions made by counsel for the mother, said this:

'I find that submission unacceptable. In my view this was the plainest example of an unlawful removal. The mother herself appears to have thought so, for she later stated that she regretted having taken that step at that time. It is suggested that she did not appreciate the legal position, although she was in receipt of legal advice at the time. It seems to me that the court itself had a right of custody at this time in the sense that it had the right to determine the child's place of residence, and it was in breach of that right that the mother removed the child from its place of habitual residence. I should say that there has never been any issue as to the fact that the child's habitual residence was at all material times in Ontario. Accordingly, I am of the view that the judge was in error when he decided that the removal of the child was not unlawful.'

Mr Levy places strong reliance on the words of the President in the centre of that paragraph, when he said:

'It seems to me that the court itself had a right of custody at this time in the sense that it had the right to determine the child's place of residence.'

Leggatt LJ said:

'Having made what is no more than an interim custody order, the Ontario court, in my judgment, retained what article 5(a) of the Convention calls "the right to determine the child's place of residence."'

That sentence seems to me to encapsulate the ratio decidendi in B v B, namely, that as an interim custody order had been made, so rights of custody remain in the court. That case must be the high watermark of any submission of this nature and the basis of the decision was that the court had made an interim custody order. No such order has been made in the present case. For my part, I do not think that that case or the other cases relied upon by Mr Levy can be stretched to the extent of the court making a finding that the issue of proceedings in the Willesden County Court or the High Court vested rights of custody either in the father or in either of those courts.

As I have already indicated, the father may indeed have rights in relation to this child either in this country or in Italy after a hearing. However, in my view, the facts of this case on the merits should be investigated prior to any order or any declaration being made. It is not an appropriate case within the Convention for a peremptory order. I entirely agree with Mr Levy that at some time questions that arise in relation to rights of custody which have been investigated in the cases which we have cited and in other cases need to be considered and resolved by this court. Unfortunately, for the reasons which I have endeavoured to give, I do not regard this as an appropriate case for that exercise. Accordingly, and for those reasons, I would refuse leave to appeal.

PHILLIPS LJ: I agree.

HIRST LJ: I also agree.

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