



<http://www.incadat.com/> ref.: HC/E/UKe 32
[19/06/1989; High Court (England); First Instance]
Re J. (Minor: Ward of Court) [1989] Fam 85, [1990] 3 All ER 590, [1990]
1 FLR 276, [1990] Fam Law 177

Reproduced with the express permission of the Royal Courts of Justice.

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

19 June 1989

Swinton J

In the Matter of J.

Heather MacGregor for the father

Susan Maidment for the mother

E. James Holman for the guardian ad litem

19 June. Swinton Thomas J. read the following judgment. These proceedings concern a young girl, M., aged five, who was born on 19 April 1984. There are two sets of proceedings. (1) The first set of Proceedings, in which the father of the child is the plaintiff and the mother is the defendant, are brought pursuant to the Convention on the Civil Aspects of International Child Abduction and the Child Abduction and Custody Act 1985. The father applies for a declaration that the removal of the child and her retention outside the United Kingdom are wrongful within the meaning of article 3 of the Convention. (2) The second set of proceedings are current wardship proceedings, in which the mother is the plaintiff and the father is the defendant. The father applies that he be granted the care and control of the child. It was conceded by Mrs McGregor on behalf of the father that that application is a procedural device aimed at bringing the father within the provisions of the Convention and of the Child Abduction and Custody Act 1985. This application was not pursued by Mrs. McGregor for the father with any great enthusiasm. It was also conceded that the application that the father be granted the care and control of the child had not been served on the mother.

M. is represented by the Official Solicitor and she has been made a party to each set of proceedings. I am grateful to the Official Solicitor for the assistance I have received in this case.

The primary point which arises is whether in the circumstances which arise in this case a child who is a ward of court properly falls within the provisions of the Convention and the Act of 1985, with the result that the courts of a contracting state can be asked to recognise

and enforce orders made by the courts of this country and, in this case, order that the child be returned to the jurisdiction of the courts of England and Wales.

The mother and the father were married in January 1983. M became a ward of court by originating summons of 25 April 1984. A decree nisi of divorce was pronounced on 21 March 1985 and was made absolute on 15 April 1986. The father subsequently remarried. On 18 June 1984 the mother was granted the interim care and control of the child. The father subsequently applied for access and a number of different orders have been made granting him access. On 29 April 1987 Waite J. ordered that he should have access each week during the day and that order remains in force. The child remained a ward of court, with the result that she could not be removed from the jurisdiction of the court without leave being granted. Nonetheless on 22 December 1987, the mother took M. out of the jurisdiction and did not return until 3 March 1988. A number of court orders were made in consequence of that action. In April 1989, the mother left the jurisdiction again together with M. On the evidence which I have heard it is overwhelmingly probable that she has gone to the United States of America and is still there. The father made an application to the Lord Chancellor, pursuant to article 8 of the Convention, asking for assistance in securing the return of the child to this country. The Lord Chancellor's Department replied that they were unable to take the action requested unless and until the court made the declaration sought by the father in these proceedings.

The preamble to the Convention is in these terms:

"The states signatory to the present Convention, firmly convinced that the interests of children are of paramount importance in matters relating to their custody, desire to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the state of their habitual residence, as well as to secure protection for rights of access, have resolved to conclude a Convention to this effect, and have agreed upon the following provisions."

The relevant articles for the purposes of this part of this application are:

"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; (b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

ARTICLE 6

A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities.

ARTICLE 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain--(a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;... (c) the grounds on which the applicant's claim for return of the child is based;... The application may be accompanied or supplemented by - (e) an authenticated copy of any relevant decision or agreement; (f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;..."

The father in this case has access rights only. Clearly he does not himself have any custody rights to establish that the removal of the child is to be considered wrongful under article 3. However, pursuant to article 8, he does not himself have to have custody rights in order to rely on the provisions of the Convention. He must show that the child has been removed in breach of custody rights attributed to a person, institution or other body and, if he shows that, he is then a person who may apply for assistance in securing the return of the child pursuant to article 8. It is submitted on behalf of the father that custodial rights are vested in the court within the wardship proceedings and that the removal of the child is to be considered wrongful because it is in breach of the rights of custody attributed to the court.

The Official Solicitor through Mr. Holman told me that, acting on behalf of the child, he would wish the child to be returned to the jurisdiction of this court and thought that should be done, but, assisting the court as though amicus curiae, he submitted that it is doubtful whether the court has power to make the order under the Act of 1985. Much depends on the interpretation of the relevant provisions of the Convention and the Act itself. The central issue is whether the removal of the child is to be considered wrongful within article 3 of the Convention when the child is a ward of court and the father, who in this case is the applicant, does not himself have rights of custody. Clearly the point in issue is an important one.

It is of course clear and vital to this application that the person, institution or other body claiming that a child has been removed or retained in breach of custody rights under article 8 does not himself have to have custody rights but has to show that the removal 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."

The Central Authority in this country for the purposes of article 6 is the Lord Chancellor. The father, through his solicitor made the appropriate application to the Lord Chancellor, who replied by letter, through one of his officers, on 8 May 1989. In the course of that letter this appears:

"You say the children are wards of court and argue their removal overseas has breached the court's 'rights of custody.' Whilst I can imagine the difficulty the American court would have in recognising the concept of wardship and considering an application to return a ward

to the court I can see the logic of the argument. In any event given that my authority to refuse to accept applications, which is set out in article 27, is extremely limited I would be bound to present the argument to the U.S.A. Department of State in Washington, D.C., if the court were minded to claim, in terms of article 3, that there had been a wrongful removal or retention."

Accordingly, the applicant, before he can start proceedings at all, requires a declaration that there has been a wrongful removal.

Mrs. MacGregor conceded at the outset that the father does not have any custodial rights which would entitle him to rely upon article 3. He has rights to access, but they do not bring him within the phrase "custodial rights" for the purposes of the Convention. Accordingly, it is submitted that the custodial rights breached are the rights vested in the court by reason of the court's wardship jurisdiction. It is submitted that the court itself has "rights of custody attributed to a person, an institution or any other body" and "at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." It is further submitted, pursuant to article 5, that the court has "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 Official Solicitor and the mother submit "that the "Convention must be construed purposively and that so to construe the Act would be to blur or even obliterate the distinction between rights of custody and rights of access. In those circumstances it is necessary for me to consider the nature of the wardship jurisdiction.

In *Regina v Gyngall* [1893] 2 Q.B. 233, 239, Lord Esher M.R. said in relation to wardship:

"That was not a jurisdiction to determine rights as between a parent and a stranger, or as between parent and a child. It was a paternal jurisdiction, a judicially administrative jurisdiction, in virtue of which the Chancery Court was put to act on behalf of the Crown, as being the guardian of all infants, in the place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent."

Then, at p. 240, quoting Lord Cottenham, L.C.:

"This court interferes for the protection of infants, qua infants, by virtue of the prerogative which belongs to the Crown as *parens patrie*, and the exercise of which is delegated to the Great Seal."

In *In re W. (An Infant)* [1964] Ch. 202, 210, Ormerod L.J. said:

"It may properly be said, I think, although there may be some doubt about the history of the matter, that in a wardship case the court retains the custody of the infant and only makes such orders in relation to that custody as may amount to a delegation of certain parts of its duties. That may be a real distinction between orders made in the exercise of an inherent jurisdiction and orders made in the exercise of a statutory jurisdiction of this kind."

In *In re S. (Infants)* [1967] 1 W.L.R. 396, 407; Cross J. said: "When a child is made a ward no important step in the child's life can be taken without the court's consent."

As I have indicated, Mr. Holman and Mrs. Maidment submitted that the scheme of the Convention is to draw a firm distinction between rights of custody and rights of access and drew my attention to passages in the Explanatory Report annexed to the Convention itself, to an article by A. E. Anton in *The International and Comparative Law Quarterly* (1981), vol. 30, p. 537, and to the decision of Waterhouse J. in *B. v. B. (Minors: Enforcement of*

Access Abroad) [1988] 1 W.L.R. 526. There is no doubt at all that the proposition itself is correct and that the Convention draws a clear distinction between rights of custody and rights of access. That proposition does not, however, answer the point as to whether rights of custody in a case where a child is a ward of court are attributed to the court and whether those rights were actually exercised.

Even without the assistance of the recent decision of the Court of Appeal in *C. v. C. (Abduction: Rights of Custody)* [1989] 1 W.L.R. 654 in which judgment was given on 14 December 1988, to which I will refer in a moment, I would have no hesitation in finding that in a case where a child has been made a ward of court the removal of that child is to be considered wrongful as in breach of the rights of custody attributed to the court, and that those rights were actually exercised at the time of removal. As I have said, article 5 provides that rights of custody should 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. As Cross J. said in *In re S. (Infants)* [1967] W.L.R. 396, 407, "no important step in a child's life may be taken without the court's consent," and when the child is a ward, as Ormerod L.J. said in *In re W.* [1964] Ch. 202, 210, "the court retains the custody of the infant." It is a breach of the court's rights if the child is removed from the jurisdiction. Every important aspect of the child's life, whilst he or she remains a ward of court, comes within the court's jurisdiction. In a real sense the court itself has the custody of the court's ward and does exercise those rights. In my judgment there could be no argument but that the court has the right to determine the child's place of residence.

It was next submitted on behalf of the mother and by the Official Solicitor that the court itself is not "a person, an institution or any other body" within articles 3 and 8 of the Convention. It was submitted that the court is merely "a judicial authority." Again, without the considerable assistance that I received from *C v. C.* I would have no difficulty as a matter of construction and common sense in holding that the court itself is "a person, an institution or any other body" within articles 3 and 8 of the Convention.

I turn then to *C. v. C. (Abduction: Rights of Custody)* [1989] 1 W.L.R. 654. That was a case in which the mother of a child had removed him from his home in Sydney, Australia. The father applied for his return under the provisions of the Child Abduction and Custody Act 1985. The judge at first instance refused that application and the case went to the Court of Appeal.

The leading judgment was given by Butler-Sloss L.J. She recited the relevant order in Australia, at p. 656:

"On 4 November 1986 the deputy registrar in Sydney made a consent order including "the following words: '(1) The [mother] to have custody of ... the child of the marriage and the [father] and the [mother] to remain joint guardians of the said child. (2) Neither the [father] nor the [mother] shall remove the child from Australia without the consent of the other."

Butler-Sloss L.J. set out the preamble and article 1 of the Convention, and then went on to say, at p. 657, that three questions arose in the case:

"(1) Was the removal of the child wrongful? (2) Is the retention of the child wrongful? (3) If the answer to either or both of the first two is 'yes', does article 13 apply to stop the return of the child?"

She then set out articles 3 and 5 and continued, at pp: 657-658:

"In respect of my first question-was the removal wrongful?- Latey J. heard argument as to the effect of the order of November 1986 and in particular the effect of joint guardianship. He had before him the written opinion and oral evidence of an Australian Queen's Counsel. The judge's attention does not appear to have been sufficiently drawn to the effect on the definition in article 5 of the Convention of clause 2 of the November 1986 order, that neither parent should remove the child from Australia without the consent of the other. Accordingly, the judge's attention was not drawn specifically to the question whether under Australian law clause 2 was capable of constituting a right of custody within the Convention. In the absence of sufficient expert evidence on that point, this court must do its best to consider whether clause 2 comes within the definition given in article 5.

"By clause 2 the father had, in my judgment, the right to determine that the child should reside in Australia or outside the jurisdiction at the request of the mother. In 1987 he gave his consent to the child coming to England for a specified holiday. One might consider the example of a parent wishing to leave the jurisdiction with the child for a longer period, say 12 months. The other parent, with clause 2 in the order, would have some control over not only the child leaving the jurisdiction but also as a place to ' which the child was going, and not only the country; for instance, to live in London in suitable circumstances. If the child was retained under such an arrangement beyond the agreed date of return, it seems inconceivable to me that the Convention could not effect the return of the child. But if the argument so attractively advanced by Mr. Connell is right, there would be no instant redress by the justifiably aggrieved parent. The words of article 5 must, in my view, be read into article 3 and may in certain circumstances extend the concept of custody beyond the ordinarily understood domestic approach. Therefore in the present case there would be the general right of the mother to determine the place of residence within the Commonwealth of Australia, but a more limited right, subject to the father's consent, outside the jurisdiction of the Australian Family Court. The father does not have "the right to determine the child's place of residence within Australia but has the right to ensure the child remains in Australia or lives anywhere outside Australia only with his approval. Such limited rights and joint rights are by no means unknown to English family law and no doubt to Australian family law. Indeed, in article 3 rights of custody are specifically recognised as held jointly or alone. The Convention must be interpreted so that within its scope it is to be effective. For my part I consider that the child was wrongfully removed from the jurisdiction in breach of clause 2 of the order of 4 November 1986."

Neill L.J. said, at p. 663:

"I am satisfied that this right to give or withhold consent to any removal of the child from Australia, coupled with the implicit right to impose conditions, is a right to determine the child's place of residence, and thus a right of custody within the meaning of articles 3 and 5 of the Convention. I am further satisfied that this conclusion is in accordance with the objects of the Convention and of the Act of 1985. Until last August this child was habitually resident in Australia. In 1986 the Family Court of Australia made orders relating to his custody, which included an agreed provision that he should not be removed from Australia without the father's consent. In my judgment, the enforcement of that provision falls plainly within the objects which the Convention and the Act of 1985 are seeking to achieve."

Lord Donaldson of Lynton M.R. said, at pp.663-664:

"'Custody,' as a matter of non-technical English, means 'safe keeping, protection, charge, care, guardianship' (I take that from the Shorter Oxford English Dictionary, 3rd ed. rev. (1973)); but 'rights of custody' as defined in the Convention includes a much more precise meaning which will, I apprehend, usually be decisive of most applications under the

Convention. This is 'the right to determine the child's place of residence.' This right may be in the court, the mother, the father, some caretaking institution, such as a local authority, or it may, as in this case, be a divided right in so far as the child is to reside in Australia, the right being that of the mother; but, in so far as any question arises as to the child residing outside Australia, it being a joint right subject always, of course, to the overriding rights of the court. If anyone, be it an individual or the court or other institution or a body, has a right to object, and either is not consulted or refuses consent, the removal will be wrongful within the meaning of the Convention. I will add for completeness that a 'right to determine the child's place of residence' (using the phrase in the Convention) may be specific-the right to decide that it shall live at a particular address or it may be general, 'within the Commonwealth of Australia.'"

It was submitted that that passage from the judgment of Lord Donaldson of Lymington M.R. is obiter. That may well be correct. However, with the greatest respect, I entirely agree with it, and, in any event, it must have very great persuasive effect. There can be no doubt that the "safe keeping, protection, charge, care, guardianship" of a ward of court lie in the court. Lord Donaldson M.R. then continued to say that rights of custody as defined in the Convention include a much more precise meaning which will usually be decisive, that is, the right to determine the child's place of residence. He then continues: "This right may be in the court, the mother, the father, some caretaking institution, such as the local authority or it may be divided right." Then a little later Lord Donaldson M.R. says that if the court or other institution or a body has the right to object and either is not consulted or refuses consent the removal will be wrongful within the meaning of the Convention. In my view, that judgment is decisive of both the first two points that have been raised on this application, namely, whether the removal from the jurisdiction of a ward of court is to be considered wrongful and whether a court is a person, institution or other body.

The Official Solicitor and the mother submitted that, by reason of section 8 of the Child Abduction and Custody Act 1985 and article 15 of the Convention, I have no power to make the declaration sought. Section 8 provides:

The high Court or Court of Session may, on an application made for the purposes of article 15 of the Convention by any person appearing to the court to have an interest in the matter, make a declaration or declarator that the removal of any child from, or his retention outside, the United Kingdom was wrongful within the meaning of article 3 of the Convention."

Article 15 of the Convention provides:

"The judicial or administrative authorities of a contracting state may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the state of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of article 3 of the Convention, where such a decision or determination may be obtained in that state. The Central Authorities of the contracting states shall so far as practicable assist applicants to obtain such a decision or determination."

To my mind those provisions apply to particular circumstances, and to particular circumstances only, that is to say when a contracting state to which the child has been taken wishes to obtain information from the authorities of the State of the habitual residence of the child. That is not the position here. The position in this case is that the father and his advisers have not arrived at that situation. They wish to provide the Lord Chancellor's Department, and not the judicial or administrative authorities of a contracting state, with

the information that the removal of the child was wrongful. Section 8 of the Child Abduction and Custody Act 1985 is, in my judgment, permissive and not restrictive, permitting the courts to make declarations in the particular circumstances envisaged by the section and article 3 of the Convention but the section does not in any way preclude the court from making a declaration in the circumstances which arise here. It was suggested that I should deal with this problem by making a finding of fact and not by making a declaration. That seems to me to be a distinction without a difference. I have no doubt that the court is empowered to make the declaration sought.

Accordingly I will grant the declaration sought, namely, that the removal of the child, M., from the United Kingdom is wrongful within the meaning of article 3 of the Convention.

I will deal with the father's application to be granted care and control within the wardship proceedings very shortly. Quite apart from the point relating to service, on the facts of the case as known to me at the moment, I would not think it right to commit the care and control of the child to the father and that application is refused.

[\[http://www.incadat.com/\]](http://www.incadat.com/)

[\[http://www.hcch.net/\]](http://www.hcch.net/)

[\[top of page\]](#)

All information is provided under the [terms and conditions](#) of use.

For questions about this website please contact : [The Permanent Bureau of the Hague Conference on Private International Law](#)