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[21/08/1991; High Court (England); First Instance]
C. v. C. (Minors) (Child Abduction) [1992] 1 FLR 163, [1992] Fam Law 199

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

21 August 1991

Bracewell J

In the Matter of C. v. C.

Michael Horowitz QC and Mark Everall for the father

Lionel Swift QC and Rowena Corbett for the mother

BRACEWELL J: In this case, the originating summons before the court is under the Child Abduction and Custody Act 1985, which gives effect to the Hague Convention. The summons as issued seeks, first, an order securing the return of the children to the USA to the State of New York and, secondly, an order securing the effective exercise of the plaintiff's right of access to the children.

The father no longer seeks the return of the children, and he accepts that they will remain within this jurisdiction, but he seeks a declaration that they were wrongfully removed from the jurisdiction of New York State by their mother in February 1991 when they were brought to this country by her. He further raises questions of access. The background to the case is that both parties are nationals of the USA. Father and mother were born and raised there and married there on 24 October 1976. The matrimonial home was in New York State. Two sons were born of the marriage, the first on 25 November 1980 and the second on 1 February 1983. Neither party had had any connection whatsoever with this jurisdiction until the mother and the children left the USA and came to England with her English cohabitant, P, on 6 February 1991.

The parties' marriage had undoubtedly been stormy, at time violent and deeply unhappy. Separation occurred in July 1985 when the father left the matrimonial home where the mother continued to live with the children. Negotiations for a divorce settlement were protracted. Arguments occurred between the parents, often within hearing or sight of the children.

By June 1986, P had moved into the matrimonial home, although financial arrangements had not been agreed and acrimony continued between the parties. Since that time, the mother has lived with P in a permanent relationship.

The matrimonial home had a self-contained basement flat and, in 1988, the father obtained a court order permitting him to reoccupy that part of the matrimonial home, by what is termed an occupancy order. The mother has been very critical of her husband obtaining such an order, which led to much aggressive confrontation between the parties, despite the separate nature of the accommodation. Undoubtedly, that episode soured relationships and made co-operation more difficult, but the court was seized of the matter and, having heard the application, granted permission to the father, who was acting lawfully if insensitively.

The stress of the matrimonial situation undoubtedly affected the elder child's school performance and his emotional welfare. By May 1989 the mother and father, through their respective lawyers, reached agreement, and on 30 May 1989, on dissolution of the marriage, the Supreme Court of the State of New York granted custody to the mother and made stipulations about the father's entitlement to information and to participate in matters affecting the health and education of the children. Detailed arrangements were made for defined access, child support was determined and consent orders were made concerning the home and ancillary relief, to which I will refer later in more detail. I have seen the order, the judgment and the colloquy. The mother complains that the transcript and the order are not accurate and that she did not agree to the stipulations as set out nor to details about Christmas access, and she refused to sign the order. I am satisfied that the mother's recollection is not reliable about that. All the terms were put to her at the hearing, her consent is recorded and, in the stress of the occasion, it may well be that she was not listening too carefully or did not absorb the proceedings in every detail and maybe regretted her agreement later. In the event, she made an application to modify the custody terms, but the application was listed for hearing after she and the children had left the jurisdiction.

The last contact the father had with the children was at the end of January 1991. He had been seeing the children regularly and had taken them on holidays, but the divorce does not appear to have improved relationships between the parents. There were scenes at access collection and return and the father refused to allow the mother to contact him.

On 6 February 1991 the mother and children, without any advance warning to the father, left the country with P, who broke a contract of employment to accompany them, and the family has now set up home near Hungerford in a property owned by P's mother. By April 1991 the father was taking proceedings under the Convention and the originating summons dated 30 May 1991 was served on the mother on 6 June 1991. On 14 June 1991 the case came before Ward J and, upon mother undertaking not to remove the children from this jurisdiction, leave was granted for her to obtain psychiatric evidence regarding the children and the case was adjourned.

It has been suggested by the father, in his fax, that the mother had been planning to leave the USA with the children since the middle of 1990. Having heard the mother, I reject that submission. I am satisfied that her decision was formed when she knew that she was faced with foreclosure of the mortgage on her home, in circumstances to which I now turn.

The father has not given evidence in the case and has not appeared, save by counsel. The mother has given evidence and has been cross-examined at length.

The history leading to the eviction of the mother, P and the children is that, upon the divorce, the mother was anxious to continue to live at the former matrimonial home. It was in the joint names of husband and wife. It had been purchased for some $160,000, with a

mortgage to the Dime Savings Bank of $80,000. It had the advantage of some separate self-contained accommodation which could be let and was large enough to have capacity for other tenants to produce income.

The agreement upon divorce was that the father would vacate the basement flat within 7 days and that the mother would pay $55,000 to the father within 30 days, upon receipt of which he would convey the house into the sole name of the mother who would discharge mortgage repayments. Child maintenance was agreed and there was no support for the mother, who was cohabiting with P. The mother said in evidence that she was to raise the $55,000 from a policy to which P was entitled. In the event, the money was never forthcoming. I do not know why. It may be that the mother was eager to divorce and did not make serious inquiries as to the availability of the fund. It may be that she was prepared to make promises that she doubted she would keep. It may be that she was so weary of the matrimonial wrangles that she was prepared to promise anything to stay in the home. It may well be that paying the father was low on her list of priorities. Whatever the reason, she has given no convincing explanation as to why she failed to keep her part of the bargain. I do not blame the father for obtaining a judgment which, with interest, amounted to $65,000. He was entitled to the money, his lawyers advised against him agreeing to the sale of the house and it is not appropriate for me to question their advice.

The evidence from the mother is very vague as to her finances thereafter. She ceased to pay the mortgage installments of $800 per month in January 1990. She was informed of some arrears which had accrued through an error in the escrow account and she borrowed $5700 from her mother for the purpose of paying it to the loan bank in February 1990. Thereafter she paid nothing, although the repayments had increased to $1300 per month. She had previously sold her hairdressing business which had, in the past, produced an income and she had been left with some $12,000 after payment of debts. P was working and there was rent from the tenants. However, for a period of one year until foreclosure, she paid nothing and neither did P.

On 8 June 1990 by letter she was informed of the threat of foreclosure, by reason of what was said to be the delinquent mortgage accounts. Although the letter invited her to come to an arrangement to prevent foreclosure, she paid nothing, she came to no agreement and concentrated on attempting to remortgage through P's contacts with Hanover Manufacturing Trust. That came to nought and it is not surprising that foreclosure came ever nearer. The mother denies knowledge of the foreclosure sale in December 1990. Her denials were less than convincing. She said that she would have gone to bid had she known of the event. I question how, by this time, she would have raised any sufficient money when P's efforts had come to nothing. I am not satisfied that she had no knowledge of the event. She was burying her head in the sand and she said that she was receiving papers in the post every day. On the totality of the evidence, I conclude that she let things drift because she had no prospect of retrieving the situation. Whoever bought the property on the foreclosure sale would require vacant possession in normal circumstances. Although I do not blame the father for purchasing the property for the highest bid, which was indeed a bargain on the forced sale at $100,000, nevertheless I do blame him for what happened thereafter. Although the mother had, by her inaction, come perilously close to making herself and the children intentionally homeless, she was entitled to think that her former husband would not evict his children. The father had all the cards in his hand and, although he had some justification for displeasure with the mother, he was, in my view, behaving disgracefully when he caused the eviction notice to be sent on 29 January 1991, requiring vacant possession by 9 February 1991, and further when he told the boys, on an access visit, a version that was wholly favourable to him of what was in truth happening. Nevertheless, he exploded a bombshell as far as the children were concerned. Any father concerned about the welfare of his children

would have stayed his hand, pending alternative accommodation being found, and would have acted so as to cause minimum disruption to the children. The father made no proposals to care for the children himself, he made no inquiry of their fate and he behaved in a callous manner which, on any view, could only lead to disturbance and trauma in the children and alienation of feelings towards him.

The mother thereupon decided to move out of the jurisdiction with the children without informing the father. She and P had sufficient funds to arrange and to pay for the move and the flight tickets, and they prearranged accommodation near Hungerford.

I turn now to consider the law. The preamble to the Hague Convention sets out the intention of the signatories, namely to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure prompt return to the State of their habitual residence when appropriate, as well as to secure protection for rights of access. It has been argued by the mother in the present case that since return to the State of habitual residence is no longer a live issue, it is not appropriate to determine whether the removal was wrongful. I do not agree with that argument since, in my judgment, the issue of wrongful removal has a bearing on the jurisdiction to determine matters of access under the Convention and has a relevance to the merits. It is agreed in this case that the Convention, as enacted in the Child Abduction and Custody Act 1985, has the force of law in both relevant States.

The first question to be answered is: was the removal of the children wrongful? By art 3, the removal 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; and

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

By art 5, 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.

Courts have considered the meaning and effect of art 3, when read in conjunction with art 5, in two authorities which have been referred to in this case. In Re H (A Minor) (Abduction) [1990] 2 FLR 439 Ewbank J decided that in a case where the custody order in favour of the mother expressly prohibited removal of the child from Ontario without the leave of the court, the subsequent removal of the child without such leave was a breach of the rights of custody attributed to her under the law of Ontario. The judge found that there was nothing in the Convention to say that the breach of the rights of custody had to be a breach of the rights belonging to any other person or institution. In Re C (A Minor)(Abduction) [1989] 1 FLR 403 the Court of Appeal decided the effect of art 5, and concluded that the definition of 'custody' had a wider meaning than the domestic concept. In that case, the father and mother had a consent order in the Sydney court, whereby the mother was granted custody, and by cl 2 'neither the father nor the mother shall remove the child from Australia without the consent of the other'. When the mother removed the child to England without such consent, it was held that the father's right amounted to a right of custody within art 5, enabling him to decide whether, at the request of the mother, the child should live inside or outside Australia. This decision demonstrates the wide extent of the meaning of 'rights of custody'. Neill LJ at p 411F referred to custody and said:

'The term "custody" in relation to a child is a term which is used in many systems of law. The meaning of the term may vary in different jurisdictions and in different contexts in the same jurisdition. The phrase "rights of custody" may also have varying meanings. For the purposes of the Convention however the phrase "rights of custody" is given a particular definition.'

He then quotes the definition and continues.

'The right to determine the child's place of residence is therefore included among the rights of custody to which art 3 applies. Moreover, it appears from art 3 itself that this right may be attributed to a person, either jointly or alone, it may arise by reason of, inter alia, a judicial decision or by reason of an agreement having legal effect under the law of the State in which the child was habitually resident immediately before the removal.'

He then went on to say that in relation to the facts of that particular case, the father was given the right to determine the child's place of residence. He said:

'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 arts 3 and 5 of the Convention.'

Lord Donaldson MR said at p 413C:

'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 add for completeness that a right to determine the child's place of residence may be specific, the right to decide it shall live at a particular address, or it may be general, for example within the Commonwealth of Australia.'

The present case goes one stage further than either of the two authorities from which I have quoted. The relevant law in determining if removal was wrongful is the law of New York State, that is the country of habitual residence of the children. There is no declaration from the court of New York State in this case and, therefore, I have been provided with affidavit evidence from three people familiar with the law of New York State, two of whom are experienced practitioners in the State. The affidavits are from Mr James Brown, Mr William Beslow and Mr Norman Scheresky.

Article 14 of the Convention sets out that in ascertaining whether there has been wrongful removal within the meaning of art 3, this court may take notice directly of the law and of judicial or administrative decisions formally recognised or not in the State of habitual residence, without recourse to the specific procedures for proof of that law or for the recognition of foreign decisions which would otherwise be applicable. The three experts do not all consider the same authorities, but each of them concludes that, in relation to the access order, the custodial parent is not entitled, in law, to frustrate the visitation right by removing the child to a distant locality. Various authorities are quoted by Mr Brown, in particular Sipos v Sipos, which is authority for the proposition that the award of access rights or visitation rights creates an implied prohibition running against the custodial parent removing the child to a distant place, which would frustrate regular visitation and render the non-custodial parent's rights nugatory. This proposition derives not from the statute but from a line of case-law, including the cases of Prieby, Daghir and Kelly, which have received Court of Appeal approval in New York State. Mr Beslow expressly approves Mr Brown's analysis of the law and refers, in addition, to another authority, Schwartz, as well as other decided cases. Mr Scheresky's affidavit deals mainly with other matters not now relied upon

by the father, but he concludes by stating that he is not in general disagreement with what Mr Beslow states about visitation rights, but goes on to say that, if the mother and children were rendered homeless by the father and/or she was put in the position of having to remove to England, it is quite likely that she would have been granted permission for removal of the children to this country, and that the New York court might grant permission even now should she apply. The plain inference of that opinion is that Mr Beslow has correctly stated the law, that the mother needs permission of the court to remove the children lawfully, and that the merits might be on her side so as to enable her to succeed. In fact, no such application has been made by the mother.

On consideration of the authorities before me, it is, in my view, implicit that the law of the State of New York requires such an application before permission can be granted. Mr Scheresky deposes as to the merits, which in no way affect the principle of requiring leave. The case of Cataldi v Shaw is not inconsistent with that proposition, and the case of Hemphill, which is the latest authority, follows the same tradition.

I am satisfied that, although the orders of the New York State court do not expressly forbid removal from the jurisdiction without leave, the law is such that there is an implicit prohibition, and that the mother was not entitled unilaterally to remove the children without such leave. Whether or not she completely understood the legal position is in dispute, but, in my judgment, it matters not for the purpose of interpreting arts 3 and 5. In Re H (A Minor) (Abduction) the mother was said to be unsure of the legal position, but it made no difference. On the evidence in this case, I am satisfied that the mother did know the implications, because it was spelt out in considerable detail about how access was to be effected and she knew that she had not to frustrate those arrangements. All of the arrangements were made on the basis of the children remaining in that jurisdiction. However, it would make no difference to my findings whether the mother knew or not of the prohibition on the removal of the children and, in my judgment, para 22 of the mother's affidavit does not affect the legal position one way or the other. I am satisfied that the prohibition derives from case-law, was implied into the order by settled legal precedent, which is sufficient to satisfy the requirements of arts 3 and 5, and conforms to the principles set out in Re C (A Minor) (Abduction) (above).

Although there is no decided authority in this jurisdiction to which I have been referred, I find that there is no distinction in law between an express prohibition contained in an order and one that is implied by settled case-law. Both have the force of law in the jurisdiction concerned and can be enforced by the courts there. The only distinction is that the implied principle will require more detailed proof than the express order. I therefore that the removal of the two children by the mother to England was wrongful. Such a breach gives the father the right to bring the matter to this court under the 1985 Act. Subject to certain exceptions, he has the right to secure the return of the children so that the New York State court has jurisdiction. The father, having considered the evidence filed, decided not to seek to enforce those rights, as he recognises that the children are settled here, have no home to return to in the USA, and he does not offer them a house under his roof. He does, however, seeks orders for access to the children within those proceedings, both within the UK and outside the jurisdiction.

Mr Swift, on behalf of the mother, has urged me to adjudicate on whether the mother would have been granted leave to bring the children to England in the circumstances of this case had she so applied. I do not, however, consider it appropriate for me to speculate as to how a court in New York State might determine such an issue then or now. The finding that the mother is in breach of the Convention is a matter of jurisdiction. Merits and welfare do not affect that decision, which is merely a determination as to which is the appropriate forum to

try matters affecting those children's removal from the USA. Allegations against the father, and explanations for the mother's actions, are not relevant to an application under the 1985 Act, save insofar as they might affect the New York State court in their approach to any return by the mother, and any penalties to be imposed upon her. The welfare of children as the first and paramount consideration is not the basis of the Convention or the Act. In my judgment, welfare issues only became relevant in this case in relation to issues of access.

Mr Swift has invited me to invoke the wardship jurisdiction in order to determine future access to the father. I agree that I do have that jurisdiction, if I find it appropriate to exercise it, in the light of art 16 and the fact that the children are not now to be returned. However, having considered all the circumstances, I can find no advantage in invoking wardship in the present case. I am satisfied that I have the necessary jurisdiction under the 1985 Act to make appropriate orders. Wardship places custody with the court, which does not appear necessary or appropriate in this case, and delay might well be caused in that the current legal aid certificates which were granted under the Convention procedure would not cover wardship, and assessment of means would be required as in all non-Convention cases. Delay might be occasioned and I can see no advantage to the children.

Mr Swift has argued that I do not have the jurisdiction to modify or order or withhold access, either in this jurisdiction or the State of New York, under art 21. With all respect to his very eloquent argument, I do not agree. There is no decided authority on the point, except for the obiter dicta of Waterhouse J in Re B (Minors) (Access: Jurisdiction) [1988] 2 FLR 6, plus those examples of orders produced by the Lord Chancellor's Department, which have been made by consent in various cases. The fact that the orders for access were made by consent and not contested does not, of course, alter the principle that the court can only act within its lawful jurisdiction.

I am satisfied that art 7(f) enables this court to make arrangements for organising or securing the effective exercise of rights of access. Article 5(b) defines 'rights of access' as including the right to take the child for a limited period of time to a place other than the child's habitual residence. On the facts of this case, as conceded by both parties, the children's habitual residence is now England, and I find that the scope of the Convention does not limit the territorial jurisdiction of this court to make appropriate arrangements for access. If this court did not have such a power, then this father would have prejudiced himself by conceding that the children can remain within the jurisdiction. He would be prevented from seeking access here under the Convention and would be forced to apply in New York State, where he would have the difficulty of enforcing any order in respect of children living in England. The original order for access is no longer relevant now that the children are to remain in this jurisdiction. It would, in my view, not only be unjust but would be a misinterpretation of the Convention to hold that it restricts the ability of a father, whose children had been wrongfully removed, to seek access by accepting the realities of the children's new environment. I am satisfied that this is a proper case in which to deal with access issues and that, in principle, there is no bar to ordering access within or without the jurisdiction. I am also satisfied that the welfare of the minors is the first and paramount consideration when determining questions of access, and that nothing in the Convention displaces that principle.

I have concluded, upon the evidence, that past events have had a profound effect upon the children in respect of their relationship with the father. It is true that Dr Wilkins, an experienced consultant psychiatrist, did not have the opportunity of considering the father's evidence. The father has only himself to blame for not appraising Dr Wilkins of his version of events. It is also true that the doctor was considering the defence to the return of the children afforded by art 13. However, I find his conclusions are significant regarding access.

Some of the bases for Dr Wilkin's strongly held views are not completely supported by my findings of fact, but in the end I find it matters not precisely how and why the children have formed such an unfavourable and fearful view of the father, or why they are so protective of the mother. Whatever the precise details of the father informing the children of the forthcoming eviction, and whether he gave out the news through callousness or insensitivity, seems to me to matter little. The effect on the children was for them to view the father, with some justification, as the person who evicted them and rejected them, and the emotional consequences have been great. I accept the doctor's account that the traumas of the children have not been the result of brainwashing by the mother, but rather by the children's perception of events and their absorption of the mother's distress and insecurity. Many fences need to be mended and much trust needs to be regained and that, in my view, can only be done at the children's pace and with sensitive consideration by the father. I agree with the doctor that access outside England cannot be contemplated at present. Relationships need to be rebuilt carefully stage by stage, and must commence with some supervised access in England by the father, hopefully during the autumn half-term. The father would, in my view, be well advised to seek some counselling before that access, because any attempt by him to deal with or to explain the past could be extremely damaging to future relationships between him and the children. Dr Wilkins has offered to counsel the children and I welcome that. I do not agree with Mr Horowitz that access in England is a formula for no access at all. I consider it to be one step in a continuing process. The onus will be on the father, initially, to demonstrate that it can work and lead eventually to access in the USA. Matters must proceed cautiously and carefully for the welfare of the children. I consider the appropriate person to supervise initial access is the court welfare officer, and that he or she should have discretion, in consultation with Dr Wilkins, to determine the extent of supervision or, indeed, whether any supervision is required after the initial contact meeting, and to determine how frequently access should take place and for how long during the half-term. I envisage several relatively short meetings during the half-term period, but no overnight staying access. Following such access, if it can take place, I will require a report to assist me to determine the future pattern and whether or not it is appropriate to order access in the USA, with or without the mother accompanying the children, for a holiday and subject to satisfactory financial arrangements. In this respect, the mother must be prepared to contribute according to her capacity, if overseas access is appropriate. It would be wholly wrong, in my view, for the mother to refuse to pay any part on principle, when she is responsible for the children being wrongfully brought here in the first place.

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