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http://www.incadat.com/ ref.: HC/E/UKe 37
[25/01/1995; High Court (England); First Instance]
Re W. (Abduction: Procedure) [1995] 1 FLR 878, [1996] 1 FCR 46, [1995] Fam Law 351

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

25 January 1995

Wall J

In the Matter of W.

Jonathan Cole for the mother

Robert Altham for the father

WALL J: This case raises points of interest under Arts 3 and 13 of the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980 ('the Hague Convention') as incorporated into the law of England by the Child Abduction and Custody Act 1985. It also raises two points of practice.

The child in question is W. He was born on 29 September 1992, and so now a little over 2 1/4 years old. His mother is an Irish citizen living in the Republic of Ireland. His father is also an Irish citizen, but currently living in Wales.

The mother and the father were never married: thus in Irish law under s 6(4) of the Guardianship of Infants Act 1964 as amended and substituted by s 11 of the Status of Children Act 1987 (which I will recite later in this judgment) the mother is alone the guardian of W unless (which is not the case here) there is in force an order under s 6A of the Act appointing the father a guardian of W.

W was born in the Republic of Ireland and lived there until 3 August 1994 when he was brought to Holyhead by his paternal grandparents and handed over to the father, who took him to live in Wales. Prior to that date there is no doubt that he was habitually resident in Ireland. The mother submits that W's removal to England and Wales is a wrongful removal within Art 3 of the Hague Convention, and that, accordingly, he should be returned forthwith to the jurisdiction of the Irish Republic under Art 12. The father takes two points:

(1) W's removal from Ireland was not wrongful under Art 3 because at the time of his removal his mother was not actually exercising her rights of custody over him; alternatively,

(2) under Art 13(a) the discretion not to return is available because, prior to W's removal, she had consented to it.

Mr Altham, for the father, initially argued in his helpful skeleton response to the originating summons, that in the further alternative the mother had subsequently acquiesced in W's removal. In the event, however, Mr Altham, in my view rightly, did not pursue the latter point, and accordingly I need say no more about it, save formally to record my finding that no case that the mother acquiesced in W's removal has been made out either on the papers or in the oral evidence which I heard.

Oral evidence

In this case I heard short oral evidence from the mother, the father and the paternal grandfather. This is a highly unusual course to adopt in proceedings for a peremptory return under the Hague Convention. I took the view, however, that it was necessary on the facts of this particular case for me to do so, although for reasons which I will give later, it may be that in future cases where the 'consent' defence under Art 13(a) is raised, the court will be reluctant to take this course. In the event I found the oral evidence I heard extremely helpful in resolving the issue I had to try.

I therefore propose to explain first why I heard oral evidence: thereafter I will set out the facts as they appeared in the documentation and how the oral evidence shifted the perspective. I will then state my conclusions on the defences raised by the father.

The case has also thrown up two points of practice. The first, of general application, relates to the provision of bundles; the second relates specifically to the manner in which issues arising in cases under the Hague Convention should be pleaded. I will deal with these two points at the end of the judgment.

The evidential approach to cases under the Hague Convention

The leading case on this subject is the decision of the Court of Appeal in Re F (A Minor) (Child Abduction) [1992] 1 FLR 548, in which the leading judgment, by Butler-Sloss LJ, deals in some detail at pp 552G-554A with the manner in which a judge should deal with irreconcilable affidavit evidence when oral evidence is not available. In addition, at p 558A, Neill LJ says this:

'There may be cases, however, of which - with the benefit of hindsight- this would appear to be one, where the foreign court has not yet become involved and where there is an issue as to whether the Convention applies at all. In such cases, the court may have to decide questions as to the intention of the parties or other matters where the affidavit evidence is in direct conflict. It may then be more satisfactory for the court, before reaching a decision, to hear oral evidence if this is available.'

In my judgment, this observation applies directly to the proceedings before me. Whilst the father's principal defence under the Convention is that the mother consented in advance to W's removal from Ireland (and thus does not go to the applicability of the Convention) it raises, and indeed depends upon, issues of fact. The mother denies that she consented to W's removal. She puts the facts asserted by the father in issue. On the face of the documentation, as I shall relate, each side puts forward a credible case. Oral evidence was available, and I decided I should hear it. I therefore directed when the case was before me at an interlocutory stage on 6 January 1995 that there should be leave to the parties to call oral evidence limited to the issues of consent and/or acquiescence within Art 13 of the Convention. In the event, I heard the mother, the father, and the paternal grandfather.

Had I not decided to hear oral evidence in this case, I would, I think, have been bound to conclude that since the burden of proof in establishing that the mother had consented under Art 13(a) was on the father, he had failed to discharge that burden: see Re F (above) at p 554A. Whilst it would have been possible for me to have dealt with the case on this basis, I do not regard such an approach as wholly satisfactory when the court is dealing with the welfare of children, even in the context of peremptory orders under the Convention.

The facts as they appear on the documentation

The mother's case as stated in the originating summons is that in early September 1994 (this date is clearly in error) she agreed to a request from W's paternal grandparents to allow W to spend the weekend with them in Dublin, and that during the course of that weekend the father removed the child to England. The affidavit of the mother's English solicitor, sworn on 15 December 1994, does not take the matter any further save to state that under Irish law the mother of a child born out of wedlock has sole rights of custody over the child.

In answer to the originating summons the father filed three affidavits and a statement. The affidavits are from himself, his mother and his father; the statement is from his cohabitee. The father's case is that his relationship with the mother broke down some time after W's birth, but that he remained in contact with the child and had regular contact with him. He says that at the beginning of February 1994 the mother told him she could no longer cope with W and asked him to take W and look after him for one year whilst she went on a computer course in England. The father says his response was that it was not fair on W to be passed to and fro between his parents, and that he told the mother he would take W if it was on the basis of W residing permanently with him. He says the mother agreed to the father 'having residence' of the child. Thereafter, he says, she saw him on only a few occasions although he stayed with her for a week or so in July 1994.

The father says in his statement that in about June 1994 he decided to try to make a fresh start in Wales, where he hoped to obtain employment. By this time he was living with another woman, Ms S, who was expecting his child and who had relatives living in Wales. The father left for Wales in mid-July 1994. His case is that about one week prior to his departure he went to see the mother and told her of his plans. He says he had a long conversation with her about it and that she was in total agreement: indeed, he says she offered to look after W for the week or so whilst he got himself set up in Wales. He says that on 1 August 1994, in pursuance of the agreement, his parents collected W from the mother and brought him over on the ferry on the following Wednesday, 3 August 1994. W has been living with the father and Ms S ever since.

The bulk of the evidence contained in the affidavits sworn by the father's parents is hearsay. However, the paternal grandmother does say that after the father had allegedly discussed with the mother his plan to take W to Wales, the mother brought W over to see her one day. She says the mother 'was clearly quite happy about the whole move. We discussed it at some length'.

The paternal grandmother also deals with a telephone call from the mother on Friday, 5 August 1994. This was, of course, after W had been taken to Wales. The paternal grandmother says the mother telephoned to say that she had changed her mind. There was, according to the paternal grandmother, a 'heated discussion'. The same day the police visited the grandparental home and told the grandparents that the mother had alleged that she and the grandfather had 'snatched' W. The paternal grandmother says in her statement: 'I explained the situation to the police and showed them a note from [the mother] confirming that [the father] has residence of W'. She says the police then left.

The note in question is written on a piece of paper obtained from the information centre at the local department of social welfare. It is signed by the mother and dated 2 March 1994 and is witnessed. It reads:

'I wish to state that I agree to [the father] claiming for my child W, as the child is now residing with him.'

At the foot of the document are the words, 'CB (Child Benefit) book returned claim no 1219414', and the date 2 March 1994.

The paternal grandfather deals with the collection of W from the mother on the Irish bank holiday, Monday, 1 August 1994. He says:

'On the bank holiday Monday at the beginning of August 1994 I went to collect W from [the mother] as agreed. She knew full well that we were taking W back to stay with ourselves for a few days before taking him on to Wales. She gave to me all of W's belongings which had been with her.'

Of the subsequent visit of the police on 5 August 1994 he says:

'What she actually did was to telephone our home several days later to say she had changed her mind. She then sent the police around. It is my understanding that the police accepted our explanation and went back to [the mother].'

Ms S's affidavit does not address the particular issue of agreement save by hearsay support for the father's case.

The mother's affidavit, which was prepared in Ireland, is in a most unhelpful format. It is unpaginated and in single-spaced type: it runs to some 16 pages and 32 paragraphs although a number of the paragraphs are very long, and two extend over more than a page of dense type. It is thus difficult to read and to cross-reference.

The mother's case is that in February 1994 she approached the father and asked him if he could care for W for a short period of time, to enable her to care for her elderly father (who suffers from silicosis) and her two younger siblings. Her mother had died in 1989.

The mother's case is that there was never any agreement that W would live permanently with the father, and she asserts that she was wholly unaware of the father's intention to remove W from Ireland. When W was collected from her house by the grandparents on 1 August 1994, she says she understood that they were taking him to Dublin for a short holiday, and that he was to be returned on the following Thursday evening. When he was not returned, she says she telephoned the father's parents and demanded to know where W was. She says they refused to tell her, and she thereupon contacted the police.

The mother's case in relation to the signed statement dated 2 March 1994 produced by the father is that the father only agreed to take W for the limited period of time requested if she gave him the lone parent's allowance and that she signed the piece of paper referred to for the sole purpose of enabling the father to claim the allowance. She denies any suggestion of going to England on a computer course, and says permanent residence of the child with the father was 'never ever discussed'. Her case is that she remained In regular contact with the child. She deals in great detail with her movements and her contact with the child during 1994, and says that in the middle of July 1994, after a temporary breakdown in the relationship between the father and Ms S, and after a brief but unsuccessful attempt at

reconciliation between herself and the father, W was returned to her by the father on either 19 or 20 July 1994 on a permanent basis.

The mother categorically denies that the father gave her any advance notice of an intention on his part to leave the jurisdiction and to remove himself and W to Wales. Of his actual departure, she says that the paternal grandmother telephoned her, asking if she and the paternal grandfather could take W to Dublin for a few days in order to see the grandfather's sister, who lived in Dublin. When W was not returned at the appointed time, the mother says she telephoned the maternal grandmother the following morning to ask where W was, only to be told that the father had gone to Liverpool with W. She says she immediately contacted the police, who, as is common ground, then visited the home of the paternal grandparents.

There was in the affidavits a great deal of additional extraneous matter, but nothing which either bore directly on the issue of consent or assisted me in deciding which of the two versions of events relating to the mother's alleged 'consent' to W's removal was more likely to be true.

The oral evidence

Several points struck me about the oral evidence which, despite its brevity, gave me a much clearer perception of the case as a whole. The first was the reluctance of the father and his family to disclose both the father's and W's whereabouts to the mother or the police. This reluctance was not limited to the events of August 1994. The father told me that in May 1994 he moved to Wicklow, and took W with him. He did not tell the mother where he and W were: indeed, he positively did not want her to know where he was because (on his case) the mother was besotted with him and would be likely to pester him to restart their relationship. The father made it clear that he had deliberately not told the mother where he was living with W in Wales. His explanation was that she was not interested, but if she were, she could easily have found out from friends.

The paternal grandfather was cross-examined on the same point in the context of the visit by the police on 5 August 1994. He agreed that the police came to visit on that day. He was remarkably vague about it. He could not recall what they wanted. It was about W. They wanted to know where he was. They knew he was in Wales. He didn't think they asked for his address. In any event, neither he nor his wife gave the police the address. Why not? Because they did not know it themselves. They did not tell the police that the mother had consented to W going to Wales. Why not? The police did not ask.

I found the grandfather an unconvincing witness, and I have to say I simply did not believe him when he told me that he did not know where his son was on 5 August 1994. In any event, Mr Cole, for the mother, was in my judgment entitled to submit, as he did, that if this was a true bill, and if the mother had given her full-hearted consent to W's removal, this is something the police would have been told, and the family would have been entirely open about W's whereabouts.

The second point on the grandfather's evidence which is important is that he gave me details of the conversation between the mother and himself on 1 August 1994 when he collected W from her. These are not in his affidavit. He told me that the reason he was sure the mother consented to the move was that they talked about W 'having a great day out on the boat' on the following Wednesday, and joked about him being seasick. Having heard the mother, I am not satisfied that this part of the conversation took place: if it did, I am not satisfied that the mother understood it to refer to a trip by W across the Irish Sea. Furthermore, the reference in the grandfather's statement to the mother giving him 'all of W's belongings which had been with her' is misleading. She gave him some nappies and a change of clothing.

A point which emerged during the course of the father's evidence was that both the father and the mother had been together to see a solicitor on 3 March 1994, the day after the mother signed the document in the offices of the department of social welfare which I have recited above. The mother says that they went because she was worried that by signing the document she had deprived herself of her rights over W. The father says that they went to seek advice on the father obtaining full custody. The father told me that he was advised that he would have to get a court order and that to do so he would have to go to a local court some miles away in order to issue a summons. He told me he intended to do this on the following day, but was called in to work and could not go. Thereafter, he never got round to it. It follows that on his own case he had been made aware of what he would need to do to obtain legal rights over W.

I was also struck by the father's oral evidence about the nature of his decision to move to Wales and the manner in which it was implemented. It was all done very swiftly. He made the decision some time in June 1994.

He went on 23 July 1994. At that point, he had no job to go to and no accommodation. He got the train to Colwyn Bay. He stayed with Ms 5's relations. After about a fortnight he moved to a flat. When W came over he had no job.

There was a great deal of mutual hostility shown by the parents on the documents and in the witness-box: in particular the mother makes allegations of violence against the father, which he denies, and about which I make no finding whatsoever. Indeed, I am very conscious of the fact that at this stage of the proceedings, when the issue is where proceedings for custody, residence or guardianship should be heard, it is dangerous for me to make detailed findings on limited evidence and thus incumbent on me to make as few findings of fact as is consistent with my duty properly to dispose of the application in front of me. I will, accordingly, deal with my conclusions on the evidence overall when I come to consider the father's defence under Art 13(a).

Before doing so, however, I must consider Mr Altham's more fundamental point, raised in his skeleton response and developed in argument that the removal was not wrongful within Art 3.

Was the mother actually exercising her rights of custody over W at the time of his removal?

Mr Altham put the matter this way:

'For the removal to be wrongful it must be in breach of a right of custody which was being exercised at the time of removal.

It would appear from the copy of the Status of Children Act 1987 which has been provided by [the mother] that [the mother] is and was the sole guardian of the child. However, [the father] contends that [the mother] was not exercising her rights of custody at the time of the removal as she had agreed to [the father] having residence of the child in about February 1994 and the child had been living with [the father] since then. She was, at most, exercising rights of contact by agreement. There is no evidence to suggest that any such right of contact would allow [the mother] to veto the child's removal from the Irish Republic or determine his place of residence.'

The relevant Irish legislation is the Guardianship of Infants Act 1964 as amended and substituted by the Status of Children Act 1987. The sections of the Act in point are the following:

Section 6:

'(4) Where the mother of an infant has not married the Infant's father, she, while living, shall alone be the guardian of the infant unless there is in force an order under section 6A . . . of this Act or a guardian has otherwise been appointed in accordance with this Act.'

Section 6A:

'(1) Where the father and mother of an infant have not married each other, the court may, on the application of the father, by order appoint him to be a guardian of the infant . . .

(3) Rules of court shall provide a special procedure for determining an

application under this section where --

(a) the mother consents in writing to the appointment of the father as guardian; and

(b) the father is registered as the father in a register maintained under the Births and Deaths Registration Acts 1863 to 1987; and such procedures shall be as informal as is practicable and consistent with the administration of justice.'

Section 11:

'(4) In the case of an infant whose father and mother have not married each other, the right to make an application under this section regarding the custody of the infant and the right of access thereto of his father or mother shall extend to the father who is not a guardian of the Infant, and for this purpose references in this section to the father or parent of an infant shall be construed as including him.'

It follows from these statutory provisions that 'rights of custody' over W under Irish law vest solely in the mother until such time as the father, by means of an application to the court, is appointed a guardian of the child: after that, as I understand it, the court would have the power to direct that the child live with his father or that the mother afford the father contact to him.

Against this background, Mr Altham's argument that the mother in this case was not exercising her rights of custody is, in my judgment, untenable, even if the factual premise upon which it is based (an informal agreement to the father having permanent residence of the child) is established.

Article 3 of the Hague Convention reads as follows:

'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 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.'

The phrases 'rights of custody' and 'rights of access' in Art 3 are defined in Art 5(a) which reads:

'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.'

The simple answer to Mr Altham's argument is that the agreement for W to live with his father (assuming for this purpose, contrary to the mother's case, that there was such an agreement) is itself a continuing exercise of the mother's rights of custody. It cannot be the law (and in my judgment is not the law) that an agreement between parents that a child shall live with one of them rather than the other entitles the person with whom the child is living unilaterally to remove that child from the country of his habitual residence.

Where two parents have equal rights of custody, the exercise by one of them of the right to determine the child's place of residence does not (in the absence of a court order or express agreement) permit that parent unilaterally to remove the child from the State of his habitual residence. The reason for this is obvious. Such an exercise of that parent's rights of custody is an infringement of the other parent's rights of custody, which remain in being, despite the fact that the child resides with the parent who is seeking to exercise his rights.

If this is the situation where both parents have rights of custody then, a fortiori, it must follow that where one parent has no rights of custody but is caring for the child by agreement, that parent cannot unilaterally remove the child from the country of his habitual residence without court order or the express agreement of the other party.

The view which I have formed on this point is supported by authority. In Re H; Re S (Minors) (Abduction: Custody Rights) [1991] AC 476, [1991] 2 FLR 262 at pp 500 and 272 respectively, Lord Brandon of Oakbrook answered the question whether removal or retention meant removal from or retention out of the care of the parent having the custodial rights, or removal from or retention out of the jurisdiction of the courts of the country of the child's habitual residence. In the course of deciding it was the latter, Lord Brandon observed:

'Article 3(b) specifies the second of two matters required to render a removal or retention wrongful. That second requirement is that at the time of removal or retention the custody rights of the custodial parent "were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention". It was suggested that, if removal for the purposes of the Convention involved the taking of the child concerned across the frontier of the State of its habitual residence, it might be impossible for the custodial parent to show that the requirement contained in Art 3(b) was satisfied. In my view, Art 3(b) must be construed widely as meaning that the custodial parent must be maintaining the stance and attitude of such a parent, rather than narrowly as meaning that he or she must be continuing to exercise day-to-day care and control. If the narrow meaning was adopted, it could be said that a custodial parent was not actually exercising his or her custodial rights during a period of lawful staying access with the noncustodial parent. That, as it seems to me, cannot be right.'

I respectfully adopt that reasoning. If Mr Altham's argument were correct, any parent with whom it had been agreed a child was to reside could with impunity unilaterally remove that child to another country on the ground that the other parent was not actually exercising parental rights over the child. Such an argument would drive a coach and horses through the Convention, and in my judgment is plainly wrong.

Further support for the view which I have expressed is contained in the case of W v W (Child Abduction: Acquiescence) [1993] 2 FLR 211 in which Waite J (as he then was) held that a father's agreement to his child leaving the jurisdiction of the child's habitual residence for an extended visit abroad constituted a continuing exercise of parental rights. Thus it could not be said that when the child left the jurisdiction the father had ceased to exercise those rights.

The point is reinforced by the terms of Art 13(a). This Article states that:

'Notwithstanding the provisions of the preceding Article, 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 that-

(a) the person, institution or other body having the care of the person of the child [my emphasis] was not actually exercising the custody rights at the time of the removal or retention, or had consented to or subsequently acquiesced in the removal or retention . . .'

Article 13(a) refers to rights of custody which are not being actually exercised by the person who has the care of the person of the child: this contrasts with Art 3 which refers to rights of custody generally. The Art 13(a) defence in this context is thus limited to the situation in which the child's actual caretaker is not actually taking care of him. This is a much narrower situation, and plainly does not apply in the instant case.

In my judgment, therefore, even assuming the facts on this point to be as the father submits they are (something on which I make no finding), it cannot in my judgment be argued that the mother's rights of custody over W were not actually being exercised immediately before his removal, and the father's argument under Art 3 must fail.

The argument under Art 13(a): consent to the removal

In my judgment, the removal of children across international frontiers is a matter of great importance to the children concerned, and is not to be undertaken lightly or capriciously. Such removal can only be undertaken either by order of a court of competent jurisdiction or by agreement between the child's parents or the parties having parental responsibility for or rights of custody over the child.

It follows, in my judgment, that where a parent seeks to argue the Art 13(a) 'consent' defence under the Hague Convention, the evidence for establishing consent needs to be clear and compelling. In normal circumstances, such consent will need to be in writing or at the very least evidenced by documentary material. Moreover, unlike acquiescence, I find it difficult to conceive of circumstances in which consent could be passive: there must in my judgment be clear and compelling evidence of a positive consent to the removal of the child from the jurisdiction of his habitual residence.

On the facts of this case I am not satisfied that the father has made out his case under Art 13 (a). The evidence, taken as a whole, is neither clear nor compelling. It is possible that sometime in July 1994 the father told the mother that he was thinking of moving to Wales and that he would like to take W with him, but I am not satisfied on the balance of probabilities that he did so; neither am I satisfied on the balance of probabilities that the mother knew that W was being taken to Wales on 3 August 1994, let alone consented to his removal.

Whilst on the papers the father makes out a credible prima facie case for an agreement, my view after hearing oral evidence is that he has not made out his case under Art 13(a). I have

set out the points in the oral evidence which impressed me. The mother's evidence remains entirely credible. It is true that I did not hear the paternal grandmother, who was not called to give evidence. The mother denies her statement that there was a discussion about the removal, and I am in the circumstances unable to give that statement any weight without the opportunity of hearing the grandmother in the witness-box. But even if there was discussion about W going to England, I am not satisfied that it comes anywhere near satisfying the test for the establishment of consent under Art 13(a) which I have posited.

The message of the Hague Convention which parents must learn is that, save in exceptional cases, the court will set its face against the removal of children across international frontiers, unless satisfied that the removal is pursuant to the order of a court of competent jurisdiction or by consent. Of course the test for consent is the balance of probabilities, but the more serious the issue, the more convincing the evidence needed to tip the balance in respect of it. The importance to children of a change in the country of their habitual residence cannot, in my view, be overstated; thus cogent evidence is needed to tip the balance if the question of consent is disputed. In my judgment, the evidence in this case lacks the necessary cogency, and the defence fails.

In the result, the outcome of the case would have been the same had I decided not to hear oral evidence, and had I decided the matter by holding that since there were no grounds for rejecting the written evidence on either side, the father had failed to establish his case. One of the reasons I decided to hear oral evidence in this case is the absence of any authority on the nature of the evidence required to establish the consent defence under Art 13(a). But if I am right in my view that the movement of children across international borders is a matter of great importance and that the evidence of consent to it needs to be clear and compelling and in most cases evidenced unequivocally in writing, then it may be that in future cases a parent who cannot produce such evidence will fail to establish the defence on the face of the documentation. In such circumstances, oral evidence is unlikely to affect the issue and will not be entertained.

The result

In the result I find that W was wrongfully removed under Art 3 and must be returned under Art 12. Having heard representations from counsel I make the following additional and consequential orders and directions:

(1) that within 7 days the father deliver W into the mother's care and control in circumstances to be arranged between the parties and their solicitors;

(2) that the father, pending such handover, do not change the child's place of residence.

I also direct that this part of my judgment shall be made available to any court in the Irish Republic which deals with W in the future.

Practical points

I am authorised to say that the following part of my judgment has been shown to the President of the Division, and has his full approval and agreement.

(1) Bundles

It so happens that this is the second consecutive child case which I have tried this term in which there has not been a bundle of documents. The first was a 2-day residence application. The documents were substantial. Counsel in that case apologised for the absence of a bundle,

which it was submitted was due to administrative reasons consequent upon the Christmas vacation. In the instant case, no explanation for the absence of a bundle was forthcoming. I regard the absence of a bundle in each case as highly unsatisfactory.

In B v B (Court Bundles: Video Evidence) [1994] 1 FLR 323, I made a statement, after consultation with the President and with his approval, about the manner in which bundles of documents should be prepared in contested children cases in the Family Division. I did not in that statement explain why bundles were necessary. I did not think it was necessary to do so. I thought it sufficient to say that 'nothing is more irritating to a court and time-wasting both in and out of court, than documentation which is disordered, not contained in bundles, unpaginated, illegible or incomplete'. My recent experience, however, leads me to believe that it is necessary to spell out in detail the need for bundles, and the duty of the lawyers to provide them.

The first and most obvious reason for documents to be contained in an ordered bundle or bundles is that it saves time both in and out of court. Thus whether the judge is asked to pre-read, or reads after the case has been opened, reading of an ordered bundle takes substantially less time than reading the court file or loose affidavits. Moreover, where the file is substantial, the very process of sorting the documents into an order in which they can be read is itself a time-consuming process.

Similarly, in court, reference to the documentation is immensely simplified if the advocate asks the judge or the witness to look at page x as opposed to para x on page y of a document which then has to be extracted by the judge from the pile on the bench and (for the witness) from the file of counsel's instructing solicitor.

In B v B (above) I said that the advocate must try to put himself or herself in the position of the judge. All judges work in different ways. But most, in my experience, like to highlight passages in the evidence which they think of importance: most like to cross-reference in the documentation: some, like myself, like on occasions to annotate passages in the written evidence as the oral evidence or argument proceeds. If all the judge has is the court file and the original statements and documents it is, in my view, inappropriate for him or her to mark them in this way. The case may well come back before a different judge. That judge needs to approach the case uninfluenced by marks on the documentation or comments by another judge.

All this, in my view, is elementary in the extreme, but it plainly needs to be said. There may be a view at the bar that bundles are only required in long cases: in my judgment this is quite wrong. Indeed, the less time available for a case, the more important it is that the documentation should be properly ordered.

In my judgment, there was no excuse for the absence of a bundle in either of the cases under discussion. I am particularly surprised about the absence of a bundle in a case under the Hague Convention, where the applicant's solicitors are, by definition, experienced practitioners carefully selected by the Lord Chancellor's Department. Preparing a bundle for use in court in such a case is not difficult, nor should it add substantially to the costs of the case given that counsel on both sides work from photocopies of the documents, and copies of the documents thus have to be prepared (and presumably presented in ordered form) for the use of counsel. There is absolutely no reason at all, in my judgment, why a similar courtesy should not be afforded to the bench, and it is plain that in both of the cases under review, the legal teams either simply did not apply their minds to the problem, or applied their minds when it was too late to do anything about it.

I observe that the Practice Direction handed down in the Queen's Bench and Chancery Divisions on 24 January 1995 ([1995] 1 All ER 586), contains the following paragraph:

'Documents for use in court should be in A4 format where possible, contained in suitably secured bundles, and lodged with the court at least 2 clear days before the hearing of an application and at least 7 days before trial. Each bundle should be paginated, indexed, wholly legible and arranged chronologically. Where documents are copied incompetently the cost will be disallowed.'

I anticipate that a similar Practice Direction will follow in this Division. If so it is greatly to be welcomed. (see Practice Direction: Case Management (31 January 1995) [1995] 1 FLR 456.)

Practitioners must get themselves into an appropriate mindset not just to co-operate with each other in the preparation of court bundles, but to recognise that efficient presentation of the documentation is good advocacy. I see no reason whatsoever why, as part of the discipline of running and preparing a case, solicitors carrying the burden of litigation, in cooperation with their opposite numbers, should not keep a running file of court documents (notices of application, summonses, statements and reports) indexed, paginated and in chronological order. Such a bundle can then be produced for the use of the court whenever it is required. Of course, I am not saying that a full bundle of documents needs to be produced at every directions appointment. What I am saying, as I said in B v B, is that the profession must apply its mind to the documentation to be placed before the court in every case and ensure that the documentation is properly prepared and ordered. I repeat: in my judgment this is an essential part of the art of good advocacy.

In the instant case, I do not propose to disallow any part of the applicant's costs since the matter concluded in a day, and was, despite the disordered documentation, efficiently and economically presented by both counsel. Counsel for the applicant was himself critical of the documentation, and where counsel is brought in at the last moment, I appreciate that it is difficult for him or her to rectify the position. But I make it clear: (a) that both solicitors and counsel have a duty to apply their minds to the documentation needed in each case and to ensure that proper bundles are produced; and (b) that in a case where sloppy presentation of the documents or the absence of a bundle has an adverse effect on the timing of a case, that failure will be visited by a direction from the judge that part of the costs of those responsible be disallowed on taxation.

(2) Skeleton statements of argument in Convention cases

When the matter came before me at a preliminary stage on 21 December 1994, I directed that the father produce a short statement or letter by the date of the adjourned hearing setting out his case.

It is my regular experience in cases under the Hague Convention that partly due to the speed with which they are prepared, and partly because the rules do not provide for pleadings, the statements or affidavits filed frequently range over a spectrum of factual issues, often in a wholly unstructured way. The judge then has the task of gleaning the issues in the case (and usually, in particular, the defence to the application) from a mass of frequently irrelevant information.

Family Proceedings Rules 1991 (SI 1991/1247), r 6.3(d) requires the originating summons issued by the applicant to state the grounds of the application, which are usually relatively straightforward. However, there is no specific structure laid down for the answer to such an

application: the rules merely provide that a defendant to an application 'may lodge affidavit evidence in the Principal Registry' within a given timescale.

Unless and until this matter is considered by the relevant rules committee, therefore, it is my view that there should be a requirement in all Hague and European Convention cases for the respondent to such an application, by his or her solicitor, to file a short statement (separate from any affidavit or statement by the respondent him or herself filed in answer to the originating summons) in which the respondent sets out, simply and concisely, the nature of the defence under the Convention, and the Article or Articles relied upon.

In Re B (Child Abduction: Habitual Residence) [1994] 2 FLR 915, Ewbank J said that if a specific defence was going to be raised to an application under the Hague Convention it was desirable that it should appear in the affidavits or that notice of such intention should be given. I respectfully agree. In that case, the respondent raised at trial a defence not foreshadowed in the documentation, thereby taking everybody by surprise.

In the instant case, I found counsel for the father's admirably succinct skeleton response extremely helpful in concentrating my mind and the minds of the parties, on the relevant issues in the case. In my judgment, such statements should be a required feature of future cases under the Convention.

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