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http://www.incadat.com/ ref.: HC/E/UKe 42
[27/06/1994; High Court (England); First Instance]
Re B. (Child Abduction: Habitual Residence) [1994] 2 FLR 915, [1995] Fam Law 60

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

27 June 1994

Ewbank J

In the Matter of B.

Ian Karsten QC and Jeremy Rosenblatt for the father

James Holman QC and Nicola Simpson for the mother

EWBANK J: This is an application for the return of A, who is 12 1/2, to Canada. He was removed from Ontario by the mother on 8 March 1993 and brought to England.

The father and mother were married in 1976. They emigrated to Canada in 1980. They became Canadian citizens. A was born on 25 August 1991 in Canada. The mother and father separated in May 1992 when the father left the mother. A remained with the mother.

On 7 December 1992 the father and mother, through their solicitors, executed what is described as an 'interim interim' agreement. This was a document drawn up consequent upon the separation and with a view to allowing the mother to come back to England with A. It was executed under seal, having been drafted by the solicitors for the parties. The agreement is between the mother (giving her address in England, although she had not then gone there) and the father (giving his address in Ontario). The agreement recites that the father and mother have been living separate and apart and provides that the mother should have the interim sole custody of the child, the father should have reasonable access on reasonable notice and the father consented to the child being moved from Ontario in the care of the mother to take up residence in England. It also made provision for dealing with the matrimonial home in Ontario. Finally, it was provided that the agreement should expire on the signing of a final separation agreement or on 7 days' written notice.

The mother accordingly came to England at the beginning of December 1992, bringing A with her. The aim was to settle in England.

The father got in touch with the mother after she had gone and persuaded her to come back to Canada to try for a reconciliation. She agreed to do so and she came back on 30 December 1992. They resumed living together, A was with them, but the attempted reconciliation was a

failure and at the end of February 1993 or the beginning of March 1993 the mother left with A.

The father made it clear that he did not want A to go to England this time.

The mother bought stand-by tickets to fly by air back to England for herself and A. A stayed with his father from Saturday, 6 March 1993 to Monday, 8 March 1993. On Monday, 8 March 1993 he went to school. In the afternoon the mother collected him from school, took him to the airport and flew to England. This was done without consultation with the father and A did not have the opportunity of saying goodbye to him.

The father suspected that the mother had the intention of going to England and the same day that she left he went to his solicitors and signed a document giving notice that the interim interim agreement was to be terminated in accordance with the provisions of the agreement, the termination to take place 7 days after 8 March 1993. It was the view of the solicitors that this agreement was still in force. The notice of termination was received by the mother's solicitor the same day.

The father did not take any legal steps for a considerable time and it was not until 25 February 1994 that the originating summons under the Hague Convention was issued.

The first ground of defence by the mother in these proceedings was that A was not habitually resident in the State of Ontario at the time that he came to England. Habitual residence immediately before the removal is a prerequisite of any application under the Hague Convention. No notice was given by the mother's lawyers that this point was to be taken in these proceedings. There is no suggestion in the affidavits that this point was going to be taken. The father's counsel had only a short time to consider the matter. If a specific defence is going to be taken under the Hague Convention, it is desirable that it should either appear in the affidavit or that notice should be given of it.

Once this defence is raised it is, of course, incumbent on the father to establish that the jurisdiction exists and that A was indeed habitually resident in Ontario at the time of his removal.

The agreement of 7 December 1992 clearly involved A in moving to England and having a permanent home there. It is asserted on behalf of the mother that as soon as he left Ontario in December 1992 he relinquished his habitual residence in Ontario.

The question of habitual residence was considered in the case of Re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562, sub nom C v S (A Minor: Abduction: Illegitimate Child) [1990] 2 FLR 442. Lord Brandon in considering this question said at pp 578 and 454 respectively:

'In considering this issue it seems to me to be helpful to deal with a number of preliminary points. The first point is that the expression "habitually resident" as used in Art 3 of the Convention is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, but rather to be understood according to the ordinary and natural meaning of the two words which it contains. The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. The third point is that there is a significant difference between a person ceasing to be habitually resident in country A and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in country A in a single day if he or she leaves it with an intention not to return to it but to take up long-term residence in

country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so.'

In my judgment, in English law it is clear that A, being in the sole custody of the mother at the time, ceased to be habitually resident in Ontario when he came to England at the beginning of December 1992.

The question which arises is whether the habitual residence was resumed when the mother returned to Canada for a short time for an attempted reconciliation. The father asserts that that is the case. He made an application under Art 15 of the Hague Convention for a decision of the court of Ontario whether the removal of the child was wrongful within the meaning of the Convention. That matter came before Leitch J in the Ontario Court of Justice. She dealt also with the question whether the child was habitually resident in Ontario when the mother moved her on 8 March 1993.

It is asserted on behalf of the mother that any decision made by the Canadian court is not binding on this court, and certainly in relation to habitual residence it is English law which has to be applied. Secondly, it is pointed out that under Art 15 the question of habitual residence is not one of the issues which is to be addressed by the foreign court and that Leitch J was going beyond her jurisdiction to deal with that. Thirdly, it is asserted that the application before Leitch J was made ex parte. It was made after the originating summons had been issued, there was no urgency in this case in obtaining the order, and it is asserted that notice ought to have been given. I agree. If there is no urgency in a case there is no reason why applications under Art 15 should not be made on notice rather than ex parte so that the foreign court has the advantage of hearing both sides making their submissions.

Leitch J referred to two cases concerning separation agreements and held that the interim interim agreement came to an end at the beginning of the attempted reconciliation on 30 December 1992 by Canadian law. She quoted s 22 of the Children's Law Reform Act 1990 which provides that in Canadian law a child is habitually resident in the place where he resides with both parents. She accordingly held that A was habitually resident in Ontario according to Canadian law.

I have to say that the Canadian statute is not reflected in English law, either by case-law or by statute, and the decision where a child is habitually resident has to be decided in this court according to English law.

In my judgment, the short period of time during which the attempted reconciliation took place could not have been sufficiently long for a settled intention to have been formed by the mother in relation to her residence. Accordingly, although the father may have been habitually resident in Canada, the mother (in whom the custody of the child had been given when the child came to England) could not be said to have acquired a new habitual residence in Ontario. I do not accept that A had become habitually resident in Ontario as a result of the short period of time he spent with his mother and father in Ontario at the beginning of 1993.

In my judgment, the removal of the child cannot be considered wrongful because the child was not habitually resident in Ontario immediately before the mother removed him to England.

That would be sufficient to determine this case but since other issues have been put before me I deal with them briefly.

The second point raised by the mother is that the removal was not wrongful because it was not in breach of rights of custody given to the father. She asserts that the rights of custody vested in her as a result of the interim interim agreement. Leitch J held that the interim interim agreement had gone and that therefore both parties had custodial rights and therefore the removal was in breach of the custodial right. It is said that Leitch J did not have the opportunity of hearing argument the other way - and that is correct - but since this is a matter of Canadian law, I have no reason to doubt that Leitch J came to the correct decision. So, that argument of the mother fails.

The third argument of the mother is that the father acquiesced in the retention of A in England. Almost one year passed between the removal and the originating summons being issued. During that year very little was done by the father. On 13 May 1993 his solicitors wrote a letter to the mother's solicitors saying:

'The father would like to see A for access in Canada this summer. Please remind the mother of the father's rights to information as an access parent, particularly when the custodial parent and child are in another continent. It is incumbent upon the mother to make efforts to ensure that the father is given this information. The father says that his family in the UK have had no communication with the mother or A since their return. Please ask the mother to ensure that A has contact with his paternal relatives. The father would not object to the mother initiating divorce proceedings and acknowledges the necessity of resolving the remaining issues of custody, access, support and division of property.'

The mother says that indicates that the father was accepting that the mother had the custody of A and that he was going to have access. He went to a different solicitor later on and on 7 September 1993 they wrote saying:

'The father has had very little access to his son. Since the mother returned to England without prior notice, except for a period of time in August 1993 when A was with my client's grandmother, when the father had some telephone access between 14 June 1993 and the second week of August 1993, the father has only had one phone call and one letter from A.'

It goes on to say:

'The father is unable at this time to travel to England because he cannot afford to leave at this time given the house payments. As a bare minimum at this time the father is requesting that A have unlimited rights to call him and that the father have unlimited rights to contact his son, A, as well as requests that A attend for access in Canada for 3 weeks at Christmas.'

The mother says that, again, the father is accepting the position as it is and he accepts that the mother has custody and that he should have access. She says, moreover, that the last suggestion (that A should come to see him in Canada for 3 weeks at Christmas time) is inconsistent with a summary return as envisaged by the Hague Convention.

In another letter, dated 26 October 1993, the solicitors write asking, in considerable detail, for various contact arrangements between the father and A.

I have been referred to the case of Re S (Minors) (Abduction: Acquiescence) [1994] 1 FLR 819. In that case Hoffmann LJ said at pp 834-835:

'The primary question is whether the conduct is objectively inconsistent with an intention to pursue the Convention remedy and little if any weight is given to whether the applicant knew the nature of the remedies between which he was entitled to choose or the reasons for

his conduct. On the other hand, the cases emphasise that the inconsistency must be clear and unequivocal.'

The father for his part says that he did not receive good professional advice concerning his rights. But I have to say that reading the letters from the two firms of solicitors I regard the remarks they make as objectively inconsistent with an intention to pursue his rights under the Hague Convention. Neill LJ made a similar comment. He said at p 839:

'It is also clear, however, that where the applicant has made some unambiguous communication to the other parent which, looked at objectively, constitutes acquiescence in the removal or retention the applicant is not allowed to withdraw that communication and rely on some unexpressed reservation.'

It is said by the mother's solicitor in Canada that she was told by the husband's solicitor at the time when the mother went to England with A that the father did not intend to pursue the custody of A but he wanted to set up an access schedule. This is not accepted by the husband's solicitor, who says that she told the mother's solicitor that she had no instructions to pursue custody. But if the mother's solicitor is accurate, that is further evidence that the father was acquiescing.

So, I find that there was acquiescence by the father in the retention of A by the mother in England under Art 13 of the Hague Convention. If acquiescence is established this court is not bound to order the return of the child. It is necessary, accordingly, to take into account the various circumstances of the case in order to decide whether the child should nevertheless be sent back if acquiescence was the only ground on which the mother succeeded.

The mother has now been 15 months in England. So has A. He seems to be settled here. There is nothing for the mother in Canada. Her family is here, just as A's paternal family is here. The court welfare officer has looked into the circumstances and although the court welfare officer says that the manner in which A was brought to England was not appropriate, and has caused emotional disturbance, she does not recommend that A should return to Canada. If there is to be an issue as to who should have custody of A, in the circumstances of this case there does not seem to be any particular point in insisting that the issue should be tried in Canada. This court is perfectly capable of dealing with it if the father wishes to make an application.

On that ground, too, the mother succeeds.

Finally, the mother asserts under Art 13 that there is a grave risk that the return of A would expose him to psychological harm. This was not pursued with any vigour, has no merit and would fail.

Accordingly, having decided that the child was not habitually resident in Canada, the court does not order him to return under the Hague Convention and, in any event, if the Hague Convention did apply, because the father has acquiesced in the retention of the child in England, in all the circumstances A would not be ordered to return.

The originating summons is dismissed.

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