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[13/11/1992; High Court (England); First Instance]
W. v. W. (Child Abduction: Acquiescence) [1993] 2 FLR 211, [1993] Fam Law 451

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

13 November 1992

Waite J

In the Matter of W.

Michael Horsford-Tanner for the father

Sheron Bedell-Pearce for the mother

WAITE J: At 5 o'clock in the morning of 20 August 1992 the telephone rang in the home of a mother who had been living in this country for the past 12 months as a single parent, having the care of her 5-year-old son. The caller was the child's father, speaking from Australia. He asked to speak to a son who had not heard his father's voice for over a year. Permission was refused for him to speak to the child, on that or any other occasion. There is now before the court, in consequence, the father's application under the Child Abduction and Custody Act 1985 and the Hague Convention on the Civil Aspects of International Child Abduction 1980 for a peremptory order for the return of his son, aged 5, to Australia.

It is common ground that the child was brought to England by his mother for a holiday in 1991 and was retained by her in this country. It is also common ground that the 12 months from the date of retention mentioned in Art 12 had not yet expired by the date of issue of the originating summons. The issues that arise are:

(1) Was the child retained here wrongfully, ie in breach of the father's custodial rights and without his consent?

(2) If so, has the father acquiesced in such wrongful retention?

(3) If he has so acquiesced, should the court in its discretion make an order for the child's return?

The father is an Australian national aged 33 whose parents live in Tyers, Victoria. In August 1981 he married the mother, who is also 33 and was born in Britain. She emigrated to Australia at the age of 7 with her parents, who live near Melbourne, about 2 hours' drive away from Tyers.

The mother and father were married in Australia in August 1981 and they have one child, who was born on 10 March 1987. Their matrimonial home was close to the father's parents in Tyers.

In December 1990 the father went to the Gold Coast in Queensland in search of work in the second-hand car industry. There is an acute conflict of evidence as to the state of the marriage at the time he took this step. He says he went there to prospect for a new job and home for himself and his family. The mother says that the marriage was by then at an end, and that his departure was symptomatic of its permanent breakdown. He says that he regularly rang home while he was there. The mother says that he telephoned at first, at long intervals, and then stopped ringing altogether. The father claims that in June 1991 the mother and son came to join him for a week in Queensland she denies that she ever came to Queensland at all during his time there.

It is, however, common ground that in July 1991 the mother's parents offered at their own expense to take her and the son on holiday to England for what was intended by the maternal grandparents to be a stay of 6 to 8 weeks. It is also agreed that on or about 9 August 1991 the father was on a return visit to Tyers and saw the mother and son. There is an acute conflict as to the context of that meeting. The father says he had returned to the matrimonial home for a whole month, during which he and the mother lived together as man and wife, although he acknowledges that there were stormy moments during that reunion. The husband testifies that he readily gave his consent to the proposed holiday in England, but only on the basis of the 6 to 8 weeks that had been proposed by the maternal grandparents. The mother has sworn that he said to her on 9 August 1991, 'Go for 6 months, 12 months, I do not care'.

On 13 August 1991 the mother and her parents flew to England and went to stay with an aunt of the mother. From that household, she had an angry telephone conversation with the husband on 22 September 1991, principally about money.

The next day the father consulted solicitors in Australia who wrote to the mother (at the aunt's address in London) a letter dated 23 September 1991 in these terms:

'Re Family Law matters

'We wish to advise that we act for [the father]. He has consulted us in respect of your marriage. So far as our client is concerned, the relationship is finished. We now write because he has told us that you and, more particularly your mother have been harassing him and, on one occasion, your mother has threatened him with violent harm. Please be advised that if these threats continue then the matter will be placed in the hands of the police and, furthermore, an intervention order will be gained to prevent you further threatening or harassing our client.

'Our client wishes to settle this matter between you and him and, in particular, wishes to obtain a property settlement and also deal with matters of custody and access to your child. We remind you, no doubt as your solicitor will, of our on-going responsibility to ensure that your child has a relationship with his father and in this regard, whilst our client is prepared to allow you to have sole custody, he seeks an order for joint guardianship and on-going access.

Our client is also aware of his rights in respect of maintenance of the child. He intends to continue to pay maintenance in this regard. However, he is not prepared to continue to wholly support you and, in this regard, it is suggested that you either obtain gainful employment or avail yourself of our social security system.'

The letter then concluded with advice that she should see a solicitor.

The father's solicitors have stated that, according to the instructions they had received from the father at the time of writing that letter, the mother was expected shortly to return to Australia. Their letter was not answered. The father say that, from that time onwards, he regularly wrote letters to the son at the English aunt's address and sent money to the mother for the son's maintenance. That is denied by the mother, who asserts that he sent no letters at all and that the only payment he made was a money order in October 1991 representing the proceeds of sale of her car.

On 21 November 1991 the father saw his solicitors again and instructed them that the mother was 'now indicating that she might intend to stay in England to start a new life and that she accordingly wanted her property settlement as soon as possible'. That was confirmed on 2 December 1991 when the father telephone them and said that the mother had said that she would not return to Australia. 'We briefly discussed', say the father's solicitors, 'the bringing of a custody case in Australia or England and what the chances of success might be'.

The father's version of his discussions with his solicitors is rather different. He says:

'I raised the question [though he does not say when he did so] 'of having [my son] returned to Australia with my solicitor in Victoria. He said the only way I could do this was to fight a custody battle in the UK and this would cost me 10,000 Australian dollars. I did not have that money at the time and I still do not have that sort of money now.'

By that time, two further firms of solicitors had been brought on the scene in Australia, instructed respectively by the mother (it seems, through the maternal grandparents) and by the paternal grandparents, who appear to have owned the land on which the matrimonial home was built. Their principal function seems to have been to deal with the disposal of the matrimonial home and other property matters in dispute within the family. The local solicitors thus instructed on the mother's behalf wrote to the father's solicitors on 6 December 1991 confirming that the mother had no intention of returning of Australia. This letter was passed on to the father by his solicitors, who have described what then transpired between them and their client as follows:

'We forwarded a copy of this letter to [the father] on 12 December 1991. We saw him on 13 December 1991 and discussed mainly the property matters. He [the father] indicated to us that he wished to have access to his son for the full length of the Christmas or long vacation and that they [he and the mother] should each share half in the fare. We are unable to say whether these instructions as to access were ever put to Steadman Cameron [that is the mother's solicitors] as our file indicates that much of the ensuing correspondence was centred on the property question, as a response to an offer was urgent as otherwise the offer might be withdrawn.'

Subsequent events are described by the father's solicitor in these terms:

'A new address was dropped in to us by [the father's] father on or about 21 January 1992. On 24 January 1992 we inquired if [the father's father] had a telephone number for [the father]. We were not given it as it was not known. We were unable to answer queries raised in the mother's solicitors' letter of 22 January 1992 as we did not have instructions. On 27 February 1992 we wrote to the father at his last-known address, asking for his instructions. This correspondence was returned "Undeliverable". Despite attempts, we were unable to correspond with the father. We wrote and informed the mother's solicitors of this on 18

March 1992. Upon receiving further correspondence from the mother's solicitors dated 27 May 1992, we wrote to the father on 1 June 1992. Again it was returned.'

The position therefore seems to have been that, for some 6 months from January to June 1992 the father remained out of communication with his own solicitors and, it would appear, his own parents also. He claims that all this time he was continuing to write once a fortnight to his son at the English aunt's house and to have sent him a present for his birthday in March 1992. That is denied by the mother, who had by then moved house in England but was still in touch with her aunt.

In July 1992 the father made contact again with his Australian solicitors. The matters he discussed with them related to the property dispute (which it had not proved possible to finalise in his absence, but which had apparently reached the stage of a draft agreement approved by the various firms of solicitors concerned) and access to the boy.

As a result of the instructions he then gave them, they wrote to the mother's Australian solicitors as follows. The first part of the letter dealt with the draft property agreement and then continued:

'Our client is minded to get some suitable access arrangements in place and suggests that Christmas holidays may well be a time during which he could see the child. He believes that as your client has decided to live in England that part of the travelling expenses of either him flying to England to exercise access or, alternatively, the child being flown to Australia should be borne by your client.'

The letter ended with the suggestion that any monies released as a result of the financial settlement might also be used for such travel expenses. In August 1992 the father discovered the new address of the mother in England and, having obtained the telephone number through International Inquiries, telephoned her and asked to speak to J. She refused to allow him to do so. When he told his Australian solicitors of the intention he had then formed to go to England to see the boy, they put him in touch with an Anglo-Australian lawyer from whom he learned, for the first time (as he asserts), of the provisions of the Hague Convention. As a result of the advice then given to him, he invoked the Convention through the central authority in Australia. Hence the application now before the English court for an order for the boys' immediate return to Australia.

His Australian solicitors have stated the following as to the relevance of the Hague Convention to any conversations they had with the father:

'From the inception of this matter, the details of any application under the Hague Convention were not discussed. Most, if not all, of our discussions related to property matters. We say therefore that the father was not advised by us regarding the Hague Convention as it did not arise prior to 13 January 1992. Upon regaining contact with [the father] in July 1992 and upon his further insistence, we put him in touch with . . . [and the Anglo-Australian lawyer is named].' Following what is now approved practice in cases under the Convention, I have not heard oral evidence. There is a good deal of conflict on the affidavits, but I have not found it necessary to resolve every issue of fact. The better course has seemed to be to leave marginal issues to be resolved in due course in any family proceedings heard in one jurisdiction or the other, concentrating only on the issues which it is essential to decide for the purpose of answering the various questions to which this application gives rise. Those questions relate, as I have already indicated, to separate issues of consent, acquiescence and discretion and I shall deal with them in turn.

No one disputes that the child was brought to England with the father's consent. The question is whether he was retained here wrongfully; in breach, that is to say, of the father's rights of custody under the law of the child's State of habitual residence immediately before the retention, being rights which the father was actually exercising at the time or would have been exercising but for the retention (see Art 3 of the Convention).

There is no dispute that Australia was the country of the boy's habitual residence for this purpose and there was no challenge to the evidence of an Australian lawyer that under the governing statute (the Family Law Act 1975) the parents had joint rights of custody and guardianship.

The first submission of Miss Bedell-Pearce (for the mother) was that there had been no breach of the father's rights of custody because he had consented in advance to the child being retained in England for an indefinite period. She relies in particular upon the words attributed to the father in the mother's evidence, words which her own father also claims to have heard spoken, to the effect of, 'Go for 6 months, 12 months, I don't care'. Those, she says, are to be construed as express authority to the mother to keep the son in England indefinitely. I do not accept that submission. The father has certainly, I am satisfied, considerably understated the difficulties in the marriage at the time of the mother's departure for England. They were having frequent rows, mostly about money. Nevertheless, although I accept (despite his denial) that the father used those words or said something very similar, it is plain to me that they were spoken in the heat of an exasperated moment. They were not intended to have the effect of a general authority to keep his son away from him in England indefinitely, nor, I am confident, did the mother understand them at the time in anything like that sense.

Miss Bedell-Pearce submits, alternatively, that at the point when the child became retained in England the father was not exercising any custodial rights at all, because he had ceased to exercise them -- and would by definition be unable to exercise them -- as soon as his wife and child left Australia. That is very shortly answered. The father had agreed to his son going on a trip to England with his mother and maternal grandparents, who were paying for it. All members of the party had return tickets and were expected back by the father in 6 to 8 weeks. When he gave his permission for that holiday, the father was exercising rights of custody. It was a continuing permission, and consequently a continuing exercise of custodial rights right up to the moment when the mother, at the end of that period -- that is to say at the end of October 1991, retained the child in this country without his authority.

I find, therefore, in answer to the first question that there was a wrongful retention in England made without the father's consent and that the requirements of Art 3 are satisfied.

The next question which accordingly arises is whether the father, subsequently to the wrongful retention, acquiesced in it for the purposes of Art 13(a). Acquiescence, as a term used in the context of child abduction, has been recently defined in the Court of Appeal, especially in the judgments of Lord Donaldson MR and Stuart-Smith LJ in Re (Minors) (Abduction: Custody Rights) [1992] Fam 106, sub nom Re A (Minors) (Abduction: Acquiescence) [1992] 2 FLR 14 and those of Sir Donald Nicholls V-C and Butler-Sloss LJ in Re AZ (A Minor) (Abduction: Acquiescence) [1993] 1 FLR 682.

The gist of the definition can perhaps be summarised in this way. Acquiescence means acceptance. It may be active arising from express words or conduct, or passive arising by inference from silence or inactivity. It must be real in the sense that the parent must be informed of his or her general right of objection, but precise knowledge of legal rights and remedies and specifically the remedy under the Hague Convention is not necessary. It must

be ascertained on a survey of all relevant circumstances, viewed objectively in the round. It is in every case a question of degree to be answered by considering whether the parent has conducted himself in a way that would be inconsistent with him later seeking a summary order for the child's return.

When it is viewed from that perspective, I regard the present case as a very plain instance of a parent's acquiescence through inactivity. It is apparent from the recent letter which the father himself exhibits from his own Australian solicitors summarising the instructions they were given (or not given) by him, that they were never asked directly by the father whether any immediate legal steps could be taken to enforce the boy's early return to Australia. If the father's evidence (already quoted) purports to say anything to the contrary, I reject it. Even if, which I do not accept, the legal advice given to him after he had first learned of the mother's retention of the child in England had been in any respect inaccurate or incomplete, that would not help him. His conduct has to be viewed objectively from outside. For something like 10 months after learning of his wife's decision not to return the boy to Australia, he took no steps towards having him brought back and for much of that period his address was unknown, even to his own solicitor. That was conduct wholly inconsistent with his later seeking a summary order under the Convention.

The third question therefore arises. It is one of discretion, derived from the provision in Art 13 that in cases where the retaining parent establishes acquiescence on the part of the other parent, the court in the requested State is 'not bound' to order the child's return. The limited nature of that discretion was pointed out by Lord Donaldson in Re A (above) at p 122. His remarks were made in anticipation of that case being remitted (as it was) to the Family Division for precisely that discretion to be exercised in a case where, like this one, acquiescence had been found to be established.

The judge who dealt with the remitted discretion in Re A was Booth J. She exercised it by deciding not to return the children concerned to the requesting State, which, in that case, also happened to be Australia. Her decision has not yet been reported, but a transcript of her judgment was supplied for use at this hearing. It will be convenient to refer to those proceedings as Re A (No 2). A number of factors were considered by Booth J. They included the usual considerations of forum conveniens, on which she took the view that there was little to choose between the competing fori in England and Australia; the nature and consequence of the acquiescence which had occurred in that case; the extent to which the children had established a sense of security in this country and would be upset by adding one more move to those which, in the circumstances of that case, the children had already experienced; and the anticipated situation which would face the mother and children in Australia if the mother were ordered to return there (the arrangements for their maintenance, accommodation an so on). Having taken those factors into consideration, Booth J directed herself in these terms:

'In exercising discretion under Art 13(a) of the Convention, I have to balance my findings as to the interests of the children and the detriment which I am satisfied would befall them, were I to order their return, against the fundamental purpose of the Convention which is to ensure as far as possible that children wrongfully removed from the place of their habitual residence are returned there as soon as possible.'

A little later she continued:

'In my judgment, the interests of the children are now to be taken into account and to be considered in relation to all the circumstances of the case, including in relation to the general desirability that children wrongfully removed from their place of habitual residence should

be returned. It is clearly for the mother in this case to establish to the court that the interests of the children lie in their remaining in England and that their future can appropriately be determined here so that it would be proper to allow those matters to prevail over the purpose and philosophy of the Convention.'

The father in Re A (No 2) appealed from that decision. The Court of Appeal hearing before the President and Staughton and Scott LJJ took place on 11 May 1992. The Supreme Court library transcript of their judgments has also been supplied for use at this hearing.* The specific ground of appeal, contending that considerations of welfare under this particular Art 13 discretion are not at large but are restricted to the more extreme instances created by the context in Art 13(b), was rejected. Booth J's direction and decision were both upheld.

On the basis of those authorities, I interpret my duty in the present case as follows. All relevant factors must be examined. They include the welfare of the child, which is to be treated as important but not necessarily paramount (see Scott LJ in Re A (Minors) (Abduction: Acquiescence) [1993] 1 FLR 396 at 406). An appropriate balance must then be struck between the need to fulfil the purpose and philosophy of the Convention through the return of the child on the one hand and any countervailing factors pointing on the other hand to the child being kept in England.

Six matters appear to me to be relevant to that consideration. They are:

(1) choice of forum;

(2) possible outcome of any family proceedings initiated in whichever forum is chosen;

(3) the consequences of the acquiescence that has occurred in this case;

(4) the situation in Australia that would await the mother and child if a return order were to be made;

(5) the anticipated emotional effect on the child of a peremptory return order;

(6) the extent to which the purpose and philosophy of the Convention would be at risk of frustration if a return order were to be refused in the particular circumstances of this present case.

The considerations to choice of forum are very evenly balanced. In either jurisdiction the parent coming from the other country would be eligible for legal aid and there seems to be no reason to assume a preponderance of witnesses drawn from one country or the other, although it is right to take note of the fact that the maternal and paternal grandparents both live in Australia. As to the prospective outcome, there is very little doubt, indeed it appears to be undisputed, that the mother would be granted a residence order in either jurisdiction; nor, as the mother's evidence has confirmed, would there be any objection to contact by the father in whichever jurisdiction the mother was living. The real issue in future family proceedings, wherever heard, is likely to be whether the mother will be allowed to continue to make her home with the child in the country of her choice (England), or be compelled against her will to live in Australia for the sake of affording a readier and more frequent level of contact to the father than he would be capable of exercising if the child were to be resident in England.

The mother has already offered to bring the child to Australia for a 4-week holiday every year to provide an opportunity of contact with his father, and her own father has undertaken to pay one-half of the air travel bill involved in that return journey.

There must be at least a real possibility, therefore, that the mother would be successful in her request to the court to be allowed to live in England. If that were indeed to be the outcome, it would involve for the child, assuming that a return order had been made by the court in the meantime, the double dislocation of a move to Australia and a sojourn there, while the family proceedings were decided in that country, followed by a return to his home and school in England. The result (turning to the next factor) of the acquiescence that has occurred in this case is that the boy started school in January 1992, in a state of settled expectation that he would remain there and continue to make his home with his mother in England. His school report describes him as having settled well and made friends, although he may need help in time with his speech development.

Coming next to the situation which would be awaiting the mother and child if they were to return to Australia, the matrimonial home has been sold. The father has undertaken to allow the mother and child to live with the maternal grandparents in Mulgrave pending the determination of family proceedings in Australia. He does not, however, make any firm proposals for the mother's financial support or that of the child during that interval, and past experience of the history of this marriage suggests that maintenance would immediately become a serious bone of contention.

The effect (turning to emotional consequences) on a 5-year-old of being compelled to leave his school and surroundings that have become familiar and travel to a country that will have lost much of its familiarity in what for him at his age will have been a very long interval, in the company of a mother who is distressed at having to be there at all, is too obvious to need spelling out. The emotional effect of a return order on the child will therefore be significant, but it ought not to be exaggerated. It is implicit in the whole operation of the Convention that the objective of stability for the mass of children may have to be achieved at the price of tears in some individual cases.

In considering, finally, the extent to which the purpose and philosophy of the Convention would be frustrated by a return order in this case, it is relevant, in my judgment, to stand back and look at the whole conduct of the father, not just the behaviour which has been held to amount to acquiescence, and consider how far that has been consistent with the Convention's underlying aims. He is a man who, in effect, went to ground for 7 months from January 1992. I reject his improbable evidence that he was sending presents and letters to his son at the aunt's address in England at a time when his own family and solicitor were unable to contact him. After a long period of silence, he telephoned the mother's home, out of the blue, at 5 am British time and asked to speak to his son. This was not impulse. His tape recorder was switched on so that he could maintain a record of the conversation. The transcript he made of that recording contains this remark of his own at an early stage of the conversation:

'First of all, can we take this opportunity to sort the thing out rather than go to court because, obviously, starving you out of money hasn't got you back here?'

In his affidavit he explains that this was intended to be a reference to the property proceedings being pursued before the family court in Australia and that his intention in conducting those proceedings in the way that he had done was in an endeavour to induce the mother to return to Australia 'to resolve those outstanding property proceedings'.

The impression that is left, at the end of the day, upon the mind of the court is that this father has never been single-mindedly committed to the return of his son to Australia for purely family reasons. Monetary considerations have played, and continue to play, an important role in his attitudes towards the future upbringing of his son. My conclusion,

therefore, under this final head is that refusal of a return order in this present case would run less risk than in most other cases of coming into conflict with the purpose and philosophy of the Convention. The signatories to that international agreement cannot have intended that it should be allowed to operate for the benefit of parents who make a late use of its summary powers or motives which include tactical or mercenary advantage.

That completes my findings on the various factors which I have regarded it as my duty to consider before carrying out the final balance which I am now required to make between them, applying the test in law which I have already described. It would be of no help to the parties for me to attempt a mathematical analysis, factor by factor, of the weight which each should receive. It is I hope sufficient to say that, when they are all taken into account and given their due weight, the scales appear to me to tip fairly heavily in favour of refusing a return order. This is demonstrated in the end to be an opportunist application, coming too late and taking too little account of the potential disruption for the child concerned. It provides one of those occasions, rare though they must necessarily be, when the demands of loyalty to the spirit and purpose of the Convention must yield to countervailing considerations of public policy and child welfare.

The application under the Hague Convention accordingly fails and the originating summons will be dismissed.

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