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[27/07/1995; High Court (England); First Instance]
Re C. (Abduction: Consent) [1996] 1 FLR 414

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

27 July 1995

Holman J

In the Matter of C.

Caroline Lister for the father

Kate Branigan for the mother

HOLMAN J: This case concerns two children: C, who was born on 10 November 1987 and is now therefore 7 years and 8 months old, and H, who was born on 14 September 1992 and is now therefore 2 years and 10 months old. Their parents, who are now each aged about 30, were married in 1987. The father is American-born and bred, and by nationality. The mother is English-born and bred, and British by nationality. The children have dual American and British nationality.

At the time of their marriage the father was serving in the US Air Force, but in 1991 he completed his active service and enrolled at the University of Alaska in Anchorage, Alaska, to read for a degree in natural sciences. He was due to graduate in, and did graduate in, May 1995.

The parties' home was a rented house in Martha's Vineyard, Anchorage, and here the children have until recently been brought up. The mother's own family live in England, and naturally from time to time the mother came on holidays here, bringing the children with her. During 1988 they were here twice for periods of 30 and 10 days. On those two occasions the father came too. In 1989 the mother came for a month with C, and the father joined them for 2 weeks. In 1991 the mother came for 2 months with C, and in the summer of 1993 she came for 6 weeks with C and H.

Shortly after that holiday C started at Lake Lotis Elementary School in Anchorage, where she remained until January 1995, and where she did well. Clearly she is a bright and able child, as befits her intelligent parents.

It is quite clear that the relationship between the parties has been a difficult one for some time. One only has to read a letter which the mother wrote to the father on 13 March 1995

and the anguished letters from the father to the mother in February and March 1995 to see that. There was an up set in about May 1992 which resulted in the father being charged with criminal proceedings, although the charge was later dropped. Whatever took place on that occasion, which is in dispute and irrelevant to anything I have to decide, it is obvious that the marriage was in some difficulty at the time.

The father admits that the following year, while the mother was in England, he had a brief affair. During 1994 there was undoubtedly a period of separation. The parties disagree how long it lasted, but I think that is at least in part because the father was coming and going. The mother regards him as having continued to live away, but spending periods at home. The father regards himself as having returned home, although continuing to spend periods away.

There is a document dated 25 May 1994 and signed by the father, to enable the mother to obtain day-care assistance on the basis of her low income. It states that he has been residing at another, stated, address 'since March 1994 pending the dissolution of my marriage and subsequent child custody arrangements'. However, from about October 1994 the father was residing effectively full-time at home; but I accept the oral evidence of the mother that they did not routinely sleep together after that time, and that sexual relationships were rare.

To jump ahead in time: on 11 January 1995 the mother flew to England with the children, and has remained here ever since. There is no doubt that when she came here it was her settled intention to remain permanently in England. The father says that he only agreed to her coming here for a holiday as on previous occasions which I have outlined, and that accordingly she either wrongfully removed the children from Alaska on 11 January 1995, since his consent to the temporary removal was vitiated by her deceit as to her true intentions, or alternatively she has wrongfully retained the children from some later date, by which time she should have returned them. No actual date had been fixed for their return, but he says that as they had 30-day return tickets a wrongful retention occurred at the latest 30 days after 11 January 1995.

The father now applies for the return of the children under the provisions of the Child Abduction and Custody Act 1985 and the Hague Convention.

It is common ground, and there is no doubt about it, that immediately before 11 January 1995:

(i) both children were habitually resident in Alaska;

(ii) under the law of that State each parent had equal rights of custody in the Convention sense over and in relation to their children; and

(iii) the father as well as the mother was actually exercising those rights.

In defence of the father's application the mother says that:

(i) in fact the father consented before 11 January 1995 to the permanent removal of the children to England;

(ii) even if not, he subsequently acquiesced in their retention here; and

(iii) in any event there is a grave risk that the return of the children would expose them to physical or psychological harm or otherwise place them in an intolerable situation.

I say at once that I am entirely unconvinced of either (ii) acquiescence, or (iii) grave risk of harm, etc. If contrary to the mother's claim, the father did not know of her intention to remove the children permanently and did not consent thereto before the removal on 11 January 1995, then I can see nothing in his subsequent conduct or, insofar as it is relied upon, delayed action, which could possibly constitute acquiescence.

As to risk of harm, I would, for various reasons, have considerable concerns about requiring these particular children to return to Alaska without their mother. However, she has made it clear that that scenario does not arise, for she would return with them. The father offers undertakings as to travel, future accommodation, and other matters which, subject to discussion and refinement of the detailed terms, make it possible for the mother to return and look after the children appropriately in Alaska pending future court proceedings there.

Thus the sole effective issue in this case is consent. The mother says that this removal simply was not 'wrongful' or an 'abduction' at all, since she came to England with the full knowledge and agreement of the father that it was a permanent move following on the break-up of the parties' marriage.

Such a case does in fact raise an interesting question on the construction of the Convention and the interrelation of Arts 3, 12 and 13. The summary provision of Art 12 only applies 'Where a child has been wrongfully removed or retained in terms of Article 3 . . . '. Under Art 3:

'The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody . . .'

Obviously, it is difficult to characterise a removal as 'wrongful' or 'in breach of rights' if it is done with the consent of the other parry. Thus it is arguable that where there is consent one never gets as far as considering Art 13, the effect of which is to provide certain discretionary 'exceptions' to the otherwise unqualified duty to order the return of the child under the first paragraph of Art 12.

On this argument:

(i) the burden of proof would be on the applicant to negative consent (ie to prove a 'breach' of his rights), just as it is on him to prove such matters as the State of prior habitual residence and the existence of a right of custody under the law of that State; and

(ii) if there is consent then there is no wrongful removal at all, and the exercise of a discretion under Art 13 does not arise.

There is much force in this argument, but it ignores the fact that the Convention specifically places the issue of consent firmly within Art 13. So far as is material Art 13 reads:

'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 was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; . . .'

It is quite clear from both the English and the French texts that the word 'subsequently' in Art 13(a) only qualifies the word 'acquiesced', and that the words 'had consented to' clearly refer to a consent before the act of removal or retention.

It is also to be observed that although the issue of whether rights of custody were actually being exercised also forms part of the 'definition' of 'wrongful removal' within Art 3 itself that issue, too, is also specifically placed within Art 13(a). This must have been done deliberately, and proper force must be given to it. The Convention clearly intends that once it has been shown that:

(i) there has been a removal from or retention away from the State of habitual residence; and

(ii) that is prima facie in breach of rights of custody; and

(iii) consent is put in issue,

then the onus shifts firmly onto the person or body which opposes the return of the child to prove that the removal or retention was by consent. Further, even if that is proved the court still has, and must exercise, a discretion.

As to proof Art 13 requires that the person, institution or other body which opposes the return 'establishes' consent. In Re W (Abduction: Procedure) [1995] 1 FLR 878, Wall J considered amongst other matters the issue of proof of consent. He said, at 888F:

'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.'

Later, at 889D he said:

'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.'

With the utmost respect to Wall J, I regret that I cannot entirely agree with parts of those passages and, because of the facts of the present case, I cannot avoid saying so.

In particular, I cannot agree with the propositions that 'in normal circumstances, such consent will need to be in writing or at the very least evidenced by documentary material', and, as he later put it, 'in most cases evidenced unequivocally in writing'. Article 13 does not use the words 'in writing', and parents do not necessarily expect to reduce their agreements and understandings about their children to writing, even at the time of marital breakdown. What matters is that consent is 'established'. The means of proof will vary.

It follows that I cannot accept the conclusion at 889G that a parent must establish the defence 'on the face of the documentation', and that if he cannot do so 'oral evidence is unlikely to affect the issue and will not be entertained'.

I certainly do not wish to encourage the giving of oral evidence generally in these applications, but in the present case both parents were in fact present in court. In my judgment it would have been unreal, unjust, and not consonant with the interests of these children if I had not heard their oral evidence on and surrounding the specific issue of consent. I limited the testimony of each parent to 45 minutes, including cross-examination. I think that proved amply long enough to give the evidence of each a fair and reliable hearing, and I found their oral evidence extremely valuable in confirming the conclusions which I have reached.

I also have reservations about Wall J's sentence 'I find it difficult to conceive of circumstances in which consent could be passive' -- I emphasise the word 'passive' -- and that there must be 'positive consent' if by positive is meant 'express'. If it is clear, viewing a parent's words and actions as a whole and his state of knowledge of what is planned by the other parent, that he does consent to what is planned, then in my judgment that is sufficient to satisfy the requirements of Art 13. It is not necessary that there is an express statement that 'I consent'. In my judgment it is possible in an appropriate case to infer consent from conduct.

However, I am in complete agreement with Wall J that the issue of consent is a very important matter. It needs to be proved on the balance of probabilities, but the evidence in support of it needs to be clear and cogent. If the court is left uncertain, then the 'defence' under Art 13(a) fails.

I now return to the facts in the period prior to 11 January 1995. The mother says that around spring 1994 she decided that, as the marriage had become so unhappy and the father had then left her, she would like to return to England permanently, bringing the children with her. She says that she had lengthy discussions with her husband about this, that he agreed to her doing so, and that he stood by over many months while she made open and elaborate arrangements in pursuance of her plans. She says that it is only since she has come here that, no doubt because he understandably feels very greatly the loss of his children, he has changed his mind and pleaded with her to return, and now made this application.

It is agreed that in about June or July 1994 the parties held a 'garage sale'. The mother says that this was to sell items which would no longer be needed after her departure, and to try to raise some funds towards the fares (although actually the sale was financially rather unsuccessful). She says items sold included paddling pools, easels, ride-on toys, and the children's desks and chairs. The father says that the sale was merely part of a general clear-out occasioned by their removal to a smaller home when he left the US Air Force, and that the items sold were mainly things like old bicycles and a lawnmower. This does not really fit his earlier statement that the entire sale took place from two folding tables. Further, the move to smaller accommodation had taken place several years previously, in 1991.

The mother had worked for some years at a day centre or creche for the children of staff at a local hospital. She helped to look after about 30 children there, including (except when C was at school) her own. In December 1994 she gave in her notice. When she had visited England for 6 weeks in 1993 she had not given in her notice, but kept open the job for her return. It is difficult to see why she should have given in her notice on this occasion, save in pursuance of a permanent move.

She actually purchased the tickets at the beginning of December 1994. Although they were 30-day return tickets, she says this was simply because, as seems so often to be the case, such tickets were actually cheaper than single tickets.

Around the end of December 1994 and early January 1995 the mother was the subject of a number of 'farewell parties'. These included a 'surprise parry' for her given by the staff of the day centre. The father knew about it in advance, for arrangements were made for him to look after the children. There was also a high-tea parry for the mother and the children at the day centre, and a sledding parry. Although the father clearly knew all these farewell parties were happening, he says it was simply because she was leaving the job.

Towards the end of 1994 the mother began to pack. As well as more conventional suitcases she packed a large number of large boxes which I accept were each about the size of a small tea-chest. These were special cardboard boxes for shipping goods by sea. She says in all there were around 10 to 12 large boxes and some smaller ones. The father says that only about seven to nine boxes were involved. The mother says that all the children's belongings which had not been sold at the garage sale were packed up, including items like their special forks and spoons and dining plates, and all their duvets and bedding and books. The cost of shipping the boxes to England by sea was quite considerable, and she had no ready funds with which to do so. She says it was agreed that the father would try to sell their second car, an old Subaru, and use the proceeds to pay for the shipping costs. The father says that the boxes were not actually labelled before her departure, and that he first saw that they bore labels addressed for England when he returned from Seattle shortly after she left on 11 January 1995. However, he certainly saw the labels and the Customs dockets on them when he got back from Seattle. It is true that he did not then forward the boxes to England, but nor did he react to what he saw. Similarly, when the father returned from Seattle he found even the children's bunk-beds had gone (having been sold), but he did not at that stage react.

The father was not actually in Anchorage on 11 January 1995, for he had gone on 9 January 1995 to Seattle. In his first statement he said he went there to see a friend of his called Scott. But he now says that the real purpose was to visit a medical school there and investigate the possibility of his starting on a course of medical studies in autumn 1995. He says there was a general plan that the family would move to Seattle some time after he graduated in May 1995. He says that the mother giving up her job, the parties, and all the packing of boxes, is equally consistent with the parties moving to Seattle and was done for that purpose.

I do not find this convincing. It does not explain why, if she was only going to England for a maximum of 30 days, the mother should give up her job in December 1994 rather than in May 1995, or later when the move to Seattle actually arose; and it seems improbable that the mother would have done all her packing of boxes as early as late in 1994 for a move on an uncertain date after May 1995. Further, the whole question of a move to Seattle was clearly very embryonic, since it was only on 9 January 1995 that the father went there to investigate a medical school, and indeed the plan to move has now been dropped. He now plans to embark on a further one year's master's course at Anchorage this autumn.

The father says that he was so busy with working for his university finals in May 1995 that he did not realise that his wife was planning a permanent move. I find this unconvincing. He is an alert, highly intelligent man, with a forceful personality. It must have been absolutely obvious to him throughout the whole period that the mother was indeed making preparations to leave Alaska permanently and come to England.

It is true that on 5 January 1995 the mother signed an annual application form to claim Alaskan Permanent Fund Dividend the following October. This is the annual distribution to residents of Alaska of profits from Alaskan oil revenues. The form contains a printed statement to the effect that the applicant intends to remain an Alaskan resident indefinitely. But the form was actually filled in by the father who himself signed a similar one at the same time, and in my judgment was done to defraud the fund.

Of greater significance in fact is that, although the deadline for returning the form was not until 31 March 1995, the parties obviously took care to sign it before the mother left for England.

Nor do I regard it as inconsistent with the mother's case that when, in October 1994, the dividend from the fund was received it was spent in part on winter clothes for the children. They were still going to be in Alaska until about the middle of January 1995, and as growing children they needed, as the mother put it, new seasonal children's clothes.

After the mother did come here there were some telephone calls between the parties, and the father spoke also to the children. On 8 February 1995 the mother wrote a letter to a mutual friend in Alaska, Mrs Pollard. It is quite obvious from that letter that Mrs Pollard knew that the mother had come permanently to England. It starts, 'Well we're here! I am still trying to come to terms with all that that means', and goes on to deal with schooling for the children, a home, and jobs for herself. The letter does later say that the father 'is [and the letter itself uses quotation marks] "absolutely at a loss to know why we left" so he says'. Later, that he 'threatened to stop school [ie university] now and just come over', and later says she has been to see a lawyer but has not yet told the father.

I agree that on their face those statements do not seem consistent with the mother having come here with the wholehearted consent of the father, but in my judgment they are entirely consistent with what the mother says is the true explanation of events in this case: that is, that the father did indeed agree to her coming and permit her to come over many months whilst she made the arrangements, in the belief that once here she would change her mind and return to Alaska seeking a reconciliation. When he slowly realised that she was not going to do so he became very anguished, and when finally he learned that she was actually having an affair with someone called Bernie (who happened to be a former acquaintance of his but now living in England) he realised that his hope of a reconciliation had failed, and so he himself came here.

In March 1995 the mutual friends, Mr and Mrs Pollard, who were in England on a holiday, tried to persuade the mother to return and reconcile. At their urging she wrote a letter to the

father dated 13 March 1995. It is true that nowhere in that letter does she say that he agreed to her and the children moving permanently to England, but that is not the issue she is addressing in the letter. What she endeavours to do in the letter is explain to him that reconciliation and a return to Alaska is simply not on. The letter does refer to the father going back on 'your promise to send our boxes and send us some money', and later says 'I never wanted you to be excluded from the children's lives. We have talked about you settling here after the summer when you've saved some money. . .'.

In his statement of 21 July 1995 the father says that he wrote numerous letters between January 1995 and June 1995, when he came to England, and that the letters clearly show that he believed the marriage would continue and that the mother and children would return to Alaska. He says today that there were in fact about 10 such letters. The mother says that she only recalls three, and she has now (during the course of the hearing) produced them. They are dated 6 and 22 February 1995 and 3 March 1995. They are very anguished letters. They speak at length of past happiness and past mistakes. They do seek the return of the mother and the children to Alaska, but I do not regard anything in them as inconsistent with him having earlier agreed to the children coming here permanently. They are entirely consistent with his having done so in the hope that the mother would in fact return, and that hope now rapidly fading.

In support of the mother's case she has placed before the court 10 affidavits from people in Anchorage, all dealing with such matters as the garage sale, the parties, the packing, and the sale of the Subaru car. Of course all that evidence is entirely untested by cross-examination. The father says that he did not know most of the deponents at all well, and one or two of them not at all. He says that, together with certain other affidavits, notably one from a Mr Ian Hayworth (which it is not necessary for me otherwise to refer to, since it relates to certain matters relevant only to Art 13(b)) all show that the mother and her lawyers have created a massive and unjustified trumped-up case against him which has no foundation in fact.

Counsel for the father submitted that the affidavit of Mr Hayworth in particular, and also the affidavit of a Karin Sikora, which is said to be too incredible to be believed, illustrate the lengths to which the mother has been prepared to go to attack the husband.

I cannot accept these strictures. I do agree that the mother or her lawyers have been unusually diligent in obtaining and placing before the court a large amount of corroborative evidence. On the whole I deprecate that. I agree that a case does not gain by adding affidavit after affidavit to the same effect, and it is particularly undesirable in summary proceedings such as these are under the Child Abduction and Custody Act 1985. I wish to make it quite clear that I have not succumbed here to the sheer weight of supporting affidavit evidence. But equally I am not prepared to hold against the mother the fact that it has been adduced. I decide this case primarily on the evidence of the parties themselves.

I found the mother to be transparently honest and reliable as a witness, and entirely clear in her answers. I have very great sympathy for the position of the father, who faces the bleak prospect, unless he chooses to settle in England, of life 10,000 miles or more away from his wife (whom I believe he still loves and would dearly like back) and his children. But I regret that I found his evidence less reliable, both as a matter of overall impression and because he initially denied in oral evidence what he had expressly said twice in his written statements, that the mother had ever threatened to leave him and come to England.

I am quite satisfied to a considerably higher standard than the balance of probabilities, and by evidence that I regard as clear and cogent, that throughout most of 1994 and right up to

the time the mother actually left on 11 January 1995 the father was in agreement (however sadly and reluctantly) with the mother bringing the children here permanently. His motive in agreeing was that he believed, wrongly as it turned out, that the mother would ultimately have second thoughts and return to him. He made it clear to the mother that he was in agreement, and he stood by for many months while she openly made the arrangements to come.

I am thus satisfied that he did consent at the time to the removal.

I must nevertheless still consider whether to order a return. The effect of consent under Art 13(a) is simply to 'open the door' to the exercise of a discretion. But in my judgment it should clearly be exercised in this case in favour of not ordering a return.

The history as I have already described it is relevant. The mother did come in a planned and organised way, with the father's long-held consent. The children have now been here for over 6 months. C is well settled in school here. The mother and children have settled into a home. There is now no home at all in Anchorage, since the father has given up his tenancy there. The future there for the children is uncertain. There is no possibility now of the parents reconciling. The mother is English, and her family live here. The children themselves have dual nationality. It is not capricious or contrary to their cultural or other needs that they now make a permanent home here.

It is open to the father, if he wishes, to pursue a claim for a residence order and for leave to remove the children back to Alaska with him, but I refuse to order a summary return under the Convention, and his application is dismissed.

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