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[22/01/1997; High Court (England); First Instance]
Re K. (Abduction: Consent) [1997] 2 FLR 212, [1997] Fam Law 532

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

22 January 1997

Hale J

In the Matter of K.

Indira Ramsahoye for the father

Mark Rogers for the mother

HALE J: This is an application by a plaintiff father under the Child Abduction and Custody Act 1985 and the Hague Convention for the return of his daughter C, who was born on 16 November 1995 and so is aged 14 months, to the USA. The father is a US citizen and the mother is British. They met in the father's home state of Texas in 1992 and they were married in her home town, Nottingham, in 1993. They set up home together in Texas in July 1993. Their daughter was born there more than 2 years after that.

The mother returned to work in January 1996. The arrangements were that the father worked night shifts, the mother worked one week days (in effect, long mornings), one week evenings (in effect, afternoon to evening) and one week nights. When neither parent was available because they were at work or needed to rest, or no doubt for any other reason, C was looked after by her paternal grandmother who lived nearby.

According to the mother, the marriage had been in difficulties for some time and matters came to a head when her parents came over to visit them in October 1996. Her father was due to stay for a week and her mother to stay for 7 weeks. But they decided to return together, the mother says because of the way they were received and treated and what they found in Texas.

The mother wanted to return to England with them taking C with her. She says that there was a long talk with the father in which she alleges that he agreed to her staying here with C. Her father bought return tickets for them both with an expected return date of 7 November 1996. They came to this country on 25 October 1996 to her parents' home where they still are.

She wishes to remain in this country. She told the father so. Shortly after that the father consulted his attorney and sent over a box containing letters from her grandmother and other bits and pieces. The father then consulted his local senator and was referred by him to the Central Authority under the Hague Convention and the application to them was made on 15 November 1996. These proceedings were launched on 20 November 1996. They began with the usual holding orders. There was a directions hearing on 3 December 1996 and the case was listed for final hearing on 17 December 1996. It came before Bennett J and he decided that there was an irreconcilable conflict of evidence between the parties on their affidavits, and I am told that he directed that both parties attend to give oral evidence limited to the issues of consent and acquiescence.

I say I am told that because the order as drafted and sealed states in para 2, 'The case being adjourned for third parties to attend for the purposes of consent and acquiescence only and relisted on 22 January' etc. I do not believe that that order means what it says. I believe it is common ground that 'third parties' means 'both parties' and that 'for the purposes of consent and acquiescence only' means for the purpose of giving oral evidence on those issues.

I am told that Bennett J did not give a judgment at that time. It is, of course, an exceptional step in summary proceedings under the Hague Convention to order that the parties attend to give oral evidence. One reason why it is so exceptional is that the policy of the Convention is that children should be speedily returned to the country from which they have been taken in such a way that the person who seeks their return is not put to the trouble and expense of travelling long distances to give evidence in a foreign court. But the issue of consent is, of course, a crucial issue and, in my experience, it is the one on which courts are, from time to time, prepared to relax that strict approach. No doubt Bennett J was influenced in his decision by the father's stated willingness to come over to this country in order to take his daughter home, should the court order her return.

Be that as it may, the result is that both parties are here at court today, both expected to give evidence, and it would have seemed particularly unjust to the father in those circumstances had I refused to hear them. So I have done so.

I turn now to the issues. It is accepted on the mother's behalf that C was habitually resident in Texas before she came to this country. Any suggestion that she might have changed her place of habitual residence since then would, in any event, depend upon the view that I took upon other issues in the case. So there was no need to pursue that matter. It is also accepted that the father has rights of custody within the meaning of the Convention and that he was exercising them at the time that they left and, indeed, at the time the mother said that she was not going to return. It is further accepted that the retention of C in this jurisdiction would be wrongful under the terms of the Convention, and I would be obliged to order her return to the USA, unless the mother can establish one of the defences which is provided for in Art 13. It is accepted, therefore, that the burden of proof rests on the mother. I have not been invited to consider the inter-relationship between Arts 3 and 13 as was Holman J in Re C (Abduction: Consent) [1996] 1 FLR 414 and I therefore express no view on the point.

The mother relies on both subparagraphs of Art 13. Article 13(a) refers to the person, institution or other body having the care of the person of the child, having consented to or subsequently acquiesced in the child's removal or retention. Article 13(b) refers to the grave risk of physical or psychological harm or otherwise being placed in an intolerable situation. It is not doing an injustice to the mother's case, as presented by Mr Rogers on her behalf, to say that the real burden of her defence relies on consent.

The mother says that when she decided that she wanted to go back to England with her parents she had a long discussion with the father in the back yard. She explained how unhappy she was and said, in effect, that she wanted to have a breathing space to sort her feelings out. She made it clear that there was only a 5O/5O chance that she would come back because that was how she was feeling at the time. She says that the father agreed to her taking C. She also says that she asked him whether, if she did decide to stay here, she could keep C and she says that he agreed. She says that they also had a discussion about contact and he said that he did not wish to be a part-time dad and that she should tell C that he was dead when she was of an age to ask. The mother also says that having had that discussion she gave up her job the day before she left and it was not kept open for her.

She had not finally decided when she did leave. Return tickets were purchased because the father said that that would be cheaper. She made up her mind when she was here. She told the father on the telephone on 1 November 1996. The father was upset and asked her to think again and she rang again the next day, the second, and confirmed her decision. She says that the father telephoned at least four times and, in effect, he was pressing for her to go back to have the matter dealt with in Texas. It is common ground that in one conversation he said that he had considered snatching C, but he said that he quickly thought better of it. He did, however, after she had made it clear that she did not intend to return, send a box containing her grandmother's letters and some other things, personal documents of the mother's.

The father's evidence is that he was not aware of the difficulties, that it came as a bolt from the blue on 23 October 1996. The mother said that she was going to leave her job. He also says that her parents thought that he had behaved badly to them on their trip and there were discussions then about how they could manage on just one salary, but that the reason for the mother leaving with her parents was only that the mother's grandmother was seriously ill and might not make it to Christmas. He denies that there was any conversation about not coming back, about the 50/50 chance that she would not do so and about whether she could keep C if she decided not to do so.

It is clear from his evidence that he consulted an attorney very soon after his telephone conversation with the mother on 2 November 1996. It is also clear from his evidence that the priority (as he and the attorney saw it) was to set about protecting his assets and that he wanted the divorce dealt with in Texas. He first referred to splitting up the family bills and then later, in answer to a question from me, he mentioned community of property. He agreed that he sent the grandmother's letters, but in his oral evidence he says that this was as a bargaining tool to get the mother to return her keys to his house, to the grandmother's house and also to the car.

He says that the grandmother pressed him, as I understand it, to do something about getting C back and he contacted his senator with the result that these proceedings were swiftly instituted in the way J have described.

There is, therefore, on the crucial issue of what took place before the mother and C left the USA, a complete conflict of evidence. Neither of them can be telling the truth or at least the whole truth. Which account do I prefer?

In favour of the father it can be argued that the purchase of return tickets is more consistent with a short trip for a limited purpose than with the mother's account. However, the purchase of return tickets is consistent with an account in which the mother, when she left, was undecided and considered that there was an even chance that she would return.

There are features of the father's evidence which are difficult to accept. I do not believe that the mother's complaints came as a complete bombshell to him. He knew that the mother was homesick and at one point he referred to her wanting to go home all the time. Furthermore, his affidavit does not refer to what he said in his statement to the Central Authority:

'[The mother] told me she needed time to think and that her grandmother was ill and might not live until Christmas. [The mother] and I had plans to visit the grandmother in March 1997. [The mother] and I talked and we had agreed that she would take C over until 7 November 1996. [The mother] said that she might stay longer and she wanted to think about where her life was going. [The mother] and I had talked and agreed that when she returned she could be a full-time housewife.'

On its own, that statement is, of course, consistent with a denial of any agreement that the mother should go and, if she decided to, stay with C beyond 7 November 1996. But when the father gave evidence he initially said that the only reason was the grandmother's illness, and he did not mention anything about needing time to think or that the mother might stay longer and that she wanted to think about where her life was going. There can be little doubt that what the father says in the first statement that he made on 15 November 1996 when events were fresh in his mind is likely to be closer to the truth than anything said subsequently, and in that it is quite clear that there was talk about the mother needing time to think and staying on here. That lends support to some of what the mother says, although, of course, it does not entirely confirm everything that she says.

It is also significant that the first mention of the bargaining of letters for keys was in evidence to this court. That is a striking feature of obvious significance which it is surprising was not mentioned earlier. The sending over of the grandmother's letters is also consistent with the mother's story by itself, and even with the father's story about the keys, were I to accept it (which I do not), it scarcely assists in supporting his side of these events.

Taking these and all the circumstances of the case into account, including what I have seen and heard of the parties in the witness-box, I have reached the firm conclusion that I prefer the mother's evidence to the father's, and I am satisfied that a conversation such as she describes took place between the mother and the father before she left and brought C to this country and I am satisfied that that conversation included the assurance that if the mother chose to remain in this country she could keep C.

I should add that the father's evidence was that the subsequent conversation about not wanting to be a part-time father had, in fact, taken place before C was ever born. It seems to me that that would be a very odd conversation to have in those circumstances, and that adds to my view that the mother's version of events is to be preferred.

It also seems to me quite clear that the father thought better of what he had said when the implications came home to him after the mother told him that she was not going to return and he consulted his attorney. It was striking how in his evidence his first thoughts were about the finances, the divorce and securing matters in Texas. All of that is consistent with a change of mind resulting from what the mother decided to do.

Having reached that conclusion on the facts, is that sufficient to amount to consent for the purposes of the Convention? My attention has been drawn to two recent decisions in this court. The first is by Wall J, a decision in Re W (Abduction: Procedure) [1995] 1 FLR 878. At 888 he says this about the issue of consent:

'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.'

The other case is a decision of Holman J in Re C (Abduction: Consent) [1996] 1 FLR 414. At 418-19 he considers with care and, of course, the greatest of respect the views which had been expressed by Wall J in Re W. At 418 he says that he cannot agree with the proposition 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'. Holman J points out that Art 13 does not use the words 'in writing' and that:

'. . . 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.'

He goes on, at 419, also to disagree with the proposition that 'it is difficult to conceive of circumstances in which consent could be passive'. Of course, it all depends on what is meant by 'passive', and he points out:

'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.'

They are, however, both of them in agreement 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.'

For my part, and with the greatest of respect, I prefer the views expressed by Holman J on those two issues. It is obvious that consent must be real. It must be positive and it must be unequivocal. But that is a separate issue from the nature of the evidence required to establish it. There will be circumstances in which the court can be satisfied that such consent has been given, even though it has not been given in writing. It stands to reason, however, that most people who wish to retain or remove a child would be well advised to get written consent before they do so to place the matter beyond argument. There may also be circumstances in which it can be inferred from conduct. I am not saying that this is the latter sort of case. If it is a case of consent, it is a case of express consent resulting from the conversation which I have found as a fact took place as the mother describes it.

However, that is not the issue which is principally troubling me. The issue which concerns me is that at the time when the father said what he did the mother was undecided as to whether or not she would return to the USA. It was only later that she decided that she would not return and, from the moment that that decision was communicated, the father indicated (I am satisfied) that he was unhappy with it. But the mother's evidence was of an unequivocal acceptance that if she did decide to stay in this country she could keep C here. It is not a case in which the mother changed her mind. It is a case in which she made up her mind.

Having allowed the mother and C to come to this country on that basis, can it be said that the mother has failed to establish that the father had consented to C's removal or retention? Not without some difficulty, I have reached the conclusion that that is sufficient to amount to consent and that that consent is not taken away by the father subsequently thinking better of it. Having had that consent, the mother was entitled to rely upon it in making up her mind and in keeping C in this country.

Having reached that conclusion on the issue of consent, I can deal with the other matters of defence very shortly because Mr Rogers again accepts that if I agree with the mother's case on consent, then it is unnecessary for me to consider acquiescence, and if I do not accept her case on consent it is unlikely that I will accept her case on acquiescence. He prays in aid the matter of the sending of the grandmother's letters as corroboration of her case on consent. It could, of course, be some indication of acquiescence, but he does not put that forward very strongly. It seems to me that if I am wrong about consent, it would be difficult in the extreme to establish any case of acquiescence. Having heard the mother's decision, the father very soon communicated his unhappiness with it and took steps to do something about it. Admittedly, the first steps were not in an attempt to retrieve C, but it did not take him long to discover what the steps under the Hague Convention should be to do something about that.

So, if I had reached a different conclusion on consent, I would not hold that the mother had established acquiescence. Similarly, as far as Art 13(b) is concerned, the gravity of the case that has to be established under either limb of Art 13(b) is severe. The mother has put in a report from a well- known and respected child psychologist, Professor Newson, who has observed the mother and C together and states with some firmness that it would be harmful to C to be separated from her mother. But it is difficult to construe his report as establishing a grave risk of psychological harm simply as a result of return to the USA, given that it is clear that her mother would return with her if ordered to do so. Similarly, it would be difficult to construe a case that C would be placed in an intolerable situation if so ordered. That, again, is a very different test from the test of whether or not it would be in her best interests or for her welfare to be ordered to return.

However, I have held that the defence of consent is established. That does not conclude the matter. It merely gives me a discretion in terms of the Convention whether or not to order C's immediate return. In exercising that discretion a variety of factors, which will depend, to some extent, upon the circumstances of the case, have to be weighed in the balance. One of the factors is the most appropriate forum within which any dispute between these parents about the future of their daughter should be decided. There is no doubt that their main connection is with Texas. C's main connection is with Texas. It is where she was born. It is where she has lived all her short life until October 1996. It is where the home in which she lived is situated. It is where her father and her father's relatives, including the grandmother, who has played a large part in her care, are situated. So, in terms of the closest connection it is obvious that Texas wins.

There are, however, no proceedings which need influence the matter. The father wishes the divorce proceedings to take place in Texas, and it may very well be that even if the English courts have jurisdiction as a result of the mother's domicile here -- and I am making no observations about that -- it will be more appropriate for any divorce proceedings to take place in Texas. But the question is not where the divorce proceedings take place, it is where any proceedings about what is to happen to C will take place.

I am entitled to take into account the likely outcome of any such proceedings, and Ms Ramsahoye, very fairly on behalf of the father, says that it is unlikely that the Texas courts

would adopt any different approach from that which would be adopted in this country. They will regard C's welfare as the paramount consideration. They will, of course, be concerned to preserve as good a relationship as possible with each of her parents, but they will take into account how young she is; they may take into account that she is a little girl. I know not. They are likely to have evidence before them similar to that which has been given to this court by Professor Newson, although they may also have other evidence. It may, therefore, be surmised that it is more likely than not that they would conclude that C should live with her mother. Whether they would also conclude that she should have leave to come to this country, again, I know not. It is, perhaps, more difficult to predict the outcome of that sort of application. But there would certainly be a reasonable chance of its success were such an application to be made in the reverse situation in this country.

As well as all of those considerations, which have to do with the proceedings, I can take into account the welfare of this little girl. It is not the paramount consideration, but it is a relevant one. It is clear that mother and child should not be separated and that is now accepted on the part of the father, although he says he would like C to live with him. It seems clear as a result of these proceedings that they cannot be expected to live in the same house together. The father's mother offers to accommodate them in her home and, on the face of it, this is an attractive proposition because the grandmother has spent so much time looking after C and so she will be familiar with the home and the surroundings. I have every sympathy for the grandmother in this case, but I am bound to say that the terms in which the offer is couched, as stated in the bundle, are not such as to suggest that mother and child together will find it a comfortable experience living with her in these circumstances. The effect upon the child of a return to Texas in those circumstances has to be borne in mind. In addition to that I take into account that the father has offered support, but the financial situation is such that this is a difficult matter for him and he is clearly very seriously troubled about the level of debt that there is in Texas. One is bound to have reservations about how sustainable that offer would be.

I appreciate that the normal purpose of such undertakings is only to tide things over until the Texas court is able to take control of matters and the evidence is that the Texas court can take control very quickly indeed. Nevertheless, when one is looking at things in terms of the court's discretion, one is entitled to give rather more weight to the welfare considerations, which suggest quite firmly, in my view, that C would be better off with her mother here for the time being, than one would when one is considering a defence under Art 13(b).

The final thing which I have to weigh in the balance is the purpose of the Convention. This is something to which the courts attach the greatest possible importance. We all want children to be returned as soon as possible to the place from which they have been wrongfully removed. The reasons why the Convention exists to secure this are partly that it is bad for children to be uprooted from one jurisdiction to another and partly to fulfil the obvious proposition that if there is a dispute between parents as to the future of their child it is better dealt with in the courts of the country where the child has hitherto been habitually resident because that is where the best information lies.

However, I have to bear in mind in particular that that factor has a different weight in a case in which consent to the removal or retention has been established. Indeed, in cases of consent, all of those factors carry a rather different weight. But if it has been agreed between parents that a mother may bring her child to another country and, if she so chooses, remain here with the child, then frustrating those two purposes of the Convention scarcely comes into question. I do, however, take it into account because of the evidence of a very swift change of mind on the father's part.

Weighing all those factors up, I have reached the conclusion that it would not be appropriate for me to exercise my discretion to order a return. Therefore, this application is dismissed.

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