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[11/01/1995; High Court (England); First Instance]
Re G. (Abduction: Striking Out Application) [1995] 2 FLR 410, [1995] Fam Law 116

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

11 January 1995

Connell J

In the Matter of G.

Harry Martineau for the father

Henry Setright for the mother

CONNELL J: Before the court this morning is an application made by the mother to strike out an application made by the father under the Hague Convention and under the provisions of the Child Abduction and Custody Act 1985. The background history is somewhat complex. I shall refer only to those dates in the chronology which appear to the court now to be relevant to the decision which falls today.

The mother of the four children with whom I am concerned is by background American; the father is English. That perhaps is an irony in view of the respective stances of the parents as now instanced in the litigation between them. They married in the USA in December 1983 and of that marriage there are four children: A, aged 9; K, aged 8; A, aged 7; and M, aged 5. Two of the children were born in the USA and two of the children were born in the UK. The parties appear to have lived together with their children on occasions in the UK and on occasions in the USA.

Between 1990 and 1992 the mother and the children remained in England but on 4 May 1992 they flew to the USA. There is an issue between the mother and the father (as I shall call them) as to the purpose for the mother's going there and no doubt as a result of the background history, if fully investigated, there would be nice issues for the court to decide in the context of the Hague Convention proceedings as to where these children were habitually resident in 1992.

Shortly before the mother and the children flew to the USA in May 1992, the father had filed for a divorce in the Florida court and was requesting from that court orders relating to joint responsibility for the children, asserting an appropriate primary residence of the children with him and secondary residence with their mother. Those proceedings continued for

rather less than 2 months until, on 8 June 1992, an order was made in the Florida court which was actually drawn up on 11 June 1992. By that order, it was adjudged that the mother should have exclusive use and occupancy of the marital home in Florida, that the temporary residence of the children, the four children, should be with the mother at that home and, further, that the father should have reasonable and liberal visitation privileges to the children. The order further provided (and this is important) that neither party should remove the children from the State of Florida pending further order of the court.

Notwithstanding that order made on 8 June 1992 and drawn up on 11 June 1992, on 16 June 1992 the mother and the father together took these our children to the airport from where mother and children flew back to the UK. The father says that when he took the mother and the children to the airport in Florida and allowed them to leave the Florida jurisdiction he believed that the mother would return with the children to the USA once she had put her affairs in the UK in order. The mother says that the opposite was the case: that the father had in fact agreed to drop his litigation in the USA and realised that the return of the mother and the children to the UK was intended to be permanent.

It is plain that there is a substantial issue of fact between the mother and the father as to the correct arrangement between the parents on 16 June 1992. But certain matters are agreed. The first is that the father accompanied the mother and the children to the airport and released to the mother the children's passports, notwithstanding the order of 8 June 1992 to which I have referred, which provided that neither party should remove the children from Florida pending further order of the court. It is then agreed that the children did in fact travel to the UK. Finally, it is agreed that since 16 June 1992 the mother and the four children have remained living in this jurisdiction; therefore, they have remained living here for a period of 2 1/2 years.

The father continued with the litigation in Florida in November 1992, returning to the Florida court with an application based on the allegation that the mother was in contempt of court for having removed the children from Florida without his knowledge or consent. That suggestion is made notwithstanding the fact that he was present at the airport and had dealt with the passports in the way that I have described.

Matters continued within the Florida jurisdiction until on 28 July 1993, now some 13 months post the mother and the children's departure from that jurisdiction, the husband placed before the court in the USA a motion to compel the mother to return to Florida, alleging that she was and is or was at that time an unfit mother.

The mother and the children remained in the UK and on 3 December 1993 the mother issued an application under the Children Act 1989 seeking a residence order in respect of all four children and also seeking a prohibited steps order preventing the father from removing the children from this jurisdiction.

There were further motions before the court in Florida until, on 23 December 1993, the father issued applications within this jurisdiction. The applications that the father issued on that date, as I understand it, were, in essence, two. First, he issued an application within the ambit of the Children Act 1989, in which he sought contact to his children and, secondly and most importantly for today's purposes, he issued an originating summons within the provisions of the Child Abduction and Custody Act 1985 and of the Hague Convention.

As is well known, proceedings under the Hague Convention are specifically designed to be summary proceedings aimed at, in appropriate cases, obtaining a speedy return of children to a jurisdiction from which they have been wrongfully removed or from which they are being wrongfully retained.

The order of the court that was made consequent upon the father's application is set out in the bundle now before me. The order specifically refers to the Child Abduction and Custody Act 1985 and by order the mother was forbidden from removing the children from the jurisdiction or from their home in East Sussex. It was directed the order should remain in force until 29 December 1993; it was certified as fit for vacation business; and specifically it was ordered that at the hearing on 29 December 1993 the court should determine whether the said minors should be returned to the USA. Although that order may have been somewhat ambitious in that last direction or order, none the less it is an interesting and helpful reflection of the urgency which in normal circumstances attaches to proceedings under the Hague Convention and the Act to which I have made reference.

The matter came back before the court on 29 December 1993 when his Honour Judge Cook made certain orders. First, he ordered that there should be a court welfare officer's report requested; secondly, that a directions appointment should be fixed on application to the clerk of the rules on the filing of the welfare officer's report; thirdly and somewhat unusually, he ordered that the child abduction proceedings should be consolidated with the Children Act proceedings; fourthly, he gave leave to dispense with acknowledgements and answers to the Children Act application; fifthly, he directed that both parties should file further evidence if so advised within 21 days; and then he made directions as to costs.

Accordingly, no decision as to the return of the children was made on that date, nor was any specific return date for the Hague Convention application then specified. In fact, what happened was that the matter next came before the court on 15 February 1994. On that occasion, it was before the district judge, who had before him letters of 4 February 1994 from the father's solicitors and 11 February 1994 from the mother's solicitors. He read the order of 29 December 1993 and then he ordered that the child abduction application of the father's be treated as the lead file in the consolidated proceedings, which included the current Children Act application and otherwise vacated the directions appointment for that date.

It is important to remember that the Hague Convention proceedings were the father's proceedings. If he wished those proceedings to achieve a speedy return of his children to the USA, then prima facie it was for him to ensure that the relevant rules were observed and that the matters proceeded at a proper pace. Unhappily, however, the father did not do that. There was no further forward step taken in the context of the Hague Convention proceedings by the father until October 1994, that is to say, some 8 months after the directions hearing before the district judge. He did in fact take steps within the jurisdiction of Florida, but not within this jurisdiction.

On 24 May 1994 the welfare officer's report which had been requested on 29 December 1993 was filed. A reading of that report indicates that the welfare officer felt that the status quo with the children living with their mother in Sussex was in their best interests and, consequent upon that report, on 20 June 1994 the mother's solicitors wrote to the father's solicitors, asking whether or not it was the father's intention to pursue, in particular, the Hague Convention proceedings. No steps were taken by the father to forward those proceedings until 25 October 1994, when his solicitors sought from the court a date for directions in respect of the Hague Convention proceedings. The date that was sought turned out to be 5 December 1994 and on that occasion Mr Hayward-Smith QC, sitting as a deputy judge of the Division, gave certain directions and directed a hearing which is, in effect, this hearing for the wife's application to strike out the father's Convention application. Also on the same occasion a hearing was fixed for the disposal of the Children Act applications, that hearing being fixed for 23 March 1995 with an estimate of time of some 2 to 3 days.

It is immediately apparent from a recitation of the relevant dates, first of all, that the children have been here now for some 2 1/2 years; secondly, that there was significant delay between the children coming to this jurisdiction and the father instituting Hague Convention proceedings on 23 December 1993; and, thirdly, that since the issue of those proceedings they have not been conducted with the expedition which is invariably appropriate to applications phrased under the Hague Convention.

My attention has been directed, helpfully, by counsel to Art 12 of the Hague Convention, which reads as follows:

'Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.'

I pause there to observe that the removal or retention of these children that is relied upon in the amended summons on behalf of the father is said to be in breach of the order of 8 June 1992 drawn up on 11 June 1992. The removal occurred on 16 June 1992, and any wrongful retention would have occurred shortly thereafter, so that it is immediately apparent that a period in excess of 12 months has elapsed between the issue of the originating summons under the Hague Convention and the date of the order which is relied upon, which was closely followed by the removal to which I have referred. Article 12 goes on:

'The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.'

Accordingly, it is apparent that although more than 12 months have elapsed since the order of which the mother is said to be in breach and since the removal or retention relied upon, none the less there remains jurisdiction in the court to entertain an application under the Hague Convention, although at that stage and in those circumstances a demonstration that the child is now settled in the child's new environment is a matter which the court can properly consider when deciding whether or not in exercising what is by then a discretion the court should make an order under the Convention.

I do not read the balance of Art 12 since it is not material to today's application.

Given the delay which had taken place between June 1992 and December 1993, it was in my judgment even more important that the father should proceed with all proper expedition if it was his true intention to prosecute the Hague Convention application which he had made in December 1993. As is indicated by the chronology which I have summarised, he did not in fact do that and it is, in my judgment, further relevant at this stage to consider the Family Proceedings Rules 1991 and, in particular, r 6.10. That rule deals with the adjournment of a summons and reads as follows:

'The hearing of the originating summons under which an application under the Hague Convention or the European Convention is made may be adjourned for a period not exceeding 21 days at any one time.'

It is plainly incumbent upon the father, if he wishes to pursue those proceedings, at least to observe the spirit of that rule. As I have already indicated, the Hague Convention proceedings are his. Further, it is relevant in my judgment to remember that very often and

probably in this case the expenditure of public funds is involved in the prosecution of Hague Convention proceedings.

Now the situation is that the children have been within this jurisdiction for 2 1/2 years and the question which falls to be considered is this: what possible purpose can there be now to the father seeking to pursue the Hague Convention proceedings, particularly given that there is to be, on 23 March 1995, a proper hearing of the Children Act proceedings with an estimate of time of some 2 to 3 days? At that hearing, the question of what is in the best interests of the children will be to the forefront of the mind of the court, and the father will be in a position to make all the proper submissions that he wishes to make to the court as to where the best interests of the children lie, as to whether they should live with their mother within the UK or their father in Florida, and as to what contact the parent with whom the children do not live should have to those children.

Having considered all the circumstances and in particular bearing in mind what in my judgment is the manifest failure of this father to conduct his Hague Convention proceedings with proper diligence and speed, the conclusion to which I come is that it is appropriate in the circumstances here to strike out the application of the father under the Hague Convention. The conclusion that I reach is that in the circumstances described, those proceedings have not been properly prosecuted and now amount to an abuse of the process of the court. Accordingly, the order will be made, subject to any further submissions which counsel may place before the court, in the terms of the summons of 6 December 1993 that the father's application under the Hague Convention on the Civil Aspects of International Child Abduction 1980 be struck out.

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