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[19/08/1992; High Court (England); First Instance]
Re B. (Minors) (Abduction) (No. 1) [1993] 1 FLR 988

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

19 August 1992

Waite J.

In the Matter of re B.

Counsel: Jeremy Rosenblatt for the mother; Heather MacGregor for the father

WAITE J: At the outset of these proceedings under the Child Abduction and Custody Act 1985, based upon a mother's contention that children habitually resident in Germany have been retained unlawfully by their father in England, I have to deal with an application which goes to the whole root of the jurisdiction. The respondent father applies to stay or to dismiss the proceedings as an abuse of the process of the court upon the ground that the applicant mother, having entered an appearance to the father's divorce petition in this country, and also to family proceedings started by him here in which she has made a cross-application on her own behalf, cannot now be heard to avail herself of the rights given by the Convention to parents of children who have been unlawfully removed to or retained in another jurisdiction.

The circumstances in which that application is made are briefly summarised as follows. The parties, whom I will call the mother and the father, were married in July 1988. Their two children, J and K, were born on 27 November 1988 and 27 April 1990 and are thus still very young. For a time the parents lived in England and Scotland where the father had his own business. Signs that the marriage was coming to grief became evident in September of last year, 1991, when the mother took the children to Germany and stayed with them at her own mother's house near Frankfurt. The father soon followed. The result may not have amounted to a reconciliation, but it certainly led to an agreement, as a result of which the whole family returned to the UK.

Arrangements were made for the flat where they had lived in Glasgow to be sold. That was done by Christmas of 1991 and in early or mid-January 1992 the family came to London. On 20 January 1992 the whole family moved to Germany. They had an uninterrupted stay there, apart from a 2-week skiing holiday, and by July 1992 the mother had made

arrangements to obtain part-time work at a local kindergarten. On 19 July 1992 the family travelled to England. There is a conflict of evidence as to their motives for so doing. The mother says it was merely in furtherance of an intended 10-day holiday in this country, but the father contends that it was a permanent return.

If the proceedings are allowed to continue that conflict will have to be resolved. It is sufficient for present purposes to say that almost immediately upon the return of the family to England, the father took certain legal steps. On 22 July 1992 he obtained, ex parte, a prohibited steps order against the mother, restraining the removal of the children from the jurisdiction of the English court. That was granted upon a very short-term basis only, on the father's undertaking to bring the matter back before the district judge on an inter partes basis on 30 July 1992. On the same day, 22 July 1992, the father presented a petition to the English court for dissolution of his marriage to the mother. It was served upon her in this country on 23 July 1992 and on 27 July 1992 she entered an appearance in the prescribed form, which included a statement that she did not intend to defend the suit so far as it sought dissolution of the marriage, and added an intimation that she intended to apply on her own account for a residence order in respect of the two children.

The father, meanwhile, had complied with his undertaking to present an application inter partes and he launched on 22 July 1992 an application in the family proceedings court, which meant at that stage the county court, claiming a residence order in respect of the children and a prohibited steps order restraining their removal by the mother. It will be convenient for brevity's sake to call that 'the father's family proceedings application'.

I have mentioned that the district judge who granted ex parte relief on 22 July 1992 had done so upon the basis that the matter would come back inter partes on 30 July 1992. So it did, and a very active day it proved to be for these parents on the procedural front. First of all on that day, the mother, for her part, made an application in family proceedings under s 10 of the Children Act 1989. In it she claimed a residence order in these terms: 'I want the court to order that both children should reside with me in Germany'. Her application included particulars of the arrangements she proposed for the children if that order were to be granted. I will call that proceeding 'the mother's family proceedings application'.

It was made returnable before the district judge at the same time and place as the father's family proceedings application. District Judge Moorehouse was due to hear them both at 3.30 pm that afternoon. At 2 o'clock that same day the mother, through her counsel, made an application to Bracewell J, who was sitting to deal with urgent ex parte applications. She sought from her a peremptory declaration that the retention of the children in England had been wrongful or unlawful within the terms of Art 3 of the Hague Convention. The judge declined to grant her such relief upon an ex parte basis, indicating that if such orders were to be applied for, the relevant application should be made at a hearing at which the other party would have the opportunity of being heard in opposition.

Having made that unsuccessful application for ex parte relief, Mr Rosenblatt, the mother's counsel, joined Mrs MacGregor, the father's counsel, at the appointment before District Judge Moorehouse at 3.30. Mr Rosenblatt informed the district judge, and his opponent, of the fact that he had made an unsuccessful application for interim ex parte relief under the Child Abduction and Custody Act 1985. There is some dispute, which fortunately I do not find it necessary to resolve, between the recollections of counsel as to whether or not he went further and stated that it was his client's intention to go ahead and launch proceedings under the Child Abduction and Custody Act 1985.

It seems that a sufficient degree of accord was reached between the parties' representatives

at the hearing before District Judge Moorehouse for an order to be made by her by consent. First of all, she directed that the father's family proceedings application and the mother's family proceedings application both be transferred to the High Court. Time was abridged for the filing of evidence. A court welfare officer's report was ordered as to residence and removal of the children from the jurisdiction and the ex parte prohibited steps order against the removal of the children from the jurisdiction was continued until the hearing of the application. The date fixed for the hearing of the applications, that is to say the father's family proceedings application and the mother's family proceedings application, was 17 November 1992.

That does not, however, exhaust a description of all that happened procedurally on that day, for on the same day, 30 July 1992, the mother took out an originating summons under the Child Abduction and Custody Act 1985. It seems to have been a hurriedly, and certainly a clumsily, drawn document because it misdescribes the status of the parties as plaintiff and defendant respectively, but in other respects it accorded with the normal form of originating summons invoking the jurisdiction under the 1985 Act, and it sought an order under the Convention for the peremptory return of the children to resume their alleged habitual residence with the mother in Germany, contending that they had been unlawfully retained here by the father.

That summons was duly served and listed for hearing before myself. It is the summons which is now the subject of Mrs MacGregor's application on the father's behalf for the stay or dismissal to which I have already referred.

Mrs MacGregor, in claiming on the father's behalf a stay or dismissal of the Hague Convention proceedings, relies principally upon general principles of consistency and fair play. By submitting to the matrimonial and family proceedings jurisdiction in the way that she has, the mother -- so Mrs MacGregor submits -- has accepted the jurisdiction of the English court as the appropriate forum to decide the future both of her marriage and of her children. It would be wrong in principle and unjust to the father, so it is urged, to allow the mother at one and the same time to invoke the jurisdiction of the English court both for the purpose of obtaining an order for the children's peremptory return under the Convention, and for the purpose of having the issues as to their future residence and relationship with their parents settled in the family proceedings in which she and her husband are applicant and cross-applicant.

This argument, though persuasively urged, is in my judgment fallacious because it overlooks the clear distinction between the respective functions of the two jurisdictions. In family proceedings the court is concerned to settle permanently, so far as permanence is ever possible in proceedings of that kind, the role of the divided parents in the future upbringing of their children, and specifically to decide with which parent they are to reside and what degree of contact is to be afforded to the other parent.

In Child Abduction and Custody Act 1985 proceedings, by contrast, the court is concerned, in the interests of sparing children the misery of being moved from one centre to another by parents hoping to secure a tactical litigious advantage, to restore the status quo of the children's habitual residence. An order under the Convention for the children's return to the jurisdiction of the requesting State does not, however, in the least affect the authority of the court of the requested State to deal with any issues of residence or contact of which they may happen already to be seized or which may be subsequently raised there by either parent. An order under the Convention for the children's return to the jurisdiction of their habitual residence may certainly, and often does, give rise to issues of forum conveniens as between the courts of one jurisdiction or the other. Whenever that happens, a choice has to be made

between the competing claims of the two jurisdictions. The basis for that selection is now well settled by the principle propounded in the House of Lords in a series of authorities of which De Dampierre v De Dampierre [1988] AC 92, [1987] 2 FLR 300 is a recent example.

In making a selection between one forum or the other as the court which is to decide the children's future, the fact that the children happen to be physically located in one of the competing jurisdictions is bound, of course, to be relevant and cannot be overlooked. It is very far, however, from being conclusive. That can be illustrated from the circumstances of the present case. If the Child Abduction and Custody Act 1985 proceedings are allowed to stand and the mother is successful in obtaining an order for the children's return to Germany, that will not in the least prejudice or obstruct the future progress of the matrimonial proceedings in this country, or the father's and mother's family proceedings applications already on foot here. Administrative matters like court welfare officers' reports can be arranged, as they frequently are these days, by interviews conducted through international co-operation in either Germany or England or both. Either parent would in that event (that is to say the success of the mother's child abduction application) be entirely free to continue, or to start afresh, family proceedings in either country. If the result was to bring into play parallel sets of proceedings threatening a conflict of jurisdiction, then the consequent issue of forum conveniens would have to be resolved in one jurisdiction or the other by the means I have already mentioned.

There is therefore nothing inconsistent, in my view, about the mother's decision at one and the same time to take an active part in family proceedings in this country, and to maintain the application under the Child Abduction and Custody Act 1985. The father's application to stay or dismiss those proceedings is therefore, in my view, misconceived and it will be dismissed.

I should add one comment, in deference to the argument addressed to me by Mrs MacGregor. The principles of equitable estoppel are often acclaimed as a high example of the flexibility of English law. They are just as often deployed as a weapon of last resort by a despairing advocate. I hope I do not do an injustice to Mrs MacGregor's reliance upon estoppel in the present case by saying no more than that in my view her argument falls firmly into the latter category.

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