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[07/02/1994; Court of Appeal (England); Appellate Court]
Re K. (Abduction: Consent: Forum Conveniens) [1995] 2 FLR 211

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

7 February 1994

Neill, Hoffmann, Waite LJJ

In the Matter of K.

James Turner for the father

Michael Hosford-Tanner for the mother

WAITE LJ: J is a 5-year-old American boy whose parents are divorced. On 15 December 1993 Johnson J heard two applications by the father for the boy's early return from this country (where he at present lives with his mother) to the family's home State of Texas. The first was made under the Child Abduction and Custody Act 1985, on the ground that the Hague Convention requirements for a mandatory return order were satisfied. The second appealed, in the alternative, to the court's discretionary jurisdiction: the father claimed that the dispute which has developed between the parents as to his future upbringing is one which ought, in the interests both of the child himself and of international comity, to be determined in any event (whether or not the Convention applies to its particular circumstances) in the courts of Texas. The judge rejected both applications, and gave directions for the family proceedings which the mother had already started in England to continue. The father now appeals against that refusal.

The family history begins with the marriage of the mother and father on 31 October 1987 in Texas, where the father practises in Houston as an orthopaedic surgeon. J was born on 21 July 1988. He lived with both parents in the family home in Houston, until the marriage came to grief and the parents separated in January 1991. The mother remained in the area, however, and the father continued to see a good deal of J. By March 1991 the mother had become anxious for an early divorce because she wished to remarry; her intended husband being a Mr C. The father agreed, but insisted that the divorce formalities should include approval by the court of future arrangements for the care of J, to be specified in detail in a formal order. Those arrangements would need to be approved not only by the parents but also by the court, for the governing Texas statute authorises a court to make only such custodial orders as are 'for the best interest' of a child, in very much the same way as such orders are governed in England by s 1(1) of the Children Act 1989.

The order (referred to hereafter as 'the Texas court order') was duly approved by the parents and by the court, and came into being on 3 April 1991. It was a substantial document, running to 11 pages. Although entitled a decree of divorce, only the opening paragraphs here concerned with the dissolution of the marriage. The bulk of it was devoted to the arrangements for J. The mother and father were appointed joint conservators of the child, who was to have his primary residence with the mother. Such residence was to be in the county of Harris, Texas unless altered by order of the court. The father was given staying contact for three weekends per month. A very detailed rota was laid down for the sharing of school holidays and the alternating of festivals (with the exception of Jewish festivals which were to be spent with the father, who is of the Jewish faith). The paternal grandparents were to be allowed 2 weeks' staying contact every year on notice to the mother. Provision was made for payment of maintenance (including health insurance) for J by the father. There was general leave for the mother to take the child beyond the territorial limits of the USA for vacation purposes with the written authorisation of the father. Both parties were ordered to notify the court within 10 days of any change of address.

The mother married Mr C, 2 days after the date of the Texas court order. The father looked after J while they were on their honeymoon, and continued to look after him for a while when the mother and Mr C went to England on 22 April 1991. He had by then agreed to give his permission for the mother to take J to England and did so in writing on 17 April 1991. On 22 May 1991 J was taken to join the mother in England by his Mexican nanny. The judge found that the father's consent to this arrangement, although given reluctantly and in the hope that it would have only a temporary effect, was not at that stage qualified by any expressed condition or time-limit. He had agreed to J going to live with the mother in England - not because he particularly welcomed that, but because he felt he really had no choice: the child was very young, and the mother had married a European without ties to Texas.

It is not disputed that the removal of J from the USA for purposes other than vacation involved a breach of the Texas court order, in that the necessary leave of the court was never obtained (by either parent) for a removal of the child outside the USA for purposes other than a vacation. It would be understandable if neither parent appreciated that at the time, but the point has assumed a significance for legal argument which will be mentioned later.

The mother's new marriage was extremely short-lived. She and Mr C had been married for only 3 months when they separated in July 1991. During that same summer she met and became attached to a Mr K, who is English and has a property consultancy in this country. In October 1991 the mother returned J to live with the father in Houston and the child remained with him (apart from one week with his mother in England at the New Year) until May 1992.

By the early months of 1992 the mother had become pregnant by Mr K and wished for a divorce from Mr C so that she would be free to marry him. She could have obtained that in England, but preferred to divorce him in Texas. She accordingly applied to the divorce jurisdiction in Houston where she obtained a decree dissolving her marriage to Mr C on 30 April 1992. The decree was granted (as its recital shows) on her assertion that she was domiciled at the time in Texas and had been resident there for the required period of 90 days.

In May 1992 the father returned J to the mother in England. The judge found that in July 1992 the mother (who in that month had, married Mr K) told the father that she would never agree to J going to live again with the father in Texas. She repeated that insistence when the father, visiting England 2 months later to approve J's entry to Hill House

preparatory school in London, tried to get her to agree that it should be his school for one term only.

In September 1992 the mother resorted once more to the Texas court. This time she filed a motion to modify the Texas court order by increasing the maintenance payable for J and varying the orders for care and control and contact. The motion was not served on the father until November 1992. No further steps were taken on it, and 4 months later it was voluntarily non-suited.

The mother's new child by Mr K was born on 3 December 1992. J was returned to the father for a month's holiday over Christmas and New Year 1992/3. In mid-January 1993 he came back to London for what the father intended (and understood) would be his last term at Hill House. He was not, however, returned by the mother when that school's term ended in May 1993. The father protested, and the judge made a finding that the mother did eventually promise to return J on a date which was fixed as 17 July 1993.

The father went to Houston Airport that day to meet him, but the child was not on the flight. On 29 September 1993 the father applied to the Texas court for a modification of the Texas court order so as (in effect) to give him interim sole care and control of J. The grounds of that application alleged breach by the mother of the terms of the order both in refusing him contact and in leaving the jurisdiction without the court's leave. The mother's Houston lawyer filed a cross-motion objecting to the jurisdiction on the ground that she was now domiciled in England and that Texas was no longer J's home State. That objection was dismissed, and the mother's lawyer filed a general answer traversing the father's motion. A hearing date was fixed for 22 November 1993. Negotiations took place in Houston between the parents' lawyers, but no agreement was reached.

Meanwhile in England the mother began family proceedings against the father in which an interim residence order was made by a district judge on 19 November 1993.

The Houston court had made an order that the mother should attend the hearing of 22 November 1993 with J. She did not do so, but was represented by her attorney Mrs Allen. The Houston judge made an order appointing the father temporary sole conservator of the child and directed the mother to return J to the father at his address in Houston within 10 days from 22 November 1993.

She failed to do so, and at the expiry of that period the father, on 2 December 1993, issued the originating summons in the Hague Convention proceedings which represented the first of the applications before Johnson J on 15 December 1993. The second application was less formally constituted. There was no summons, but the hearing proceeded by agreement as though there had been before the court a formal request by the father first for a stay of the English family proceedings under s 5 of the Family Law Act 1986 on the ground that there were (in the language of s 5(2)) proceedings continuing in Texas with respect to the same matters as were in issue in the English proceedings and that it would be more appropriate for those matters to be determined in Texas than in England, and secondly for an order for J's early return to Texas.

Both applications were heard together, and both parents attended the hearing, gave oral evidence, and were cross-examined on that and on their written statements. The judge was not able to regard either of them as a wholly satisfactory witness. In some respects he partly accepted and partly rejected the evidence of each, and in others he preferred to base his findings on the probabilities of the case, rather than rely on the evidence of either parent.

I shall follow the judge in dealing with each of the applications in turn.

The Hague Convention summons

The judge had (as already described) found that J was brought to England in the first place with his father's consent (without express limit as to time) in May 1991. He found also that any consent on his part was spent by the end of May 1993, when he expected J to be returned at the close of the Hill House term. On those findings the judge held that it was impossible to regard this as a Convention case. The father did not contend that J had been removed from the Texan jurisdiction in breach of his own custodial rights as joint conservator: no breach of those rights was alleged to have occurred until the date when the child had become retained in England after May 1993. When the mother first came to this country in May 1991, she did so with the settled intention of staying here, with the result that she, and consequently J, became habitually resident in this country. Accordingly by the date of retention asserted by the father to be wrongful (May 1993) Texas had long since ceased to be J's State of habitual residence; and therefore, so the judge held, no breach of relevant custody rights for the purpose of Art 3 was involved.

In his able argument for the father, Mr Turner relied first on the principle that no child of married (or formerly married) parents can lose his habitual residence on the initiative of one parent alone - see Re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562, sub nom C v S (A Minor) (Abduction) [1990] 2 FLR 442 per Lord Donaldson MR at pp 572 and 449 respectively. He accepted that the father had indeed consented initially to J being brought to England in May 1991, but submitted that the judge was wrong to have held that there was any element of permanence in that consent. The judge ought, he submitted, to have held on the evidence that the father never consented to J being brought to England for anything longer than a temporary visit and was consenting to more than a 'temporary shift of base'. The judge was wrong, he said, to have rejected the father's evidence on this point and misappreciated the factors relevant to an assessment of the probabilities of the case.

I am unable, for my part, to accept that submission. The judge was entitled on this aspect to prefer the evidence of the mother to that of the father, and I cannot find any fault in the judge's appraisal of the probabilities. Habitual residence is, moreover, an ephemeral concept. In Re J (A Minor) (Abduction: Custody Rights) (above) Lord Brandon described it (at pp 578 and 454 respectively) as being capable of loss in a single day. It by no means necessarily follows, therefore, that even if the Judge had found that the father consented to no more than a 'temporary shift of base' the court would necessarily have been precluded from holding that a consent of that kind (transient though it may have been) was sufficient in the circumstances to constitute consent by the father to a loss by J of his habitual residence in Texas.

Mr Turner relied secondly on the fact that the custodial rights whose breach in the country of habitual residence provides the justification for a mandatory duty of return in the receiving country are not restricted to the rights of parents. Where custodial rights are vested in a court of law, breach of those rights may also provide the mainspring for a mandatory return order because Art 5 includes in the definition of rights of custody 'the right to determine the child's place of residence', and Art 3 includes, in the definition of a wrongful breach or removal, one which is in breach of rights of custody attributed to 'a person, an institution or any other body' -- see Re R (Wardship: Child Abduction) (No 2) [1993] 1 FLR 249 and B v B (Abduction: Custody Rights) [1993] Fam 32, sub nom B v B (Abduction) [1993] 1 FLR 238.

A question of law of some interest and importance underlies that submission. It is this. Can a parent who has been unable to establish a relevant breach of his or her own custodial rights in the country of origin (or has lost their own right to rely on such breach through lapse of

time or consent or acquiescence or for any other reason) be allowed to mount an independent claim for a mandatory return order under Art 12 based solely on breach of the custodial rights attributed to a court of law in the country of origin? That seems to me to be a potentially difficult question, which may one day require full and careful examination in a case where it arises for direct consideration. It does not, however, arise, in my judgment, in the present case, for this reason. Assume, in the father's favour that, although disabled himself (by the judge's findings of fact on habitual residence) from relying on any breach of his own custodial rights, he is nevertheless entitled in law to rely on any breach which may have occurred of custodial rights attributed to the court in Texas under the laws of that State and under the terms of the Texas court order. There was indeed, a breach of that order, but it occurred in May 1991, when the mother (albeit with the father's consent) removed J without the leave of the Texas court from the County of Harris, State of Texas and territory of the USA, on what amounted (according to the judge's finding) to a permanent visit to England unconnected with any vacational purpose. By the time the father's summons under the Convention had come to be issued in England on 2 December 1993, the 12-month period allowed by Art 12 had long since expired. It does not therefore seem to me that the father - even assuming his claim is sound in law - would on the facts of this case have any right to require a mandatory return order under the Convention based solely on a breach of the custodial rights of the Texas court. It was, in short, too late on any view for him to rely on a breach of the Texan court's rights of custody. For these reasons I would hold that the judge was right to decide that the father had not established any entitlement to a mandatory return order under the Hague Convention, and the appeal does not in that respect succeed.

The discretionary application

An encouraging feature of this case is that the parents have been able to agree, despite their differences, that J's future upbringing is something to be shared between them. Whatever the outcome of the hearing, and in whichever forum it is decided, the result will be an order designed to ensure that the parent with whom he does not principally reside is granted the most generous possible contact with him. The means and the goodwill both exist to make that possible. The real dispute is as to which parent should be his primary carer, both now and (in case it be thought that the balance of parental responsibility should be shifted when he is older) at any future stage of his development.

The machinery by which effect will be given to the decision of that question, in whichever forum, is unlikely to involve any material distinction. The two systems of law are so similar in approach and in execution that the order which eventually emerges (whether from London or Houston) will lay down a regime for future residence, contact and maintenance that will be expressed (differences of legal terminology apart) and enforced identically in either jurisdiction.

In regard to procedure, both systems adopt the same child-centred and pragmatic approach to cases involving children. Both operate under the same sense of urgency and in a spirit of comity with each other. Each has available to it a court welfare service equipped to make inquiries not only within its own territory but also through their colleagues working in the other jurisdiction.

As to the logistics of the case, the judge was clearly right to hold that there was little of note to distinguish between one forum or the other. This is not a case where problems of travel (for the parties or their witnesses), finance or representation pose any significant threat to a fair hearing in either jurisdiction.

All these factors being equal, the claim that J's best interests would be served by having his future decided in Texas is clearly a strong one. He is a Texan child of Texan parents who, having at divorce negotiated an agreed regime for his future upbringing, entrusted the validity and future supervision of that regime to an order of the Texas court, whose authority the mother was herself prepared for a time to accept (by her own applications to it) as a continuing one.

The force of all that was fully appreciated by the judge, but he appears to have thought that the claims of the Texas jurisdiction, though compelling, could not be allowed to prevail because (even in an application not invoking the letter of the Convention itself) the court was bound, in an issue of forum conveniens between the jurisdictions of two signatory States, to give effect to the policy of the Convention as expressed in its preamble -- namely that decisions about children are best made by the States of their habitual residence. What the judge said was this:

'I have not found this an easy matter. In so very many respects this seems to me to be a Texan case. One only had to listen to the mother and the father giving evidence to realise that this boy is still a Texan boy. All three of them remain citizens of the USA. They are not nationals of the UK. The Texan court undoubtedly has jurisdiction. The Texan court would apply to the decisions that had to be made the same principles as would be applied here in England. In respect of the logistics of the matter there is little of consequence to note, although it is the fact that J is here and although, of course, he could readily be taken to be seen or interviewed by or for the court in Texas, the fact is that for at least the past 18 months he has been here in London and evidence about his care and circumstances here in London would be better given to the English court than to the court in Texas. But, over and above that is the fact that the court in Texas is already seized of the matter, and I need not repeat the detail. Indeed, it is not without interest that it is to the courts of Texas that the mother herself has had recourse when she thought it to her advantage to do so.

Mr Turner, rightly, emphasises the importance of comity between States and between judges. Judges of the UK and of the USA are accustomed now to working together, albeit without any direct communication, to achieve what they judge to be the best interests of the children under their jurisdiction. I must certainly seek to avoid creating a clash of orders in relation to this boy. That certainly could not be to his advantage. On the other hand, the policy of the Hague Convention, to which both the USA and the UK are parties, is to the effect that decisions about children are best made by the courts of the State of their habitual residence: see the preamble to the Hague Convention itself. The fact is that this boy has been here now for 18 months and it seems to me that the judge in Texas, if he or she had had the opportunity of hearing argument and evidence from both sides as I have heard these last 2 days, would have reached the same conclusion as me, namely, that from the point of view of the best interests of the boy rather than any question of justice between the parents the right order for me to make is to direct that further proceedings about J should go forward here in England. I emphasise, if that be necessary, that I seek not to circumvent the order or undermine the authority of my brother judge in Texas. I have reached the conclusion that, were he or I to discuss the matter, we would both agree that the order I make is the correct one for J.'

It seems to me that the judge was there treating the claims of the Texan jurisdiction, which he would otherwise have regarded as predominant in the child's interests and those of international comity, as being displaced by the need to follow the spirit of the Convention in the emphasis placed on habitual residence. In so doing he fell, in my judgment, into error. Certainly the court, when exercising a discretion in a child abduction case outside the confines of the Convention, is entitled to have regard to the habitual residence which the

child has by then established (or lost) as a relevant factor. In many cases it may even prove to be a decisive one. The judge in this case, however, gave the finding he had made of habitual residence a disproportionate emphasis, treating it as though it virtually bound him to reject the Texas jurisdiction, however powerful claims of that jurisdiction might be. Indeed Mr Horsford-Tanner, counsel for the mother, went so far as to contend that the judge was bound in law to follow his finding that J had acquired habitual residence in England to the point of treating that as conclusive in favour of the English jurisdiction. He cited no authority for that submission, and for the reasons already given I would reject it.

As for the length of J's most recent stay in England (18 months at the date of the hearing), the judge was of course entitled to take that into account. But he was bound, also, to take into account the fact that this is a child who, though his memories of it will inevitably have failed a little through lapse of time, is no stranger to Texas or to his father's care in that country. In the case of a child who is accustomed to travelling between Texas and England, and to changes of parental care, there was no justification for giving the emphasis which the judge did, purely on the strength of the lapse of time since the last transatlantic trip, to the risk of disruption to J if he were to be required to return to Texas as a preliminary to a hearing in that country to determine the future arrangements for his upbringing.

That leaves this court free to exercise its own discretion. For the reasons already stated, I would regard the claims of the Texas jurisdiction to serve J's welfare by having his future decided in the courts of that State as overwhelming. I think it highly likely that the judge, had he felt free to do so, would have reached the same conclusion. It is of course a pity that the strenuous efforts made by the listing authorities, with encouragement from the judge, to arrange an expedited hearing for next Wednesday in England will have proved unnecessary, but I do not regard this as a case of such urgency that mere considerations of timing should be allowed to displace the choice of forum which would best accord with the child's welfare. I would allow the appeal from the refusal of a discretionary order, and the order I would propose to substitute for that of the court below would be the following.

There will be a stay of the English proceedings save for the purpose of determining (in default of agreement) the arrangements for the early return of J to Texas. The formula of an 'early return' would be intended both to allow the child a little time to adjust to a return and also to afford the adults an opportunity of working out how it can be organised in a way that will leave him feeling as peaceful and happy as possible about it. It would have to be understood, however, that the formula is intended, also, to indicate that there must be no undue delay. The time span contemplated is one of days rather than weeks. If the parties were able, with the assistance of their legal advisers, to agree those arrangements today or tomorrow, they could be handed in and incorporated in the formal order made by this court. If agreement proves impossible, then the proposed hearing date before Johnson J fixed for next Wednesday will have to be retained, in order that he may give the directions necessary to ensure J's early return to Texas.

It would obviously be desirable for the mother to feel herself free to accompany J to Texas, or at least follow him soon afterwards, to help his readjustment to Texas life during the pendency of any hearing in that State. She is at present in contempt of the return order made by the Texas court, and it would be very unfortunate if she felt unable to return to Texas for fear of possible consequences to her liberty. An indication has already been given to this court by Mr Turner that he hoped, after an opportunity for further instructions, to be able to tender suitable undertakings to allay those fears. It would be helpful to learn that he is now in a position to do so.

For those reasons I would allow the appeal.

HOFFMANN LJ: I agree.

NEILL LJ: I also agree.

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