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[13/03/1996; High Court (England); First Instance]
Re S. (Abduction: Children: Separate Representation) [1997] 1 FLR 486

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

13 March 1996

Wall J

In the Matter of S.

M Hosford-Tanner for the High Court of New Zealand

H Setright for the mother

K Cox for the children

WALL J: This is a directions appointment in proceedings under the Hague Convention in which a point of some difficulty arises. The substantive summons is listed for final hearing on 2 April 1996 with an estimate of one day. The parties have been able, without difficulty, to agree appropriate directions designed to ensure that the case is heard on that day.

The issue which arises in the case is that the children concerned apply through counsel to be joined to the proceedings as parties and to have separate representation in the substantive hearing. This is a highly unusual application and it is resisted on behalf of the plaintiff to the proceedings. I therefore need to look at the case with some care.

The two children in question are S, born on 5 April 1982 and so very nearly 14; and her sister M, born on 13 April 1984 and therefore nearly 12. The underlying factual substratum of this case is highly unusual and on any view makes very depressing reading. There is a long history of parental strife and litigation. For present purposes I take the facts from the affidavit of Mr Paul Merrick who is a registered clinical psychologist and for this purpose the agent of the plaintiff which is the High Court of New Zealand.

Mr Merrick's affidavit summarises the history in this way. The parties, that is the mother and the father, were married in England in 1981 and moved almost immediately to New Zealand. The mother is British and the father a New Zealand citizen. Both children were born in New Zealand. There is, as Mr Merrick reports, a long history of proceedings relating to the two children following the breakdown of their parents' marriage in 1985. In late 1986, however, when court proceedings were pending in the Christchurch Family Court, the mother abducted the children to the UK.

At that time the Hague Convention did not apply between England and New Zealand but in any event, pursuant to conventional principles, the children were returned to New Zealand by Swinton Thomas J, as he then was, on 20 June 1986.

There were then further proceedings in New Zealand in 1987 and 1988. There were allegations made against the father by the children. There was a judgment in July 1988 dealing with those allegations. There followed a period of relative calm, although there is a dispute as to the regularity and quality of contact. However, reports Mr Merrick, in February 1993 the father believed that another abduction was about to take place and on 23 February 1993 an order was granted preventing removal of the children, that order still being in force. He reports that at some point in 1993 there was a complete breakdown in contact between the father and the children and there has been no contact since September 1993 apart from one occasion in 1994 when it is said that the father spoke to S for a few minutes outside school. Mr Merrick advances the reason for that breakdown as the children's implacable hostility towards their father which he attributes to the mother's influence and the mother in particular telling the children that he, the father, was preventing them moving out of the New Zealand jurisdiction.

In January 1994 there were further proceedings in New Zealand. In those proceedings on 15 February 1994 the judge granted custody of the children to the mother with interim access to the father after completion of family therapy. The mother had at that stage applied to remove the children from the jurisdiction to Holland but she was given leave to withdraw that application and the judge directed that no further applications in respect of the children were to be made without leave.

The father appealed the order giving the mother custody of the children but the appeal did not come on until 9 October 1995 when it was heard in tandem with the mother's application of 14 July 1995 to remove the children permanently to England. There was a 5-day hearing at the end of which the judge -- and his judgment is exhibited -- refused the application by the mother to remove the children although he directed that the children should remain in her day-to-day care and control. They were made wards of the court. Mr Merrick, and the father's new wife, were appointed agents of the court to administer the wardship and the court directed that the children should live in Auckland. Apparently at that hearing the mother had told the judge that she had already sold her house and booked plane tickets to England in anticipation of leave being granted. In accordance with her plans she left for England, taking with her the two children of her relationship with her new husband, but M and S remained in New Zealand in the care of foster-parents.

There was a further conference between counsel for all parties and the judge held on 25 January 1996. The mother flew back for that conference. She made it clear that her new husband was adamant he would not return to New Zealand. The court, according to Mr Merrick, declined to reconsider its decision as to where the children were to live. The judge noted that the placement of the children with foster-parents had been a signal success and stated that it may well be in their interests for that to be resumed. The court made directions as to the children's schooling and it is made clear in the conference note to which my attention has been drawn that the mother was free at any time to make a further application to the court for leave to remove the children.

What she appears to have done is to have removed the children clandestinely via Hong Kong. It appears on the evidence of Mr Merrick that she used a passport in her maiden name and passports in false names for the children. The children are now in England. It is a notable feature of the case that they themselves have applied to a local court for leave to

apply for residence and prohibited steps orders although that application is stayed pending the outcome of the application under the Hague Convention.

The immediately unusual feature of the case which stands out is that whereas in most child abduction cases (a) it is a parent who abducts from a country in which there is an active issue between that parent and the parent who remains behind, and (b) the purpose of the Convention is usually to ensure that the issue between the parents is litigated promptly in the country of the children's habitual residence, it is clear here that if the Convention is applied by the court, the children will return not to the care of their father but effectively to the care of the High Court of which they are wards in New Zealand; that they will live either with their previous foster-parents or alternative foster-parents and the court will pursue its plan perceived by the High Court of New Zealand to be in their interests of attempting to rebuild the relationship which the children had with their father. It is clear from the evidence, however, that there is no immediate prospect of face-to-face contact between the children and their father, although that is a goal to which the court in New Zealand is working. That, therefore, is the background to the case. The facts are in my judgment highly unusual.

In support of the children's application for leave to be joined as parties, there is before the court an affidavit of Mr Derek William Parsons, a solicitor who has been instructed by them to make this application. To that affidavit is exhibited, amongst other documents, a report from Dr Caplan who is a consultant child and adolescent psychiatrist. Mr Parsons' evidence makes it quite clear that in his view the children have sufficient intelligence and maturity to be in a position to instruct him. He recounts in his affidavit detailed instructions which the children have given to him and has formed the clear view on the instructions which he has received that the children's feelings run very deeply indeed. He concludes his affidavit in these terms:

'The children's views run very deep. They cannot contemplate going back to live in New Zealand leaving their brother and sister behind. They do not want to live in care nor do they want to see their father let alone live with him, and in the circumstances of their case would ask this honourable court to join them as defendants to the proceedings.'

The affidavit from Dr Caplan once again makes stark reading and leaves no doubt both as to the children's feelings and as to Dr Caplan's assessment of their current psychiatric state. There is also in evidence an affidavit from the general practitioner who had the care of the children in New Zealand who expresses similar concerns to those put forward by Dr Caplan.

How then should I approach the application for separate representation by the children? The starting-point must of course be Art 13 itself which reads in its relevant portion:

'The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.'

There is in this country a developing jurisprudence on this aspect of Art 13. It is in my view encapsulated in the decision of the Court of Appeal in the case of Re S (A Minor) (Abduction: Custody Rights) [1993] Fam 242, sub nom S v S (Child Abduction) (Child's Views) [1992] 2 FLR 492. That case is authority for a number of propositions. It makes clear -- and this is relevant for the current proceedings - that the part of Art 13 which I have just read is completely separate from Art 13(b) and therefore can exist effectively as a head of its own. However, a finding that a child does not wish to be returned is not of course determinative of the exercise of the discretion under Art 13. In exercising the court's discretion it is clear that the policy of the Convention and its faithful implementation by the

courts of the countries which have adopted it should always be weighty factors to be brought into the scales, whereas the weight to be attached to the objections of a child clearly vary with age and maturity. The older the child the greater the weight, the younger the less weight.

Although Re S gives guidance as to the manner in which the discretion under Art 13 falls to be exercised, it does not of course address the issue which I have to resolve, namely the circumstances in which it may be appropriate for a child to be separately represented. Indeed, in Re S the court specifically declined to lay down guidelines for the procedure to be adopted in ascertaining the child's views.

Giving the judgment of the court Balcombe LJ said: 'We do not think it is desirable that we should do so. These cases under the Hague Convention come before the very experienced judges of the Family Division, and they can be relied on, in those cases where it may be necessary to ascertain these facts, to devise an appropriate procedure, always bearing in mind that the Convention is primarily designed to secure a speedy return of the child to the country from which it has been abducted.

. . . It will usually be necessary for the judge to find out why the child objects to being returned. If the only reason is because it wants to remain with the abducting parent, who is also asserting that he or she is unwilling to return, then this will be a highly relevant factor when the judge comes to consider the exercise of discretion.

. . . Article 13 does not seek to lay down any age below which a child is to be considered as not having attained sufficient maturity for its views to be taken into account. Nor should we.'

It is perhaps of relevance, however, that in the case of Re S the child in question was 9 and had views which effectively disposed of the application and which invoked the exercise of the discretion not to return. It is also clear from Re S and from all the authorities that the circumstances in which the court will refuse to order the return of a child under Art 13 have themselves to be exceptional and it must necessarily follow that the circumstances in which a child requires separate representation for his or her objections to be heard must also themselves be exceptional.

This proposition is clearly established by the two cases which touch on the question of separate representation: Re M (A Minor) (Child Abduction) [1994] 1 FLR 390 and Re M (A Minor) (Abduction: Child's Objection) [1994] 2 FLR 126.

The former case lays down what has become the conventional practice for ascertaining the degree of maturity of the child and the strength of the child's objection, namely the involvement of the court welfare officer. In that case the children in question were 11 1/2 and nearly 10. On its face it was a not untypical Hague Convention case. The unusual feature was the strength and nature of the children's objection.

The Court of Appeal dismissed an appeal by the children against the refusal of the deputy High Court judge to join them as parties and in doing so Butler-Sloss LJ said this:

'This part of Art 13 [I interpolate that is the part which I have previously read] puts the court on inquiry if the child's views are brought to its attention. There is nothing in Art 13 or the Child Abduction and Custody Act 1985 (which enacts the Convention), which provides for automatic inquiry into the views of older children or a specified procedure either to make them parties or for a court welfare officer or other person to ascertain their views. We are indebted to the Official Solicitor for providing a decision of the Family Court of Australia sitting in Brisbane on 27 June 1988. In Turner v Turner, Lambert J made the

children parties. That appears to be the only reported decision known to our central authority and may be an indication that it would be exceptional within the Contracting States to have the children separately represented. Rule 6.5 of the Family Proceedings Rules 1991, which sets out the defendants to be served with a Convention application, does not include the child itself. However, the rules do not preclude the court from making a child a party on the rare occasion it might be necessary. We are urged to find that this is such an occasion.

The provision in Art 13 requires a court to find that the child objects to being returned. It is clear that S objects. C's position is less clear but on the facts before us he is likely to remain with his brother in either household. These children are of an age that the court is put on inquiry as to whether they are, or either is, of a sufficient degree of maturity for their views to be taken into account. How is that to be achieved? In this case the obvious person to assist the court in an assessment of the degree of maturity of each child is the court welfare officer. He is also able to provide the court with the views of the child he has interviewed. There is an advantage in the involvement of the court welfare officer over separate representation of the children in such cases since he can perform the dual role of assessment and conveying the children's views to the court. There might exceptionally be cases where either the court welfare officer was unable adequately to represent the views of the child concerned (see L v L (Minors) (Separate Representation) [1994] 1 FLR 156) or expert medical opinion was needed (which would be wholly exceptional). I do not consider the facts of this case require the children to be separately represented. We dismiss the appeal on behalf of the children.'

Slightly later in her judgment Butler-Sloss LJ says this:

'The court has however to be vigilant to ascertain and assess the reasons for the child not wishing to return to the parent living in the State of habitual residence. If the only objection is his preference to be with the abducting parent who is unwilling to return, this will be a highly relevant factor in the exercise of discretion. Otherwise an abducting parent would be likely to encourage the older child to remain and frustrate the purpose of the Act. The court has to assess the ability of the child to understand the situation and whether he has valid reasons for not returning.'

She then deals with a number of cases in which the objections of the child have been upheld.

It is also, I think, necessary for me to point out that in the same case Sir Thomas Bingham MR said this in relation to separate representation:

'The Convention is intended to provide a simple and summary procedure for a returning to their country of habitual residence children who have been wrongfully removed from it. The courts would not be true to the letter or spirit of the Convention if they allowed applications to become bogged down in protracted hearings and investigations. While I accept that there is jurisdiction to permit the children to be joined as parties it would very rarely be right to exercise it, and compelling grounds would be needed. It is for the judge in the country of habitual residence to decide what is best for the child in the medium and longer term. Ordinarily, therefore, appeals such as that of the mother in this case must be doomed to speedy failure.'

In the second case, also called Re M the child was 13. He was effectively without representation since his father, who had brought him to England, had immediately placed him with the police protection team and was not caring for him. An order was made initially for the boy's return to Ireland under the Convention but he ran away and it could not be implemented. The boy then instructed his own solicitors and was joined by the judge as a party to the proceedings. The judge gave him leave to appeal against the decision under the

Convention and in turn his mother, who was seeking his return to Ireland, sought leave to appeal against the order making him a party to the proceedings.

The relevant portion of the headnote reads:

'(1) Although a child should only be made a party to a Convention application in exceptional cases, the present case, where the dispute was between mother and child not mother and father, and where the only effective way for the boy's objections to return to Ireland to be considered by the court was by his own legal representation, was such a case. The mother therefore would be refused leave to appeal from the order [of the judge].'

At [1994] 2 FLR 126, 130H the point is amplified by Butler-Sloss LJ in her judgment. She says this:

'We considered first the application of the mother for leave to appeal, since if successful it would remove the main argument under Art 13, the objections of the child, from the consideration of this court. Mr Reilly, for the mother, argued that it was exceptional to make a child a party in a Hague Convention application and prayed in aid a decision of this court in Re M (A Minor) (Child Abduction) [1994] 1 FLR 390. He argued that the views of the child were adequately expressed by the court welfare officer from the Royal Courts of Justice and sufficiently taken into account by the judge. If this case had remained at the stage of 5 November 1993 I would have agreed with counsel, although we were provided neither with a transcript of the court welfare officer's oral evidence to the judge on 5 November 1993, nor a written report. But we are now considering a situation which has moved on.'

Slightly later she says this:

'In this case, the father, who might be expected to express the opposite point of view to the mother, is not represented and the dispute is between the boy and his mother and not between mother and father, whatever may be the underlying causes.

N is 13 years old. He appears to have been seriously in dispute with his mother over 2 years in most unusual circumstances. The judge found that he objected to being returned and that he was of sufficient maturity for his views to be listened to. Those views must be communicated in some form before the court which is charged with considering Art 13 and the objections of the child. Cazelet J already made the decision to return him and, as we said in Re M (A Minor) (Child Abduction), it is for this court to consider the matter by way of appeal rather than that the trial judge should rehear it. Consequently the additional evidence and the further grounds under Art 13 can only be heard, initially at least, by this court. In this case, unlike Re M (above), the only effective way for the validity of his objections to return to Eire to be considered by this court is by his own legal representation. We understand from [counsel] that there is an American decision -- Renovales v Rosa (27 September 1991) -- before Caplan J in the Superior Court of Connecticut, where the child was separately represented, in addition to the Australian decision [of Turner v Turner] cited in Re M (above). It is, and ought to be, rare for a child to be separately represented in an Art 13 dispute in a Hague Convention application but this is such a rare case . . .'

From the authorities I have cited I seek to derive a series of propositions. First, where a child's objection to being returned falls to be considered the court must initially decide whether or not the child is prima facie of an age and degree of maturity at which it is appropriate to take account of his or her views. Where the court is, as Butler-Sloss LJ puts it, put on inquiry that the child is of such an age and the appropriate degree of maturity, the usual method of ascertaining his or her degree of maturity and the strength of the objection

is by means of an interview with the court welfare officer. It follows therefore that for a child to require separate representation there must be exceptional circumstances which on the facts make it inappropriate for the child's wishes and feelings to be represented either by one of the existing parties to the proceedings or by the court welfare officer. There must also in my view, although this is not apparent from the authorities, but by analogy with applications for leave under the Children Act, be an arguable case that the discretion under Art 13 will be exercised.

It is of course impossible to define 'exceptional circumstances' but they clearly include the situation in the second Re M in which there was in effect nobody to represent the child's wishes and feelings and the child's father was unable to do so.

Another similar case in my own experience was that of a French girl of 15 who was in the equivalent of care in France and who had run away to stay with her boyfriend in England. The plaintiff in those proceedings was the French juge des enfants. The defendant, as originally constituted in the case, was the young man in question. I did not feel in that case that he could or should represent the girl's views and I granted her separate representation.

In the instant case the affidavit of Mr Parsons and the report of Dr Caplan satisfy me not only that the children clearly object to being returned but that they are of an age and degree of maturity at which it is appropriate to take account of their views. Dr Caplan's report, in particular, satisfies me that it would not be appropriate in this case for the court welfare officer to be the agent for the ascertainment of the degree of maturity of either child or indeed their current states of mind. That evidence satisfies me that this is a case in which expert medical evidence is necessary to ascertain the children's states of mind.

In my view, therefore, the door is open to the exercise of the discretion under Art 13 but how that discretion will fall to be exercised, I, of course, have no idea. From a reading of the papers this is in my judgment an extremely difficult case and nothing in this judgment, which is plainly interlocutory, should be read as giving any indication of any kind as to how the case will ultimately be resolved.

Accordingly, for the children to have separate representation there must, as I have indicated, be elements in the facts which render it inappropriate for their views to be put forward either by the court welfare officer or their mother.

As I have already indicated, in my view the mental condition of the children is something in this case outwith the expertise of the court welfare officer. There must, however, be a perceived need for the children to have a voice independent of their mother.

Mr Hosford-Tanner for the plaintiff effectively says that whatever the difficulty and complexity of the case, the material evidence will be placed before the court. Dr Caplan's report will be available for the judge. Counsel for the children can effectively say nothing that cannot be said by the mother.

I therefore have to ask myself do the exceptional elements which I have identified exist? In my judgment, they do.

I accept the submissions of Miss Cox and Mr Setright that this is a highly unusual case on the facts. If the children are being returned to New Zealand, it is not for the purpose of their future to be decided by that court in litigation between their parents. There is, as the history I have read outlines, no question of them living with their father or even of them meeting him face to face in the immediate short term. The return will be for the purpose of the New

Zealand court continuing to put into effect the plan which it has devised by exercising its jurisdiction and its discretion in what it perceives to be in the best interests of each child.

In my judgment, therefore, the question of the children's future in this case is a matter on which children of these ages are entitled to have a specific and independent voice. In conventional English proceedings I have no doubt at all that these children would be separately represented. I suspect that if they made an application for leave to be represented by their own solicitor in English proceedings it would be granted. Indeed, they were separately represented in New Zealand.

Secondly, their mother, as I understand the chronology, is in flagrant contempt of the High Court of New Zealand. Furthermore, there is a finding that she has exercised undue influence over them. She has been found to have inculcated or at least fermented views in the children about their father. Miss Cox makes the point that the children feel that their independent voice in these proceedings is prejudiced by their mother's previous conduct and by the likely view that the court will take of their mother's behaviour. Her evidence on this point, the children fear, will be tainted and devalued and will therefore affect the strength of their objection.

I do not find this an altogether easy point. I am satisfied that no English judge would consciously reject a child's objection on the basis put forward. But the point which underpins it seems to me to have some foundation. In my judgment these children need to have the freedom in these proceedings to take independent advice and to put forward views which may in fact either be critical of or conflict with the views of their mother and her conduct towards them. In my view there is here a potential for conflict, certainly on the historical material between the mother and the children. There may also be issues in the proceedings, in the way that the matter is argued, where the children will need to be critical of their mother's conduct. In my view they would not have that freedom without separate representation.

There is also in my judgment considerable force in Miss Cox's point, given the history of this case and its highly unusual factual substratum, that there is likely to be a real sense of grievance felt by the children if the decision of the court is to return them to New Zealand without their independent voice being heard and without feeling that they have had the opportunity to put their case independently to that of their mother.

I am also influenced by the fact that the children may wish to advance not just their own objections under Art 13 but may wish also to put forward a case from their own perspective under Art 13(b). Once again, it is in my judgment important that they should be free to argue that case independently of their mother.

Finally, I am influenced by the fact that this is, in my judgment, a very difficult case indeed and one in which the court will have to balance powerful considerations, namely the implementation of the policy of the Convention against strongly held objections and the arguments of both the mother and the children under Art 13(b).

I am satisfied that it is an exceptional case and I am also satisfied from the evidence of Dr Caplan that the children's states of mind are, as I have already indicated, an issue which requires independent medical evidence.

On the procedural front there will be no delay caused by separate representation although there will be of course an increase in costs. That factor, in my judgment, is outweighed by the critical importance of this issue to the children and for the need for their fully independent voice to be heard in the proceedings.

There will therefore be an order that the children be separately represented in the proceedings to which they will be joined as parties by their guardian ad litem, Mr Parsons, who is a solicitor of the Supreme Court and who, I am satisfied, is an entirely appropriate person within the rules.

The directions will need to be amended to include the presentation of any further evidence by the children. Now that the children are parties I would certainly think it appropriate for all the relevant material to be shown to Dr Caplan and, if the children, are so advised, for Dr Caplan to file a further report. Whether or not Dr Caplan will be required to give oral evidence is a matter which I must leave to the parties who will obviously, since this is a Convention case, need to make application to the trial judge for leave to adduce oral evidence, if, for example, the plaintiff wishes cross-examination of Dr Caplan. I do not, however, think it necessary at this stage to give a separate direction to that effect.

The clerk of the rules ought perhaps to be warned that there is a danger of the case lasting slightly more than a day since there will be voluminous reading for the judge and there is the possibility of oral evidence. I am, however, clear that the date needs to be held. This litigation in relation to the children has been of very long standing and it is essential that the proceedings under the Convention are resolved with the speed with which they are normally dealt with in this jurisdiction.

The only direction I propose to add to those agreed between counsel is that there should be prepared by the plaintiff, at the very latest by the close of business on the Friday preceding 2 April 1996, an indexed and paginated bundle of documents which will include all the documents to be read by the judge and which should include the skeleton arguments which are provided for in the directions and any skeleton argument put forward on the children's behalf. In my judgment it is very important that the issues in this case should be clarified pre-trial. They cannot be entirely clarified at the moment pending further consideration by the children of the evidence they wish to put in. But the children must make it clear through their counsel what their case is. They must file a skeleton argument in accordance with the directions given in relation to the mother and an indexed and paginated bundle must be available for the trial judge. I have found it difficult to find my way through what is already a very substantial bundle in loose form.

Miss Cox, your application therefore succeeds.

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