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[03/10/1995; Court of Appeal (England); Appellate Court]
Re G. (A Minor), 3 October 1995

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

3 October 1995

Sir Thomas Bingham MR, Henry, Thorpe LJJ

In the Matter of G.

M Scott-Manderson for the Applicant

H Setright for the Respondent

SIR THOMAS BINGHAM MR: This is an appeal by a mother against an order of Hollis J made on 7 September 1995. The judge's order was made on an application by a father under the Hague Convention and the application related to a child, aged 8, named J. The effect of the judge's order was that the child should be returned to Florida.

The facts relating to the case are, to some extent, in dispute, but certain matters appear to be clear. The father is aged 46 and the mother just slightly older. Both are British citizens, having been born and brought up in this country. They married on 18 September 1971 and there are two children of the family, both daughters. The elder of the two, named Z., is now just 13 and the younger, J., is, as I have said, aged 8.

In September 1992 the family moved to the United States, it would seem as a result of the father's financial difficulties, he having been involved in the Lloyd's insurance market. A year later, in the summer of 1993, the mother returned to England with the children for the school holidays and the arrangement was that the father should join the family for the last three weeks with the intention that they should all return at the end of the summer holiday. In the event the mother indicated that she did not propose to return to the United States so that the father returned to the United States with the children, but without the mother, in August 1993. There followed a series of visits. The mother visited the United States in November 1993, in April 1994, again in December 1994 and in April 1995. The two children visited the mother in England in the summer of 1994, returning home to their father in the United States at the end of that visit.

There is some issue between the parties as to the purpose of the mother's visits to the United States. Plainly one of the purposes was to visit the children who indeed stayed with her for some periods in the United States. She says that unsuccessful attempts were made to achieve

a reconciliation between the two parents, but that is something with which the father does not agree.

In due course the father instituted divorce proceedings and on 9 February 1995 a Decree Absolute of divorce was pronounced in the Pinellas County Court in Florida. Under that order the mother and the father were to share parental responsibility for the two children, but the father was designated as the primary residential parent, that is the parent with whom the children should live, it further being ordered that the mother should be entitled to liberal visiting rights.

The mother has said that the order relating to the children was obtained by the father by deceit and she contends that it had been agreed that the order should provide for the children to live with her from the summer of 1995. That is a suggestion which the father challenges and we are in no position to make a decision as to which of them is right.

What does seem to be clear is that the mother was served with the divorce papers and the order and although she makes the contention that the order is inconsistent with the understanding which she and her former husband had reached, she has not appealed against the order or made any formal move to set it aside. But she did write a letter to the judge, which the judge declined to read as an ex parte communication from one party sent to him in the absence of the other.

In the early months of 1995 the father remarried, his second wife having children of very much the same age as those of the mother and the father. The question then arose about arrangements for the summer of this year, 1995, and a document was prepared which the mother signed and which we see at page 45 of the bundle. It is not, I think, necessary to recite the terms of that document, although it is quite plain that it made provision for the two children to come to the United Kingdom and stay with the mother for a visit, only for a period of time not exceeding two calendar months and to be completed by August 14 1995, at which time the minor children should be returned to the United States of America and to the custody of the father. The mother signed that document, although before doing so she added, I think in her own handwriting, an additional rider:

"Without prejudice to any proceedings that may take place concerning the children following this agreement either in a Florida court or an English Court of Law."

The father, in the event, did not sign that document because he was uncertain as to the effect of the words which the mother had added. But it seems reasonably clear that the children came to this country on holiday this summer on the basis of a clear understanding that they would return at the end of the holiday. Return tickets were booked and as a result of the schedule of flights it was arranged that they should return on 16 August and not the 14th, as provided in the agreement. When 16 August came the older child, Z., duly returned to the United States where she now is living with the father, but J. did not return.

The father complains that it was never the mother's intention that J. should return to the United States. He relies on evidence that when the children arrived back in this country the mother asked them whether they wanted to stay in this country with her or to return to the United States and live with their father and that the older child then opted for the United States, but the younger child made clear her preference to remain with the mother in this country.

The mother thereupon made arrangements for the child to become enrolled at an English school and bought a uniform. It would seem that at that stage the mother was treating the child's preference as if it were decisive and that, if true, is unfortunate since there was of

course a Court Order governing the matter and it was not in law the position that the child's preference was entitled to be treated as decisive.

The mother says in the evidence which she has filed that she did intend to return both children, that she put no obstacle whatever in the way of the return of the older child, but that the younger child, J., simply refused to go back and refused to travel on 16 August.

Following the failure of J. to return on 16 August the father applied, taking advantage of the Hague Convention, to the Lord Chancellor's Department Child Abduction Unit which, in turn, instructed solicitors who issued an Originating Summons very promptly on 22 August, seeking the return of J. to the United States pursuant to the Convention.

On 25 August Singer J made a temporary protective order and also ordered that a court welfare officer should interview J. and write a report. Both those things were done.

So it was that the matter came before Hollis J on 7 September. He had before him the report of the court welfare officer which concluded with an opinion by the court welfare officer that J. is a mature, articulate child of nearly 8. The court welfare officer expressed the view that:

"[J.] is very clear that she does not wish to be separated from her mother again; in fact [J.] is unable to countenance a separation from her mother at the present time, while appearing to cope with the separation from her father."

The learned judge also had before him affidavits on both sides. On the father's side he had an affidavit from Alison Hayes, the solicitor acting for the father, and also an affidavit from the father himself. On the mother's side there were three affidavits sworn by her, an affidavit sworn by her solicitor and two affidavits sworn by airport officials who had been present on 16 August when the abortive attempt had been made to return J. to the United States. Both those airport officials described the scene which then took place. Mr Andrew Clark described the child as "hysterical and tearful" and Miss Christine Bowden described the child as "crying uncontrollably and clinging". A clear picture was painted of a distressed child strongly resisting a return to the United States on the aeroplane, clinging to her mother and resisting any attempt to induce her to enter the aeroplane.

Having considered the matter at considerable length the learned judge made his order. The order begins by reciting a series of undertakings which the father gave to the court. These included undertakings to pay any excess return air fare which might be involved in returning the minor; not to seek to punish the mother in the Florida courts for any breach of the Florida order; undertakings not to remove the child from the mother save by court process; to provide the mother and the child with accommodation, free of cost, pending a decision in Florida and to appear, without representation, in the Florida court if the mother could obtain no representation, so as to ensure equality of arms. The mother also gave a series of undertakings, the most important of which was in (ix) of the order on page 5 of the bundle, which records an undertaking by her to return to Florida with the child on a flight, the particulars of which were to be agreed between the parties' solicitors within 48 hours of the date of the order, such return to be no later than ten days from the date of the order.

In the light of the undertakings given by both the mother and the father the learned judge ordered that the child should return forthwith to the jurisdiction of the State of Florida, pursuant to Arts 3 and 12 of the Hague Convention. He also provided that that order should not be enforced unless the mother failed to comply with various of her undertakings, including undertaking (ix).

On 14 September a further attempt was made to return the child to the United States, this time, in accordance with the judge's order, the child being accompanied by the mother. The scene that then took place has been the subject of very considerable new evidence, new in the sense that it was not of course before Hollis J on 7 September. There is evidence from Linda Tatler, who is a Virgin Airlines supervisor, and also from Lesley Kemp, who is a Virgin Airlines manager. There is evidence from the mother's solicitor, Mr Lebor, and also from the principal in the mother's solicitors' firm, Mr Goodwin. In addition there is evidence from the mother herself. Heavy reliance is placed by the mother on this evidence and our attention has been drawn to various paragraphs in which those witnesses describe the distress of the child crying uncontrollably. She is described as hysterical and refusing and rebuffing all attempts to divert her and distract her and induce her to enter the aeroplane. Those witnesses paint a picture in which the mother was doing all she reasonably could to induce the child to fly but without succeeding in overcoming the child's resistance to doing so.

On the other hand, there was evidence sworn on behalf of the father by Alison Hayes, by Katherine Hughes and by Elizabeth Kendrew, all being representatives of the solicitors acting for the father, and they, while not challenging that the child was distressed and crying and resistant to flying, paint a less clear picture of pressure by the mother to induce the child to fly.

The upshot undoubtedly was that there was a distressing scene which culminated in the mother and the child going to a lounge and not boarding the flight. Arrangements were made for an alternative flight to Florida on the following day, 15 September but, in the event, no advantage was taken of that.

The first application that has been made to us is that this new evidence should be introduced. The introduction of the evidence has not been opposed and we have ordered that it should be admitted since it seems to be a very clear case in which the courts should act on the best evidence there is. All this evidence, of course, relates to matters which had not even happened at the time when the case was before the judge. There is also evidence of a psychiatric report, to which I shall refer in a moment.

At this stage it is perhaps appropriate to remind oneself of the terms of the Hague Convention. Article 3 of the Convention provides:

"The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

In this case it is not challenged in any way that the retention of J. by the mother in the United Kingdom was wrongful within the terms of Art 3. Plainly the Convention is directed to a situation which is, alas, not uncommon but which is always difficult and distressing to all involved. It envisages a situation in which a mother and a father are separated following the breakdown of a marriage and living in different countries, each of them wanting the children of the marriage to live with them.

In the first instance, in the ordinary way, a divorce is granted and orders regarding the children made in the place where the family was living before the marriage broke down.

That is indeed what happened here. That order, of course, including any order for the care of the children, remains in force until it is altered or varied. But sometimes it does happen that the non-custodial parent seeks to take the law into his or her own hands. This may happen either where such a parent visits the country where the children are and removes the children or the child and takes the children to the country where that parent lives or the situation may arise, as here, where the non-custodial parent has children to stay and retains those children. It is of course obvious that the effect of a removal or a retention in such circumstances is to flout the order of the court in whose jurisdiction the children were before they were removed or retained. If such removal or retention is allowed to be effective then clearly the effect is to encourage conduct which breaches subsisting court orders. If such conduct is encouraged it is also plain that international chaos is promoted because the deprived parent would have to take action in the country to which the children have been taken or in which the children have been retained and the judges in that country might naturally be inclined to be sympathetic to the parent who wanted to keep the children there and bring the children up in that jurisdiction. That is, I think, the background to the international agreement which was reached between the countries party to the Convention, the operative principle being that children should be returned to the country where they had been habitually resident before the removal or retention, for the judge in that country to decide whether the child or children should live with the mother or the father. The operative principle is not that the judge in the country of habitual residence should necessarily rule that the child should live with the parent in that country. He might or she might very well conclude that the child's happiness and welfare would be better served if the child lived with the other parent in the other country. But the linchpin of the Convention regime is that the decision should be made by the judge in the country of habitual residence. Accordingly, as the Convention very clearly provides in Art 12; it is the duty of judges as well as other authorities in Convention countries to which children have been wrongfully removed or in which they have been wrongfully retained to co-operate by returning the child or the children to the country of habitual residence for that judge to make the final decision as to where the child should live. As I have indicated, there is no challenge here to the fulfilment of Art 3. But the terms of the Convention are not absolute and central to this appeal are the terms of Art 13. Article 13, so far as relevant, provides:

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that

(a) ...

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

Then there is a further paragraph:

"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."

It is in reliance on those provisions that Mr Scott-Manderson, for the mother, bases his appeal. He puts the appeal on three main grounds. First, he says that on the evidence there is a grave risk that the return of this child would expose the child to psychological harm. Secondly, he submits that there is a grave risk that the return of this child would place the child in an intolerable situation. Thirdly, he submits that the court should exercise its discretion to give effect to the wishes of the child since he submits 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.

The learned judge was not persuaded on the evidence before him that there was a grave risk of psychological harm to the child if she were returned. He was not satisfied that the return would place the child in an intolerable situation and although he thought it right to take account of the wishes of the child, he did not, in all the circumstances, accord those wishes such weight as to induce him to exercise his discretion in favour of an order that the child should be returned.

Mr Scott-Manderson, arguing the case with great skill, for the mother, does not submit that the learned judge erred on the material before him. But he does very strongly submit that in the light of the new evidence and the experience of seeking to return the child on 14 September a new situation has arisen and that those conditions are now made out even though they were not before. First of all, therefore, he repeats the submission, in the light of the new evidence, that the return of the child would expose the child to psychological harm. He relies not only on the evidence of the independent airline witnesses as to the behaviour of the child on 14 September, but also on a report made by a distinguished psychiatrist on the basis of the papers which were laid before the psychiatrist, but without an interview with the child herself. That report ends up by expressing a tentative, but necessarily tentative, conclusion that J. is probably suffering from separation anxiety which might be amenable to psychiatric treatment. The doctor is, however, properly reticent about expressing strong or concluded views in the absence of any interview with the child. It is partly because those views are necessarily tentative that Mr Scott-Manderson submits that the court should either itself instruct that a psychiatric interview take place with the child or that the Official Solicitor be invited to act and represent the child with a view to procuring such an investigation.

Speaking for myself, and bearing in mind the clear intention of the Convention, I am not myself persuaded that the mother is able, on the facts here, to show a grave risk that the return of the child would expose her to psychological harm, nor do I think it appropriate that a further psychiatric investigation should take place since to order such an investigation would, in my view, frustrate the clear intention of the Convention by inaugurating an interlocutory battle in this country, no doubt with conflicting evidence on both sides and a long period of delay which would itself militate against the making of the order which the Convention in any ordinary case requires to be made.

I have particularly in mind that what is envisaged is not that this child should be separated from her mother, that she should simply be put on an aeroplane to a foreign environment, but that she should be accompanied by her mother and also by her father to Florida to live at an address, which will be provided, with her mother until such time as the judge can make an order. In my judgment it is simply an exaggeration to suggest that that programme involves a grave risk that the return would expose the child to psychological harm.

So far as putting the child in an intolerable situation is concerned, I am prepared to accept Mr Scott-Manderson's submission that the intolerable situation comprises not only the end result but the process which is involved in achieving it. But, again, the solution which is envisaged, namely the child travelling to the United States with her mother and her father and then living with her mother until a decision is made, cannot, in my judgment, be regarded as putting the child in an intolerable situation.

So far as the third ground is concerned, I am equally unpersuaded. The judge was, in my view, right to pay regard to the views of the child, but he was also right, in my judgment,

and I think we would be right, to bear in mind that this is a child of tender years, being barely 8, and a child who has of course since June been in the company of the mother alone. It is to be remembered that for most of the last two years the child has been in the custody of the father, that the elder sister is living with the father, that there are stepchildren with whom the child has been on completely happy terms until this summer and that no accusation of any kind is made against the conduct of the father who has throughout behaved as a loving and attentive father would be expected to do. The child has made some very minor criticisms of her stepmother but those are, in my judgment, of no weight. Although, therefore, it is appropriate, in my judgment, to take full account of all the new evidence which has been filed and I accept that there is, on the basis of that evidence, a situation which did not exist before Hollis J, nonetheless I am not persuaded that his order was wrong or should be overruled.

I should mention as part of the history that on 18 September 1995 Hale J made an order, on the application of the father, that he have leave to remove the child from the jurisdiction of the United Kingdom to Florida. That is, in effect, what is proposed. I would, however, wish to emphasise this: both these parents, I feel confident, have the best interests of J. at heart and all that is being insisted upon is that the Florida judge should be in a position to review the position of this child in the whole family context and make a just decision as to what in the longer term is best for this child. It is really very important that both the mother and the father should co-operate to seek to make the return to Florida as peaceful and lacking in trauma as possible. The child has enjoyed an extremely happy relationship with the father over the years. There is no antipathy between them, but there has now been a period during which they have not seen each other and it would be most unfortunate if their first meeting was to be at the airport. I, accordingly, envisage that over the next few days there should be contact between the father and the child to reintroduce them to each other with a view to a peaceful and, so far as possible, unstressful departure from the airport. I do not envisage that the child should be in any formal way handed over by the mother to the father. It seems very much better that the child during the journey should remain under the wing of the mother with whom she will, in the first instance at least, be living in Florida. But I do express the hope that the mother and the father, with the child's best interests at heart, will now put their heads together to devise arrangements which will minimise that which both must abhor, namely the causing of trauma to this child. I would, for my part, dismiss this appeal.

HENRY LJ: I agree with everything my Lord has said and particularly as to the need for parental co-operation from now on.

THORPE LJ: I agree. J. has lived in her mother's emotional climate since June. Difficulties in implementing the order of Hollis J were certainly foreseeable in the light of the history, particularly the happenings on 16 August. The order of Hale J, in response to the happenings on 14 September, has yet to be implemented. In order for it to succeed it seems to me important that prior to the date of departure J. should re-establish her relationship with her father. The extent to which she is consciously or unconsciously influenced by her mother's emotions should thereby be reduced.

Mr Scott-Manderson emphasises that these are both good parents. It is important that they should now both demonstrate their capacity to put J.'s interests before their own wishes and feelings. The implementation of the order is a shared parental problem and it is essential that they should seek to solve it co-operatively and in unity. Should J. sense that they are not united, she will perceive the opportunity to divide and conquer. It is, therefore, important that the plans for the journey and for the embarkation formalities should be carefully planned and agreed.

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