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[16/01/1992; High Court (England); First Instance]
Re C.T. (A Minor) (Abduction) [1992] 2 FCR 92

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

16 January 1992

Sir Stephen Brown P

In the Matter of C.T.

J Plange for the Plaintiff

A Tidbury for the Defendant

SIR STEPHEN BROWN (P): The court has before it an application by an Australian father of a little girl called C., born on 27th November 1989, made under the Child Abduction and Custody Act 1985 more particularly pursuant to the provisions of schedule 1 to the Act which incorporates in the statute the Convention on the Civil Aspects of International Child Abduction known generally as the Hague Convention.

The defendant to the application is the mother of C., she is the wife of the plaintiff. The short facts giving rise to the application are that the mother and father were married in Brisbane, Australia on 29th October 1988. The father is an Australian national by birth. The mother was born in England and she emigrated to Australia in 1986. At that time she was expecting a child by another man. The child, S., is now 6 1/2. She is not the subject of this application. C. was born, as I have said, on 27th November 1989 and is now 2 1/2 years old.

The marriage became unhappy and, indeed, it is not in dispute between the parties, having regard to the evidence in their respective affidavits, that there were considerable episodes of violence. The father of C. does not deny that he has at times behaved badly towards the mother though there is considerable conflict in their respective affidavits as to precisely what took place.

On 27th June 1991 the mother of C. left the matrimonial home taking with her both her daughters, S. by the previous association and, C., the child of her marriage with the plaintiff. She went to stay with her parents who had lived in Australia for many years and are still living there, in Brisbane. Then on 4th or 5th July 1991 she left Australia and brought both the children to this country and she has since then been living in Shropshire with the children. It is not in dispute that having regard to the provisions of the relevant Australian

statute the father, as the mother's husband and the father of C., enjoyed joint custodial rights in respect of C. It is not in dispute that the mother, on or about 4th July wrongfully removed C. from the place where she was habitually resident in Australia in breach of the father's custody rights. Prima facie that wrongful removal gave rise to the position dealt with in Art 12 which states:

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

That mandatory situation is subject however to the provisions of Art 13 to which I shall make reference shortly. This originating application was made in November 1991 within the period of one year and, therefore, prima facie the court is under a mandatory duty to order the return of the child forthwith. It has to be made clear that the procedure which is enshrined in the Hague Convention is a summary, indeed, a peremptory procedure for returning children who have been wrongfully abducted from their habitual place of residence to the jurisdiction of the courts of their habitual place of residence. It is not the function of this court, on hearing such an application, to consider in the substantive sense, the matters which may relate to the general welfare of the child.

However, in this case there are certain unusual features. The mother came, as I have said, came to England in July 1991. It is quite clear that at that time she had wrongfully removed the child in question from Australia and that it was therefore open to the father to seek the return of the child to Australia under the provisions of the Convention.

It appears that the father did, indeed, take steps to institute such an application by contacting the central authority of Australia, which is the Department of the Attorney General, and that that Department communicated a request to the central authority of this country, which is the Lord Chancellor's Department, and that instructions were given by the Lord Chancellor's Department in this country to solicitors to act upon a request from the Attorney General of Australia to pursue an application under the Hague Convention. That appears to have occurred in July 1991.

However, the father did not pursue the matter at that stage and no originating application was issued. He did not pursue it because he came to England and saw his wife intending, he says if he could, to effect a reconciliation. It appears that he also saw the child, but the hope of a reconciliation was not achieved and he returned to Australia. It appears that on his return to Australia he suffered some form of mental depression. He has described it as a "breakdown" in his own affidavit. It appears that he did receive some treatment in hospital for a limited period.

After his return to Australia and after he had apparently received some treatment, he wrote a letter to his wife, the defendant, which has been exhibited to a further affidavit sworn today by the defendant. In her affidavit she says this in para 2.

"During one of his visits [that is to see the children in Shropshire] the plaintiff said that I might get a letter under the Hague Convention seeking the return of C. to Australia. He told me not to worry about it. He said he did not want C. back but that it was a device for getting me to return to Australia. He went on to say 'Do not worry I am not going to do it. Just throw away the papers when you get them.'"

The letter which is postmarked 9th September 1991 from Australia commences:

"How are you, haven't heard from you for a while? Don't understand what you are doing must really hate me. Obvious you don't care any more, done everything for you and got nothing in return. Haven't got a thing from you telling me how C. is. Could still get her back in the country but I'm not. Don't worry I'm not going over there either. Your dad said if I was you would get the Police on to me. For what, that's what I like to know. You can't stop me from seeing C. I promise you like I promised you I go home and not try and get C. back. Just don't know why you are not contacting me you can't just run away from this. I am not just one of your childhood boyfriends. We are married and we have a child. She is mine just as much as she is yours. I wish I could say they were both ours but they are not."

And subsequently in the letter in the second paragraph he says:

"I am not going to push you either I can wait forever, but you got to still love me and see I can change and if you think that I would ** S. like I threatened to you don't know me at all. I have done a lot of bad things but I am not a sicko. Hope you don't think that only deviate with you ha, ha. Don't even know if you are reading my letters any more. Sorry if you think that I am harassing your parents, what else am I supposed to do. If you contact me and talk to me I wouldn't have to. I wouldn't know nothing if they didn't tell me."**

Then this passage:

"Like I said before, I promise you I won't get C. back and won't go over there. Just hope in the future we can work it so I can come over and see C. You know I will always love you and don't know why you are giving up on me. Why did you write those nice letters for me."

Article 13 of the Convention provides, inter alia, that:

"Notwithstanding the provisions of the preceding Art the judicial or administrative authority for the requested state is not bound to order the return of the child, if the person which opposes its return establishes that a) the person having the care of the person of the child was not actually exercising custody right at the time of the removal or retention, or had consented too, or subsequently acquiesced in the removal or retention."

The argument which is addressed to the court on behalf of the defendant mother, is that in this case although the original removal of the child was plainly wrong in the light of the established facts, and although the proceedings now before the court were instituted within a period of one year of that wrongful removal, nevertheless the evidence establishes in this case that the plaintiff father subsequently acquiesced in the removal of the child and or her retention in the United Kingdom.

The submission made by Mr Tidbury, who appears on behalf of the mother, is that although the father in July did initiate proceedings under the Hague Convention, he did not pursue them, although solicitors had been instructed in this country by the Lord Chancellor. He travelled to England and saw his wife. Mr Tidbury relies upon the evidence contained in paragraph two of the mother's affidavit sworn today to the effect that he told her not to worry about a letter under the Hague Convention Provisions which he might receive, and added that he did not want C. back, but that it was a device for getting her to return to Australia. That, of course, appears in an affidavit which has not been the subject of cross-examination, but Mr Tidbury submits that it is corroborated and confirmed by the letter of 9th September written by the plaintiff after his return to Australia, in which he reiterates twice in the letter: "Like I said before, I promise you I won't get C. back, and won't go over there".

It was after that -- and substantially after that -- submits Mr Tidbury, that the plaintiff had then sought to reactivate the application which was ultimately transmitted by the Lord Chancellor's Department to solicitors acting in the matter on 8th November.

On behalf of the plaintiff, Miss Plange submits that in this case the court ought not to consider that the mother defendant has established subsequent acquiescence in the wrongful removal, and/or retention of C. in this country. Further to the statements contained in the letter, and the evidence contained in the mother's most recent affidavit, she has disclosed to the court certain correspondence from the solicitors acting in Australia for the plaintiff, to the solicitors instructed in this country by the Lord Chancellor. In particular there is a letter dated 12th September 1991 from the plaintiff's solicitors in Brisbane. It says this:

"We are instructed by Mr Taylor's parents that he has suffered a breakdown after the separation, and is currently in hospital. His specific instructions at this stage are not to proceed further with the application. Although we are continuing to endeavour to obtain further instructions from him that he does not wish to proceed any further".

Miss Plange submits that the court ought not to accept the statements in the letter of 9th September are to be taken at their face value. She submits that they do not establish acquiescence in the retention of the child in the United Kingdom. This court does not have any psychiatric evidence about the plaintiff's alleged breakdown. It is clear from the affidavit of the plaintiff himself and the letter from his solicitors in Brisbane, that he had been admitted to hospital. However, the evidence which the defendant mother had adduced is not only that of the letter of 9th September, but her own evidence in paragraph two of her recent affidavit which related to the period when the plaintiff was in England. It is not suggested that although he may have been suffering distress and depression as a result of what had happened, that he was suffering from some form of psychiatric illness. The position is that the court has before it clear evidence that the plaintiff having initiated proceedings had decided not pursue them, and reiterated that decision after his return to Australia.

There is further confirmation in the letter of 12th September from the Australian solicitors, to which I have referred, which shows that they had specific instructions through the plaintiff's parents not to proceed further with the application. I have been referred to the passage in the case of Re A [1991] 2 FLR 241, which deals with acquiescence in a case which was then before the Court of Appeal. I have to say at once that the facts of each of these cases are different. That is indeed a truism, and one has to consider the application of the Convention in the light of the particular facts of individual cases. I consider that on the balance of probabilities in this case the mother has established that the father did subsequently acquiesce in the removal and retention of C. in England. It may be that it was a reluctant acceptance of the situation, but I also consider that her statement that it was a device to get herself to return to Australia is a matter to which credence should be given. In the result I consider that the court has a discretion not to order the mandatory return of this child to Australia, and having regard to all the facts before me I propose to take the course of not ordering the return of this child to Australia. I need not go on to consider further submissions made by the defendant on the basis that if her return were to be ordered, the child would be exposed to physical or psychological harm, or placed in an intolerable situation. I do not think that the mother, in fact, established those matters under sub paragraph A, Art 13. But I think she has established the plaintiff's "subsequent acquiescence" within the meaning of sub paragraph (a) of Art 13. In the circumstances I decline to order the return of C. to the jurisdiction of Australia.

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