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[27/04/1999; High Court (England); First Instance]
Re B. (Abduction: Acquiescence) [1999] 2 FLR 818

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

27 April 1999

Kirkwood J.

In the Matter of re B.

Counsel :Henry Setright (instructed by Dawson Cornwell) for the father; Leo Curran Aldershot) for the mother

KIRKWOOD J: This is an application by a father under the provisions of the Child Abduction and Custody Act 1985 and the Convention on the Civil Aspects of International Child Abduction (The Hague, 25 October 1980; TS 66 (1986): Cm 33) (the Hague Convention) (which has the force of law in the United Kingdom by virtue of s 1(2) of the 1985 Act and is set out in Sch 1 thereto). By it he seeks an order for the immediate return of his daughter, J, to the United States of America (USA). J's mother, with whom J is presently living in England, opposes the application.

J was born on 17 August 1992, so she is now six years and eight-and-a-half months old. Her mother is 27, and is English. Her parents live in England. J's father is 31 and is American.

J's parents met in the middle of 1991, when they were both working in Croydon at a centre for children with learning difficulties. J was conceived later that year of a relationship between them, which neither regarded at that stage as a settled and permanent one. Soon after J's conception the father returned to the USA.

J was born in England on 17 August 1992. In October 1992 the father visited and saw his daughter for the first time. Over the following year the father was working on ships off Alaska. He is a marine engineer. His pattern of work was three months at sea and then a month's leave. During his leaves the mother, father and J were together, the father travelling to England or the mother and J to the USA. The relationship between mother and father blossomed and they married in England on 8 October 1993.

There has been an issue raised as to whether or not the father upon marriage acquired

parental responsibility for J. The mother's contention is that for a technical reason he did not as a matter of law do so. It is not necessary for me to resolve that issue.

In 1994 the mother and J went to America and a family home was established for the mother, father and child in Washington State. I have no doubt in my mind that J became habitually resident in the USA. In the first part of 1997 the mother and father discussed a move from Washington State to the State of Idaho. The father's case is that there was formulated a settled family plan to go and live there. The mother's case is that there were difficulties in the marriage and she agreed to go to Idaho to see if the marriage could thereby be saved. At all events the family did move to Idaho, and on 14 May 1997 moved into rented accommodation.

At the beginning of September 1997, J, then aged just five, started to attend a kindergarten on a very occasional basis. On 5 October 1997, or perhaps 4 October 1997, the mother left the USA and brought J to England. She did so without telling the father. She left a note saying she was going away for a few days to have space and time to think. It was on 6 October 1997 that the father heard from his mother-in-law on the telephone that the mother had gone with J to England.

The father came over to England on 11 February 1998 to see J. He came initially for two weeks. He did not manage to see as much of J as he had hoped. He brought contact proceedings in the English court, and, in fact, stayed in England until December 1998. After that, apart from a few days in England in February 1999, when this case was due to be heard, the father has been in Idaho until about a week ago. He has come over for this hearing.

The first question raised is whether the mother's removal of J was wrongful. It was wrongful if it was in breach of rights of custody attributed to the father under the law of the state in which J was habitually resident immediately prior to her removal, and if at the time those rights of custody were being exercised. That is provided for in art 3 of the Hague Convention. It is important to stress that the word 'state' there refers to a national state, to the USA. It does not refer to a state within the Union. The mother says that she was not herself ever habitually resident in Idaho. She went there conditionally to see if the marriage could work out, but it is J's state of habitual residence with which I am concerned. J was, as I have found, habitually resident in the USA.

I have no evidence as to any law relating to rights of custody of universal application in the USA. It may be thought self-evident that the father of a child married to the child's mother, even though after the child's birth, has rights of custody, at all events within what is contemplated by the Hague Convention. I do have evidence as to the law in Idaho under which a child is legitimated by the subsequent marriage of the parents and the mother and father of a legitimate child are equally entitled to custody. The law of Idaho was the law applicable where J was, in fact, living at the time of her removal. In the circumstances, I hold that the father did have rights of custody and that immediately prior to removal he was exercising them. I also and consequently hold that the removal of J in October 1997 was wrongful and that pursuant to art 12 of the Hague Convention the court is bound to order return unless the mother establishes one of the matters under art 13, which, if established, gives the court a discretion.

The mother raises matters under art 13(a), acquiescence, and under art 13(b), grave risk of physical or psychological harm, or that a return would place J in an intolerable position.

Under art 13(b) the mother makes a series of allegations about the father's conduct towards

her and towards J. Whilst not in any way seeking to undertake a trial of the issues raised, which it would not be appropriate for me to do, there do seem to me to be some areas that are not much disputed. I have a general picture of the father being somewhat boorish, selfish and inconsiderate, of heated rows between the parents, of a good deal of shouting by both. I have a picture of the father smacking J more than was wise. Certainly, J seems to remember that. It was, overall, a rather unhappy picture.

It is all complicated by a suggestion raised much later by a psychologist in England that J may have been interfered with sexually by her father during contact in England. I stress that I deliberately and purposely say absolutely no more about that matter. But the overall point is that if J has to go back to the United States then the mother will go too. Until there can be an inter partes hearing in Idaho J will be with her mother. The court in Idaho is well able to resolve the issues upon the matters the mother puts forward in her art 13(b) case. Although I have no doubt that the mother, and with her, J, too, would be distressed at having to go back to the USA, there is nothing intrinsically harmful or risky for J in a return to the United States itself.

The question for me is whether it is established that there a risk of the kind envisaged by art 13(b) such that J will inevitably be exposed to it, and in that regard I have in mind the undoubted ability of the Idaho court to afford to J any protection that may be found by it to be necessary. In my judgment, the mother entirely fails to satisfy any limb of the art 13(b) defence.

I should say that I have in mind also the advice of Mrs Morris Smith, a consultant psychologist, who has seen J in England, that a return may jeopardise the mother's mental health. I do not have evidence that the mother has a history of mental ill-health, nor am I persuaded that the courts of Idaho cannot take into account and provide necessary safeguards for J in respect of any frailty of the mother's mental health that may be perceived in that jurisdiction.

I turn to consider the mother's case under art 13(a). The mother raises a case that the father acquiesced in her keeping J in this country after removal. The authorities in relation to acquiescence were reviewed and the law made clear by the House of Lords in Re H (minors) (abduction: acquiescence) [1997] 2 FCR 257, [1998] AC 72. Acquiescence is a question of fact. The burden of proof rests on the abducting party. In the reference in art 13 to acquiescence, art 13 is looking at the subjective state of mind of the wronged parent. Has he in fact consented to the continued presence of the child in a jurisdiction to which he or she has been abducted? In the course of his speech Lord Browne-Wilkinson said ([1997] 2 FCR 257 at 267-268, [1998] AC 72 at 87):

'In ordinary litigation between two parties it is the facts known to both parties which are relevant. But in ordinary speech a person would not be said to have consented or acquiesced if that was not in fact his state of mind whether communicated or not. I am encouraged to find that this is also the view reflected in decisions in other jurisdictions. In the French Cour de Cassation Case No. 228 of 16 July 1992 [X v X (16 July 1992) Bull Civ No 228], the court, whilst accepting that acquiescence could be inferred from conduct, held that acquiescence could not be inferred simply from the wronged parent having concurred in a temporary arrangement with a view to arriving at an amicable solution: the court was looking to the actual intention of the parent. The district court of Massachusetts in Wanninger v. Wanninger (1994) 850 F. Supp. 78 concentrated on the actual intention of the wronged German parent despite his visiting the mother in the U.S.A. (to which the children had been abducted) to seek a reconciliation. In Friedrich v. Friedrich (1996) 78 F. 3d 1060 the Court of Appeals of the 6th circuit adopted a similar approach. In my judgment, therefore, in the

ordinary case the court has to determine whether in all the circumstances of the case the wronged parent has, in fact, gone along with the wrongful abduction. Acquiescence is a question of the actual subjective intention of the wronged parent, not of the outside world's perception of his intentions.'

Lord Browne-Wilkinson recognised that there is an exception to those general principles. Lord Browne-Wilkinson said ([1997] 2 FCR 257 at 269, [1998] AC 72 at 89-90):

'It follows that there may be cases in which the wronged parent has so conducted himself as to lead the abducting parent to believe that the wronged parent is not going to insist on the summary return of the child. Thus the wronged parent may sign a formal agreement that the child is to remain in the country to which he has been abducted. Again, he may take an active part in proceedings in the country to which the child has been abducted to determine the long-term future of the child. No developed system of justice would permit the wronged parent in such circumstances to go back on the stance which he has, to the knowledge of the other parent, unequivocally adopted: to do so would be unjust. Therefore, in my judgment there are case[s] (of which Re A (Z) [(child abduction) [1993] 1 FCR 733] is one) in which the wronged parent, knowing of his rights, has so conducted himself vis-a-vis the other parent and the children that he cannot be heard to go back on what he has done and seek to persuade the Judge that, all along, he has secretly intended to claim the summary return of the children. However, in my judgment these will be strictly exceptional cases. In the ordinary case behaviour of that kind will be likely to lead the Judge to a finding that the actual intention of the wronged parent was indeed to acquiesce in the wrongful removal. It is only in cases where the Judge is satisfied that the wronged parent did not, in fact, acquiesce but his outward behaviour demonstrated the contrary that this exceptional case arises. My Lords, in my judgment these exceptional circumstances can only arise where the words or actions of the wronged parent show clearly and unequivocally that the wronged parent is not insisting on the summary return of the child: they must be wholly inconsistent with a request for the summary return of the child. Such clear and unequivocal conduct is not normally to be found in passing remarks or letters written by a parent who has recently suffered the trauma of the removal of his children. Still less is it to be found in a request for access showing the wronged parent's desire to preserve contact with the child, in negotiations for the voluntary return of the child, or in the parent pursuing the dictates of his religious beliefs.'

He continued ([1997] 2 FCR 257 at 270, [1998] AC 72 at 90):

'The important factor to emphasize is that the wronged parent who has in fact never acquiesced is not to lose his right to the summary return of his children except by words or actions which unequivocally demonstrate that he was not insisting on the summary return of the child.'

In a summary of that part of his speech Lord Browne-Wilkinson said ([1997] 2 FCR 257 at 270, [1998] AC 72 at 90):

'Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced.'

It is worth, I think, noting the repeated references by Lord Browne-Wilkinson to the phrase 'summary return of the child'. The difficulty that has been presented from those passages and that has been the subject of argument before me lies in the words 'in which the wronged

parent, knowing of his rights, has so conducted himself' (see [1997] 2 FCR 257 at 269, [1998] AC 72 at 89), and the stress I intend is on the words 'knowing of his rights'. That immediately follows a reference by Lord Browne-Wilkinson to Re A (Z). That was a case in which the trial judge found that notwithstanding what were plainly acts of acquiescence by the father he was not to be held to have acquiesced because acquiescence had to be given, 'in the knowledge of rights which had been breached and rights that could be enforced'. In the course of her judgment in the decision of the Court of Appeal in Re A (Z) (child abduction) [1993] 1 FCR 733 at 747 Butler-Sloss LJ said:

'I do not agree with the Judge nor with the argument of Mr. Richie [counsel for the applicant father] that in order to acquiesce it must be shown that the applicant had specific knowledge of the Hague Convention.'

She continued (at 747-748):

'In my judgment, the Judge misdirected herself in saying that "acquiescence has to be done in the knowledge of rights that had been breached and rights that can be enforced". That statement goes too far. If a father knows that his son has been retained in another country against his wishes and he wants him back and has the capacity to and is able to seek legal advice as to what proceedings he might be able to take, the factual situation has arisen upon which he may objectively be considered to have sufficient knowledge either to consent or to acquiesce in the situation which has occurred.'

She continued (at 748):

'Acquiescence has to be conduct inconsistent with the summary return of the child to the place of habitual residence. It does not have to be a long-term acceptance of the existing state of affairs.'

In the same case Sir Donald Nicholls V-C, as he then was, said in his judgment (at 752):

'At the other end of the spectrum the parent may, again through force of his circumstances, accept that the child should stay where he is or she is for an indefinite period, likely to be many months or longer. There is here a question of degree. In answering that question the court will look at all the circumstances and consider whether the parent has conducted himself in a way that would be inconsistent with him later seeking a summary order for the child's return. That is the concept underlying consent and acquiescence in Article 13. That is the touchstone to be applied. I am not able to accept that, in applying this test, there cannot be acquiescence unless the parent knew, at least in general terms, of his rights under the Hague Convention. Whether he knew or not is one of the circumstances to be taken into account. The weight or importance to be attached to that circumstance will depend on all the other circumstances of the particular case.'

The House of Lords in its decision in Re H did not detract from the decision of the Court of Appeal in Re A (Z) on this aspect. On the contrary Lord Browne-Wilkinson found Re A (Z) to be an example of the exceptional case.

In Re D (a minor) (abduction: acquiescence) [1999] 2 FCR 84 at 88 Sir Stephen Brown P said:

'On behalf of the mother it is argued that there was clear acquiescence on the part of the father to his children remaining with the mother in this jurisdiction. Although the initial departure from Australia was unlawful the father in due course consented, it is submitted, to

their remaining with the mother in England and went so far as formally, through his solicitor, to consent to the making of residence orders on 3 September. On behalf of the father it is argued that he was in ignorance about his legal rights because it appears, so it is submitted, (though not specifically admitted on behalf of the solicitor), that all the evidence points to the fact that the Hague Convention was never raised with the father himself until he had subsequently returned to Australia, when he took the steps which I have already referred to-getting in touch with the Attorney General's Department. The problem for the father in this case, in my judgment, is that he formally, through solicitors, accepted the jurisdiction of the County Court at Swansea and specifically agreed to the making of final full residence orders. This was not an interim order, it was a considered move and must be taken to have been a considered move since he clearly had legal advice and was formally represented before the court. Counsel, on behalf of the father, seeks to rely upon the House of Lords' decision Re H ... in which the subjective quality of acquiescence was emphasised. However, it is also clear from a passage in the speech of Lord Browne-Wilkinson ([1997] 2 FCR 257 at 269, [1998] AC 72 at 89-90) that there may well be an exception where the English court is invited to make an order which is a final order. In my judgment, the father is not in a position, in this case, to have second thoughts. He may regret his lack of advice, but it appears from the note to which I have already referred ... that there was a specific discussion about the father's intentions before the court hearing on 3 September.'

Following the mother's departure from the USA to England in October 1997, the father was undoubtedly distressed and undoubtedly hoped for a reconciliation. He wrote to the mother a number of letters in which he spoke of his love for the mother and for J, that he recognised that he had been at fault in the marriage and that he believed that he had changed and was trying to change. That is the context of those letters but his proposals come across most strongly in his letter of 11 January 1998. It was a long letter and I read extracts of it only into this judgment:

'It was a bad phone call on Friday. It really upset me and I imagine it upset you. I'm sorry ... [A little later on in the same page] That phone call was a little bit of an attempt to stand up and I failed miserably. I slipped back into the old pattern of being pushy and telling you how much I was going to see [J]. I feel that I have rights (I'm talking morally, not just legally) to [J], but I should have approached the issue in a different way ... [Further into the letter the father wrote] Like I said in the bad phone call I am planning to take a trip to England shortly. It really surprised me when you started saying things like I would not be allowed to be alone with you or [J]. At first it seemed very insulting to me ... [The father then referred to discussions he had had with friends and his letter continued:] After hearing this your arrangements seem more reasonable to me, as a temporary arrangement. It is not something I will agree to long-term for my relationship with [J]. (This is standing up for myself and for [J]. It is not an attempt to be pushy. If you disagree let me know.) I understand it will take a little while to build some trust-just like it did for me to gain your trust to allow me to talk to [J] on the phone without your listening in. I will try to be patient during this period. I ask two things of you on this point. First of all, that you will reconsider the arrangement, as time goes on, if I prove myself to be reasonable. Secondly, that you do not give [J] the impression that she needs to be body guarded against me-I feel this could create permanent damage that may not be repairable. I love my little girl, and I love my wife. I want to wait a short period before coming over, because I want you to consider some things first. I would like you to consider coming to Hailey for this period. If you choose to come to Hailey, we could make the legal arrangements plus a couple of others. If you come to Hailey, I will also agree in legal writing that you are to be [J]'s primary care giver, and that she is to reside with you in whatever country you choose to live. This will alleviate any concern you might have about bringing [J] to America and not being allowed to return to England with her. I have no desire to make you live in a country that you do not want to live in, and I have no desire to

keep [J] from her Mummy because of my own hurt feelings-the very thought of it is sick and I will have no part in it ... [A little further on in the letter the father wrote:] However I do want to say a few general things, if you choose to come to Hailey. One thing is that it is not necessarily a permanent move. If you come over then come to the conclusion while you are here that our marriage is definitely dead and you do not wish to live in Hailey I will abide by your decision. I also want to let you know that you can use our credit card to purchase two open-ended round trip tickets ... [Then further into the letter:] Hailey is a great place to live even in the winter. Even if we weren't able to work out our marriage I believe this would still be a great place for you to live. You will have support here, probably more than I will, if you come over and, most importantly I think, it is a place where you can support yourself and not be dependent upon another person for your house, for your food, for your life. It will be your life to live. I understand if you decide you are not ready to make this step at this point, or ever, but I wanted to throw this out there. If you choose to come to Hailey I will respect and honour you, and I will respect and honour the legal arrangements. If you decide you are not ready for a step like that now, I will come to England. There I will respect and honour you. And again, I will respect and honour the legal arrangements you have made. I just want to see my little girl and to see you.'

In that letter the father made reference to his legal rights. It is in evidence that he consulted an attorney in Hailey, Idaho, called Tracy Dunlap. She has sworn an affidavit in which she says:

'In late October 1997 I was contacted by [the father]. He was extremely distraught because his wife had recently left their home in Blaine County with their young daughter and was apparently residing in England at her parent's home. We had several conversations in which we discussed Idaho law regarding child custody. At no time did I discuss the Hague Child Abduction Convention with [the father].'

Also in evidence and immediately following that affidavit in my bundle of documents is a document dealing with aspects of custody law in Idaho. That contains a passage about legitimation of issue by marriage, of rights of parents over children and a passage also about child custody interference, which is an offence that may attract punishment.

The father in fact came to England on 11 February 1998. His initial plan was to stay for two weeks to try to see J. He was allowed by the mother to see J on three occasions in the presence of family members. The father was not satisfied with that. He consulted solicitors. In his written evidence the father says:

'Those solicitors at no time advised me as to the provisions of the Hague Convention on Civil Aspects of International Child Abduction. On the contrary, I was advised that I would have to issue Children Act proceedings in this jurisdiction to have contact. I was also advised that if I wanted to have an ongoing relationship with [J] I would have to be in a position to show the British court that I had roots in this country and that I could remain in this country. I was advised to obtain a work permit and seek to achieve resident status. I did ask about the possibility of [J] being returned to the USA. I was advised that the chances of the same were very remote and that I would have to apply for what they termed as "a leave to remove her from the jurisdiction". I was advised that the most sensible course if I was going to have an ongoing relationship with her was to immigrate to the UK and in the meantime do my best to appease my wife. As matters seemed to drag on with no movement one way or the other I again asked my advisers of the possibility of obtaining a return with [J] to the United States. I was advised there was absolutely no point in my pursuing an application for the return of [J] to the United States through the British courts, and, further, that there was no point in me pursuing it through the American courts. She advised me that if I did not accept that

advice I should take the advice of a USA attorney.'

A little further down that statement the father says:

'Following the advice of my British legal advisers I did seek further advice from the American attorney. She told me that I would have to issue custody proceedings in the USA. She did not however inform me that I could issue proceedings in this jurisdiction.'

That is the father's perception of the legal advice he received. I have nothing whatever about it from the English firm of solicitors who advised the father, so I really have no means of knowing whether what on its face seems surprising advice in a number of respects is exactly what the father was told and all that he was told.

With the assistance of his English solicitor the father took two early steps. On 25 February 1998 the father signed an acknowledgement of service of a petition for divorce which the mother has caused to be issued in England on 23 December 1997 and which had been served on the father in the United States. In the accompanying statement of arrangements the mother had given the address at which J was living in England and said no change was proposed and she said contact with the father could be discussed. In his acknowledgement of service the father said he did not agree with that and added: 'I shall file a statement shortly'. No such statement was ever filed.

On 27 February 1998 the father issued an application in Form C1 for contact. He said: 'I wish to apply for a contact order including interim contact'. In other words, this was not merely an interim contact application to provide for an interim period pending, for example, return to the United States.

Under para 6 of Form C1 the father said:

'[J] usually resides at [an address at] Hailey, Idaho, USA with myself and her mother. She has resided in the United States since July 1994. On 3 October 1997 [J] was taken by her mother without notice to me to England. They have resided at [and then an address is given where mother and child have been living].'

Indeed, in para 12 of Form C1 the father repeated the circumstances of J's removal. He spoke of his endeavours to establish contact and he spoke of the three periods of contact he had had. He said: 'I have been refused unsupervised contact and contact by telephone'. He said:

'I wish to have unsupervised contact whilst I am in England now and for my return to the United States I wish to have put in place telephone contact and contact by letter. I also wish to have arrangements put in place for future contact during school holidays. My two week stay in this country has now expired. I have extended my stay. My ticket is valid for a short while longer, until 10 March 1998. If I cannot make arrangements for contact in that time I will have to buy a new return ticket. My visa is valid for six months. I cannot return to the United States not knowing when I will see or speak to or hear from my daughter again.'

On 4 March the court made an order giving directions for the filing of evidence and fixed a date for an interim hearing. On 17 March 1998 the father made a statement of evidence in which he said in para 1:

'I make this statement in relation to an application issued by me on 27 February 1998 for contact, including interim contact, with my daughter [J]. There is an interim contact

application due to take place on 20 March 1998 and I make this statement for use in this interim application.'

The statement that followed was, however, a very full statement in which the father set out at length the history of the marriage and the history of the recent contact that he had. At para 26 of the statement the father said:

'As it is, because I have not had enough quality time with our daughter I have decided to stay in this country. The separations I have endured for now over five months has led me to consider the future carefully. I have made the decision to remain in this country as long as I can and to apply for a work permit to enable me to leave the United States and set up home in this country. I believe that I am well placed to obtain a work permit in this country and that I have a specialised trade which will assist in my application. I currently have a six month visa and intend to stay for those full six months to try and make attempts to set up home and to organise employment for myself. Since this indication has been communicated to the petitioner through her solicitor I have met with a blanket refusal to see our daughter.'

On 20 March the court made a court order for contact on various occasions to the end of June. It ordered the production of a court welfare officer's report and it fixed a further hearing for 22 June. The court welfare officer's report of 2 June 1998 contained these passages:

'I understand [the father] currently has a six month visa which permits him to remain in the UK until August of this year. He tells me that he hopes to obtain an extension to his visa and to ultimately obtain a work permit to allow him to remain here permanently. [The father] is confident he has the necessary skills to obtain a work permit and employment in the United Kingdom. Thereafter he intends to live here permanently, purely, he says, for the sake of his daughter, although he is hopeful that his marriage can be reconciled. He is currently unemployed and living in bed and breakfast accommodation . . . a short distance from [J]'s home.'

Later in the report, the court welfare officer said:

'Should contact go well during the remainder of the interim order then progression to a day's contact at the week-end could be envisaged, as could visiting contact during the school holidays. This would enable [J] to spend more quality time with her father and for him to broaden the range of activities in which they can participate together. However, I consider that staying contact would be inappropriate at this stage, given the nature of [the father's] current accommodation, which, in any event, is a short distance from [J]'s home.'

In his conclusion the court welfare officer said:

'[the father] has demonstrated commitment towards his daughter with his self-financing stay in England and with his intention to settle here permanently. I would propose that contact now progress to a whole day each week-end, say, between 10.00 a m and 5.00 p m and for the current midweek arrangements to remain. Additionally there could be visiting contact during [J]'s forthcoming summer holidays as may be agreed. Given the present uncertainty over [the father]'s status in this country and how this may translate into more permanent living arrangements the court may feel that a review at a directions hearing in three month's time is not only appropriate but necessary to give a clearer picture of [the father]'s future circumstances.'

The next hearing before the court was, in fact, to be on 9 July. On 6 July the father issued a

notice of application for a penal notice to be attached to any order made by the court on 9 July. There had been some difficulties with contact which had not gone as smoothly as the father had hoped. On 9 July a further order was made for contact to take place after a short introduction, unsupervised twice a week, and a further date to progress the contact case further was fixed for 14 October 1998. The father's application for a penal notice was dismissed.

The facts I find in respect of the acquiescence case up to 9 July 1998 was as follows. (1) The mother left Idaho with J at the beginning of October 1997 without telling the father. (2) The father took advice from an US attorney who advised him as to the child custody law in Idaho, but not about the Hague Convention. It is clear that under Idaho law the father had rights of custody and that interference with those rights was an offence. (3) The father instituted no proceedings of any kind in Idaho. (4) The father corresponded with the mother. He pleaded his case for her to reconsider her decision to leave him and to consider a trial return to Idaho. He made clear that if the trial failed he would not stand in the way of mother and J returning to England. Alternatively, if the mother did not wish to return he would respect her decision. I have fully in mind that in this correspondence the father was seeking reconciliation and I would not regard what he said in it, standing alone and apart from other matters, as probative of acquiescence. (5) The father came to England to see J. He consulted solicitors. I have the father's account of the advice he received as he understood it. I do not, as I have said, have any account from the solicitor. I do find it astonishing that a solicitor practising family law in 1998 could have failed to mention the Hague Convention but I must accept that that happened. Even if the solicitor did not know of the Hague Convention he must surely have known of the inherent power of the court in wardship to make the peremptory order for return. However that may be, the father took no proceedings in the English court other than for contact, including interim contact. In particular, he did not apply for residence or challenge residence with the mother. (6) In his notice of application for contact the father set out all the material facts relating to J's removal from the United States to England. He expressed his case as I find to be for both interim contact and for longer term contact. In both his written evidence in his contact application and in his interview with the court welfare officer the father expressed his long-term plan to settle, establish a home and get work in England, subject only to the necessary immigration permissions. (7) The contact litigation was conducted on the basis of laying the foundations for and building towards a long-term regime. (8) The contact arrangement was not working as well as the father hoped and he met with frustrations and disappointments in respect of it.

Taking all that together, I find myself compelled to a clear picture of the father taking no steps to procure a summary return, whether by demands made to his wife by himself, nor in any solicitor's correspondence, nor in any form of proceedings, nor in what he said to the court with the court welfare officer.

He allowed the state of affairs to run on and decided for himself to settle in England.

Against that, it is argued on the father's behalf that he conducted himself as he did because: (a) he did not know whether he had an argument; and (b) he did not want to rock the boat. I do not find those two points to be mutually supportive. In aid of those submissions the father relies upon a passage in the mother's statement of evidence in the contact proceedings. The passage is this:

'I would say that the respondent is a very manipulative type of person since I have returned to the United Kingdom the respondent has tried to manipulate me into a situation to return to him, such manipulation of which also extends to his daughter.'

I have not had evidence in enlargement of that and I see it in the context of the letter of 11 January 1998, in the context of father being in England since February 1998, and in the context of a wish of the father in the early part of 1998 that his wife and child return to him, as the mother says, rather than particularly a return to the United States. Accordingly, on the evidence up to 9 July 1998 I reach the finding of fact that the father had indeed acquiesced in the mother's keeping J in England having removed her from the United States in October 1997 in a way in which the father must have known was unlawful.

On 18 July 1998 the father visited the United States Embassy in London. I have not been told why he did that. It occurred to me that it may well have been in connection with his plan to stay in England and I raised that point, but I have not been further informed as to his reasons. In any event, it appears that whilst the father was at the embassy he was told of the Hague Convention. Subsequently he made an application to the central authority who instructed solicitors in the matter on 4 August 1998. I find it surprising and regrettable that neither the mother nor her solicitor was told anything of what was going on. There was a contact order in place and due for implementation based upon the father's expressed intention to stay in England permanently. The first the mother knew of the Hague Convention proceedings was when she was served with them by post with a very short covering letter within a few days of their issue on 14 September 1998.

I have been told that having decided to make a Hague Convention application the father took no further steps to pursue his earlier expressed ambition to settle in England. As I have indicated, he stayed in England until December 1998 and then returned to Idaho. The submission made on the father's behalf is that in ignorance of the Hague Convention he had gone along with what he saw as the inevitable and formulated his plans accordingly. As soon as he knew of the Hague Convention he acted promptly.

I think that that is probably oversimplistic. I do not think that the father's change of mind can be disassociated from the frustrations he felt he was encountering in securing full contact with J and which led him to make application, unsuccessfully as it happens, for a penal notice. In short, the plan on which he had settled was not working to his satisfaction and specifically alerted to the Hague Convention alternative he decided to alter course. Whilst I cannot be certain about it I find that to be the probable turn of the father's mind. Accordingly applying my findings of facts in the light of the legal criteria as I have outlined I find as a fact in this not entirely straightforward case that the mother has established acquiescence.

What is the consequence of that? Article 13 provides that if acquiescence is established the court is not bound to order return of the child. The court has a discretion. In exercising that discretion I have very much in my mind that the mother's removal of J in October 1997 was wrongful. Although I have found that the father subsequently acquiesced, the purpose of the Hague Convention remains to deter such action by parents and to ensure that in the ordinary course questions about the arrangements for the child are decided in the court of the child's habitual residence. Those purposes exist precisely because it is in the interests of the welfare of children that they should do so.

J had lived from the age of about 18 months to the age of five years and one-and-a-half months in the USA. Despite that, it is a material fact that there was a change and no doubt a disruption to J's life and associations when she moved in May 1997 from Washington State to Idaho.

If J now returns to the USA with her mother there is no doubt that contact with her father

would be easier to establish and maintain on a routine basis than if J's parents live on opposite sides of the Atlantic Ocean. Contact could, of course, be maintained, but with less frequency and perhaps with less informality than otherwise. The advantage to J in respect of contact if she were to return could, of course, be replicated if the father resurrected his plan to settle in England.

As I exercise my discretion in the light of the circumstances as they are today I am influenced by the fact J has now been living in England with her mother and with, or close to, her maternal grandparents for the last 19 months. Over these important years of just over five to nearly six and three-quarters, J has undoubtedly become settled in her present circumstances. She has started her formal education at primary school. She has settled to it and is, I understand, doing well. Looking at J's welfare alone and questions of contact apart, important though they are, there is a strong welfare case for not disturbing J's present arrangements and really no welfare case for a return. The purpose of the Hague Convention, the desirability for prompt action and a speedy return of a child to her home and home area for arrangements by her home court has been substantially frustrated by the passage of these many months in J's young life.

I acceded to a request for J to be seen by the duty court welfare officer at this court yesterday for reluctant reasons which I gave at the time. Mr Reilly saw J, who does not want to go back to the USA, but is, not surprisingly, unable to articulate her reasons beyond saying it would make her mummy sad. Whilst mother would undoubtedly be unhappy were she obliged to return to the USA that is to a degree consequent upon her wrongful action back in October 1997. Nevertheless, it is a factor to which I have regard in exercising my discretion, because if the mother is miserable that will have an adverse impact on J's welfare.

I should add that I do not find J of an age and maturity for her views to carry weight beyond the fact that she is rightly concerned that her mother would be unhappy, a fact that is not in dispute in this case.

Weighing all those matters up, the particularly sharp dilemma I find myself with is whether to order a return with the adverse consequences to which I have referred, adverse consequences for J, with a view: (a) to leaving to the Idaho court decisions as to the future of J; the live issue apparently being contact; and (b) to creating the possibility, on one possible outcome, for J to be living comparatively close to her father, so that routine contact may be realistic; or, on the other hand, whether to decline to order a return so as to spare J the major disruption that would be inevitable after the time that has passed, with a view to leaving the English court to decide about J's future. It would still remain open to the father to consider his own long-term plans, as he did in 1998. It is my duty to weigh that balance and the other matters relevant to the exercise of my discretion as best I can and to reach a judicial decision upon it.

In all the circumstances, I have reached a conclusion that the right way to exercise my discretion is by declining to order return of J to the USA. Accordingly, the father's application will be dismissed.

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