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[12/02/1999; Court of Appeal (England); Appellate Court]
Re C. (Abduction: Grave Risk of Psychological Harm) [1999] 1 FLR 1145, Fam Law 371

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

12 February 1999

Nourse, Auld, Ward L.JJ.

In the Matter of C.

The Appellant Father appeared in person

M Scott-Manderson for the Respondent Mother

WARD LJ: This is an appeal by the father of two children against the order of Connell J made on 6 July 1998 whereby he dismissed the appellants application for the return of the children to California pursuant to the Hague Convention on the Civil Aspects of International Child Abduction 1980 enacted by the Child Abduction and Custody Act 1985.

The facts

The appellant (whom I shall call the father) married the respondent (the mother) at the beginning of 1988. Their son M, also known as A, was born on 28 December 1988 and their daughter L on 30 June 1990. At the time of the judges decision, they were aged nine and a half and eight. Their marriage broke down and they separated towards the end of 1993. On 27 January 1994 the Superior Court of California, County of Los Angeles, dissolved their marriage and made a detailed order with regard to the children providing that they should have joint legal custody, in the exercise of which neither should change the state of residence of the children without the written consent of the other or further order of the court. Neither parent was to make unilateral decisions without consulting the other regarding the education of the children. There were detailed provisions for the fathers visitation every other weekend and for longer periods during school holidays.

Later in 1994 the mother met another man and she married him at the end of that year. I shall call him the step-father. They have a daughter E, born in July 1997. An unhappy feature of the case is the intense hostility which the two men showed to each other. The father alleged that the step-father had assaulted him and obtained an injunction to restrain the molestation. Relationships deteriorated throughout 1995. On 31 January 1996 the Superior Court revised the visitation arrangements and directed that neither party should remove the children from the seven southern Californian counties without the written consent of the other party and that neither should change the state of residence of the children without the others consent. On 15 February 1996 the mother complained to the Juvenile Court of the fathers physical abuse of the children including but not limited to hitting M with a belt buckle and with his fist, and hitting L

with a belt buckle, hitting her in the face with his hand and stamping on her foot. Charges were laid that there was a substantial risk that the children would each suffer serious physical harm and separate charges that they would suffer serious emotional damage and that they had been subjected to acts of cruelty. On 28 August 1997 the court found the charges of serious physical harm to have been established but they dismissed the allegations of serious emotional damage and cruelty. The father has never accepted the correctness of that decision and immediately appealed to the Court of Appeal of the State of California, Second Appellate District but, perhaps because of the events which have since happened, the appeal has, so far as we know, not yet been heard. The Juvenile Court ordered that the father was to have monitored visits with the minors in a therapeutic setting and a programme of counselling was directed.

On 21 November 1997 the Juvenile Dependency Court ordered that the mother be permitted to take both minors to England for a Christmas visit from 19 December 1997 to 1 January 1998. She gave an address in Merseyside where she would be staying. It was the home of her mother-in-law. The mother failed to return to California with the children on the due date. Enquiries made by the father revealed that on 3 December 1997 the mother and her husband had transferred their matrimonial home for valuable consideration. Their telephone contact numbers had been discontinued. They had vacated the hotel where they had been temporarily lodging. On 16 January 1998, the Californian social worker wrote to the mother at the address given for her in England to ascertain her views. On 26 January the Californian Court issued an arrest warrant for the mother. The father also alleged a breach of the Californian Penal Code by her depriving him of his rights of visitation.

The father then invoked the Hague Convention and by 30 January 1998 the US Central Authority sought the help of the authorities here and on 3 February the originating application was issued seeking the children's return. On 4 February 1998 Stuart-White J made the first order for the Court Tipstaff to seek and locate the children. Coincidentally on the same day the mother telephoned the children's social worker in California in response to her letter and informed her that she and the step-father had attempted to return to the United States after their vacation but that the step-father was denied residency. She stated she was residing at the same address that they provided for their vacation. The step-father stated that his working visa had been revoked due to a criminal assault charge made against him by the father. He said that he did not wish to remain in England because he considered America to be his home having resided there for the previous 13 years. He told the social worker that he had filed an application with the American Embassy to seek permission to return but that he did not know how long that process would take. The Tipstaff's efforts to find the children were frustrated and it seems quite clear to me that the mother was intent upon evading service. Eventually, after help had been sought from British Telecom plc and after an order had been made for the step-fathers mother to attend for cross-examination, the mother appeared before the court on 6 March. A fortnight later she filed her statement of defence asserting firstly that there was a grave risk that the return of the children would expose them to physical or psychological harm and otherwise place them in an intolerable position and secondly that they objected to being returned to America. Directions were accordingly given for the children to be seen by the court welfare officer who was to report.

Meanwhile concurrent proceedings were taking place in America. On 6 February the Juvenile Court terminated its jurisdiction, recalled the warrants for the arrest of the mother and the children but made Family Law orders giving the sole physical custody of the children to the mother with joint legal custody to both parents. The matter was ordered to the Family Law Department of the County. The father duly applied to the Superior Court for modifications of the original custody order. Eventually on 16 June 1998 the Honourable Justice Haber made a conditional order for the return of the mother and children subject to the dismissal by the High Court in London of the mothers art 13(b) defence. Thus, with the Californian Court standing by ready and willing to conduct a hearing in August to resolve the disputed issues if the return of the children were to be ordered, the matter came before Connell J on 6 July 1998. To bring

matters up to date, I should add that Justice Haber has set a date some days hence should this court decide to return the children.

The judgment of the court below.

It was accepted on the mothers behalf that her retention of the children was wrongful and contrary to art 3 of the Hague Convention. Equally there was no issue but that the children had been habitually resident in California prior to that retention. The live issues were whether the mother had proved any of the so-called defences under art 13 of the Convention which in its relevant terms provides as follows:-

"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 -

...

(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.

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 obtained an age and degree of maturity at which it is appropriate to take account of its views."

Connell J then directed himself as follows:-

"I remind myself that the onus of proof is upon her. If she has proved any of these defences within Article 13, then this court must go on to exercise its discretion and decide whether or not to order the children to return in all the circumstances of the case...."

That was a correct direction though one observes that he did not remind himself of the high threshold that has been set to establish these defences nor of the cogency of the evidence necessary to discharge the burden of proof which lies on the defendant. I shall return to this shortly.

So far as exposure to physical harm was concerned the judge concluded that as contact would be monitored by the Californian court, that limb of the mothers defence was not made out.

Turning to psychological harm, the judge observed:-

"Here the situation is not as satisfactory as it might be, because there is no expert evidence on this aspect of the case other than the evidence from the welfare officer."

He recited the welfare officers conclusion which was that:-

"While the Los Angeles Juvenile Court had jurisdiction, the children were adequately protected from any further physical or psychological harm from the plaintiff father. I note the view put forward by the children's attorney in California that since the plaintiff father is not complying with Court Order treatment the children by implication continue to be at risk. The view expressed by the children's attorney that the family should not be split up in order to accommodate the fathers visitation privileges, is a compelling one. To do so in my view would place the children concerned in an intolerable position and would in itself risk profound psychological damage."

The judge held that this evidence was very persuasive. He referred to other passages in the report including these:-

"The children's thoughts and feelings about the father are dominated by their painful memories of what they consider to be his cruel and harsh mistreatment of them in the past, their anxiety and fear about his continuing involvement with them, which they see as maybe ruining their lives, and their desire to be left alone by him in the security of the family unit with their mother, step-father and little E. ...

While the memories (of being hit by the father) did not seem particularly vivid or pressing upon either child, the fear of their father engendered by the experience and their resistance now to having anything to do with him certainly were real and very much alive. ...

Distance, the welcome and support provided by the step-fathers family and the absence of the pressures caused for M and L by court-ordered counselling, conjoint therapy and supervised contact meetings with their father, contrary to their express wishes, all combine to make this country feel as if it offers a safe refuge and a fresh start. ...

As regards the prospect of remaining here in this country, both children say how much they want to do so. This is because they are extremely resistant to having any further contact with their birth father, the plaintiff, and because they are so attached to their mother and step-father upon whom they are dependant for their every need. ...

They feel very strongly that they should not be returned to California because as far as they are aware that would mean being denied their wish to remain in their present family unit, and being forced to have occasional contact on a supervised basis with the plaintiff contrary to the wishes they have consistently expressed to all concerned since their mistreatment by him. Both children object to being returned to California on that basis."

The judge then held that:-

"So far as (the court welfare officer) is concerned I stress that his view is not conclusive on any matter in this case. The decision lies fairly and squarely with the court. Equally his view, in my judgment, is an important view on matters relating to these children."

The judge then said he bore in mind that if the children were returned the mother would accompany them but the step-father could not because he had been refused re-entry. It was not clear to him whether E would return with the mother or remain here. He took account of the fathers undertakings to provide the mother with accommodation and financial support and of her ability to litigate before the Californian courts. Then he said:-

"There is however another important aspect of the mothers situation as it would be, were she to return to California, as she would if the children were ordered to go. For some time now the question has been ventilated as between the parties as to whether or not the father would offer to the mother and to this court an undertaking that he would not seek to promote a prosecution of the mother in California. The mother's situation there is that she has wrongfully retained the children away from the Californian jurisdiction and she, as I understand it, is at risk of criminal prosecution being put in train as a result of the charge, akin to that of kidnapping, of her children. As far as that matter is concerned one would have expected a father who genuinely has the best interests of his children at heart ... to offer the undertaking sought straight away. ... Throughout the proceedings the father has not been able or willing to offer the undertaking sought. Indeed when submissions were made after the evidence had been considered on Friday afternoon, the fathers counsel was still not able to obtain instructions from the father to offer the undertaking which had been sought. This morning when the court resumed, the court was told of a dramatic change in the fathers situation. He apparently had reflected upon the situation over the weekend and had reached the conclusion that he had shown insufficient forgiveness to the mother in relation to her conduct concerning her children. In those circumstances, and despite his steadfast earlier refusal to offer the undertaking sought,

he did through counsel offer the undertaking ... not to seek promote a prosecution of the mother in effect for kidnapping the children from California."

The judge then asked whether that undertaking was reliable and said:-

"My conclusion must reflect the undoubted fact that there is and has been over a significant period of time great hostility between this father and this step-father and this mother. In my view, given the history of the case it is very likely that the father will repent of recent change of heart once the mother and children return, if they do to California. ... From the mothers point of view, if she returns, as she will if the court orders that the children return, she will be in at best a most uncertain and unsatisfactory position. ... She will believe herself to be at risk from prosecution and from possible removal of her liberty. And her state of mind will be such that she will be put under further distress because of the history of the matter, in particular in relation to the undertakings. She will be under stress already because her husband cannot go with her. She will either have a young daughter with her who is deprived of the company of her father or she wont have a young daughter with her which will further upset her. ... She will, even for a short period of time, in my judgment, be significantly handicapped from performing the functions expected of a mother of children of this age."

The judge then concluded that the court welfare officers fears and his opinion on the risk of psychological harm were well founded and he held that the mother had therefore brought herself within art 13 (b). He continued:-

"As to the tolerability of the children's situation it would, in my judgment, be intolerable for these children to be faced by a situation in which they were in a jurisdiction where they did not wish to be, being looked after by a mother who was subject to the stresses and strains to which I have referred. The mother makes out that aspect of her Article 13 (b) defence."

Dealing with the children's objections which he accepted they held, he asked whether it was appropriate to take account of their views. In this regard he had the evidence of the welfare officer that:-

"Though L aged seven and M aged nine show no signs of developmental delay and have achieved a level of cognitive and emotional understanding commensurate with their respective ages I do not think they are sufficiently mature for their objections to be determinative."

He held:-

"These children are, in my judgment, of an age where it would be wrong- wholly wrong - to ignore their views. That does not mean that their views are decisive or determinative of the issue. But given their ages and degree of maturity, in my judgment, it is appropriate for this court to bear their views in mind and to take account of their views given that they do object to being returned, as I have described, when I come to carry out the discretionary exercise which is vested in the court.

Accordingly the mother has, in my judgment made out the limbs of Article 13(b) and Article 13 generally as described in this judgment."

The judge then turned to the exercise of the discretion vested in the court. He bore in mind that the mothers conduct was not praise-worthy conduct in wrongfully retaining the children. He took account of the purpose of the Convention to secure the speedy return of children to the jurisdiction of the court of their habitual residence. He bore in mind that the Californian court was ready and willing urgently to deal with their case. He took account of the family's wish to settle in England and said:-

"I bear in mind that the father does seek orders relating to the custody of these children. But, in my judgment, his prospects of achieving such a result given the history of this case are remote in extreme. ... There is, in my judgment, the overwhelming prospect, if the children are returned to California, that the court there will permit their eventual return here with their mother. And it cannot be, in my judgment, in their best interest to require them to return with the consequent anxieties which that would produce against the probability, if not the certainty that they would in due course be permitted to return here.

If one adds to that the real risk which I have described that this mother might, if not be subject to prosecution, at least continue to feel anxious about the possibility, then the conclusion to which, in my judgment, this court ought to come in the exercise of its discretion becomes clear."

His conclusion was that it would not be appropriate for him to order the return of the children and so he dismissed the application.

The appeal

The father now presents his appeal in person. The case began before a different constitution of this court in November 1998 but was adjourned in order to give the parties the opportunity to avail themselves of the courts Alternative Dispute Resolution service to seek some mediation of their difficulties. That attempt failed and so the father has pursued his appeal. He has submitted a lengthy written argument and advanced his case with moderation, courtesy and no little skill. Mr Scott-Manderson, who did not appear below, has made his usual helpful contribution on the mothers behalf and I am grateful to him. From their submissions I can confine the issues which appear to me to be pertinent to this appeal to the following:-

1 The purpose of the Convention and the proper approach to art 13.

The most authoritative statement of the purpose of the Convention was given by Lord Browne-Wilkinson in Re H (Abduction: Acquiescence) [1998] AC 72,81 [1997] 1 FLR 872, 875E:

"The recitals and Article 1 of the Convention set out its underlying purpose. Although they are not specifically incorporated into the law of the United Kingdom, they are plainly relevant to the construction of an International Treaty. The object of the Convention is to protect children from the harmful effects of their wrongful removal from the country of their habitual residence to another country or their wrongful retention in some country other than that of their habitual residence. This is to be achieved by establishing a procedure to ensure the prompt return of the child to the state of his habitual residence."

As for the court's approach, one of the earliest judgments of this court was given by my Lord, Nourse LJ, in Re A (A Minor) (Abduction) [1988] 1 FLR 365, 372H-F where he said:

"It is important to remember that (the judge) had already taken the material words in Art. 13 (b) to mean that the risk has to be more than an ordinary risk, or something greater than would normally be expected on taking a child away from one parent and passing him to another. I agree with Mr Singer, who appears for the father, that not only must the risk be a weighty one, but it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words or otherwise place the child in an intolerable situation. It is unnecessary to speculate whether the eiusdem generis rule ought to be applied to the wording of an International Convention having the force of law in this country. Assuming that it ought not, I nevertheless think that the force of those strong words cannot be ignored in deciding the degree of psychological harm which is in view."

The following year in Re C (A Minor) (Abduction) [1989] 1 FLR 403, 413D-F, Lord Donaldson of Lymington MR said:

"We have also had to consider Article 13, with its reference to psychological harm. I would only add that in a situation in which it is necessary to consider operating the machinery of the Convention, some psychological harm to the child is inherent, whether the child is or is not returned. This is, I think, recognised by the words or otherwise place the child in an intolerable situation which cast considerable light on the severe degree of psychological harm which the Convention has in mind. It will be the concern of the court of the state to which the child is to be returned to minimise or eliminate this harm and, in the absence of compelling evidence to the contrary or evidence that is beyond the powers of those courts in the circumstances of the case, the courts of this country should assume that will be done. Save in an exceptional case, our concern, ie, the concern of these courts, should be limited to giving the child the maximum possible protection until the courts of the other country ... can resume their normal role in relation to the child."

There are other expressions of the high standard the defendant must meet. In B v B (Child Abduction: Custody Rights) [1993] Fam 32, 42, sub nom B v B (Abduction) [1993] 1 FLR 238, 247A, Sir Stephen Brown P spoke of a very high degree of "a very high degree of intolerability [which] must be established in order to bring into operation art 13 (b)." It is not without significance that in 1995, Butler-Sloss LJ in Re M (Abduction: Undertakings) [1995] 1 FLR 1021, 1026C-D was able to comment:

"It is, however, important to recognise, to my knowledge at least, no English court has yet found circumstances to meet the stringent requirements under Article 13 (b), nor do I believe they have been met in the Convention Countries with which we principally are concerned, such as the USA, Canada, Australia and New Zealand."

The high water mark was reached for the first time in Re F (A Minor) (Child Abduction: Custody Rights Abroad) [1995] Fam 224, sub nom Re F (Child Abduction : Risk if Returned) [1995] 2 FLR 31 where the Court of Appeal found the Art 13 defence was established. Even then, Sir Christopher Slade observed at 238 and 43G-H respectively:

"I understand that the courts of this country are only in rare cases willing to hold that the conditions of fact which give rise to the courts discretion under Article 13 (b) are satisfied. They are in my view quite right to be cautious and to apply a stringent test. The invocation of Article 13 (b), with scant justification, is all too likely to be the last resort for parents who have wrongfully removed their child to another jurisdiction."

There is, therefore, an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence.

I have already observed that Connell J did not expressly direct himself to the stringency of the test he should adopt. I would not allow the appeal for that reason alone because Connell J is a judge of vast experience, one of the small number of specialist judges who deal regularly with these cases and whom I would therefore confidently expect to be well aware of the need for caution. That, however, does not absolve this court on our rehearing the matter from testing his findings of fact against the high standard which, in my judgment, it is vital that our courts maintain in order to give full effect to the purpose of the Convention so to carry out our international obligations. The stringent test must be enforced, not diluted.

In approaching our review of the judges findings, I bear in mind that he reached his conclusions from the same written material placed before him as is now before us and he did not, therefore, enjoy that special advantage which the trial judge so often enjoys over the appellate court of seeing and hearing the witnesses give evidence and judging their credibility

accordingly. They judge the person; we judge the page. Although, therefore, the appellate court can, in circumstances like this, more easily conclude that a finding is against the weight of the evidence, nonetheless we must give due weight to the judges conclusions and must be slow to disturb his decision.

2 The basis of the findings of grave risk of psychological harm.

The particular factors which weighed heavily with the judge were the effect of splitting the family and the uncertainties of the mothers prosecution in the light of the unsatisfactory undertaking given by the father.

Before I consider those specific aspects it is important to note that the judge discounted the risk of physical harm to the children should they be returned to the United States because he was satisfied the Californian Family Court would be able speedily to exercise its jurisdiction and protect the children from exposure to physical harm. It is difficult to see why their intervention cannot also reduce the risk of psychological harm. The judge appears to have given no particular weight to the conclusion of the court welfare officer that:

"while the Los Angeles Juvenile Court had jurisdiction the children were adequately protected from any further physical or psychological harm from the plaintiff father". (My emphasis is added.)

The court welfare officer did go on to say:

"I note the view put forward by the children's attorney in California that since the plaintiff father is not complying with court treatment the children by implication continue to be at risk."

The father tells us - and there was some evidence of this before the judge - that in fact he completed the relevant treatment to the satisfaction of the therapists and we were referred to their reports to substantiate that claim. Be that as it may, for my part I cannot see why the Californian court cannot by restriction of visitation or the imposition of monitoring or in some other way protect these children from any emotional harm they may suffer from their father. That is something distinct from any upset inherent in the return itself.

Moreover, as the father trenchantly observed, the anomalous position has now arisen where, on the one hand, the Juvenile Court found that the children were at risk from physical harm but Connell J did not find such risk to be significant enough to prevent their return, yet, on the other hand, he did conclude there was the risk of psychological harm whereas the Juvenile Court had dismissed the charges that the children were at substantial risk of suffering serious emotional damage evidenced by severe anxiety depression withdrawal untoward aggressive behaviour towards self or others as a result of the conduct of the father.

I turn to the two particular factors relied on by the judge, and I deal firstly with splitting the family:

(1) The only evidence before the judge, at least so far as the papers before us reveal, was the wife's assertion in her affidavit sworn on 30 March 1998 that:

"I am not prepared to return to the United States without my husband and daughter, E. Both M and L have a close and loving relationship with me, my husband and E. Any separation from us will severely damage them. Indeed the children's attorney has said she would not support any such separation." (My emphasis added)

Nonetheless the judge appears to have proceeded upon the basis that it was plain the mother would accompany the elder children if they were ordered to be returned to the United States.

Her change of position must have become common ground. The judge then commented on the uncertainty about her plans for E and the difficulties this would create for her. He did not deal with that in the way which Butler-Sloss L.J. disposed of a similar dilemma in Re C (A Minor) (Abduction) [1989] 1 FLR 403, 410E-F where she took the view:

"Is a parent to create a psychological situation, and then rely upon it? If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who moved him out of the jurisdiction and refused to return. It would drive a coach and four through the Convention..."

The uncertainty in the mothers position has now been compounded by the mother having temporally separated from her husband. This was information given to us by Mr Scott-Manderson. He informed us that she is anxious for a reconciliation but this breakdown in her marriage has understandably placed her under great stress. The step-father is a British subject and his roots are in Merseyside. The mother, like the father, was born in Mexico though she lived in California. Her roots are there and she has no other connection with England than those obtained through her husband. We know no more than that and those facts serve only to heighten the uncertainties. One possibility is obvious: she and the three children may now voluntarily return home to California without the step-father.

(2) That the family might be split was a matter which was or ought to have been known to them and it was a factor which, if they had given full and frank disclosure of their position, ought to have been revealed to the Californian court and to the father at the time they sought permission for their purported holiday. The step-fathers employment authorisation card had expired on June 16th 1997 and the documents before this court show that they were denied a renewal on June 6th 1997 by Mr Hollister (Officer in the Immigration (on the date) for our interview). They left the United States knowing full well that the step-father was likely to be refused re-entry. They should not have embarked upon an Xmas visit from which the family could not return intact. By their own actions they created the adverse conditions upon which they now seek to rely. It does not avail them to complain that one of the matters which may have affected the Immigration Authorities was a criminal conviction for an assault committed by the step-father against the father and possibly for another violation of the restraining order the father had against him. The evidence before us suggests that he had a prior conviction for an assault against someone other than the father.

(3) Relying on these uncertainties misses the vital point that it is really for the Californian court to assess their implications and deal with their consequences. That the family has been temporarily split will no doubt be a factor for the Californian court to bear in mind when considering an application for leave permanently to remove the children from that jurisdiction and to return to the United Kingdom. The Californian court is standing by ready willing and able to resolve these issues.

Secondly as to the husbands undertaking with regard to the pending criminal proceedings, there are two points to note:

(1) There was no evidence before the court in which the mother articulated any fear or anxiety about her position. She did not allude to it at all in her affidavit. In his judgment, Connell J said:

"For some time now the question has been ventilated as between the parties as to whether or not the father would offer to the mother and to this court an undertaking that he would not seek to promote a prosecution of the mother in California."

The father told us that the first he knew of a request for such an undertaking was when it was mentioned to him in court on the Friday. We called for the production of any letters in which

the request had been made. None was forthcoming. It is, therefore, difficult to know upon what basis the judge proceeded. We do not know what explanation, if any, counsel for the father gave for the fathers initial reluctance. He tells us in his skeleton argument:

"I wanted to offer such an undertaking but I though that it was up to California court to approve it and to enforce it."

He pointed to the steps he had taken to enable the Californian courts to be seized of the problem and he may well have been in confusion about his position.

(2) The judge expressed his grave doubts about the genuineness of the undertaking. Having heard more from the father, I might not be as harsh but the important point is that the judge has again overlooked that the mother is the author of her own misfortune. As Balcombe LJ said in Re E (A Minor) (Abduction) [1989] 1 FLR 135, 142:

"The whole purpose of this Convention is ... to ensure that parties do not gain adventitious advantage by ... having taken the child, with the agreement of any other party who has custodial rights, to another jurisdiction, then wrongfully to retain that child."

The judge erred in not bearing that in mind when attaching the very significant weight which he did to this factor.

Conclusion about the grave risk of psychological harm.

It appears to me that the judge gave undue weight to each of the factors upon which he relied. Looking at the case in the round, I return to the only evidence of the psychological harm which was before the judge. It was in the court welfare officers report. This was, as the judge recognised, not the best evidence of psychological harm, there being no expert to support it. Nonetheless the senior court welfare officer is a man of vast experience and the judge was fully entitled to act upon his opinion. He ought, however, to have paid heed to the other passages in that report which are material. They are these:

"9.... M and L appear confident of their mothers continuing love for them. They look to her to meet their needs, but are worried about how she could do this if they are required to return to California, knowing that their step-father cannot accompany them. Neither M nor L can comprehend why their family should be split-up ... in order to make them see their birth father, albeit with a therapist there to protect them from harm."

12 The children found it difficult to countenance the life they think awaits them if they are to be returned California. They know that it would be without their step-father. They realise how much they would miss him and are aware of how distressed their mother would be without him. . .

13 They feel very strongly that they should not be returned to California because as far as they are aware that would mean being denied there wish to remain in their present family unit and being forced to have occasional contact on a supervised basis with the plaintiff."

I have highlighted the extent of the children's concerns in order to test that against the conclusion that splitting up the family would of itself risk profound psychological damage. I am quite satisfied that it is too great a leap to take to conclude that this inevitable worry, uncertainty and anxiety about their position were they to be returned can amount to profound psychological damage. Their concerns are inherent in their return. There is nothing approaching the severity of harm which satisfies the stringent test which our courts must be determined to uphold in order to fulfil the purpose of the Convention. I am firmly of the view that this is not a case where there is a grave risk of psychological harm within the meaning of art 13 (b) of the Convention.

A grave risk of placing the children in an intolerable situation.

The same high test applies. In my judgment it is not satisfied simply by the children not wishing to be returned to be looked after by a mother subject to the self-induced stresses and strains to which the judge referred. The judge appears wholly to have overlooked the fact that according to the mothers report to the Californian social workers, the family tried to return to the United States but were prevented by the step-fathers immigration difficulties. Their communication with the USA Embassy in London pleaded that it is imperative for my self and family to hear from you. They clearly had no sufficient anxiety either about fear of physical or psychological harm from the father or of any intolerability facing the children on their return. The refusal of the US Immigration Authorities to permit the step-fathers return is not a justification for the clear purpose of the Convention to be frustrated.

The children's objections

I am far from clear what finding the judge made. He expressed the conclusion that art 13 generally was established though he earlier said that it was appropriate for this court to bear their views in mind ... when I come to carry out the discretionary exercise which is vested in the court. Assuming that he did find their objections to be a defence, we must ask whether it was appropriate to take account of their views in the light of their age and degree of maturity.

The only evidence available to the court was that provided by the court welfare officer. The judge was entitled to rely upon it. The welfare officer had the benefit of seeing the children which the judge did not have. They were then aged 9 and 7 and although they are clearly intelligent, articulate children, nevertheless this experienced officers view was that I do not think that they are sufficiently mature for their objections to be determinative.

There was simply no other material to assist the court in deciding whether or not the views they expressed to the court welfare officer should prevail. Whilst, therefore, I might agree that their views could be taken into account, though the weight given to their wishes might not be great, if and when the time arrived for the carrying out of a discretionary exercise, that stage had not been reached. The question was whether their objections could found and sustain the defence under art 13. In the light of the welfare officers conclusion about their lack of maturity, there was no justification for finding this defence established.

The approach of the court to the views of young children was stated by the court in the judgment of Balcombe LJ in Re S (A Minor) (Abduction: Custody Rights) [1993] Fam 242, sub nom S v S (Child Abduction) (Child's Views) [1992] 2 FLR 492, 501D:

"Thus, if the court should come to the conclusion that the child's views have been influenced by some other person, for example the abducting parent, or that the objection to return is because of a wish to remain with the abducting parent, then it is probable that little or no weight will be given to those views. Any other approach would be to drive a coach and horses through the primary scheme of the Hague Convention."

Here the court welfare officer made the point:

"They are, of course, very much influenced by their mother, who has been their primary carer since birth, and their step-father."

That makes their objections all the more unreliable.

Conclusions

I differ with diffidence from any conclusions formed by Connell J. Nevertheless, having given the matter anxious thought, I am firm in my conclusion that no limb of the art 13 defences is

established by the mother. Accordingly no question of discretion arises because the court is bound to return the children pursuant to art 12. I would not, however, wish to depart from the case without some further consideration of other aspects of Connell Js judgment.

I understand the force of his view, expressed when considering whether or not to exercise his discretion that:

"It cannot be...in their best interests to require them to return with the consequent anxieties which that would produce against the probability, if not the certainty, that they would in due course be permitted to return here."

Nevertheless I am doubtful whether it is appropriate for this court to engage in that speculation. To do so is to usurp the function of the Californian Court. The mother may have an overwhelming case, which the father does not appear to deny, that the children should remain in her care. It is another question whether they should make their home in California or be permitted to leave. The purpose of the Convention is to ensure that that decision is taken by the courts where the children are habitually resident.

I am also very conscious that the children have been away for over a year. Delays in the legal process have not served these children well. That is most regrettable. The father acted very promptly indeed through the proper channels to seek a peremptory order for their return. One only has to ask what the outcome of this case would have been had he been able to have a full hearing on 4 February on the very day the mother was saying that she had made her attempts to return to California. I have no doubt at all that a peremptory order for return would then have been made.

In the result, I am quite satisfied that the mother has not discharged the very heavy burden which lies upon her to establish any ground of defence under Art 13. That being so, the duty of the court is to implement the Convention trusting in its underlying thesis that the welfare of these children will be best served by the Californian courts now dealing with their future. Subject to the undertakings which have been given, I would allow the appeal and order the return of the children to California.

AULD LJ: I agree.

NOURSE LJ: I also agree.

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