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[30/11/1998; High Court (England); First Instance]
Re L. (Abduction: Pending Criminal Proceedings) [1999] 1 FLR 433



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**IN THE HIGH COURT OF JUSTICE**

**FAMILY DIVISION**

**Royal Courts of Justice**

**30 November 1998**

**Wilson J.**

**In the Matter of re L.**

**Counsel: Michael Nicholls for the father; Kharin Cox for the mother**

**Solicitors: Heald Nickinson for the father; Dawson Cornwell for the mother**

**WILSON J: The plaintiff father, who is American, and the defendant mother, who is Danish, are married and have two children, twins of each sex, who were born on 5 October 1995, so who are 3 years old. The family lived together in Florida until June 1996; in July 1996 the mother removed the children from Florida to Denmark. In November 1997, on the father's appeal from the order of a lower court, the High Court in Denmark ordered that the children be returned to Florida under the provisions of the Hague Convention dated 25 October 1980. On 1 December 1997, in order to preempt the implementation of that order, the mother secretly removed the children from Denmark to England and set up home with them in Portsmouth under a different surname. In October 1998 the father discovered the whereabouts of the children and issued the present proceedings, which are strenuously opposed by the mother, for a summary order for the return of the children to Florida.**

**Mr Nicholls, on behalf of the father, alleges that there are four alternative jurisdictions which the court might invoke in making an order for a return:**

**(a) jurisdiction under the Hague Convention, which has the force of law by virtue of s 1(2) of the Child Abduction and Custody Act 1985; as I will explain, Mr Nicholls argues for the invocation of this jurisdiction in three different ways;**

**(b) jurisdiction by way of enforcement of the order of the High Court in Denmark under the European Convention dated 20 May 1980, which has the force of law by virtue of s 12(2) of the 1985 Act;**

**(c) jurisdiction by way of enforcement of the same order under the Brussels Convention dated 27 September 1968, which has the force of law by virtue of s 2(1) of the Civil Jurisdiction and Judgments Act 1982; and**

**(d) the inherent jurisdiction of the High Court.**

**The rival arguments require me to notice the following circumstances relating to the Danish proceedings, to civil and criminal proceedings in Florida and to extradition proceedings here:**

**(i) On 13 January 1997 the circuit court in Palm Beach, Florida, found that the mother's removal of the children to Denmark had been wrongful and awarded their interim custody to the father.**

**(ii) In or before March 1997 the father issued the proceedings in Denmark under the Hague Convention.**

**(iii) On 10 April 1997 the circuit court in Palm Beach refused the mother's application to vary its orders dated 13 January 1997; the mother had supported her application by oral evidence from Denmark by telephone.**

**(iv) On 17 September 1997 the bailiff's court in Esbjerg, Denmark, refused the father's application under the Hague Convention. It found that in March 1997 the father had acquiesced in the children's removal. It seems also to have found that there was a grave risk that the return of the children to Florida would expose them to psychological harm or otherwise place them in an intolerable situation. It appears that it may also have found that the children were settled in their new environment and have held that such was a defence in that, by the date of the order, more than a year had expired since the wrongful removal.**

**(v) On 12 November 1997 the western division of the High Court in Denmark allowed the father's appeal and made an order for the children's return to Florida. The High Court reversed the finding of the bailiff's court that the father had acquiesced in the removal. Miss Cox, on behalf of the mother in the present proceedings, expresses perplexity that the other limb or limbs of the decision in the court below was or were despatched by the single phrase that 'no information had been brought forward to justify' it or them. In my view the court meant that the evidence in the lower court was not strong enough to sustain its findings. At all events I have refused to grant Miss Cox an adjournment for that and other matters to be explored.**

**(vi) On 5 December 1997 the mother was due to appear again in the bailiff's court in Denmark so that detailed directions could be given for the children's return to Florida; but 4 days beforehand the mother had disappeared with the children to England. The Danish police were ordered to locate her.**

**(vii) On 9 June 1998 a grand jury in Florida charged the mother with the criminal offence of international parental kidnapping, apparently as from November 1997; and a warrant for her arrest was issued by a criminal court in Florida, namely the district court.**

**(viii) On 2 July 1998 the circuit court in Palm Beach converted the interim order for custody in favour of the father into a full order.**

**(ix) On 11 August 1998 in Denmark the mother applied by her lawyer to the bailiff's court for the proceedings heard in 1997 to be reopened in order that she could seek to establish, for example by reference to proposed evidence of a child psychologist, that by then there had**

**arisen a grave risk that the return of the children to Florida would expose them to psychological harm or otherwise place them in an intolerable situation. The mother's whereabouts were not disclosed.**

**(x) On 14 October 1998, following discovery of the mother's presence in England, the US government asked the UK government to arrest her in anticipation of a request for extradition.**

**(xi) On 16 October 1998 the mother was arrested, taken to Bow Street Magistrates' Court, charged and bailed on terms including a prohibition upon her departure from the UK.**

**(xii) Meanwhile on 15 October 1998 the present proceedings had been issued.**

**(xiii) On 4 November 1998 the bailiff's court in Denmark refused the mother's application to reopen the proceedings. The pendency of the proceedings in England was a major factor in the decision.**

**(xiv) On 13 November 1998 in Denmark the mother filed notice of appeal against the decision dated 4 November 1998 but the appeal has not yet been heard.**

**(xv) Under UK rules, the US government must submit its case for the mother's extradition to the Home Office by 14 December 1998, whereupon the latter will decide whether to authorise the application for the mother's extradition to be continued.**

**Of the three arguments of Mr Nicholls under the Hague Convention, the first is that I must take the order of the Danish High Court dated 12 November 1997 as conclusive evidence that the father's case under the Convention is made out and that none of the defences articulated in the Convention is available to the mother. He submits correctly that the prompt return of children wrongfully removed from the State of their habitual residence is the principal object of the Convention (Art 1) and that central authorities are charged with the duty to promote co-operation amongst the competent authorities of all Contracting States to secure that object (Art 7). He suggests that the draftsmen of the Convention failed to provide specifically for the case where, after an order under the Convention has been made but not implemented, the children are wrongfully abducted to a third Contracting State; but he submits that in such a case loyalty to the principal object of the Convention requires me to draw upon common-law rules as to the recognition and enforcement of foreign judgments.**

**Mr Nicholls relies on Re O (Child Abduction: Re-Abduction) [1997] 2 FLR 712. There a Swedish mother removed children from California to Sweden in breach of the rights of an American father. On 6 February 1997 the father's application to a Swedish court for an order for the return of the children under the Hague Convention was dismissed. On 27 May 1997, while his appeal was pending in Sweden, the father wrongfully removed the children to Denmark and thence, on 29 May 1997, to England en route for the USA. Following his arrest in England the father applied to the English court for an order under the Hague Convention and argued that, notwithstanding the proceedings in Sweden, the English court should decide for itself whether his claim was made out. Holman J declined to entertain his application. At 719E-H he said:**

**'. . . one objective of the Convention is to provide an effective mechanism for the prompt return of children through administrative and judicial procedures so that people in the position of the father in this case do not resort to self-help and secondary abduction. In my judgment, it would run quite counter to this objective if a parent who had failed to procure**

**the return of his child from one Contracting State could successfully obtain a rerun of his application by himself abducting the child to or via another Contracting State.**

**. . . the machinery of the Convention, read as a whole, essentially contemplates a summary procedure to be operated once only . . . Thus, if a child is abducted to England and, within proceedings under the Convention, the court decides that, because of the discretions under Art 13, it should not be summarily returned, the force of the Convention insofar as it relates to summary return is then spent. There cannot be second or subsequent applications under the Convention.**

**In my judgment, that principle and approach must apply no less forcefully just because the summary procedure under the Convention has taken place in another Contracting State.'**

**Mr Nicholls says that, just as the father there was denied a rerun of his failed application, the mother here should, for the same reasons, be denied a rerun of her failed defences. But, whereas Holman J declined for such strong reasons even to consider making an order under the Hague Convention, I am being asked to make an order and, in this part of Mr Nicholls' argument, to make it under the Convention. Such an order can be made only if the requirements of the Convention are satisfied and if either the defences which constitute the threshold to the exercise of a discretion are not established or the resultant discretion should nevertheless be exercised in favour of an order for return.**

**In the light of Holman J's analysis, with which I agree, about the impact of the object of the Convention on relitigation, I would not hesitate, in considering what falls to be considered before an order should be made, to apply the doctrine of issue estoppel to the prior adjudication in any other Contracting State of any issue under the Convention which was truly identical. Thus, as Miss Cox accepts, it is not open to the mother in these proceedings to assert that in March 1997 the father acquiesced in the removal; for such an assertion was rejected in the High Court in Denmark.**

**But the two defences which the mother wishes this court to consider under the Convention are not identical to those considered in the Danish court. The mother's main proposed defence is that now, namely in November 1998, in the light in particular of the criminal proceedings launched against her in the USA in 1998, there is a grave risk that the return of the children to Florida would expose them to psychological harm or otherwise place them in an intolerable situation (Art 13(b)). The High Court in Denmark only found that there was no evidence of such risk in 1997.**

**The second proposed defence, namely that the children are now settled in their new environment in England, also raises an issue different from whether they were settled in Denmark in 1997. Indeed, notwithstanding the ostensible conclusion of the bailiff's court, this defence was not even open to the mother in the Danish proceedings since, although the hearing did not take place within a year of the children's removal, the father's application was filed within that period (Art 12 of the Convention and s 11(1) of the Danish statute).**

**I therefore hold that it is not open to me to found an order under the Hague Convention upon the order made thereunder in the High Court in Denmark.**

**Mr Nicholls' second argument under the Hague Convention is that the removal of the children from Denmark to England on 1 December 1997 was wrongful within the meaning of Art 3 and should found an order for their return to Florida.**

**Mr Nicholls may be right to submit that an order under the Convention need not be for the children to be returned to the State from which they are found to have been wrongfully**

**removed. In Re A (A Minor) (Abduction) [1988] 1 FLR 365, 373B-C, Nourse LJ observed, particularly in the light of its preamble, that an order for return to that State was what the Convention contemplated. But in para 110 of the Explanatory Report upon the Convention, which may not have been drawn to the attention of Nourse LJ, Professor Perez-Vera suggests that the wording of the text of the Convention was deliberately left wide enough to cater for special cases, such as where the applicant no longer lives in the State from which the children have been wrongfully removed and where, therefore, they should be returned to a different State.**

**But other grave difficulties beset the second argument. Mr Nicholls submits that the removal from Denmark was in breach of rights of custody attributed to the High Court in Denmark. He relies, first, upon the definition of rights of custody in Art 5, as including the right to determine the children's place of residence; and, secondly, upon B v B (Abduction: Custody Rights) [1993] Fam 32, sub nom B v B (Abduction) [1993] 1 FLR 238 where the Court of Appeal held that the court in Ontario, before which cross-applications for custody were pending at the time of the child's removal and which had already made in interim order for custody, itself had rights of custody of which the removal was in breach. That authority may be a good example of where resort to a degree of artifice is fully justified; but I am not prepared so to stretch the notion as to hold that a Danish court which had decided that it was not the appropriate court to determine the children's place of residence and had ordered their return to Florida for such a determination to take place there held, and was exercising, rights of custody at the time of their removal to England. Furthermore, in that the mother had at all times acted in breach of the rights of the father under Floridan law, I do not accept that by 1 December 1997 she had secured change in the habitual residence of the children from Florida to Denmark. So Mr Nicholls' second argument also fails.**

**Mr Nicholls' third argument under the Hague Convention is the obvious one. It is that the children were wrongfully removed from Florida in July 1996 and should be returned there. So we reach the heart of the case, namely the mother's two defences. I turn to her primary contention that, within the meaning of Art 13(b), there is a grave risk that the children's return to Florida would expose them to physical or psychological harm or otherwise place them in an intolerable situation.**

**The children, says Miss Cox, were taken from Florida when they were babies. It is the mother who has cared for them every day and every night of their lives. The father had occasional contact with them in Denmark between March and November 1997 and has seen them on a few occasions in England during the past month; but the children do not know him well. The mother alleges that he is unfit to care for them for various reasons; but what is incontrovertible is that he has no track record of successfully caring for the children singlehandedly.**

**Miss Cox argues that, in the above context, the custody and in particular the criminal proceedings in Florida present grave risk for the children. In the custody proceedings the court has now invested the father with a full order. But the father would undertake, in a form binding on him in Florida, not to enforce that order for 28 days following the return of the children and the mother in order to give her time to seek interim variation of it. There is nothing in the evidence which leads me to think that, in the event of a return, my colleague in Florida would, whether on an interim or final basis, do other than to evaluate without preconception where the interests of the children then lay. He or she would, I have no doubt, weigh the young age of the children, the mother's history, on one level apparently successful, as their sole carer and the father's absence from their lives for whatever reason, alongside of course the mother's grave irresponsibility as a dual abductor and all other factors relevant to their welfare. He or she would also be told that the father is on record in the Danish**

**proceedings as having then accepted in principle that the children should live with the mother, albeit in Florida.**

**In that the existence of the custody proceedings in Florida therefore gives me no cause for concern, I turn to the criminal proceedings. This was the main focus of Miss Cox's preliminary application to adjourn this hearing: what was the point, she asked, of her persuading me not to make an order for the children's return if in due course the mother were to be extradited to Florida in any event? But I decided to press on.**

**The mother says that, were I to order the children to be returned to Florida, she would, subject to the permission of the Bow Street Magistrates' Court, which would no doubt be forthcoming, elect to accompany them. But, in the light of the criminal proceedings and the warrant for her arrest, what would happen on her arrival? An attorney in Florida gives evidence that she would be arrested, shackled, incarcerated, taken to Tampa, brought before a federal court, arraigned and then either bailed or remanded in custody. The father produces evidence from the prosecuting attorney that, subject to conditions, he would strongly recommend that the court should grant her bail. But, asks Miss Cox, could the mother meet the conditions of bail, for example raise the amount of any recognisance? Would the court act on the recommendation for bail? What would have happened to the children in the meantime? And for this offence, which carries a maximum penalty of imprisonment for 3 years, what might be the ultimate sentence passed upon the mother? The father says that he does not want the mother to be imprisoned, whether in the short or long term, and that, following the return of the children to Florida and the creation of maximum safeguards against re-abduction, he would indicate to the prosecuting authorities that he would not want the prosecution to proceed. But, although such an indication would presumably carry some weight, it is clear that the decision is not in his hands.**

**Miss Cox submits that, unless the prosecuting and criminal judicial authorities in Florida were to make clear to this court that, if the mother and children were now to return, there would be no arrest, no prosecution and no imprisonment of the mother at any stage, the children would be at grave risk of physical or psychological harm in being forcibly separated from the mother upon arrival and/or in the long term following sentence.**

**I do not accept the submission. Many Contracting States, including England and Wales, buttress the provisions of the Convention with criminal sanctions against parental kidnapping of children out of their jurisdiction. Following the mother's second abduction and prolonged disappearance, it was entirely predictable that criminal proceedings would be launched in Florida; indeed it seems to have been the warrant for arrest pursuant thereto which triggered the international police activity that led to the location of the mother and children in England. There is no reason to think that, in deciding whether to continue with the prosecution following any return of the mother and children, the state prosecutor would exclude consideration of the interests of the children; nor that, in deciding whether to grant bail or, in the event of conviction, whether to sentence the mother to any term of imprisonment, the Floridan judge would fail to pay significant regard to their interests.**

**I will not pretend to relish the prospective scene at the US airport upon the arrival of the mother and children. The father would presumably be present in order to look after the children in the very short term. If each parent could show a measure of co-operation and self-control and if the police could discharge their duties in a sensitive manner and convey the mother as swiftly as possible to a judge who could grant her bail, the event need not be damaging to the children even in the very short term. At all events, the mother has failed by a long way to establish that this spectre, together with the uncertain effects of the criminal proceedings in the longer term, creates a grave risk that the return of the children would**

**expose them to physical or psychological harm or otherwise place them in an intolerable situation.**

**The mother's second defence, pursuant to Art 12, is that the children are now settled in their new environment. Miss Cox, to whom the brief for the mother was passed very late, admits that there is no foundation for this defence in the mother's affidavit. But, she says, the omission is the fault of the lawyers, for which the mother and children should not suffer. Towards the end of her submissions she indicated that, were I to permit the mother to give brief oral evidence, it would easily be demonstrated that the children were now settled. But I declined to admit such evidence and my reasoning was -- and is – as follows.**

**The mother might or might not have demonstrated that the children were now settled in their new environment. The proposition is harder to demonstrate than at first appears. In Re S (A Minor) (Abduction) [1991] 2 FLR 1, 24C, Purchas LJ described what was required as a long-term settled position; and in Re N (Minors) (Abduction) [1991] 1 FLR 413, 418C, Bracewell J observed that the position had to be as permanent as anything in life could be said to be permanent. Whether a Danish mother who has been present with the children in England for a year only because it has been a good hiding-place and who faces likely extradition proceedings could demonstrate the children's settlement in England within the meaning of those authorities is doubtful.**

**It, however, she had demonstrated it, then, instead of an obligation to order a return, there would have arisen a discretion in the court as to whether to make the order. In Re S (A Minor) (Abduction), above, at 24B, Purchas LJ noted that the discretion arises from Art 18 of the Convention, which states that:**

**'The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.'**

**At first I wondered whether this was a reference to a power outside the Convention, for example arising in the inherent jurisdiction, in relation to which the children's welfare would be the paramount consideration. But both counsel are agreed, and I am now satisfied, that the power referred to in Art 18, focused as it is upon the return of children who have been wrongfully removed or retained, is a power arising within the Convention and thus by virtue of the 1985 Act; and that the discretion which arises under Art 12 when it is demonstrated that the children are settled in their new environment is analogous to that which arises when any of the matters referred to in Art 13 is established or found. In other words, to use the phrase of Lord Donaldson of Lymington MR in Re A (Abduction: Custody Rights) [1992] Fam 106, 122E, sub nom Re A (Minors) (Abduction: Acquiescence) [1992] 2 FLR 14, 28F the discretion must be exercised '. . . in the context of the approach of the Convention'. The welfare of the children is not paramount but it is a factor; and it is hard to conceive that, if established under Art 12, the settlement of the children could ever be unimportant. But the discretion is to choose the jurisdiction which should determine the merits of the issues as to with whom, and in which country, the children should live and therefore where they should reside in the meantime; that is the context in which, as one factor, their welfare falls to be appraised.**

**I am clear that this is a case where the policy behind the Convention would outweigh the other factors in the exercise of any discretion that might have arisen under Art 12 or indeed, had my finding about grave risk been otherwise, would have arisen under Art 13(b). The mother wrongfully removed the children from Florida. Then she removed them from Denmark in flagrant defiance of an order. If they are settled in their new environment in England, it is because for 10 months she hid them here, with the result that the father could**

**take no earlier action to secure their return. Apart from the fact that the mother was once an au pair here, neither parent had any connection with England prior to 1 December 1997. Florida is where they and the children lived; where the father still lives; and where custody proceedings, in which the mother has participated, have been on foot for almost 2 years.**

**In a moving plea Miss Cox says that the welfare of the children must not be sacrificed on the altar of high-sounding moral principle. I consider that, at least other than in the very short term, the welfare of the children would not be prejudiced by an order for their return to Florida. On the contrary, in resolving some of the paralysing conflicts ranged above their heads in three jurisdictions and in enabling them to begin to enjoy again a relationship with each of their parents, I believe that the order would be likely to be for their benefit.**

**But, if I am wrong and if and to the extent that the order would not serve their welfare, it would not merely be an order loyal to abstract principle. It would be an order contributing in a very small way to the welfare of those numerous other children who live in the Contracting States across the world and whose parents would be deterred from abducting them and re-abducting them and secreting them by a growing public awareness that what would then happen would, in all probability, be an order for return.**

**In that I am resolved to make an order for the return of the children to Florida under the Hague Convention, it is unnecessary for me to consider Mr Nicholls' suggested invocation of the European Convention and the Brussels Convention. The suggested invocation of the European Convention threw up an interesting point: is the decision of the High Court in Denmark under the Hague Convention a 'decision relating to custody', namely a decision which 'relates to the care of the person of the child, including the right to decide on the place of his residence . . . within the meaning of Art 1(c) of the European Convention? It seems to me that opposite answers to that question might each reasonably be given, although the Explanatory Report on the Convention suggests an affirmative. The suggested invocation of the Brussels Convention was surely a longshot.**

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