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[14/11/2002; Second Division of the Inner House, Court of Session (Scotland); Appellate Court]
M.M v. A.M.R. or M

SECOND DIVISION, INNER HOUSE, COURT OF SESSION

LORD JUSTICE CLERK, LORD MACLEAN, LORD WEIR

P991/02

OPINION OF THE COURT

delivered by

THE LORD JUSTICE CLERK

in

RECLAIMING MOTION

in the cause

M. M.

Petitioner and Respondent:

against

A. M. R. or M.

Respondent and Reclaimer;

_____

Act: Miss Hodge; Morton Fraser (Petitioner and Respondent)

Alt: Miss Wylie; Balfour & Manson (Respondent and Reclaimer)

14 November 2002

The petition

[1] This is a reclaiming motion by the respondent against the decision of the Lord Ordinary in a petition under the Child Abduction and Custody Act 1985. The petitioner seeks inter alia an order on the respondent to return the three children of the parties to the United States of America. The petition is founded on the provisions of the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention") to which the 1985 Act gives effect. By Interlocutor dated 18 October 2002 the Lord Ordinary granted the order sought.

The background

[2] The parties have three children born in 1996, 1998 and 2001 respectively. They lived together with the children at the matrimonial home in Michigan until 3 May 2001. On that date, the respondent travelled to Scotland with the children in order to spend a holiday with her parents in West Lothian. The respondent and the children had tickets for the return flight to the United States on 2 August 2001. The petitioner consented to the respondent's taking the children to Scotland for that purpose and for that period.

[3] During July 2001 the respondent informed the petitioner that she had decided not to return to the USA. She and the children have remained with the respondent's parents ever since.

[4] On 16 August 2002 the petitioner presented this petition. If the petition had been brought within the period of one year from the date of the wrongful retention, the court would have been obliged under article 12 of the Convention to order the return of the children forthwith. The Lord Ordinary held that the precise date of the retention of the children was a point on which nothing turned. He appears to have favoured the view that the retention occurred in July 2001 when the respondent informed the petitioner of her decision not to return to the United States with the children. In our view, the retention occurred on 2 August 2001, the date when the respondent acted upon that decision and thereby broke the agreement to which the petitioner had consented. On either view, the petition was lodged only a matter of weeks after the one year period elapsed. We consider that that is a significant factor to be taken into account in relation to the issue raised in this reclaiming motion.

[5] Before 3 May 2001, the children were habitually resident in Michigan. The law of that state confers on the parties joint rights of custody. That state remains the place of the children's habitual residence. The respondent has retained the children in Scotland in breach of the petitioner's rights. At the time of the retention, the petitioner's rights were being actually exercised. It is agreed that the retention of the children was therefore "wrongful" within the meaning of the Convention (cf. art. 3).

The decision of the Lord Ordinary

[6] The Lord Ordinary has set out the relevant provisions of the 1985 Act and of the Convention. Since the issue in this reclaiming motion is a short one, we need not quote them again. The case was argued before the Lord Ordinary on the basis that his decision should be made, for or against the petitioner, in respect of all three children alike. The reclaiming motion has been presented and argued on the same basis.

[7] There were only two issues before the Lord Ordinary; namely (1) whether an order for the return of the children should be refused on the basis that the petitioner had acquiesced in the wrongful retention (art. 13 (a)); and (2) whether the order for return should be refused because the children were now settled in their new environment. On the agreed facts, and on the affidavits and productions, the Lord Ordinary found against the respondent on both issues. He held that on each of them the respondent had failed to discharge the onus incumbent on her. He therefore held that the petitioner was entitled to the remedies that he seeks.

[8] Counsel for the respondent challenges that decision on the first issue only. She submits that the Lord Ordinary erred in two respects in his consideration of the facts.

[9] Counsel for the respondent accepts that the onus of proving acquiescence rests upon the respondent throughout. She accepts that the Lord Ordinary applied the correct test on that question in the context of the Convention, and in particular that he was right in adopting the test formulated by Lord Browne-Wilkinson in In re H & Others (Minors)(Abduction): Acquiescence) ([1998] AC 72 at pp. 87 - 88). According to that test, the court must ascertain the subjective intentions of the wronged parent. That is a pure question of fact. In deciding it the court is likely to attach more weight to the express words or conduct of the wronged parent than to his subsequent evidence as to his state of mind. It is a matter of inferring actual subjective intention from outward and visible acts.

[10] Counsel for the reclaimer argued that in taking that approach to the facts of this case the Lord Ordinary had made two specific errors. First, he had erroneously found that during the period between the retention of the children and the raising of this petition, the petitioner had made over 70 telephone calls to the respondent. The Lord Ordinary had relied on that as evidence pointing against acquiescence. Second, the Lord Ordinary had erred in failing to take proper account of the petitioner's delay in raising proceedings. Counsel for the reclaimer submitted that in the application of article 13(a), the passage of a significant period of time during which a party takes no action to enforce his rights can of itself give rise to a legitimate inference of acquiescence (Friedrich v Friedrich, 78 F. 3d 1060 (1996)). In this case there was such a period of time. When considered against the primary purpose of the Convention, which was to secure the prompt return of children in a case of this kind, the petitioner's inaction indicated acquiescence.

Decision

[11] The starting point in our consideration of this reclaiming motion is that the respondent removed the children from the jurisdiction in which they had been born and brought up and were domiciled, to a jurisdiction with which they had no previous connection. She thereby forced the petitioner to sue in what is for him a distant foreign court in order to enforce his rights. In the framework of the Convention it is the

fundamental duty of this court, since the retention has been wrongful, to order the return of the children to their proper jurisdiction (Soucie v Soucie 1995 SC 134). Article 13(a) provides that we are not bound to do so if the respondent establishes that the petitioner has acquiesced in the wrongful retention. Even if acquiescence were to be established, the court, although not bound to do so, would nonetheless be entitled in its discretion to grant the order. That would involve a wider consideration of the welfare of the children.

[12] In our opinion, both of the arguments put forward by counsel for the reclaimer are unsound. It is agreed that the Lord Ordinary erred in his finding in relation to the telephone calls; but the Lord Ordinary does not suggest in his Opinion that that finding was crucial to his decision. On the contrary, his Opinion shows that his finding on the point was merely one adminicle of evidence in a wider body of evidence that excluded the inference of acquiescence.

[13] We agree that when the question of acquiescence is considered in the context of article 13(a), the lapse of time is a significant consideration. If a petitioner were to delay for a number of years before raising proceedings, that delay alone would almost certainly imply acquiescence. On the other hand, if the delay is only a matter of weeks or months, that delay would not necessarily, in our opinion, be a sufficient basis for the plea. But in all cases of this kind, a delay in the raising of proceedings has to be considered in the wider context of the facts and circumstances as a whole.

[14] The petitioner raised this petition only a matter of weeks after the elapse of the one year period to which we have referred. If he had raised the petition a few weeks sooner, the result of his petition would have been inevitable.

[15] Where delay is founded on as a basis of acquiescence, the first question is whether there is a reasonable explanation for it. The petitioner has offered several explanations for his failure to raise proceedings at an earlier date. We need not go into the details. It is sufficient to say that he had financial problems, which he considered to have been caused in part by the respondent's departure; he had medical problems; and he lost his job. These considerations appeared to the Lord Ordinary to represent a reasonable explanation for the delay.

[16] But there are other significant considerations. Throughout the period from August 2001 to 5 November 2001, the petitioner sent a succession of e-mails to the respondent, all of which clearly conveyed to her the fact that he did not agree to her retaining the children in Scotland. These e-mails also indicated that the petitioner was anxious not to resort to litigation if the matter could be resolved amicably, and that he was deterred by considerations of expense from instructing lawyers in the United States. In the event, in July 2002, after a friend researched the matter on the Internet, the petitioner contacted a Scottish solicitor who informed him of the service offered by the United States Central Authority in assisting citizens of the USA to enforce their rights under the Convention. By then the petitioner had obtained employment and was in a better position to pursue his claim. Finally, it is clear that throughout the period between the retention of the children and the raising of this petition, the petitioner gave no indication of any kind, whether by word or deed, that he acquiesced in the respondent's conduct. His raising of the petition was precipitated by a residence application made by the respondent to the sheriff at Linlithgow.

[17] Our conclusion is that the Lord Ordinary, notwithstanding the error to which we have referred, was entitled on all the material before him to reach the conclusion that he did on the subject of acquiescence. In our opinion, the conclusion that he reached was plainly the correct one on the information before him.

[18] The respondent has therefore failed to discharge the onus incumbent on her under article 13(a) of the Convention and the question of our exercising our discretion whether or not to order the return of the children does not arise. The petitioner is entitled to the order that he seeks.

[19] We shall therefore refuse the reclaiming motion and adhere to the interlocutor of the Lord Ordinary. Paragraph 2 of that interlocutor allows the respondent to apply, if necessary, for prorogation of the period of six weeks for the return of the children to the United States. We understand from counsel for the respondent that her application for a visa to enable her to take the children there is presently being processed. If the visa is not granted in time, it will be open to the respondent to enrol for a prorogation of the six-weeks period.

OUTER HOUSE, COURT OF SESSION GP998/02

OPINION OF LORD MACFADYEN

in the Petition

of

M. M.

Petitioner;

against

A. M. R. or M.

Respondent:

for

An order under the Child Abduction and Custody Act 1985

Petitioner: Ms Hodge; Morton Fraser

Respondent: Ms Wylie; Balfour & Manson

14 October 2002

Introduction

[1] The petitioner and the respondent were married in Las Vegas, Nevada, on 19 December 1993. They have two female children, T, who was born on 14 March 1996, and E, who was born on 5 March 1998, and one male child, K, who was born on 18 January 1999. They lived together at their home in Michigan until 3 May 2001. On that date the respondent and the children travelled to Scotland, in order to spend a holiday with the respondent's parents, who live in West Lothian. They had return air tickets for travel back to the United States on 2 August 2001. The petitioner consented to the respondent and the children travelling to Scotland for that purpose and for that period. In the event, the respondent, while in Scotland, decided that she would not return to the United States. She and the children did not make use of the return air tickets. She intimated her intention of not doing so to the petitioner in the course of July 2001. The respondent and the children remain resident with the respondent's parents in Scotland.

[2] On 16 August 2002 the petitioner presented a petition to this court under the Child Abduction and Custody Act 1985 ("the 1985 Act") alleging that the respondent had wrongfully retained the children in Scotland and seeking an order on the respondent to return them to the United States. After certain preliminary procedure, in the course of which the respondent lodged answers maintaining inter alia that no such order should be pronounced because (a) the petition was presented more than twelve months after the alleged wrongful retention and the children were settled in Scotland and (b) the petitioner had acquiesced in the retention of the children in Scotland, the petition came before me for a hearing on 3 and 4 October 2002.

The Convention

[3] The Hague Convention on the Civil Aspects of International Child Abduction ("the Convention"), so far as set out in Schedule 1 to the 1985 Act, has the force of law in the United Kingdom by virtue of section 1(2) of the 1985 Act.

[4] Article 3 of the Convention provides inter alia as follows:

"The removal or the retention of a child is to be considered wrongful where -(a)it is in breach of rights of custody attributed to a person ..., either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." Article 5 provides inter alia that for the purpose of the Convention "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.

[5] Article 12 provides inter alia as follows:

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

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment."

[6] Article 13 provides inter alia as follows:

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requesting State is not bound to order the return of the child if the person ... [who] opposes its return establishes that - (a) the person ... having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or (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."

[7] Article 14 provides inter alia that:

"In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of ... the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law ... which would otherwise be applicable."

[8] Article 18 provides:

"The provisions of this Chapter [i.e. Articles 8 to 19] do not limit the power of a judicial or administrative authority to order the return of the child at any time." Matters not in issue [9] The respondent did not dispute that the children were, prior to their departure from the United States, habitually resident in the State of Michigan. Nor did she dispute that, if the parties had joint rights of custody according to the law of the State of Michigan, Michigan remained the place of the children's habitual residence. She accepted that it was not open to her to change their place of habitual residence unilaterally. [10] There was no real dispute as to the relevant provision of the law of the State of Michigan as to the petitioner's rights of custody in respect of the children. The averment in the petition does not correctly identify the relevant provision. There was produced in the course of the hearing, however, a print of a Michigan statute, the Status of Minors and Child Support Act (293 of 1968), section 2 of which provides:

"Unless otherwise ordered by a court order, the parents of an unemancipated minor are equally entitled to the custody, control, services and earnings of the minor, but if one parent provides, to the exclusion of the other parent, for the maintenance and support of the minor, that parent has the paramount right to control the services and earnings of the minor."

While Miss Wylie, who appeared for the respondent, did not expressly concede that the effect of that statutory provision was that by the law of the State of Michigan the petitioner, jointly with the respondent, has "rights of custody" within the meaning of Article 3 in respect of each of the children, she did not advance any contrary submission. I have no hesitation in holding that it does have that effect. I am entitled so to hold (a) in the light of the provisions of Article 14 and (b) in the absence of any positive submission to the contrary (Perrin v Perrin 1995 SLT 81 at 85E).

[11] It was not disputed on the respondent's behalf that, if I held that the petitioner had rights of custody under the law of the State of Michigan, the respondent had retained the children in Scotland in breach of those rights. The removal of the children to Scotland was not in breach of the petitioner's rights of custody, because it took place with his consent. The respondent accepted, however, that that consent was for a limited period and a limited purpose. The petitioner had not given his consent to retention of the children in Scotland after 2 August 2001. The retention of the children in Scotland after that date was therefore undoubtedly in breach of the petitioner's custody rights. Miss Wylie submitted, however, that the retention of the children in Scotland became a breach of the petitioner's custody rights as soon as the respondent intimated to the petitioner that she did not intend to bring the children back to the United States. Such intimation was given in the course of July 2001 (see the respondent's affidavit, No. 7/1 of process, paragraph 26; her mother's affidavit, No. 7/2 of process, paragraph 3; and the petitioner's affidavit, No. 6/33 of process, paragraph 12), but the evidence does not justify a more precise finding as to the date on which it was given. In the event, in my opinion, nothing turns on the precise date of the wrongful retention.

[12] The respondent did not dispute that the petitioner had satisfied the second branch of the definition of wrongful retention in Article 3, namely that at the time of the retention his rights were actually exercised.

[13] Finally, it was not disputed that in this case the wrongful retention took place more than one year before the commencement of proceedings before the relevant judicial authority. The relevant judicial authority is

this court (1985 Act, section 4(b)). This petition was presented on 16 August 2002. The wrongful removal, as I have held, took place more than one year earlier, in July 2001. It follows that it is the second, rather than the first, paragraph of Article 12 that is relevant.

[14] Although the answers to the petition contain a plea founded on paragraph (b) of Article 13, Miss Wylie did not advance any substantive submission based on that provision. The only context in which she sought to rely on Article 13(b) was in submitting that any decision which involved returning one or two, but not all three, of the children to the United States would place the returned children in an intolerable situation within the meaning of Article 13(b).

The Issues

[15] In the result, therefore, the parties were in dispute on only two principal issues. These were:

whether return of the children to the United States should be refused because the petitioner had acquiesced in the wrongful retention (Article 13(a)), and

whether return of the children to the United States should be refused because the children were now settled in their new environment (Article 12).

Acquiescence

(a) The Law

[16] In terms of Article 13(a) the court is not bound to order the return of the children if the petitioner has "subsequently acquiesced in the ... retention". The leading case on the meaning of "acquiescence" in Article 13(a) is In re H and Others (Minors) (Abduction: Acquiescence) [1998] AC 72. At 87E Lord Browne-Wilkinson said:

"An international Convention, expressed in different languages and intended to apply to a wide range of differing legal systems, cannot be construed differently in different jurisdictions. The Convention must have the same meaning and effect under the laws of all contracting states. I would therefore reject any construction of article 13 which reflects purely English law rules as to the meaning of the word 'acquiescence'. ...

What then does article 13 mean by 'acquiescence'? In my view article 13 is looking to the subjective state of mind of the wronged parent. Has he in fact consented to the continued presence of the children in the jurisdiction to which they have been abducted? ... In my judgment [this approach] accords with the ordinary meaning of the word 'acquiescence' in this context. 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. ...

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 went on to say that the question of acquiescence is a pure question of fact, and added (at 88E):

"In the process of this fact-finding operation, the judge, as a matter of ordinary judicial common sense, is likely to attach more weight to the express words or conduct of the wronged parent than to his subsequent evidence as to his state of mind. In reaching conclusions of fact, judges always, and rightly, pay more attention to outward conduct than to possibly self-serving evidence of undisclosed intentions. But in so doing the judge is finding the actual facts. He can infer the actual subjective intention from the outward and visible acts of the wronged parent. That is quite a different matter from imputing to the wronged parent an intention which he did not, in fact, possess."

After dealing with an exception which does not arise for consideration in the circumstances of the present case, Lord Browne-Wilkinson went on (at 90E) to summarise the applicable principles as follows:

"(1) For the purposes of article 13 of the Convention, the question of whether the wronged parent has 'acquiesced' in the removal or retention of the child depends upon his actual state of mind. ... (2) The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the

circumstances of the case, the burden of proof being on the abducting parent. (3) The trial judge, in reaching his decision on that question of fact, will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. But that is a question of the weight to be attached to evidence and is not a question of law."

[17] I am, clearly, bound to adopt that approach, given that it was formulated in a unanimous decision of the House of Lords on the interpretation of an international Convention given the force of law in the whole of the United Kingdom by a United Kingdom statute. I was referred to two Outer House cases in which it has been adopted (Dombrowicz v Dombrowicz, 4 May 2001, Lord Carloway, unreported; and J, Petitioner, 23 May 2002, Lady Paton, unreported), although the circumstances of each of those cases were very different from those of the present case. The question in the present case is whether the respondent has proved that, although the petitioner had not consented to the retention of the children in Scotland prior to its taking place, the proper inference from his subsequent words and conduct is that he changed his attitude, accepted in his own mind that the children should stay in Scotland, and thus "went along with" the wrongful retention.

The Facts

[18] I have no doubt that at the time when the respondent intimated to the petitioner that she did not intend to return with the children to Michigan, that was contrary to the petitioner's wishes. In paragraph 12 of his affidavit (No. 6/33 of process) the petitioner explains that when the respondent told him in July 2001 that she was not coming home, his response was to say that he would be at the airport to meet her as arranged. That response is confirmed by the respondent's affidavit (No. 7/1 of process) at paragraph 27. Thereafter there was regular telephone and e-mail contact between the parties. The petitioner's telephone bill (No. 6/13 of process) shows seventy-nine telephone calls to the respondent's parents' number between 10 July and 7 December 2001. I do not find it helpful to examine in detail each party's description of the attitude of the other on the telephone, but it is in my view clear that for a period of weeks, if not months, the petitioner clearly evinced his unwillingness that the children should remain in Scotland. In paragraph 12 of his affidavit, he says: "I did not believe at this time that she intended to stay in Scotland for good." That position is, in my view, broadly borne out by the e-mails of which hard copies have been produced (Nos. 6/14 and 7/3 of process). Several of these were couched in highly emotional terms. In a relatively early one, dated 12 August, the petitioner said: "... divorce - is this what you want - OK by me; but OUR children ... in Scotland no good". The latest of them, dated 5 November 2001, contained the following passage:

"I do not want to fight you because I don't hate you, I am confused about my feelings for you. A war is not my goal. I just want to see my kids grow up, to be their father. You seem to have decided against this.

Our kids belong in the States. You think differently and continue your action. Maybe I will think differently soon too."

[19] Towards the end of 2001 the petitioner's mother offered to pay for him to travel to Scotland. The respondent, however, refused to allow him to stay with her parents, and in the event he did not come to Scotland. In paragraph 15 of his affidavit, the petitioner said:

"After about December 2001 when my wife said that I was not allowed to come and stay with her family at Christmas time I think I finally took it on board that she was not coming back. ... Because of the difficulties in communicating with my family at a distance, contact between us did become less. I however was trying very hard to get my life together again, and to get a job and to deal with the problems I had."

There followed a period of several months during which there was little contact, and nothing done by the petitioner directly with a view to procuring the return of the children to the United States. Considerable weight was placed on that period in the submission on the respondent's behalf that the petitioner had come to acquiesce in the wrongful retention. There is, however, support in the evidence for the last sentence of the passage from the petitioner's affidavit quoted above. The petitioner had been laid off from his employment, because of a lack of work in his area of expertise, on 30 April 2001, a few days before the respondent and the children left for Scotland (see No. 6/15 of process). He recognised the need for him to address that situation in his e-mail of 12 August: "Don't just say 'get a job - this is obvious". In his affidavit (paragraph 16) he said that, apart from a couple of small jobs, he remained unemployed until January 2002, when he undertook training as a casino dealer. He took up employment in that capacity on 1 April 2002 (see No. 6/20 of process). The context in which he decided that his best course was to get a job was explained by him in his affidavit (paragraph 16) by reference to the fact that when he sought legal advice the lawyers told him: "... we can do something but we need money. I tried to get lawyers to help me under legal aid, but was told that I had too many assets." The petitioner's "other problems" referred to in paragraph 15 of his affidavit related to his mental health and his abuse of alcohol. That these were problems that had ante-dated the respondent's

departure for Scotland is very clear from the affidavits of both parties. That the petitioner sought to address them and obtain help and treatment for depression and alcohol dependence from December 2001 onwards, however, is vouched by documents from the clinic which he attended (Nos. 6/31 and 6/35 of process) and a report from his doctor (No. 6/36 of process).

[20] In paragraphs 17 and 18 of his affidavit, the petitioner sets out his account of how he eventually came to raise proceedings under the Convention. He describes seeking legal advice from a number of sources, and always being told that substantial cost would be incurred. Eventually at the beginning of July a friend found information about child abduction on the internet, and through "lawyers.com" the petitioner made contact by telephone with Karen Bruce Lockhart of Brodies W.S. (see No. 6/25 of process), and she advised him to make contact with the United States Central Authority. He did so, and on 11 July Barbara Greig, an official in the Office of Children's Issues in the Bureau of Consular Affairs at the State Department sent him information about the Convention and application forms, which reached him on 14 July (Nos. 6/26 and 6/27 of process) His applications were dated 20 July (Nos. 6/4, 6/5 and 6/6 of process).

[21] By the time he instituted his Convention applications, the petitioner was aware that the respondent had instituted proceedings in Linlithgow Sheriff Court seeking residence orders in respect of the children. The respondent's application for legal aid in that connection was intimated to the petitioner in May, and legal aid was granted on 14 June. Warrant to cite the petitioner in the action was granted on 27 June. The respondent, in paragraph 34 of her affidavit observes:

"It seems that it was only after he received this paper work that he decided to take action".

The petitioner himself acknowledges (in paragraph 21 of his affidavit) that receipt of the legal aid application was a factor (although not the only one) in his decision to bring Convention proceedings.

[22] In the submissions made on the respondent's behalf it was contended that the petitioner had understood the legal position, and in particular had known of the availability of proceedings under the Convention from a date in the summer of 2001. In paragraph 28 of her affidavit the respondent said:

"I was surprised to read in my husband's affidavit that he did not have legal advice on this matter until reasonably recently. I can remember in July last year [2001] during one of our arguments by telephone, my husband saying to me that I should be aware that there was something called the Hague Convention which would stop me doing this type of thing. I had no idea what he meant but assume that given he knew the name of the Convention that he must have been speaking to somebody at around that time. The reason I know it was in July was that I didn't consider going to see a solicitor until August last year. At that time I went to see Ms Stroud at Drummond Miller. I remember saying to her that my husband had mentioned the Hague Convention and asked what it was. She told me that it was about child abduction. I remember saying that it wouldn't apply to me then as I had not abducted children."

Drummond Miller's file (No. 7/12 of process) demonstrates that the respondent is mistaken in recollecting that she did not consult them until August 2001. After an undated manuscript file note, there is a typed file note of 10 July recording a meeting between Ms Stroud and the respondent. Although it is evident from the terms of the note that Ms Stroud had the application of the Convention in mind, there is no express reference to it. In the next file note, dated 17 July, there is reference to the respondent reporting that the petitioner had been "talking about the reconvention" (sic). That is plainly a typographical error, and what follows makes it plain that what was being discussed between Ms Stroud and the respondent was the Hague Convention. It is also a reasonable inference from the terms of the note that Ms Stroud disabused the respondent of the notion that the Convention did not apply to her because she had not abducted the children. A file note of 11 September indicates that the respondent was advised that the proper thing for her to do was to return to the United States to have any issue about the children's residence decided there. That advice was obviously unpalatable, because the respondent had no further dealings thereafter with Drummond Miller.

[23] In paragraph 17 of his supplementary affidavit (No. 6/34) the petitioner dealt with paragraph 28 of the respondent's affidavit in the following terms:

"If I did mention the Hague Convention, it was in passing. As I indicated at paragraph 17 of my Affidavit, I saw a number of lawyers and one may have mentioned it. However, I did not understand what it was. I thought it was some kind of nebulous international court. I did not know that it had anything to do with child abduction. I had no idea how the Hague Convention operated. In any event, anyone who mentioned it to me could not have explained it properly. Otherwise, I would have got in touch with the Central Authority. It was not until my friend found out about the Hague Convention and I telephoned Karen Bruce Lockhart at

Brodies in Edinburgh that I was aware that there was a government agency in America who could deal with it for me."

I do not find that explanation wholly satisfactory. The passage in paragraph 17 of the original affidavit appears to me to be referring to a date in 2002, not the summer of 2001. It is less than clear why, if he did not know that it was something to do with child abduction, the petitioner would have mentioned the Convention to the respondent, as he seems to accept he may have done. I therefore find it difficult to accept that the petitioner did not know at that stage that the Hague Convention related to the situation in which he found himself, and contained provisions on which he could rely in seeking to procure the return of the children to the United States. What I can and do accept is that whoever mentioned the Convention to him in the summer of 2001 did not make it clear to him that he could enlist the aid of the US Central Authority, without incurring the expense of engaging a lawyer in the United States. That is, to my mind, borne out by the fact that he did not contact the US Central Authority until he was ultimately directed towards it by Karen Bruce Lockhart in July 2002, rather than doing so as soon as he became aware of the respondent's intention to bring residence proceedings in Scotland on receipt of intimation of the legal aid application in May 2002. It is also borne out by the terms of an e-mail which he sent in August 2001, to which I have not yet referred.

[24] The e-mail in question was sent on 27 August 2001. The petitioner appears to have been somewhat more in control of his emotions when he sent it that he was when sending several others of the e-mails. Indeed, it is somewhat analytical in tone, and might even be thought to have been written in order to be founded on later. It contained the following passage:

"My immediate choices in the open issue of our children still in Scotland and your unilateral decision to keep them there at this time are few:

I can do nothing.

I can call the police and accuse you of parental kidnapping.

I can hire an attorney and file an injunction to return our children to Michigan, USA.

I contest your decision and keep the matter open.

The first choice is no good. The lawyers I have contacted tell me that to not contest the current situation is to condone it. This I do not!

The second choice is absurd because both of us agreed that you would take our children on vacation until early August and I agreed. I know that you are a good mother and would never consider hurting our children but I cannot believe that you are a kidnapper.

The third choice will probably get us both nowhere. Dollars here; pounds there. As Jeff Parker says 'the only people who will profit are the lawyers - err barristers - involved'.

This leaves me with choice four. With this choice, I again declare my opposition to this affair and hope that through my statement of opposition, Amanda, you will reconsider the actions you are now taking and bring our children home. Otherwise, I wish this emailed letter to officially confirm again, to whom it may concern, my opposition to the current situation.

Bring the kids home."

That seems to me to indicate that the petitioner, although he was aware that legal remedies were available to him (whether under the Convention or otherwise), was not specifically aware of the Convention procedure for making application through the Central Authority.

Discussion

[25] It was not, I think, disputed that it was clear from the evidence, and in particular from the terms of the e-mails sent in August to October 2001 that the petitioner did not in that period acquiesce in the respondent's retention of the children in Scotland. I find it clearly established that his subjective state of mind at that time was that he wanted the children to be brought back to the United States. It is true that he did not immediately have recourse to legal proceedings to compel the respondent to bring them back. It seems reasonably clear, too, that he was aware, at least in a general way, that such proceedings were available to him. The fact that he did not take such proceedings immediately cannot, however, in my view be regarded as justifying an inference that his true state of mind was different from the one which he evinced in contemporary

communication. There is, in my view, no proper support in the evidence for an inference that the petitioner acquiesced in the retention of the children in Scotland during the autumn of 2001.

[26] During the first six months of 2002, there was no continued expression on the petitioner's part of the state of mind he had earlier evinced. Communication with the respondent and the children all but ceased. No steps were taken which were concerned directly with procuring the return of the children to the United States. The question which I must determine is whether that inaction properly yields an inference that the petitioner had changed his mind and had decided to "go along with" the respondent's retention of the children in Scotland. It seems to me that the petitioner in his evidence gives an adequate explanation for the cessation of telephone communication. It is plain, without seeking to apportion blame for the situation, that the petitioner and the respondent had come to be unable to converse civilly with each other on the telephone. In the circumstances it is, I think, understandable that the petitioner formed the view by the end of 2001 that he was not going to succeed in persuading the respondent to change her mind, and that there was therefore no point in communication for that purpose. That is not, however, in my view to say that the petitioner accepted the situation. So far as communication with the children was concerned, the difficulties were manifest. Given the ages of the children, it is scarcely surprising that attempts to speak in any worthwhile way by long distance telephone were frustrating and distressing, both for them and for the petitioner. I do not consider, therefore, that it can properly be inferred, from the fact that the petitioner ceased to attempt to telephone the children, that he had come to acquiesce in their retention in Scotland.

[27] It is unnecessary for present purposes to examine in detail the problems that the petitioner had had in his life prior to the respondent's departure to Scotland, but it is clear that they were real and required to be addressed. I therefore do not find it difficult to accept that, finding himself in the situation he was in at the end of 2001, the petitioner should have realised that he needed to obtain psychiatric help, both for his depressive illness and for his abuse of alcohol. That he did so is vouched in the way I have already mentioned. In addition to addressing those problems, the petitioner required to find work. The two aspects of putting his life in order were not unrelated. They can therefore, in my view be seen as quite consistent with his taking a longer-term approach to the resolution of the children's situation. If he was going to deal with that by legal proceedings, he needed to have funds to meet the lawyer's charges. If he was to be able to afford legal fees, he had to have a job. If he was to obtain and hold down a job, he needed to regain his mental health and cease abusing alcohol. If it is once accepted, as I do accept, that the petitioner was, during the first half of 2002, attempting to set his life in order in those ways, it seems to me that there is insufficient in the fact that he took no direct steps to raise proceedings under the Convention during that period to justify the inference that he had changed his mind and was willing to allow the children to remain in Scotland.

[28] I take the view that it is reasonably clear that the intimation of the legal aid application for the residence proceedings in Linlithgow Sheriff Court played an important part in spurring the petitioner into action. It was submitted on the respondent's behalf that it should be inferred that in taking action at that stage the petitioner was evincing a second change of mind, reverting to his original opposition to the children remaining in Scotland, after a period during which he had acquiesced in their doing so. It was suggested that as a computer-literate person the petitioner was perfectly capable of finding information about the Hague Convention on the internet for himself if he had been interested in doing so, and need not have relied on his friend, Susan Kennedy, who found out about it for him by that means. That may be so, but in light of the letters from Ms Kennedy (Nos. 6/37 and 6/38 of process), the date of the print-out from the website of lawyers.com (No. 6/25 of process), and the date of the letter from Barbara Greig of the US Central Authority (No. 6/26 of process), I accept that it was not until June/July 2002 that the petitioner in fact found out about the procedure for invoking the Convention through the Central Authority, without incurring the expense of instructing an attorney. I do not regard the fact that he might have done so earlier as a sufficient basis for inferring that his application in July 2002 represented a second change of mind, after a period of acquiescence.

[29] Applying the test derived from In re H, that acquiescence involves actual subjective acceptance on the part of the wronged parent of the retention of the children in the other jurisdiction, I do not consider that the respondent has discharged the burden incumbent on her of demonstrating that there is a sufficient basis in the evidence for an inference that the petitioner decided to go along with her retention of the children in Scotland. I am satisfied on the evidence that the petitioner was initially strongly opposed to the retention of the children in Scotland. He made that clear repeatedly over a number of months. I reach that conclusion not on the basis of potentially self-serving statements made for the purpose of these proceedings, but on the basis of contemporaneous expressions of his feelings. I am equally satisfied that in July 2002 he took the appropriate steps to enforce his opposition to the wrongful retention. In the circumstances I reject the submission that the period of inaction in the first half of 2002 is a sufficient basis for an inference that the petitioner had changed his mind and decided to "go along with" the wrongful retention. That period is in my view explicable as a period in which the petitioner was seeking to put his life in order and gather the

resources which at that stage he thought were necessary to take legal action. I reject, likewise, that the action ultimately taken in July reflected a further change of mind provoked by intimation of the respondent's legal aid application. I accept that receipt of that intimation was an important factor in spurring the petitioner into taking action, but not that that action involved reverting to a state of mind that had earlier been abandoned. My conclusion therefore is that the petitioner did not acquiesce in the wrongful retention of the children, and that the respondent's submission based on Article 13(a) therefore fails.

Settlement

The Law

[30] The Convention distinguishes cases where the application to the court is made within a year of the wrongful removal or retention from cases where the application is made after the elapse of that period. In the former case, subject to Article 13, return must be ordered. In the latter case the obligation to order return is qualified by the phrase "unless it is demonstrated that the child is now settled in its new environment". It is convenient to begin examination of what is meant by that phrase with P v S 2002 Fam LR 2, in which various earlier authorities were reviewed. Lord Prosser, delivering the Opinion of the Court, after referring to Re N (Minors) (Abduction) [1991] 1 FLR 413, said (at 18, paragraph 1-107):

"[39] That case ... makes a convenient starting point. At p 417H, Bracewell J refers to the 'degree of settlement' which has to be demonstrated, and says this: 'I find that word should be given its ordinary natural meaning, and that the word "settled" in this context has two constituents. First, it involves a physical element of relating to, being established in, a community and an environment. Secondly, I find that it has an emotional constituent denoting security and stability.' ...

[40] In Scotland in Soucie v Soucie [1995 SC 134] the court noted at ... p 138D ... that the constituents of settlement identified by Bracewell J were accepted and adopted in Perrin v Perrin. And in Soucie, the court went on to observe (at p 138H) that the question of settlement had to be considered in the context of the spirit of the Convention 'whereby the fundamental duty of the court is to order a return of the child to the proper jurisdiction when there has been a wrongful removal or retention.' In relation to the 'settlement' exception, the court (at p 139C) says this: 'Having regard to the context we consider that the proper question is whether the child is so settled in her new environment that the court would be justified in disregarding an otherwise mandatory requirement to have the child returned. This is another way of saying that the interests of the child in not being uprooted is so cogent that it outweighs the primary purpose of the Convention, namely the return of the child to the proper jurisdiction so that the child's future may be determined in the appropriate place.'

After distinguishing this issue, under art 12, from other situations under art 13 and involving discretion, the court says at p 139E-F that 'what must be clearly shown is that the settlement in a new environment is so well established that it overrides the clear duty of the court to order the return of the child.' ... [We] agree with the court in Soucie that the whole question of whether a child is so settled has to be looked at in the context of the overall policy and the primary rule to which this is an exception."

The court then considered the relevance of evidence of settlement on the part of the abducting parent, and said (at 18, paragraph 1-111):

"[41] ... [C]learly art 12 does not raise the question of whether the abducting parent is now 'settled' in the new environment. But it does not follow that where a young and dependent child is living with the abducting parent, circumstances which would be significant in relation to the irrelevant question of the parent's settlement must be treated as insignificant or irrelevant in relation to the actual question of whether the child is settled. A child in such circumstances will necessarily be tied to the abducting parent in many ways; and frequently, the child will be so closely tied emotionally to his mother that it can be said ... that he 'will be content to go where his mother goes'. The court need not ask or decide whether the mother is 'settled' in terms of art 12. But when a child's situation is closely dependent on the mother's it would in our opinion be quite unrealistic, and wrong, to ignore her circumstances and intentions, upon which the child's degree of settlement is dependent.

[42] It will of course often be the case that facts founded upon as indicating settlement are, as the court observed in Soucie at p 139F, such as might be expected to be found in any case of a young child living with its mother. In themselves, these might therefore not go far towards establishing any kind of integration into the community, or stability. But if coupled with indications that the mother herself was, in ordinary terms, settled in the new environment, and intended to stay there for the long-term or permanently, a finding that

the child was, in ordinary terms, settled with his mother might go far to establishing that he was settled in the environment."

(b) The Facts

[31] The respondent has always been the person primarily involved in the day to day care of the children. Since May 2001 they have lived with her in her parents' house, which has three bedrooms, one of which is occupied by the respondent and K, and another by T and E. The respondent states in her affidavit (at paragraph 39) that prior to the raising of the present proceedings she had been looking for a house of her own in the same area as her parent's house. The respondent works part-time in her mother's business.

[32] In the same paragraph the respondent depones that the children enjoy considerable contact with her brother and sister-in-law, who live in a neighbouring town and have a six year old daughter. Curiously, the affidavits say nothing about the relationship between the children and the respondent's parents, but I am prepared to proceed on the basis that that may be an oversight. The respondent says that the children are "very well settled" and expresses concern that it would "cause them considerable distress to return to Michigan at this stage".

[33] The respondent depones that the children were extremely quiet and introverted when they first came to Scotland (paragraph 37). T, who is now six and a half years old, had not started school in the United States, but started in Primary 1 at the local primary school in West Lothian in August 2001. She is now in Primary 2. She has done well at school, and documentary material from the school is produced to vouch that state of affairs (No. 7/4, 5 and 6 of process). It is said that she has a number of friends at school, and has developed a special friendship with a classmate who has learning difficulties, and enjoys helping her with her schoolwork. Outside school, T attends highland dancing lessons, and Rainbow Guides. The respondent also depones that T is aware that something is worrying the respondent, and has become "clingy" and seeks reassurance that the respondent will be there when she comes home from school.

[34] The respondent depones that E and K are also very well settled. They both attend a nearby nursery. A report by the head teacher of the nursery is No. 7/7 of process.

[35] Evidence to the same general effect as that given by the respondent is also given by her mother in paragraph 4 of her affidavit (No. 7/2 of process).

(c) Discussion

[36] The question raised by the exception in the second paragraph of Article 12 is whether the child is "settled in its new environment", not whether he or she is settled in family life with the abducting parent. In order to make out the "settlement" exception more must, in my view, be shown than that the children have a happy and settled home life with the abducting parent. As the authorities show, the question is whether the degree of settlement is such as to outweigh the primary purpose of the Convention, namely securing the return of children to the jurisdiction of their habitual residence so that their future may be determined there. The question of settlement does not arise at all if the Convention proceedings are begun within a year of the wrongful retention. In this case, the period that elapsed was only a few weeks more than a year.

[37] I accept the respondent's evidence that she herself is settled where she now is. Although her residence in her parent's home is not the long-term proposal, I accept that her intention is to settle in the same area. I do not consider, however, that this is a case in which evidence of the respondent's own settlement casts very much light on the settlement of the children. Given their ages, and the fact that she has looked after them from birth, it is natural that they should be settled, in a family sense, wherever they happen to be, so long as they are in her care.

[38] T is beginning to put down roots in her new environment by attending school, forming friendships, and taking part in leisure activities. E and K are at an even earlier stage of that process. None of them, it seems to me, has in any real and substantial sense become settled in their new environment to any degree more than is implicit in their residence there with their mother.

[39] In all the circumstances of the case, I am not persuaded that there has been established that degree of settlement on the part of the children in their new environment that would result, on a proper application of the relevant authorities, in the decision that they should not be returned to the United States.

Result

[40] For the reasons which I have given, I am of opinion that the respondent has failed to make out either (1) her case that the petitioner has acquiesced in her wrongful retention of the children, or (2) her case that an order for the return of the children should be refused on the ground that they are settled in their new environment. In the event, no question arises of the possibility of one or two of the children being returned to the United States while the others or other remain here. It is therefore unnecessary to consider the submission that an order having such an effect would place the returned children in an intolerable situation (see paragraph [14] above). It is also unnecessary to consider the discretion which I have under Article 18 to order the return of the children even when circumstances exist under Article 12 or Article 13 which would entitle me to refuse to do so. I am in these circumstances minded to order the return of the children to the United States of America.

[41] The prayer of the petition seeks an order for the return of the children "within 7 days, or such other period as the court may determine, of the said order". I do not consider that it would be appropriate to make an order without giving the parties an opportunity to reach agreement on suitable arrangements for the return of the children. I shall therefore put the case out By Order for a hearing a few days after the issue of this Opinion. If agreement on appropriate arrangements is reached, an order can then be pronounced in terms reflecting the agreed arrangements. If no agreement is reached, I shall at the By Order hearing make such order regulating the time and manner of the children's return to the United States as seems appropriate in light of the parties' submission.

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