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http://www.incadat.com/ ref.: HC/E/UKe 506
[28/10/2002; High Court (England and Wales); First Instance]
Re G (child abduction) (unmarried father: rights of custody) [2002] EWHC 2219 (Fam); [2002] ALL ER (D) 79



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**IN THE HIGH COURT OF JUSTICE**

**FAMILY DIVISION, NEWCASTLE**

**Royal Courts of Justice**

**28th October 2002**

**Before MR JUSTICE MUNBY**

**Re G (child abduction)(unmarried father: rights of custody)**

**COUNSEL: Sarah Woolrich for the father.; Thomas Finch for the mother.**

**SOLICITORS: Dickinson Dees, Newcastle upon Tyne; Mortons, Sunderland**

**MUNBY J:**

**1 In this case an unmarried father seeks the return from Ireland of his son. The case raises again the vexed question of whether and in what circumstances an unmarried father who has never obtained parental responsibility in accordance with the provisions of the Children Act 1989 can invoke the 1980 Hague Convention on the Civil Aspects of International Child Abduction.**

**2. Ms Woolrich on behalf of the father seeks a declaration of wrongful removal in accordance with article 15 of the Convention and section 8 of the Child Abduction and Custody Act 1985. She submits that the removal was in breach of "rights of custody attributed to a person" - the father - within the meaning of article 3(a), alternatively that it was in breach of "rights of custody attributed to ... an institution" - the English court - within the meaning of the same article.**

**3. Mr Finch on behalf of the mother denies that the father or the court ever had any such rights of custody. Alternatively, he says, if the father ever had such rights they were not being "actually exercised" at the relevant time within the meaning of article 3(b). Furthermore, he submits, even if persuaded by Ms Woolrich that the removal was wrongful within the meaning of article 3 I should nonetheless in the exercise of discretion refuse to grant the father the relief he seeks.**

**4. There is much learning on these matters. The cases to which I have been referred are, in chronological order, In re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562, Re B (A Minor) (Abduction) [1994] 2 FLR 249, Re O (Child Abduction: Custody Rights) [1997] 2 FLR 702, Re B (Abduction) (Rights of Custody) [1997] 2 FLR 594, In re W (Minors) (Abduction: Father's Rights) [1999] Fam 1, Re J (Abduction: Declaration of Wrongful Removal) [1999] 2 FLR 653, Re C (Abduction: Wrongful Removal) [1999] 2 FLR 859, In re H (A Minor) (Abduction: Rights of Custody) [2000] 2 AC 291 and Re G (Abduction: Rights of Custody) [2002] 2 FLR 703. I must deal with these in due course but first I must summarise the facts so far as they are relevant to the issues I have to decide.**

**The facts**

**5. Every case is different and every case must, of course, be decided in the light of its own particular facts. But, that said, the facts of the present case contain no particularly unusual features. In its essentials this case is typical of many. It is a sobering reflection on the state of our law that it is nonetheless not altogether easy for a lawyer advising someone in the father's position to do so with any great confidence.**

**6. C was born on 10 January 1998. Although he was apparently conceived in the Republic of Ireland he was born, and until the events that have given rise to this litigation had always lived, in this country. His parents have never married. Their relationship began in Ireland in about 1996. They returned to this country in July 1997. From C's birth they lived together as man and wife at a property they jointly owned in Sunderland together with the two children of the family, C and his elder half-brother J. J was born on 23 October 1986 and is the mother's child by a previous relationship. The present proceedings relate only to C.**

**7. The father's position is that he enjoyed a full role in C's life and upbringing. The mother disputes it: "That is simply not true." In support of her version she points to a number of matters. For three years - he says it was for only 10 months - the father worked away from home during the week and was only at home for the weekends. She says - he denies it - that when the father was at home he showed little interest in the children or home life and was quite happy for her to take full responsibility for the children and the home: "If I ever asked [him] to help out with the children I would usually be asked to stop bothering him and to get on with things myself." She does not recall the father ever taking C to the nursery. She describes an incident some four weeks before the separation when the father lost his temper with C and so frightened C that he wet himself.**

**8. Most of this is hotly disputed by the father. There is also a dispute as to the extent to which the father's own mother was involved in C's care. These are disputes that I am in no position to resolve because I have heard no oral evidence. Indeed the mother did not attend the hearing. But I do not think it matters. Let it be assumed for the sake of argument that the mother's account is correct. That would, no doubt, paint the father in a poor light and reveal him as someone adopting what today would be thought of as a somewhat disengaged and less than satisfactory role both as the parent of his child and as the partner of his child's mother. But the reality is that there are, up and down the land, many fathers, both married and unmarried, who behave in the kind of uncaring - even boorish - way described by the mother. Such a father might be thought to be discharging his responsibilities inappropriately and deficiently; but it could hardly be disputed that he was equally responsible for his child's care. The officious neighbour would not say that he was not equally responsible with the mother for their child's care: she would say that he was not shouldering his share of their joint responsibilities.**

**9. Overall, and even on the mother's version of events, the picture is one of a mother and a father sharing the responsibility of caring for their son, even if much of the day to day domestic burden was left to the mother. The father, after all, even on the mother's case, was supporting the family financially. He may have been working away from home during the week, but from the date of C's birth until 2 July 2002 he had no other home than the home he shared with C and the mother. So, even on the mother's account, the picture is one of shared responsibility for care and shared care. But that is all it is, even if the father's account is to be preferred. He is critical in many respects of the mother's lifestyle and domestic capabilities. But there is nothing in his evidence to suggest that the mother ever abandoned her care of C, whether to him or to his mother. Even on his account the picture, as it seems to me, is one of shared responsibility for care and shared care.**

**10. The father and the mother separated on 2 July 2002 after an incident involving J. According to the mother the father assaulted J. The father was arrested and after being released on police bail went to live his mother. The mother applied to the Sunderland County Court for non-molestation and occupation orders against the father. On 8 August 2002 the father gave**

**undertakings to the Sunderland County Court that he would not molest J or return to the family home in Sunderland and that he would allow the mother to reside there. On 9 August 2002 the charge in relation to the alleged assault on J was dropped on the father agreeing to be bound over.**

**11. Following his departure from the family home the father continued to see C. There is a dispute which I am in no position to resolve at this stage as to both the frequency and the nature of his contact with C. According to the father he initially had unsupervised contact with C every evening for 21/2 hours and staying contact every weekend for the whole weekend. This arrangement was changed on 30 July 2002 at the mother's insistence to contact from 9am on Friday until lpm on Saturday and from 8am to 9pm on Mondays. The mother denies that father ever had staying contact. She says that prior to the change in the arrangements the father usually saw C for a couple of hours each day, including weekends and that this contact was supervised at the father's parents' home. This dispute does not matter for present purposes. On any view the father was having substantial contact with his son.**

**12. The father became concerned that the mother might take C away and return with him to her home country Ireland. He instructed solicitors and on 13 August 2002 signed a Form C1 seeking a residence order in relation to C. Under paragraph 6 (the care of the child) he stated that "C ... is cared for by his mother."**

**13. On 14 August 2002 his solicitors wrote to the mother's solicitor:**

**"Our client has instructed us to issue a residence application in respect of [C]. Before such an application is issued we would be obliged if you would let us know if your client would consent to a joint residence application, as you are aware our client and his parents have substantial contact to [C] and they have provided a great deal of security and stability in his life. If we have not heard from you within seven days that your client consents to a joint residence application, we shall proceed with our client's application.**

**... we understand that our client is maintaining [C] in the sum of £ 100.00 per week ...**

**Finally our client wishes to take [C] on holiday to Portugal during school half term and we would be obliged if your client could confirm that she will provide her written agreement before our clients book the holiday."**

**14. The proceedings were in fact issued in the Newcastle upon Tyne County Court on 15 August 2002 before the mother's solicitor had responded. The father's solicitors wrote again on 16 August 2002, having just received a telephone call from their client that he had learnt that the mother was intending to travel to Ireland for a holiday. On arriving for contact - 16 August 2002 was a Friday - C had apparently said to his father that he was going on holiday to stay with his uncle Paul, who as I understand it lives in Ireland. The father's solicitors wrote:**

**"We would be obliged if you would confirm that your client will not remove [C] from England without the written consent of our client. We must inform you that if we do not receive this confirmation from your client then our client will take steps to prevent your client from removing [C] without his consent. We await hearing from you as a matter of urgency."**

**15. The mother's solicitor replied the same day (16 August 2002):**

**"I am taking instructions ... I will revert to you in due course ... I am not really appreciating your client's confrontational stance in this matter. Any proceedings your client may take will be duly considered and dealt with but meanwhile I am taking the client's instructions as soon as practicable."**

**16. On 20 August 2002 the mother and C left the jurisdiction and went to Ireland. There they remain. She did so without telling the father. He discovered that she had told friends she was**

**going to a family wedding and would be returning on 30 August 2002. She says that the father had been invited to the wedding but said that he could not go. She does not say that she told the father she was going, although as I have mentioned he seems to have been alerted by C the previous Friday to what was going on. She says, and I quote her affidavit,**

**"The children and I had a good time in Ireland and the children were not too keen on returning to England. I decided to remain in Ireland and took legal advice about my position."**

**17. The father does not accept that. He believes that, as he puts it, the mother has extricated herself from the jurisdiction in order to defeat his application for residence.**

**18. On 23 August 2002 the father's solicitors wrote again to the mother's solicitor:**

**"We understand from our client that your client is currently in Ireland. Would you please confirm the date of your client's return ... In the meantime, we enclose by way of service upon you, our client's application for a residence order. You will see that the matter is listed at Newcastle upon Tyne County Court on 16 September".**

**19. I need not set out the remainder of the correspondence. On about 2 September 2002 the father discovered that the mother had not returned from Ireland. On 6 September 2002 the mother's solicitor wrote:**

**"I confirm that I have spoken by telephone with [the mother] and the upshot is that I have no instructions from her at all to deal with your client's residence application nor did I receive from her any instructions to accept service of those proceedings. I shall not be attending or taking part in the proceedings in respect of which there is a directions hearing on 16th September. I return the application."**

**20. On 9 September 2002 the father issued an application in the Newcastle upon Tyne County Court in Form C2 seeking a specific issue order ordering the return of C to the jurisdiction and a prohibited steps order preventing his removal from the jurisdiction whilst the application for residence was being dealt with. On the same day District Judge Bullock ordered the time for service to be abridged to 1 hour, listed the matter for hearing on 16 September 2002 and directed that the summons was not to be served out of the jurisdiction. On 16 September 2002 District Judge Alderson gave directions for the filing of the father's evidence and adjourned the matter for directions to 30 September 2002. The father's witness statement filed in accordance with that order is dated 20 September 2002. On 30 September 2002 District Judge Bullock transferred the matter to the High Court and directed that it be adjourned generally with liberty to restore.**

**21. In the meantime, on 23 September 2002, the father had applied to the Sunderland County Court for the discharge of the undertakings he had given on 8 August 2002. That application, supported by his affidavit sworn on 20 September 2002, came before District Judge Arkless on 1 October 2002 who directed that the father be released from those undertakings which prevented him returning to the family home in Sunderland. The father has in fact since returned to live in the family home.**

**22. On 3 October 2002 the father issued a summons in the High Court seeking under, inter alia, the 1985 Act (i) a declaration that the removal of C by the mother from the jurisdiction was wrongful, (ii) an order that the mother return C to the jurisdiction within 48 hours and (iii) orders that the mother, having returned to the jurisdiction, do reside with C at the family home and do not remove C from the jurisdiction without the consent of the father or order of the court. (I should add that Ms Woolrich made it clear to me that the father was prepared, if required, to give the court undertakings that he would again vacate the family home and not return there pending the determination of the proceedings.) The application was supported by affidavits sworn by the father's solicitor on 8 October 2002 and by the father on 9 October 2002.**

**23. Personal service was effected on the mother in Ireland on 26 September 2002. Personal service of further documents on her was effected on 12 October 2002. The matter (that is, the father's applications issued in the Newcastle upon Tyne County Court on 15 August 2002 and 9 September 2002 and his summons issued in the High Court on 3 October 2002) came on for hearing before me on 16 October 2002. Father was present and represented by Ms Woolrich. Mother was not present but was represented by Mr Finch. He had just been instructed by new solicitors who had not yet been able to obtain the file from their client's previous solicitor. I adjourned the matter to enable the mother to give instructions and file evidence. Her affidavit was sworn on 24 October 2002. The adjourned hearing took place before me on 25 October 2002.**

**Rights of custody - the father**

**24. It has not been disputed - it cannot sensibly be disputed - that immediately before his departure for Ireland on 20 August 2002 C was habitually resident in this country. He was born here and had lived his entire life here. Thus to succeed on this part of her case Ms Woolrich has to show that the mother's removal of C on 20 August 2002 was, within the meaning of article 3(a), in breach of rights of custody, as defined in article 5(a), attributed to the father, either jointly or alone, under the law of England and Wales.**

**25. I consider first the state of affairs prior to the parties' separation on 2 July 2002. The father and the mother were not married. The father had never acquired parental responsibility for C in accordance with the provisions of the 1989 Act. He shared the care of C jointly with the mother. Did he have "rights of custody" for the purposes of the Convention?**

**26. The difficulty in giving the simple and straight-forward answer which such a simple question surely demands arises out of the difficulty of reconciling the decision of the House of Lords in In re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562 and the decision of the majority of the Court of Appeal (Staughton and Waite LJJ - Peter Gibson LJ dissented) in Re B (A Minor) (Abduction) [1994] 2 FLR 249.**

**27. In In re J the House had to consider the position under the Convention of an unmarried father whose rights under the law of South Australia were for present purposes the same as an unmarried father without parental responsibility under the law of England and Wales. At p 577G Lord Brandon of Oakbrook said:**

**"the father had no custody rights relating to J of which the removal of J by the mother could be a breach. It is no doubt true that, while the mother and father were living together with J in their jointly owned home in Western Australia, the de facto custody of J was exercised by them jointly. So far as legal rights of custody are concerned, however, these belonged to the mother alone, and included in those rights was the right to decide where J should reside."**

**28. In Re B Waite LJ, having referred to what Lord Brandon had said in In re J, said at p 261A:**

**"The difficulty lies in fixing the limits of the concept of 'rights'. Is it to be confined to what lawyers would instantly recognise as established rights - that is to say those which are propounded by law or conferred by court order: or is it capable of being applied in a Convention context to describe the inchoate rights of those who are carrying out duties and enjoying privileges of a custodial or parental character which, though not yet formally recognised or granted by law, a court would nevertheless be likely to uphold in the interests of the child concerned?**

**The answer to that question must, in my judgment, depend upon the circumstances of each case. If, before the child's abduction, the aggrieved parent was exercising functions in the requesting State of a parental or custodial nature without the benefit of any court order or official custodial status, it must in every case be a question for the courts of the requested State to determine whether those functions fall to be regarded as 'rights of custody' within the terms of the Convention. At one end of the scale is (for example) a transient cohabitee of the sole legal**

**custodian whose status and functions would be unlikely to be regarded as qualifying for recognition as carrying Convention rights. The opposite would be true, at the other end of the scale, of a relative or friend who has assumed the role of a substitute parent in place of the legal custodian."**

**29. The outcome in Re B was that an unmarried father from Western Australia was held to have the very rights of custody for the purposes of the Convention which in In re J it had been held that another father from Western Australia did not have.**

**30. The reconciliation of In re J and Re B has exercised a number of judicial minds: Cazalet J in Re O (Child Abduction: Custody Rights) [1997] 2 FLR 702, Hale J (as she then was) in In re W (Minors) (Abduction: Father's Rights) [1999] Fam 1 and Re J (Abduction: Declaration of Wrongful Removal) [1999] 2 FLR 653, and Sumner J in Re G (Abduction: Rights of Custody) [2002] 2 FLR 703. Both In re J and Re B are, of course, binding on a puisne judge unless and until the House of Lords or Court of Appeal says otherwise. There is no basis for saying that Re B was decided per incuriam. The two cases must therefore be reconcilable. But how? I recognise that I may be parti pris, for I was the counsel whose argument, relying upon In re J, was rejected in Re B. But I take comfort from the fact that I share with greater minds than mine the difficulty I have in seeing how the cases are to be reconciled: see, for example, the comments of Hale J in In re W at pp 11F, 12F, and in Re J at p 659H.**

**31. There are three reported cases in which the unmarried father or other relative of a child whose mother alone has legal custody rights has nonetheless been held to have rights of custody for the purposes of the Convention: Re B, Re O and Re G. I shall take them in turn.**

**32. In Re B the mother, who alone had legal custody rights, had fled from Australia to Wales in breach of bail, leaving the child in the joint care of the child's father and grandmother (see at p 251C). Connell J held (p 25611) that the father had acquired rights amounting for Convention purposes to 'rights of custody' through his active role in the care of the child and through the status which the mother and the grandmother had themselves accorded to him as a party whose consent they had recognised was necessary before the child could be removed from Australia or issued with a passport. The Court of Appeal, albeit only by a majority, upheld that reasoning and, in effect, accepted the submission (p 259G) of Mr James Holman QC (as he then was) that the regime in Western Australia after the mother left for Wales was one under which, even before any written agreement was brought into being, the father was functioning in the fullest sense as a parent, that status being assented to by the mother and maternal grandmother, and tacitly acknowledged by their acceptance that he had the right to object to the child's removal from Australia, to give authority for the diversion of social security payments to the grandmother, and to give approval for the issue of a passport.**

**33. Having set out the principles in the passage I have already quoted, Waite LJ explained at p 261D why the father had rights of custody within the meaning of article 3:**

**"The father ... was the child's primary carer, sharing his upbringing with the maternal grandmother as his secondary carer. It was a settled status which the absent mother, as the only parent with official custodial rights, had at first tacitly and later (by her acceptance of the father's right to insist on her signature of the minutes) expressly approved."**

**34. In Re O, where the question was whether grandparents jointly had rights of custody within the meaning of the Convention, Cazalet J held that they did, and that the case fell within the principle in Re B. He held that the case could properly be distinguished from In re J because, as he found (see at p 708C),**

**"here, certainly from October 1995 to December 1996, the grandparents, and particularly the grandmother, were caring for the child, with the mother, apart from short periods of contact, playing no part in such care and being off the scene ... in Re J it was the mother who, when living**

**with the father, had primary care of the child and she continued to have that care when she came to the UK."**

**35. In Re G Sumner J followed Re B and Re O in finding that the unmarried father and paternal grandmother, Mrs M, of a child D had acquired joint rights of custody within the meaning of the Convention. His reasoning is to be found at pp 721-723 (paras [102]-[129]). Put shortly it was because the mother had placed D in the care of Mrs D, who was joined after a time by the father:**

**"The mother ... envisaged before her departure that the father or his family would take responsibility for D's care. She was in fact placed with Mrs M. She remained there for 6 months ... Mrs M during that time made all the necessary arrangements for D. She arranged for doctor's appointments, schooling, and day-to-day care. She was unequivocally in Mrs M's care. The mother knew this. She kept in regular contact and made visits ... Mrs M ... did not just look after D on a day-to-day basis. She was taking essential decisions for her future ... After placing D with Mrs M the mother never sought ... to exercise her own rights of care ... The mother may have debated shared care with the father ... It never came to pass ... Mrs M had acquired rights of custody. It arose from the circumstances in which D was placed with her namely, long-term, with the right to make decisions which she was given (and to the mother's knowledge exercised), and the length of time that she did so ... D was very young. The mother's role in her life was limited to occasional visits and frequent telephone calls. Mrs M alone and then jointly with the father took over parental privileges and duties ... in the circumstances he had rights of custody."**

**36. Now there is, as it seems to me, a common thread running through all these three cases. In each case the mother was the only person who had legal rights of custody. In each case the mother had left the scene and abandoned the care of her child to someone else: in Re B to the father and grandmother; in Re O to the grandparents; and in Re G to the paternal grandmother and subsequently to the father and the paternal grandmother jointly. In each case the mother was no longer the child's primary carer; in fact the mother was no longer involved in the day-to-day care of the child at all. In each case primary care had been delegated by the mother to someone else, either an individual or a pair of individuals.**

**37. More particularly there is nothing in any of the authorities to suggest that someone else can acquire rights of custody within the meaning of the Convention in circumstances where a mother who has sole legal custody rights herself remains the child's primary carer. Nor is there anything to suggest that an unmarried father can acquire such rights even when he shares with the mother the role of primary carer. Re B and Re G show that there can be circumstances in which an unmarried father will acquire rights of custody within the meaning of the Convention even though he is not the sole primary carer of his child, and even if he is jointly sharing care with another -at least if that other is someone other than the child's mother (for example the maternal grandmother in Re B and the paternal grandmother in Re G). But that is as far as the authorities go. And even if the authorities which go thus far are consistent with In re J - and it is not for me to say that they are not - to go any further would, as it seems to me, be to defy what the House said in In re J.**

**38. In the present case, as I have said, the father was an unmarried father who shared care, and the responsibility of care, with the mother. Both were primary carers. The mother never relinquished her responsibilities to the father. The mother never left the scene so as to leave C in his father's sole care. She never abandoned the care of C to the father or, indeed, to anyone else. Her position is quite different from the position of the mothers in Re B, Re O and Re G. On the contrary, the father's position here is, as it seems to me, indistinguishable from the position of the father in In re J.**

**39. In my judgment the father, notwithstanding that he had until 2 July 2002 shared the primary care of C with the mother, living together with the mother and C in the same household, never acquired rights of custody within the meaning of articles 3 and 5.**

**40. In In re W Hale J concluded at p 19E that an unmarried father who has not acquired parental responsibility in accordance with the provisions of the 1989 Act will nonetheless have rights of custody for the purposes of the Convention if he is:**

**"currently the primary carer for the child, at least if the mother has delegated such care to him".**

**41. I respectfully agree with that formulation, so long as it is understood as also applying to a case of shared primary care with someone other than the mother.**

**42. In Re J Hale J was concerned with an unmarried father in a situation strikingly similar to that of the father in the present case. At p 659G she said this:**

**"In this case there is a dispute about how much the father in fact did for the child, but there is independent evidence from the health visitor, general practitioner, nursery and playgroup, that he shared the care of his son in the way that mothers and fathers living under the same roof commonly do. There is no reported decision applying the concept of 'inchoate rights' to such a case, but I would have had little difficulty in holding that it fell on the right side of the continuum described by Waite LJ were it not for the more serious difficulty of reconciling this with the House of Lords' decision in In re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562. This concerned an unmarried couple living together when the mother secretly abducted the child to this country. The House of Lords held that de facto custody was not sufficient.**

**In the event it is not necessary for me to resolve this difficult issue."**

**43. Like Hale J in that case I would have had little difficulty in holding - in fact I would have held - that this case fell on what from the father's point of view would have been the right side of the continuum, were it not for the decision in In re J. But the difficult issue, as Hale J described it, has now to be resolved. Consistently with In re J it can, in my judgment, be resolved in only one way. An unmarried father who, as Hale J put it, shares the care of his child in the way that mothers and fathers living under the same roof commonly do, does not, in my judgment, have rights of custody within the meaning of the Convention.**

**44. The father in this case was far indeed from being merely a transient cohabitee but even so he did not have rights of custody within the meaning of the Convention.**

**45. That is sufficient to dispose of this part of the father's case. But there is in any event another reason why, as it seems to me, the father did not have rights of custody at the relevant time, on 20 August 2002. This is because of the change of circumstances following his separation from the mother on 2 July 2002.**

**46. Prior to 2 July 2002 the father and the mother had been living together under the same roof, sharing the care of C. On 2 July 2002 they separated. He left the family home. From 8 August 2002 he was barred from returning by the undertaking he gave the Sunderland County Court. He had contact - substantial contact - with C. But essentially he was a non-residential parent enjoying contact, but only contact, with his son. True that he never formally relinquished his rights. True that in the letters written on his behalf by his solicitors on 14 August 2002 and 16 August 2002 he was asserting his right to residence and his right to be involved in the decision as to where C should live. But there is a difference between, on the one hand, the "rights of custody" referred to in article 5(a) and the "rights of access" referred to in article 5(b). There is also a difference between asserting rights of custody and such rights being "actually exercised" as required by article 3(b).**

**47. Whatever may have been the state of affairs before he left the family home on 2 July 2002 it seems to me that certainly by 8 August 2002 and in any event by 20 August 2002 the father had only rights of access. He did not have, and even if he did have he was not actually exercising, any rights of custody.**

**48. An unmarried father without parental responsibility who merely has contact, however extensive, does not, even on the basis of the Re B principle, have rights of custody within the meaning of the Convention: see Re B (Abduction) (Rights of Custody) [1997] 2 FLR 594 and In re W (Minors) (Abduction: Father's Rights) [1999] Fam 1.**

**49. I conclude, therefore, that the father did not have on 20 August 2002, and indeed has never had, rights of custody within the meaning of the Convention.**

**Rights of custody - the court**

**50. Ms Woolrich submits in the alternative that by 20 August 2002 the court was actually exercising rights of custody within the meaning of article 3.**

**51. It is clear that a court can be an "other body" within the meaning of article 3(a) and that in appropriate circumstances "rights of custody" can accordingly be "attributed to" a court for the purposes of article 3: In re H (A Minor) (Abduction: Rights of Custody) [2000] 2 AC 291.**

**52. It is also clear that the mere issue of wardship proceedings vests rights of custody in the court, for the effect of the issue of such proceedings is immediately to make the child a ward of court and to vest responsibility for all aspects of his welfare in the court: see In re J (Abduction: Ward of Court) [1989] Fam 85 and Re B-M (Wardship: Jurisdiction) [1993] 1 FLR 979, discussed by Hale J in In re W at p 15C, in Re J at p 655G and again in Re C at p 861A.**

**53. But what of other types of proceedings? In In re H Lord Mackay of Clashfern said at p 304C:**

**"There are two aspects to this matter. First of all the application to the court must raise matters of custody within the meaning of the Convention and that will require in every case a consideration of the terms of the application. Secondly, a question arises as to the time at which the court acquires such right. It is clear that the interpretation which has been accepted of the Convention which allows the possibility of a court having rights of custody does not contemplate that happening unless there is an application to the court in a particular case raising the issue of the custody of one or more children. The date at which such application confers these rights is a matter which has not been the subject of detailed consideration in relation to the Convention.**

**In relation to the present Convention while in the wardship jurisdiction the issue of an application makes the child who was the subject of the application a ward of court I consider that generally speaking there is much force in using the service of the application as the time at which the court's jurisdiction is first invoked. It is true that interim orders may be made before service and special cases may arise but generally speaking I would think it a reasonable rule that at the latest when the proceedings have been served the jurisdiction has been invoked and unless the proceedings are stayed or some equivalent action has been taken I would treat the court's jurisdiction as being continuously invoked thereafter until the application is disposed of."**

**54. The father's application in the present case, since it sought a residence order, was an application of the appropriate kind. But when the mother left the jurisdiction on 20 August 2002 the proceedings had not been served on her. Indeed at that time neither she nor her solicitor were aware that proceedings had even been issued though her solicitor at least knew that they might be. So the stage contemplated by Lord Mackay of Clashfern had not yet been reached.**

**55. But what of his reference to interim orders and special cases? For this purpose it is necessary to go back to earlier authorities: see in particular B v B (Child Abduction: Custody Rights) [1993] Fam 32 and Re B (Abduction) (Rights of Custody) [1997] 2 FLR 594, considered and applied by Hale J in In re W, Re J and Re C. From these authorities one can, I think, derive the proposition that, even if the proceedings have not been served, rights of custody will be vested in the court if, in proceedings of the appropriate kind (as to which see In re W at p 19B, Re J at p 655H and Re C at p 864A) the court: ,**

**i) has made an interim order for residence or prohibiting the removal of the child from the jurisdiction or**

**ii) even if it has not yet made any such order, has considered the matter and given directions for the future conduct of the proceedings: see In re W at pp 5A-D, 12E, 16C-17D, Re J at pp 654F-H, 657C-E, and Re C at pp 860GF, 863GG.**

**56. The furthest that the court has yet gone was in Re J where the proceedings were ex parte. Hale J described at p 654F what happened:**

**"the father made an urgent application, ex parte, for a parental responsibility order and a prohibited steps order. In his witness statement ... he explains that he is applying without notice because he is concerned that if given notice the mother might move out of the flat to an unknown address and thereafter take J to South Africa. Unfortunately, District Judge Bassett Cross considered that there was not enough evidence to make the order ex parte. He adjourned the application to be heard on notice but abridged time ... That very day, however, the mother left with J for South Africa."**

**57. She explained at p 657C why in her view the court was sufficiently seized of the matter as to be invested with rights of custody:**

**"It seems to me that the court was actively seized of the matter when the father made his application to District Judge Bassett Cross on 5 May 1999. In hindsight it is regrettable that the district judge did not make the prohibited steps order sought, for no harm could have been done by preserving the status quo for a very short time while the mother was served. But he did address his mind to the case and give directions for its future conduct. Had he indeed considered that there was a risk that the child would be taken abroad so soon he would surely have made the order. There was not at that stage any question of his jurisdiction to do so. On the particular facts of this case, therefore, I would be minded to hold that there was sufficient to invest the court with rights of custody, in the sense that the court was seized of the issue of whether or not this child should be taken abroad."**

**58. So the court will be invested with rights of custody if, even before the respondent has been served, the matter comes before a judge who exercises a judicial discretion as to the future conduct of the proceedings, even if he makes no substantive order and only gives directions.**

**59. But, wardship apart, the mere issue of proceedings that have not yet been served will not normally be enough. That was the view expressed by Hale J in In re W at p 19C and again in Re J at p 656B, having regard in each case to what had earlier been said in Re B (Abduction) (Rights of Custody) [1997] 2 FLR 594. In that case the father had started proceedings on 17 February 1997 for a parental responsibility order. The mother removed the child on 3 March 1997 before any hearing had taken place. The Court of Appeal declined (at p6001-1) to hold that any rights of custody were vested in the court. The subsequent decision of the House of Lords in In re H in my judgment puts the point beyond argument. A judicially determined adjournment in the course of proceedings which have not yet been served will be sufficient. An administrative step without judicial involvement will not suffice.**

**60. The position in the present case was precisely the same as that in Re B. The proceedings had been issued but not served. The matter had not been before a judge by the time the mother left with C on 20 August 2002 - the first hearing of any kind took place only on 9 September 2002. It follows that unless the case can be brought within Lord Mackay of Clashfern's category of "special cases" the father's claim must fail.**

**61. I can see nothing "special" about the present case to take it out of the normal rule. The correspondence between the solicitors was subjected to close scrutiny. Mr Finch suggested that the letters from the father's solicitors were disingenuous. I do not agree, but more to the present point there is nothing that can properly be criticised (nor did Ms Woolrich seek to do so) in the**

**letters written by the mother's solicitor. This is not a case in which anything said by the mother's solicitor, or indeed by the mother herself, can be said to have been disingenuous or misleading let alone untruthful. Neither he nor his client did or said anything to create a false impression in the minds of either the father or his solicitors. There was nothing in his responses to the letters from the father's solicitors which was in any way calculated - in either sense of that word - to lull the father into a false sense of security or to 'lead him up the garden path'. He was under no obligation to disclose whatever his client may have told him. He did not do so. But that does not make it a special case.**

**62. In my judgment this part of the father's claim also must fail, for the court was not sufficiently seized of the matter on 20 August 2002 as to have rights of custody vested in it.**

**Overview**

**63. It follows that the father has failed to demonstrate that the mother's removal of C from the jurisdiction on 20 August 2002 was in breach of any rights of custody vested either in him or in the court. His claim to declaratory relief fails. Paragraph 1 of his summons dated 3 October 2002 must be dismissed.**

**64. At the end of the day the father's case as helpfully summarised by Ms Woolrich in her skeleton argument comes down to this. Here was a fully involved father, who lived together with his son and his son's mother until 2 July 2002 and thereafter enjoyed extensive contact, to whom parental responsibility would have been granted had it been sought. Had he been aware of the mother's true intentions when his application was issued on 15 August 2002 he would no doubt have made an urgent application for an ex parte prohibited steps order preventing the removal of C without his permission or the leave of the court. Had such an application come before the court the District Judge would probably have made an ex parte order. At the very least he would have given directions abridging time for service. On either footing the court would have been sufficiently seized of the matter as to make the mother's subsequent removal of C wrongful - wrongful as involving a breach of rights of custody vested in the court even if, contrary to Ms Woolrich's primary case, the father himself had no rights of custody.**

**65. Granted all that - and I see no reason to disagree with any part of Ms Woolrich's analysis - the fact remains, in my judgment, that even in the circumstances postulated by Ms Woolrich the authorities show, as I have sought to demonstrate, that the mother did nothing wrongful in the Convention sense.**

**66. The outcome may be thought less than satisfactory. If it is it is because our domestic law does not yet vest an unmarried father with the parental responsibility with which a married father is clothed.**

**67. The lesson is clear. Unless he can bring himself within the untypical kind of case of which Re B, Re O and Re G are examples - and most unmarried fathers will not, not even if they are the most assiduous of fathers, co-habiting with their child's mother and sharing with her the care of their child - an unmarried father who has reason to fear that his co-habitant may be thinking of removing his child from the jurisdiction must issue proceedings and must immediately apply to a judge for relief. Otherwise he will all too probably find himself deprived of any effective right of recourse to the Convention.**

**Declaratory relief**

**68. The point no longer arises for decision because the father has failed to establish any basis for the grant of the declaratory relief he seeks. But I ought nonetheless to deal with Mr Finch's argument that I should in any event as a matter of discretion have refused the father declaratory relief.**

**69. The father seeks declaratory relief for two purposes: first as a means of persuading the mother to return to this country without the need for proceedings under the Convention to be commenced on his behalf in Ireland; and, secondly, in order to assist the prosecution of such proceedings if the mother is unwilling to return voluntarily. The claim is brought by the father and not by either the English or the Irish Central Authority. It is brought by the father, as Ms Woolrich tells me, at the suggestion of the English Central Authority which, for reasons I can entirely understand, is somewhat hesitant about commencing proceedings before a foreign court on behalf of an unmarried father without the support of an appropriate declaration of the English court.**

**70. That there is jurisdiction in such a case to grant a declaration even though it has not been sought by the requested state is clear from the decision of the Court of Appeal in Re P (Abduction: Declaration) [1995] 1 FLR 83 1, my own decision in Re L (children) (abduction: declaration) [2001] 2 FCR 1 and Sumner J's decision in Re G. As I said in Re L at p 9d, referring to Re P:**

**"That case clearly establishes (a) that the father has locus standi to make this application for a declaration and (b) that this court has jurisdiction under s 8 of the Child Abduction and Custody Act 1985 to grant such a declaration whether or not the circumstances referred to in art 15 of the Hague Convention can be shown to exist. As Millett LJ said:**

**'But it is not a pre-condition of the exercise of the jurisdiction conferred by s.8 of the 1985 Act that the procedure laid down by Art. 15 of the Convention has been followed. Section 8 speaks of an application "for the purposes of Article 15" not of an application "made in accordance with the provisions of Article 15", and in my view the choice of words is deliberate.' ([1995] 1FLR 831 at 839)."**

**71. When sitting in a court of the requested state a judge, as is well known, has little discretion. Article 12 of the Convention is expressed in mandatory terms: once the fact of wrongful removal or retention is established "the authority ... shall order the return of the child forthwith." Discretion comes into play only if the respondent is able to establish one of the defences under article 13 - and the mother here has not sought to invoke article 13 at all. However I am not sitting as a judge in the court of the requested state but rather as a judge in the court of the requesting state. There is nothing in the language of article 15 that I can see to impose on me any obligation to grant a declaration and section 8 of the 1985 Act pointedly uses the word "may" - a word which I interpret as meaning that Parliament has conferred on me not merely a power to grant declaratory relief but also a discretion as to whether or not to do so.**

**72. Accordingly the grant of declaratory relief even in this context is always, in my judgment, in the final analysis a matter of discretion.**

**73. That said, in the normal case an applicant who succeeds in persuading this court that a child has been wrongfully removed from this jurisdiction in breach of the Convention, and who seeks declaratory relief, as the father does here, to assist his prospects of obtaining substantive relief from the courts of the requested state, will as it seems to me be entitled as of right to such a declaration and can normally expect to have the court's discretion exercised in his favour.**

**74. In Re L, having referred to the judgment of Millett LJ in Re P, I said at p 9h:**

**"The correct approach is that laid down by Millett LJ:**

**'The existence of the statutory jurisdiction depends in my view on the purpose for which the declaration is sought and not on the source of the initiating request. If it is sought for a proper purpose it can be granted under s.8; if it is not sought for a proper purpose it should not be granted at all.' ([1995] 1 FLR 83 1 at 840)**

**Accordingly, I ask myself, is this declaration sought by the father for a proper purpose, that is, as Millett LJ put it:**

**'For the purpose of satisfying, either immediately or in due course, the appropriate judicial or administrative authorities of the requested State that the removal was wrongful by the law of the requesting State'? ([1995] 1 FLR 831 at 839)**

**There can, in my judgment, be only one appropriate answer to this question. That is precisely the purpose for which the father seeks this declaration. His application is for a proper purpose. His application ought, accordingly, to be granted."**

**75. I might add that in that case I specifically rejected the submission (at p 9c) that I should not grant a declaration in the absence of evidence that such a declaration was actually necessary.**

**76. Accordingly, had I been satisfied that the mother's removal of C was wrongful I would have granted a declaration in appropriate terms.**

**Other issues**

**77. At the end of the hearing I announced my decision, indicating that I would give my reasons for refusing declaratory relief at a later date in writing. 78. Mr Finch and Ms Woolrich were agreed that the remaining matters in dispute between the parties were better dealt with on a later occasion and after both parties had had an opportunity to supplement their evidence. I agreed and gave appropriate directions to enable the remaining issues to be dealt with as soon as possible.**

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