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[05/03/1997; High Court (England); First Instance]
Re O. (Child Abduction: Custody Rights) [1997] 2 FLR 702, [1997] Fam Law 781

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IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

5 March 1997

Cazalet J

In the Matter of O.

Henry Setright for the grandparents

Paul Hollow for the mother and her partner

CAZALET J: The applications before me are made under the Hague Convention, the European Convention and the inherent jurisdiction of the court. They concern a child, J, born on 24 May 1992, now aged 41/2 years.

The first and second plaintiffs are AR and CR, her husband. The first defendant is SK, the second defendant is CC. The first plaintiff is the maternal grandmother of J. The second plaintiff is the maternal step-grandfather of J -- although he is not her natural grandfather, I shall refer to both the plaintiffs as 'the grandparents'. The grandmother is aged 46, the grandfather 49 years.

The first defendant is the mother of J. She is aged 30. The second defendant is the mother's boyfriend/partner, aged 40. J currently lives with her mother and the second defendant in Peterborough, all three of them having arrived in England from Germany on 16 December 1996.

In each of their applications the grandparents seek the immediate return of J to Germany.

I deal shortly with the background. The grandparents, and the mother, are German nationals, having lived all their lives in Germany. J is also a German national who had lived all her life there until brought to England by her mother on 16 December 1996. The second defendant is a British national, who in the past resided in the Peterborough area. Since approximately 1993-4 he and the mother have been carrying on their relationship, living in Germany; he returned to England with the mother and J on 16 December 1996.

The documents before me include detailed statements by the grandmother, mother and the second defendant, together with various other documents to which I will make reference as may be appropriate.

The mother was married on 5 June 1990 (it may have been a marriage of convenience) to a TO, hence the name O, which is the surname of J. On 24 May 1992, J was born. It appears not to be in dispute that her father was a Mr RS, that he has played a very limited part in J life and that he plays no part in these proceedings. Indeed, he has played no part whatsoever in J life in recent times.

In about 1993 -- the mother met the second defendant and started her relationship with him. In August 1995 they had housing problems and, for reasons which are not relevant, they then lost the house in which they had been living. The mother's case is that the second defendant went to live in a men's hostel and she, because she had nowhere else to go, took J to the grandparents' home.

The mother says that this was only a temporary situation -- see para 9 and onwards of her statement of 8 January 1997 -- and that the object of returning to her grandparents' home was to obtain a respite period so that she and the second defendant could get back on their feet and set up home again with J, having sorted out their accommodation problem. However, in October 1995, she said that she and the grandmother had a major row; allegations were made by the grandmother that the mother was unable to look after J properly and that the second defendant was 'no good'. It all became very heated. The mother's case is that the upshot was that the grandparents threw her out of the house. She had nowhere to go and so she had no alternative but to leave J with the grandparents. She gave evidence of various addresses at which she then stayed. She and the second defendant were reunited in approximately February 1996. She said that the accommodation which they then obtained was too small to have J with them.

The mother said that at times there were difficulties with the grandparents in regard to her obtaining contact to J. In May 1996 there was a road accident; she and J were not hurt but the second defendant was badly injured, was hospitalised and on discharge was unable to work. As a result they did not have the funding necessary to try and organise a home for the three of them, so J remained living with the grandparents. In September 1996 they decided that they would, when able, move to England and try to make a new start. Thereafter, from time to time, the second defendant came over to this country, bringing their possessions, with a view to setting up a home here to which they could move with J.

The grandmother makes clear, in her statement of January 1997, that there were, indeed, differences between herself and her daughter. At para 7 she says that there had been a number of emotional scenes between them. She said that, in August 1995, the mother came to their home and asked if she could come back with J because she had broken from the second defendant and wanted to start a new life. The grandmother said that she was pleased and truly believed that that was what the mother wanted; she said that at that stage she was more than happy to take over the responsibility for J on a short-term basis. She continued by saying, 'It very quickly became apparent that that was not the mother's intention'.

The grandmother said that the mother did not contribute in any way to or show interest in J and led, in effect, her own life with the second defendant; J effectively became the grandmother's responsibility. From October 1995, after the row between them, the grandmother says that she took over responsibility for J. She says that, even prior to that, there had been long periods when J had come to stay at the grandparents home. In paragraph 8 of her statement she gives details of this; in 1993, J stayed with the

grandparents' for approximately 16-18 weeks, in 1994, 23-25 weeks and then for quite a number of weeks in the earlier part of 1995, leading on to J coming to make her home with them, as of August 1995. She states in para 9 that she has very real concerns about the mother's care of J.

It is no business of mine to make any finding about the mother as such; I have not heard evidence from the witness-box and I can make no finding as to this. However, I record that the grandmother expressed real concern about the mother's care of J; she made a number of complaints about J being brought back from contact hungry, dirty, exhausted and being placed in dangerous situations; she was worried about the mother's involvement with drugs. There were occasions when she said that she denied contact to the mother because she considered that the mother was not in a fit state to drive or because the vehicle concerned was unroadworthy. She referred to a number of incidents which gave her concern.

The mother says that she told the grandmother that she was going to move to the UK, taking J with her. It is not disputed that, as of 26 October 1996, the grandparents started custody proceedings in respect of J in the German court. Their application for custody was never served on the mother. The grandmother's case -- which is in issue -- is that approximately 2 days after the application was issued, and on other occasions, the grandmother told the mother of the application. However, there were problems serving the mother with the application. The mother firmly denied that she was ever informed of those proceedings. It was accepted by CC that, for a driving offence on 18 November 1976, he received a sentence of imprisonment of 30 days in Germany. As of 14 December 1996 the mother, having obtained the grandmother's consent that she could have J overnight and for that weekend, obtained contact with J and was due to return her on 16 December 1996. The mother did not return J but removed her and, with the second defendant, came with J to this country where they have since remained.

The grandparents moved quickly. They went back to the German court and, on 18 December 1996, obtained an interim custody order. A copy of this order appears on p 4 of the bundle, and, as to its material parts, it states that parental custody of J 'is withdrawn from the mother by means of a provisional order and transferred to Mrs AR'. The mother was served with that order on 2 January 1997.

Applications were made by the grandparents under the Hague Convention and the European Convention, and, on 7 January 1997, leave was given to the grandparents to include an application under the inherent jurisdiction for the immediate return of J. By this time, after the mother had removed J from Germany, the grandparents had obtained certain expert evidence. On 31 December 1996 Dr Kubril, a copy of whose report is before me, indicated, for reasons there set out, that there was a possibility that sexual abuse had been perpetrated on J; by a further report, dated 5 January 1997, Dr Muller (the family doctor of the grandmother and J) says in the fifth paragraph: 'Since November 1995, I assume J has been sexually abused. We actually have no proof . . . ' -- that does not appear to be a very precise translation. He continues: 'Now that J is not under the custody of her grandmother, who is very interested and with whom she has a lovely relationship, it is feared that sexual abuse will be continually practised'.

To bring the medical evidence up to date, the mother took J, on 10 January 1997, to see Dr Dryberg, a consultant community paediatrician with the North-West Anglia Health Authority. He examined J and prepared a full report. He gives J, if I may describe it succinctly, a clean bill of health, stating his opinion to be that she is a tall, well-built healthy girl; in regard to the suggestion that she may have been sexually abused, he says in the penultimate paragraph:

'Some vulva soreness, perineal adhesions, are probably associated with over-use of bubble bath. I have advised her mother to stop using bubble bath and just to bathe her in clear water, to dry her well and then to apply a barrier cream. I could find no medical evidence of sexual abuse . . . I do think it would be quite unsafe to assume sexual abuse when a child suffers from perineal soreness and behaviour change, which are both very common.'

The mother firmly denies that the child has been sexually abused and that, whatever the suggestion may be, the second defendant certainly has not been so involved.

That is the position on the evidence before me. It is not in dispute that the grandparents, through their advisers, have tried hard to have these applications heard at a much earlier date, but the shortage of court time was such that they were unsuccessful in that. Therefore, the application has come before me approximately 2 1/2 months after J was removed from Germany.

On the Hague Convention application, issue has been joined as to whether the grandparents have joint rights of custody pursuant to Art 3. If they do not, the Hague Convention application fails outright, since to bring themselves within the Convention they must establish such rights. Mr Hollow, on behalf of the defendants, concedes that as no Art 13 defence is raised by or is available to the mother, if the grandparents succeed in bringing themselves within Art 3 there must, accordingly, be a mandatory order for return. However, Mr Hollow contends that the grandparents have not established the necessary rights of custody within Art 3. Article 3 provides 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, an institution or any other body, 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.'

The last paragraph of the Article provides:

'The rights of custody mentioned in sub-paragraph (a) above may arise, in particular, by operation of law or by reason of a judicial or administrative decision or by reason of an agreement having legal effect under the law of that State.'

Mr Hollow helpfully referred me to the Court of Appeal decision in Re B (A Minor) (Abduction) [1994] 2 FLR 249, a case where a child had been living in Australia with the father and grandmother and the father had agreed to the temporary removal of the child to stay with the mother in Wales for 6 months. The mother did not thereafter return the child. The mother had left and come to this country without the child in April 1992 and the child left Australia for his agreed 6-month period of contact with her here in the middle of 1993. The mother did not return the child and the question arose, because the father had not been married to the mother, as to whether the father had rights of custody. As an unmarried father, he did not acquire rights of custody as such under the relevant State law in Australia. The English court had to decide whether it had jurisdiction to make an order under the Convention. One matter raised was whether the father did have those rights of custody. Waite LJ, at 260G, dealt with the matter in some detail:

'The purposes of the Hague Convention were, in part at least, humanitarian. The objective is to spare children already suffering the effects of breakdown in their parents' relationship

the further disruption which is suffered when they are taken arbitrarily by one parent from their settled environment and moved to another country for the sake of finding there a supposedly more sympathetic forum or a more congenial base. The expression "rights of custody" when used in the Convention therefore needs to be construed in the sense of what will best accord with that objective. In most cases, that would involve giving the term the widest sense possible.

There is no difficulty about giving a broad connotation to the word "custody". Attention was drawn by Lord Donaldson in Re C [ie Re C (A Minor) (Abduction) [1989] 1 FLR 403] to the width of its dictionary meaning, and by Sachs LJ in Hewer v Bryant [1970] 1 QB 357 at p 373 to the diversity of the "bundle of rights" which it incorporates in legal terminology. The same is no doubt true of the word "garde", which (in the phrase "droit de garde") provides the translation for "rights of custody" in the French language version of the Convention.

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 and 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 the place of the legal custodian.

When that approach is applied to the particular circumstances of the present case, the answer reached by the judge was in my judgment unimpeachable. The father who saw off his young boy at Perth airport on 25 August 1993 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 minutes) expressly approved. I accept Mr Holman's submission that it was a status which any court, including the FCWA, would be bound to uphold; at least to the point of refusing to allow it to be disturbed --abruptly or without due opportunity of a consideration of the claims of the child's welfare -- merely at the dictate of a sudden reassertion by the mother of her official rights. It is a status which falls properly to be regarded as carrying with it rights in the Convention sense, breach of which by unauthorised removal would be rendered wrongful within the terms of Arts 3 and 5.'

Mr Hollow points to the passage at 261E where the Lord Justice refers to the absent mother tacitly and later expressly approving minutes of agreement entered into between herself and the father. Those minutes are referred to specifically in the judgment, at 252E. Under para 1 of such minutes, it was stated that the father was to have sole custody of the child. Mr Hollow submits that that case accordingly came within the provisions of Art 3 in that rights of custody arose by reason of the minutes of agreement having legal effect under the law of that State.

Mr Hollow further relied on the decision in Re J (A Minor) (Abduction: Custody Rights) [1990] AC 562, sub nom C v S (A Minor) (Abduction) [1990] 2 FLR 442. In that case the parents were unmarried and resident in Western Australia. The mother and father had lived together. The mother came to this country from Australia, bringing the child with her. The father, as an unmarried parent, had no rights of custody under the relevant Australian State law. He applied in the UK for an order of immediate return to Australia under the Hague Convention. However it was held that, as he had no rights of custody, the court had no jurisdiction. Mr Hollow prays that case in aid, saying that there the court was concerned with a parent who was fully involved with the child, having lived, up to the time of removal, in the same house with the child and the mother, yet that parent was not deemed to have rights of custody.

In my view that case can be distinguished from the instant case on the basis that 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. However, 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.

I return to the passage in Re B. With respect to Mr Hollow's succinct argument, I do not consider that the court there was seeking to bring itself within the strict provisions of Art 3 by holding that there was a legal agreement in being under the law of the State in question. If one goes to the passage, which I have read, at 261C of Waite LJ's judgment, he was clearly basing his finding that rights of custody existed on a consideration of the extent of the actual privileges enjoyed and duties carried out by the particular parent. He held that it was a question of fact in each case. Indeed, if one considers the submissions made by Mr Holman, for the father, at 259, he was there asserting in terms that the father had been functioning in the fullest sense as a parent, and that that was the fact on which he sought in particular to rely. Furthermore, in his judgment Waite LJ did not make the qualification which Mr Hollow invites me to make, namely that it was the legal agreement which brought the case within the provisions of Art 3. The test which the judge propounded was whether the individual concerned was exercising functions of a parental or custodial nature without the benefit of any official custodial status.

Mr Hollow further submits that, in any event, I must bear in mind that the mother has maintained her connection with J through contact and that in any event it is her case that she placed J on a temporary basis only with the grandparents whilst she was seeking to obtain accommodation of her own. That she has not give up her rights of custody is borne out, he submits, by the very fact that the grandparents themselves went to the German court on 25 October 1996, making their applications, thereby underscoring the absence of an agreement between the grandparents and the mother as to J making her home with them.

Against Mr Hollow's submission as to the limiting effect of the last paragraph of Art 3, it is important, in addition to what I have said, to bear in mind that the word 'may' is used. The paragraph starts, 'The rights of custody mentioned in sub-paragraph (a) above may arise . . .' Accordingly, rights of custody, in my view, are not confined solely to the specific situations set out in the Article; the court may step beyond them, as the court did in Re B (above).

I turn to consider -- and I believe this to be the correct approach -- whether there was an agreement, following the passage in Waite LJ's judgment, whereby either the mother can properly be said to have agreed to J making her home with the grandmother, or alternatively, whether some situation arose whereby the grandparents were carrying out duties and enjoying the privileges of a custodial or parental character which the court would

be likely to uphold in the interests of the child concerned. I bear in mind what Mr Hollow has submitted; he emphasises the mother's contact, the fact that she was short of funds and so lacked a home, the difficulties arising from the second defendant's motor car accident and her view that the placement of J with the grandparents was a temporary one. Against that, Mr Setright, on behalf of the grandparents, submits that there was an agreement which can be spelt out from the parties' conduct and exchanges; alternatively, there was a commitment and involvement by the grandparents whereby they carried out the duties and enjoyed the privileges of a custodial or parental character which came within Waite LJ's definition in Re B.

He submits that the grandparents were the actual physical carers of J for 14 months without the mother, and for 16 months in all with some assistance from the mother for 2 extra months. J made her settled home with them. They, over more than a year, made parental decisions about her. Their care was not challenged by the mother until the mother removed J on 14 December 1996. Mr Setright emphasizes that there were occasions when the mother did not have contact because the grandparents declined to permit it; they also say that the mother was away for periods when they did not know where she was and so they were in sole charge of J, not just looking after her on a day- to-day basis but making essential decisions about her. In these circumstances, Mr Setright submits that J should properly be seen as having been placed unequivocally with the grandparents, not on a temporary basis but on a long-term, longstanding arrangement with them. Indeed, they appear to have started her off at her kindergarten, which she must first have attended in about September 1996. He indicates how the grandparents' care was brought to an end abruptly, unilaterally and secretively, by the deceit of the mother in the way indicated. By this time they had already started custody proceedings in proper form in the German court, that that court became fully seized of the matter and, indeed, following J's removal on 16 December 1996, the German court acted quickly, making a provisional transfer of custody to the grandparents. Of course, I accept that this must be qualified by stating that the mother's case is that she had not had notice of the proceedings; in any event the mother has not been heard in such proceedings.

I also bear in mind that this is a case where there is a real issue as to the mother's ability to care for J and as to where J's welfare may best be provided for in the long term.

I can also take into account the fact that this is really, on any view, a German case. As I said rather crudely at the outset of this hearing, this case has Germany stamped all over it. The mother is German, the grandparents are German (and do not speak English), J is German, has been brought up to speak German and has spent all her life in Germany until mid-December 1996. There is expert evidence which is available in Germany which concerns J's welfare. Of course, there will also be a large body of non-expert evidence in Germany going to events that have happened in J's life there.

This German aspect of the case has, it seems to me, also some bearing on the settlement of J with the grandparents based in their German home, which was also J's home since August 1995 through to December 1996.

Mr Setright invites me to say that an agreement can be spelled out from the conduct of the parties or the exchanges that have taken place between them to the effect that the grandparents should have full custodial rights. Whilst I have reservations as to whether any such agreement came into being, I have no hesitation in coming to the conclusion that the grandparents held joint custodial rights within the provisions of Waite LJ's definition. In the circumstances to which I have already made detailed reference, they carried out full

parental responsibilities over a substantial period of time, and accordingly must be taken to have established their joint rights of custody within Art 3.

That being so, Mr Hollow has appropriately indicated that there is no point which he can further take on the Hague Convention, and an order under that Convention accordingly follows.

However, were I to be wrong about that, there is a further summons before the court, relying on its inherent jurisdiction, to return J forthwith to Germany. In exercising its inherent jurisdiction, the court may, where a child has been taken unilaterally from its habitual residence to this country, order, if the matter is brought swiftly to the attention of the court, that it is in the welfare and best interests of that child to be summarily returned without a detailed investigation so that the hearing can take place in the country of habitual residence. The remedy is discretionary. Mr Hollow emphasises that, when those powers are not available to the court under the Hague Convention, any such jurisdiction must be exercised sparingly. Mr Hollow submits that J gives the appearance of being settled in this country. The paediatrician, on 10 January 1997, gave her a clean bill of health. She has been here for approximately 2 1/2 months, she has recently been placed in school and, although her English is limited, she is making ground. Further he maintains that I must avoid, at all costs, a situation arising whereby this little girl goes back to Germany now and then returns at some later date because a court, at the substantive hearing, rules that J must make her home with her mother. I bear all those matters in mind. I also bear in mind in particular those factors to which I referred, namely the German aspect of this case and this little girl's involvement in Germany up to December 1996. I appreciate that since then 2 1/2 months have passed; nevertheless the plaintiffs have done their best to get this case heard at the earliest possible date and they have moved the court expeditiously. The German court has already become seized of the matter and in making certain orders has indicated that, if the matter returns to it, appropriate orders can be made with expedition. In addition to that, I also bear in mind that this little girl made her home in Germany throughout her life up to December 1996.

In those circumstances, being asked to exercise my power also under the inherent jurisdiction, I consider it appropriate to order that J be returned forthwith to Germany for an expedited hearing to determine her long-term future. In my view it is apparent that her welfare requires that this should be decided as soon as possible in Germany, where all the main evidence should be available at an early date.

For the benefit of the mother, I wish to make it quite clear that in making the order I do, I am not in any way prejudging the ultimate outcome of what will be, to use a general term, competing custody applications to be heard by the German court. The substantive decision is a matter for that court when it has heard the evidence. I have heard no oral evidence today. I simply say that the substantive matters should be dealt with by the German court. Of course, that is also a matter of comity. I have regard also to the welfare of the child. In my view it is desirable that this matter should be dealt with in Germany, the place where this child has made her home for so much of her life.

Accordingly I make the two orders under the two applications in question, namely that J be returned to Germany forthwith. The European Convention application has not been pursued before me and, therefore, I make no order on that.

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