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[06/06/1994; High Court (England); First Instance]
N. v. N. (Abduction: Article 13 Defence) [1995] 1 FLR 107, [1995] Fam Law 116

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

6 June 1994

Thorpe J

In the Matter of N. v. N.

Judith Hughes QC for the father

Jane Bennington for the mother

THORPE J: This is a summons brought under the Child Abduction and Custody Act 1985 by a father, who is 33 years of age and an Australian national. The defendant is the mother who is 32. She was born in England but spent a good deal of her childhood in South Africa and Australia. She has dual nationality, Australian and British. She moved to Australia when she was about 15 years of age. In 1980 the couple met and, on 1 August 1981, were married. Their first child, L, was born on 30 March 1983 and is therefore 11. In September 1983 the family left for South Africa on trial. The trial lasted approximately 6 months. On 18 July 1985 A was born, she is now 8. On 25 January 1989 T, the youngest child, was born and is now aged 5. In 1990 the family tried a move to England. It lasted 6 months. The experiment was a failure. It seems that at that stage the mother was having some difficulty in her relationship with her own family. In March 1992 the mother's brother was killed in the Bosnian conflict. The consequence was, inevitably, that she was very upset and she returned to England for a period of 3 weeks for her brother's funeral. After that, there is certainly a perception on one side that the marriage ran into difficulties.

In the first 3 months of 1993, the father began to slide into a depressive illness. He was diagnosed by his general practitioner and referred to local specialist consultant psychiatric services. He was admitted to hospital for a period of 3 weeks. He was diagnosed as suffering from bipolar affective disorder, he was put on a prescribed dose of lithium carbonate which swiftly controlled his psychiatric state. There is in the evidence notes in his own hand which he wrote during that period of disorder which, to some extent, corroborate what extraordinary stresses he must have caused to the mother and the children during the period when the depressive state was developing and was undiagnosed and untreated. However, it is significant that in the mother's first affidavit in these proceedings she recorded her

estimation that prior to the onset of the illness, 'He was the quietest, most gentle father one could hope for'.

In May 1993 the couple separated. Each left the final matrimonial home for separate rented accommodation. The children, of course, stayed with their mother. In July 1993 the mother asked the father whether she could take the three children to England to her family for the long Australian summer holiday. To that, the father agreed, providing that they returned by the middle of February 1994, missing only the first few days of the new school year. In August or September 1993 the mother says that she began to suspect that her daughter had been sexually interfered with. She did not raise the matter with the father and took no action to reduce or supervise his continuing contact. She undoubtedly experienced difficulties, also, with L who was referred to the local child psychiatric resource and there is in the papers a report from the doctor who was responsible for his treatment. The report, which is dated 26 May 1994, shows that L was referred for management of aggressive behaviour and tantrums, said to be present over 6 months since his father was admitted to hospital. The report shows that he presented as a thin, distressed-looking boy, defensive and reluctant to discuss either his behaviour or feelings. The report also shows that the father had been sleeping occasionally in the mother's home and that in consequence L was confused as to whether or not his parents were separating or reuniting.

Seemingly, the movement was towards reconciliation, for at the beginning of November 1993 the family reunited for the 3 weeks immediately prior to the planned departure for the UK. During that period the mother took A to the same unit, the Princess Margaret Hospital for Children, for physical examination. The report from the specialist who conducted the examination concluded that there was an irregularity of A's hymen consistent with interference instanced as, perhaps, the insertion of a finger or other object into her vagina. The father had no knowledge of this referral, or of the consultant's opinion, or of the mother's developing suspicions. The departure at the end of November 1993 was, therefore, one that was not regarded by the father as in any way a final departure. As far as he was concerned the 3 weeks of resumed family life had been entirely successful and were a firm basis to resume family life at the end of the summer holidays. The mother and the children, on arrival in the UK, stayed with her parents in Northampton. There was some telephone contact which did not in any way alert the father to any impending crisis. He sent presents for Christmas and a card for T's birthday. He telephoned at Christmas. L was in the room, as his parents spoke, and wished to speak to his father, but that was not permitted by his mother. After Christmas this telephone contact ceased. The mother and children were housed by the local authority and the mother's parents changed their telephone number.

In January 1994 the mother says that A began to attribute the physical signs observed in Australia to interference by her father. The case was referred to the local social services department and an interview was arranged in accordance with standard procedures. When seen by the social worker and a woman police constable, A again attributed to her father the responsibility for inappropriate sexual experience. On 27 January 1994 the mother's solicitors wrote a letter to the father in Australia informing him of this development. But because of a change of his address he did not receive that letter until after the commencement of these proceedings. By February 1994 the father was clearly alarmed that the mother and the three children might not meet their commitment to return on 18 February 1994 and a letter was written threatening proceedings under the Convention. The originating summons that I determine was not actually issued until 23 March 1994, since as always there was an interval during which the wheels set in motion in Australia led to the issue of proceedings by the central authority. On 15 April 1994 Kirkwood J gave directions, including a direction that the court welfare officer should report on the children's views. Also on 15 April 1994 the father issued an application in the Family Court of Western

Australia for custody of the three children. This summons has a return date, Thursday of this week, 9 June 1994.

On 6 May 1994 the case came before me. I heard oral evidence from the court welfare officer, Mrs Werner Jones, and having read the reports prepared by the consultant psychiatrists who had been involved in the case pursuant to leave granted by Kirkwood J, I adjourned to enable the child psychiatrists to see the children. During the course of that first hearing it seemed to me that the issue of grave psychological harm relied upon by the mother needed to be looked at on two distinct bases. One, if the children returned accompanied by their mother and, two, if the children returned unaccompanied. As a result of criticisms that I made of the mother for having prevented L from speaking to his father on the telephone, opportunity was arranged for the father to speak to L over the adjournment and that telephone contact took place on 13 May 1994. The conversation was entirely successful, and lasted somewhere between 60 and 90 minutes. It was, of course, intended that the case should be returned reserved to me, since I had already heard oral evidence. But as a result of some misunderstanding the case was, in fact, listed again before Kirkwood J on 20 May 1994. He adjourned the case for 7 days, saying that it should be listed on 27 May 1994 and that in the interim the two child psychiatrists should produce a statement as to what they agreed and what they did not agree in the assessment of possible psychological harm in the event of return accompanied or, alternatively, unaccompanied.

On 25 May 1994 the father arrived in the UK from Australia and was seen on the same day by a consultant adult psychiatrist, Dr Wilkins. Arrangements had been made for him to speak to the children on the telephone on the following day. The arrangement was that they would telephone him in the evening at his hotel, but that did not take place, the mother saying on the following day, through her counsel, that the children had not wanted to speak to their father. That, then, is the chronology.

I heard oral evidence from Dr Wilkins, Dr Dennehey and Dr Lindsey, in addition to the oral evidence of the court welfare officer. Miss Hughes applied for leave to call her client to give oral evidence. I refused that application, partly because during the extended preparation of the case both parents had made very long affidavits setting out their respective version of the history, and partly because it seemed to me inevitable that if I acceded to that application the mother would then want to give oral evidence giving her version of events.

The evidence of Mrs Werner Jones was a helpful addition to her written report. Her view was that if the children returned to Australia with their mother, there would be no risk of grave psychological harm because they feel that she could protect them and would ensure that they did not see their father if they did not wish to do so. Of the children, she said that the least concerned at the prospect of return to Australia was L who, provided he was with his mother, would prefer Australia to the UK. However, Mrs Werner Jones was of the opinion that if they were returned to Australia without their mother they would be at risk of psychological harm by implication because they would feel unprotected. She emphasised that L's preference for Australia was very positive.

I found the evidence of Dr Wilkins of limited value. When he came to this court he had no evidence of the detail of the father's treatment in Australia and he had not had communication with those who had had clinical responsibility. The only evidence available to him was the evidence available to all of us in the short reports from Dr Solah and Dr Nelson. It seemed to me, too, that his primary purpose was to certify the fitness of a patient, rather than to assess his past and future relationship with his children. I was a little concerned that the level of the father's prescribed daily dose of lithium carbonate fell relatively high in what Dr Wilkins said was the range of 600 to 1200 milligrammes per day.

However, Dr Wilkins' assessment of the father's bipolar affective disorder as mild has subsequently been corroborated by evidence which he has obtained from Australia since I reserved judgment. In particular, we now have available a copy of the report of 19 February 1993 from the consultant psychiatrist to the general practitioner in which he said in his opening sentence, 'I agree there has been a personality change recently, the basis of which is probably a mild bipolar affective disorder'.

Dr Dennehey and Dr Lindsey each seemed to me initially to have been to some extent influenced by the outcome sought by the parent on whose behalf each was instructed. I certainly concluded that Dr Dennehey's first report minimised the risks of psychological harm to the children in the event of their return. The second report is manifestly not open to that criticism. The subsequent co-operation between Dr Dennehey and Dr Lindsey has been most helpful. Equally helpful has been their oral evidence. I conclude that Dr Lindsey has made a realistic assessment of the possible psychological effect of return upon the mother and the children, but that Dr Dennehey has made an important contribution in highlighting the psychological effect of refusing return upon the mother and the children.

Upon that basis, what should be the outcome? First, wrongful abduction is conceded. The mother's case rests upon the Art 13 defence and the submission that there is a consequential discretion to refuse the order which ordinarily follows in the event of a conceded wrongful abduction. The case for the mother is put by Miss Bennington on three grounds. First, she relies upon the children's objections to return and especially A's. Secondly, she relies upon the risk of physical harm to A. Thirdly, she relies upon the risk of psychological harm to all three children.

I take those objections in turn. First, I consider the children's wishes and feelings. The children have been interviewed by a number of experienced experts. They have been seen by Mr Pitts the social worker, Mrs Werner Jones the court welfare officer, Dr Lindsey, and Dr Dennehey. If one only of those experts had assessed the children the picture that emerged would have depended on who had conducted the interview. This reflects not partiality in the interviewer, but the reality that the wishes and feelings that children express are variable, being partly dependent on mood, on adult influence and on reaction to the individual assessor. So here, instead of a still, there is a moving picture. It seems to show developing resistance to return. That may be a reflection of the influence of the mother's rising emotion as the case has progressed. In the end I give primary weight to the evidence of Mrs Werner Jones. She alone was specifically commissioned to ascertain the children's wishes and feelings. Her report shows that what the children objected to was not return to Australia, but separation from their mother. Indeed, so long as they were with their mother there was, on balance, a preference for return. Clearly, A's objections, realistically analysed, are to re-exposure to the father rather than return to Australia. To be and to feel protected there is the essential safeguard that she requires.

So in relation to the wishes and feelings of the children, I have regard to a passage from the judgment of Balcombe LJ in S v S (Child Abduction) (Child's Views) [1992] 2 FLR 492 at p 500. He said:

'It will usually be necessary for the judge to find out why a child objects to being returned. If the only reason is that it wants to remain with the abducting parent who is also asserting that he or she is unwilling to return, then this would be a highly relevant factor when the judge comes to consider the exercise of discretion.'

On the following page he said:

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

Those words seem to me to be apposite to the present case and the first ground relied upon by Miss Bennington.

As to the risk of physical harm to A alone, there is, of course, a possibility that the father has sexually abused A. The case rests on: (a) the physical abnormality; (b) A's assertion; and, possibly, (c) the father's acceptance that he used to get into her bed. But it is equally possible that the abnormality was accidentally or otherwise caused and that the assertion is the product of direct or indirect influence. The issues need to be investigated in the pending proceedings which are at present appropriately constituted in Australia. In the interim, A needs protection. But protection does not require refusal of the application for her return. Such risk of physical harm as may exist is created by unsupervised staying contact to the father, not by return to Australia.

Thirdly, I consider what is the real buttress and the real foundation of the mother's case, namely the risk of psychological harm to all three children. One resolution of this summons would be to conclude that, first, Dr Lindsey has realistically assessed the psychological effect of accompanied return upon the mother and children. Secondly, both Dr Lindsey and Dr Dennehey agree the risk of psychological harm to the children if returned without their mother. Thirdly, the mother refuses to contemplate return under any circumstances, preferring to part from the children than to accompany them. Fourthly, therefore, in the exceptional circumstances the plaintiff must be refused his order.

In my judgment, that is far too facile an analysis. Dr Dennehey rightly emphasises the psychological effect on the children of refusing to order their return. They know their abduction has been achieved by deceit. How will they relate to their mother and their father hereafter if she achieves her object by such means? The mother is seeking to obliterate the father from her life and the lives of the children, almost as though he were dead. If she succeeds in distancing him by ten thousand or more miles, directly or indirectly discouraging contact, what will be the long-term effect on the children of losing a devoted father in such a way? In my judgment, an Art 13(b) defence needs to be weighed both in the light of the immediate past and comparatively. As to the immediate past, the mother has manifestly put the children at risk of grave psychological harm by removing them from their homeland by deception and by obstructing contact with their father. That risk would have been avoided, had she separated the family in Australia and responsibly addressed the consequences by seeking leave to remove the children by agreement or order in Australian proceedings and by establishing a post-separation relationship between the children and the father by agreement or by order in the proceedings. Having herself so jeopardised the children, she creates the opportunity to assert that to return them home risks further disturbance and thus psychological harm.

As to the comparatives, I conclude that the court is entitled to weigh the risk of psychological harm of return against the psychological consequences of refusing return. Here I conclude that both risks are substantial. It involves speculation to determine which is the more substantial. In exercising the discretion in such circumstances, due weight must be given to the important primary purpose of the Convention to ensure the swift return of abducted children.

Finally, I must consider whether the mother's ultimatum prevents me from making the order sought. In this province it is obviously of primary importance that abducting parents should not be empowered to defeat the Convention by manipulation or even by the expression of genuine fears and sincerely held feelings. The general case was considered by Butler-Sloss LJ in Re C (A Minor) (Abduction) [1989] 1 FLR 403. At p 410 she said:

'The grave risk of harm arises not from the return of the child, but the refusal of the mother to accompany him. The Convention does not require the court in this country to consider the welfare of the child as paramount, but only to be satisfied as to the grave risk of harm. I am not satisfied that the child would be placed in an intolerable situation if the mother refused to go back. In weighing up the various factors I must place in the balance and as of the greatest importance the effect of the court refusing the application under the Convention because of the refusal of the mother to return for her own reasons, not for the sake of the child. Is a parent to create the psychological situation and then rely on it? If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and four through the Convention, at least in respect of applications relating to young children. I, for my part, cannot believe that this is in the interests of international relations. Nor should the mother, by her own actions, succeed in preventing the return of a child who should be living in his own country and deny him contact with his other parent.'

Whilst that statement is of general application, I recognise that this is an exceptional case. Here the father is disqualified from primary care as a single parent by: (1) his illness; (2) the unresolved possibility that he has exposed A to inappropriate sexual contact; (3) the children's estrangement as a consequence of his recent psychiatric history. I cannot say, as Butler-Sloss LJ said in the passage I have quoted, I am not satisfied that the child would be placed in an intolerable situation if the mother refused to go back. But here, as in the case of Re C, the mother is offered the protection of conditions and undertakings to ensure her independent life and management of the children in the event of their return. There is thus no evident substance to her fears, nor do they seem to recognise that: (1) the bad experiences of 1993 were preceded by years of model behaviour; (2) the father's conduct in 1993 was not wilful but the product of illness; (3) once diagnosed and chemically controlled, the father's behaviour has reverted to pre-morbid stability. If the order compelled her return to cohabitation, her bitter preference to forego her children might be credible and decisive. But the order only compels her to return to reality, to the consequences of her flight, and to the responsibility of dealing with separation and its consequences either by mediation or by litigation in what is clearly the convenient forum. In the end, even if the wife succeeds in establishing that the order for return viewed in isolation gives rise to a risk of grave psychological harm, the consequence is only to confer upon me the judicial discretion. In exercising the discretion, the welfare of the children is an important, but not paramount, consideration. In all the circumstances of this case, I am not prepared to exercise that discretion to refuse the order sought by the originating summons.

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