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[30/10/1992; High Court (England); First Instance]
Re B.-M. (Wardship: Jurisdiction) [1993] 1 FLR 979

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

30 October 1992

Eastham J

In the Matter of B.-M.

Mark Everall for the father

EASTHAM J: In this case I am concerned with a very young girl called B-M. She was born on 25 October 1991 and she is therefore one year old this month. Her parents never married. The father is a British subject, the mother is a German citizen.

I have been provided with a very helpful chronology which shows that the mother came to this country in 1989. The two parents met in 1990 in circumstances in which they both had accommodation in the same building but with the shared use of a garden and they met in that garden. By August 1990 they had formed a relationship and were cohabiting and by early 1991 the mother was pregnant of B-M. In April 1991 the two parents moved to a new flat and 2 months later, in June 1991, they moved again to new premises. That was their shared home when B-M was born, as I have already said, on 25 October 1991.

Unfortunately the relationship between the parents got into difficulties. They continued to live together in strained circumstances until May 1992 when they agreed to separate. That agreement was not immediately put into effect because it was not until the beginning of July 1992 that the father moved out of the premises and in the same month, not without significance to what I am called upon to decide, the mother then entered into negotiations and obtained a new lease of those premises for a further period of 12 months. In July 1992 there had been discussions between the parents about contact by the father. He wanted frequent contact, but by August 1992 difficulties were being put in his way on his evidence by the mother and so eventually in August 1992 he went to solicitors to obtain assistance from the court for more formal contact arrangements. The first letter from his solicitors appears in the bundle prepared for my use at p 24 and is dated 12 August 1992. Those solicitors advised him, in view of the fact that the child was illegitimate, to apply under the then Children Act 1989 for a parental responsibility order and also for what used to be called a defined access order and is now a contact order. Those two sets of proceedings were commenced by the father on 14 August 1992.

As the father's solicitors pointed out to the mother, he did not wish to become involved in hostile proceedings and there was going to be a conciliation appointment which he hoped would be successful, but unfortunately the conciliation appointment was not successful and on 20 August 1992 the mother submitted answers to the two applications made by the father for parental responsibility and contact orders.

Then there was correspondence between the respective English solicitors acting for the parents and that correspondence related mainly to interim contact pending the decision of the family proceedings court. Agreement was reached in principle. The mother insisted that it should be under supervision and she was opposed to any form of staying contact, but she was agreeable to the father and the father's mother having the child for a short period once a month. The letters which appear at pp 30, 31, 32, 34, 36 and 38 related to that.

One interim access was agreed for the father and another period was tentatively agreed for the father together with his mother and that was agreed for a date early in September 1992, some time during the week. However, the mother's solicitors wrote to the father's solicitors making it plain that the mother had recently started a course in this country which occupied her during weekdays of Monday, Tuesday, Wednesday and Thursday and re-suggesting the date for the mother and father's access on the Friday.

Now we move to the position obtaining on 3 September 1992. It would appear that either on that date or possibly very early on 4 September 1992 -- and I think more probably on 3 September 1992 -- the mother took B-M out of this country to Germany where her parents live. The father was in touch with his solicitors. He was not completely certain as to what was happening but on the morning of 4 September 1992 he, the father, through counsel made an ex parte application to myself, as it so happened, in wardship and the order which I made appears in the bundle at p 15 (although in the index I appear to have changed the spelling of my name). That order provided that B-M should continue to remain a ward of this court during her minority. Because of the father's lack of certainty of knowledge, there was then an order to the tipstaff to seek and locate not only B-M but also the mother, but the order also provided that, if the minor, B-M, was located out of the jurisdiction of England and Wales, the mother should forthwith return B-M to this country.

The mother's solicitors in Germany have taken up the attitude that the father, in obtaining those orders from the English court and from myself, was guilty of failure to make full and frank disclosure and it is also contended that the English court had no right and must have known that it had no right to make the order which it did. That was 4 September 1992.

Reverting now to the chronology: at about 12.30pm, after I had made the order, the father telephoned the mother in Germany and his version of what took place over the telephone is recorded in his affidavit. He also brought in B-M's English godmother and on the following day that lady telephoned the mother and her version of what passed on the telephone is set out in a short affidavit which she swore, which appears at p 68 of the bundle put before me.

On 11 September 1992, because neither the German lawyers nor the English lawyers who had come on the scene in relation to the parental responsibility and contact order applications were prepared to accept service, the mother was served personally with the wardship documents and the affidavit of service appears at p 47 of the bundle of documents put before me.

On 23 September 1992 the father applied for assistance to the Lord Chancellor's Department and on 29 September 1992 he issued the current summons before me which asked for an order that I should declare that the retention of B-M is wrongful within the

meaning of Art 3 of the Hague Convention on the Civil Aspects of International Child Abduction 1980.

On 16 October 1992 the mother was served with that summons but she has not appeared before me and on 19 October 1992 a district judge made an order that that summons in wardship should be heard this week and a similar order was made by another district judge in relation to the applications for parental responsibility and contact.

On 21 October 1992, Mr Michael Nicholls, on behalf of the Official Solicitor, who is the administrative head of the Child Abduction Unit in this country, wrote a letter to the father's solicitors in which he - Mr Nicholls - on behalf of the Official Solicitor raised a number of points which at that stage were causing him some concern. The letter finishes by saying:

'You mention that you were in the process of seeking a declaration of wrongful removal. The Official Solicitor, as administrative head of the Child Abduction Unit, is prepared to instruct counsel to appear as amicus curiae on the hearing of the application. If a declaration is granted then, of course, your application will be transmitted to Germany without delay.'

Although it does not appear in the letter, I have been told by Mr Everall - and of course I accept what I am told -- that the Official Solicitor said that, whether or not he instructed counsel, he would like a copy of the letter to which I have just referred to be in the bundle to be put before me and that was duly done. Halfway through his submissions, Mr Everall allowed a suitable pause for me to say that I would like the Official Solicitor to attend as amicus, but in all the circumstances for the reasons which I shall be giving subsequently, I did not think it necessary to trouble the Official Solicitor to instruct counsel as amicus in this case.

So far as English law is concerned, the father had not succeeded as at the date of the removal of B-M to Germany in obtaining a parental responsibility order. B-M was an illegitimate child and, subject to any order that the court might make - which it had not done - the mother, unless and until custody was taken out of her hands by an order of the court, was the effective custodian of the child.

It is common ground that B-M is a German citizen and therefore an alien so far as this country is concerned and the first point to consider is whether the court had any jurisdiction at all to make the order which I made on 4 September 1992. I was helpfully referred to Lowe and White, Wards of Court (2nd edn), pp 19-24 and in particular I was referred to the passages dealing with alien children. At p 19, the authors submit that:

'Inherent jurisdiction to ward a child is based on the minor's allegiance. Any minor who can be said to owe allegiance to the sovereign enjoys the corresponding right to protection from the Crown and may be made a ward of court.'

Then they quoted a passage from the judgement of Pearson LJ in Re P (GE) (An Infant) [1965] Ch 568 at p 587, in which he said:

'It is clear from the authorities that the English court has, by delegation from the sovereign, jurisdiction to make a wardship order whenever the sovereign as parens patriae has a quasi-parental relationship towards the infant. The infant owes a duty of allegiance and has a corresponding right to protection and therefore may be made a ward of court.'

It is on that basis that the courts for a long time have held that any minor who is a British subject can be warded, whether he is born in or out of allegiance and irrespective of where he is domiciled, resident or physically located at the date of the application.

So far as alien minors are concerned, the Official Solicitor accepts that there is jurisdiction in the English wardship court to make a child a ward of court in respect of any alien minor who is physically present in England and Wales, ie the jurisdiction of the High Court of England. That is duly stated at p 21 of Lowe and White, Wards of Court, in this sentence:

'Alien minors who are physically present in England and Wales can be warded here irrespective of their nationality, domicile or citizenship. This is because aliens owe temporary allegiance while present in the jurisdiction.'

However, the learned authors of Wards of Court say and submit that there is another ground upon which the court has jurisdiction in respect of alien children and that appears at p 22 of the volume under the heading of 'Ordinary residence', in which it says:

'In Re P (GE)' [and that is a case to which I shall subsequently have to refer] 'it was held that the court had jurisdiction in respect of a Stateless alien minor, who though not physically present could be said to be "ordinarily resident" in England and Wales. The test of ordinary residence was justified on the basis of justice and convenience in that it would be, in the words of Pearson LJ, "unjust if the wrong parent or parents were prevented from obtaining relief in the English court by the accident of the child being on holiday at a particular date or by the wrongful act of kidnapping".

To be ordinarily resident the court held that a child must be said to have had his home or base in the jurisdiction at the date of the application.'

Finally at p 24 the authors say:

'Despite its widespread acceptance there is in our view some doubt about the precise application of Re P (GE). The parties in question were Stateless and it could be argued that the strict ratio of the case was that jurisdiction based on ordinary residence only applies if the minor is Stateless. It is submitted that the decision is wider than that and extends to any alien minor who can be said to be ordinarily resident in England. Admittedly the court referred to the fact that both father and son held travel documents entitling them to return to England, issued pursuant to the Final Act and Convention relating to the Status of Stateless Persons 1954, but this plus the fact that the parties had only obtained a temporary tourist visa to visit Israel pointed to their being resident in England so that the decision would appear not to be confined to Stateless minors.' I have come to the clear conclusion that the learned authors of that volume were correct in the second proposition that I have just read and I have come to the conclusion that the English wardship court does have jurisdiction over an alien child provided England or England and Wales is the habitual residence of the child.

In this case, the mother has taken no part at all and the order which I made was made, as I have already found, probably the day after the mother had taken B-M out of the jurisdiction to Germany. If as at the date I made the order it could be established that the mother and, through her, the child had ceased habitually to reside in this country, then I would have had no power or jurisdiction to make the order which I did. On the other hand, if on the totality of the evidence it appears to me - and I have considerably more evidence today than I did when I originally made the order - that the place of habitual residence of this child and indeed of the mother on 4 September 1992, which is when I made the order, was England or England and Wales, then I had jurisdiction to make the order.

One then has to look at the evidence and it is quite plain from the authorities, in particular from judgments given by Parker LJ and subsequently by Balcombe LJ, that it is upon the father in the first place in this case because he is making the application to satisfy the court that the mother and his child, B-M, were habitually resident in this country. If he establishes that fact, then it is incumbent upon the mother - and the burden is on her - to establish to the satisfaction of the court that as at the date that the court purported to exercise its wardship jurisdiction she had by that date changed her habitual residence and thereby changed B-M's habitual residence from England to Germany.

So far as the burden is on the father: he and the mother met in this country. They started an association and the mother certainly was indicating pretty firmly that England was her choice of residence and it was clearly her place of habitual residence. They shared a flat and when unfortunately they separated the mother then took a lease for a further year on the same flat. Although, of course, the mother is bilingual and wanted the child to be bilingual, nevertheless according to the father she generally spoke to B-M in English. After the birth of the child, she took several steps such as enrolling on the course which I have already mentioned which established on the balance of probabilities that her place of habitual residence was this country.

The father in his evidence and in his second affidavit refers to the fact that in moments of stress, which is purely understandable, this mother on at least two occasions had gone back to her parents in Germany for a short while and then returned to this country. He also refers to an occasion when she visited her parents in, I think, July 1992. She came back from all those visits to Germany. She left, as I have said, probably on 3 September 1992 without any indication of what she was about and, as I have said, the father had a telephone conversation with her just after midday on the following day and the godmother spoke to her on 5 September 1992. They have given me accounts of those conversations which in my judgment are acceptable. They do not seek to put in her mouth over-damaging admissions and the substance of what they say was that this was a woman who was clearly undecided as to what she should do and obviously she had been upset and worried needlessly, in my opinion, by the father having issued his proceedings for parental responsibility and contact.

The mother has not attended here but I have had to look at all the evidence available to me to see whether I can be satisfied on the balance of probability that she had irrevocably made up her mind as at the morning of 4 September 1992 to abandon her habitual residence here and to adopt a new habitual residence for herself and the child in Germany and, having looked at all the available evidence, not only am I not satisfied that a case has been made out that she had abandoned her place of habitual residence but I am satisfied on the balance of probabilities, even though the burden is not on the father, that as at the date that I made the order in wardship she had not changed her habitual residence from this country to Germany, notwithstanding the fact that she and the child were physically in Germany with effect from 3 September 1992.

In these circumstances, I have come to the conclusion that I did have jurisdiction to make the order. It was a perfectly effective order and one of the results flowing from the making of the order is that the custody of this child became vested in this court and the mother thereafter had no right to change the child's place of habitual residence. Those were matters for the court.

On 11 September 1992 the order was personally served. It may well be that the removal on 3 September 1992 by the mother was not an unlawful removal. There was no court order in existence and she was the mother of an illegitimate child. But come 11 September 1992, the court had on 4 September 1992 made B-M a ward of this court and on service of that order,

by keeping the child out of the jurisdiction and failing to return her in accordance with the order of this court, in my judgment, the mother was guilty of wrongfully retaining B-M out of the jurisdiction.

The next point that arises is whether a declaration ought to be granted, bearing in mind that the father has no rights of custody and indeed, unless and until the English courts give him a parental responsibility order and a contact order, he has no rights of access or contact. But on the authorities that does not matter. The father can point to the fact that the court itself has no custody and can rely on that in support of an application that he makes for the return of the child under the Hague Convention. If there were any doubt at all about that, one only has to look at two cases cited by Mr Everall in relation to applications being made by persons who themselves did not have any right of custody but other persons did to see that the person who did not have any right of custody was entitled in the view of the court to make the application on the basis of a third party's right of custody, the most extreme example being the case cited towards the end of this argument by Mr Everall, a decision of Ewbank J in which he allowed the father to make an application based upon breach by the mother of her custodial rights - the case of Re H (A Minor) (Abduction) [1990] 2 FLR 439.

Mr Everall, in the course of his submissions, because of the request by the Official Solicitor that his letter of 21 October 1992 should be placed before me, went through the letter pointing out where, in his submission, the Official Solicitor's views were not well-founded. He started at p 2, where the Official Solicitor said that the wardship proceedings may not be effective because, if B-M is a German national, she was not in the jurisdiction at the time that the order was made. At the time of writing this letter, the Official Solicitor did not know precisely whether B-M was German and, if so, when she had been removed. I have already stated that B-M is a German national and I have already said that she was not physically within the jurisdiction at the time when I made my order but, for the reasons I have already given, I am satisfied that she was ordinarily resident within the jurisdiction as at the time I made my order and therefore I had jurisdiction to make the order which I did.

He then goes on to say that Art 3(a) of the Hague Convention restricts the definition of wrongful removal to rights of custody which existed immediately before the removal and, of course, as a plain statement of fact that is correct. But this father is not saying that the removal was unlawful. What he is submitting is that, as the mother as at the date of my order had not changed her place of habitual residence, then it was a case of a wrongful retention as opposed to a wrongful removal and therefore the observations made by the Official Solicitor are not applicable to wrongful retention; and I have already found that as at 11 September 1992 the mother did wrongfully retain the child out of the jurisdiction when she was served with the wardship order.

So far as the paragraph headed 'The European Convention' is concerned, I need not deal with that for the simple reason that the father does not rely upon that Convention at all - he relies on the Hague Convention.

The Official Solicitor, under the heading 'The Hague Convention', then unfortunately considers once again removal as opposed to retention. He says, perfectly correctly, that if the High Court had acquired rights of custody and if B-M was in the jurisdiction when the order was made and then removed, that would constitute a breach of the court's rights of custody. But for the reason I have endeavoured to make plain, as at the date of the court's order in wardship, B-M was still habitually resident in this country, the court had jurisdiction and, having custody of the child, when it made the order that the child was to be brought back within the jurisdiction, as from the date of the service of that order, the mother wrongfully retained the child out of the jurisdiction.

The next paragraph doubts whether the father has the necessary standing to make application. I have already dealt with that in the course of my judgment. He plainly can make the application if this court had custody and jurisdiction at the time that it made the order in wardship.

On p 3 of the Official Solicitor's letter, unfortunately, the Official Solicitor has misunderstood the father's contentions. The father is not submitting that there was a wrongful removal as opposed to a wrongful retention and therefore the whole of that paragraph is written under a misapprehension and, again for the reasons that I have given, I do not think it is necessary to pay all that much attention to the date on which B-M left the jurisdiction, except in trying to reach a conclusion as to whether, as at that moment, the mother had abandoned her place of habitual residence in this country and had adopted a new one in Germany. In those circumstances I propose to grant the declaration as sought. I am going to direct that a transcript of this somewhat feeble extempore judgment given at a rather late hour should be provided at public expense, and I give leave in the wardship to the father's solicitors to make use of that transcript both in any negotiations he has with the Lord Chancellor's Department and also if so advised in any proceedings in this country or in Germany relating to the return of this girl.

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