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[04/12/1990; High Court (England); First Instance]
Re N. (Minors) (Abduction) [1991] 1 FLR 413, [1991] Fam Law 367

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

4 December 1990

Bracewell J

In the Matter of N.

E James Holman for the father

Geraint Norris for the mother

BRACEWELL J: This is an application by the plaintiff father for an order returning two children to the jurisdiction of the Texas court. The father makes his application under the Child Abduction and Custody Act 1985, which incorporates the Hague Convention.

The background is that the father is American and the mother is English. Around the year 1981 the mother visited America in order to work as a nanny. She met the father during her stay in America and they married in February 1984 in Austin, Texas. They set up home in Texas at a place called Pflugerville, where they were able to live in some comfort in a four-bedroomed house. K was born on 27 February 1986, so that she is now over 4 1/2 years of age, and B was born on 23 December 1987, so that he is almost 3 years old. The marriage deteriorated and by 1988 had become unhappy, and it appears that the mother at that time was emotionally affected by the suicide of her father which had taken place in England leaving her mother to cope with a difficult, stressful situation. It was agreed between father and mother, the plaintiff and the defendant, that the mother should visit England with the children to see and comfort her own mother.

She went at the end of May 1989 and returned to Texas in the middle of September 1989. She was away for some 3 1/2 months with the consent of her husband. She returned to the matrimonial home with the children and continued to live there with the plaintiff.

However, on 17 October 1989, the mother unilaterally and without any notice brought the children to the UK where they have since remained. It is conceded by the mother that this was a wrongful removal under the Hague Convention. The mother went initially to Wigan to stay with her own mother and she remained there with the children until 13 September 1990. On 18 October 1989 the mother made the children wards of court. The father then

started proceedings for divorce and other ancillary matters in the courts of Texas and he also, very promptly, sought advice from English solicitors about the effect of the Hague Convention, and exhibited to his affidavit is a letter from a firm of solicitors in London, the letter being dated 8 December 1989, which contained wrong advice to the father and was completely misleading in advising him that his case did not come within the terms of the Convention.

The father, therefore, did not take proceedings for the return of the children, which at that time would have been bound to succeed under the provisions of the Child Abduction and Custody Act 1985. The father obtained an injunction against the mother removing the children, although by that time it was too late. That was served on the mother in England on 16 November 1989. The father obtained a divorce in the Texas jurisdiction on 29 January 1990. The father was appointed what is called 'managing conservator', which meant, as I understand it, that he was granted custody of the two children, and mother was appointed 'possessory conservator', which means that she was granted access, which was in fact defined and supervised. There is no dispute in this case that the Texas court had the jurisdiction to deal with the matter. Meanwhile the wardship proceedings continued. On 1 November 1989 the registrar at Wigan granted the mother interim care and control. A court welfare officer's report was ordered, and in May 1990 the father swore an affidavit in those proceedings, not because he was acquiescing in the children remaining in the UK - far from it - but because he was acting on the wrong advice which he had received. A welfare report was obtained from Texas in connection with the wardship proceedings. No date has yet been fixed in the substantive hearing of the wardship. These proceedings take precedence over the wardship jurisdiction.

It then happened that in October 1990 one of the father's relatives saw a television programme about the Hague Convention, as a result of which the father made further inquiries and he learned that he had been misinformed and the Convention did apply to his particular case. The father acted very promptly and an application for the return of the children to the Texas jurisdiction was faxed to the Lord Chancellor's Department on 14 October 1990, at a date still within one year of the children having been brought to this jurisdiction. By an unfortunate combination of circumstances, that fax was not received for the simple reason that the machinery in the Lord Chancellor's Department was not working correctly. Therefore, the fax was not received in time for the proceedings to be commenced on or before 17 October 1990.

The father came over to this jurisdiction, bringing the relevant documents with him and, as a result, the originating summons was dated 19 October 1990, namely one year and 2 days after the abduction. In the meantime, the mother, who had been living in her own mother's home in Wigan, moved on 13 September with the children into her own council house at Ashton in Makerfield, which is a short distance from her own mother's house. K started school in September and B started nursery school.

The preamble to the Hague Convention sets out the intention of the signatories, namely to protect children internationally from the harmful effects of their wrongful removal or retention, and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access. Article 1 of the Convention states that the objects are:

'(a) to secure the prompt return of children wrongfully removed to or retained in any contracting state; and

(b) to ensure that rights of custody and access under the law of one contracting state are effectively respected in the other contracting state'.

Those, and the other relevant provisions, show that the primary object is to ensure summary return to the country of habitual residence of children wrongfully removed or retained in breach of rights of custody or access and, except in clearly specified circumstances, the court cannot refuse to order the return of children. The relevant articles are enacted in the Child Abduction and Custody Act 1985, and it is conceded in the present case that the Convention has the force of law in both relevant jurisdictions.

The next matter arising is whether art 12 is applicable to this case, and whether the mother has demonstrated that the two children have settled in their new environment. Article 12 in relation to para 2 reads as follows:

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

If the answer to that question is 'yes', then this court has a discretion under art 18 as to whether or not the children should be ordered to return. If, however, the answer to that question is 'no', namely that the mother has not so demonstrated, then the mother relies on art 13, which states under (b):

'Notwithstanding the provisions of the previous article, the judicial or administrative authority of the requested state is not bound to order the return of the child if the person, institution or other body, which opposes its return, establishes that . . .

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation . . .'

It is the second part of art 13(b) that the mother would seek to rely upon, namely she argues that to return the children would place them in an intolerable situation.

It is plain from various authorities that the requested State cannot refuse to order the return of any child, whether on the grounds of choice of forum or on consideration of what is in the best interest of the child, because the welfare of the child is not the first and paramount consideration. Furthermore, any allegations or complaints made by the mother against the father, and any explanations for the removal of the children, are not relevant considerations save insofar as the Texas court may react to any possible proceedings for contempt. It is not argued in this case that any criticism could be made of the approach of Texas courts to children's cases and, if the father succeeds in his present application, it would be entirely a matter for the Texas court to determine which parent should care for the two children. This case is solely about jurisdiction, and nothing which I find should be taken as in any way prejudging any decision which any court in Texas may make in respect of the children's upbringing and care.

It is also not a matter of argument in this case that this application takes precedence over the wardship proceedings. So the position under the Convention, so far as this case is concerned, is that it is mandatory to return the children even though more than one year has expired since their abduction, unless it is demonstrated that the children are now settled in their new environment. In the event of the court being so satisfied, then a discretion arises under art 18 as to whether or not to order the return of the children. Since the emphasis of the Convention is to ensure the prompt return of children to their country of habitual residence,

I find that the mother in this case has the onus of establishing such settlement. Various matters have been canvassed before me, and there is little judicial authority upon the interpretation of art 12. My attention has been drawn to Re S, decided by the President and judgment (unreported) given on 10 May 1990, heard on appeal by Purchas, Butler-Sloss and Leggatt LJJ [see now Re S (A Minor) (Abduction) [1991] 2 FLR 1] and the case of M v M decided by the President, judgment (unreported) given on 8 October 1990.

The question has arisen in this case as to the meaning of the word 'now' in art 12, in the context of 'unless it is demonstrated that the child has now settled in its new environment'. Counsel for the mother has argued that 'now' means: 'today' in deciding the issue. Mr Holman for the father has argued 'now' must mean 'the date of commencement of the proceedings' rather than 'the date of the hearing'. In the absence of any decided authority drawn to my attention, I find that the word 'now' refers to the date of the commencement of proceedings, as otherwise any delay in hearing the case might affect the outcome. However, that is a purely academic finding because, on all the circumstances of the present case, it makes no material difference to my conclusions, whichever of the two dates is chosen.

The second question which has arisen is: what is the degree of settlement which has to be demonstrated? There is some force, I find, in the argument that legal presumptions reflect the norm, and the presumption under the Convention is that children should be returned unless the mother can establish the degree of settlement which is more than mere adjustment to surroundings. I find that word should be given its ordinary natural meaning, and that the word 'settled' in this context has two constituents. First, it involves a physical element of relating to, being established in, a community and an evironment. Secondly, I find that it has an emotional constituent denoting security and stability. Purchas LJ in Re S did advert to art 12 at p 35 of the judgment and he said:

'If in those circumstances it is demonstrated that the child has settled, there is no longer an obligation to return the child forthwith, but subject to the overall discretion of art 18 the court may or may not order such a return.'

He then referred to a 'long-term position' required under the article, and that is wholly consistent with the approach of the President in M v M and at first instance in Re S. The phrase 'long-term' was not defined, but I find that it is the opposite of 'transient'; it requires a demonstration by a projection into the future, that the present position imports stability when looking at the future, and is permanent insofar as anything in life can be said to be permanent. What factors does the new environment encompass? The word 'new' is significant, and in my judgment it must encompass place, home, school, people, friends, activities and opportunities, but not, per se, the relationship with the mother, which has always existed in a close, loving attachment. That can only be relevant insofar as it impinges on the new surroundings.

Every case must depend on its own peculiar facts, and I have considered all the circumstances set out in the affidavits and exhibits attached and the submissions made by counsel. I am not satisfied that the mother has demonstrated that these young children are settled in their new environment. Whether or not the mother herself is settled in the UK is not a relevant factor. It is not the welfare test that I am concerned with in applying art 12. These children in their young lives have moved about. They spent the first part of the their lives in Texas. They were then moved to England, with the consent of their father, for a period of 3 1/2 months. They then returned to Texas for a short period and finally, in October last year, were brought to this country. They lived, initially, with their grandmother for some 11 months and it is only as recently as 13 September that they have moved into their own accommodation. K has had less than one term at school. The court welfare officer

has made an investigation for the purpose of the wardship proceedings. Her task was rather different than to determine whether or not art 12 applied. Her task was to look to see how the children were faring and whether or not there was any justification for a change of caretaker. The court welfare officer was naturally concerned with welfare considerations.

As in the case of M v M, I find that it is early days in relation to any question whether or not the children are settled and I am not satisfied that the mother has so demonstrated.

The mother seeks to rely, as I have already mentioned, on art 13 in relation to what she describes as 'an intolerable situation' if the children were to be returned to the jurisdiction of Texas. In order to come within art 13(b) the mother has to demonstrate that the children would be placed in an intolerable situation, and it is right to say that what is envisaged by that can only be understood by reading the words that precede it, namely, 'grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation'. The first part of that sentence has been analysed in various cases including Re C (A Minor) (Abduction) [1989] 1 FLR 403, and it is plain that it is not a trivial risk and it is not a trivial psychological harm which is envisaged and which has to be justified and, furthermore, I am satisfied that the intolerable situation envisaged has to be something extreme and compelling. What is it that the other relies upon? She relies upon the proposals of the father for the care of the children if the matter is tried in Texas. Those are matters which, in my judgment, are relevant to questions of welfare of the children in a contested custody dispute. She refers to problems of immigration. Nowhere in the affidavits or documentation has this been raised until the final speech of counsel for the mother. But in any event it is not suggested in this case that the mother would be unable to accompany the children to Texas and, indeed, she has given instructions that it would be her intention to do so.

An 'intolerable situation', in my judgment, envisages such compelling matters which have to bear some relationship to the serious risk of physical or psychological harm relevant to the earlier part of the provision. The matters which the mother seeks to rely upon fall very far short of any such definition, particularly when viewed in the context of the under-takings which have been offered by the father and are set out in his affidavit. Finally, I consider it appropriate to say that even if I had been satisfied under art 12, which I am not, I would have exercised my discretion in favour of returning the children to the Texas jurisdiction. The reasons why I would have exercised by discretion thus is that, first, this is a plain case of abduction by the mother; secondly, if the proceedings had, in fact, been commenced by 16 October, it would have been a plain case for the return of the children, and it is relevant to consider that the children had been in this country for 2 days over the one-year period before proceedings were commenced; and thirdly, there is a good explanation as to why proceedings were not commenced earlier. There is no culpable delay on the part of the father. It arose solely because of inaccurate advice and the failure of the fax machine at the Lord Chancellor's Department.

I have already dealt with any arguments raised by the mother in respect of art 13. All the matters which have been raised by her I find are relevant to welfare considerations before the Texas court and, therefore, I would have exercised my discretion in favour of the children being returned. I, therefore, order the return of these two children to the jurisdiction of the Texas court.

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