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[25/06/1999; High Court (England); First Instance]
Re J. (Abduction: Declaration of Wrongful Removal) [1999] 2 FLR 653

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

25 June 1999

Hale J.

In the Matter of re J.

Counsel: Adrienne Barnett for the father; Kay Jones for the mother

HALE J: This is an unmarried father's application for a declaration under s 8 of the Child Abduction and Custody Act 1985 that the mother's removal of their child from England and Wales, or alternatively his retention outside England and Wales, was wrongful within the meaning of Art 3 of the Hague Convention on the Civil Aspects of International Child Abduction 1980. He also desires that the child be made a ward of court and that the court order that the mother return him forthwith to this jurisdiction.

The short facts

The child concerned is a little boy called J, born on 2 October 1997, and so nearly 21 months old. His mother comes from South Africa and his father is a British national of Maltese origin. They met in this country in 1995, formed a relationship and began living together in the father's flat, but did not marry. J was born here and spent his whole life living in the same household with both his parents until May 1999.

By then the relationship was in difficulties. The mother took J on holiday to South Africa in January 1999 and stayed longer than originally intended but returned in February 1999. She told the father that she was going to seek alternative accommodation. He asked her to make a parental responsibility agreement with him but she refused. The mother had a termination of pregnancy at the end of April 1999 and told the father that she intended to move out shortly after that.

On 5 May 1999, therefore, the father made an urgent application, ex parte, for a parental responsibility order and a prohibited steps order. In his witness statement of that date he explains that he is applying without notice because he is concerned that if given notice the mother might move out of the flat to an unknown address and thereafter take J to South Africa. Unfortunately, District Judge Bassett Cross considered that there was not enough

evidence to make the order ex parte. He adjourned the application to be heard on notice but abridged time so that it could be heard on 12 May 1999.

That very day, however, the mother left with J for South Africa. She had told the father than she was planning to spend the night with a friend and then spend the following day in Brighton. Instead she and J flew out of the country at 6.30 pm on 5 May 1999, travelling on return tickets which had been bought the day before. She telephoned the father around 10.15 the next morning from her parents' house in Cape Town.

The father went back to court that same day and this time District Judge Bassett Cross did make an order: that the mother return the child to the jurisdiction of England and Wales forthwith upon service of the order. The order was personally served upon the mother on 17 May 1999. She telephoned the father that day and made it clear to him that she was not going to comply with the order.

The father had also consulted the Child Abduction Unit of the Lord Chancellor's Department, which advised that because of doubts over the father's custody rights it would be advisable to obtain a declaration that the removal was wrongful before proceeding further. Hence these proceedings were launched on 24 May 1999 when Bodey J gave directions which have resulted in the hearing before me. The order of 6 May 1999 was stayed until now.

The law

In determining whether the mother's removal of J on 5 May 1999, or alternatively her retention of him in breach of the order of 6 May 1999, was wrongful within the meaning of Art 3 of the Hague Convention, we must start from the proposition that in English law an unmarried father does not automatically share parental responsibility for his child as married fathers do: see the Children Act 1989, s 2(2)(b). He may acquire it by agreement with the mother or by court order: see the 1989 Act, s 4(1). He may also apply to the court for orders about the child's upbringing, known as 's 8 orders', covering where the child is to live, what sort of contact the child is to have with the father, and specific issues of upbringing such as schooling, and prohibiting steps such as taking the child away from his home or out of the country: see the 1989 Act, ss 8 and 10(2), (4)(a). However, until the father acquires parental responsibility or an order is made prohibiting a child's removal the mother does not commit the offence of child abduction by taking the child out of the country without his consent: see the Child Abduction Act 1984, s 1(1), (3)(a)(ii).

However, that is not the end of the matter. The court is bound to approach the facts of this case with very considerable sympathy for a father who has summarily been deprived of a relationship with a child who has lived with him all his life and was still living with him when secretly removed to a destination which makes the continuation of that relationship extremely difficult. Ms Barnett, on behalf the father, has put forward three bases upon which the court might make the declaration sought.

Two of these depend upon the fact that the court is an institution to which may be attributed rights of custody within the meaning of the Hague Convention. This is clearly the case where a child has been made a ward of court, for not only does the court formally assume guardianship over its wards but the automatic effect of even issuing the proceedings is to prevent the child's removal from the jurisdiction: see Re B-M (Wardship: Jurisdiction) [1993] 1 FLR 979, a decision of Eastham J in very similar circumstances to this save that the father made the child a ward of court instead of applying under the Children Act 1989. It is also the case where there are proceedings on foot in which the court is asked to determine

rights of custody: see B v B (Child Abduction: Custody Rights) [1993] Fam 32, sub nom B v B (Abduction) [1993] 1 FLR 238, in which the court in Ontario had made an interim custody order in divorce proceedings. This includes not only proceedings in which custody or residence is in question but also proceedings involving the right to determine whether or not the child can be taken out of the country. This is because the right to prevent the child's removal from the country (sometimes known as a 'travel restriction') is a 'right of custody' for the purpose of the Convention: see Re C (A Minor) (Abduction) [1989] 1 FLR 403. In English law, a parental responsibility order brings with it that right: see the Child Abduction Act 1984, s 1(1), (3)(b)(ii). Hence pending proceedings for such an order can vest rights of custody in the court for this purpose: see Re W (Abduction: Father's Rights) [1999] Fam 1, sub nom Re W; Re B (Child Abduction: Unmarried Father) [1998] 2 FLR 146, a decision of my own. Proceedings for a prohibited steps order preventing such removal would also fall within this category.

This much is common ground between the parties in this case. However, the mere issue of proceedings for such an order is not sufficient to invest the court with the rights in question. There are dicta in Re F (A Minor) (Child Abduction: Rights of Custody Abroad) [1995] Fam 224, sub nom Re F (Child Abduction: Risk if Returned) [1995] 2 FLR 31, at 231 and 238 respectively, to the effect that 'the mere existence of a court order or pending proceedings does not automatically clothe the court with "rights of custody"', although the court was not there called upon to decide the point. Further, in Re B (Abduction) (Rights of Custody) [1997] 2 FLR 594, the father had issued an application for a parental responsibility order on 17 February 1997, but there is no indication that anything else had happened before the mother had taken the child abroad on 3 March 1997. Wall J refused to make an ex parte declaration that the removal was wrongful and the Court of Appeal refused leave to appeal, describing B v B (Child Abduction: Custody Rights) [1993] Fam 32, sub nom B v B (Abduction) [1993] 1 FLR 238 as the 'high watermark' of submissions of this nature.

In Re W (Abduction: Father's Rights) [1999] Fam 1, sub nom Re W; Re B (Child Abduction: Unmarried Father) [1998] 2 FLR 146 an unmarried father's applications for contact and parental responsibility orders had been proceeding for some time; there had been several hearings and a court welfare officer had recommended that the father acquire parental responsibility; the mother had taken the children abroad shortly before the final hearing, having apparently lulled the father into a false sense of security by agreeing to more liberal contact than the court had ordered. I distinguished Re B on the basis that the court had been actively seized of the application for a long time, there had been previous hearings at which substantive orders had been made, and the case was on the point of coming to a conclusion. At [1999] Fam 1, 16, [1998] 2 FLR 146, 160D, I said this:

'I am greatly attracted to the proposition that, where the court is actively seized of proceedings to determine rights of custody, removal of the child from the jurisdiction without leave of the court while those proceedings remain pending is a breach of the rights of custody attributable to the court. It is even questionable whether the consent of the other party would prevent this . . .'

At 19 and 162F-163A respectively, I summarised the position thus:

'Prima facie, removing a child who is habitually resident here will be wrongful under the Hague Convention of 1980 if.

(a) . . .

(b) . . . or

(c) there are relevant proceedings pending in a court in England and Wales.

. . . proceedings will obviously be pending for this purpose if interim orders have been made and directions given for a final hearing. In the light of Re B (Abduction) (Rights of Custody) [1997] 2 FLR 594, however, it is doubtful whether the mere issue of proceedings is sufficient. They should probably have been served and it is possible that some action by the court is necessary to invest it with rights of custody. This could be making interim orders or it could be giving directions for the future conduct of the case.'

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

However, there is no doubt that the court assumed such rights the following day, when it ordered the mother to return the child forthwith. But that would only be effective if the court had jurisdiction to make the order. Jurisdiction to make 'a s 1(1)(a) order' is governed by s 2(2) of the Family Law Act 1986: a 'section 1(1)(a) order' is 'a section 8 order made by a court in England and Wales under the Children Act 1989, other than an order varying or discharging such an order'. A court in England and Wales does not have jurisdiction to make such an order unless:

'. . . on the relevant date the child concerned --

(a) is habitually resident in England and Wales, or

(b) is present in England and Wales and is not habitually resident in any part of the United Kingdom or a specified dependent territory . . .'

See the Family Law Act 1986, ss 2(2) and 3(1). Under s 7 of that Act, the 'relevant date' for this purpose:

'. . . means in relation to the making or variation of an order --

(i) where an application is made for an order to be made or varied, the date of the application (or first application, if two or more are determined together), and

(ii) where no such application is made, the date on which the court is considering whether to make, or as the case may be, vary the order . . .'

There is no doubt, and it is conceded by Ms Jones on behalf of the mother, that J was habitually resident in this country on 5 May 1999 when the father first applied to the court for a prohibited steps order, which is an order under s 8 of the Children Act 1989. The order which was made the following day was not in terms an order prohibiting removal, but it was the logical concomitant of such an order, given that the mother had in fact removed J from

the jurisdiction in the interim. It was undoubtedly an order under s 8 of the Children Act 1989. No new application or fresh proceedings were required. In my view, once an application for a s 8 order has been made in respect of a child present or habitually resident here and has not yet been determined the court retains jurisdiction to make a s 8 order. It would be stretching the words of the 1986 Act far too far to say that 'an order' made must be in identical terms to 'an order' sought for 'the relevant date' to remain the date of the application: in children cases courts frequently make orders in different terms from those sought by the parties and it would be nonsense to say that this deprived them of the jurisdiction which they had when the application was made. Once the proceedings have been determined, jurisdiction is retained only for discharge and variation of the order made but that does not arise here.

There is nothing in the case of Re S (Residence Order: Forum Conveniens) [1995] 1 FLR 314 which is inconsistent with this reasoning. I therefore conclude that the court still had jurisdiction to make the order, because the father had applied for it while J was still both present and habitually resident here. That is sufficient to dispose of these proceedings, for J is wrongfully detained in South Africa in breach of the order.

If that be so, it is unnecessary to determine whether J had ceased to be habitually resident here as a result of the mother's actions on the night of 5 to 6 May 1999. It is common ground that, as he was habitually resident here on 5 May 1999, the burden of proof lies on his mother to show that he had lost that habitual residence overnight: see Re B-M (Wardship: Jurisdiction) [1993] 1 FLR 979. Of course, where a young child is in the actual care of the only person with parental responsibility for him, his habitual residence will in almost all circumstances be the same as hers: see Re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562, sub nom C v S (A Minor) (Abduction) [1990] 2 FLR 442.

The mother's case is that her decision that their future lay in South Africa had crystallised after her stay there in January and February 1999, although she does not say precisely when. In support of the argument that the mother abandoned their habitual residence here for good when they got on the plane, Ms Jones points to the clandestine plans laid for their departure, the father's own statements that when she telephoned him the next day she said that they were not coming back, and her evidence that she had been offered employment in South Africa by the time that the order for return was served.

The father's case is that until the order was served she had not finally made up her mind and was keeping her options open. The offer of employment is dated the day after she was served with the order and has not been taken up. She told him that she was not coming back, but not that she was never coming back. She travelled on return tickets (although there is evidence that these were cheaper than one-way tickets). Above all, she expressed interest in an offer of accommodation which had by coincidence arrived from the local authority shortly after she left, and on 10 May 1999 she faxed a letter to the housing department, stating that she was out of the country 'for personal and medical reasons' and hoping that her absence would not jeopardise the rehousing for which they had been waiting for so long. She only withdrew this on 17 May 1999 after learning of the court order. She later suggests that the earlier fax was simply to do the father a favour by helping him to get a better property, but she also confesses that she was curious about it having waited so long.

The mother was not at court to be cross-examined on these matters, whereas the father was available. So too was a friend of the family, SD, who states in her affidavit that she spoke to the mother on 20 May 1999, when the mother said that until she received the order she had not made up her mind and that it was only when she did so that she decided to stay in South Africa. The mother vehemently denies this in her later affidavit, but is unable to suggest why

SD should be willing to lie on oath in this matter.

In these circumstances, I would be quite unable to hold that the mother had discharged the burden of proving that she had abandoned her habitual residence in this country before the district judge made his order on 6 May 1999. But for the reasons already explained, he had jurisdiction to make that order whether or not she had done so.

Ms Barnett also argues that the father had what were described by Waite LJ in Re B (A Minor) (Abduction) [1994] 2 FLR 249, 261 as:

'. . . 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.'

Thus:

'If, before the child's abduction, the aggrieved parent was exercising functions in the requesting State of a parental or custodial nature without the benefit of any court order or official custodial status, it must in every case be a question for the courts of the requested State to determine whether those functions fall to be regarded as "rights of custody" within the terms of the Convention. At one end of the scale is (for example) a transient cohabitee of the sole legal custodian whose status and functions would be unlikely to be regarded as qualifying for recognition as carrying Convention rights. The opposite would be true, at the other end of the scale, of a relative or friend who has assumed the role of a substitute parent in place of the legal custodian.'

This concept was employed in Re B and also in Re O (Child Abduction: Custody Rights) [1997] 2 FLR 702 to protect the position of a de facto carer from whom children are abducted. In this case there is a dispute about how much the father in fact did for the child, but there is independent evidence from the health visitor, general practitioner, nursery and playgroup, that he shared the care of his son in the way that mothers and fathers living under the same roof commonly do. There is no reported decision applying the concept of 'inchoate rights' to such a case, but I would have had little difficulty in holding that it fell on the right side of the continuum described by Waite LJ were it not for the more serious difficulty of reconciling this with the House of Lords' decision in Re J (A Minor) (Abduction: Custody Rights) [1990] 2 AC 562, sub nom C v S (A Minor) (Abduction) [1990] 2 FLR 442). This concerned an unmarried couple living together when the mother secretly abducted the child to this country. The House of Lords held that de facto custody was not sufficient.

In the event it is not necessary for me to resolve this difficult issue because I have no doubt that the retention of J in South Africa in breach of the order made on 6 May 1999 is wrongful within the terms of the Convention and I so declare. I will also lift the stay on the order of 6 May 1999 so that the mother is required to return J to the jurisdiction forthwith. I would not think it appropriate to order that, should the mother return to this country with J, she is immediately to hand the child over to the father. But I will hear further argument about whether any supplementary orders are necessary or appropriate, given that the matter can now be pursued through the Central Authorities under the Hague Convention.

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