

Re S (A Child: Abduction)

[2003] 1 FLR 1008

27/11/2002

Barristers

Henry Setright KC
Justine Johnston

Court

Court of Appeal

Facts

The Welsh father and German mother had one child, who was a German national, having been born in Germany. On divorce the Welsh court granted the mother a residence order, with contact to the father and his parents. Shortly after taking the child to Germany to stay with relatives, the mother wrote to the father informing him that she had decided to remain in Germany with the child. Her solicitors later wrote to the father seeking his agreement to permit the mother and child to reside in Germany permanently, and suggesting contact arrangements. The parents made arrangements by telephone for the child to visit the father in Wales during the holidays. The father confirmed these arrangements in a fax to the mother in which he assured her that he would return the child at the end of the holiday. The mother's solicitors confirmed the arrangements by a letter which referred to the father having told the mother that he did not have any objection to the child residing permanently in Germany, subject to agreeing contact arrangements. The child was duly returned to the mother after the holiday, but no written confirmation of the father's position on residence was received by the mother or her solicitors. The father then instructed his own solicitors, who pressed for acceptance of his contact proposals, threatening proceedings. However, shortly afterwards they wrote to the mother's solicitors confirming an oral agreement between the parents, to the effect that the father would share the child's school holidays, much as the mother had proposed. The mother's solicitors replied confirming the dates of the child's forthcoming summer holidays in Wales. After the child arrived with the father for the summer, the father issued residence order proceedings under the Children Act 1989 in Wales. The Welsh court required the mother to apply to relocate with the child to Germany, and ordered that in the meantime the child remain with the father. The mother duly issued her application to relocate, but also applied to the local German court for an order for the return of the child to Germany, and to the central authority in Germany for the return of the child under the Hague Convention on the Civil Aspects of International Child Abduction 1980. In the abduction proceedings in the Family Division, the father successfully argued that the child was not habitually resident in Germany by invoking s. 41(1) of the Family Law Act 1986, which sets out certain circumstances under which children were to be treated as habitually resident within the UK.

Held

Held - allowing the mother's appeal -

(1) Section 41 of the Family Act 1986 was of no application in determining questions of habitual residence under Art 3 of the Hague Convention. Section 41(1) was a deeming provision that applied only to Part I of the Family Law Act 1986; it regulated any jurisdictional or enforcement conflicts between the constituent jurisdictions of the UK, having no application to conflicts between the UK jurisdictions and any jurisdiction that was not a constituent jurisdiction of the UK. Questions of habitual residence in relation to Art 3 of the Hague Convention were to be determined by reference to the international jurisprudence (see paras [30], [31]).

(2) The judge fell into manifest error, having failed to take due account of the letter from the father's solicitors in which they confirmed an oral agreement between the mother and father concerning contact during the holidays on the basis that the child was to live permanently in Germany. The correspondence established that the father had acquiesced in the child's relocation to Germany, and that the child was habitually resident in Germany by the relevant date. This finding in no way eased the burden on abducting parents seeking to assert acquiescence (see paras [32], [39], [42]).

Per curiam : the judge had been right to reject a submission by the mother that relocation by a parent with a residence order was not in breach of a court order unless the parent had been restrained by some free-standing injunction (see para [40]).

Per curiam : the appeal had been impeded by the seeming reluctance of the Legal Services Commission to respond to requests from both the Court of Appeal and the central authority to authorise the instruction of leading counsel for the mother; it was to be hoped that in future these sort of difficulties could be overcome (see para [41]).

Per curiam : this case history reinforced the need for international mediation services that could engage parents across the frontier breached by wrongful abduction. The service which Reunite was piloting for European jurisdictions was a welcome innovation (see para [43]).

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