

C v C (Minors) (Child Abduction)

[1992] 1 FLR 163

21/08/1991

Court

Family Division

Facts

Both parties were nationals of the USA and were born, raised and married there. They had two sons, born in 1980 and 1983. The marriage was unhappy and in 1985 the father left the matrimonial home in New York State. The mother remained there with the children and from 1986 an English cohabitant lived there with her. On the dissolution of the marriage in May 1989, the Supreme Court of the State of New York granted custody to the mother, determined child support, made arrangements for defined access and made consent orders concerning the home and ancillary relief, whereby the mother was to pay a lump sum to the father and he would convey the house into her sole name. She was to discharge the mortgage repayments. The mother never paid the lump sum and ceased to pay the mortgage instalments. She disregarded a letter informing her of a threat of foreclosure and failed to attend the foreclosure sale at which the father purchased the property at a forced sale price. He then caused an eviction notice to be sent to her without apparently giving any consideration to the question where or how she and the children were to live. At that stage, the mother decided to take the children out of the jurisdiction. She went with her cohabitant to England without informing the father, who issued an originating summons under the Child Abduction and Custody Act 1985, seeking the return of the children to the USA and an order securing the effective exercise of his rights of access. At the hearing, he no longer sought the return of the children, but he applied for a declaration that they were wrongfully removed from the jurisdiction of the State of New York and raised questions of access. The court was provided with affidavit evidence from three experts familiar with the law of New York State to which, in the absence of a declaration from the court of that State, it was entitled by art 14 of the Convention to have regard.

Held

Held -

(1) According to the law of the country of habitual residence of the children, ie of New York State, to which the court was required to have regard in determining whether the removal of the children had been wrongful within arts 3 and 5 of the Convention, there was an implicit prohibition derived from a line of case-law that the custodial parent was not entitled to frustrate visitation rights by removing the children to a distant locality, and although, if the mother were rendered homeless by the father and/or she was put in a position of having to remove them to England, it was likely that the New York court would grant permission for her to take the children out of the jurisdiction, it was clear from the authorities that the mother was not entitled to remove them without applying for, and obtaining, that permission. It made no difference whether or not, for the purposes of arts 3 and 5, the mother

understood the legal position, and there was no distinction in law between an express prohibition contained in an order and one, as in the present case, that was implied by settled case-law, except that the latter required more detailed proof than the former. It must therefore be concluded that the removal of the two children by the mother to England had been wrongful, that the father had the right to bring the matter to the English court under the 1985 Act, and that, subject to certain exceptions, he had the right to secure the return of the children so that the New York State court could have jurisdiction.

(2) However, since the father had decided not to seek an order for the return of the children, it remained for the court to make orders as to access, on the basis that the scope of the Convention did not limit the territorial jurisdiction of the court to make appropriate access orders, and, further, that nothing in the Convention displaced the principle that in the determining questions of access, the welfare of the children was the first and paramount consideration. As it was clear from the evidence that the children viewed the father as the person who had evicted them from their home, and had formed an unfavourable and fearful opinion of him, relationships needed to be rebuilt carefully and must commence with supervised access in England by the father. Following that, a report would be required to assist the court to determine the future pattern.

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