

B T v J R T (2008)

[2008] EWHC 1169 (Fam); [2008] 2 FLR 972

22/05/2008

Barristers

Private: David Williams QC

Court

Family Division

Summary

The court upheld an agreement that a mother and child would remain in the United Kingdom for a period of five years following the mother's refusal to return to Australia after a holiday. The father's acceptance of this agreement amounted to acquiescence under the Hague Convention on the Civil Aspects of International Child Abduction 1980 art.13 and could not be withdrawn by him.

Facts

The applicant father (F) applied for the summary return of his two-year-old daughter (E) to Australia following the refusal by the respondent mother (M) to return after a holiday in the United Kingdom. F, M and E had lived in Australia, where E was habitually resident. F and M had a tumultuous relationship and M alleged that F was routinely drunk, violent and aggressive towards her. They had planned a holiday in the UK but F chose not to go. Whilst on holiday, M told F that she would not be returning. F then sent various text messages and a letter to M during which he clearly accepted that the relationship was over. He incurred considerable expense in posting various items to M; took steps to sell a number of family possessions; and terminated the lease of the family home. M and F reached an agreement that M and E would remain in the UK for five years and that F would provide a letter consenting to this on the understanding that M would bring E to visit him in Australia once a year. After this, F told M that he was thinking of visiting the UK for six months of the year although M was not enthusiastic about this. Nine days after the agreement was reached, F sent an abusive text message to M, indicating that the deal was off. In his statement, he indicated that he had felt he had to agree to anything M asked if he was to see E again. M resisted F's application on two grounds: firstly, that he had acquiesced in her remaining in the UK with E; secondly, that there was a grave risk that to order E's return would expose her to physical and psychological harm. F submitted that the discussions about the proposed agreement were part of negotiations and did not amount to clear and unequivocal acquiescence in E remaining in the UK. He argued that even if he had acquiesced, his acquiescence was obtained by deceit since M had never intended to return to Australia or to visit every year with E as she had promised.

Held

HELD: (1) By his words and actions, F had subjectively consented to the continued presence of M and E in the UK for the purposes of the Hague Convention on the Civil Aspects of International Child Abduction

art.13. He did not ask M to reconsider or try to seek her return but made it clear that he accepted the situation, *H v H (Child Abduction: Acquiescence)* (1998) AC 72 HL applied. (2) Although acquiescence obtained by fraud or based on a misunderstanding or non-disclosure would be unlikely to be effective, M had neither deceived nor misled F. She had only reached her decision not to return to Australia after arriving in the UK, had not misled F about the point when her relationship with her new partner began and she had intended to return to Australia every year with E, as agreed. (3) It was clear that F had not spoken or acted in an emotional turmoil. On the contrary, he was a person of resolute and determined nature. His acquiescence was real and could not be withdrawn, *A (Minors) (Abduction: Custody Rights), Re* (1992) Fam 106 CA (Civ Div) applied. (4) The agreement reached between M and F came within the meaning of acquiescence in art.13 and the court should give effect to it, particularly because it addressed the important issues of how long the agreement should last and arrangements for paternal contact in the meantime. F's subsequent attempt to withdraw his consent was an unjustified reaction to M's lack of enthusiasm to his proposal of living in the UK for six months of the year and did not terminate or invalidate the agreement. (5) It was necessary for the court to strike a fine balance. E was only two years old and had lived most of her life in Australia. However, an agreement had been reached and M had a real and justified fear of F. There was a real risk that if she were made to return to Australia, her severe anxiety would impact adversely upon her relationship with E. There was also a strong likelihood that M would be granted residence of E and would be successful in an application to move permanently to the UK. In these circumstances, the return of E to Australia would result in future disruption for her, particularly since she was now benefiting from being settled in the UK, *M (Children) (Abduction: Rights of Custody), Re* (2007) UKHL 55, (2008) 1 AC 1288 and *W v W (Child Abduction: Acquiescence)* (1993) 2 FLR 211 considered. In the exercise of the court's discretion the return of E to Australia was not ordered.

Application refused