

F (Child's Objections) (was Re N on appeal)

[2015] EWCA Civ 1022

14/10/2015

Barristers

Private: David Williams QC
Jacqueline Renton

Court

Court of Appeal

Practice Areas

International Children Law

Summary

A judge appeared to have wrongly placed a special meaning on the word "object" in the Hague Convention on the Civil Aspects of International Child Abduction 1980 art.13 and had erred in concluding that children's strongly expressed wishes not to return to their mother in Australia did not amount to objections.

Facts

A father appealed against an order for the return of his four children to the mother in Australia.

The children aged between 9 and 13, who were born in England, had been living in Australia with the mother since 2007 following their parents' divorce. They were wrongfully retained by the father in England following a Christmas holiday. They remained in the father's home with his new partner and their baby half-sister. The mother had since lost her house in Australia when the father had stopped making mortgage payments. The children all expressed a strong desire to remain with the father in England. On the mother's application for a return order under the Hague Convention on the Civil Aspects of International Child Abduction 1980, the judge found that the mother had not acquiesced in the father's wrongful retention and that the children's views did not amount to objections to being returned to Australia. He stated that had he found that the children objected, he would still have ordered their return to Australia based on the financial and power imbalance between the mother and the father, who had the greater income and was able to pay for private school and holidays, and on the mother's continuous care of the children for seven years which had not been criticised. The judge considered that it was not compatible with their interests for there to be an abrupt change of primary carer brought about by the wrongful act of the other parent.

The father submitted that the judge had not attached appropriate weight to the strength of the children's views and had wrongly given a special meaning to the word "object".

Held

(1) At the return order hearing, the mother's counsel had introduced an unwarranted gloss on the simple words of art.13 of the Convention by submitting that "objection" meant a wholesale objection to returning to the country of habitual residence. That was not the correct test. The exception was established if the judge concluded that the child objected to returning to the country of habitual residence. There was some indication in the judgment that counsel's submission had influenced the judge's thinking. The judge omitted the children's strong comments about their wishes which should have steered him in the direction of finding that the children objected. The premise of the judge's opinion seemed to be that objections were different from wishes and feelings. It was important to use the ordinary meaning of the word "object" and to leave it to the CAFCASS officer to collect facts relevant to that issue and to the judge to make his finding, taking them into account. The judge's conclusion had not been open to him on the evidence. The totality of the evidence clearly established that the children did object to returning to Australia (see paras 34 - 37, 39-41 of judgment). (2) The judge's discretionary exercise was incomplete. He had failed to mention factors raised by the father at the hearing that there were no arrangements in place for the children's accommodation or education if they were returned to Australia. The judge's focus had been too narrow (para.44). (3) The children had very clear, strong views and their maturity had impressed the CAFCASS officer. A particularly important feature of the case was that their home in Australia was no longer available to them. Circumstances had completely changed since they had left. Their relationship with their mother would not be improved by returning them summarily to Australia against their expressed wishes. The correct exercise of discretion was not to order the children's return to Australia (paras 50, 52, 55-56)

Appeal allowed

Permission

Lawtel

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