

Re T (Abduction: Rights of Custody) (2008)

[2008] 2 FLR 1794; [2008] EWHC 809 (Fam)

17/03/2008

Barristers

Henry Setright KC
Private: Marcus Scott-Manderson QC
Private: Hassan Khan
Rebecca Foulkes

Court

Family Division

Practice Areas

International Children Law

Summary

The Legal Services Commission was invited to reconsider its opinion that an issue directed by an English court to be decided by a foreign court pursuant to the Hague Convention on the Civil Aspects of International Child Abduction 1980 art.15 constituted "foreign proceedings" within the meaning of Access to Justice Act 1999 s.19.

Facts

In an application under the Child Abduction and Custody Act 1985 the court was required to determine as a preliminary issue whether, in determining whether or not the applicant father (F) rights of custody, the mechanism under the Hague Convention on the Civil Aspects of International Child Abduction 1980 art.15 was to be adopted. The respondent mother (M) had brought the child (T) to the United Kingdom from Oregon, USA. F asserted that that had been done without his knowledge or consent and sought T's return. M opposed the application on a number of grounds, asserting that F had no rights of custody that had been breached. Whether or not F had such rights depended on an interpretation of the law of Oregon, and the question was whether the issue should be determined by the English judge or, pursuant to art.15 of the Convention, by the authorities in Oregon. Experts instructed by M and F disagreed about whether F had custody rights, but were of the opinion that the matter was finely balanced. There were no relevant Oregon judicial decisions, so the point would be a novel one if dealt with in that jurisdiction.

Held

HELD: (1) There was no doubt that the matter was one that was apt for the Oregon judge. The point was a novel one and the court was reluctant to trespass into the area of making determinations of foreign law unless it was unavoidable. In Hague Convention cases it was peculiarly important that issues like rights of custody should be very clearly settled by the foreign law, either directly or by reference to statute, other written material, or to the foreign court's previous decisions. It would be invidious for the English court to

trespass into that area unless it was unavoidable. (2) The order was made conditional on M being fully represented in the Oregon court. The Legal Service Commission took the view that, pursuant to the Access to Justice Act 1999 s.19, it did not have to fund M's representation in Oregon because the proceedings were foreign proceedings. However, the proceedings before the English court were proceedings under the Hague Convention and necessarily art.15 could call for issues to be determined abroad. A decision that was not made inter partes would be given little weight by the English court and it would be strange, and would render art.15 useless, if a vital issue such as the instant one could not properly be determined because one party was not able to be represented before the foreign court. The Commission was invited to reconsider the proper interpretation of s.19 of the 1999 Act at the highest level.

Judgment accordingly

Permission

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