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Re G (Abduction: Withdrawal 0f Proceedings, Acquiescence, Habitual Residence) (2007)

[2008] 2 FLR 351; [2007] EWHC 2807 (Fam)

30/11/2007

Barristers
Private: Marcus Scott-Manderson QC

Court
Family Division

Summary
In the circumstances a father had not acquiesced in a child's retention by withdrawing proceedings under the Child Abduction and Custody Act 1985, and in subsequent proceedings under the Act the father was not precluded from relying on the mother's wrongful retention prior to the withdrawal of the first proceedings.

Facts
The applicant father (F) applied under the Child Abduction and Custody Act 1985 and the inherent jurisdiction of the court for a summary order for the return of his children to Canada. F was born in Canada where his family lived and he was brought up. The mother (M) was born in Zambia and at the age of eight moved to England where her extended family lived and where she was brought up. The parties met and married in Canada. They lived principally in Canada where a first child (X) was born, but M spent much of her time in England with her own family and after X's birth M returned to England. By the time M returned to Canada the marriage was in trouble. When M was pregnant with a second child (Y) she sought medical attention in England. A consultant psychiatrist recommended that she remained in the United Kingdom with her family during the pregnancy. F wanted to collect M and X and take them back to Canada. M then obtained an interim residence order in respect of X and a prohibited steps order preventing F from removing X from the care and control of M. F issued an originating summons under the Hague Convention on the Civil Aspects of International Child Abduction seeking the summary return of X to Canada. The proceedings were withdrawn by consent and a reconciliation attempted. The attempt was unsuccessful and F issued a second originating summons under the Convention. M submitted that, pursuant to Art.13(a) of the Convention, the court was not bound to order the return of X to Canada because the father had acquiesced in her retention by withdrawing the first originating summons, that F could not rely on alleged retention prior to the withdrawal of the first originating summons, and that X's continued presence after the making of the consent order could not be wrongful as there had never been any agreement that she should be returned to Canada. F submitted that under the consent order F preserved his position that M's original retention of X was wrongful, should the attempted reconciliation fail.

Held

HELD: (1) On the evidence M never agreed that she would return to live in Canada. On the other hand she never said she would not. (2) M's wrongful retention of X crystallised at the point when, in the face of a deadline for her return to Canada, she made her ex parte application for a residence and prohibited steps order in respect of X. (3) F had not acquiesced in X's retention by withdrawing the first originating summons, H v H (Child Abduction: Acquiescence) (1998) AC 72 HL applied. The withdrawal of the first Convention proceedings did not amount in law to the equivalent of an adjudication, or otherwise to a species of waiver, election or estoppel that prevented the taking of fresh Convention proceedings if the planned attempt at reconciliation, set out as the basis for the consent order, proved abortive. There was no adjudication of any kind upon the issues raised or intended to be raised in those proceedings and, on ordinary principles of English law, no estoppel or waiver could be made out. Nor could F be regarded as having so acquiesced by his subsequent conduct. (4) In the instant proceedings, F was not precluded from relying on M's wrongful retention of X prior to the withdrawal of the originating summons. Analysis established the wrongful retention of X before the first proceedings, and such wrongful retention survived the withdrawal of the first proceedings. At the date of the wrongful retention X was habitually resident in Canada, as the parties agreed in the consent order. (5) On the evidence and in the light of undertakings offered by F, an order for the return of X to Canada would not place her in an intolerable situation. M failed to establish that there was a grave risk that her mental health would reach such a level of anxiety or depression that she became unable to provide her children with proper care. The defence of intolerable situation was not established and the court had to make an order for the return of X to Canada. (6) When Y was born M had been in England for some seven months. At birth Y was by prior agreement in the physical care of M in England, and so remained, following their discharge from hospital to the home of M's family. Given M's habitual residence in England before Y's birth, and the earlier acceptance by F that, following the birth, Y should be within the care of M in England pending any agreement on a return to Canada, Y acquired upon her birth M's habitual residence in England. In the circumstances the court declined to make any order under the inherent jurisdiction for Y to go to Canada.

Application granted in part