

Cannon v Cannon (2004)

**(2005) 1 WLR 32 : (2005) 1 FLR 169 : [2004] EWCA Civ 1330;
Times, October 28, 2004**

19/10/2004

Court

Court of Appeal

Summary

In a child abduction case, each case had to be decided on its own facts but it would be very difficult for a parent who had hidden a child away to demonstrate that it was settled in its new environment and thus overcome the real obligation to order a return. Even if settlement was established, the court retained a residual discretion to order a return under the Hague Convention on the Civil Aspects of International Child Abduction 1980.

Facts

The father (F) appealed against the refusal of his application for the return of his child (S) pursuant to the Hague Convention on the Civil Aspects of International Child Abduction 1980 . F married the mother (M) in the United States in 1994. F was American and M was Irish. S was born in 1994. The family home was in the US until December 1998 when M kept S in Ireland following a holiday. In July 1999 a consent order for S's return to the US was made. M returned to the US but did not take part in those proceedings and re-abducted S and took her to England. She then assumed names for herself and S, which she obtained from gravestones, in order to escape detection. They were discovered four years later. Issues arose as to the interpretation of Art.12 and Art.18 of the Convention, particularly (i) the proper construction of the phrase "the child (was) now settled in its new environment"; and (ii) once the defendant had proved that the child was settled in its new environment, whether the court nevertheless retained a residual discretion to order the child's return. F submitted that (1) concealment under a false identity was inconsistent and incompatible with the concept of settlement in Art.12; and (2) the judge erred in his conclusion that in proceedings commenced more than one year after wrongful removal, and where the child was settled, there was no residual power or discretion under the Convention to order a return.

Held

HELD: (1) Each case should be decided on its own facts but it would be very difficult for a parent who had hidden a child away to demonstrate that it was settled in its new environment and thus overcome the real obligation to order a return. The impact of concealment could affect the child's emotional and psychological state. An older child would be enmeshed in the sole carer's web of deceit. The judge had wrongly departed from established domestic case law on the concept of settlement in Art.12(2). In cases of concealment and subterfuge the burden of demonstrating the necessary elements of emotional and psychological settlement was much increased. Judges should look critically at any alleged settlement that was built on concealment especially if the defendant was a fugitive from criminal justice. (2) The case

law on the second issue established that a finding of settlement did not result in the dismissal of the claimant's application but gave the opportunity for the exercise of judicial discretion as to whether to order the return of the child under the Convention. The global judicial community construed Art.18 to confer upon the court a discretion to order return in a case where the defendant had established both that the proceedings were commenced more than 12 months after the abduction and that the child was settled in a new environment.

Permission

Lawtel 