

Re T (Children) Sub Nom Re T (Minors) (Abductions : Custody Rights) Sub Nom Re T (Abduction : Child's Objections to return) (2000)

(2000) 2 FLR 192 : Times, April 24, 2000

18/04/2000

Court

Court of Appeal

Summary

Once an abducted Child was judged to be of an age of maturity for it to be appropriate for the Court to take account of her views, then the Art. 13 defence of the Hague Convention was established and the court had to exercise its discretion on whether to return the child

Facts

Father's appeal against an order of Wall J on 3 March 2000 that the father's two children ('G' and 'T') be returned to Spain. The father and mother were British nationals. G was born in 1989 and T in 1993. The parents moved to Spain just before T's birth. On the break-up of the marriage the mother commenced divorce and custody proceedings in Spain in July 1997. Proceedings involving the children were ongoing in the Spanish courts and various orders regarding visiting rights and residence had been made. There had been previous problems with the care of the children and the father had removed them from the mother's care before. It was common ground that the mother had been at times, whether under the influence or drink alone or a combination of drink and medication she took for depression, unfit to care for the children. In May 1999 the Spanish court awarded an interim order of physical custody of the children to the father but legal custody to both parents. The father had moved the children from the town where the mother lived and placed them in a different school in Spain. He applied to the court to be able to take the children to England for Christmas. The Spanish court refused that application and ordered that the father return the children to the mother's town and the school that they were previously attending otherwise the children would be taken away from him. The father wrongfully removed the children from Spain in breach of the mother's custody rights on 3 January 2000 and set up home in England. Meanwhile the care proceedings were heard in Spain in absence of the father and it was found that he had influenced G and the mother was found to be the suitable parent to have custody of the children. The father's defence under Art.13 Hague Convention on the Civil Aspects of International Child Abduction, that there was a grave risk that the return of the children would expose them to physical or psychological harm or otherwise place them in an intolerable situation, was rejected and the children were ordered to be returned to the country of their habitual residence, Spain. G was 11 years old at the time of the hearing and had strongly objected to being returned to her mother. Wall J had found that she

had not attained an age and a degree of maturity at which it had been appropriate to take any account of her views. He had found that G's views were influenced by her father's hostility to her mother. It was submitted on appeal that the judge had been wrong to take no account of G's objections, and was wrong in exercising his discretion to order the return of the children. Further it was submitted that the judge was wrong to find that there was no defence on the facts of the case under Art.13(b) Hague Convention.

Held

HELD: (1) Under Art.12 UN Convention on the Rights of the Child 1989 a child had the right to have the opportunity to express her views and to be heard. Whilst that was not a right of self-determination, due weight should have been given in accordance with the age and the maturity of the child. The sentiment in that Convention was the same as that in the Hague Convention and they both gave strong support to the idea that the purpose of the exception to the general rule of immediate return was to defer to the wishes of the child for Convention purposes. Therefore, once a child was judged to be of an age and maturity for it to be appropriate for the court to take account of her views then the Art.13 defence of the Hague Convention was established and the court then had to exercise its discretion on whether to return the child. In assessing the age and maturity of a child the court had to ascertain: (i) the child's own perspective of what was in her interests, short, medium and long term; (ii) whether the reason for objection was rooted in reality or might reasonably appear to the child to be so grounded; (iii) whether the child's view had been shaped or coloured by undue influence or pressure from the abducting parent; and (iv) to what extent the objections would be mollified on return. *S v S (Child Abduction) (Child's Views)* (1993) 2 WLR 775 considered. (2) In the instant case G's objections to returning to Spain were not in dispute. She objected to returning to her mother's care because she did not trust her mother to remain free from drink. Spanish psychologists, British psychologists, the court welfare officer and her headmaster found that G was mature before she was 10 years old and again in examination when she was 11 years old. Those conclusions were accepted by the instant court. Whilst it was found that G's views had been coloured and sharpened by her father, the consistency of her approach, the expressions of love for her mother, and in particular one of the letters she had written had led the court to the conclusion that G's views were genuine and not merely or even mainly the product of her father's hostility towards her mother. The court was satisfied that G's fears and anxieties would not evaporate upon her return to Spain. Taking all the evidence as a whole, some of which was not before the court below, G was found to be of an age and maturity that compelled the court to take her views into account. Therefore, the defence under Art.13 was made out. (3) The court had to exercise its discretion in balancing the Art.13 defence against enforcing the spirit of the Hague Convention despite the Art.13 defence. In G's case the demands of comity, convenience and even the welfare of the child in having her future decided in the court of her habitual residence did not override the respect which should be paid to her wishes. Therefore G would not be ordered to return. (4) T was not of an age or maturity where his opinion could be taken into account by the courts. The Spanish courts had found that whatever the mother's past failings she was now capable to care for the children. Therefore, T would not be at grave risk of exposure to physical or psychological harm if returned. However, there was a grave risk that in returning T without his sister he would be placed in an intolerable situation. Therefore, in the quite exceptional circumstances of the case, the Art.13 defence was established in T's case. The important considerations of enforcing the Hague Convention could not prevail against the intolerability of T's situation.

Appeal allowed. Application for return of the children to Spain under the Hague Convention dismissed. Application under the UN Convention dismissed.

Permission

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