

Re D (Abduction : Acquiescence) (1998)

(1999) 1 FLR 36

26/08/1998

Barristers

Henry Setright KC

Court

Family Division

Summary

Habitual residence was a matter of fact to be determined by reference to all the circumstances and relevant authorities.

Facts

An application by the mother under the Hague Convention concerning a child ('D') who was born in 1990 and was aged 8 at the time of the instant case. The mother was a American citizen and the father was a UK citizen. They were married in England in 1988 and lived in America until they separated in 1994. On separation the father brought D to live with him in the UK and was helped in D's care by his own father. Divorce was granted to the couple on 28 November 1994 and by consent physical custody of D was given to the mother. In September 1995 it was agreed that D should come back to the UK to be looked after by the father. In December 1996 D was returned to the mother in America. In June 1997 the mother was in the process of separating from her new partner, with whom she had had two further children, and D was returned to the father. There was conflicting evidence as to the duration of the return. The mother contended that D had only come to England for the summer holidays whereas the father contended that D had been brought back on a permanent basis. The father did not return D. The mother married her former partner in America and the father and D moved in with the father's girlfriend. On 24 April 1998 the father was convicted of importing drugs and was sentenced to 15 months' imprisonment. His earliest release date was 4 December 1998. During that time D continued to live with the father's partner and they agreed not to inform the mother of the father's detention. Once the mother discovered the situation the father's girlfriend was worried that the mother would take D and so applied for a residence and prohibited steps order in respect of the child. The mother then made an application under the Hague Convention. It was submitted for the father that D removal from America had not been wrongful and that D's habitual residence had ceased to be in America.

Held

HELD: (1) In exercising the court's discretion it was necessary to balance the welfare of the child against the fundamental purpose of the Convention. (2) Habitual residence was a matter of fact determined by reference to all the circumstances and relevant authorities. Under Re H (Abduction : Acquiescence) (1997) WLR 563 acquiescence was a pure question of fact to be resolved by the trial judge based on the

subjective intention of the wronged parent, and the burden of proving acquiescence was on the abducting parent. (3) The mother and father were not found to have been wholly satisfactory witnesses. There was conflicting evidence on both sides but it was found that there had been agreement for D to return to the mother after the school holidays and that the father had wrongfully retained D in the UK. (4) Whilst the mother made clear in her evidence that she wanted D back she had not put any request in writing and had not sought legal advice until July 1998 after she had discovered that the father was in prison. The mother had also sent D's belongings and had not objected to him enrolling in a UK school. (5) On the totality of the evidence, the mother had accepted that D had made his home with the father and D had acquired habitual residence in the UK by the end of 1997. Therefore the mother had acquiesced to D's wrongful retention in the UK by the father.

Application under the Hague Convention refused.

Permission

Lawtel 