

A v B (Abduction: Declaration)

[2008] EWHC 2524 (Fam)

30/09/2008

Barristers

Private: David Williams QC

Court

Family Division

Summary

Where a mother had removed a child to France from the United Kingdom, both the English court and the father had rights of custody at the relevant time by reason of an ex parte order prohibiting the child's removal, even though the order had not been served on the mother prior to her departure.

Facts

The applicant father (F) applied pursuant to the Child Abduction and Custody Act 1985 for a declaration that he and/or the English court had rights of custody at the relevant time in respect of his daughter (S) for the purpose of the Hague Convention on the Civil Aspects of International Child Abduction 1980 art.3. S, who was seven, had lived in the United Kingdom with her unmarried parents, F and the respondent (M), from birth until the age of six when she was removed to France by M, who was a French citizen. F had opposed the move and, only hours before the departure, had obtained an ex parte order granting him parental responsibility and prohibiting M from removing S from the jurisdiction. Some days later, despite the fact that M had not been served with any of the documentation, the order for parental responsibility was confirmed and she was ordered to return S to the family home. Thereafter, F's Hague Convention application to the French court for the return of S was refused on the basis that the parental responsibility order had not been made known to M until after her departure from the UK. In making that decision, the French court had before it an opinion on English law which was flawed and did not deal squarely with the issue of the lack of service. The issues to be decided were whether (i) the English court had jurisdiction to make a declaration on F's application; (ii) F and/or the English court had rights of custody at the time that M left the jurisdiction with S; (iii) the court's discretion should be exercised so as to grant a declaration; (iv) the orders granting F parental responsibility and requiring that S be returned to the family home ought to be discharged.

Held

HELD: (1) The court had jurisdiction to make a declaration on F's application, and the only question was whether it was appropriate for it to exercise its discretion to do so, P (A Minor) (Child Abduction: Declaration), Re (1995) 1 FLR 831 CA (Civ Div) followed. (2) Both the English court and F had rights of custody before M removed S from the jurisdiction. While service of an application on the respondent was the time when the court's jurisdiction could be regarded as first invoked, interim orders made before

service could be regarded as a special case where the vesting of rights of custody preceded service, H (A Minor) (Abduction: Rights of Custody), Re (2000) 2 AC 291 HL followed. In the ex parte situation, the court obtained rights of custody once there had been some judicial determination, even if only by way of judicial case-management. It did not matter that the order was not served on M before she removed S from the jurisdiction. While she would not have been in contempt of court given her lack of knowledge of the existence of the order, that did not render the order ineffective until she was served with it. The English court therefore had rights of custody at the relevant time and there was no basis for distinguishing between the rights of the court and the rights of the father. (3) If no declaration was granted the French court would proceed on the flawed basis that service was necessary under English law, and that would be wrong. International comity required the position at English law to be corrected, and on that basis a declaration was granted. (4) If M was ordered by the French court to return S to the UK it was unlikely that the orders for residence and parental responsibility would be kept in force. The orders were therefore discharged so as to restore the status quo.

Permission

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