

Re Z (Abduction)

[2008] EWHC 3473 (Fam); [2009] 2 FLR 298

20/10/2008

Barristers

Private: David Williams QC

Court

Family Division

Summary

Habitual residence was a question of fact; an agreement that habitual residence be limited to a specified term could not take precedence over factual circumstances indicating the contrary. Furthermore, acquiescence and consent to the removal of children had to be established as a fact and a delay in instituting proceedings under the Hague Convention on the Civil Aspects of International Child Abduction 1980 did not amount to acquiescence.

Facts

The applicant father (F) applied for the summary return to Israel of his children (N and X) following their removal to the United Kingdom by their mother (M). F was of French-Israeli background and M was of British-Israeli background. N, aged seven and X, aged five were born in England where the family was based. F, wishing to return to Israel, obtained employment there but M remained in England with the children. M subsequently agreed to move to Israel for the next few years. Following alleged incidents of domestic violence, M moved out of the family home and sought temporary custody of the children. F obtained injunctions preventing the removal of the children from Israel. Three months later, M and the children moved back in with F and the injunctions were discharged. M then removed the children to England after three years of living in Israel. M contended that (1) the children had not been habitually resident in Israel for the purposes of the Hague Convention on the Civil Aspects of International Child Abduction 1980 because she had agreed to move with the children to Israel on the understanding that it was a temporary move; thus, her agreement to change the children's habitual residence had been vitiated by breach of the original agreement; (2) the agreement that the move to Israel was temporary amounted to F's consent to the children's return to England, and his delay in issuing proceedings under the Convention constituted acquiescence; (3) the risk of domestic violence meant that the children were at grave risk of harm if returned to Israel; (4) the children's objections to being returned should prevail.

Held

HELD: (1) Habitual residence was a question of fact. A term of habitual residence that was expressed and agreed to be time-limited could not take precedence over factual circumstances that indicated the contrary. Prior to the removal of the children to England they had been habitually resident in Israel, and M's decision to move back to England was provoked by her desire to separate from F rather than by her

pursuit of the original agreement. (2) M had to demonstrate F's acquiescence in fact and not her perception of his acquiescence. Accordingly, F's delay in pursuing proceedings did not amount to acquiescence, *H v H (Child Abduction: Acquiescence)* (1998) AC 72 HL applied. Furthermore, M knew that F did not consent to the removal of the children and had concealed her intentions. (3) There was no evidence of grave risk of harm to the children and any risk of domestic violence would be reduced or eliminated if the parents resided separately in Israel. (4) The children's objections could not prevail. X was too young to have a view taken into consideration, and whilst N was of an age where his views could be given some weight, his fears appeared to reflect anxieties engendered by M's account of their life in Israel rather than his own memories. Accordingly, M had failed to establish the existence of an exception to the requirement under art.3 and art.4 of the Convention that the court should return the children to their place of habitual residence.

Permission

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