

Re R (A Child) sub nom DE L v H (2009)

[2010] 1 FLR 1229 : [2010] Fam Law 328 : [2009] EWHC 3074 (Fam)

03/12/2009

Barristers

Private: David Williams QC
Charles Hale KC

Court

Family Division

Practice Areas

International Children Law

Summary

Although a mother who applied to have her 13-year-old son returned to her in Portugal had established that his father had wrongfully retained him in the United Kingdom, where the son had expressed a firm view that he felt domestically happy, settled and educationally secure with his father in the UK, and that view was rooted in reality and had not been shaped by parental pressure, the court declined to make an order for his return to Portugal under the discretionary defence of "child's objections" under the Hague Convention on the Civil Aspects of International Child Abduction 1980 art.13.

Facts

The claimant mother (M) sought an order that her 13-year-old son (R) be returned to her in Portugal. M was a Portuguese national and the defendant father (F) was a British national. R was born during their brief marriage, and M returned to Portugal when the marriage collapsed. Following protracted legal proceedings concerning R's residence and custody, M was ultimately awarded custody of R in Portugal, although F enjoyed extensive custody arrangements. Shortly before he was due to return to M in September 2008, following a long summer holiday with F, R informed F that he had burned both his British and Portuguese passports so that he could not return to Portugal as arranged. F informed M that, as she had R's birth certificate, it was she who would need to acquire replacement documents to enable R to travel home. However, M made no attempts to deal with replacing R's passport and R remained with F who enrolled him in a local school in October 2008. In April 2009, F found R's British passport. M then brought a Hague Convention application pursuant to the Child Abduction and Custody Act 1985 and Regulation 2201/2003. M contended that F had wrongfully retained R in England since September 2008. F denied wrongful retention and raised defences of acquiescence and the child's objections pursuant to the Hague Convention on the Civil Aspects of International Child Abduction 1980 art.13(a). R, in his own right and following conversations with the judge, made clear his objections to a return to Portugal.

Held

(1) M's primary case of wrongful retention from September 2008 had to fail because F had done all he could to secure R's return at that time, only to find such efforts frustrated by the absence of travel documentation and M's attitude. However, by the end of October 2008, having secured a place in school for R, F had sat back to wait and see whether M would launch proceedings under the Convention. That evidenced a change of attitude from his initial resolve that R should return to one of opposition and non-cooperation because of R's own strong objections. F's wrongful retention of R was, therefore, established as from late October 2008. (2) For the purposes of art.13 of the Convention, the question whether a parent who complained of wrongful removal or retention of a child had acquiesced in such removal or retention depended upon the subjective state of mind of the complaining party. That question did not concern the removing or retaining parent's perception of the position, but whether the complaining parent had acquiesced in fact, *H v H (Child Abduction: Acquiescence)* (1998) AC 72 HL and *S (Minors) (Abduction: Acquiescence)*, Re (1994) 1 FLR 819 CA (Civ Div) applied. The burden of proof rested upon the abducting parent. In the circumstances, F had failed to establish that M had ever acquiesced in R's non-return, either as a subjective matter or by reason of unequivocal action, or inaction, in asserting her rights for R's return. It was difficult to envisage a case where simple refusal by a custodial parent to assist the non-custodial parent in fulfilling the latter's responsibility to return a child from abroad could be held to amount to acquiescence in the child's non-return. Whilst F had undoubtedly hoped that M would not in the event take Convention proceedings, he had no grounds by reason of her attitude or conduct to doubt that she would do so or that she wished to do other than assert her right to R's summary return. The defence of acquiescence failed accordingly. (3) The "gateway" findings that were required of the court in relation to the discretionary defence of "child's objections" under art.13 of the Convention were that the child did in fact object to being returned and that he had attained an age and maturity at which it was appropriate to take account of his views. In the instant case, it was clear beyond argument that R satisfied both of those requirements. For the purpose of considering the soundness and validity of R's strongly and clearly stated objections, it was appropriate to deal with them under four heads: (i) the child's own perspective of what was in his own short, medium or long term interests; (ii) the extent to which the reasons for objection were rooted in reality or might reasonably appear so grounded; (iii) the extent to which those views had been shaped or coloured by undue parental pressure, direct or indirect; (iv) the extent to which the objections would be modified on return or the child's removal from the pernicious influence of the abducting parent, *T (Children) (Abduction: Child's Objections to Return)*, Re (2000) 2 FLR 192 CA (Civ Div) applied. R's firm view was that with F in England he felt domestically happy, settled and educationally secure, whereas his return to Portugal would result in a stressful and quarrelsome situation. R's views were rooted in reality and had not been shaped by pressure from F. There was no real likelihood that R's objections would be modified on return. In those circumstances, the court exercised its discretion and declined to make an order for R's return.

Permission

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