

D v S sub nom Re E (A Minor) (DOB 19 May 2000) : S v D (2008)

[2008] EWHC 363 (Fam); (2008) 2 FLR 293

19/03/2008

Barristers

Charles Hale KC

Court

Family Division

Summary

For the purposes of the Hague Convention on the Civil Aspects of International Child Abduction 1980, the fact that a lawful removal of a child from one country to another could become a wrongful retention after the move showed that changes of intention by the removing parent before the move were relevant to whether there was sufficient consent to the removal at the time.

Facts

The applicant father (F) applied for the respondent mother (M) to return his child (E) to Mexico under the Hague Convention on the Civil Aspects of International Child Abduction 1980 or the Children Act 1989. F, who was Belgian, and M, who was English, had lived in Mexico, where E was born. The family moved to the United States where M had a temporary teaching post for three months. Thereafter, M and F agreed to alternately choose where the family lived for successive three-year periods. F made the first choice and moved the family back to Mexico. M and F lived separately but established a successful shared care arrangement in relation to E. For the next three-year period, the family moved to England. M and F lived in separate accommodation and continued the shared care arrangement with E. However, it later transpired that M had left Mexico intending not to return there, and she initiated divorce proceedings in England. She sought a residence order in her favour and a reduction in E's time with F, who then initiated Mexican proceedings seeking shared custody, although he did not at that time seek an order for E to be returned to Mexico under the Convention. However, the petition in the Mexican proceedings made it clear that F did not agree to E's remaining in England and that he regarded M as having acted in bad faith by waiting until she and E had left Mexico before telling him of her true intentions. The court held a full hearing on welfare with the agreement of the parties.

Held

HELD: (1) There had been a wrongful removal and the Hague Convention applied. The fact that a lawful removal could become a wrongful retention after the move showed that changes of intention by the removing parent before the move were relevant to whether there was sufficient consent to the removal at the time of the move from one country to another. In the instant case, M had knowingly misled F before the move to England by not telling him that she never intended to return to Mexico; if he had

known that, he would not have consented to E leaving that country. Although there was some overlap of intention and understanding between M and F in relation to the issue of consent as to E's removal from Mexico, the authorities required a true and unequivocal consent in that regard, P (A Child) (Abduction: Custody Rights), Re (2004) EWCA Civ 971, (2005) Fam 293 followed. For Convention purposes, therefore, F did not consent to E's removal from Mexico, T v T (Child Abduction: Consent) (1999) 2 FLR 912 Fam Div applied. (2) However, F had acquiesced in E's removal by not immediately initiating proceedings under the Convention. That could be established by reference to his subjective intention or to an inference drawn from his words or actions. The first limb was established because F had consulted solicitors shortly after the move to England and although the evidence was unclear as to precisely what advice he had received, the outcome was that he knew of the existence of the Convention and decided not to bring proceedings under it at that time. The second limb was satisfied by F's conduct in relation to the Mexican divorce proceedings, which indicated that he was not reserving the right to argue that the welfare issues should be dealt with only by the Mexican courts. (3) Because of the delay in reaching a final hearing in the English courts, it was not in E's best interests to order his return to Mexico under the Convention for the purpose of enabling the Mexican courts to take the welfare decisions, as that would result in further delay and uncertainty for E and his parents. (4) However, his return to Mexico would be ordered under the 1989 Act. The balance was in favour of E's return because of the support, security and stability of his environment there and because the changes inherent on a return to that country, including the reactions of the parents, were likely to be easier to manage on account of E's preference for Mexico and his history there.

Permission

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