

Re K (Children) (2009)

[2010] 1 FLR 57; [2009] EWHC 1066 (Fam)

19/05/2009

Court

Family Division

Summary

Even though a father of two children habitually resident in Spain had no parental responsibility for them under English law, where he was exercising rights of parental control and custody of them under Spanish law, their removal from Spain by their mother amounted to a breach of his rights of custody under the Hague Convention on the Civil Aspects of International Child Abduction 1980 art.3 and art.5.

Facts

The court was required to determine as a preliminary issue whether the claimant father (F) had rights of custody under Spanish law in respect of his two children which were breached by their removal from Spain by the defendant mother (M). F and M were of British nationality. They had lived together but never married and their children, aged seven and five, were born in Spain where F and M were habitually resident. The children's births were registered in Spain by both parents and Spanish birth certificates were obtained. It was common ground that F did not have parental responsibility under English law. The children were habitually resident in Spain and had always lived there until M removed them to the United Kingdom. F brought proceedings under the Child Abduction and Custody Act 1985 and Regulation 2201/2003 including an application for the summary return of the children under the Hague Convention on the Civil Aspects of International Child Abduction 1980. When the matter came on for directions, the question arose as to whether the children had been removed in breach of F's rights of custody under art.3 of the Convention, and the preliminary determination of that issue was ordered. Both parties adduced expert evidence. M contended that as, under Spanish law, the national law of the child governed all questions relating to the rights and duties of parents towards their children, English law was to be applied to the issue of whether or not F had rights of custody, and that being so, F lacked custody rights at the time of their removal. F submitted that as he had established "filiacion", or "parenthood", under Spanish law upon production of the children's birth certificates, parental responsibility automatically followed, and that there was a public policy objection to the application of a foreign national law on the ground that it did not recognise the automatic grant of parental responsibility to the father in the case of an unmarried union.

Held

HELD: The nature, scope and application of public policy considerations might vary from country to country and the court was, in the instant case, required to direct its attention to Spanish rather than English public policy considerations. It was an important factor that, under Spanish law, parental authority was attributed to both unmarried parents. It was probable that the Spanish court would find

that (i) F had established his paternity; (ii) at the time of the children's removal he was exercising parental responsibility or rights of custody including his right of parental control under Spanish law; (iii) the effect of applying the national law of the child to the instant case would be to deprive the children of the protection and benefit of those rights, and that that was discriminatory as between the children of married and unmarried parents, and thereby contrary to Spanish public policy as enshrined in the Spanish constitution. The application of English law would have the effect of attributing custody of the children to M alone without taking into account their welfare interests as recognised and respected by Spanish law. At the time of their removal, F had been exercising rights of parental control over and custody of the children according to Spanish law. Their removal or retention was, accordingly, in breach of F's rights of custody under art.3 and art.5 of the Convention.

Permission

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