

Re C (Minors) (Abduction: Habitual Residence) (1999)

(1999) 1 FLR 1145 : Times, February 23, 1999

12/02/1999

Barristers

Private: Marcus Scott-Manderson QC

Court

Civil Division

Summary

A judge had erred in not giving sufficient weight to the fact that a mother, in taking children from the Californian jurisdiction, was the author of her own misfortunes in relation to any charges she might face on return, and also to the fact that the Hague Convention existed to prevent one party gaining an advantage by taking children to another country in an attempt wrongfully to retain a child.

Facts

Appeal by the father of two children from an order of Connell J on 6 July 1998. The issue was the dismissal of the appellant's application for the return of the two children to California pursuant to the Hague Convention. The appellant father ('H') married the respondent mother ('W') at the beginning of 1988. Their son ('M') was born in December 1988 and their daughter ('L') in June 1990. At the time of the judge's decision they were aged 9 and 8. The marriage broke down in 1993. On 27 January 1994 the Superior Court of California dissolved the marriage and provided a detailed order with respect to the children providing, amongst other things that H and W should have joint residence and that neither should change the state of residence without the written consent of the other or further order of the court. Later in 1994 W met another man ('SF') and married him. SF became the children's step-father. They also had a daughter ('E') in 1997. H made allegations of assault against SF and the court imposed various restrictions, including an order that the children should not be moved from outside seven southern Californian counties. In February 1996 W complained to the Juvenile Court ('JC') of H's physical abuse of the children. In August 1997 the JC found the charges of physical abuse proven but not those of psychological or emotional harm. H appealed but that appeal had not yet been heard. On 21 November 1997 the Juvenile Dependency Court gave permission for W to take the children to England for a Christmas visit from 19 December 1997 to 1 January 1998. She supplied the address of her mother-in-law in England. However, she did not return and on 26 January 1998 the court issued an arrest warrant for W. H invoked the Hague Convention. W said that she had attempted to return to the USA with SF but he had been denied residency because of an assault allegation made by H. SF said that he wished to return to the USA where he had lived for 13 years. W appeared to have evaded service of the warrant but appeared in the High Court on 6 March 1998. She accepted that her retention of the children was

wrongful and contrary to Art.3 of the Convention but mounted a defence based on Art.13(b) of the Convention and alleged that there was a grave risk that the children faced physical and psychological harm if they were returned and exposed to H. A court welfare officer's report was ordered. The judge had found his report persuasive and held that there was a grave risk of psychological harm which brought the case within Art.13(b) and concluded that it would not be appropriate for him to order the return of the children. H appealed against that refusal.

Held

HELD: (1) The judge had correctly directed himself that the onus of proof was on W to bring the matter within Art.13(b) but had not reminded himself of the high threshold that has been set to establish such defences nor of the cogency of the evidence necessary to discharge the burden of proof. That in itself would not be a sufficient ground to allow the appeal as the judge was highly experienced and would no doubt have given due weight to those principles. (2) However, there was an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which was much more than was inherent in the inevitable disruption, uncertainty and anxiety which followed an unwelcome return to the jurisdiction of the court of habitual residence. (3) The anomalous situation had arisen where the JC had concluded that there was a physical threat but no psychological risk and the English court had reached the opposite finding. There was, however, good reason to believe that the children could be protected in California from whatever risk H might pose. (4) Since the earlier order, W had split from SF although there was some mention of a reconciliation. SF had ties in England but W did not, beyond SF. W and SF should not, in any case, have embarked on a Christmas visit to England when they well knew that SF might have visa difficulties in trying to return. (5) Equally, although H had belatedly ventured an undertaking not to instigate kidnapping charges in California and there were grounds to be sceptical as to his intentions, W was the author of her own misfortune in this jeopardy. The judge had erred in not giving sufficient weight to this reality and the fact that the Convention existed to prevent one party gaining an advantage by abducting children to another country in an attempt wrongfully to retain a child. (6) The judge had also given undue weight to the factors he assessed in respect of any grave risk to the child. The court found that there was no risk of profound psychological damage, nor a grave risk of placing the children in an intolerable situation, nor were the children's objections (expressed to the court welfare officer when very much influenced by W and SF) other than unreliable. (7) It was not appropriate for the English court to engage in speculation as to the outcome of subsequent proceedings. To do so would be to usurp the function of the Californian court. W may have had an overwhelming case, which H did not appear to deny, that the children should remain in her care in California. It was another question whether they should make their home in California or be permitted to leave. The purpose of the Convention was to ensure that that decision was taken by the courts where the children were habitually resident. (8) Despite the long time spent in England, W had not discharged the very heavy burden which lay upon her to establish any ground of defence under Art.13. That being so it was the duty of the English court to implement the Convention trusting in its underlying thesis that the welfare of the children would be best served by the Californian courts.

Permission

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