

Re S (A Minor : Abduction: Acquiescence) (1997)

(1998) 2 FLR 115

26/11/1997

Barristers

Henry Setright KC

Court

Civil Division

Summary

Mother's appeal against grant of father's application under Hague Convention for the return to Australia of their child which the mother had taken to England. The mother argued acquiescence under Art.13 Hague Convention.

Facts

Appeal by an English mother from the order of Mr Justice Sumner allowing the father's application under the Child Abduction and Custody Act 1985 and the Hague Convention for the return to Australia of the parties' child, N born 30 September 1995. The mother alleged, under Art.13 Hague Convention, that the father acquiesced in her taking the child to England. The parties had lived in Australia from 1989. In December 1996 the mother returned with N to Wales where she had remained since. The father contended that he had agreed that N should go to England for a holiday only and only knew that the mother and N would not return when the mother telephoned him in January 1997. The mother argued that the father's actions or inactivity amounted to acquiescence: (i) immediately after the January telephone call he had put the former matrimonial home on the market and had arranged for the mother's and N's belongings to be shipped to England, (ii) the father made no attempt until September 1997 to seek the return of N despite knowing of his rights under the Hague Convention. The father submitted (i) he had put the house on the market because he did not want to live there in the circumstances but soon afterwards took it off the market, (ii) he had shipped the belongings as a step to facilitating contact with his son, (iii) he had instructed three sets of solicitors. The first solicitor, instructed in January 1997, had, as was accepted by the judge, not been aware of the father's rights under the Hague Convention and had given misleading advice. The second in April had apparently known of the Hague Convention but had informed the father that any application under the Convention would have been bound to fail. The third solicitor was instructed in September and had assisted the father in the Hague Convention application. The mother argued that from at least April the father was aware of his rights and that the judge had required too high a standard of knowledge of his Convention rights.

Held

(1) In deciding whether the wronged party had acquiesced the court had to consider the subjective state

of that party's mind in the context of what facts were known by that party at the time. The objective perception of the party's intentions was irrelevant. (2) Whether the party had acquiesced was a question of fact and the burden of proof was on the abductor. (3) The crucial question in the present case was the degree of knowledge of the father. It was not necessary that he knew his full rights under the Hague Convention. (4) The judge had applied too high a standard of knowledge. The father had been made aware of his rights under the Convention and been given realistic advice as to the chances of an application. (5) The father had never stated his intention to care for N though he had made suggestions for contact. The court would not consider a subsequent change of mind if it concluded, which it did in the present case, that the father had initially acquiesced; *Re A (Minor:Abduction)* (1992).

Permission

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