

Re O (A Minor) (Child Abduction: Custody Rights) (1997)

(1997) 2 FLR 702 : Times, June 24, 1997

05/03/1997

Barristers

Henry Setright QC

Court

Family Division

Summary

Applications by grandparents under Hague Convention and court's inherent jurisdiction for the return of a four year-old child to Germany from the UK where she had been taken by her mother. Whether joint custody rights established under article 3.

Facts

Applications for the return of a child, ('O'), to Germany, made by O's maternal grandmother and her husband ('the grandparents') who were German nationals, as was O herself and her mother, the first defendant. The second defendant was a British citizen and the mother's partner. O was almost five years old and had lived in Germany for all her life until she was brought to the UK by the defendants in December 1996. The defendants were living in Germany with O until they lost their house in August 1995, at which point the second defendant went to live in a men's hostel and the mother went to live with O at the grandparents' house. Following arguments between the mother and the grandmother concerning the mother's ability to look after O and the suitability of the second defendant as a partner, the mother contended that she was thrown out of the grandparents' house and had no choice but to leave O where she was. The grandmother had expressed real concern about the mother's care of the child, her involvement with drugs and her relationship with the second defendant. Meanwhile the mother, who had contact with O throughout the time that the child was with her grandparents, informed the latter that she intended to move with the second defendant to the UK and that she would be taking O with her. The grandparents started custody proceedings in the German courts as a result; the application was never served on the mother and she denied that she had known of the proceedings, although the grandmother asserted that she had told her of the application. The mother removed O to the UK during a period of overnight contact. The grandparents quickly obtained an Interim Custody Order from the German court, and applied under the Hague Convention and the inherent jurisdiction of the court for the return of the child to Germany. It was contended for the defendants that the grandparents did not have joint rights of custody pursuant to Article 3 of the Hague Convention so that their application under the convention must fail.

Held

(1) This case could be distinguished from the decision in *Re J (A Minor)* (1990) in that the grandparents in this case were caring for the child with the mother playing no part in such care and being 'off the scene' apart from short periods of contact, whereas the mother in *Re J* (supra) had primary care of the child which continued when she came to the UK. (2) The test propounded in the case of *Re B (A Minor) (Abduction)* (1994) was whether the individual concerned was exercising functions of a parental nature without the benefit of any official custodial status. This was a question of fact in each case; the court in *Re B* (supra) did not hold that the case came within art.3 because agreement between the parties had legal effect under the law of the state in question. (3) It was to be borne in mind that the mother had maintained contact with O throughout, that she was short of funds and so lacked a home, and that she saw O's placement with her grandparents as a temporary one. Against this was the real issue as to the mother's ability to care for O, the provisional transfer of custody by the German court after O had been brought to the UK and the fact that this was on any view a German case, with evidence pertinent to O's welfare being available in Germany, where the child had lived for her whole life until recently. (4) The court concluded without hesitation that the grandparents held joint custodial rights, because they had carried out parental responsibilities over a substantial period of time and so had established their joint rights of custody under art.3. The Hague Convention application accordingly succeeded. (5) If that conclusion were wrong, the essentially German nature of the case caused the court to conclude that it would be appropriate to order O's return under its inherent jurisdiction. Her long-term future should be decided as soon as possible at an expedited hearing in Germany. (6) Applications allowed.

Permission

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