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O v O [2013]

[2013] EWHC 2970 (Fam)

21/08/2013

Barristers
Henry Setright KC

Court
High Court (Family Division)

Practice Areas
International Children Law

Summary
Application under Hague Convention for return of a child to a third country, not the country of the child's previous residence, pursuant to an agreement between the parents. Application successful.

Facts
A mother of two children, M (9) and S (2), applied under the inherent jurisdiction and under the Hague Convention for the return of M to the US. The applications were opposed by the children's father who asserted that M should remain living in the UK, or that, if there were to be an order made under the Hague Convention, that M be sent with him to Australia, the country in which M had previously lived, for a determination of welfare there.

The parties had travelled regularly. M had been born in the US and S in Australia. Ten months after S's birth, the parents separated but agreed shared care arrangements for both girls. During the next year, after court proceedings had been initiated in the Australian Family Court, the parents entered into an agreement to leave Australia and live separately, but close together, in the US. The agreement appeared to record that S and the mother would move permanently together and M would be coming permanently with the father, taking a holiday in Thailand en route.

Prior to leaving for Thailand, the father indicated to the mother by text that he intended to take M to visit the UK after their holiday. Despite the mother not agreeing to do this, M was taken to her paternal grandmother's home in the UK, from where the father later emailed the mother and stated that it was now his intention to remain in the UK and not travel to the US. The mother promptly issued proceedings in relation to the custody of both children in the US, before issuing proceedings in the UK.

Held
The matter came before Keehan J, who heard oral evidence from both parties and read a report from CAFCASS, who had interviewed M. The father asserted that there was no firm agreement between the parents to live in the US, and raised concerns about M's ability as a carer. The judge considered that he

had rarely heard a witness give evidence that was so blatantly untrue.

The judge considered when the father had formulated a plan to live in the UK, for if he had done so before he and M left Australia, it would have been a wrongful removal, whereas if it had occurred afterwards, it would be a wrongful retention. He decided that he was in no doubt that the father's decision to renege on the plan was formulated before the departure from Australia, and found that there was a wrongful removal. He then considered the father's defence to the applications – namely, that M objected. He determined that M did not object to going to the US, but did object to being separated from her father. This did not reach the status of objection within the meaning of Article 13 of the convention.

The judge then turned to the father's assertion that if it were ordered that M should go to the US, he would not go with her. Given the close relationship between father and daughter and the fact, as found, that he was a loving and caring father, the judge determined that this was a litigation ploy.

Finally, the court considered the unusual situation whereby the requested return of a child, following wrongful removal, was to a third state, the family having left the country from which the child was returned. The judge decided that the Convention should be given a purposive interpretation, which sought to promote the interests of a child, and observed that it would be absurd, artificial, and contrary to the interests of M to be returned to Australia. He duly ordered the return of M to the US, where a welfare decision could be made.