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# Re B (Children) 2015

## [2015] EWCA Civ 1302

22/12/2015

**Barristers**
Alex Verdan QC
Charles Hale QC

**Court**
Court of Appeal (Civil Division)

**Practice Areas**
International Children Law
Private Children Law
Appeal against an order permitting the permanent removal of two children to the United Arab Emirates. Consideration of the use of wardship and provision of financial security to ensure and enforce compliance.

The case concerned two girls, aged 13 and 11. The parents had never married and, post separation, had conducted acrimonious litigation about the arrangements for the children, since which time (despite continued 'sniping') the girls had spent approximately 45% of their time with their father, with whom they had a strong relationship.

In 2008, the mother formed a relationship with Mr B (whom she married in 2014). He obtained employment in the UAE in 2010 and (without objection from the father) she and the girls had visited him there on over 20 occasions. The mother applied for permission to relocate permanently to the UAE with the girls.

In reaching his original decision (to permit the mother's application) HHJ Glenn Brasse heard from a jointly instructed expert, Ian Edge, that, in so far as was possible, the father's parental rights set out on any English order would be enforceable in the UAE even though he and the mother had never been married.

Subsequent information (latterly accepted by Mr Edge) provided by the lawyer instructed to draft a formal agreement, intended for approval and transformation into an order by the relevant court in Abu Dhabi, revealed that in fact: the rights of an unmarried father were neither recognisable nor enforceable through the Abu Dhabi courts.

The matter was referred back to HHJ Brasse who, having reconsidered the matter at a further full hearing with fresh oral evidence, once again granted permission for the removal. On this occasion though, he underpinned the order by a different structure from that originally directed, including requiring detailed

undertakings, making the children Wards of Court and requiring Mr B to execute a second charge of £250,000 over his London property that would stand forfeit to the father in the event of a breach of the arrangements for the child set out in the order.

The father appealed.

Lord Justice McFarlane, in considering the two judgments of HHJ Glen Brasse, commented that each were examples of 'composition and judgecraft of the highest order'.
In his first judgment (at which point the evidence of Mr Edge had not been displaced) the judge had set out his approach to the law and had conducted a thorough analysis based on all the relevant case law and the welfare checklist. As part of this exercise, although he found that the mother's plan to move were entirely reasonable and not part of a campaign against the father, he did make findings against the mother in terms of her honesty and behaviour towards the father as well as finding deficits in the father's approach. By contrast, he had formed favourable impressions of both Mr B and the father's new partner, Ms S. He had also considered the strength of the girls' relationship to their father (described as the 'first pillar') and the ability to place the arrangements within an order enforceable in Abu Dhabi (described as the 'second pillar') to be adequate remedies against the potential for the mother to 'slip'.

His overall conclusion was that the move was in the children's interests and that the father would be protected by the 'two powerful pillars' of the girls' 'indomitable' love for their father and the 'availability of a process by which an agreement…could become an enforceable order of the Abu Dhabi court'.

In February 2015, some two months after the judgment, the judge refused an application by the mother for a short trip to the UAE on the basis that, by then, the expert evidence was in dispute, the father had therefore refused to sign the proposed agreement and the implementation of his judgment was in a state of hiatus.

The case then came back for reconsideration, by which time it was common ground that the order of the English court could not be enforced in the UAE. HHJ Glen Brasse's second judgment was also a model of good practice. It included full analysis of all the relevant factors, demonstrated a clear grasp of the issues and dealt with updating evidence as to some positive changes made by the mother (less by the father) and the 'emotionally wearing' impact on the girls of being in limbo when their strong wish (to which he attached very considerable weight) was to live with their mother and Mr B in Abu Dhabi.

The judge concluded that the 'strength of the first pillar' remained intact to the extent that it was 'made of granite'. His view remained that the mother's plans were well thought out and borne out of genuine motivation. The combination of the imposition of wardship and of the charge against the property formed a sufficient 'alternative pillar' to provide protection to the father and, accordingly, the application should be granted.

The father then appealed, citing the following grounds: the original decision was wrong on the basis of adverse findings made against the mother; undue weight had been given to the children's wishes and feelings; there had been a failure to consider the impact of the removal of the 'second pillar' and the legal consequences of the non-existence of the father's parental rights under UAE law (and consequent breach of his Article 6 and 8 rights); the property charge was no substitute for an enforceable order in the UAE and the use of wardship was impermissible and wrong in law.

In essence, the father argued that once the 'second pillar' of the 'enforceable order' had 'crumbled', the basis of the original decision was shown to have been wrong and that it was then inconsistent and irrational for the second decision not to reverse the first. Wardship was said to be an 'empty vessel' that

would provide no protection, as once they had left, the English court would, in reality, cease to have jurisdiction over the children. Criticism was also raised as to the legality of the imposition of the charge.

Against the background of the thoroughness of the judgments, the respect to be afforded the 'privileged position' of the trial judge had to be treated at its highest. In that context, the ground of appeal based of the judge having got the original welfare balance wrong was unsustainable.

As to the assertion that, once the 'pillar' of the enforceable order had gone, the application should have been refused; the judge could not be criticised for having embarked on a full re hearing and for having re appraised the case in the light of the changed circumstances. Moreover, given the strength of the girls' feelings (which had formed an important strand in the judge's evaluation, upon which he had placed great, but not, in the view of the Court of Appeal, excessive weight) the judge was entirely right to look to see if there was another way to allow them to go to the UAE whilst protecting their relationship to their father.

The criticism that the judge had failed to give sufficient weight to the legal consequences of the move was also 'hard to accept' in circumstances where he had gone to great lengths to set up a structure, the intention of which was precisely to maximise the ability of the father to enforce the arrangements envisaged. Once the original error came to light, much of the judge's focus had been on providing a suitable alternative.

There was no undue interference with the father's Article 6 and 8 rights. The issue of relocation engaged the rights of all four family members and those of Mr B, within which context, any interference was proportionate and necessary. The legal position in the UAE was but one factor and not a 'trump card'.

The judge was, moreover, alive to the risk posed by the mother. Central to his evaluation of the management of this had been his reliance on the girls' wishes combined with the imposition of the charge and orders in wardship driving against any non-compliance by her.
In terms of the charge, this had eventually been executed in a form acceptable to all parties which included provision for it to be 'immediately realisable by the father' on any breach of the order or undertakings. Concern was raised (and dealt with by an analysis of Henderson LJ, adopted by McFarlane LJ) as to the nature of the charge: fears that it was unenforceable, though understandable, were misplaced. The only aspect of the scheme that was questionable was that the initial decision as to whether or not a breach had occurred lay with the father. Given that the trigger to realising the charge was a breach of the court's order, this was undesirable. The matter should instead come back before the court for it to decide on whether or not the charge should be realisable. As the charge had already been executed, provision for this variation would be dealt with by modification of the existing Order.

With regard to the use of wardship, the father argued that it added nothing and that the judge had erred in placing reliance upon it. The mother asserted that, whilst it did not enhance the court's powers of enforcement beyond those available in respect of a s.8 order, it did 'no harm' and its greater formality might further incline the mother to abide by the orders made.

McFarlane LJ conducted a lengthy survey of relevant case law pertaining to the use of wardship for children who were physically outside the jurisdiction, concluding that the circumstances of the instant case fell short of establishing the need for its use. Wardship did not add anything to the force of, nor the ability to enforce the judge's order if made under CA 1989. The wardship order should be replaced by a child arrangements order under s.8 CA 1989.

The overarching basis of the appeal was that the 'pillars' supporting the regime were wholly inadequate

in the overall context of the law in the UAE and the judges' findings about the mother and that, accordingly, the judge had been wrong to grant permission for the move.
The highly experienced trial judge had 'steeped himself' in the case.  He was not in error in considering the charge to be an enforceable security and, despite the Court of Appeal's decision in respect of wardship, he was correct to rely on the ability of the English court to take all legally viable steps to enforce its order. The consequences to the mother of breaching a s.8 order would be the same as for breaching an order within wardship. She would face contempt proceedings, forfeiture of the charge and, in effect, exile from being able to return to the UK; these were powerful incentives for compliance. Moreover, whilst the original scheme was predicated on the unknown element of whether or not the UAE court would take appropriate action, it was, if anything, now more robust, resting as it now did on the predictable outcome that breach would be followed by immediate financial loss and an inability to return to the UK without facing contempt proceedings.

The strength of these provisions were to be set alongside the judge's evaluation of the girls' strength of character to which the father had not been able to mount a successful challenge.
It was not sufficient to establish that another judge might have taken a different view. For the father to succeed he would have to show that the judge had been 'wrong'. Quoting from Lord Neuberger PSC in Re B [2013] UKSC33 , McFarlane LJ referred to the 'face to face, bench to witness box acquaintanceship' afforded to trial judges and of the difficulty of mounting an appeal in the absence of an error of law.

In this case, the judge's welfare evaluation could not be said to be 'wrong'. He was entitled to hold that the two pillars would 'hold the mother and Mr B to the mark' and that the move was in the best interests of the children.

Accordingly, subject to the changes to the order in respect of implementation of the charge and the substitution of a s.8 order for the wardship, the appeal would be dismissed.

**Permission**