A v B (ABDUCTION: DECLARATION) [2008] EWHC 2524 (Fam)

Family Division

Bodey J

30 September 2008

Abduction – Rights of custody – Court granted parental responsibility before child left jurisdiction – Court orders not served until after child left jurisdiction – Whether valid

The unmarried father had been living with the French mother and the child in England for a number of years. On returning from a business trip the father discovered that the mother had vacated the family home and had booked tickets for herself and the 7-year-old child to fly to France. The father consulted solicitors urgently, informing them of the name of the taxi driver who, he suspected, would be asked to take the mother to the airport. The solicitors contacted the taxi driver and told him that the father would be seeking a court order preventing removal of the child on the following day, which was the day on which the mother and child were due to travel. The taxi driver was indeed asked to drive the mother and child to the airport, and he duly informed the mother of the father's intentions. Meanwhile the court made an order without notice, granting the father parental responsibility and prohibiting the mother from removing the child from the jurisdiction. The mother, now aware of the father's plans, decided not to fly, but instead drove down to Dover and caught a ferry. On the 'return day', 3 days after the without notice hearing, the father and his solicitors attended court but the mother did not appear and was not represented; the mother had not yet been served with any of the documentation and was still unaware of the English court proceedings except for the conversation with the taxi driver. The judge made orders confirming the grant of parental responsibility to the father, ordering the mother to return the child to the jurisdiction of the English court, granting the father a residence order in respect of the child and ordering the mother to return the child to the family home. The proceedings were transferred to the High Court. The mother was not served with any of the court orders until some days after she had arrived in France with the child. The father then sought from the French court an order for the summary return of the child to England under the Hague Convention on the Civil Aspects of International Child Abduction 1980. A brief attempt at mediation proved unsuccessful. Eight months later the father's Hague application was heard by the French court. An inaccurate and incomplete opinion on English law in relation to the rights of custody was made available to the French court, although it was not clear whether the opinion was actually placed before the court. The opinion provided a general overview of rights of custody and parental responsibility but did not address the significance of the rights of custody vesting in the English court once the English court had made an order. The father's application for summary return was dismissed by the French court on the grounds that the mother had not been served with the court orders before the removal. The father entered an appeal in France against that decision, the hearing of which appeal was imminent. He also asked the English court to determine whether or not he and/or the English court had rights of custody for the purposes of Art 3 of the Hague Convention at the time the child was removed to France.

Held – making a declaration that both the father and the English court had rights of custody; upholding the orders granting parental responsibility and ordering the child's return to the jurisdiction; but discharging the orders which granted the father residence and which ordered the child's return to the family home –

(1) The Child Abduction and Custody Act 1985, s 8, which gave the court jurisdiction to make a declaration on an application for the purposes of Art 15 of the

Hague Convention, did not restrict applications for such a declaration to requests emanating from the Requested State: it permitted any person who appeared to the court to have an interest in the matter to apply for a declaration; *Re P (Abduction: Declaration)* [1995] 1 FLR 831 applied. There was, therefore, no jurisdictional impediment to making the declaration sought; the question was one of appropriate exercise of the discretion (see paras [18]–[20]).

(2) The English court had acquired rights of custody for the purposes of Art 3 of the Hague Convention before the mother and child left the jurisdiction. Although, generally speaking, service of the application was the point at which the court's jurisdiction was first invoked, interim orders made without notice were a special case, in which the vesting of rights of custody could and did precede service on the respondent; *Re J (Abduction: Declaration of Wrongful Removal*) [1999] 2 FLR 653 applied. In without notice cases, rights of custody were vested in the court once there had been some form of judicial determination, even if only by way of judicial case management; all the more so when, as in this case, the court had made a substantive order. It did not matter that the order itself had not been served on the mother before she removed the child from the jurisdiction. Although the mother would not have been in contempt of court in removing the child from the jurisdiction before she was served with the order (unless she had some other knowledge of the order), that was not to say that the order was ineffective until she was served: orders of the court took effect in principle once they were made. A party forbidden without notice from leaving the jurisdiction could not be heard to say at the airport 'I am entitled to leave the jurisdiction because there has not yet been service of the order'; otherwise without notice orders would often be pointless. If an order could have effect without needing to be enforced against the individual who was the subject of the order, then it had immediate practical (as well as theoretical) effect and validity (see paras [21]–[24]).

(3) The father had obtained rights of custody before the mother and child left the jurisdiction in the same way as the court. There was no logical reason for distinguishing between the rights of a father and the rights of the court; either the order was effective before it was served on the mother, or it was not (see para [25]).

(4) International comity required that the position in English law be corrected and the declaration sought would be granted. The English court had no wish or intention to trespass upon the functions of the French court, which was thoroughly seized of the matter, but it would be wrong to allow the French court to proceed on the flawed basis that service was necessary under English law, and to factor that proposition into its conclusion when going on to seek the autonomous meaning and correct application of Art 3. If the roles were reversed, the English court would be grateful for the intervention of the French court, so as to put the English court back onto the right track as to the meaning of 'rights of custody' in French law (see paras [30]–[33]).

Statutory provisions considered

Child Abduction and Custody Act 1985, s 8

Hague Convention on the Civil Aspects of International Child Abduction 1980, Arts 3, 5, 12, 15

Cases referred to in judgment

C (A Child) (Unmarried Father: Custody Rights), Re [2002] EWHC 2219 (Fam), [2003] 1 WLR 493, [2003] 1 FLR 252, FD

D (A Child) (Abduction: Custody Rights), Re [2006] UKHL 51, [2007] 1 AC 619, [2006] 3 WLR 989, [2007] 1 FLR 961, [2007] 1 All ER 783, HL

Hadkinson v Hadkinson [1952] P 285, [1952] 2 All ER 567, CA

H (A Minor) (Abduction: Rights of Custody), Re [2000] 2 AC 291, [2000] 2 WLR 337, [2000] 1 FLR 374, [2000] 2 All ER 1, HL

J (Abduction: Declaration of Wrongful Removal), Re [1999] 2 FLR 653, FD

P (Abduction: Declaration), Re [1995] 1 FLR 831, CA

David Williams for the applicant
Geraldine More O'Ferrall for the respondent

Cur adv vult

BODEY J:

Introduction

[1] This is a father's application pursuant to s 8 of the Child Abduction and Custody Act 1985 for a declaration that he and/or the English Court had 'rights of custody' for the purpose of Art 3 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) at the material time when his daughter was removed from this jurisdiction to France.

[2] The child concerned is S, a girl, whom was born on 13 December 2001, and is therefore rising 7. Her parents, whom I will call 'the mother' and 'the father', were never married. So the father did not have parental responsibility. However, they lived together from about 1998 to about September 2007, with an interruption of some 18 months after the mother had suffered complications surrounding the birth of S.

[3] The father is a British citizen of Greek origin whilst the mother is a French citizen. In about February 2000 the couple bought the family home at an address near Colchester in Essex, where they lived up until the time when they separated in September 2007.

The factual background

[4] On 17 September 2007 the father discovered that the mother had booked tickets for herself and S to fly the next day from Stansted Airport to France, where her parents live. He had not been consulted about this. He also found out on returning from a business trip that she and S had vacated the family home. He, therefore, consulted solicitors urgently and told them, amongst other things, the name of the taxi driver (a Mr C) whom he guessed the mother might use to drive her and S to the airport. The father's solicitors managed to get in touch with Mr C and told him that the father would be going to court on the morning of 18 September 2007 to seek an order preventing S from being removed from England.

[5] As it turned out, the father's hunch had been right and the mother did book Mr C to drive her and S to Stansted Airport. During the journey to the airport, on the morning of 18 September 2007, he (Mr C) told the mother what he had been told by the father's solicitor. He then dropped them both off at Stansted Airport and went about his business.

[6] Meanwhile, the father's solicitors were attending that very morning (18 September 2007) 'ex parte' (ie without notice to the mother) before Deputy Circuit Judge Brandt at the Colchester County Court. Following a short hearing in the absence of the mother, the court made an order granting the father parental responsibility for S and prohibiting the mother from removing S from the jurisdiction of England and Wales.

[7] The mother meanwhile, being now aware that the father had found out about her travel plans, had decided not to travel to France out of Stansted. Instead she took a taxi down to Dover, from where she and S travelled by ferry to France and so to the home of her parents at Lanahelin, near Dinan.

She says that her departure from Dover was 'at around lunchtime' and it is common ground that this was after the orders made earlier that morning in the Colchester County Court.

[8] On 21 September 2007, the 'return day' of the without notice hearing on 18 September 2007, the father and his solicitor attended once more at the Colchester County Court. The mother was again neither present nor represented. She had not yet been served with any of the documentation and was still ignorant of the court proceedings in this jurisdiction, save to the extent that she had been forewarned of them by Mr C. Deputy Circuit Judge Brandt made the following orders, amongst others:

(a) he confirmed the order for parental responsibility in favour of the father;
(b) he ordered the mother to return S to the jurisdiction of the English court forthwith;
(c) he granted the father a residence order in respect of S; and
(d) he ordered the mother to return the child to the former home near Colchester.

He also transferred the proceedings from the Colchester County Court to the High Court of Justice.

[9] At this hearing before me Miss More O'Ferrall, counsel for the mother, has applied for the discharge of the orders mentioned at (c) and (d) above, namely the residence order in favour of the father and the requirement that the child must be returned to the family home near Colchester. Miss More O'Ferrall does not seek the discharge of the parental responsibility order in the father's favour, nor of the order that the mother is to return S to the jurisdiction of the English Court.

[10] The mother was not served with the above two orders of 18 September 2007 and 21 September 2007 until about 25 September 2007, some days after she and the child had left England and arrived in France.

[11] On 7 October 2007, since the mother was continuing to retain S in France, the father applied through the English Central Authority for the return of S to this jurisdiction. There was then an attempt at a mediated settlement with the help of Reunite, but this came to nothing.

[12] On 13 June 2008 the father's Hague Convention application to the French Court for the return of S to England was heard by the Tribunal De Grande Instance at Rennes. There was available to that court an opinion on English law in relation to 'rights of custody', which I shall call 'the opinion'. It is unknown for sure whether it was or was not actually placed before the French Court, but I imagine from the overall context that it probably was. I shall have to revert to its contents again later. The outcome of that hearing in Rennes (13 June 2008) was the dismissal of the father's application for an order that S be summarily returned to this jurisdiction. Whilst it was found that the child had been 'habitually resident' in England until 18 September 2007, the application failed because:

> '… the parental responsibility order obtained by the father on the 18 September 2007 in the absence of the mother was not brought to the knowledge of the mother until the 25 September 2007, ie several days after her departure from the UK.'

[13] The father has lodged an appeal in France against that ruling, which is pending and is due to be heard by the French appeal court at the beginning of November 2008.

[14] In the meantime, I am told that the father has been advised to make this application to the English High Court for a determination as to whether or not he and/or the English Court had 'rights of custody' for the purposes of Art 3 at the time when the mother removed S from this jurisdiction. Article 3 of the Hague Convention reads as follows:

> 'The removal or the retention of a child is to be considered wrongful where
>
> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the state in which the child was habitually resident immediately before the removal or retention; and
>
> (b) at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal of retention.
>
> The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that state.'

[15] I now revert to the opinion on English law. Whilst it came from a source which is held in high regard, I do not propose to identify its author, since he or she has not been heard at this hearing, nor has been able to justify his or her expressed conclusions. The fact is, however, that both Mr Williams, counsel for the father, and Miss More O'Ferrall are agreed that the opinion was both inaccurate and incomplete. I have considered it carefully myself. Whilst it gives a general overview of 'rights of custody' and of the concept of 'parental responsibility' in English law, it does not deal in terms with the significance of the English Court having already made orders before the mother removed S from this jurisdiction (albeit that she had not by then been served). It discusses the fact that the father was living with the mother and helping to care for S up until 17 September 2007 and makes the assertion that he thereby had 'inchoate rights of custody'. This is even though the decision of Munby J in *Re C (A Child) (Unmarried Father: Custody Rights)* [2002] EWHC 2219 (Fam), [2003] 1 WLR 493, [2003] 1 FLR 252 makes clear that such shared primary care, absent a delegation of care by the mother to an unmarried father, does not clothe such unmarried father with rights of custody. The opinion thus advised that the removal from this jurisdiction was wrongful as being in breach of the father's 'inchoate rights of custody'.

[16] Whilst the French Court did not accept that view (rightly so in my judgment) it did, as already stated, decide the case against the father on the

basis of lack of service. It is on that key point (lack of service) that the opinion was further deficient in that, although it touched upon the acquisition of rights of custody pre-service, it did not address this point squarely nor express it as being the key issue in the case. In particular and as I have said, the opinion was silent (apart from a passing reference) about the concept of rights of custody vesting in the English Court once an English Court has made an order.

[17] This summary of the rather unusual background raises essentially four questions.

(i) Does the English court have jurisdiction to make a declaration on the application of the father?

[18] Section 8 of the Child Abduction and Custody Act 1985 reads as follows:

> 'The High Court may on an application made for the purposes of Article 15 of the Convention by any person appearing to the Court to have an interest in the matter, make a declaration … that the removal of any child from, or his retention outside, the United Kingdom was wrongful within the meaning of Article 3 of the Convention.'

Article 15 of the Hague Convention, as referred to in s 8 of the Act, reads as follows:

> 'The judicial … authorities of a contracting state may prior to the making of an order for the return of the child request that the applicant obtain from the authorities of the state of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention … The central authorities of the contracting states shall as far as practicable assist applicants to obtain such a decision or determination.'

[19] It has in the past been argued that the reference in s 8 to Art 15 effectively restricts applications for a declaration to requests emanating from the requested state (here France); but that argument was rejected in *Re P (Abduction: Declaration)* [1995] 1 FLR 831. There Butler Sloss LJ construed the interrelation between s 8 and Art 15 and expressed herself as satisfied that applications for a declaration can be made '… by any person appearing to the Court to have an interest in the matter and [are] not limited to the applicant or to the circumstances within a narrow definition of Art 15'. Millett LJ said in the same case at 840:

> '… The existence of the statutory jurisdiction depends in my view on the purpose for which the declaration is sought and not on the source of the initiating request. If it is sought for a proper purpose it can be granted under s 8; if it is not sought for a proper purpose it should not be granted at all.'

[20] Accordingly, there is no jurisdictional impediment to my making the declaration sought by the father and the question is thus one of the appropriate exercise of discretion, as considered further below.

(ii) According to English law, did the father and/or the English Court have rights of custody at the time when the mother left the jurisdiction with S?

[21] There is no doubt that the Colchester County Court had made its first orders (parental responsibility and forbidding removal of S from the jurisdiction) before the mother and child left the jurisdiction. The only question, therefore, is the significance of the fact that neither the father's application and supporting statement nor the order itself had been served on her by that time. This point was discussed by the House of Lords in *Re H (A Minor) (Abduction: Rights of Custody)* [2000] 2 AC 291, [2000] 2 WLR 337, [2000] 1 FLR 374, where Lord Mackay said at 304, 344 and 380 respectively:

> '… In relation to the present convention, while in the wardship jurisdiction the issue of an application made the child who was the subject of the application a ward of Court, I consider that generally speaking there is much force in using the service of the application as the time at which the Court's jurisdiction is first invoked. It is true that interim orders may be made before service and special cases may arise but generally speaking I would think it a reasonable rule that at the latest when the proceedings have been served, the jurisdiction has been invoked.'

That citation demonstrates at least by strong inference that 'interim orders made before service' (ie made without notice) are a special case where the vesting of rights of custody can and does precede service on the respondent. Certainly that was the view of Hale J (as she then was) in *Re J (Abduction: Declaration of Wrongful Removal)* [1999] 2 FLR 653, and of Munby J in *Re C (A Child) (Unmarried Father: Custody Rights)* [2002] EWHC 2219 (Fam), [2003] 1 WLR 493, [2003] 1 FLR 252. There, having reviewed the authorities, he said at 506 and 266 respectively:

> '… The Court will be invested with rights of custody if, even before the respondent has been served, the matter comes before a judge who exercises a judicial discretion as to the future conduct of the proceedings, even if he makes no substantive order and only gives directions.'

[22] It is thus clear that in the 'ex parte' situation (before service of the originating process) the court at any rate obtains rights of custody once there has been some judicial determination, even if only by way of judicial case-management; all the more so where, as here, the court has made a substantive order.

[23] Does it matter then that the order itself (as distinct from the notice of application and supporting statement) was not served on the mother before she removed S from the jurisdiction? In my view, it does not. It is true that the mother would not have been in contempt of court by leaving the jurisdiction before she was served with the order (unless she had knowledge of it some

other way); but that is not to say that the order was ineffective until she was served. Orders of the court take effect in principle when they are made. Thus a party forbidden ex parte from leaving the jurisdiction cannot be heard to say at the airport 'I am entitled to leave the jurisdiction because there has not yet been service of the order'. Otherwise ex parte orders would often be pointless. Accordingly, where an order can have effect without needing to be enforced against the individual who is the subject of it, then it has immediate practical (as well as theoretical) effect and validity. Take for example the order granting the father parental responsibility: being purely conceptual, it could and did take effect immediately it was pronounced during the morning of 18 September 2007.

[24] I am, therefore, satisfied that the English Court became clothed with 'rights of custody' for the purposes of Art 3 of the Hague Convention before the mother and S left the jurisdiction.

[25] Miss More O'Ferrall, however, submits that the same should not apply to the father, and that it would not be fair for him to obtain rights of custody as an individual (as distinct from the court obtaining such rights) without the mother having an opportunity to be heard. I cannot however discern any logical reason for distinguishing between the rights of a father and the rights of the court. Either the order was effective before it was served on the mother, or it was not. So I am against Miss More O'Ferrall on that submission. I find myself satisfied as a matter of English law, therefore, that 'rights of custody' were vested in both the father and the English Court at the time when the mother removed S from the jurisdiction. This is by virtue both of the order forbidding the child's removal and of the order vesting the father parental responsibility, as to which see *Re D (A Child) (Abduction: Custody Rights)* [2006] UKHL 51, [2007] 1 AC 619, [2006] 3 WLR 989, [2007] 1 FLR 961. It is pertinent to add that in its judgment of 13 June 2008, the French Court did not address the English concept of 'rights of custody' vesting in the court, precisely because the opinion on English law gave deficient advice as to the real force of that point on the facts of this case.

(iii) Should the discretion be exercised such that the father's application for a declaration be granted?

[26] Miss More O'Ferrall submits that the answer to this is 'No'. She says that there was no conflict of expert evidence before the Tribunal de Grande Instance, and that the opinion about English law was clear, albeit deficient. She emphasises that the decision was one for the French Court, applying the autonomous law of the Hague Convention (as to which she is, of course, right) and that the French Court '… had all the necessary information about English law to reach its conclusion'. She stresses that the French Court itself could have asked the English Court to make an Art 15 declaration, but did not do so. Thus she submits that the father brings this application to this court simply in order '… to bypass the current French proceedings'. For these reasons she says a declaration should be refused.

[27] Mr Williams submits to the contrary: that the father has an established right to apply under s 8 and that he has been justified in exercising it, given the flawed information which was before the French Court. Alternatively, if the opinion as to English law was not in fact placed before the French Court (which I have said I regard as the less likely scenario) then, submits

Mr Williams, the French Court proceeded to its decision without any evidence at all as to English law and thus its decision was flawed either way.

[28] In *Re C* above, having ruled that a grant of declaratory relief is always ultimately a matter of discretion, Munby J went on to say at 508 and 268 respectively:

> '… in the normal case an applicant who succeeds in persuading this Court that a child has been wrongfully removed from this jurisdiction in breach of the Hague Convention and seeks declaratory relief, as the father does here, to assist his prospects of obtaining substantive relief from the Courts of the requested state will as it seems to me be entitled as of right to such a declaration and can normally expect to have the Court's discretion exercised in his favour.'

[29] I also mention the decision of Butler Sloss LJ in *Re P (Abduction: Declaration)* [1995] 1 FLR 831 when she emphasised the limited status and role of s 8/Art 15 declarations as follows at 836:

> '… The judicial or administrative authorities [in the USA] faced with the judgments from the English Courts and the declaration will accept as little or as much of them as they choose. We are not trespassing upon their jurisdiction in these judgments. They know, as we know, that the decision whether the removal or retention of this little girl was wrongful within the definitions of Articles 3 and 5 and whether Article 12 is to apply is theirs and theirs alone …'

[30] I am very conscious of the stage which the father's application has reached in France, namely that the French Courts are thoroughly seized of it, and that it would normally proceed without any further input from this country. It is quite clear however that, if the opinion as to English law was in fact placed before the French Court, then it served to mislead by omission and by failing to grasp the real issue in the case, ie that the English orders had been made before S was removed from this jurisdiction. The question of the father's perceived 'inchoate rights of custody' was a red herring.

[31] The English Court certainly has no wish or intention to trespass upon the functions of the French Court at this stage in its process, or at all. But I need to ask myself 'what would happen if I accept Miss More O'Ferrall's submissions and decline the declaration sought?' The answer is that the French Court would (understandably) proceed on the flawed basis that service is necessary under English law and so would factor that proposition into its conclusion when going on to seek the autonomous meaning and correct application of Art 3 of the Hague Convention.

[32] In my view, that would be wrong. If the roles were reversed I consider that this court would be grateful for the intervention of the French Court, so as to put this court back onto the right track as to the meaning of 'rights of custody' in French law. Thus I entertain the strong hope that the French Court will see this intervention for what it is, namely as one intended to help and not to trespass or impose.

[33] In short, I consider that international comity requires the position at English law to be corrected, given the unfortunate circumstances which have

arisen. I shall, therefore, make the declaration sought. It will be for the French Court to attach such weight to it as it thinks fit in reaching its decisions in respect of Art 3 and Art 12.

(iv) Should the orders granting the father residence and requiring S to be returned not just to the jurisdiction but to the family home, be discharged?

[34] Those orders were made without notice and a respondent normally has an absolute right to be heard for a discharge or variation. Here Mr Williams submits that the mother still remains in breach of the order of 18 September 2008 requiring S to be returned to this jurisdiction, that being a provision of the order which she is not seeking to have set aside. Therefore, he argues on familiar *Hadkinson v Hadkinson* [1952] P 285 principles that she should not be permitted to make any application to this court until having put her house in order and complied with this court's requirements in full.

[35] There is considerable force in Mr Williams' submission and I have come close to acceding to it; but I have also considered the practicalities. The reality is that the residence order in favour of the father and the order requiring the child to be returned not just to the jurisdiction but to the family home are extremely unlikely to be kept in force in practice if the mother is ordered by the French Court to return S to this jurisdiction. In such event, the mother would inevitably need to get before this court very urgently in order to retain residence of S herself and to nullify the obligation to return the child to the family home. If she could not get before this court until S were already delivered back into this jurisdiction, then there would (at least in theory) be an unseemly rush to court, but for which the mother would be vulnerable to having S taken away from her and given over to the father, even though she (the mother) would never have been heard on that issue. To proceed in that way would seem to me to be unsatisfactory and potentially wasteful as to costs.

[36] I propose, therefore, to grant the mother an indulgence: namely by discharging the two orders in question (the residence order to the father and the obligation on the mother to return S specifically to the family home) whilst leaving the other two ex parte orders in being (ie the orders giving parental responsibility to the father and requiring the mother to return S to this jurisdiction). This will largely restore the status quo as it was before the removal of S, so that if the French Court does decide to order her (S's) return to this jurisdiction, then she will remain in the residence of the mother (unless the father were to get before the English Court and obtain some other form of order) and she will not have to be returned to any particular property. It goes without saying that if S is so ordered to be returned to this country by the French Court, then either party can apply to this court urgently for whatever orders he or she may seek; but that would occur in a rather more orderly manner than if the two orders challenged by Miss More O'Ferrall were left in force today.

Order accordingly.

Solicitors: *Ashton Graham* for the applicant
Fisher Jones Greenwood for the respondent

SAMANTHA BANGHAM
Law Reporter