

Re A (Abduction: Habitual Residence: Consent)

[2006] 2 FLR 1

21/12/2005

Barristers

Catherine Wood KC, MCI Arb

Court

Family Division

Facts

The father, a US citizen, applied under the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) for the return of his daughter, aged four, who had been living with her mother in Wales for a year. During his marriage to the mother, the mother had had an immigrant visa (Green Card) to remain in the USA for a period of up to 90 days at any one time. Because of this the mother and child had left the USA, where the family lived, five times between September 2003 and October 2004. The mother and father separated in December 2004, whereupon the father returned to the USA leaving the mother and child in Wales, where they had remained since. The mother argued that she had not wrongfully retained the child, as neither she nor the child had been habitually resident in the USA at the relevant time; rather they have been visitors with no right to remain. Alternatively, she argued that she was habitually resident in both the USA and Wales. She further argued that the father had acquiesced or consented to the child's retention in Wales, and that it would expose the child to a grave risk of physical or psychological harm, or otherwise place her in an intolerable position, to order her return to the USA.

Held

Held - refusing to order the child's return to the USA. A's country of habitual residence was (as was that of the mother) the USA at the relevant time -

(1) Habitual residence arose where a person settled voluntarily in a particular country for a settled purpose whether of a short or long duration, or even on a trial basis. Habitual residence could be interrupted by temporary absences, provided the absences were not, in total, inconsistent with settlement in another country. The father and mother had moved to the USA in September 2003 with the settled intention of making it their permanent home. That intention was not lost until December 2004 when the mother decided that she did not want to return to the USA. Prior to that, the mother's absences from the USA did not detract from her habitual residence there (see paras [35], [53]-[67]).

(2) Consent needed to be clear, unequivocal and informed in order for the court to be able to exercise its discretion under Art 13 of the Hague Convention. The father had agreed to the child remaining in Wales with her mother. He had not been under pressure to do so. The fact that he had later changed his mind

did not vitiate the initial consent (see paras [70], [88]).

(3) In order to determine whether the father had acquiesced to the child remaining in Wales with her mother, it was necessary to determine the father's state of mind in December 2004 when the parents separated. The evidence showed that he had quickly begun to plan a new life without his family. His subsequent correspondence with the mother had concerned contact with the child rather than custody and he had not sought the return of the child to the USA. He had even encouraged the mother to believe that he accepted the situation. Although he was unaware of the Hague Convention he had, by January 2005, come to the view that the mother's retention of the child was wrongful. However, he had nonetheless encouraged the mother to pursue her own life without him and with the child. Such conduct constituted acquiescence (see paras [149], [150]).

(4) It had not been determined whether the mother could remain in the USA pending any court hearing. If she were to be obliged to leave the USA before the end of the hearing, leaving the child behind, there was a grave risk that the child would suffer psychological harm as a result (see para [160]).

(5) The court had a discretion under Art 13 not to order a child's return where consent or acquiescence or grave risk was proved. Since her separation from the father, the mother had, with the father's encouragement, pursued a new life and the child had flourished as a consequence. Furthermore, the immigration restrictions on the mother entering and staying in the USA involved delay and uncertainty. In the circumstances it was appropriate for the court to exercise its discretion against ordering the return of the child to the USA (see paras [162]-[164]).

Permission

Reproduced with kind permission from Justis 