

Re C (A Child) (2006)

[2006] EWHC 1229 (Fam)

25/05/2006

Barristers

Private: Marcus Scott-Manderson QC

Court

Family Division

Summary

Although the policy of the Hague Convention on the Civil Aspects of International Child Abduction 1980 was that it was normally in the best interests of a wrongfully removed child to be returned promptly, where a 14-year-old girl removed from the United States of America five years earlier was settled in her new environment, clearly did not wish to return, and where there were strong welfare considerations against it, the court would exercise its discretion not to order return.

Facts

The applicant father (F) brought proceedings seeking return of his 14-year-old daughter (D) to the United States of America. D's mother (M) had had sole physical and legal custody, and F had had contact rights. After remarrying, M brought D to the United Kingdom without the knowledge or consent of F or the approval of the court, at a time when there was a dispute over contact. F only discovered their whereabouts five years later, at which point he issued proceedings under the Hague Convention on the Civil Aspects of International Child Abduction 1980. The parents and D were American citizens. F claimed that M and D had left the US at a date later than claimed and there was thereby a breach of a subsequent US custody order in his favour. M submitted that (1) D had settled in her new environment within the meaning of Art.12 of the Convention, and by virtue of Art.13 of the Convention the court should exercise its discretion not to return her to the US because it would expose her to physical or psychological harm or otherwise place her in an intolerable situation; (2) D objected to returning to the US and was of an age appropriate for her views to be considered.

Held

HELD: (1) Where a child had been wrongly removed within the terms of Art.3 of the Convention and proceedings had been commenced after one year had elapsed, the court had to order the child's return unless it was demonstrated that the child was settled in its new environment. "New environment" encompassed place, home, school, people, friends, activities and opportunities, but not, per se, the relationship with the defendant parent, *Re N (Minors) (Abduction) (1991) 1 FLR 413* considered. "Settled" denoted not only physical establishment, but also emotional and psychological elements of security and stability and a current situation for the child that implied stability in the future. Equal regard must be had to both, and in cases of concealment and subterfuge the burden of demonstrating those elements was

much increased, Cannon v Cannon (2004) EWCA Civ 1330 , (2005) 1 WLR 32 applied. The proper approach was not simply to disregard a period of concealment, subtracting it from the total delay to calculate whether the one-year period had been exceeded. The court had to look critically at any alleged settlement built on concealment and deceit, especially if the abducting parent was a fugitive from criminal justice. Further, as the Cannon case emphasised, even if settlement was established on the facts, the court had a residual discretion to order return under Art.18 of the Convention. On the evidence, the physical element of settlement was satisfied in D's case. Although M and D were plainly subject in principle to deportation, on the particular facts it was not likely that they would be deported in the near future, and settlement within the meaning of Art.12 of the Convention was established. The court's discretion should not be exercised to order D's return, considering the purposes of the Convention. The US courts were not in a noticeably better position to decide welfare questions concerning D, given that the difficult events of the last five years that governed her present welfare needs had all taken place in the UK. Although M had been in breach of a court order, which did not excuse her wrongdoing, she had been under considerable mental stress at the time and the circumstances went some way to explain her conduct. However, the principle concern was the effect of return on D, which would not only uproot her in the vulnerable early teenage years, but would destroy the emotional and educational stability now within her grasp. Accordingly, the court would decline to exercise its discretion to order her return. (2) The court took into account the policy of the Convention that in normal circumstances, it would be in the best interests of children generally to be returned promptly and only exceptionally should the court have a discretion to refuse to do so, Z (Children), Re (2005) EWCA Civ 1012 , (2006) 1 FLR 410 considered. However, in the instant case, D's views were clearly her own, based largely on her recollection of life in the US and her wish to remain in the UK, and for the same reasons as applied in regard to Art.12, there were strong welfare considerations against her return.

Permission

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