

W v W (2009)

**[2010] 1 FLR 1342 : [2010] Fam Law 228 : (2010) 154(1) SJLB
28 : [2009] EWHC 3288 (Fam)**

10/12/2009

Barristers

Private: David Williams QC
Jacqueline Renton KC

Court

Family Division

Practice Areas

International Children Law

Summary

The rule in *S v B* (2005) EWHC 773 (Fam), concerning entitlement to be joined as a mandatory defendant under the Family Proceedings Rules 1991 r.6.5(e), was capable of encompassing nearly everyone who was likely to be able to demonstrate an interest in the welfare of the child sufficient to be heard on the question of whether to order the child's return to the country from which he had allegedly been wrongfully removed.

Facts

The applicant child (W) applied to be joined as a defendant to proceedings brought by the respondent father (F) for the return of F's 11-year-old son (L), who was also W's brother, to Australia. At the date of instant hearing, W was 17 years and 11 months old. She had moved from Australia with L when their mother (M) had brought them to England without F's consent. M alleged that F had raped her and been violent towards her and both children. F brought proceedings under the Child Abduction and Custody Act 1985, the Hague Convention on the Civil Aspects of International Child Abduction 1980 and under the court's inherent jurisdiction, for L's return and M filed a defence relying on art.13(b) of the Convention. W's solicitors filed an affidavit in support of W's application which set out W's position that if L was ordered to return M would follow and so would W to protect L and M as she was extremely concerned about their and her own welfare. It also set out W's allegations of violence by F against W, how F had allegedly been horrible to L and W's concerns that M was so scared of F that she believed M could not say no to him or protect her children from him and so their only protection was distance. W submitted that under the Family Proceedings Rules 1991 r.6.5 (e) she was a mandatory defendant to the proceedings. F argued that the court retained a residual discretion to refuse the application and it should do so if satisfied that joining W would have an adverse impact on the proceedings, for example by resulting in further delay.

Held

To be entitled as of right to be joined as a mandatory defendant under r.6.5(e), an applicant had to establish that he or she was directly concerned with the welfare of the subject child in the sense that they had provided care for the child and/or had a continuing or potential interest in the provision of care for the child or had some legal or practical responsibility for the child's welfare, *S v B (Abduction: Human Rights)* (2005) EWHC 773 (Fam) considered. That definition was capable of encompassing everyone, or nearly everyone, who was likely to be able to demonstrate an interest in the welfare of the child sufficient to be heard on the question whether to order a return of the child to the country from which he had allegedly been wrongfully removed. The rule defining the categories of persons to be joined as defendants to the Hague applications was expressed in mandatory terms. It did not give the court a discretionary power to join any other person whom the court thought fit. The court also did not have a discretion not to join as a defendant a person who could demonstrate that they came within the terms of r.6.5(e). W had demonstrated that because of the alleged volatility and dysfunctionality of her parents' relationship, she had taken on the role of protecting L. Pointing to instances in the past where L had not been protected from what W described as F's abusive behaviour, W questioned M's capacity to protect him in the future. For that reason she wished to be heard on the application for his summary return and in particular art.13(b). She was an older sibling, approaching adulthood, who felt an acute sense of responsibility for her brother's welfare. She had a different perspective, and a different case to put, from M. Most people would feel it right and essential that she should be separately represented. W therefore manifestly fell within r.6.5(e) as she was directly concerned in L's welfare in the sense that she had a continuing and potential interest in the provision of his care and had some practical, albeit not legal, responsibility for his welfare.

Permission

Lawtel 