

M v M (2010)

[2010] EWHC 3350 (Fam)

21/12/2010

Barristers

Mark Jarman KC

Court

Family Division

Practice Areas

International Children Law

Summary

Two children who had been removed by their father from the United States to the United Kingdom and away from their mother would neither be at grave risk nor placed in an intolerable situation if returned to her. The father's reliance on his desperate financial situation and potential criminal charges in the US were insufficient to meet the necessarily high standard of proof required under the Hague Convention on the Civil Aspects of International Child Abduction 1980 art.13(b) to resist the mother's application for the children's return.

Facts

The applicant mother (M) sought the return of her two children to the United States following their removal to the United Kingdom by the respondent father (F). M, a US national, and F, who was British, had been married in the US. Their marriage was subsequently annulled and, following their separation, the children lived with F in the US for a period, often visited by M. Thereafter, F removed the children to the UK in order to avoid facing a charge of a misdemeanour assault on a former girlfriend and to be closer to his family in the UK because of his desperate financial situation. Having discovered that F and the children were missing, M contacted the US police, instructed an attorney and made attempts to locate them before applying in the UK for the children's return pursuant to the Hague Convention on the Civil Aspects of International Child Abduction 1980. F submitted that (1) M had consented to his removal of the children to the UK; (2) alternatively, M had acquiesced to his retaining the children in the UK; (3) to return the children to the US would, in light of his financial predicament and alleged criminality, expose them to a grave risk of physical or psychological harm or place them in an intolerable situation pursuant to art.13(b) of the Convention and that the court should exercise its discretion not to order the return of the children to the US. In that regard, F pleaded poverty, absence of welfare benefits, risk of immediate imprisonment with the prospect of no bail, and that M had had little contact with the children.

Held

(1) Not only had F failed to establish that M ever consented to to him removing the children from the US, almost all the surrounding circumstances strongly pointed to the opposite conclusion. Amongst other

things, F had left clandestinely without giving M any forwarding address or telephone number; he seemed motivated to avoid facing a charge of assault; he had taken no steps to contact M when in the UK for some five months; whereas M had taken action within a short time to try to trace F and have the children returned to the US, (see paras 58-59 and 62 of judgment). (2) Acquiescence was a subjective state of mind: it was a pure question of fact on which the burden of proof in each case was on the abducting parent, H v H (Child Abduction: Acquiescence) (1998) AC 72 HL followed. M had taken expedient action to locate F and her children, saving money to instruct a lawyer, visiting police stations and pursuing a remedy under the Convention. In those circumstances, there could be no question that she subjectively acquiesced to F's removal of the children and it was impossible to see how F could have been led to believe that M was not going to assert a right to the summary return of her children when he took no steps to inform her of where he was, (paras 64-66). (3) If the children were in a position whereby basic support and accommodation was not available and there was a risk that F might be locked up without bail then the consequences were plainly significant. However, F had to accept his share of responsibility for the state of his affairs. There had to be a limit to which any court could permit him to use such factors in order to establish grave risk or intolerability. If it were otherwise, it would be a positive signal to any prospective abductors to disobey court summonses, give up employment and accommodation and abduct children with the prospect that those actions would enhance their chances of pleading grave risk and intolerability. In any event and preferring M's evidence where there was a conflict, the court was not persuaded that if F returned to the US he would either be arrested or bereft of state or federal engendered means nor that the children would be insufficiently accommodated or without financial support in the US, (paras 82-87).

Permission

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