

DL v EL (Hague Abduction Convention – Effect of Reversal of Return Order on Appeal) [2012]

[2013] EWHC 49 (Fam)

23/01/2013

Barristers

Henry Setright KC
Michael Gratton KC

Court

High Court (Family Division)

Practice Areas

International Children Law

Summary

Hague Convention application for return of child to the US considering whether child's habitual residence can be changed by a removal pending exhaustion of appeals and relevance of pending appeal in US Supreme Court.

Facts

The parties married in the U.S in 2005 and lived in Texas. The child KL was born there in 2006. The marriage broke down in 2008 and the mother had temporary custody of the child during a period of time when the father was serving in the US army overseas. The mother moved with the child to the UK. The divorce was finalized in 2010 by the Texan Court which awarded custody of the child to the father. The mother did not appeal against the decision of the Texas Court.

However, the mother did institute Hague Convention proceedings on her return to the UK. The basis of her application under the Hague Convention was that at the time of the orders of Texan Court the child had been habitually resident with her in the UK. The child was returned to her care on the basis that he had been wrongfully retained by the father. She returned to the UK in August 2011. She applied for a residence order in England in October 2011.

In the interim, although he had not applied for a stay of the return order, in September 2012 the father appealed against the decision of the US Court in the Hague proceedings. In March 2012 the father applied for residence and contact orders in the UK. In July 2012 the US Court of Appeals Fifth Circuit reversed the Hague decision of the lower court.

The mother was required to return the child to the US on the basis that the custody order of the Texan Court was restored. The mother appealed that decision to the US Supreme Court. The decision of the US Supreme Court which is listed to be heard at the same time as a similar case, *Chafin v Chafin* is pending.

In August 2012 the father applied for return order under the Hague Convention. Failing a Hague return order the father sought a return order under the court's inherent jurisdiction. It was that application that was before Singer J.

In determining the father's application under Hague, the Court had to consider whether the removal of the child in August 2012 breached the father's rights of custody or whether it was effected under an order which was subsequently appealed and was therefore lawful at the time. A further issue whether the 'consent' to the removal pursuant to a court order was a matter to be considered under Article 3 or 13. It was not clear whether the US appellate decision requiring the return of the child meant that the child that she had wrongfully retained the child. Further was it arguable that the child was habitually resident in the UK. In addition the Court had to consider whether it should order the child's return to the US under Article 18 of the Hague Convention and the inherent jurisdiction in view of the extensive involvement of the US courts.

Held

The Court rejected an argument that while the removal of the child by the mother under the US order may have been lawful at the time it became retrospectively unlawful when the father successfully appealed the decision. Of particular relevance was the fact that the father had neither sought nor obtained a stay of the decision in the US court pending the appeal. The Court concluded that the question of whether the mother had wrongfully retained the child in the UK after the Texan Court had ordered his return following the appeal of August 2012 was linked to the child's habitual residence. It concluded that the child was habitually resident in the UK at the time the father issued his application under Hague, notwithstanding the appeal decision. In reaching that decision the Court concluded that a child's habitual residence can in effect be changed if he is removed prior to the exhaustion of any appeals process.

Permission

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