

H v K (Return Order) (2017)

[2017] EWHC 1141 (Fam)

11/05/2017

Barristers

Jacqueline Renton

Court

Family Division

Practice Areas

International Children Law

Successful application before Macdonald J for the return of two children to the USA pursuant to the 1980 Hague Convention.

This was the father's application for the return of two children to Hawaii, USA. The father was aged 70 and the mother aged 54. The children were B, a girl aged 10, and M, a boy aged 9. The children were separately represented.

The mother accepted that, during the currency of ongoing family proceedings in Hawaii concerning the children's welfare, she wrongfully retained the children in England at the conclusion of a permitted holiday period. She accepted that the children were habitually resident in Hawaii and resisted the husband's application on two grounds, namely: (i) Article 13(b), i.e. that a return would expose the children to physical or psychological harm or otherwise place them in an intolerable situation; and (ii) Article 13 generally, namely that the children objected to a return and were of an age and maturity at which it was appropriate for the court to take their views into account.

During the proceedings in Hawaii, the mother had had her petition for a restraining order against the father dismissed on the basis of insufficient evidence. She had alleged domestic abuse and inappropriate behaviour with the children, although the Hawaiian court concluded that the father was the more credible witness. The Hawaiian proceedings also involved an assessment by a Dr N, a custody evaluator, who raised no concerns about the relationship between the father and the children and suggested that B had been coached by her mother.

B alleged to her mother that a neighbour had twice touched her inappropriately, and a restraining order was granted against the neighbour. During the course of the Hague proceedings, B alleged to the children's Guardian that the father had hit her and the mother.

Contact notes in relation to the father's time with the children demonstrated that he had a close, warm and loving relationship with M, save that there was an 'alarming change' in M's approach to his father at the final contact. M informed the Guardian that he did not wish to return to the USA. B's contact with her

father was far less successful, and at the start of the first contact, B refused to say hello to her father and would not look at him and she refused to positively engage with him. B's demeanour at contact was consistent and her contact terminated prematurely at her own instigation on each occasion.

Macdonald J granted the application on the following basis:

(i) He noted that the mother's defence pursuant to Article 13(b) was focused far more on the risk of emotional or psychological harm than it was on the allegations of physical or sexual abuse by the father. He doubted whether such concerns were capable of reaching the threshold in Article 13(b) and had 'significant doubts' regarding the credibility of the mother's allegations.

(ii) In any event, he concluded that the protective measures offered by the father were sufficient to protect the children until the next hearing of the Hawaiian proceedings. He accepted that the risk of the mother being subject to criminal prosecution in the USA for child abduction could not be ruled out, but noted that this was the case in most instances of child abduction, and must be an accepted risk by those who seek to abduct children.

(iii) He found that the children had expressed views to the Guardian which amounted to an objection to being returned to the USA. Nevertheless, he agreed with the Guardian and exercised his discretion to order a return. In so doing, he balanced the policy objectives of the Convention and the welfare benefits of a return against the children's wishes. In so doing, he noted the 'flagrant nature of the mother's objections', having concluded that the mother's action was deliberate and pre-meditated, and that she had actively sought to avoid detection by the father.

Macdonald J was required to determine the date for the children's return to the USA. He agreed with the father's proposal that this be relatively quickly, two days before the next hearing in the Hawaiian proceedings.

Permission

 **Family Law Week**