RE F (ABDUCTION: UNMARRIED FATHER: SOLE CARER) [2002] EWHC 2896 (Fam)

[2003] 1 FLR 839

Family Division

Dame Elizabeth Butler-Sloss P

12 December 2002

Child abduction — Hague Convention — Unmarried father — Disputed paternity — Inchoate rights of custody

The youngest of four siblings was abducted by a relative and taken to live with his mother who had settled in Australia some months earlier. At the time of the abduction the child was in the sole care of the mother's former partner, Mr C, who believed himself to be the child's father. The mother did not initially dispute Mr C's paternity, but subsequently denied that he was the child's father. The parties agreed that there should be paternity tests, but paternity had not been ascertained by the time of the hearing. Mr C and the mother, who had never married, had three other children together, all of whom had been in the sole effective care of their father for a number of years. During this time the mother had lived with the family intermittently. Mr C had parental responsibility for the three elder children under a consent order, and had applied for a residence order and parental responsibility order in relation to the youngest child. Due to the original papers being lost, however, these applications had not been processed at the time of the child's abduction. Following the abduction, Mr C made an application for the child's return under the Hague Convention on the Civil Aspects of International Child Abduction 1980. On the assumption that Mr C was the father, the judge made an ex parte order and declaration forbidding the mother from removing, or attempting to remove, the three elder children of the family, declaring that the removal of the youngest child was wrongful within the meaning of Art 3 of the Hague Convention and ordering his return to England.

Held — dismissing the application to set aside the declaration and upholding the judge's order —

(1) There were circumstances in which a person who was not related by blood to a child, but who fell into a quasi-parental role and had exclusive care of the child, might be found to have inchoate rights of custody in relation to the child for the purposes of making an application under the Hague Convention.

(2) Inchoate rights of custody were those which were capable of being affected by court applications in which there was a reasonable prospect of success. The father here, even if he were not the natural father, had good prospects of obtaining a residence order under s 8 of the Children Act 1989 and consequently had inchoate rights of custody which were capable of being perfected.

Per curiam: it was not possible for courts to have inchoate rights of custody for the purposes of the Hague Convention.

Statutory provisions considered top

Children Act 1989, s 8

Hague Convention on the Civil Aspects of International Child Abduction 1980, Arts 3, 15

Cases referred to in judgment top

B (A Minor) (Abduction), Re [1994] 2 FLR 249, CA

J (A Minor) (Abduction: Custody Rights), In re [1990] 2 AC 562, [1990] 3 WLR 492, sub nom *C v S (A Minor) (Abduction)* [1990] 2 FLR 442, [1990] 2 All ER 961, HL

O (Child Abduction: Custody Rights), Re [1997] 2 FLR 702, FD

W (Minors) (Abduction: Father's Rights), Re [1999] Fam 1, [1990] 3 WLR 1372, sub nom *Re W; Re B (Child Abduction: Unmarried Father)* [1998] 2 FLR 146, FD

Mark Everall QC and *Sarah Prager* for the applicant
Michael Nicholls for the respondent

DAME ELIZABETH BUTLER-SLOSS P: This is an application by the mother of a little boy, L, born on 20 December 1997, to set aside an order of Charles J, made on 5 November 2002, in which he granted an injunction forbidding the mother from removing, or attempting to remove, the three elder children of the family (to whom I shall refer in a moment) and also made an order that the removal of the child, L, by the mother from the jurisdiction of the UK was wrongful within the meaning of Art 3 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention) and he also ordered that the mother should return the child forthwith to England. She is in fact in the state of Victoria, Australia.

This case raises interesting and difficult issues on the proper way to go forward under the Hague Convention in the light of a number of decisions of the English courts and, indeed, courts around the world, which are also signatories to the Hague Convention. In an ideal world, I would give myself time to consider with care the careful and erudite submissions of both Mr Everall QC, for the father (as I shall call him), and Mr Nicholls, for the mother. However, there is no possibility in the last-but-one week of term for a judgment to be ready and handed down before the end of term. It would be unjust to the parties and unjust to the child if I were to adjourn this case for my judgment to be written until the beginning of next term (that is to say some date after 13 January 2003) because this is a Hague Convention application. There is a hearing pending, though we do not know quite when, before the Family Court in Australia, and the application to this court originally, and granted by Charles J, was principally for a declaration under Art 15 to support the application being made under the Hague Convention in Australia. Consequently, there is no advantage to waiting and I therefore intend to give an extemporary judgment in which I shall do the best I can.

The background to this case is that, in November 1989, the parents met and cohabited. They did not marry. In 1990, the first child, K, who is 12, was born; in 1992, the second child, H, who is 10, was born; and in 1994, the third child, S, who is 8, was born. All three children are the children of the father. He has for many years been the sole effective carer of those three children. The mother has gone in and out of the home where the father has cared for the children. From time to time he has given up work to be the sole carer and sometimes he has gone back to work, but, throughout, there is no doubt that these three children, who are his children, have remained with him and he has cared for them. On 17 April 1996, by consent, there was an order granting him parental responsibility for the children, since of course as the unmarried father he did not have parental responsibility without an agreement or an order.

The mother has had a number of sexual relationships with other men. When L was born, she was, as I understand it, not living with the father. She says she had not had a sexual relationship with him at the relevant time of conception of L, and she was undoubtedly having a relationship with another

man. The father, as I shall call him since he is the father of the elder three children, says that he is the father; they were having a sexual relationship at the time of conception. Not only is he the father but the mother has acted throughout as though he was the father; indeed she has told him he

was the father; and she has made it possible for him to have the benefit book for L, in addition to the benefit books for the other three children, on the basis that he is the father.

There is, of course, an issue of fact here and it may well be that the mother cannot say definitively who is the father because, if she was having a sexual relationship with two men at one and the same time, it would be impossible to say which is the father. But she went back to the father, with L, in February 1999 and, thereafter, L has continued to live with his three brothers and sisters (half-brothers or half-sisters, as they may be) and in late 1999 the mother moved out; since then, the father has cared for the four children, and L has lived with his three elder brothers and sisters.

In May 2001, there was a reconciliation and a further period of cohabitation. But in February of this year, the mother finally left and left all four children with the father. Not only did she do that, but, within a week or two, she flew to Australia and she left the father as the sole exclusive carer of the four children. She did not leave any information, as I understand it, as to when she was coming back or whether she was intending to take over the care of the children, and the father has continued to care for L, as he has continued to care for the three elder children.

Some time in the summer, the mother asked for the children to go and stay with her for a holiday; there was no suggestion that L was not the child of the father. The reason, it appears, why the children did not go was the very simple question of finance — for four children to go to Australia would no doubt be extremely expensive — and so they did not go.

In June of this year, the mother married an Australian, MW, and, presumably, she now intends to settle and make her home in Australia. However, she made no attempt to consult the father or to ask him that one or more of the children should go and live with her in Australia. What she did was to — and I cannot see how she cannot have been — be party to an abduction of L from the home of the father on 30 October 2002. Her cousin, KA, had babysat for the children and, on 30 October 2002, asked that the little boy (who of course is not yet 5 years old) should go with her to visit Madame Tussauds. The father agreed to that, there was no problem over it, and, instead of going to Madame Tussauds, KA got on a plane and flew to Australia with L. L is now living with the mother and with the mother's new husband.

Whether or not the father has any rights in law over this little boy, it seems to me that that was a disgraceful enterprise. It removed the child arbitrarily from one country to another. He did not have the opportunity to take any clothes or toys with him, anything which he cared about, and he went to his mother, with whom he had not lived since February and who has of course been an intermittent carer of him throughout his 5 years of life.

The father, clearly, was a bit concerned that the mother might wish L, or indeed the other children, to go with her. On 9 August 2002, he made the preliminary attempt to make applications to the court, for a residence order and for parental responsibility to L, by applying for public funding. His first application was lost, which was, in this particular case, disastrous and through

no fault of the father. When it was eventually discovered it was lost, he made a further application, on 1 October 2002, but that had not yet been processed by the time that the child was abducted from the father's home. There is no doubt that KA abducted him, the only question is whether the mother was a party to it.

So the father has no court order in his favour. However, he made an application under the Hague Convention and, on 5 November 2002, as I have said, Charles J made an ex parte order and declaration which was intended for the Australian court.

On 12 November 2002, Sumner J, I think it was, agreed with the parties that there should be paternity tests. The father has given a sample. Neither the mother nor L has yet given a sample, so we are in a state of uncertainty as to who is the father of L. There is no doubt that, on 5 November 2002, which was an ex parte application, the judge proceeded on the basis that Mr C

was the natural father of L, and the application before me today is to set aside the declaration that the child was wrongfully removed.

The father falls into the trap of being an unmarried father, without parental responsibility, and most of the argument before me has been on the basis that he may not be the father, but everybody agrees that he has been the sole carer. There is no legal right of custody in the father which can be transmitted to Australia to assist the Australian court. In the House of Lords' decision *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, sub nom *C v S (A Minor) (Abduction)* [1990] 2 FLR 442, Lord Brandon of Oakbrook, in dealing with an unmarried father's application, pointed out that the de facto custody of J was exercised by the parents jointly, but, so far as legal rights of custody are concerned, these belonged to the mother alone, and included in those rights was the right to decide where J should reside:

'It follows, in my opinion [said Lord Brandon of Oakbrook], that the removal of J by the mother was not one brought within the meaning of Art 3 of the Convention.'

That, in 1990, was the approach of the English courts; indeed, in those days, fathers without parental responsibility, not married to mothers, appeared to have no opportunity to invoke the requirements of the Hague Convention.

However, the Court of Appeal in *Re B (A Minor) (Abduction)* [1994] 2 FLR 249, Staughton, Waite and Peter Gibson LJJ, by a majority of 2 to 1, held that:

'The Convention was to be construed broadly as an international agreement, according to its general tenor and purpose, without attributing to any of its terms a specialist meaning which the sorts of words in question might require under the domestic law of England. Right to custody was a term which, when so construed … was not necessarily synonymous with simple connotations of custody when that word was used alone.'

That I have read from the headnote, and I read into the judgment but do not repeat it now, from 260F—260G to the conclusion at para F, stopping just above G. In that part of the judgment of Waite LJ agreed to by Staughton LJ, Waite LJ said that the difficulty lies in fixing the limits of the concepts of

rights and asked if it was to be confined to what lawyers would instantly recognise as established, or was it capable of being applied in a Hague Convention context to describe the inchoate rights of those who have carried out duties and enjoyed privileges of a custodian or parental character which, though not yet formally recognised and granted by law, the court would nevertheless be likely to uphold in the interest of the child concerned? Consequently, an unmarried father in the situation of being the sole carer of the child, in the circumstances of *Re B (A Minor) (Abduction)*, was found to have the inchoate right of custody. That was a very interesting case, again an Australian case.

Cazalet J, in the case of *Re O (Child Abduction: Custody Rights)* [1997] 2 FLR 702, followed *Re B (A Minor) (Abduction)*, in an application by German grandparents, and Hale J, who was urging caution in her decision in *Re W (Minors) (Abduction: Father's Rights)* [1999] Fam 1, sub nom *Re W; Re B (Child Abduction: Unmarried Father)* [1998] 2 FLR 146, nonetheless pointed out at 19 and 163 respectively:

'Following *Re B (A Minor) (Abduction)*, there is, however, one … situation which should be included: where the father is currently the primary carer for the child, at least if the mother has delegated such care to him.'

Mr Nicholls concedes in this case that if the father is the natural father of L, he comes within *Re B (A Minor) (Abduction)* and, consequently, he has an inchoate right of custody which ought to be recognised, and indeed is recognised in this country and I do so recognise it for the purposes of this declaration. Whether it is considered by the Australian court to amount to such a situation will be a matter for the Australian court and not for the English court. But on the assumption that Mr C is the natural father of L, I would refuse to set aside the order of Charles J made on the assumption that he was the natural father and, indeed, would uphold that order.

The much more difficult situation, on which we have spent all this time, is whether or not the facts of this case come within the broad assertions of Waite LJ. One has to balance with some care, it seems to me, on the one hand the wisdom of the House of Lords in *Re J (A Minor) (Abduction: Custody Rights)*, the broad brush approach of *Re B (A Minor) (Abduction)*, the cautionary observations in the dissenting judgment of Peter Gibson LJ and, indeed, in the judgment of Hale J.

In my judgment, I come to the conclusion that there are circumstances in which a person who is not related by blood to the child who has been in his care may nonetheless be found to have inchoate rights of custody. It starts, in my view, in the situation as to what is the purpose of the Hague Convention. The purpose of the Hague Convention is, as Waite LJ said, not to allow children to be removed arbitrarily from one jurisdiction to another; secondly, that the underlying principle of the *Re B (A Minor) (Abduction)* case and the judgment of Waite LJ is not the blood relationship of parent or grandparent who does not have parental responsibility but the situation of the exclusivity of the care of the child. Whether it is by delegation by the only parent with parental responsibility (the mother in this case) or whether it is by, in effect, abandonment, there is no doubt that between March 2002 and the end of October 2002, this father, whether or not he is the natural father of L, had had

the sole exclusive care of this child who has lived with him and with his siblings in the household where he has now lived for 3 years.

If the underlying principle is the position of the carer, as I think it is, the next question, it seems to me, is what are these inchoate rights? Does the carer have a right to go to the court and seek an injunction to prevent the child from leaving the jurisdiction? That, however, in my view, is only the starting point because a court will not accept an application for an injunction or indeed make any order which is in relation to an application which in the end is not one which is soundly based. So I do not agree with Mr Everall that the only point one has to look at is whether the father can make the application, as the father clearly could under the principles laid down in *Re B (A Minor) (Abduction)*. There is no decision in relation to a full-time exclusive carer who is not the father or the grandparents. Therefore, it seems to me that if the definition of inchoate rights given to me by Mr Nicholls, which is 'rights which are capable' — he said are bound to be effective; I would say, 'capable of being affected by applications to the court' — there must be a reasonable prospect of success when such applications are made, otherwise the injunction would not be a proper injunction to grant.

Looking at this case, on the facts before me, I have little doubt on the basis of the facts presented to me, which may of course be challenged. If this man, not the father, made an application to the Family Court, under s 8 of the Children Act 1989, on the balance of probabilities, he would be likely to obtain a residence order. He would have to get leave because he is not a parent, but the circumstances: (a) of the child living with him since February 1999; (b) the mother leaving the child and departing to Australia with effectively very little contact with any of the family until the

child was removed in October 2002; and (c) that the child has been removed from the three elder siblings with whom he has, except in the early part of his life, up to about 2, always lived, there is a strong case for keeping the four siblings together and a strong case for saying that the person who is in the position of the father and who is the primary carer ought, in the circumstances of a case like this, to take over the continuing care of the child, under a residence order. I appreciate that the arguments would be that the mother was the only person with parental responsibility and one always prefers a parent to a non-parent. But this is the very odd situation: this little boy is being brought up to believe that the father is his father, and the father has been living under the illusion (if that be the illusion) that he is the father. It is an unusual case and I think he has good prospects of obtaining a residence order. Consequently, in my judgment, his inchoate rights are capable of being perfected and therefore it can be said that he has those inchoate rights in this case.

Mr Nicholls, in a powerful argument for the mother, has pointed out with force that to make an order to support an order that there has been wrongful removal on the basis of the inchoate rights by father, or particularly by a non-father, is improperly fettering the rights of the mother, under domestic law. Those are, of course, already fettered by the decision in *Re B (A Minor) (Abduction)* for the purposes of international law and the Hague Convention. If the underlying principle of *Re B (A Minor) (Abduction)* is that it is the exclusivity of the carer, then I see no difference in principle between fettering the rights of the mother if he is the father and fettering the rights of the mother if he is not the father, but falls into a quasi-parental role, as clearly he has.

This is not a case where there was joint caring. There were periods of joint caring, but at the relevant period it was not joint caring. I do not see this as an extension of inchoate rights of custody to someone who is not a member of the family; I see it as another example of the broad principle set out by Waite LJ. I do see, as Mr Nicholls has pointed out, certain dangers of the extension of this doctrine where people might have the care of a child for a period or, indeed, a series of people having the care of a child. If the requirements which I set out for this case are complied with, that is to say that the basis of *Re B (A Minor) (Abduction)* is followed, that it is a carer with exclusive care of the child, and who has a right that a court would be likely to uphold by making a domestic family order under the Children Act 1989, then I think that would exclude a considerable number of people. The private fostering arrangement which Mr Nicholls suggested was the situation for Mr C, and suggested, if he would allow me to say so, in somewhat disparaging tones, that this is only a private fostering, the time may come when a private fostering arrangement has lasted for sufficiently long and in sufficient circumstances that if the parent with parental responsibility leaves that private fosterer the care of the child, that may be a case in which inchoate rights would be capable of being perfected.

It seems to me the fact that some cases may come within it and others without it is a very good example of the way in which the common law works and the court has to look at the facts of each case. But I do not see this is an extension of the principles of *Re B (A Minor) (Abduction)* if I have correctly understood them. I do not believe that those principles should be extended beyond the situation which I have raised today.

Having come to the conclusion that Mr C does have inchoate rights of custody, even if he is not the natural father of this child, I do not take further either of the subsidiary points made by Mr Everall, save to say that one of his points was that the court had rights of custody because the father had made the application for public funding and the administration had lost it and, consequently, he should not be at a disadvantage and that application should be treated as the first stage of the court proceedings.

Sympathetic though I am to Mr C for having had his papers mislaid and for the incompetence at that moment of the particular region of the Legal Services Commission, I do not think my sympathy can lead me to say that this would give the courts a right of custody. I do not believe courts can have inchoate rights of custody and, consequently, I do not think that we could rely

on that. He had another point under the rights which arose from the 5 November 2002 order of Charles J, but I am quite satisfied that Charles J made the order on the basis that he was the natural father and, on that basis, he was entirely right to make the order. If he is not the natural father then Charles J did not have the opportunity to consider that point. Now that I have said that he has an inchoate right of custody in any event, it looks as though I can say with some confidence that if I am right then Charles J is right, but I do not believe that Charles J's order can stand if I am not right on the inchoate rights of custody.

I have rather rushed through that, I am afraid, and have left out a great many of the excellent points Mr Everall and Mr Nicholls have both made, but I do not think there is any real issue of habitual residence here.

Order accordingly.

[2003] 1 FLR 846

Solicitors:*Ellison & Co* for the applicant

Myers Lister Price for the respondent

ALISON PERRY

Law Reporter