Case No: FD15P00108

Neutral Citation Number: [2015] EWHC 1160 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/04/2015

Before :

MRS JUSTICE PAUFFLEY

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Between :

B	**Applicant**
- and -	
P	**Respondent**

Re J (Child Abduction: Consent: Grave risk of harm)

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- -

Edward Devereux (instructed by **Dawson Cornwell**) for the **Applicant, father**
Clare Renton (instructed by **The Family Law Company**) for the **Respondent, mother**

Hearing dates: 23 and 24 April 2015

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Judgment

Mrs Justice Pauffley:

1. This is my judgment in the application for summary return to the United States of America of a seven year old girl, J. Until recently, it had seemed that the respondent, the mother, would seek to defend on the basis that (a) J has been habitually resident here since last September; (b) the father had consented to and also acquiesced in the removal; (c) there would be grave risk of psychological harm to the child or that she would be placed in an intolerable situation in the event of a return; and also (d) the child objected to going back.

2. The defence of 'acquiescence' was, so I'm told, abandoned last week at the pre-trial review. The suggestion that the removal was anything other than unlawful was conceded within email correspondence between Counsel on the day before the hearing – a concession which was inevitable given the expert advice proffered by Karl Hays of the Texas Bar on 13 April 2015.

3. Accordingly, at the beginning of the hearing yesterday, it seemed that the mother was relying upon Article 13A 'consent,' Article 13B 'grave risk …' and 'child's objections.' Consequent upon the oral evidence of Alicia Northcutt of the Cafcass High Court Team, Ms Clare Renton expressly conceded, as was again inevitable, that her client would not be able to sustain a 'child's objections' exception; and thus that limb of the various defences was also withdrawn from consideration.

4. The only two remaining matters for decision are Article 13A 'consent' and Article 13B 'grave risk of … harm or other intolerability.'

The law – Article 13A

5. I remind myself of the key passages from *Re P-J (Abduction: Habitual Residence: Consent) [2009] 2 FLR 1051* as I consider the available material and rival contentions in relation to 'consent.' As relevant here, they might be summarised as follows –

(1) Consent to the removal of the child must be clear and unequivocal.
(2) Consent can be given to the removal at some future but unspecified time or upon the happening of some future event.
(3) Such advance consent must, however, still be operative and in force at the time of the actual removal.
(4) The happening of the future event must be reasonably capable of ascertainment. The condition must not have been expressed in terms which are too vague or uncertain for both parties to know whether the condition will be fulfilled. Fulfillment of the condition must not depend on the subjective determination of one party, for example, "Whatever you may think, I have concluded that the marriage has broken down and so I am free to leave with the child." The event must be objectively verifiable.
(5) Consent, or the lack of it, must be viewed in the context of the realities of family life, or more precisely, in the context of the realities of the disintegration of family life. It is not to be viewed in the context of, nor governed by, the law of contract.
(6) Consequently consent can be withdrawn at any time before actual removal. If it is, the proper course is for any dispute about removal to be resolved by the courts of the country of habitual residence before the child is removed.
(7) The burden of proving the consent rests on him or her who asserts it.
(8) The enquiry is inevitably fact specific and the facts and circumstances will vary

infinitely from case to case.
(9) The ultimate question is a simple one even if a multitude of facts bear upon the answer. It is simply this: had the other parent clearly and unequivocally consented to the removal?

6. When I turn to the legal framework governing consideration of the Article 13B exception, the decision of *In Re E (Children) (Abduction: Custody Appeal) [2012] 1 AC 144* is central. As was made clear by the Supreme Court, there is no requirement to narrowly construe Article 13B. "*By its very terms, it is of restricted application. The words … are quite plain and need no further elaboration or 'gloss.'*" A number of well known principles may be drawn from the judgment and elsewhere –

- The standard of proof is the ordinary balance of probabilities. The burden of proof rests upon the person opposing the child's return. It is for that person to produce evidence to substantiate the defence raised.

- 'Grave' qualifies the 'risk' of harm rather than the 'harm' itself but there is a link between the two concepts. The risk to the child must have reached such a level of seriousness as to be characterised as 'grave.' A relatively low risk of death or serious injury might properly be qualified as 'grave' whereas a higher level of risk might be required for other less serious forms of harm.

- The situation faced by the child on return depends crucially upon the protective measures which could be implemented so as to avoid the risk that the child will be harmed or otherwise face an intolerable situation.

- Inherent in the Convention is the assumption that the best interests of children as a primary consideration are met by a return to the country of their habitual residence following a wrongful removal. That assumption is capable of being rebutted only in circumstances where an exception is made out.

- In relation to 'intolerability' Lady Hale in *Re D (Abduction: Rights of Custody*) *[2007] 1FLR 961* said, "*Intolerable is a strong word but when applied to a child must mean 'a situation which this particular child in these particular circumstances should not be expected to tolerate.'*"

Summary of the background

7. The father is an American in his late thirties who lives in Texas. The mother is an Englishwoman in her early forties who has an older child, now 14, as the result of an earlier relationship.

8. The parents met in late 2006 and were involved in a relationship which led, in late 2007, to the birth of J. The parents separated in about 2009; and proceedings followed in the District Court of Texas relating both to financial matters as between them and welfare arrangements for J. In April 2009, a very detailed order was made appointing the parents "Joint Managing Conservators" of J. It might be said that attention had been given to almost every area of J's life as the result of that 'governing' order.

9. In December 2011, the original order was varied by an Agreed Order to Modify the Parent-Child Relationship. Somewhat different arrangements for the time that J would spend with her father were made. Certain financial and other obligations of the father were redefined.

10. On 10 September 2014, the mother wrote to the father in these terms – "*This is to notify you that as of Sunday September 14th 2014 our new address will be (as stated). I have reviewed your communications. Our 2009 Order gives me the power to designate primary residence but nowhere in the 2011 order does it impose any limitations or restrictions. … I am free to determine the residency of the child … (in a place) such as the UK.*" The mother ended her letter by making proposals for visitation by the father in England and offered to assist him in finding hotel accommodation.

11. The mother together with her older daughter and J flew to England on 11 September.

12. The mother's 10 September letter did not reach the father until 25 September.

13. Thereafter the father made application to the Texan Court. On 20 January 2015, at a hearing which the mother joined by telephone, she was ordered to deliver J to the court by 16 February. The mother did not comply. At a further hearing on 5 March at which the mother was represented she was ordered to hand J over to the father at Heathrow Airport. Again the mother did not comply.

14. There were then Children Act proceedings initiated by the mother in the Exeter Combined Court in which she sought a specific issue and prohibited steps order. That application was stayed by agreement between the parties in circumstances where the proceedings brought by the father under the Hague Convention had been commenced and were listed for hearing on 20 March 2015.

Mother's case – 'consent'

15. I turn then to examine the mother's case in relation to 'consent.' In her statement, she says this – "*(the father) had wanted us to go for some time and made clear to me, prior to our departure, that he was agreeable. In fact, he initiated and agreed that J could leave in June 2014. I did not tell him the precise date of departure because the tickets were gifted at the last moment and we feared he would change his mind at the last moment or in some way make a scene …*"

16. The mother places considerable reliance on a voicemail of 13 June 2014 in which the father told her to "*take (her) bastard children and get the hell out of here,*" a follow up email of 14 June and then a phone call between them on 1st July in which, according to the mother, the father requested that they should "*go sooner rather than later and definitely by 1st January 2015.*"

17. In her written statement the mother set out part of the transcribed phone call. The entire transcript together with the recording itself were made available to me during the course of yesterday.

18. The mother's case is predicated upon parts of the available material. She seeks to select those sentences from which it might be said that the father wanted her to go to

England. Ms Renton, on her behalf, submits that "*consent was unequivocal. It was never revoked*." I was invited to listen to two recordings and was assured that the transcripts were accurate. It is contended that the father wanted J and the mother gone; and had never withdrawn the order to go. In her oral submissions, Ms Renton asked me to consider what it must have been like for the mother to be on the receiving end of the father's messages, telling her to go. Ms Renton also suggests that the content of the 1st July phone call "*plainly set up expectations in the mother's mind*." The reason, said Ms Renton, for the lack of any notice to the father in advance of the mother's departure was that she "*had no wish for a row*" and "*was afraid of his reaction.*" The mother views the father as both a powerful Texan business man, said Ms Renton, as well as a volatile and angry individual.

19. Overall, submits Ms Renton, applying common sense, I should conclude that the father had given his consent and that although the extant material over the summer (the emails and phone calls) demonstrates that "*in one way he prevaricated, he never withdrew his consent*."

Analysis of the evidence

20. Thus it is altogether necessary to analyse the written material so as to determine whether the mother's case in this regard is established. I begin with the father's message to the mother on voicemail of 12 June 2014. He said this, – "… *your parents wanted us to get along, to make things happen for our daughter. But I tell you what, I'm done doing it. If this is the way you want things to be and you want to have two bastard children without fathers, do it. Take her to England. Get the hell out of here. Get our daughter outta here. If you think it's in her best interests to not have a father take her*." At the risk of stating the blindingly obvious, the father would seem to have been, by that stage, almost at the end of his tether.

21. On 14 June 2014, the father wrote this email to the mother. He said, "*Here is my offer to you. Since you seem to think that England is the answer to all your problems. Take your family to England, J included. I will allow you to do so if the following criteria can be met.*" The father then specified that under his proposal J would spend every summer and alternate Christmases with him in Texas on the basis of travel costs shared equally between the parents. If the mother were to fail to meet her share of the flights then J would remain with him in Texas. He further proposed that child support would cease on J's departure but that he would send monies at his discretion for day to day expenses. He also suggested health care coverage for J would cease on her departure from the USA.

22. On 14 June, the mother replied saying, "*Thank you so much. This will make mine and the children's lives so much easier … I'll be forwarding the paper work as soon as it's ready.*"

23. The father did not receive any paperwork.

The 1st July 2014 phone call

24. On 1 July, the parents spoke over the phone. The mother recorded and has transcribed the call. The following extracts are relevant to the 'consent' issue. The mother complains that the father "*constantly switches weekends, constantly takes away (her)*

time." He still owes her, she says, a weekend from last summer. The mother says, "*I mean it just never stops. There's no quality of life here. Nothing. Nothing*."

25. The father's response is this, "*you know what, you and I are gonna be at each other's throats for another 10 -12 years, okay. That's why I want you to go to England. That's your answer and that's what you want to … do to be happy… I'm not a mean guy. I want you to go be happy…*"

26. The mother, referring quite obviously to the 14 June email, then says, "*I can tell you one thing… Your term for if I fail to pick her up in America then I lose custody… that's not going to fly with any court, with me, with any judge; that's not going to work, there's no way on earth that anybody will agree to that.*" The father makes clear that his "*concern is that (the mother) does not have the financial resources*." The mother seeks to assure him that "*everything is back home*" in England; that J would get special help and that the school "*curriculum is amazing*."

27. The father responds that he is not "*gonna sell (her) on the public school system … because (the mother) is gonna be a self proclaimed professional*." But what he can say is that he does not feel that England is going to be her answer. The father acknowledges that he wants the mother to go back so that she is not isolated from her family but he does "*not want J in poverty*." The father refers to the "*clauses*" and says this – "*If you can't pay to take her back that tells me that twice a year you can't afford a fifteen hundred or twelve hundred dollar plane ticket.*" He goes on, "*… The thing is I want you to leave her with me while you go get your feet wet*."

28. At that, the mother responds with considerable insistence, "*That's not going to happen. That's not going to happen. I do not know what you'll do. Knowing you, you'll file paperwork and keep her for six months and then say that you have custody. Not gonna happen, sorry*." The father replies, "*Look if my deal was to destroy you …*" He is interrupted by the mother who announces, "*I've already started everything anyway. I've already been talking about work. I've already got some contact at BP and so really honestly getting my feet wet…*

29. Then the father says this, "*I would like you gone sooner rather than later. But I would like to set a date of January of this year, of er 2015*." Although it does not appear, perhaps significantly, in the transcript the mother then says, "*OK*." She continues, "*Well I have to step out now because I've got to go ….*" When the call has concluded the mother records herself as follows, "*OK I didn't get to record all of it… Um that was (the father) discussing us returning home to England. Oh my gosh that would be amazing….*"

Events thereafter

30. Over the summer, there was a series of email communications, sometimes hostile in tone, largely focussed on the minutiae of visitation.

31. On 25 August, the father sent a lengthy email message in which he makes clear his wish they should both make a concerted effort to improve their communication. He set out a number of issues which, according to him, required immediate change. He referred to a Family Code available on a website and quoted from it extensively. He

discussed J's education, asked the mother to enrol her in a public/private school in Texas and that J should not be home schooled.

32. The mother replied in a very lengthy email of 1 September. Where she comments upon education, the mother indicates that if she stays in Texas then J will continue to be home-schooled. She continues, "*However, if we can arrange to move back home to England as per your communications … then she will be enrolled in the local school in my home town.…*"

33. After the mother had arrived in England, unbeknown to the father, there was continued email contact between them relating to contact, J's schooling and a scheduled medical procedure. If my arithmetic is correct, the mother replied to the father's emails on six occasions but did not reveal that she and J were no longer in Texas but in England.

Conclusion in relation to 'consent'

34. The ultimate question, as I've already said, is uncomplicated even if a multitude of facts bear upon the answer. It is simply this: had the father clearly and unequivocally consented to the removal? The answer, to my mind, is strikingly obvious and transparently clear. The emails, the transcribed phone call and a number of other factors referred to in the mother's evidence lead incontrovertibly to the conclusion that consent – clear and unequivocal – was never given.

35. The reality of the situation, easily elicited from the extant material, was that by June the father was of a mind, if his terms could be agreed, that he would not prevent the mother from taking J to England. There were conditions or clauses though about J travelling back to Texas for visitation and his stipulation that the mother should pay half the air fares. If she failed to meet her side of the bargain, then the father was clearly contending that J should remain with him in Texas post visitation.

36. There was never a concluded agreement because, as the mother made clear over the phone on 1st July, she was having none of the father's pre-conditions. Nor, so she believed, would any court or any judge. The father's fundamental position was that he would not consent to J being exposed to poverty in England; he wanted the mother to test the water before J would travel to join her. He said in terms that J should remain in the meanwhile with him in Texas. He also said he wanted to set a date of January 2015 for them to be gone. The mother seemingly assented by saying "*OK*." There was no further discussion or negotiation between the parents thereafter, so far as I'm aware, about the terms of any proposed relocation.

37. By no stretch of the imagination could it be said that the father had agreed to the removal in September 2014. He knew nothing of it until 14 days after it had happened. His reaction on learning of the mother's unilateral actions, comprised within his email of 28 September, was of obvious hurt and disappointment.

38. The mother left Texas by stealth to an undisclosed address in England. There was the subterfuge of emails exchanged for days without disclosure to the father as to where J was. Any notion that the father had given his consent, on the basis of what the mother did at the time of and after removal, taken together with what had gone before, may safely be dismissed.

39. Moreover, it seems to me to be highly significant that the mother's letter to the father of 10 September made no reference of any kind to an agreement on his part to J leaving Texas. Rather it concentrates on what was then the mother's fond belief, namely that she was free to determine where in the world J lived without recourse to the father. If, in reality, he had given his consent then surely the mother would have referred to it within that letter.

40. It is also of some importance that as the result of the Texan Court Order of 2009, the mother was obliged to give the father 21 days written notice of any intended travel outside the USA. Many details surrounding any trip abroad were required to be given. Self evidently, that part of the order was ignored precisely because the mother had decided to proceed by stealth and without informing the father. On her case, she realized she had to tell the father "within five days as per the order." As it turned out, he was given no notice at all and was thereby denied the opportunity of taking any preventative action.

The mother's case in relation to Article 13B

41. I turn then from the 'consent' question to consider what is said by and on behalf of the mother in support of her case under Article 13B. Her written 'defence' encapsulates the central points. J, it is said, has disabilities and developmental delay. She is behind at school and becomes exceedingly anxious when placed in stressful situations. At those times, the mother claims J will need to urinate excessively frequently; and she will chew a blanket, withdrawing into herself. It is said that J cannot manage with the resilience of a normal child and would suffer a recurrence of serious emotional symptoms if a return order were made.

42. There would be, so the mother suggests, a heavy impact upon J's learning capacity and she would be at grave risk of psychological harm if made to change schools. Moreover, says the mother, in the event that J is separated from her older sister by a return to Texas or otherwise she would be placed in an intolerable situation. The mother is, of course, J's primary carer and claims her daughter would suffer bewilderment and fear if they were to be separated.

43. The mother refers to the orders made by the Texan court since her arrival in this country – temporary custody awarded to the father and a suspension of visitation for her as well as a stringent financial order. The mother asserts that she will be at risk of incarceration and destitution upon any return to Texas which will severely impact upon her vulnerable child. Moreover, says the mother, she will not be able to support herself of provide a home, a car or insurance.

44. Ms Renton referred to her client as a "*fragile returning primary carer*." The mother has a thyroid condition for which she requires medication but she cannot afford health insurance in the States. The mother feels at a distinct disadvantage in the Texan courts "*because she has no equal fire pow*er." Overall, submits Ms Renton, the mother would be in a difficult position – her ability to house herself and J is compromised and her green card, enabling her to work, expires in June.

Discussion and conclusion – Article 13B

45. The situation which will be faced by J on return depends crucially upon the protective measures which could be implemented so as to avoid the risk that the child will be harmed or otherwise face an intolerable situation.

46. In this instance, the father has offered a series of undertakings so as to provide J with a 'soft landing' and mitigate the impact upon both her and the mother of return to Texas. His written evidence stated that he would not seek to remove J from the mother's care pending the first *inter partes* court hearing. In response to an inquiry from me, the father went further. He indicated he would "*not pursue an application for primary care of J unless at some future date there is significant inability on the mother's part to care for J*." Mr Devereux confirmed that the father wishes to do his best to settle the mother and J.

47. To that end, his other written offers are these – not to seek to enforce the Texan Court orders from earlier this year; and not to seek to prosecute the mother in relation to alleged child abduction. The father confirms there are no outstanding criminal proceedings and that he will not pursue a civil remedy in relation to child abduction. He strenuously denies he has ever been abusive but nonetheless gives an undertaking not to be so. The father agrees to meet the cost of J's return flight to the US and also to arrange for and provide suitable accommodation within the proximity of Austin, Texas for the mother and J to a level, so I was told, of $900 per month. The father also agrees to pay child support of $900 per month and to meet J's medical insurance.

48. Ms Renton submits there is "*no way the mother should be ordered to return to the child to the US until the father has provided evidence that he has discharged the Texan court orders*." She claimed there had been "*enormous problems with undertakings*" inferring they are essentially worthless.

49. I am bound to say that I can see no proper justification for proceeding in the manner suggested by Ms Renton. Judges in this jurisdiction must be entitled to accept in good faith solemn undertakings given after advice proffered by specialist Solicitors and Counsel. I have deliberately related the detail of those matters to which the father has already given his commitment so that anyone reading this judgment will know the position.

50. There is no suggestion that J should return to the USA with anyone other than her mother. J has, as Ms Northcutt said in evidence, a very strong attachment to her mother; and the presence of her mother will be a great comfort and reassurance. The matter which has caused J most anxiety, according to Ms Northcutt, surrounded something she had overheard about her mother going to jail if she returned to Texas. When J had spoken of Texas "*outside of that*" said Ms Northcutt, she had "*spoken very positively*." J said she had spent time on holiday with her father and enjoyed those times.

51. Ms Northcutt carried out her assessment, so it seems to me, with great sensitivity and understanding. Her written report relates that in her view J has positive experiences of living in the UK and the USA. J's ideal situation would be to live in both countries. When J first arrived at her school, she found it difficult to settle and was missing her friends in Texas. Doubtless, to some extent, J will find it unsettling to go back to the USA but so long as the mother heeds her daughter's need for places and people already known and familiar to her, there should be no undue difficulty.

52. The undertakings offered by the father will form a crucial part of the protective measures so as to avoid for J the risk of any harm. There is nothing which causes me to conclude there is any situation awaiting this child in the USA which could be described as intolerable.

53. I conclude there is no proper basis for claiming either that J would be at grave risk of psychological or physical harm or that she would be placed in an intolerable situation if a return order is made. She will go back with her mother, either with or without her older sister should the mother choose to leave her here. Her mother's presence will provide J with much needed security. The father will once more play an important part in her life by spending appreciable periods of time with J.

54. For the avoidance of doubt, and even although Ms Renton's oral submissions did not touch upon the potential for the mother to leave her older daughter in England, I should say I reject the argument that J would be at grave risk of harm or otherwise placed in an intolerable situation if she returns without her sibling. The mother has a choice – either to keep the family unit together or cause it to fragment. It strikes me as singularly unattractive to suggest that J would suffer because of the potential for the mother's own decision to separate the girls. Against the background of Ms Northcutt's oral evidence it becomes straightforward to dispatch the claim anyway.

Finally

55. I am impelled to the view that the mother has sought to deploy every conceivable weapon in her armoury in her bid to avoid a return. In the end result, none has succeeded. At one stage, Ms Renton described this as a "*very complex case.*" I do not share that assessment. J's removal from the State of Texas was unlawful. There is no sustainable basis on the evidence for establishing either, or indeed any, of the exceptions to a mandatory return.

56. If it had been necessary to exercise my discretion because an exception had been established, then I should have gone on, almost certainly, to order summary return. In that scenario, there would have been significant Convention reasons for making the order as sought by the father and nothing of any substance in terms of J's welfare to have deflected me from that course.