

Neutral Citation Number: [2015] EWHC 3990 (Fam)

Case No. FD15P00381

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

IN THE MATTER OF THE CHILD ABDUCTION AND CUSTODY ACT 1985
AND IN THE MATTER OF THE SENIOR COURTS ACT 1981
AND IN THE MATTER OF D (CHILDREN) (ABDUCTION)

Royal Courts of Justice

Date: Monday, 21st September 2015

Before:

MR. JUSTICE BAKER

(In Private)

B E T W E E N :

GC

Applicant

- and -

RD

Respondent

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DR. ROB GEORGE (instructed by Dawson Cornwell) appeared on behalf of the Claimant.

THE RESPONDENT appeared in Person

J U D G M E N T

IMPORTANT NOTICE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment no person other than the advocates or the solicitors instructing them and other persons named in this version of the judgment may be identified by name or location and that in particular the anonymity of the children and members of their [or his/her] family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

MR. JUSTICE BAKER:

- 1 This is an application under the Hague Child Abduction Convention and the Council Regulation 2201/2003, commonly called in this country Brussels II Revised, for the summary return to France of three children: N, born 19th August 2009, therefore now aged just six; T, born 26th January 2011, therefore now aged four and a half; and E, born 29th October 2012 and therefore now aged rising three. The applicant is the children's mother and she seeks their immediate return to France. The respondent is the children's father, who opposes that application.
- 2 The history can be summarised briefly as follows. The parties are both French nationals, the father having been born in Paris and the mother in Haiti. The children are also all French nationals and French is their primary language. The family lived together in France until July 2012 when they removed to this country. The parents' relationship came to an end in March 2013 and the mother applied to the court in this country for permission to remove the children from the jurisdiction here to live with her back in France. An order was made by a district judge on 4th July 2013 recording that the parties were agreed about the new location once a house had been bought in France for the family. In August 2014 the mother and the children moved back to live in France. The father accepts that thereafter the children were habitually resident in France.
- 3 Following the move back, the father spent time with the children monthly, including weekends in France and holidays in England and, as I understand it, had further regular contact with the children via Skype.
- 4 In the summer of this year the parties agreed that the father would bring the children to England for a holiday lasting about five weeks. It was agreed that he would collect them on 26th June and return them on 30th July. Prior to the children's departure to England, and over the first few days after their arrival, the parties engaged in a lengthy email exchange arguing about a range of matters. Translations of all the relevant emails have been put before me. Initially, they argued about whether the father could keep the children for two further days. It was the mother's request that he do so; the father refused. The

mother asked again; the father refused again. In so doing, he alluded to the fact that he was paying what he described as an “enormous amount of maintenance”.

- 5 That led to a lengthy email from the mother in which she said *inter alia* about his payment of maintenance:

“It’s your duty to do that. You’re not doing it for me. Don’t pay maintenance if you don’t want to, couldn’t care less. What are you complaining about? Do you want to swap roles, even though my maintenance won’t be such an enormous amount as yours, as you make so clear?”

In his reply the father said *inter alia*:

“If you’re not there to pick them up on 30th July in the afternoon I will file a written record of your absence and they will go back to school in England.”

In her reply, the mother said:

“Okay, if it was so simple then separated parents would send their children here and there without worrying about their wellbeing. Instead of filing a solution, you threaten me. Okay, I’m waiting to see. Bring them back the last week at school or else I’ll file a complaint for kidnapping.”

The father replied:

“It’s very simple, you agreed to take them back on the 30th of July and I cannot keep them any longer.”

A little later:

“There’s no point in making a fuss about nothing, everything was very clear and the dates were clearly stated.

You’re the one who wants to change the dates, so it’s up to you to come up with a solution.

This is my last email on this subject.”

- 6 All those emails took place on 20th and 21st June. That was the end of the exchange. The children were collected by the father and brought back to England on 26th June for their holiday.
- 7 On 1st July the email exchange resumed with further arguments about money. In the course of these arguments, at 14.49 on 1st July the father sent an email saying *inter alia*:

“If you’re not happy with the maintenance you get I can take custody back. I’m fed up of you treating me like a bank.

I’m waiting for you to confirm about the 30th of July.”

The email exchange then continued as follows. At 15.12 the mother sent an email saying simply: “OK take custody.” A minute later she sent a further email to the father saying:

“You must still be in Paris? Pop round to pick up the rest of their belongings.”

At 15.23, that is to say some ten minutes later, the father replied:

“I will need a letter from you saying that I have formal custody starting today, I will also use this email.

It’s not very important about their belongings.

You need to pay about €450 maintenance.

I let you have custody because you were creating problems when I had them last year. Unfortunately you carried on creating problems once you had custody.

This time you’ll have to get sorted, it will be the last time they move, you’ll have to sort visits out the best you can.”

At 15.33, some ten minutes afterwards, the mother replied:

“You know the procedures.

Start by making an appointment with the Family Judge.”

At 15.42, nine minutes later, the father replied:

“They are in France because I agreed to it, and that was following procedures in their original place of residency.

This time is simply them coming home.”

At 15.52, some ten minutes later, the mother replied:

“Oh no. They go to school in France and their primary residence is in France. You want to go to prison, abduct them. You will need the French judge’s ruling to put them in a school. Good luck.”

At 15.55, some three minutes later, the father replied:

“Abducting? You just told me to take custody.

I’m not playing around here.

No worries about the judge in France, seeing as you’re the one who enrolled them in school in France and they were staying with you. I’ll let you fill in the questionnaire which you can find here.”

He then attached a website link, presumably to the French court office. At 16.01, some six minutes later, the mother replied:

“Why should I fill this form in? You sort it out.

End of conversation.

Have a good day.”

8 The father’s case is that he regarded this as the mother genuinely and unequivocally consenting to the children moving back to England to live with him. The mother in her statement describes the email in which she said: “Okay, take custody” as amounting to what she describes as “a slip of full thought and in anger.” She says it was absolutely not the case that she wanted the children to remain here in England. She said the emails were sent in anger because the father was, as he had done on other occasions, mixing up issues of the children’s welfare and financial provision.

9 After this there were then three weeks of apparent silence with no emails sent between the parties. On 23rd July the mother emailed the father saying:

“Could you please confirm the meeting on the 30th of July at the station at 19.00 hours so that I can pick our children up?”

- 10 The father replied saying that in response to her email of 1st July he had initiated procedures, enrolled the children at school and registered them with the authorities in this country, and sent the form to the French Family Court, and stated that the children would be staying permanently with him in England. To this the mother objected vociferously in a series of emails. The father stood his ground and the children were not returned on 30th July.
- 11 The mother shortly afterwards started procedures under the Hague Convention via the Central Authority. The application was issued in this court only 14 days later on 14th August. Disclosure and location orders were made and revealed the children's location with the father at his home in Watford. Further direction orders were made listing the matter for a hearing before me.
- 12 In the course of these preparatory measures, the father, who has represented himself through these proceedings, indicated that his defence under the Hague Convention would simply be consent. He has confirmed that is the case to me today.
- 13 Insofar as relevant to this application, the law is as follows. The twin objectives of the Hague Convention are set out in Article I, namely:
- “(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
 - (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.
- 14 In *Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, Baroness Hale of Richmond observed at para.48:
- “The whole object of the Convention is to secure the swift return of children wrongfully removed from their home country, not only so that they can return to the place which is properly their ‘home’, but also so that any dispute about where they should live in the future can be decided in the courts of their home country, according to the laws of their home country and in accordance with the evidence which will mostly be there rather than in the country to which they have been removed.”
- 15 Article 12 of the Convention provides:

“Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings

before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.”

16 Article 13 provides *inter alia*:

“Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention...”

17 The leading case on the question of consent in this jurisdiction under Article 13(a) is the decision of the Court of Appeal in *Re P-J (Children)(Abduction: Habitual Residence: Consent)* [2009] EWCA Civ 588. Consent is a defence which the defendant has to prove. At para.48 Ward LJ identified the following nine principles to be applied when the court is considering a defence of consent:

“(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. Fulfilment 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?"

- 18 It is the father's case here that the mother in her emails made statements which amount to "clear and unequivocal consent". He points in particular to her use of the word "consent" in the email to which I have alluded and the subsequent emails, which he invites the court to read as clearly indicating that the mother was genuinely consenting and inviting him to go to the French court to obtain a formal order to avoid being accused of abduction. This is his interpretation of the references in the email exchanges which I have quoted to the court forms.
- 19 On the other hand, Dr. Rob George on behalf of the mother submits, first, that there was no clear or unequivocal consent and, secondly, even if the mother did give consent in the email exchanges on 1st July, that was plainly withdrawn on 23rd July, seven days before the end of the holiday on 30th July which constituted the point at which the children were retained in this jurisdiction.
- 20 I have no hesitation in accepting Dr. George's submissions. First, I do not regard the mother's words as I have quoted in the email exchanges on 1st July as amounting to "a clear and unequivocal consent". Plainly what she said in those emails was said in the heat of the moment, and I remind myself of the observations of Ward LJ in the passage from *Re P-J* which I have just quoted, namely that: "Consent, or the lack of it, must be viewed in the context of the realities of ... the disintegration of family life." This exchange took place in the course of a heated conversation between the parties in which the mother was becoming frustrated and angry about what she saw as the father's unreasonable behaviour so far as the precise timing of the contact was concerned, the date on which the children would be returned, and matters of money. Whether or not she was justified in becoming frustrated and angry,

I know not, but what is clear to me is that her statements made in the emails have to be viewed in that context, and I do not in those circumstances regard them as clear or unequivocal. To my mind, the fact that she referred to abduction only a few minutes later in a further email further shows that the emails do not amount to “a clear or unequivocal consent”.

- 21 Secondly, even if I am wrong about that and the statements made in those emails were “a clear and unequivocal consent”, manifestly that consent was withdrawn before the children were retained.
- 22 Accordingly, applying, as I do, the principles in *Re P-J* which relate to removal by analogy to the retention of the children, any consent that was given was plainly withdrawn on or by 23rd July in the email which I have just read out. This, to my mind, is a blatant example of unlawful child abduction and my plain duty under the Hague Convention is to order the summary return of all three children, which I shall now do.
- 23 The mother seeks the return of the children today. It is now 4.45. The children are young and in my view it would not be in their interests to be returned this evening. However, they must be returned summarily and I order that they should be returned to the mother at 10 a.m. tomorrow morning.
- 24 The father raises in the documents he has filed before the court today a number of issues about the children’s welfare, and it is plain to me from comments he has made in the course of the hearing that that is his principal concern. He may have strong arguments about where the children should live, but that is an issue which has to be determined in the courts of the country of their habitual residence, namely France. I order their summary return to that country.
