RE E (ABDUCTION: INTOLERABLE SITUATION) [2008] EWHC 2112 (Fam)

Family Division

Moylan J

20 June 2008

Abduction – Intolerable situation – Half-sibling a British citizen – Whether summary return required mother to choose between children – Whether created intolerable situation

The unmarried parents lived separately in Oregon; the child lived with the mother, but had contact with the father and with the father's extended family. The mother began an internet relationship with a man in England, and when the child was 7 the mother took the child to England to meet him. The mother decided to remain in England, and the man became the child's stepfather. At first the mother and child moved in with the stepfather's wider family, but after the mother and stepfather had a baby together, they moved, as a family of four, into local authority accommodation. The father had been aware that the mother was taking the child to England, but had believed this was only for a 2-month holiday. The mother did not contact the father or the father's family at all after leaving the USA, but did give her English address to the Oregon Child Support Agency. In the meantime, although the father's family had placed the child on a 'missing child' website, the father himself had taken no steps to trace the child. The father discovered the child's whereabouts only when he was contacted by English social services, which had become involved in the child's life when the mother contacted the police, alleging domestic violence by the stepfather. The father then issued proceedings under the Hague Convention on the Civil Aspects of International Child Abduction 1980, seeking the child's summary return. The question whether the father had rights of custody was due to be investigated by the English court rather than by the Oregon court, because the Legal Services Commission had refused the mother legal representation in the USA, but eventually the mother conceded that the father had acquired rights of custody by means of a voluntary paternity acknowledgement. To complicate matters, the local authority had instituted care proceedings in relation to the child, which resulted in an agreed one-year supervision order, on the basis that the child would live with the mother and stepfather in new accommodation. The immigration position was that the mother and the child were overstayers, but might be able to avoid deportation because the stepfather and the baby, the child's half-sibling, were both entitled to remain in the UK. The child, now 11, was objecting to a return to the USA. The stepfather had stated that he would remain in England if the court returned the child to Oregon, even if the mother went with the child, and that he would not consent to the child's half-sibling leaving the UK. The guardian, who was also the guardian in the care proceedings, gave evidence that the child was settled in England, that the child would be devastated if he were separated from the mother and his half-sibling, and would blame himself if the family were split, and that summary return would be contrary to the child's welfare.

Held – refusing the child's summary return –

(1) Notwithstanding the father's failure to look for the child, the father had not acquiesced in the child's retention in England (see para [79]).

(2) As at the beginning of the Hague proceedings the child was settled, in the full sense of the word, in England. Although it had not been established that the father had consented to or acquiesced in the mother's retention of the child in England, there had not been any deliberate concealment of the child's presence. The mother had not been as open with the father and his family as she should have been, but hers had been sins of omission, not commission: in other words the mother and child had not gone from

place to place as fugitives. The only uncertain element was the immigration position, but on the evidence it could not be assumed that the mother and child would be deported in the near future (see paras [86], [89]).

(3) In the unusual circumstances of the case there was a grave risk that the child would be exposed to psychological harm, or would otherwise be placed in an intolerable situation, if he were to be returned summarily to the USA (see para [92]).

(4) The court declined to exercise its discretion to return the child to the USA, taking into account the fact of settlement, the grave risk and the child's objections; England was now much better placed to decide any welfare issues than the courts of Oregon (see para [98]).

Per curiam: far more public funds had been spent on the determination of the issue of rights of custody in England than would have been spent on funding the mother's participation in proceedings in Oregon. The courts of Oregon were better placed than the English court to determine the effect of their local legislation, and it would be much better if effective use could be made of Art 15 of the Hague Convention (see paras [8], [10]).

Statutory provisions considered

Child Abduction and Custody Act 1985

Access to Justice Act 1999

European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Art 8

Hague Convention on the Civil Aspects of International Child Abduction 1980, Arts 12, 13(a), (b), 15

United Nations Convention on the Rights of the Child 1989, Art 12

Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1

Cases referred to in judgment

C (Abduction: Grave Risk of Psychological Harm), Re [1999] 1 FLR 1145, CA

C (Child Abduction: Settlement), Re [2006] EWHC 1229 (Fam), [2006] 2 FLR 797, FD

C (Abduction: Settlement) (No 2), Re [2005] 1 FLR 938, FD

Cannon v Cannon [2004] EWCA Civ 1330, [2005] 1 FLR 169, [2004] All ER (D) 252 (Oct), CA

D (A Child) (Abduction: Custody Rights), Re [2006] UKHL 51, [2007] 1 AC 619, [2006] 3 WLR 989, [2007] 1 FLR 961, [2007] 1 All ER 783, HL

F (Abduction: Acquiescence), Re [2008] EWHC 272 (Fam), [2008] Fam 75, [2008] 2 FLR 1239, FD

H (Abduction: Acquiescence), Re [1998] AC 72, [1997] 2 WLR 563, [1997] 1 FLR 872, [1997] 2 All ER 225, HL

M (Abduction: Zimbabwe), Re [2007] UKHL 55, [2007] 3 WLR 975, [2008] 1 FLR 251, [2008] 1 All ER 1157, HL

N (Minors) (Abduction), Re [1991] 1 FLR 413, FD

Henry Setright QC and *Hassan Khan* for the applicant

Marcus Scott-Manderson QC and *Rebecca Foulkes* for the respondent

David Williams for the second respondent

Darren Howe for the guardian

Cur adv vult

MOYLAN J:

[1] These proceedings concern an application by a father under the Hague Convention (on the Civil Aspects of International Child Abduction 1980) and the Child Abduction and Custody Act 1985. They have taken longer to determine than they might have done in circumstances I will describe later in this judgment. In particular, the hearing has been divided into two parts, at the first of which the only issue being considered was whether the father had rights of custody within the meaning of the Hague Convention at the date of the alleged wrongful retention in this country.

[2] The mother has raised a significant number of issues. In addition to rights of custody she relies on the following:

(a) she asserts pursuant to Art 13(a) of the Hague Convention that the father consented to, or subsequently acquiesced in, the retention of the child in England;
(b) she relies on Art 13(b) and asserts that there is a grave risk the child's return to the USA would expose him to psychological harm or would otherwise place him in an intolerable situation;
(c) she asserts that the child objects to being returned to the USA and that he has attained an age and a degree of maturity at which it would be appropriate to take account of his views; and
(d) she asserts that he has become settled in his new environment in England.

Accordingly, the mother contends that I have a discretion as to whether I should order him to be summarily returned to the USA and that in the exercise of my discretion I should not make such an order.

[3] The proceedings relate to a child called T, who is now aged nearly 11. The parties to these proceedings are the father, who has been represented at both hearings by Mr Setright, QC and Mr K; the mother, represented by Mr Scott-Manderson, QC and Miss Foulkes; the mother's present partner, Mr K, represented by Mr Williams and the child, T, and the mother and her present partner's child, N who is aged nearly 17 months, acting through their Guardian, Miss Russell, represented by Mr Howe.

Hague Convention proceedings

[4] The father commenced proceedings by originating summons dated 29 January 2008. In this it is alleged that the mother removed T from the USA in May 2005 'without the knowledge or consent of' the father. This assertion was repeated in the affidavit sworn in support of the originating summons. This is not the father's case, which is that in May 2005 the mother, with the father's agreement, left the USA with T for a 2-month holiday in England and France but did not return.

[5] Having regard to the reliance the court places on the information contained in these documents – namely, the originating summons and the affidavit – which frequently are the only substantive documents before the court when making without notice orders, the importance that the case is properly stated is self-evident. I do not, of course, blame the author of the affidavit as its content was based on instructions. No proper explanation has been given for the difference between the father's actual case and how it was

put in these documents. Such an occurrence is, in my experience, rare, but clearly every step must be made, particularly in the Requesting State, to ensure that the case is properly defined.

[6] The mother filed her statement of defence on 12 February, 2008. This raises the issues I have identified earlier in this judgment. By Black J's order of 18 February, 2008 the final hearing was fixed to commence on 14 April with a time estimate of 4 days. Directions were given for the filing of evidence (including on the issue of rights of custody) and for the parents to attend the hearing for the purposes of giving time-limited evidence. The final hearing was then re-fixed to commence on 21 April with a time estimate of 5 days by Ryder J's order of 27 February, 2008. This order also made provision for the parents' respective American legal experts to give oral evidence by video-link.

[7] Expert evidence on Oregon law has been produced by both of the parents. The father relies upon the evidence of Mr Lechman-Su; the mother on the evidence of Miss Root. They have each filed written reports. The former asserts that at the time of the wrongful retention the father, under Oregon law, had equal rights of custody of T with the mother. The latter contends that under Oregon law the mother had sole custody of T at all relevant times, and that the father merely had a right to apply to the court to seek a determination of his legal rights in respect of T. The determination of this issue would depend, principally, on the interpretation of Oregon statute law on which, I have been told, there is no direct authority.

[8] On 17 March, 2008 Coleridge J made an order pursuant to the provisions of Art 15 of the Hague Convention. The court requested that the father obtain a decision or determination from the courts of Oregon on whether the removal or retention was wrongful. The request is, of course, focused on seeking to ascertain the rights of the father under Oregon law. In the course of a short judgment Coleridge J said:

> 'If ever there was a case where it would be helpful for the foreign court to make the decision, it must be this one. It would be highly invidious for the English court to trespass into this area unless it is unavoidable.'

I agree. As I have indicated, the issue which divides the Oregon experts is based on their different views as to the effect of Oregon statutory provisions which have not been the subject of judicial determination in Oregon. Although 'rights of custody' has an autonomous meaning under the Hague Convention, it is obvious that the courts of Oregon are better placed than this court to determine the effect of their local legislation. This is precisely the purpose of Art 15.

[9] By his order and judgment, Coleridge J provided every encouragement to the Legal Services Commission in this country to fund representation for the mother in Oregon. The purpose was to ensure that both parents were represented so that the point at issue could be the subject of full argument. The LSC came to the conclusion that they could not fund representation in Oregon as a result principally, as I understand it, of the provisions of the Access to Justice Act 1999. This refusal was appealed to the independent adjudicator, who rejected the appeal.

[10] On a pragmatic level this has had the consequence that far more public funds – by, I would estimate, many thousands of pounds – have been spent on the determination of this issue in England than would have been spent on its determination in Oregon. In addition, it meant potentially that I would be making a decision on the effect of Oregon law. I appreciate that this is what occurs in some cases, but it seems to me that it would be much better if effective use could be made of Art 15. Although initially my attention was focused on the position of the LSC and the effect of its decision, on reflection I can see that my attention should in fact be focused on the position in the Requesting State. In the light of the way in which the case has in fact developed, it has not been necessary however for me to address this issue further.

[11] In the middle of April a medical emergency occurred as a result of which the mother was admitted to hospital. It became clear that she would not be able to attend the hearing and would not be able to give evidence. As the Oregon experts were already lined up to give evidence by video-link at the hearing fixed to commence on 21 April and in the light of the LSC's decision to refuse funding for an Art 15 determination and the apparent inability otherwise to procure a fully argued decision from Oregon, the parties proposed that that hearing should be used for the determination of whether the retention was in breach of the father's rights of custody. Reluctantly I agreed to deal with that issue alone at that hearing.

[12] The case progressed with oral evidence being given by each of the respective experts on Oregon law. Having heard that oral evidence Mr Scott-Manderson on behalf of the mother conceded that the father had rights of custody at all material times. Notwithstanding that concession, counsel have invited me to determine the issue of the father's rights of custody under Oregon law, and under the Hague Convention on the basis that I have heard the experts give evidence. I decline to do so. I consider that the concession was rightly made by Mr Scott-Manderson. However, in the light of that concession the issue was concluded before I heard counsels' submissions on it. I do not, in these circumstances, especially having regard to the decision I would be making, consider it appropriate to express my view on the rights given to unmarried fathers under Oregon law.

History

[13] The mother and the father are not, and never have been, married. He is an American citizen and is aged 31. The mother has dual American-Filipino nationality and is aged 39. They met and started living together in Oregon in 1996, the mother having moved to live in America in 1990 with her then husband. T was born in Oregon. The parents were living together at the date of his birth. The father was present at his birth and subsequently visited the mother and T in hospital. When discharged after a few days the mother and T returned with the father to the family home.

[14] On 31 July 1997, the day after T's birth, the parents signed what is entitled a voluntary paternity acknowledgement. The purpose of this document is to enable an unmarried father to be included on the original birth certificate as the father. It must be signed by both parents and, in the form

used in this case, must be completed while the mother is in hospital and within 7 days of the birth. The obverse of this form includes the following provisions:

> '*Rights and Responsibilities of Fathers*
> To be the legal father means you have all of the parental rights and responsibilities that the father would have if the child were born in a marriage. That means you have the right to visit the child or to seek custody of the child …
> *Rights of mother*
> You have the right to seek birth costs from the father and to seek child support beginning on the date of the child's birth if you are the custodial parent …
> *Custody*
> By law the parent who has physical custody of the child at the time this document is filed has legal custody. Only the court can legally change custody.'

This document would have been relevant in the determination of the issue of the father's 'rights of custody', but for the reasons I have already given it is not necessary for me further to consider it.

[15] The parents separated in 1999 or 2000. T remained living with his mother. The father had contact by agreement between the parents. There were no court proceedings, save possibly in respect of child support. The father has been paying child support since 2000 or 2001 and has continued to do so up to now. Between 2002 and 2004 the father lived in Texas. His contact with T was significantly more limited during this period. After his return to Oregon more regular contact resumed. Although there is a dispute as to its frequency, it is clear to me that, especially if I include contact between T and the father's family generally, including in particular his great-grandmother, it was frequent.

[16] In 2004 the mother developed a relationship with her current partner over the internet. She says that she and T communicated with Mr K by, among other things, webcam. In 2005 she says she decided to travel to England to meet him. The mother and T came to England on 25 May, 2005 in circumstances which are disputed. The mother says she told the father that they were coming here, and that they would stay here permanently if things worked out. The father says that he was told by the mother that she and T were coming to England for a 2-month holiday. He also says that he did not know where the mother and T were until December 2007 when he was told of their whereabouts by the London Borough of Southwark. This arose because the children are involved in care proceedings, and a social worker is said to have found a website in the USA which contained a reference to T as a 'missing' child.

[17] The mother and T have remained living in England since May 2005. Since they arrived, they have been living with Mr K and, initially, other members of his family. The mother and Mr K have, as I have indicated, a child, N.

[18] The mother and T are overstayers, having been given permission to stay in this country for 6 months only from the date of their arrival in May

2005. Initially, as I have said, the mother and T lived with Mr K and other members of his family. In February 2007 they – that is, the mother, Mr K, T and N – were provided with temporary alternative accommodation by the local authority, namely a two-bedroom flat. They were then provided with, and moved to, their present home in December 2007. It is evident that there was no communication between the mother and the father, or with any other members of his family after May 2005. The mother says that she kept an active email address for 2 months after her arrival in England, which had previously been used to arrange contact, but, she heard nothing. She accepts that she did not try and communicate with the father or his family.

[19] The father has continued to live in Oregon. Since October 2006 he has been living with his partner and her two children. Also living with them is the father's 3-year-old son by a previous marriage. T, of course, has no relationship with the father's current partner and her two children.

[20] Social services became involved with the family in England from about the beginning of 2006 as a result of neighbours and the mother contacting the police. The mother alleged that Mr K had been violent towards her. She also said that their accommodation was unhygienic. Both children were put on the child protection register because of concerns about the quality of life in their home in October 2006.The concerns focused on allegations of domestic violence, poor living conditions, and T's relationship with Mr K.

[21] T did not attend school in England until September 2006. Prior to that the mother says she was teaching him at home. Since September 2006 he has been attending C Primary School. He is due to go to his secondary school – either K School or possibly another local school – in September 2008.

[22] On 12 October 2006 the mother sent details of her change of address to the Oregon Child Support Agency, giving her then address in England.

[23] On 12 April 2007 the London Borough of Southwark commenced care proceedings in respect of both children. A guardian was appointed by order of 23 April 2007. The guardian appointed in the care proceedings is also the guardian appointed to represent the children in the Hague proceedings. Accordingly, and very unusually, by the time the guardian came to give oral evidence in these proceedings she had been involved with the family – and significantly so – for in excess of a year.

[24] The care proceedings were about to be resolved at a final hearing fixed for 1 February 2008 when the Hague Convention proceedings supervened. The parents had conceded that the threshold criteria were established. The agreed statement is dated 30 November 2007 and reads at para 5:

> 'T has been exposed to volatile arguments between his mother and Mr K. There have been no further reports of domestic arguments since September 2006. However, this exposure to the arguments between his mother and Mr K would have caused T to be at risk of significant emotional harm and places him and N at risk of significant emotional and physical harm in the future.
> 6 The living environment at [the family's then home] was unhygienic, cluttered and uninhabitable. The environment and single room space were wholly unsuitable for both T and N to reside in.
> 7 T was at risk of significant harm until the Mother and Mr K moved to alternative accommodation.

> 8 T did not attend school from May 2005 until September 2006 and would have been at risk of harm to his educational and social development. The Mother contends that she home tutored T. The LEA did not give approval for this, and in any event he was in the one room with the Mother and Mr K during a time when volatile arguments took place.'

All parties in the care proceedings were proposing that they should be resolved with no order in respect of N and a one-year supervision order in respect of T.

[25] I have been referred to some of the evidence filed in the care proceedings, including the final statement from the allocated social worker and the guardian's report.

[26] In December 2006 the allocated social worker located a reference to T on a church website in Oregon, stating that he had been missing since June 2005. Contact was then made with the father's family. It was stated in one email from T's great-uncle that the mother had taken T away from Oregon without notice to the father. It was also said in the email from his great-uncle that:

> 'I am afraid to have to say that the father did not take the kind of active role that may have been available in trying to keep track of T.'

[27] The social worker then spoke to T's great-grandmother. She told the social worker that when T disappeared she went to his school to see what information they had. She was told by a teacher that in May 2005 the mother had informed the school that she was going to England on vacation for 2 weeks and that if they liked it, they might move there.

[28] When the social worker spoke to the father he said that he had thought the mother was going on vacation for a couple of weeks. He then expressed a 'detest' for the mother. On 19 December, 2007 the father wrote to the local authority:

> 'My position is that if T is not in a healthy and loving environment then I would want him to live with me.'

[29] The mother and T do not currently have the right to reside in this country. Included in the papers are opinions provided by a barrister on the mother's immigration position. The mother first sought advice as to her (and T's) position from a local law centre in February 2007. According to the opinion from the barrister – namely, Joanne Rothwell – who practises in the field of immigration law, the immigration status of each of the mother and T is not secure. In contrast, N is a British citizen and cannot, therefore, be removed from the UK. Miss Rothwell has identified several types of application that the mother could make to secure her and T's positions in the UK. In particular, they could make an application for discretionary leave based principally, it appears, on their Art 8 rights. It is clear that none of the applications would be easy, but there is at least *a* route by which the mother and T could be given the right to reside in the UK. Further, it appears from Miss Rothwell's opinions that if the mother left the UK in order to make an

application from overseas, the rules provide that she will be refused entry for one year if she has left voluntarily at her own expense, and for much longer periods in other circumstances. It is also made clear in the opinions that if T were to leave on his own it is unlikely that he would be allowed entry back into England, at least for some considerable time.

The evidence

[30] Turning to the evidence, the mother has sworn an affidavit on 12 March 2008. I have also heard her give oral evidence. She states that prior to her coming to England in May 2005 she had two conversations with the father about her proposed journey. The first conversation was at the beginning of May when she told the father that she and T were going to England to visit family and friends, and that if they liked it they might stay. The father, she says, asked about T's birthday (30 July) and the mother said she was planning to go to Euro Disney.

[31] The second conversation was on 22 May 2005 when the father was dropping T off after contact. She says that he could see there were ten packed freight boxes in the house. He asked how the mother thought she was going to get the boxes on to the flight. She explained that they were being sent by ship. The father, she says, joked with her about her going to her new boyfriend. She says she explained that she and T were going to stay with Mr K (although his name was not mentioned) and that if things worked out, they would stay in the UK permanently. The father, she says, responded by saying, 'Well, have a nice life'. They then discussed how they would keep in touch. The father told her that he was moving to a new address, and the mother suggested that he gave this address to her housemate in Oregon who could forward it. The mother did not give the father Mr K's address in England because, she says, she felt she could not. The mother says she also told T's school that they were travelling to England, and that if they liked it they would be staying permanently.

[32] Following her arrival in the UK, the mother did not communicate with the father or any other member of his family. She explains this in part by relying on the father's alleged comment when they parted on 22 May which she says made her 'quite miffed'. He left in a hurry and she thought he did not seem really to care about what was happening. She felt that she had been chasing the father and that he was not interested in T. In her mind, she says this attitude was confirmed by the fact that she had no communication from the father, or indeed any other member of his family, on her mobile telephone or her email address, both of which she says were operative for about 2 months after her arrival in England. She denies that she was seeking to hide from the father or his family. She accepts, however, that prior to 2005 T's paternal family was very important to him.

[33] The mother was somewhat hesitant when asked when she had decided that she was going to stay in England after her arrival here. There was clearly a period at the end of 2005 and early 2006 when she was thinking of returning to America because of difficulties in her relationship with Mr K. However, she says that they sorted this out and by April or May 2006 she had decided to stay. She says that this was when the boxes of possessions were shipped over.

[34] The mother also gave evidence about her plans to visit the USA with T in the future. She said in the course of cross-examination by Mr Setright that she was intending to arrange a visit once she and T were settled in England. In

addition, she referred to not having a way to do that because of 'money and stuff'. The mother could, of course, also not leave England until her immigration status was secured.

[35] Looking at the evidence overall, and notwithstanding certain inconsistencies in it, I have come to the conclusion that the mother had decided to stay in England on an indefinite basis by in or about the summer of 2006 and has considered herself and T as being settled here since at least that date.

[36] In October 2006, as I have described, the mother informed the Oregon Child Support Agency of her new address in England. There is included in the papers a letter from the Child Support Division confirming that they had updated the mother's address to her then address in England where she remained until February 2007.

[37] The mother also says that in July or August 2005 she registered her address over the internet with the American Embassy in London, although the Embassy has no record of this.

[38] The mother firmly considers that she and T are settled in England. He is, she says, established here and has integrated into their family life here. She told me that he is extremely close to N, and he is very protective towards her. He has also developed a close relationship with Mr K, enjoys school, and has a number of friends. He is, she says, summarising, very happy living in England. The mother believes that T would be devastated if he had to return to the USA. It would result in the family with whom he now lives and in which he has integrated, being divided. She herself would face an impossible decision of either going with T or staying with N as she knows that Mr K would not agree to being separated from N for what would be likely to be a substantial period of time. The mother contends that T is happy and settled here and that he does not want to return to the USA. She points not only to his life with his family here, but also to his life outside the family, particularly at his school. He has a number of friends and is progressing reasonably well. His school report from January of this year is generally positive and refers to him settling in well.

[39] The father has filed three affidavits. He has also given oral evidence. As referred to earlier in this judgment it was initially wrongly asserted in the originating summons that the mother had secretly removed T from the USA. In the affidavit in support it was also asserted that the father had utilised an internet website and posted T as missing; that he had placed T's details on a missing child's network, and that he had been told by a local lawyer, incorrectly, that he could not take any proceedings to procure T's return unless he knew of his location.

[40] In his first affidavit, sworn on 21 March 2008, the father says that he was told by the mother in April 2005 that she and T were taking a vacation in England and France to visit family. She said she would be returning in 2 months. At that time the father thought that the mother had re-married to a man with whom she was living called M. When the mother did not return, the family made many attempts to find out from M when she would be returning, but without success. The father also used the internet to see if he could trace the mother or T, but again, without success. The Oregon Child Support Agency told him that the mother had not changed her mailing address.

[41] The father agrees that prior to the mother and T's departure from Oregon, he and the mother had two to three conversations about a proposed trip to Europe for about 2 months. The mother told him that they were going to England for one month and to France for one month for a holiday, saying she had a relative in England. He denies that there had ever been any suggestion that the mother and T might be moving to live in England. He also denies there was ever any mention of the existence of any partner, or prospective partner, and that he saw any packing cases. He equally denies that he told the mother to 'have a nice life'.

[42] The father has referred to measures taken by himself and other members of his family to try and find where T was after about July 2005. He says that he had no direct means of contacting the mother as he did not have a mobile telephone number. He sent about three emails to two different addresses for the mother of which only one bounced back, but he received no response to the others. Although the mother had told him that she would email once she arrived in England, he received no communication from her at all.

[43] Somewhat surprisingly, the father did not tell any other member of his family that T was going for a long trip in 2005 until after he had gone, and only after at least some of them had been trying to see T. I do not consider that he can simply say it was down only to the mother. In addition, the father told me, as did his stepmother, that he had not been told about his grandmother's conversation with T's teacher, reporting the mother having told the school that she and T were going to England and that if they liked it they might move there. This is surprising because it provided a very clear indication that the mother and T could well be in England. I am not quite sure what to make of this apparent lack of communication between the paternal family, save that it might give some insight into their family dynamics. The information from the school was particularly relevant because the father says that when he tried to report T to the Oregon police as missing, he was told that he could not as he did not have a custody agreement with defined contact. When he saw the lawyer from the Oregon Child Support Division, which meeting lasted for about one hour, he was told that he would need to know where the mother was before he could try and get her to return T to the USA. He did not think that she would have stayed in the UK because he did not believe she had any family here, despite what she had said previously, and because he did not believe that she would have been permitted to stay. He also believed that he would be notified by the Child Support Division in Oregon in the event of the mother's address being changed. He only, he says, discovered at the end of 2007 that the regulations had changed and that this was no longer the case.

[44] The father accepts that, in the event of T returning to the USA, it would be better if he returned with his mother. However, if this were not to happen, the father believes that with support and with help from counselling T would settle back into life in Oregon. Members of the father's family, including his parents and his grandmother, who knows T well, live nearby. When he gave evidence the father, in the course of cross-examination, said that where the mother lived, and how she maintained herself, were up to her. In his final submissions Mr Setright said that he had instructions to propose that in the event of the mother and T returning to Oregon they could stay with the father's parents.

[45] The father's stepmother, Mrs WE, has also filed an affidavit. Having flown to England with the father, she briefly gave oral evidence. Although the father's stepmother, she and the father regard her as his mother. She speaks of having a close relationship with T until he left the USA in May 2005. As I have indicated, she was only told by the father, after the mother and T had left, that they had gone on a 2-month holiday. When they did not return, she attempted to find them and make contact, but without success. She said that she would be happy for T to stay with her and her husband. I have indicated the change in that position as stated in Mr Setright's final submissions.

[46] Exhibited to Mrs WE's affidavit are letters written to T by his great-grandmother since May 2005 and kept by her. Everybody agrees that T had a particularly good relationship with his great-grandmother. In one of these she says the mother told T's teacher that they were going to England to 'check out living there'. This is said to have happened in June 2004. I suspect this is a mistake and it is more likely to have been June 2005. As I have already indicated, for some reason, which is difficult to understand, it appears that the great-grandmother did not tell the father about this conversation; indeed he was not aware of it until recently.

[47] Mr K has filed one affidavit, sworn on 2 April 2008. He has not given oral evidence. He says that he had no sense that the mother had anything to hide. He says that T is very close to his mother and his sister, and that he, T, would be devastated either to be separated from them, or to be the cause (as he says T would see it) of he and his mother being separated from the rest of their immediate family. Mr K says that the mother has been tormented by the thought of having to choose between T and N. Mr K says that he has a real bond with T and he makes it clear that he would not move to the USA, even if he was entitled to do so, which seems very, very doubtful. He would also not agree to N travelling to the USA with the mother, especially having regard to the uncertainties surrounding where she would live and how she would be able to support herself financially.

[48] I have read the final statement, dated 21 December 2007 from the allocated social worker which was filed in the care proceedings. She described T as difficult to get to know, although she says he was opening up a little more. She records that there was no concerning feedback from the school or the school nurse regarding his education or health since February 2007, and that looking back over the year he, T, had made good progress at school. She also records that he is doing well at school and interacts well with his peers in the playground. On 17 October 2007 T's teacher reported that T seemed to have settled in well during the first half of that term, and that he was friendly with a small number of other boys from his class.

[49] In the social worker's fourth statement she gives details of her contact with T's paternal family in Oregon following discovery of his name on a website. She was told that T had been taken away from Oregon without notice to the father; that the father, as I have indicated, had not taken an active role; and, as I have also already stated, the teacher at T's school had told the paternal great-grandmother that the mother was going to visit England and that if she liked it, they might move there.

[50] The guardian in these proceedings is, as I have already mentioned, also the guardian in the care proceedings. She has, therefore, a far broader and more detailed knowledge of T and his position than would normally occur in

Hague Convention proceedings. Her report in the care proceedings is dated 29 January 2008. In that report she records that T was quite clear that he wished to remain living with his mother, and expressed her conclusion that any disruption to this would be emotionally damaging to T. In part, she bases that conclusion on T's relationship with his mother, which was also seen as being 'very close' by the well-known consultant child and adolescent psychiatrist, Dr Berelowitz, who has prepared two reports for the purposes of the care proceedings.

[51] In his supplementary report, dated 15 November 2007 he describes T as a 'troubled child' and says: 'One can of course debate why T needs to have such great loyalty to his mother and Mr K, but the fact is that that is how he is at the moment'.

Dr Berelowitz's overall impression was that the family's overall level of functioning had probably improved to a satisfactory extent and was acceptable, and also that T's level of functioning was reasonably good.

[52] The guardian's report of 28 January is a long report. At one point in it she made a comment which has assumed a greater significance at this hearing. She said:

> 'T needs carers who will allow him to express his feelings, including his feelings of loss, particularly regarding significant relationships with others and the move to a new country, which he is not particularly settled in yet.'

[53] Having read both reports from the guardian, and in particular having heard her give oral evidence, I do not consider that this comment bears the weight which the father has sought to give it. By 'this comment' I am focusing on the words, '– he is not particularly settled in this country yet'. Although the guardian felt unable to withdraw this comment, it was clearly intended as no more than a passing comment and I found her attempt to explain its meaning somewhat unconvincing. It was certainly not a considered assessment of whether T is settled, or was settled, in England. There is no doubt that the guardian views T as being, as she said in her oral evidence, 'very settled where he is'. I have come to the clear conclusion that the comment in her first report does not accurately reflect, and does not answer the question of whether T was settled in England at the commencement of these proceedings.

[54] The guardian's report for these proceedings is dated 7 April 2008. She records being told by T that he overheard the mother telling his father that she was leaving to come to England. He, T, also refers to there being large packed boxes in the dining room at that time. The guardian reports that T has been very clear that he does not wish to return to Oregon and does not wish to live with the father. In her oral evidence she said that T has made it 'crystal clear' that he has no wish to move back to Oregon. He has given a number of reasons for this. He has said that he is happy in the UK and wants to stay here. Quoting extracts from the guardian's report, starting at para 6:

> 'T does not wish to be separated from the Mother, Mr K, and N. He would feel very, very sad if he had to leave what he sees as his family unit … If he went alone, then everybody will be very upset and would

miss him. He would miss everything he had and would be very scared as he doesn't really like aeroplanes …

(ii) if he and his mother had to return to America, then he would want N to come along too as he would miss her and she would miss him … Siblings, he felt, have a special bond. "She looks like me and she acts like me" …

(iii) if Mr K were left in the United Kingdom by himself, T said that Mr K would miss everybody and be all by himself. He said that he thought Mr K would find it difficult to go to America as he is an informal carer and support to his own mother.'

[55] In her oral evidence the guardian added that T feels he is now a different person from the person he was when he left America in May 2005 and that his father and family in Oregon do not really know him anymore. This does not mean that he does not want any contact with his father and the paternal family. It is her view that this should start with emails. The guardian says that T is 'not a very mature or street-wise child for his age, but he is quite intelligent and when situations are explained to him, he does understand very quickly and easily'. It is her assessment that T is 'intelligent enough to have his own opinions and express them when he considers it safe to do so'. The guardian found that he speaks in a mature way, having grown in maturity over the last few months, and that his views appear to be strongly held. She adds that it can be difficult to ascertain when he is expressing his own views and when he is repeating the views of the adults in his life. She also acknowledges that it would be T's instinct to defend the mother and Mr K and follow their wishes.

[56] When considering the overall effect of the evidence it is my conclusion that T's objections to returning to Oregon are, as the guardian said in her oral evidence, primarily his own, albeit influenced, as she also said, and as they inevitably must be, by all that is happening around him.

[57] The guardian's assessment is that T is settled in England, both physically and emotionally. She was cross-examined at some length by Mr Setright who drew her attention, among other things, to very recent case conference records.

[58] Rather than recite all the various strands in the guardian's evidence which, perhaps inevitably, tug in different directions, I propose to focus on my conclusions as to the effect of that evidence. By the end of her oral evidence it was wholly clear to me that the guardian considers T to be both physically and emotionally settled in England. Her involvement with the family and T has led her to conclude in particular that he is settled in and with his family and he is settled at school. In her oral evidence she said that he has been settled at school for quite a long time. I was referred to the school report from May 2007 which says that T was well-established in the school by that time, and to an oral report in July 2007 which refers to T doing well, taking part in school events, and as being a child beginning to blossom. The guardian also said that when she started working with the family in May 2007 she saw a reasonably settled, happy family.

[59] Returning to her written report at para 10:

> 'From my observations, the strength of the relationships within the family appear to be cohesive at this point in time. T and his mother have a very close relationship. They talk with each other about day to day events and it would appear that the mother knows her son very well. T sees Mr K as a father figure and calls him "papa". They interact well and T will often talk to Mr K about things that are bothering him or that he does not understand …
> 12 T has also developed relationships with Mr K's family. On arrival in this country he lived with Mr K's family, ie his mother, father, sisters and brothers. Although, as has been previously discussed, the living conditions were very poor indeed, T was able to use these people, particularly Mr K's sister, N, for support.'

[60] The guardian specifically considers the issue of settlement in her written report and concludes, after referring to a number of factors:

> 'Overall, my assessment is that T is settled in this country. He has been through a difficult period, but I believe that apart from the stress brought about by these proceedings for T, and for the mother and Mr K, his situation has improved considerably since the beginning of the care proceedings. He feels loved by his mother and her partner. In return, he loves them and his sister. He is making progress in school and seems pleased at the prospect of starting at secondary school.'

She also says that T really likes where he is now living, and that all his friends think it's a nice area as well.

[61] The guardian told me that T has a strong attachment to all his family in England, including Mr K's siblings. When asked in oral evidence about the important figures in his life, the guardian told me that his most important attachment is to his mother. N is the next most important member of his family as he has a very strong attachment to her. Mr K is the third most important figure in his life at the moment. From her observations, T appears to feel very comfortable with Mr K and he talks, as I have indicated, about the mother and Mr K as his parents. Whilst it had been a difficult time for the family with many pressures, she describes it as a 'close-knit and enmeshed family'. The guardian considers that T is emotionally settled in that he has security and stability within the family; has put down roots; and is grounded in England. To quote an answer she gave in the course of being questioned by Mr Setright 'In general he is emotionally settled. Any child going through all he is going through could feel a little unsettled'.

[62] Having spoken, albeit relatively briefly, with the father, the guardian concluded that he does not appreciate the effect on T of being separated from, and losing, his family in England. The father thought that T might feel sad. It is the guardian's opinion that it is much more significant than that. She is of the view that there are clear risks of harm if T's views are ignored. He will, she says, be angry and upset if his expressed objections are not respected. She says that emotionally T feels very guilty for all that has happened. He understands that the current proceedings are about him, and he feels guilty about the stresses caused to his family, and, in particular, his mother's miscarriage. This was a particularly powerful piece of evidence. The

guardian's assessment is that T would be devastated to lose what he sees as his family, having regard to the especially close relationship he has with his mother, N, and Mr K, and also having regard to his networks and friendships which he has built up in England. In her view, it would be immensely difficult for him, especially if the mother did not travel with him, as he is not a child who finds it easy to make new relationships and he has had to cope with a number of changes already. He would blame himself for what happened, and, particularly for splitting the family if N and Mr K remained in England. Her stark assessment is that any separation from his mother and N would be 'very devastating for T' and that as T would blame himself if the family were split, any consequent longer term separation would be absolutely devastating for T. There is, she considers, a real risk that he could suffer psychiatric damage because of all the emotional difficulties which would flow from a summary return to the USA.

[63] Returning to the school, T's school informed the guardian that he is generally well settled within his peer group. He is engaging well with the school and is doing very well educationally in the subjects he particularly enjoys. T himself told the guardian that he really likes his school and has a number of friends there. She saw this demonstrated when she went to the school with T as friends came up to chat with him and he went up to others. He is also looking forward to going to his new school.

[64] Finally, the guardian's firm recommendation is that it would be contrary to T's welfare to order his summary return to the USA. Having become settled, she says, he 'now needs to have some consistency and stability in his home life'.

[65] Dealing with my assessment of the witnesses who gave oral evidence, I found it quite difficult to assess the mother or the father in the limited time for which they gave evidence. They both struck me as being somewhat naïve. Neither was wholly convincing, although I found the father a more convincing witness than the mother, albeit not by a very large margin. In contrast, I was, overall, very impressed by the guardian's evidence. This is not only because of the depth of her experience and knowledge of the family and T, but also because of the manner in which she gave her oral evidence.

Parties submissions

[66] Turning now to the parties' respective cases, I have been provided with detailed and extensive written submissions to which counsel have added briefer oral submissions. I have taken into account all the matters raised by them, but in this judgment I propose only to summarise their respective cases and to deal with some of the authorities to which I have been referred.

[67] Mr Scott-Manderson made submissions in respect of each of the defences raised by the mother. He accepted that the defences of consent and acquiescence were, having regard to the evidence, borderline. He submits that the key factor in this case is the effluxion of time and the effects of this for T. He is immersed in his present family. He has a very close attachment to N. His school education in England is well-established. Mr Scott-Manderson relies in particular on the evidence of the guardian as establishing that there is a grave risk that T's return to the USA would expose him to psychological harm or

would otherwise place him in an intolerable situation. He points to the likelihood that the mother and T will be locked into the USA as a result of English immigration law.

[68] Mr Scott-Manderson identifies the issue of settlement as being his strongest point. He submits that T is clearly settled in his new environment, both physically and emotionally, and has been since well before January 2008. He contends that this is not a case in which the mother was actively seeking to hide from the father. He relies on a number of factors in support of these submissions as follows:

(1) the father knew that the mother was coming to England;
(2) the mother told T's school in the USA that she was coming to England;
(3) the mother updated her address with the Oregon Child Support Division in October 2006;
(4) the mother registered her address at the US Embassy;
(5) although the family in England have moved two times, such moves were all made as a result of suggestions or recommendations from the local authority and were not indicative of her moving as a fugitive;
(6) T has been at the same school since September 2006;
(7) neither she nor T have hidden from the UK authorities.

Mr Scott-Manderson also relies on the fact that the mother had, she asserts, the same mobile telephone number and the same email address for 2 months after her arrival in the UK.

[69] On the Art 13(b), issue Mr Scott-Manderson submits that the evidence is such that the requisite test is more than sufficiently established. He robustly suggests that no mother should be expected to choose between her children as this mother would be, if I were to order T's return. He points to the likelihood that the family would be split as a result of the mother and T being locked into the USA and to the situation they would encounter in Oregon, both from the point of view of accommodation and financial support. He relies also on the guardian's evidence as to the impact on T if he were ordered to be returned – the devastating effect, as she described it.

[70] Finally, Mr Scott-Manderson submits that when I come to exercise my discretion, the balance is overwhelmingly in favour of T remaining in England.

[71] Mr K's factual position is that he will not go to the USA, having regard to all his connections being in England and to the uncertain position he would face there, even if he was permitted to go by the USA authorities. He also, as a result, would not agree to N going to the USA. Mr Williams, on his behalf, has focused his submissions on the issue of T's objections, psychological harm or intolerable situation and settlement. As to T's objections, he submits that the approach under the Hague Convention is established. Whilst acknowledging that there may be an element of adult influence, he argues that it is hardly surprising if T feels clear consternation at the prospect of returning to the USA. He submits that there are plainly elements of T's objections which are based on his own assessment of his situation, and that he has well-founded objective reasons for saying that he

will not return. On the issue of settlement, Mr Williams submits that on an over-arching view T is settled. The fact that there are elements where he might not be settled does not mean that he is not settled in his new environment.

[72] Mr Setright submits that none of the defences raised by the mother is made out, and that in any event my discretion should be exercised in favour of ordering T's return to the USA. Dealing first with his submissions on the issues of consent and acquiescence, these are set out extensively in his written skeleton. Further, in his written supplementary final submissions he has carefully analysed the evidence relating to the issues of consent and acquiescence. He reminds me that the onus is on the mother and of the need for clear and cogent evidence of consent, and that the mother must establish that the father subjectively agreed, or acquiesced, in the mother and T moving permanently to England. He submits that the mother has fallen far short of establishing either defence.

[73] On the issue of T's objections, Mr Setright submits that T is not particularly mature. He also submits that there are, as he puts it, strong warning signs that the objections being expressed by T are probably not his own and that he is subject to, or has been subjected to, a high degree of influence.

[74] In respect of settlement Mr Setright relies on the decision of *Cannon v Cannon* [2004] EWCA Civ 1330, [2005] 1 FLR 169 (which I will return to later in this judgment), including in particular the consequences of the concealment which he submits has occurred in this case. He submits that T is not emotionally or psychologically settled for the purposes of Art 12, saying that the facts of this case transcend those present in the decisions relied on by the mother and the guardian, namely *Re C (Child Abduction: Settlement)* [2006] EWHC 1229 (Fam), [2006] 2 FLR 797, and *Re C (Abduction: Settlement) (No 2)* [2005] 1 FLR 938. He also submits that T's situation does not 'import stability when looking into the future'. He submits that there have been many changes in T's life, and relies on the initiation of care proceedings in April 2007 as a result of concerns about his well-being. In his written submissions Mr Setright has listed the factors which led to the local authority commencing care proceedings, and relies on the fact that the mother and Mr K agreed the threshold criteria were satisfied. He also relies on a child protection conference report from 16 May, 2008 which outlines continuing concerns, including whether T's emotional needs are being met. In summary, Mr Setright submits that a child who has been the subject of such extensive local authority involvement and care proceedings cannot be settled for the purposes of Art 12.

[75] In respect of the reliance on Art 13(b), Mr Setright submits that it is, as he rightly says, only in the most extreme and exceptional circumstances that such a ground will be established.

[76] As to the exercise of my discretion, Mr Setright submits that I should order T's return although he accepts that if I find T is settled in his new environment, it would be difficult for him to succeed in contending that I should, nevertheless, decide in the exercise of my discretion to order T's return.

[77] Mr Howe, on behalf of the children, submits: (a) that T does object to returning to Oregon and that he is of an age and maturity when his views should be taken into account; (b) that the evidence, and in particular the

evidence from the guardian, establishes that T is settled, both physically and emotionally, in England. He points to the evidence that he is enmeshed in the family with whom he has been living since May 2005 and also that he is well settled at the school which he has been attending since September 2006. He also submits, correctly, that the guardian is particularly well informed in this case because of her extensive involvement with the family; (c) Mr Howe submits that there is a grave risk that T's return to the USA would expose him to psychological harm or would otherwise place him in an intolerable situation. Again, he relies principally on the evidence of the guardian as to the effect on T of a return to Oregon, either alone or with his mother. Finally, Mr Howe submits that when I come to exercise my discretion, the evidence on welfare overwhelmingly supports the conclusion that T should not be ordered summarily to return to Oregon.

Conclusions

[78] Turning now to my conclusions when I will also deal with some of the authorities to which I have been referred. Dealing first with consent and acquiescence: having regard to the decision I have reached on the other defences raised by the mother, as set out later in this judgment, I propose to address the issues of consent and acquiescence in relatively summary form. All counsel agree that consent must be real, positive and unequivocal. There is little in the mother's evidence to suggest that the father gave such consent. Her oral evidence was not as strong as her case set out in her affidavit. At one point she agreed that she had told the father that she was visiting family and friends. This does not easily fit with her stated case that the father consented to her and T travelling to England to stay with her boyfriend and staying here with T if they liked it. I consider that she was not as open with the father as she should have been, and that he did not understand that she was contemplating moving to live in England. Whilst I found elements of both the mother's and the father's evidence unsatisfactory, I did not find this part of the mother's case convincing. Accordingly, I am not satisfied on the evidence that the father gave the requisite consent.

[79] As to acquiescence, I have asked myself the question posed by Lord Browne-Wilkinson in the well-known decision of *Re H (Abduction: Acquiescence)* [1998] AC 72, [1997] 2 WLR 563, [1997] 1 FLR 872, namely, was it the father's subjective intention to go along with the wrongful retention of T in England or his wrongful removal to England? It would not be possible in the present case to establish the exception identified by Lord Browne-Wilkinson. With all due allowance to the father's position, it is clear to me that he did not actually do much in seeking to trace T. He had been told by the mother that they were coming to England. It does not seem to me that it would have been difficult to assume that his maintenance payments were being passed on by the Oregon Child Support Division to the mother. I have also found it very hard to understand, as I have indicated, why the father was not aware of what the mother had told T's school. However, assessing all the evidence I am not satisfied that the father subjectively intended to acquiesce in T's wrongful retention in England.

[80] Turning now to the issue of T's objections, the approach which the court should take in considering the issue of a child's objections was considered recently by the House of Lords in *Re M (Abduction: Zimbabwe)*

[2007] UKHL 55, [2007] 3 WLR 975, [2008] 1 FLR 251. At para [46] in the speech of Baroness Hale of Richmond she said:

> 'In child's objections cases, the range of considerations may be even wider than those in the other exceptions. The exception itself is brought into play when only two conditions are met: first, that the child herself objected to being returned and secondly, that she has attained an age and degree of maturity at which it is appropriate to take account of her views. These days, and especially in the light of Article 12 of the United Nations Convention on the Rights of the Child 1989, courts increasingly consider it appropriate to take account of a child's views. Taking account does not mean that those views are always determinative or even presumptively so. Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are "authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances.'

The House of Lords in that decision also decided that the incorporation of the use of the word 'exceptional' as part of the test when assessing the impact of a child's objections was inappropriate.

[81] The President also considered this issue in *Re F (Abduction: Acquiescence)* [2008] EWHC 272 (Fam), [2008] Fam 75, [2008] 2 FLR 1239 at [44]. He refers to a previous decision in which the court reviewed the questions which need to be explored by a judge when considering a defence based on a child's objections:

> 'They may be summarised in this way: (1) are the objections for return made out? In this connection is the child objecting to being returned to the country of habitual residence as opposed simply to expressing a preference for staying with the adopting parent?; (2) has the child reached an age and degree of maturity at which it is appropriate to take account of his views? (3) in this connection have those views been shaped or coloured by undue influence or pressure directly or indirectly exerted by the abducting parent to an extent which requires such views to be disregarded or discounted?; (4) if and to the extent that it is appropriate to take account of the child's objections in exercising the court's discretion whether or not to order return, what weight should be placed on those objections in the light of any countervailing factors and, in particular, the philosophy of the Convention or what have been called the Convention considerations. These are that the deterrence of abductors and the welfare interests of children are generally best served by the making of an order for prompt return to the requesting state of a consideration of the position by the appropriate home court. They also

include comity and respect for the judicial processes of the requesting state as well as welfare considerations directed to the position of the child in question.'

[82] I am satisfied in the present case that T's objections are genuine and are, to a sufficient extent, his own objections based on his views as the consequences of a return to Oregon. He gave the guardian a reasoned explanation for his position. It is not difficult to see the basis for his objections, particularly a separation from if not his mother, then very probably from N and the rest of his English family, and from his school and friends, coupled with the distance that he now feels has grown up between him and his life and family in America. I am also satisfied that T has reached an age and degree of maturity at which it is appropriate to take account of his views. There is no indication that he is substantially more or less mature than his chronological age. In my view, an 11 year old is likely to have attained a sufficient degree of maturity to make it appropriate to take account of their views. In this case the guardian has found T to be intelligent and when situations are explained to him, he understands very quickly and easily. The guardian expressed a degree of caution when she was trying to determine whether, and the extent to which, T's views might have been influenced by, or might reflect those of, his mother and Mr K. I bear this in mind when deciding the weight to be given to T's objections when exercising my discretion as to whether I should order his return. I deal with this later in my judgment.

[83] Turning now to the issue of settlement. The test for establishing whether a child is settled under Art 12 is set out in the case of *Cannon v Cannon*. The court has to consider not only the physical nature of the child's settlement, but also the emotional and psychological elements. In the judgment of Thorpe LJ he quotes from the judgment of Bracewell J in her decision of *Re N (Minors) (Abduction)* [1991] 1 FLR 413 as follows at 417–418:

> 'The second question which has arisen is: What is the degree of settlement which has to be demonstrated? There is some force, I find, in the argument that legal presumptions reflect the norm, and the presumption under the Convention is that children should be returned unless the Mother can establish the degree of settlement which is more than mere adjustment to surroundings. I find that word should be given its ordinary natural meaning, and that the word "settled" in this context has two constituents. First, it involves a physical element of relating to, being established in, a community and an environment. Secondly, I find that it has an emotional constituent, relating to security and stability … [following a quotation from a judgment of Purchas LJ] … He then returned to the "long-term settled position" required under the Article, and that is wholly consistent with the approach of the President in *M v M*, and at first instance in *Re S*. The phrase "long term" was not defined, but I find that it is the opposite of "transient"; it requires a demonstration by a projection into the future, that the present position imports stability when looking at the future, and is permanent insofar as anything in life can be said to be permanent. What factors does the new environment encompass? The word "new" is significant, and in my

> judgment it must encompass place, home, school, people, friends, activities and opportunities, but not, per se, the relationship with the mother, which has always existed in a close, loving attachment. That can only be relevant insofar as it impinges on the new surroundings. Every case must depend on is peculiar facts.'

[84] In addition, concealment or other subterfuge on the part of the abductor is, when present, an important factor when a court is determining whether a child is settled. Returning to Thorpe LJ's judgment in *Cannon v Cannon* [2004] EWCA Civ 1330, [2005] 1 FLR 169, he refers to the impact of concealment or subterfuge on an assertion of settlement at 187:

> 'This brings me to the second factor, namely, the impact of concealment or subterfuge on an assertion of settlement within the new environment. The fugitive from justice is always alert for any sign that pursuers are closing in and equally in a state of mental and physical readiness to move on before the approaching arrest …
> 61 In cases of concealment and subterfuge the burden of demonstrating the necessary elements of emotional and psychological settlement is much increased. The judges in the Family Division should not apply a rigid rule of disregard but they should look critically at any alleged settlement that is built on concealment and deceit especially if the defendant is a fugitive from criminal justice.'

[85] I have also been referred to another decision by the President, *Re C (Child Abduction: Settlement)*. In that case the mother and the child's immigration position was also uncertain. The President, on the evidence before him, was not prepared to assume that it was likely that the child or the mother would be deported in the near future. He also had to consider the impact on the child who had been subjected to bullying and had had a number of emotional disturbances. He decided that these factors did not affect whether the child was physically settled and whilst relevant did not demonstrate that she was not emotionally settled. He also commended the approach taken by Kirkwood J in *Re C (Abduction) (Settlement) (No 2*), the factual decision in the *Cannon* case, when having found settlement established, he identified factors to which the court should have regard when deciding how it should exercise its consequent decision, namely:

(a) the purposes of the Hague Convention;
(b) the mother's wrongdoing;
(c) the injustice to the father; and
(d) the welfare of the child.

[86] I must deal with the allegation that the mother concealed her and T's whereabouts from the father, this being a relevant factor. Although, as I have already indicated, I am not satisfied that the father consented to, or acquiesced in, the retention of the child in England, I am satisfied that the mother did not set out deliberately to conceal her and T's presence in England. She was not as open with the father and his family as she should have been. But, her actions were largely ones of omission rather than commission. The situation

in this case is similar to, although, in my view, less reprehensible than, the mother's behaviour in the President's decision in *Re C*. In that case the mother had left the USA without any communication with the father at all and was not found for a number of years. To adopt the President's words used in that case, the mother and T have not gone from place to place as fugitives. They have simply gone and settled in the area where the mother's current partner (namely, Mr K) lives.

[87] Although Mr Setright submits that the mother actively concealed her whereabouts from the father, many of the matters he relied on in cross-examination of the mother are, as I have said, matters of inaction rather than action surrounding her failure to communicate with the father or any of his family after her arrival in England. I also take the following matters into account. She told the father that she and T were going to England. Whilst she was not frank about the purpose of her visit, she did say she was visiting family and friends. I accept that she told T's school that she was coming to England and, to quote from the great-grandmother's letter, to 'check out living here'. I also accept that there were a large number of packing cases at the mother's home on 22 May when the father returned T after contact. Although the father may well not have seen these, there does not appear to have been any particular attempt to hide them. In addition, after she arrived in England the mother did not act as a fugitive. As I have said, she took no active steps to notify the father or his family of T's location, but she took no steps actively to conceal her and T's presence, apart from stating in the care proceedings that the father lived in Texas. She continued to use her name, and to use T's full name. She notified the Child Support Division in Oregon of her changes of address, albeit not until October 2006. There is no indication that she sought to prevent that address being given to the father. She continued to receive financial support from the father. There was, therefore, a continuing connection via the Child Support Division. I also accept that she sought to register her address with the US Embassy in London.

[88] I heard very powerful evidence from the guardian that T is both physically and emotionally settled in England. She has supported this assessment with clear evidence of T's very strong attachment to his family in England and of his integration into life, both in and outside the home – in particular, at school. Balanced against this are the factors which led to the initiation of care proceedings in April 2007 and the continuing concerns about T's care. However, as Mr Howe has submitted, it is clear that during the course of the care proceedings the mother and Mr K improved their parenting of T, and also that the physical circumstances of their home improved both with the move in February and the move to their current home in December 2007. The fact that concerns remain, and that there might be elements in T's life which are not settled, do not prevent him, in my view, from being settled in his new environment for the purposes of Art 12.

[89] I have come to the clear conclusion that as at the commencement of the Hague proceedings the evidence demonstrates that he was settled, in the full sense of the word, in his new environment in England. He has been going to the same school since September 2006 and has developed a circle of friends. He has been living with the same family, increased with the birth of N, since he arrived in England. He moved homes, but this has been with his family, in pursuit of better accommodation. He is physically, emotionally, and

psychologically integrated into this family and into his whole life in this country. Looking into the future, the only uncertain feature, as in *Re C*, is the immigration position of T and his mother. As in that case, on the evidence before me, I am not prepared to assume that it is likely that T or his mother will be deported in the near future. The position is not wholly clear, but, as referred to in the evidence, there is at least one route available to them by which they might acquire the right to reside in this country. Accordingly, I am satisfied that T is settled in England within the meaning of Art 12.

[90] I propose in those circumstances to deal more briefly with the case on grave risk of psychological harm and/or intolerable situation. It is agreed that the threshold which the mother faces in seeking to establish the matters set out in Art 13(b) is a high one. As Ward LJ said in *Re C (Abduction: Grave Risk of Psychological Harm)* [1999] 1 FLR 1145, at 1153:

> 'There is, therefore, an established line of authority that the court should require clear and compelling evidence of the grave risk of harm or other intolerability which must be measured as substantial, not trivial, and of a severity which is much more than is inherent in the inevitable disruption, uncertainty and anxiety which follows an unwelcome return to the jurisdiction of the court of habitual residence.'

[91] The House of Lords addressed the issue of a child being exposed to an intolerable situation in the more recent decision of *Re D (A Child) (Abduction: Custody Rights)* [2006] UKHL 51, [2007] 1 AC 619, [2006] 3 WLR 989, [2007] 1 FLR 961. Baroness Hale of Richmond, at para [52] of her speech, 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". It is, as Article 13(b) makes clear, the return to the requesting state, rather than the enforced removal from the requesting state, which must have this effect. Thus, the English courts have sought to avoid placing the child in an intolerable situation by extracting undertakings from the applicant as to the conditions in which the child will live when he returns and by relying on the courts of the requesting state to protect him once he is there. In many cases this will be sufficient. But once again, the fact that this will usually be sufficient to avoid the risk does not mean that it will invariably be so.'

Then she refers to Council Regulation (EC) No 2201/2003 of 27 November 2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000 (Brussels II Revised) (2003) OJ L 338/1 and to 'adequate arrangements' and continues:

> 'Thus it has to be shown that those arrangements will be effective to secure the protection of the child. With the best will in the world, this will not always be the case. No-one intended that an instrument

> designed to secure the protection of children from the harmful effects of international child abduction should itself be turned into an instrument of harm.'

[92] I have looked at the situation which would be created both if T returns on his own, and if he were to return with his mother. The mother would be forced to choose between T and N as result of Mr K's stated intention to remain in England and his not agreeing to N travelling with her mother. In my view, both the mother and Mr K would be presented with a terrible dilemma. It is entirely reasonable for him to refuse himself to travel to Oregon. He has nowhere to live and would have no means of supporting himself. It would create an almost Solomon-esque situation. Mr Setright sought in part to avoid the consequences of this by suggesting that the mother could make an application to this court for permission to take N with her to Oregon so that the court could decide what was in N's best interests. I do not consider this a practicable suggestion, and in any event it is not consistent with a summary return in response to the father's application under the Hague Convention. It also points out the consequences of a decision to order T's return.

[93] Additionally, T and the mother would very probably be locked into the USA for a significant period of time as a result of UK immigration rules. Their family life would be wholly dislocated as a result of this consequent division between the USA and England. The father's mother has very generously offered to accommodate both T and the mother in recognition of the fact that T could not go and live with the father and his new family. However, that does not address the effect on T of a return to the USA.

[94] If he returns alone he would be separated from the rest of his English family. The guardian gave evidence, which I found compelling, that T would be absolutely devastated if he had to return to Oregon and be separated from his family. This would not be significantly ameliorated if the mother decides to travel with him as, so the guardian told me, he would blame himself for being the cause of his family being split. There is no way, in the context of an application under the Hague Convention, in which that result can, in my view, be avoided or diminished.

[95] So, applying the approach set out in the judgment of Ward LJ and in the speech of Baroness Hale of Richmond I have asked myself whether there is clear and compelling evidence of a grave risk of harm or other intolerability which is substantial and of a severity which is much more than inherent in the inevitable disruption, uncertainty and anxiety which would follow from a return by T to the USA, and whether, to apply the words of Baroness Hale of Richmond, the situation would be one which is intolerable, namely a situation which T should not be expected to tolerate.

[96] In what I regard to be the rather unusual circumstances of this case, I have come to the conclusion that there is a grave risk that T would be exposed to psychological harm, or would otherwise be placed in an intolerable situation if I was to order his summary return to Oregon, principally for the reasons enunciated by the guardian in her evidence.

[97] As a result of my determination on the issues set out in this judgment I have a discretion as to whether I should order T's summary return to the USA. In the decision of *Re M (Abduction: Zimbabwe)*, in the House of Lords, Baroness Hale of Richmond expressly approved a passage from the judgment

of Thorpe LJ in *Cannon*, subject to a caveat in respect of the use by him of the word 'overriding'. What he said at 181–182, was as follows:

> 'For the exercise of a discretion under the Hague Convention requires the court to have due regard to the overriding objectives of the Convention whilst acknowledging the importance of the child's welfare (particularly in a case where the court has found settlement) …'

Turning to the speech of Baroness Hale of Richmond at para [43]:

> 'My Lords, in cases where a discretion arises from the terms of the Convention itself, it seems to me that the discretion is at large. The court is entitled to take into account the various aspects of the Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider consideration of the child's rights and welfare. I would, therefore, respectfully agree with Thorpe, L.J. … save for the word "overriding" if it suggests that the Convention objectives should always be given more weight than the other considerations. Sometimes they should and sometimes they should not.'

She continues, considering each of the so-called defences contained in the Hague Convention:

> '44 That, it seems to me, is the furthest one should go in seeking to put a gloss on the simple terms of the Convention. As is clear from the earlier discussion, the Convention was the product of prolonged discussions in which some careful balances were struck and fine distinctions drawn. The underlying purpose is to protect the interests of children by securing the swift return of those who have been wrongfully removed or retained. The Convention itself has defined when a child must be returned and when she need not be. Thereafter the weight to be given to Convention considerations and to the interests of the child will vary enormously. The extent to which it will be appropriate to investigate those welfare considerations will also vary. But the further away one gets from the speedy return envisaged by the Convention, the less weighty those general Convention considerations must be.'

Then Baroness Hale of Richmond quotes from *Re D (A Child) (Abduction: Custody Rights)* at para [45]:

> 'it is inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate.'

Baroness Hale of Richmond then deals with the child's objections. Finally, at para [47]:

> 'In settlement cases, it must be borne in mind that the major objective of the Convention cannot be achieved. These are no longer "hot pursuit"

cases. By definition, for whatever reason, the pursuit did not begin until long after the trail had gone cold. The object of securing a swift return to the country of origin cannot be met. It cannot any longer be assumed that that country is the better forum for the resolution of the parental dispute. So the policy of the Convention would not necessarily point towards return in such cases, quite apart from the comparative strength of the countervailing factors, which may well, as here, include the child's objections as well as her integration in her new community.

All this is merely to illustrate that the policy of the Convention does not yield identical results in all cases, and has to be weighed together with the circumstances which produced the exception and such pointers as there are towards the welfare of the particular child. The Convention itself contains a simple, sensible and carefully thought-out balance between various considerations, all aimed at serving the interests of children by deterring and where appropriate remedying, international child abduction. Further elaboration with additional tests and checklists is not required.'

[98] I consider that I can state my reasons shortly as a result, in particular, of my conclusions on the issues of settlement and Art 13(b). As Mr Setright accepts, it would be very difficult for me to come to any other decision, in the light of my conclusions on those issues, but that I should not order T's summary return. The factors which support such a conclusion in the present case are, to adopt the word used by counsel for the mother and the children, 'overwhelming'. The purposes of the Hague Convention are substantially diminished as a result of the passage of time. I take into account, of course, the extent of the mother's wrongdoings, as referred to earlier in this judgment, and the injustice to the father. However, when I consider the weight to be given to the degree to which T has integrated into his new life both physically and emotionally, and to the consequences for him of an enforced return, as enumerated by the guardian, I can only conclude that it would be inconsistent with his welfare to order his return. Added to this, I must, of course, give some weight to his own reasoned objections. I also consider that England is now much better placed to decide any welfare issues than the courts of Oregon. Apart from the very important presence of T's father and his paternal family in Oregon, the majority of T's connections are now with England. Further, the courts here have already been involved for a substantial period of time.

[99] I appreciate that a great deal of this judgment will make painful reading for the father. I trust that he, and indeed other members of his family, will understand that the focus of my judgment has been on the issues raised in these proceedings rather than the much broader assessment which would take place as part of any welfare hearing. Further, from that perspective, to them this judgment may not seem balanced. I have no doubt that the father and his family – especially his great-grandmother with whom T, as I have indicated, clearly had a close relationship – have much to offer him in the future.

(Adjourned for a short time)

MR SETRIGHT: 'My Lord, what follows from the judgment does not appear to raise any difficulties at all after some short discussions at the

Bar. There will be an order which Mr K can prepare and circulate which simply provides for the dismissal of the originating summons. Of course, with the originating summons go all the attendant restrictions, including any restrictions on passports, and including the staying of the care proceedings. My learned friend for the local authority must consider in the light of that – and, dare I say it, fast – what, if any, restrictions or otherwise she seeks to perpetuate. There may be none.'

MOYLAN J: 'The care proceedings were adjourned generally to await the outcome …'

MR SETRIGHT: 'To be mentioned now. So, those proceedings are before your Lordship, but they are before your Lordship only to the very limited extent that any necessary continuation orders can be considered under the new heading, and to fix a date for directions in those proceedings. There it may well be that junior counsel – it being a directions hearing – can discuss very shortly available dates for a hearing in, hopefully, the very near future. No secret but that the father, and perhaps the extended family, will wish to take a part in those care proceedings that they have not taken hitherto.

Consequential orders. It would be helpful to have a transcript of my Lord's judgment to be made available in the care proceedings. That is certainly uncontroversial as between the parties. I know that my learned friend, Mr Scott-Manderson, would like permission for that transcript to be provided to the mother's immigration lawyers. For the moment I cannot see any particular reason why that should not happen.'

MOYLAN J: 'No, nor can I.'

MR SETRIGHT: 'Therefore, that should be facilitated. My Lord, that, subject to the provisions for costs and legal aid taxation – and might I commend no order on the first save for a provision of the latter – would complete, save for some small observations on the judgment, the order in the Hague proceedings.

As to the judgment there are some very small suggestions that we have to make. The one I have to make is this: when my Lord was referring to the threshold he said that the threshold had been agreed by the parents. That is not strictly so.'

MOYLAN J: 'No. Quite right.'

MR SETRIGHT: 'The distinction is an important one.'

MOYLAN J: 'Of course it is.'

MR SETRIGHT: 'Father was not involved.'

MOYLAN J: 'Absolutely.'

MR SETRIGHT: 'The threshold, as I understand it, was agreed by the Mother of T and N. I understand from my learned friends that it may well be that Mr K did not agree the threshold. '

MOYLAN J: 'I understood it was agreed by both.'

MR SETRIGHT: 'I will leave that to Mr Williams in his turn. From my point of view, I seek to draw my Lord's attention to that.'

MOYLAN J: 'You are absolutely right. That is just a mis-description.'

MR SETRIGHT: 'I am sure my Lord, in due course, will wish to correct that. My Lord, those are the points that I seek to raise.'

MOYLAN J: 'Thank you very much.'

MR SCOTT-MANDERSON: 'My Lord, just a few terribly small points. The Mother needs her passport, I understand, for the immigration application. The immigration solicitors would like to have the passport. I would assume from that that T's would be necessary as well. That is the reasoning behind that. There is a miniscule point in the judgment – Administration of Justice Act 1999. Access to Justice Act …'
MOYLAN J: 'Yes.'
MR SCOTT-MANDERSON: 'My Lord, in relation to the judgment release to immigration solicitors, we would thank the court for release if we may have that. Would my Lord also consider that it could be then disclosed also to the Home Office in any immigration application, and to any tribunal or court in the immigration application?'
MOYLAN J: 'Unless anybody else objects I cannot see any reason why not. I can see reasons why it should be. '
MR WILLIAMS: 'My Lord, in relation to the threshold as far as Mr K was concerned, technically it had never been finally agreed. It was due to be agreed at the hearing on 1 February, but because it did not get to the final determination, it was not actually agreed.'
MOYLAN J: 'By anybody, or are you saying not by …'
MR WILLIAMS: 'I can only speak on behalf of Mr K. As far as Mr K is concerned, it has not been finally agreed.'
MOYLAN J: 'I cannot now recollect where I got the belief that it was an agreed threshold.'
MR WILLIAMS: 'It does say on its face, my Lord, that it is an agreed threshold because it was anticipated that it would be. It is just because it was not formally approved by the court on 1 February because by then the Hague Convention proceedings had started.'
MOYLAN J: 'So, you are saying it was certainly not agreed by your client.'
MR WILLIAMS: 'No. That is right.'
MOYLAN J: 'Was it agreed by yours?'
MR SCOTT-MANDERSON: 'It was agreed by counsel on behalf of the Mother.'
MR WILLIAMS: 'My Lord, then just two dates. My Lord referred to the social worker finding a reference to T and said that that was in December 2006. It was December 2007.'
MOYLAN J: 'Of course it was.'
MR WILLIAMS: 'My Lord referred to the letter from CE. My Lord in fact said that the letter referred to 'June 2005 when it should have referred to June 2005'.
MOYLAN J: 'I meant 2004 and 2005. I thought I heard myself saying that. I could not bring myself to go back.'
MR WILLIAMS: 'My Lord, that is all.'
MR HOWE: 'My Lord, I have no corrections and there are no directions that I seek.'
MOYLAN J: 'How are we going to get a directions hearing?'
MISS FOULKES: 'That may be a matter that junior counsel can arrange between ourselves. We would want a directions hearing fairly

shortly – probably within a week we would be ready to be accommodated – in order to deal with the consequences of your Lordship's judgment of today.'

MOYLAN J: 'Do you think you will be able to get one within a week?'

MISS FOULKES: 'I think we may need to liaise with the Registry in relation to that. But, certainly we anticipate having a hearing as soon as possible. (After a pause): I am being corrected. In fact, the care proceedings were transferred to this court, to be joined effectively with the Hague Convention proceedings.'

MOYLAN J: 'I am slightly concerned that if you go off and try and get a directions hearing, when are you going to get it?'

MR SETRIGHT: 'My Lord, my suggestion for what it is worth is that if junior counsel can agree a date, the usual hopeful telephone call can be made to the Clerk of the Rules and a listing at risk on an hour's estimate can be obtained. That is the only way, I fear, it can be done.'

MOYLAN J: 'I am out on circuit for the next two weeks and so it could not be if it was within the next two weeks.'

MR SETRIGHT: 'The directions could not be your Lordship, but your Lordship is certainly not disqualified from hearing the care proceedings.'

MOYLAN J: 'I am just, for information, saying that I will not be here. Obviously, it would be easier for me to undertake anything than anybody else.'

MR SETRIGHT: 'I know that my learned friend for the local authority has the ambition of bringing them on very quickly, but judicial continuity, particularly that in a week's time it is manifestly unlikely that a transcript of your Lordship's judgment will have been prepared, would be exceedingly helpful. I am going to leave that to her because she is running the care proceedings.'

SPEAKER: 'If, indeed, your Lordship will be back in this court in about three weeks' time I do not think there will be any huge prejudice in waiting until that time. Indeed, there would be a great deal of benefit in keeping judicial continuity. I would be content for the matter to be adjourned to a directions appointment.'

MOYLAN J: 'It seems sensible, but I leave you to liaise with the Clerk of the Rules to identify when is a good date. (After a pause): I will keep the bundles. I apologise for deciding to duck the Oregon law issue. Thank you.'

Order accordingly.

Solicitors: *Dawson Cornwell* for the applicant
TV Edwards LLP for the respondent
Fisher Meredith for the second respondent
Bindmans for the guardian

PHILIPPA JOHNSON
Law Reporter