

JERSEY / JUDGMENT

S v S [2008] JRC 099 (20 June 2008)

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judgment

the deputy bailiff: 1. In this case the plaintiff ("the father") applies for an injunction ordering the defendant ("the mother") to return the child of the marriage to the jurisdiction and restraining her thereafter from removing the child from the jurisdiction without the father's consent or until further order. I refused to grant the order requested by the father on an ex parte basis but, following an inter partes hearing on 22 nd May, the Court granted the orders sought. We now give our reasons for that decision.

Background

2. The parties originate from England. They married in August 2001 and settled near Huntingdon, Cambridgeshire. Their daughter G was born in October 2003 and is accordingly now approximately 4½. She has Down's syndrome. Since G's birth the mother has stayed at home to look after her. 3. In October 2006 the family moved to live in Jersey because the father had been offered employment here. Initially they lived in a flat by the husband's place of work but in early 2007 they purchased a three-bedroomed house in their joint names and that has been the matrimonial home since then. 4. Initially G attended nursery school but, since September 2007 she has attend Mont a l'Abbé School, which is a specialist school for children with special needs. 5. Over New Year 2007 the family went on holiday to North America. On their return to the United Kingdom the mother said that she did not wish to return to Jersey and went with G to stay at her aunt's home. However, almost immediately she decided that she wished to return to Jersey after all, which she did. 6. From 11 th
- 13 th April 2008 the family went to England in order to visit the father's mother, who was quite seriously ill. On the evening of 12 th April the mother said that she wished to visit her mother in Chelmsford, Essex. Accordingly, she and G went to Chelmsford and the husband returned to Jersey. He re-arranged the flights so that the mother and G could fly back to Jersey on Wednesday 16 th April. During a subsequent telephone conversation the mother said that she would not be coming home on Wednesday and she planned instead to return to Jersey on Sunday 20 th April. On that day the father went to the airport to meet the mother and G but they did not arrive. He was unable to contact them on the telephone although he received a text saying 'still in UK'. He subsequently contacted the police and eventually was able to speak to the mother who informed him that she proposed to stay in England. 7. That

remains the position. The mother and G are in England living with the mother's mother in Chelmsford and the mother has made it clear that she does not intend to return to Jersey and that the marriage is over. She has said that the father may only have contact with G at the grandmother's house but the father has not so far felt able to take up this offer as he believes that the tension between the parents might spill over and affect G. The proceedings 8. On 30 th April the father applied to this Court for a residence order, which application was served on the mother on 1 st May. A first review date was fixed before the Registrar for 28 th May. 9. On 1 st May the mother applied for a residence order in the Chelmsford County Court. That application was served on the father on 3 rd May and a first mediation appointment was fixed, also for 28 th May. 10. On 7 th May the father applied ex parte by order of justice with supporting affidavit for an injunction requiring the mother to return G to Jersey. I declined to make such an order on an ex parte basis. The papers were served on the mother for an inter partes hearing to take place on 22 nd May. In the meantime, on 8 th May, the father issued a petition for divorce in this Court. 11. The mother did not attend the hearing on 22 nd May but swore an affidavit and was represented by Advocate Winchester. The father did attend. As well as his affidavit evidence, he gave oral evidence and was cross-examined by Mr Winchester. The Law 12. The Court has jurisdiction where a child is habitually resident in the island - see Article 5(1) of the Child Custody (Jurisdiction) Law 2005 . Furthermore, under Article 31 of the Children (Jersey) Law 2002, both parents have parental responsibility in respect of G. 13. Mr Winchester did not dispute that G was habitually resident in Jersey and in our judgment he was right not to do so. The family's home has been in Jersey since October 2006. They have no other home. They have purchased a property in Jersey which is the matrimonial home. The husband's employment is in Jersey for the foreseeable future and G was at school in Jersey until April. 14. It is clear from the decision of Wall J in *Re S (Minors)* (Child Abduction:Wrongful Retention)

(1994) 1 FLR 82 that, where both parties have equal rights of custody, no unilateral action by one of them can change the habitual residence of their child, save by the agreement or acquiescence over time of the other parent, or court order determining rights of residence and custody. 15. We have no hesitation in finding that G has been wrongfully retained in England by the mother. The father did not consent to such retention and the retention is in breach of his rights of custody. Accordingly, were the position governed by the Hague Convention, an English court would, we respectfully suggest, order the immediate return of G to Jersey. 16. However, somewhat surprisingly, it would seem from counsel's researches that the protection offered for children who are abducted or wrongfully retained as between Jersey and England is considerably weaker than that given to those from countries who are signatories to the Hague Convention. Advocate Colley sought to argue that the English courts would have no jurisdiction in the case of G because her circumstances could not be brought within the terms of Section 2(1) of the Family Law Act 1986. However, that would be a matter entirely for the English courts and it is not a matter for us to consider. 17. She went on to argue that if, contrary to her primary submission, the English courts did have jurisdiction to consider G's case, the leading authority on the

applicable principles was *Re J (A Child) (Return to Foreign Jurisdiction: Convention Rights)*

[2005] 3 All ER 291 from which it appeared that, whilst the English courts might find it convenient to start from the proposition that it was likely to be better for a child to return to his home country for any disputes about his future to be decided there, the test was the welfare of the child and the English courts would therefore reach their own decision on whether they considered it to be in the best interests of the child for his future to be decided in England or for him to be returned to his country of habitual residence for the courts there to decide the matter. That is of course not the test in relation to Hague Convention cases. 18. As we have said, matters of English law are a matter entirely for Chelmsford County Court and it would be quite wrong for us to express any view on the matter. Our duty - as required by Article 2(1) of the Children (Jersey) Law, which states that the welfare of a child is the paramount consideration - is to consider whether it is in G's best interests for her to be returned to Jersey pending a long term decision on whether she should reside with her mother in England or her father in Jersey. The submissions 19. The father gave evidence before us. We are satisfied that he is motivated entirely by love and concern for G and that he is seeking to do what he considers to be in her best interests. He stated that he does have concerns about the mother's wellbeing. He says that since G's birth, she has changed from the self confident person that she was when they married and appears to have become depressed. Indeed, on two occasions, her general practitioner had referred her to a psychologist because of such concerns but she had not taken up the appointments. G had missed school on many occasions and it appeared sometimes it was simply because the mother wanted G to be with her. Certainly the figures produced from the school suggest that G has missed the equivalent of 39 days in the two terms that she has been there, which does seem rather high even allowing for the week in December which the mother admits G missed because the mother had got the wrong dates for the end of term. 20. Given the difficulties which had arisen between them, the father accepted in evidence that it would not be reasonable to expect the mother to return with G to the matrimonial home if he were still living there. Accordingly he undertook to move out and seek alternative accommodation so that the mother and G could live in the matrimonial home pending a final decision on where and with whom G should reside. 21. The father said that, if G remained in Chelmsford pending a decision on her long term future, it would be difficult for him to have regular contact with her. The mother had proved difficult. Despite the fact that the father's mother was terminally ill, the mother had refused to allow the father to take G to see the paternal grandmother, which had been a matter of some distress to the paternal grandmother. As an alternative he had suggested contact on neutral ground but this had also been refused by the mother although she had recently indicated a willingness to consider that as a possibility. If, on the other hand, they were in Jersey G would be able to have regular contact with both parents in that she would be residing with the mother in the former matrimonial home but able to see the father on a generous basis. 22. As to long term plans, he believed that it

was in G's best interests to grow up in Jersey. It offered a safe environment. The father said that G was a trusting person who could easily be taken advantage of. He felt that the chances of her being able to live some form of independent life as she grew older were greater in Jersey than in England. His employment was flexible and he was satisfied that he would be able to make adequate arrangements for G's care if he were to be granted a residence order in due course. 23. Mrs Colley submitted that, for the reasons put forward by the father, G's welfare would best be served by securing that she remain in the matrimonial home and attend the school with which she was familiar whilst her long term future was decided. She added that there was also an important public interest point. Parents of children whose home was in Jersey should not think that one of them could 'steal a march' on the other by unilaterally taking a child to England and thus enabling an argument to be developed by the time of the full hearing that the child's home was now in England and that it would be disruptive to return the child to Jersey. Indeed, that was the whole thinking underlying the Hague Convention. It was important that the Court should send out a clear message that such conduct would not achieve its purpose. 24. Mr Winchester submitted that the mother had been the primary carer of G since her birth. It was likely that the welfare of G would ultimately lead to a residence order being made in favour of the mother, whether by this Court or the Chelmsford Court. It would not be in G's best interests to return to Jersey for a while before going back to England after the conclusion of the final hearing. 25. Although he accepted that Jersey was G's place of habitual residence, the parties had only been here for a comparatively short time. Before then they had lived in Cambridgeshire. It was likely that both parents remained domiciled in England given the short period of residence in Jersey and the doubt over whether any intention to settle here was sufficiently permanent. The connection with Jersey was therefore much less than in many such cases. 26. G and the mother were residing with the maternal grandmother. The mother's sister lived within reasonable reach. Accordingly there was a support network in Chelmsford which would not be available in Jersey. Although it was accepted that Mont a l'Abbé had been an excellent school and that G had thrived there, there was no reason to think that equally good schools suitable for G's needs could not be found near Chelmsford. 27. In summary, he submitted that G's welfare

- and this was the sole test - would best be served by remaining with her mother and grandmother in Chelmsford pending a decision by the Chelmsford County Court as to which parent she should reside with in the long term. Decision 28. It is important to state at the outset that this Court is not making any decision on whether G's long term best interests would be served by living in Jersey with the father or in England with the mother. It is concerned solely with where G should reside pending determination of that issue. The fact - if it should transpire
- that G remains in Jersey pending that decision does not give any advantage to the father. This Court is very familiar with applications by a parent to re-locate with the child or children of the marriage to another jurisdiction and regularly makes orders permitting this to occur. 29. Like Baroness Hale in *Re J*, we start with the general proposition that it is likely

to be in the best interests of a child that she not be moved unilaterally from her home surroundings and all that she is familiar with. On the contrary, given the instability which almost invariably arises following the separation of parents, it is likely to be in the child's best interests to retain as much stability in other areas as possible, e.g. home surroundings, school, friends etc. Thus it is likely generally to be best for the child to remain in the country in which she has been habitually resident whilst her long term future is decided by the courts of that country. 30. We have come to the clear conclusion that, in this particular case, G's best interests would be served by she and the mother returning to Jersey (with the father moving out of the matrimonial home) and remaining here until her long term future is decided by this Court following production of detailed welfare reports etc. Our reasons are as follows:- (i) The evidence suggests that G is well settled in Jersey. She is very young and has spent most of that part of her life that she will be able to recall in Jersey. The family home with which she is familiar is here and she has been attending a school where there seems to be little doubt that she has thrived. She is familiar with the surroundings and with the other pupils at the school. There will therefore be no additional stress on her by remaining in the matrimonial home with her mother and attending the school where she is happy. (ii) Conversely, although she has lived previously in Cambridgeshire, she has never lived in Chelmsford although no doubt she has visited the grandmother there from time to time. She will have to make new friends and, most importantly, she will have to go through the experience of attending a new school. This is always a testing experience. Of course, such a change may be necessary following any decision on her long term future but it is undesirable to put her through such pressures when it has not yet been decided where her long term future lies. (iii) If she remains in England pending a final hearing on her future, contact with the father is likely to be problematic. In the first place the father will have to travel over to England and this means that there will be a limit as to how frequently contact can take place. Secondly, it is not clear where contact would take place. It seems unlikely that satisfactory contact can take place in the grandmother's home. It would therefore have to take place elsewhere such as a hotel where the father is staying, but that is inherently less desirable than contact in the parties' respective homes. Conversely, if the mother and G were residing in the matrimonial home in Jersey and the father were residing in another home in Jersey, contact could take place frequently and in a natural manner. The prospects of both parents being able to maintain an appropriate quantity and quality of time with G seem better in Jersey than in England, given that the father will continue to reside in Jersey because of his employment. 31. We emphasise that this decision contains no implication as to the outcome of any hearing on G's long term future. Any such decision would only be made after all necessary reports and evidence has been obtained. Assuming that the mother complies with this order and undertakes not to remove G permanently from the jurisdiction without the Court's leave, there would seem to be no reason why she should not be given permission to go for holidays with G to see the maternal grandmother. That would give an opportunity for a Court Welfare Officer to report on the position in Chelmsford if that is where the mother decides she wishes to make her long term future. 32. In summary, we consider that G's best interests would be served by her remaining in the environment with

which she has been familiar for much of her young life so that as little disruption and disturbance as possible is caused to her pending a decision on her long term future. We do not consider the fact that she has now spent some six weeks or so in England leads to a different

conclusion.

At her age, her main comfort and familiarity will still be with her home and her schooling in Jersey provided that her mother is also here. We therefore granted the injunction ordering the mother to return G to the jurisdiction and thereafter not to remove G without the consent of the father or further order of this Court. Authorities Child Custody (Jurisdiction) Law 2005. Re S (Minors) (Child Abduction:Wrongful Retention) (1994) 1 FLR 82. Re J (A Child) (Return to Foreign Jurisdiction: Convention Rights)

[2005] 3 All ER 291 . Children (Jersey) Law 2002. Page Last Updated: 15 Mar 2017 BAILII:
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