

De facto Rights of Custody Under The Convention on the Civil Aspects of International Child Abduction

A comparative analysis of Re B (A Minor) Abduction [1994] 2 FLR 249, Re Flack (Unreported, High Court of Justice (Family Division) (UK), Butler-Sloss P, 12 December 2002) and State Central Authority v LJK (2004) FLC ¶93-200

1. Introduction

Are custodial rights under the Convention on the Civil Aspects of International Child Abduction ("Convention") restricted to legal rights, or can they extend to situations where a person is exercising factual parental responsibility notwithstanding their lack of formal legal responsibility by court order or operation of law? This case note reviews the leading case on the topic, *Re B (A Minor) Abduction* [1994] 2 FLR 249, in which custodial rights existed based on the factual care of a child, *Re Flack* (Unreported, High Court of Justice (Family Division) (UK), Butler-Sloss P, 12 December 2002) and *State Central Authority v LJK* (2004) FLC ¶93-200. In the Australian case, the Family Court of Australia extended *Re B (A Minor)* to a situation where factual care had overtaken a contradictory court order.

2. *Re B (A Minor) Abduction* [1994] 2 FLR 249

The child in *Re B (A Minor)* was born in Australia and 6 _ years old at the date of judgment. The child's parents lived together but were never married. Following the parent's separation, the mother returned to Britain. The child remained in Western Australia and was cared for by his maternal grandmother and father. From April 1993 onwards, the child spent weekdays with his father and weekends with his maternal grandmother. In 1993, the maternal grandmother took the child to Britain. In January 1994, the mother applied for wardship in the Welsh Courts.

The father did not have legal parental rights to the child because, at the time, s 35 of the *Family Court Act 1975 (WA)* awarded custody and guardianship of a child to the mother if a child's parents were not married. Notwithstanding this, the issue was whether the father had custodial rights for the purpose of the Convention. A majority of the Court found that he did. Waite LJ (Staughton LJ agreeing) stated that the purpose of the Convention was partly humanitarian, and that its objective was to spare children from the disruption of being removed arbitrarily from their settled environment. His Lordship held that "rights of custody" should be construed to accord with that objective and that, in most cases, the term would be given the widest possible meaning. His Lordship acknowledged the difficulties in defining the limits of the concept of rights, and stated that whether or not a parent "exercising functions...of parental or custodial nature without the benefit of any court order has custodial rights" depends on the circumstances. The father was found to have custodial rights because he was the child's primary caregiver.

3. *Re Flack* (Unreported, High Court of Justice (Family Division) (UK), Butler-Sloss P, 12 December 2002)

The child in *Re Flack* was born in the Britain and 5 years old at the time of judgment. The mother and father were never married, and had 3 older children together. A court order granted the father parental responsibility for the older children. The order was necessary because, as an unmarried father, the father did not automatically have parental responsibilities. No order was made in relation to the youngest child. The father's paternity of the youngest child was uncertain, however, the mother acted as if the father was the child's biological father. In late 1999, the mother left the children to be cared for by the father. In February 2002, the mother moved to Australia. The mother was then party to an abduction during which the child was taken to Australia.

If the father was the biological father of the child, he had custodial rights based on *Re B (A Minor)* and *Re O (Child Abduction: Custody Rights)* [1997] 2 FLR 702. The issue was whether the father had custodial rights if he was not biologically related to the child. On that issue, Butler-Sloss P found in favour of the father. He had custodial rights, irrespective of whether or not he was the

child's biological father. Her Honour stated "that are circumstances in which a person who is not related by blood to the child who has been in his care may nonetheless be found to have inchoate rights of custody". Her Honour added that her finding accorded with the underlying purpose of the Convention as well as the principle established in *Re B (A Minor)* that custodial rights could arise out of the fact of exclusive care. She noted that the case before her was unique, that the father had sole exclusive care of the child, that he would be likely to obtain a residence order in his favour from the Family Court, and that the child had been raised believing that the father was his biological father. Her Honour believed that *Re B (A Minor)* should not be extended beyond the facts before her.

4. State Central Authority v LJK (2004) FLC ¶93-200

State Central Authority v LJK concerned a child who was 5 years old at the time of judgment. The child's parents met on the internet, and in mid-1998 the mother travelled to the United States of America ("USA") for 3 weeks to visit the father. She returned to Australia, and the child was born in Australia. On 9 September 1999, the Family Court of Australia ordered that the child reside with the mother and that she have sole parental responsibility for the child's short-term and long-term care, welfare and development. The father's contact was reserved. In October 2000, the mother and child travelled to the USA. The parents reconciled and were married in December 2000. The parents and child resided together in the state of Virginia until 31 October 2002 when the mother returned to Australia with the child. The mother argued that she had not wrongly removed the child because the Court order stated that she had sole responsibility for the welfare of the child (including the right to decide where he lived).

Justice Morgan of the Family Court of Australia held the father had custodial rights for the purpose of the Convention on the two bases. Firstly, Her Honour concluded, on a balance of probabilities, that at the time of the child's removal from the USA, the father had a right of custody under Virginian law. There was no Virginian case law directly on point, but Her Honour accepted the expert evidence of Mr Crouch that the Virginian Courts would find it "extremely persuasive" that remarriage nullified prior custody orders in 15 other American states. Her Honour found that the "the logic of a marriage operating to merge the parents' formerly individual custody rights into a joint right...works just as well with formerly out of wedlock parents as with formerly married parents". Secondly, Morgan J adopted *Re B (A Minor)*, as expanded upon in *Re O (Child Abduction: Custody Rights)*. Her Honour held that the "father had a fatherly relationship with the child and cared for him and fulfilled the ordinary everyday functions of a parent with whom the child was living" in such a way that he "was exercising a *de facto* right of custody". Her Honour stated that the Court would not allow the above to be disrupted abruptly or without due opportunity for a consideration of the child's welfare.

5. Comment

The cases of *Re B (A Minor)*, *Re Flack* and *State Central Authority v LJK* firmly establish that a person can possess rights of custody under Australian and English law for the purposes of the Convention, even though they lack formal legal parental rights (whether by way of court order or operation of law).

The cases make it clear that *de facto* rights of custody arise from the fact of exclusive care of a child in a family environment and not from some other connection, such as blood relation. The English High Court of Justice explicitly ruled on this point in *Re Flack*. The cases are also authority for the proposition that the fact of exclusive care of a child is capable of superseding formal legal parental rights, irrespective of how the latter arose. In *Re B (A Minor)* and *Re Flack*, statutory provisions which effectively awarded custodial rights by operation of law were overtaken by the factual circumstances. In *State Central Authority v LJK*, an order that granted the mother sole parental responsibility did not prevent the father from acquiring custodial rights.

De facto custodial rights, however, are not without limits. In *Re Flack*, Butler-Sloss P confined her judgment to the specific circumstances and stated that she "did not see [it] as an extension of the

inchoate rights of custody *to someone who is not a member of the family*"(emphasis added). Her Honour also noted the danger of applying the principle to people who care for a child for a limited period of time. Like other cases, each case in this area will be determined on its unique facts.

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