

**IN THE MATTER OF G and T (Minors)**

SUPREME COURT (Schofield, C.J.): February 24th, 1998

*Family Law—children—abduction by parent—powers in wardship proceedings derived from pre-1991 English law and practice—governing principles: (a) child's welfare first and paramount consideration; (b) child to be returned if welfare best served by curtailing disruption caused by removal; and (c) decisions on custody best made in country of residence*

The mother of two children who had been made wards of court following their kidnap by the father applied for custody, care and control.

The parties had been married for 10 years, during which the wife had suffered periodically from depression and had abused alcohol. The duration and extent of this dependence was in dispute. Just before the birth of their second child, a boy now aged four and a half, the couple moved to Spain to live. The elder of their two children, now aged nine, was at first looked after by the husband whilst the wife worked as a television executive, but after the move to Spain was cared for, with her brother, primarily by the wife.

The parties' relationship deteriorated following their move to Spain. The wife alleged that marital breakdown occurred as a result of the husband's aggressive and violent conduct toward her, causing her to move to a women's refuge and seek a decree of separation in the Spanish courts. She was granted interim custody of the children there, with access for the husband. The husband alleged that his wife's alcoholism had been the cause of disharmony, that she had alienated friends and neighbours and was unfit to look after the children. This was disputed by medical and character witnesses for the wife.

Following failed attempts at reconciliation, the husband absconded with the children, intending to take them back to England but only reaching Gibraltar, since their passports had been surrendered to the Spanish court. He placed the children in a local school. The wife discovered their whereabouts and applied for a wardship order and for custody. The husband applied for the order to be lifted and for care and control of the children.

**Held**, awarding interim custody to the wife to allow her to return with the children to Spain:

(1) Since Gibraltar was unfortunately not a party to the Hague Convention on the Civil Aspects of International Child Abduction, its jurisdiction to make orders relating to the custody of children in wardship

proceedings where abduction had occurred was founded on pre-1991 English law, applicable under ss. 12 and 15 of the Supreme Court Ordinance. The relevant principles to be applied were: (a) as in all cases involving children, that the welfare of the child was the first and paramount consideration; (b) that the court should not seek to penalize any adult for his conduct but should return the child to the country from which he had been removed if it was in his best interests to end the disruption to his life caused by the abduction; and (c) any decision relating to custody was best made in the jurisdiction in which the child had been ordinarily resident (page 236, line 43 – page 237, line 33).

(2) Since there was no convincing evidence that the wife remained alcohol-dependent or was unable or unfit to care for the children, since they had been in Gibraltar only a short time and since, in view of their young ages, the wife was best placed to care for them in Spain, the court would allow her to return there with them. The wardship orders would be lifted when the court received notification that they had resumed residence there (page 238, lines 1–24; page 239, line 26 – page 240, line 4).

**Case cited:**

(1) *K (A Minor) (Wardship Jurisdiction), In re*, Supreme Ct., Misc. No. 16 of 1994, unreported, *dicta* of Harwood, A.J. applied.

**Legislation construed:**

Supreme Court Ordinance (1984 Edition), s.12:

“The court shall in addition to any other jurisdiction conferred by this or any other Ordinance, within Gibraltar and subject as in this Ordinance mentioned, possess and exercise all the jurisdiction, powers and authorities which are from time to time vested in and capable of being exercised by Her Majesty’s High Court of Justice in England.”

s.15: “The jurisdiction vested in the court shall be exercised (as far as regards practice and procedure) in the manner provided by this or any other Ordinance or by such rules as may be made pursuant to this Ordinance or any other Ordinance and in default thereof, in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice.”

*D.J.V. Dumas* for the plaintiff;  
*G.C. Stagnetto* for the defendant.

**SCHOFIELD, C.J.:** Mr. and Mrs. T were married in London on June 2nd, 1988. The husband was 47 years old at the time of the marriage and had been pensioned out of the British Army. The wife was 34 years old and was an executive with the Channel 4 television company in London. The parties had met in Spain, had lived together for two years prior to

their marriage and spent the first five years of their married life in London.

The wife stole about £35,000 from her employer which resulted in her appearing before Southwark Crown Court facing several charges of theft, to which she pleaded guilty in February 1993. She received a suspended prison sentence of two years together with a two-year supervision order and was ordered to pay compensation to her employer. Reports provided to the court show that the wife had suffered from depression and, for a period of three months in late 1991, had abused alcohol. Subsequent medical reports have resulted in the wife receiving medical benefits from the UK Government as she is unfit to work because of nervous debility. She was treated for depression in 1992 and again in 1996 and 1997, but at this moment in time is not suffering from the illness.

I should add here that the wife suffered two miscarriages, one in 1990 and one in 1992. The husband claims that they were abortions, not miscarriages, and that they were undertaken against his will. I do not consider this disagreement between the parties, as with many of the disagreements between them, to be relevant to the decision I have to make. For the sake of completeness, I should also add here that the husband receives a war pension and has suffered from “post-concussional syndrome” since taking a serious fall, it seems after he left the British Army. He left the army because of a less serious injury.

The parties met in Spain and, in March 1993, decided to move to Almeria on a permanent basis. From then on the marriage has deteriorated. The cause of that deterioration has been, according to the wife, her husband’s aggressive and violent conduct towards her. Its cause, according to the husband, has been his wife’s alcoholism. The husband maintains that his wife has drunk heavily throughout the marriage and drinks to such an extent that she becomes incapable of looking after herself and has destroyed the parties’ relationships in the neighbourhood in which they live. The husband’s affidavit contains a number of alleged instances of his wife’s drunkenness, all of which are denied by the wife.

G, a girl, was born to the parties in London on January 9th, 1989. The wife was still working as a television executive at the time of her birth and soon after the birth returned to work, leaving the husband to look after G. There is evidence that the wife was unhappy with that situation. In any event, she has not worked since the parties moved to Spain. On July 22nd, 1993 a second child, T, a boy, was born. He has spent all of his young life in Spain.

The parties had two homes in Spain, a spacious four-bedroomed house in Berja, an inland village, and a small two-bedroomed flat in Almerimar on the coast. Until some time in 1997 the parties lived with their children in the Berja house, but in that year they moved to the flat in Almerimar. The marital situation worsened and on June 21st, 1997 the wife moved with the children to a women’s refuge. Her evidence is that the husband

had become so aggressive that she could no longer tolerate the situation and that he had possession of the children's passports and was threatening to take them off to England, so she sought the assistance of the Social Services. The husband's explanation is that her drunkenness had become  
5 so bad that he was insisting that they return to England because it had been a condition of his agreeing to live in Spain that his wife's alcoholic behaviour should improve. Be that as it may, the wife and the two children remained in the refuge for five weeks. It is the wife's evidence  
10 that she arranged for her husband to be notified that she and the children were in safe hands, although there may be a dispute about this.

On July 25th, 1997 the parties appeared before the court at El Ejido on the wife's claim in separation proceedings based on her husband's violent conduct. The proceedings were adjourned to the next day. There is a dispute as to the full extent of the material and evidence before the judge  
15 at these hearings and, in particular, whether the husband made a complaint about his wife's alcoholism at the two hearings. What is clear is that the wife was represented by a lawyer and the husband chose not to be so represented. Although he suggests that he stands little chance of getting a proper hearing in the Spanish court, due to the inability of  
20 lawyers to understand his case presented to them in English, the husband alleges that he met a sympathetic judge who at some later stage in the proceedings told him that if he could prove that his wife is an alcoholic he would be granted custody of the children.

On July 26th, 1997, however, the judge granted interim custody of the  
25 two children to the wife, who was to reside at the flat at Almerimar, with liberal access to the husband. The children's passports were ordered to be surrendered to the court, where they still remain. The passports are now in the hands of the wife's Gibraltar solicitors. At a subsequent hearing in September the access arrangements were varied but the husband's  
30 application to have the children moved to the school at Berja, where he was residing, was denied. At some stage the husband became represented by a Spanish lawyer but he insists that the lawyer was more interested in effecting a financial settlement than in getting orders relating to the children, was not in a position to understand his client's case fully due to  
35 language difficulties and was intimidated by his more senior opponent who was acting for the wife.

Between September and December the parties talked about reconciliation and they finally signed a reconciliation agreement before a notary public. The wife moved back to the house in Berja with the children and  
40 the children resumed their schooling there. A ratification of that reconciliation was submitted to the court and the proceedings were withdrawn on January 20th, 1998. Despite this reconciliation, the marital problems continued. The wife complains that her husband continued with his unreasonable and aggressive conduct. The husband complains that the  
45 wife has continued to drink to excess.

On January 28th, 1998, according to the wife's evidence, she made arrangements to see her lawyer about her husband's behaviour. According to the husband's evidence, the wife had another bout of drunkenness and when he told her that their life in Spain was ended because of the embarrassment, the wife said she would knife the children rather than let him take them to England. Whatever is the true version of events, the husband absconded with the children to Gibraltar. He has testified to me that his intention was to go on to England to seek legal advice from a lawyer specializing in Spanish law, but that he could not leave the children with their mother whilst he did so. He says he intended to return to Berja once he had obtained that advice. 5

He only reached Gibraltar and found it impossible to get emergency passports for the children here. He left a note for his wife informing her that he had taken the children on a trip for a few days and he called her, but the husband did not tell his wife of his or the children's whereabouts. Furthermore, he put the children in the Loreto Convent School on February 2nd, 1998 and has taken a six-month lease on a two-bedroomed flat in Engineer Lane. 10 15

At first the wife thought her husband had reached England and took proceedings in the Family Division of the High Court there, pursuant to the Child Abduction and Custody Act 1985. It was only after the filing of that application that the wife discovered that the children were in Gibraltar. On February 3rd, 1998 she filed originating summonses for the children to be made wards of court, followed by summonses filed on February 19th requesting that she be granted custody, care and control of the children, that they be delivered to her and that she be at liberty to return with them to Spain. There is a cross-summons of the husband requesting that he be granted care and control of the children and that the wardship order be discharged. 20 25

Since she commenced the proceedings in this court, the wife also applied to the courts in Spain and was awarded interim custody, care and control of the children on February 6th. It is alleged that the father's removal of the children from Spain without the wife's knowledge or consent is a breach of the rights of custody vested in her under art. 156 of the Spanish Civil Code. 30 35

I ought to add here that in addition to the affidavits submitted by the parties and the benefit I derived from hearing them personally, I also interviewed G in the privacy of my chambers. The husband has agreed to the wife having access to the children twice since she reached Gibraltar prior to the hearing, but only on condition that she be supervised. Since the hearing commenced it appears access has been more readily granted. 40

A succinct summary of the law to be applied to this case was stated by Harwood, A.J. in *In re K (A Minor) (Wardship Jurisdiction)* (1) in terms which bear repeating: 45

5 “Had Gibraltar been made party to the Hague Convention on the  
Civil Aspects of International Child Abduction this case would have  
presented no difficulty. It is unfortunate that Gibraltar is neither a  
party to that convention nor does it appear to have any more precise  
jurisdiction under the Laws of Gibraltar to entertain wardship  
proceedings than the limited scope of the provisions in Part IV of  
the Minors Ordinance and s.52 of the Matrimonial Causes  
Ordinance. Jurisdiction in this case is founded on ss. 12 and 15 of  
10 the Supreme Court Ordinance and applicable United Kingdom  
statute law, precedent and practice. The application and order flow  
from s.41 of the Supreme Court Act 1981 and O.90, r.3 of the Rules  
of the Supreme Court of the High Court in England as existed before  
its revocation and replacement by corresponding provisions in the  
Family Proceedings Rules, 1991. The following cases in particular  
15 were cited by Mr. Nuñez: *Re L (Minor) (Wardship: Jurisdiction)*  
. . . and *Re F (A Minor) (Abduction: Jurisdiction)* . . . from which  
the following principles clearly emerge:

20 1. In abduction cases the same principle is to be applied as in  
other cases involving children, *i.e.* that the welfare of the child is the  
first and paramount consideration.

25 2. The court is not concerned to penalize any adult for his conduct  
when it is considering the making of a summary order to return a  
child to another country, but such an order may be justified by that  
same principle, namely that it is in the best interests of the child that  
the disruption to his life caused by bringing him to a strange  
environment should be terminated as soon as possible by returning  
him to the country from which he has been removed in the  
expectation that any dispute about his custody will be satisfactorily  
resolved in the courts of that country.

30 3. Even in a non-Convention case the general principle is that, in  
the ordinary way, any decision relating to the custody of children is  
best decided in the jurisdiction in which they have normally been  
resident.

35 In the latter case cited, Balcombe, L.J. affirmed the general  
principle that—

40 ‘courts should act in comity to discourage the abduction of  
children across national borders. The forum which has the pre-  
eminent claim to jurisdiction is the place where the child  
habitually resided immediately prior to the time when it was  
removed or retained without the consent of the other parent.

45 In my judgment, a rapid accession to the Hague Convention  
by all nations would be a welcome advance towards the  
recognition of the rule of law by all nations.’

With that principle and that opinion this court is in entire  
agreement.”

It is because the welfare of the children is my paramount consideration that I gave the matter urgent and full consideration, for I have had to assess whether there is anything in the husband's allegations relating to his wife's alcoholism. If there is, then of course I would be more than reluctant to make an order returning them to their mother, at least without a great deal more investigation. If there is nothing in the husband's allegations then the whole basis of the husband's case collapses and it is safe to return the children to their mother, who will be free to return with them to Spain.

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I say this because the children have been resident in Spain and when their parents have not been living together, have been, at least for the past five years, looked after by the wife. They have their home in Spain, their friends, and a school there which they have attended and to which they are welcome to return. Their connection with Gibraltar is very recent, of only three weeks' duration, and is tenuous. Indeed, it is only by chance they are in this jurisdiction, because had the husband been able to move on to England he would have done so. Mr. Stagnetto has had to accept, furthermore, that all other things being equal, the wife, as the children's mother, is best able to care for a nine-year-old girl and four-and-a-half-year-old boy. It is, therefore, the issue of the wife's alcoholism which determines these applications. I do not consider, from the evidence before me, that either the wife's fits of depression in themselves or the husband's medical condition renders either one of them incapable of looking after the children.

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Let us look at the evidence, other than that of the husband's bare assertions, which support his contention that his wife is an alcoholic. There is the report by the psychiatrist, Dr. Pitcher, dated February 5th, 1993 and prepared for the criminal hearing at Southwark Crown Court. In that report he states that from September to November 1991 the wife "abused alcohol heavily" and thought that sometimes she was intoxicated at work. However, there is no further evidence from that doctor that this abuse continued after November 1991 and it must be borne in mind that the information in that report was obtained from the wife herself.

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There is also a report of a Dr. Jardi of August 14th, 1996 prepared for the English Department of Social Security in which the doctor has indicated that the wife suffers from both a psychiatric illness and alcohol or substance abuse. The wife's explanation for that is that she left the form for her husband to post. The form did not at that stage indicate that the wife abused alcohol but the husband saw the doctor and persuaded him that his wife wished that it be indicated on the form that this was the case. At first blush this explanation sounds unlikely but there is a further note from Dr. Jardi addressed to Messrs. Hassan & Partners, solicitors for the wife, and dated February 8th, 1998. The relevant portion reads:

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"This lady has been a patient of mine for some years. I was treating her for depression until August 1997.

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During the course of 1996, her husband indicated that she suffered from an alcohol problem, I have never seen any evidence of this and have only ever treated her for depression. She was on 20 mg. of Prozac each day.”

5 In an endeavour to counter the allegations of alcohol abuse, the wife has produced some reports of blood tests which were carried out by a doctor in El Ejido in June and July 1997 as a result of the husband’s report to the Guardia Civil that his wife was an alcoholic. These reports show a negative result for alcohol. The wife has also provided references from friends and neighbours in London, Almerimar and Berja. These references are not disputed by the husband as being written by their friends and neighbours. They describe the wife as a caring and capable mother and one, from a neighbour in Berja, talks of how the wife looked after her child on several occasions and even taught the child to swim.

15 This is in stark contrast to the husband’s evidence that they have lost their friends in Berja because of the wife’s drunkenness and that the wife has become infamous for her alcoholic habits. His explanation for them is either that the referees do not know the family circumstances very well or that the referees for some reason prefer to support the wife in her bid to have custody of the children. Indeed, the husband’s evidence is that the neighbours prefer to support his wife on the basis that the children should not be taken from their mother. He has no explanation for the neighbours’ appearing to have a loyalty to the wife which transcends their concern for the children.

20 The documentary evidence I have before me shows that the wife may have abused alcohol in her past but there is no evidence to support the husband’s assertions that she is a complete drunk. I am satisfied after reviewing all the material before me that she is perfectly capable of caring properly for her two children.

30 I have, of course, had an opportunity of seeing the parties. The husband’s assertion that he intended to return to Berja after seeing a lawyer in England does not have the ring of truth about it. Nor do his assertions that he will not get justice in Spain. It is significant that the wife has no difficulty in being adequately represented by a lawyer. The husband has given me no adequate explanation of why, if his wife was so suffering from alcoholism, he did not make immediate representations to the judge at El Ejido and take urgent steps to ensure they were properly cared for. Furthermore, there is no evidence before me that the children did not receive adequate care when they were in the wife’s sole custody. I conclude that the reason for the husband’s departure from Spain with the children is that he knew he was not going to get his own way with the evidence he could present to the court and felt he could gain an advantage by taking the children out of the jurisdiction and that he has made up evidence to justify his actions.



It follows from the above that I find for the wife. She will have her orders that she may take the children back to their home in Berja, Spain and that the wardship orders are to be lifted once the court receives confirmation that the children have safely resumed residence there.

Costs will go to the wife.

*Order accordingly.*

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