

The Court of Appeal rejects relevance of Rose v Rose & Xydhias (financial claim) principles in 1980 Hague Convention cases

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Background

Facts

The facts of the case concern a child who was wrongfully retained in the UK after his mother travelled with him to the UK, ostensibly for holiday from the USA (specifically Texas, where the child was habitually resident) and refused to return with him. The Father issued proceedings in Texas and later Hague Convention proceedings commenced. On the evidence, the Court

noted that the parents had a difficult relationship and that the mother alleged domestic violence.

Events at the hearing

The case was listed for a 1-day final hearing. Counsel for the mother applied to adjourn the hearing on the grounds that expert evidence on Texan law was required to advise on the efficacy of protective measures. The application was refused; however, the application took up the morning of the Court's time and it adjourned for lunch before the final hearing itself could commence meaningfully.

Counsel for both parties then embarked on negotiations during the adjournment. Following the adjournment, counsel for the mother informed the Court they had come to an agreement that Mother will return to the USA with the child, subject to certain terms. However, what those terms were precisely, were still in dispute.

Mother's principal concerns were:

that any protective measures (for example funds for legal advice in the US and a non-molestation order equivalent) would not be enforced in the US; and the duration of time any protective measures would be in place for.

The Judge felt that she did not have the "relevant material" before her to determine the enforceability of undertakings (made by Father) or the need for other orders to ensure enforceability in Texas. The Judge adjourned on the basis counsel would draft an order to reflect the Judge's suggestion that undertakings be taken from the father "until further order" with a "safety backstop" of 12 months.

However, in the evening via emails between counsel and the Judge it transpired they could not agree on an order. Whilst it was opposed by Father, counsel for the mother asked for a re-listing of the hearing. The Court acceded and ½ day was listed at the Judge's next availability in two days' time.

The following day, the mother filed an application seeking for a further adjournment to allow an

expert to be instructed for her mental health, which on her case had deteriorated as a result of the court proceedings from the previous day. This application was dismissed. The Judge concluded that Mother's mental health did not amount to a material change in circumstances.

Initial decision - what did the High Court decide?

The Judge considered to what extent the mother should be held to the agreement that had been presented to the Court prior to the adjournment for drafting the Order two days earlier. In making her decision she considered the decisions of *Rose v Rose* [2002] EWCA Civ 208 as it applied to an agreement in matrimonial finances (a so-called "Rose Order") and *Xydhias v Xydhias* [1999] 2 All ER 386b– which fundamentally say that once an agreement is reached on the essential fundamental terms, placed on the court record and approved by the court, it should be deemed ordered by the court and anyone seeking to resile from it would need to establish strong reason to do so. The Judge found no such reason, and as such ordered (by consent) the following:

that the child (with the mother) was to return to the USA.
that the father had given undertakings; and
those undertakings are "intended" to take effect in Texas.

Judgment – what did the Court of Appeal say?

The Court of Appeal found in favour of the Appellant Mother, allowed the appeal and relisted the case for a case management hearing, pre-empting a final hearing.

They found in the mother's favour on the basis that:

the Judge should have recognised that there was not a true agreement given that one of the fundamental blocks was not in agreement, therefore a suggested course of action could have been to hold a contested hearing on the issue (and in so making her own determination of Mother's case under article 13(b)).

the Judge could have adjourned, and granted permission to the parties to obtain evidence from a Texan law expert advice; or

the Judge could have made a condition of the mother returning the child that the father would

first obtain a court order in Texas fulfilling the protective measures (and therefore alleviating the issues in dispute).

In failing to adopt any of these courses of actions, the Court of Appeal found that the Judge had erred in:

the conclusion that Father's undertakings would be sufficient to "to ensure that the mother is safe" outside of this jurisdiction.

relying on either of the two cases relevant to financial cases (Rose/Xydias) to support her conclusion that the court could exercise a 'broad discretion' to hold parties to an agreement.

failing to address or consider the merits of the mother's change of position; and

approving two orders simultaneously which were in some ways defective/incompatible.

Analysis

The Court of Appeal acknowledged that the learned Judge was in a difficult position in the hearing and there was pressure to resolve the case. Similarly, counsel had made efforts to come to an agreement.

The Court had over relied on the principles familiar to financial remedy practitioners in Rose/Xydias. The context of financial remedy proceedings – where assets are being divided between divorcing couples – is that in anticipation of a hearing parties have already exchanged offers to each other and there is likely to have been negotiation between parties leading up to a hearing. The hearings themselves lend themselves to judges giving an indication/early neutral evaluation to steer the parties to successful negotiation and settlement.

The Court of Appeal rejected the idea these principles apply with any level of significance in 1980 Hague Convention cases. In contrast to financial proceedings, proceedings concerning children are governed by the best interests of a child. This concept is not easily transposed to negotiations in the same way when a child's future needs to be considered.

The Court and parties should be clear if there is an agreement on all 'core' matters and simply details which need to be ironed and "perfected order", or in reality the 'core' matters are not

agreed even if that is not the favourable position.

The Court did consider that mediation would have been appropriate, and it was regrettable that the parties were not guided towards the Child Abduction Mediation Scheme.

The full Judgment is available [here](#).

Heidi Burrows is a first-six pupil who is currently supervised by Sarah Wood. Prior to commencing pupillage, Heidi worked as a senior fee earner at the UK's first fertility law firm; NGA Law. In this role, Heidi was supervised by the UK's leading surrogacy lawyer; Natalie Gamble, and gained considerable experience working with modern families in all areas of family law.

Maria Scotland practices exclusively in family law with a specialism in high-end/ big money financial remedy applications and (private law) children work. Maria is recognised in Spears' 500 2023 Guide: as a Top Recommended Family Law Barrister within the exclusive guide. Maria is ranked in the Legal 500 and Chambers & Partners in family law (including divorce & financial remedy). She is one of the leading family law juniors and is the joint head of the Family Team at 5SAH.