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[14/12/1988; Court of Appeal (England); Appellate Court]
C. v. C. (Minor: Abduction: Rights of Custody Abroad) [1989] 1 WLR 654, [1989] 2 All ER 465, [1989] 1 FLR 403, [1989] Fam Law 228

COURT OF APPEAL (CIVIL DIVISION)

Royal Courts of Justice

14 December 1988

Lords Donaldson of Lymington MR, Neill and Butler-Sloss LJJ

In the Matter of C. v. C.

Anita Ryan, QC and Cherry Harding for the Appellant father

Michael Connell QC and E. James Holman for the Respondent mother

BUTLER-SLOSS LJ: This is an appeal from the judgment of an order of Latey J given on 14th October 1988 on an application under the Child Abduction and Custody Act 1985 in respect of a boy called Thomas, born on 27th July 10, 1982. This Act gives statutory force to most of the Articles of the 1980 Hague Convention.

The child was removed by his mother on 3rd August 1988 from their home in Sydney, Australia, to England, where they are now living. The father before Latey J asserted and the mother denied that under the provisions of Article 3 of the Convention the removal was and retention of the child out of the jurisdiction of the Australian Family Court were wrongful. The mother further submitted that if the removal or retention was found to be wrongful, nevertheless under the provisions of Article 13 there was a grave risk that the return of the child would expose him to psychological harm. The judge dismissed the father's application under the Act and the father appeals from that order.

There are also wardship proceedings in respect of the child, the mother having issued an originating summons on 11th August. Those proceedings are not before the judge nor before this court.

Further evidence was submitted to this court which has been taken into account only so far as it sets out the current proposals of the father if the child returns and the present financial position of the mother.

The short facts are as follows:

The mother is 34 and English. In 1976 she went to Australia and met the father who is 35 and Australian. They were married on 15th April 1978 in England where they remained for a year before returning to make their home in Sydney. The one child was born in 1982. The

marriage broke down in 1985 and the parents separated in July of that year. Divorce proceedings were commenced and agreement was reached over finance and the future arrangements for Thomas. On 4th November 1986 the Deputy Registrar in Sydney made a consent order including the following words:

(1) The wife was to have custody of . . . the child of the marriage and the husband and the wife to remain joint guardians of the said child.

(2) Neither the husband nor the wife shall remove the child from Australia without the consent of the other.

During 1986 the mother, with the consent of the father, took the child for a holiday to England.

The mother and child lived together in a suburb of Sydney until 3rd August 1988, when she left for England with the child, without first informing the father and without his consent. As soon as the father learnt of the situation by a letter from the mother, he applied to the Family Court in Sydney. The mother before her departure had applied to vary the November 1986 consent order to delete the requirement for father's consent to the removal of Thomas from the jurisdiction.

Ross-Jones J heard the father's application on 8th and 10th August. On 10th August the judge made orders for the return of the child and transferred the custody of Thomas to the father on his return to Australian jurisdiction. There was no provision made for access to the mother in that eventuality. There was a further hearing before the judge on 23 August. The mother has appealed against the order transferring custody to the father. The judge declined to stay the order transferring custody pending the hearing of the appeal.

The mother has made in her affidavits various allegations against the father and has given explanations for her action in removing Thomas from Australia. They are not, in my judgment, relevant to an application under the 1985 Act, save as insofar as they may affect the approach of the Australian authorities to the mother's return. From reading the transcripts of the hearings and from the affidavits of the father, as well as the expert evidence called on behalf of the mother, she is likely to be seen to be in contempt of court in respect of the consent order of 1986 and the orders made in August of this year. That may be relevant to the consideration under Article 13. The welfare of the child as the paramount consideration is not, however, as Latey J correctly pointed out, the basis of the Hague Convention and the Act incorporating it in the English law. Australia is a signatory to the Hague Convention and enacted the relevant legislation in 1987.

The preamble to the Hague Convention sets out the intention of the States which signed it:

"[Desiring] to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access."

Article 1, which is not contained in Schedule 1 to the 1985 Act, states that the objects of the Convention are:

"to secure the prompt return of children wrongfully removed to or retained in any contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."

As Nourse LJ said in Re A (a minor) (abduction) [1988] 1 FLR 365, [1988] Fam Law 54 at page 368 of the former report:

"These and other provisions of the Convention demonstrate that its primary purpose is to provide for the summary return to the country of their habitual residence of children who are wrongfully removed to or retained in another country in breach of subsisting rights of custody or access. Except in specified circumstances, the judicial and administrative authorities in the country to or in which the child is wrongfully removed or retained cannot refuse to order the return of the child, whether on grounds of choice of forum or on a consideration of what is in the best interests of the child or otherwise."

Three questions arise in this case:

(1) Was the removal of the child wrongful?

(2) Is the retention of the child wrongful?

(3) If the answer to either or both of the first two is "yes", does Article 13 apply to stop the return of the child?

By Article 3 the removal or retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

By Article 5:

"For the purpose of this Convention --

'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;"

In respect of my first question -- was the removal wrongful? -- the learned judge heard argument as to the effect of the order of November 1986 and in particular the effect of joint guardianship. He had before him the written opinion and oral evidence of an Australian Queen's Counsel. The judge's attention does not appear to have been sufficiently drawn to the effect on the definition in Article 5 of the Convention of Clause 2 of the November 1986 order, that neither parent should remove the child from Australia without the consent of the other. Accordingly, the judge's attention was not drawn specifically to the question whether under Australian law Clause 2 was capable of constituting a right of custody within the Convention. In the absence of sufficient expert evidence on that point, this court must do its best to consider whether Clause 2 comes within the definition given in Article 5.

By Clause 2 the father had, in my judgment, the right to determine that the child should reside in Australia or outside the jurisdiction at the request of the mother. In 1987 he gave his consent to the child coming to England for a specified holiday. One might consider the example of a parent wishing to leave the jurisdiction with the child for a longer period, say 12 months. The other parent, with Clause 2 in the order, would have some control over not only the child leaving the jurisdiction but also as to the place to which the child was going, and not only the country; for instance, to live in London in suitable circumstances. If the

child was retained under such an arrangement beyond the agreed date of return, it seems inconceivable to me that the Convention could not effect the return of the child. But if the argument so attractively advanced by Mr. Connell is right, there would be no instant redress by the justifiably aggrieved parent. The words of Article 5 must, in my view, be read into Article 3 and may in certain circumstances extend the concept of custody beyond the ordinary understood domestic approach. Therefore in the present case there would be the general right of the mother to determine the place of residence within the Commonwealth of Australia, but a more limited right, subject to the father's consent, outside the jurisdiction of the Australian Family Court. The father does not have the right to determine the child's place of residence within Australia but has the right to ensure that the child remains in Australia or lives anywhere outside Australia only with his approval. Such limited rights and joint rights are by no means unknown in English family law and no doubt to Australian family law. Indeed, in Article 3 rights of custody are specifically recognised as held jointly or alone. The Convention must be interpreted so that within its scope it is to be effective. For my part I consider that the child was wrongfully removed from the jurisdiction in breach of Clause 2 of the order of 4th November 1986.

It is not, therefore, necessary to look at the various Australian statutes or recent decisions nor the expert opinion evidence proffered as additional evidence by the father.

The difficult question whether the retention of the child was to be considered wrongful does not now arise and I do not propose to embark upon a consideration of the effect of the orders made in Sydney in August.

I turn, therefore, to the third question as to whether Article 13 applies. It states that:

"[Notwithstanding the provisions of the preceding Article,] the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that-- . . .

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation."

In Re A (supra), Nourse LJ considered the effect of Article 13(b) and said at [1988] 1 FLR page 372:

"The intendment of Article 13(b) cannot be that the judicial or administrative authority of the requested state is to be blinkered against a sight of the practical consequences of the child's return."

The judge considered with great care the situation if the child was to return to Sydney and we are rightly reminded, by Mr. Connell for the mother, that the judge heard the mother give evidence and was impressed with her and the evidence which she gave. At page 12 of the judgment he was satisfied that there was a grave risk of psychological harm to Thomas. He pointed out that:

". . . the mother has been the sole carer of Thomas. She has devoted herself to him and his care. Other than what she did in August there is no criticism of her. On the contrary Mr. Nathan paid a handsome tribute to her as an excellent mother. For his lifetime of six years she has been the centre of Thomas's life. His emotional tie, bonding with her is the closest possible."

He also said at page 14:

"I am satisfied that to remove Thomas back to Australia without his mother would create the gravest risk of very serious psychological harm, and that it would be wholly wrong to make an order which had that effect. Unless she had a home, financial support and the care of Thomas pending any further full investigation and decision, the risk of psychological harm would be little less even if the mother went with him."

At that time the mother was in some danger of being dealt with under the contempt of court. At that time there were no offers by the father to house her and the boy or indeed any offer for the boy to remain with her pending proceedings or anything of the sort which now has been presented to this court. But now matters have moved on, and we have evidence that was not before the judge. The effect of that evidence is considerably to ameliorate the rigours of the return of the child and his mother to Sydney.

The father's position is now that, in order to facilitate the return of the child, he will give certain undertakings to this court and to the Australian Family court.

These undertakings are crucial to the welfare of the child who has been sufficiently disrupted in his removal from his home and his country and needs as a priority an easy and secure return home. The mother has been the primary caretaker throughout his short life, and since the parting of the parents when he was three for all but access periods his sole caretaker. If possible, she should for his sake and not for hers be with him and help him to readjust to his return. The father should not be instrumental in putting obstacles in the way of that easy return, nor make difficulties once the child is back. It is essential that the judge hearing the future issues of custody and access or indeed the Australian Family Court of Appeal should have the opportunity to consider the welfare of the child as paramount without emergency applications relating to the manner of the return of the child.

The father has offered a number of undertakings. Those, as far as they go, are very valuable -- and, if I may say so, for my part, show the good intent that he has for the welfare of his child and to return him to the jurisdiction of the Australian court. In my view, those undertakings should go somewhat further, and the undertakings that I for my part think should be required by this father, as a prerequisite of the return of the child, and without which I consider the child should not be expected to return, are as follows:

(1) He will not seek to enforce against the mother the order for guardianship and custody dated 10th August 1988, and will not seek to remove Thomas from the care and control of the mother until the full adjudication by the Family Court in Sydney, Australia, on the merits upon the contested issues of guardianship, custody and care and control of Thomas.

(2) He will provide for the use of the mother a suitable motor car at his expense from the date of arrival for two months or until the adjudication, whichever may be the later.

(3) He will obtain unfurnished accommodation within convenient distance of the school Thomas will attend, at a rental of not less than A$220 per week; and the mother shall pay the rent up to a limit of A$250 per week. The father will provide suitable and sufficient furniture.

(4) He will use his best endeavors to secure for Thomas a place at Mosman Preparatory School, and will pay for all fees, clothing and incidental expenses in relation to Thomas's education at that school.

(5) He will provide air tickets and book seats for the mother and Thomas from London to Sydney, to travel on a day not before 1st January 1989, and will provide the sum of L50 to cover additional expenses of travel.

(6) He will not institute nor voluntarily support any proceedings for the punishment or committal of the mother in respect of any contempt of the Australian court that she may have committed prior to the date hereof.

(7) Once Thomas's name has been removed from the mother's passport, he will not seek to have the mother's passport impounded.

(8) He will pay maintenance for the mother and Thomas from the date of their arrival in Australia until adjudication, at the rate of A$650 per week, payable in advance. If the mother obtains employment, the sum of A$650 to be reduced by 50% of the salary that the mother receives. The first four weeks payment to be made on arrival in Australia and, thereafter, the fifth and subsequent payments to be made weekly in advance.

(9) He will pay for any medical expenses reasonably incurred by the mother in respect of Thomas in Australia.

These undertakings cover, as far as I can see, all the entirely justifiable concerns of the judge. It will be a matter for the Australian Family court as to with which parent in the future the child shall make his home, and nothing that I say in this judgment should be taken as in any way prejudging or affecting the decision that the Australian court may feel it necessary to make.

Counsel for the mother accepts that he cannot suggest other than that the Australian court will try the case in accordance with their approach to child cases which appears to accord very closely to the approach of the courts of this country.

Nevertheless, the mother has said, for what appear to be emotional reasons, that she cannot go back. I am not sure that she is now saying that. But if she does, what is to be done? The judge found, and I agree with him, that the mother is very important to the child. At the time of the hearing the mother was found by the judge to have reasonable grounds for refusing to return, and I would not disagree with him. Those grounds have now been removed by the undertakings which I expect will be given to this court, without which the child will not return, and through this court will be given to the Australian Family court.

The mother has to rely on the Australian court for a decision as to the future home of the child. In the circumstances of this case, that is undoubtedly the right court to make that decision. She also has no family in Australia, a broken marriage and now, through her own actions and costly litigation, no assets.

She is responsible for the loss of her home, the spending of the proceeds of sale, the lack of job, car and money. None of these, in the light of the undertakings of the father, can be reasons to block the return of the child. The mother argues that if she does not return and the child is to return without her, there is a grave risk of psychological harm to the child.

The grave risk of harm arises not from the return of the child, but the refusal of the mother to accompany him. The Convention does not require the court in this country to consider the welfare of the child as paramount, but only to be satisfied as to the grave risk of harm. I am not satisfied that the child would be placed in an intolerable situation, if the mother refused to go back. In weighing up the various factors, I must place in the balance and as of the greatest importance the effect of the court refusing the application under the Convention because of the refusal of the mother to return for her own reason, not for the sake of the child. Is a parent to create the psychological situation, and then rely upon it? If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed

him out of the jurisdiction and refused to return. It would drive a coach and four through the Convention, at least in respect of applications relating to young children. I, for my part, cannot believe that this is in the interests of international relations. Nor should the mother, by her own actions, succeed in preventing the return of a child who should be living in his own country and deny his contact with his other parent. As Balcombe LJ said in Evans v Evans [20th Jul 1988 unreported] at page 13 of his judgment:

"The whole purpose of this Convention is . . . to ensure that parties do not gain advantitious advantage by either removing a child wrongfully from the country of its usual residence, or having taken the child with the agreement of any other party who has custodial rights to another jurisdiction, then wrongfully to retain that child."

If this mother will not accompany the child, despite the knowledge that his rightful place is in New South Wales, then, on the facts before this court, I am not satisfied that Article 13(b) applies and, in my judgment, the child should return to his father.

When the undertakings which I have set out are given on behalf of the father to this Court and, through this Court, given to the Australian Family Court, I, for my part, would allow this appeal, and order that Thomas do return to Sydney on the flight booked by the father.

NEILL LJ: I agree. I also agree with the orders proposed by Butler-Sloss LJ, provided that the undertakings that she has set out in her judgment are given by the father both to this court and to the Family Court in Australia.

I propose, however, to give a short judgment of my own on one aspect of the matter.

This case comes before the court in accordance with the Hague Convention of 1980 on the Civil Aspects of International Child Abduction. The articles of the Convention, which are set out in Schedule 1 of the Child Abduction and Custody Act 1985, have the force of law in the United Kingdom: see Section 1(2) of the Act of 1985.

In the present case we are concerned in the first place with the question whether the removal of the child by the mother from Australia was wrongful within the meaning of Article 3 of the Convention. That Article, so far as it is material, provides as follows:

The removal . . . of a child is to be considered wrongful where--

(a) it is in breach of rights of custody attributed to a person, . . . either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal . . . ; and

(b) at the time of removal . . . those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal . . .

The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

The term "custody" in relation to a child is a term which is used in many systems of law. The meaning of the term may vary in different jurisdictions and in different contexts in the same jurisdiction. The phrase "rights of custody" may also have varying meanings. For the purposes of the Convention, however, the phrase "rights of custody" is given a particular definition. This definition is contained in Article 5 which, so far as material, provides:

"For the purposes of this Convention--

(a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence; . . ."

The right to determine the child's place of residence is, therefore, included among the rights of custody to which Article 3 applies. Moreover, it appears from Article 3 itself that this right may be attributed to a person either jointly or alone, and it may arise by reason of, inter alia, a judicial decision or by reasons of an agreement having legal effect under the law of the state in which the child was habitually resident immediately before the removal.

With this introduction, I turn to the order dated 4th November 1986, made in Sydney, in the Family Court of Australia. It was a consent order. By paragraph 1 of the order it was provided that the mother should have custody of the child and that the father and the mother should remain as joint guardians. Paragraph 2 was in these terms:

"Neither the Husband nor the Wife shall remove the child from Australia without the consent of the other."

The question for decision is whether paragraph 2 gives the father the right to determine the child's place of residence. Plainly it is not an exclusive right. The mother has custody of the child and can decide where in Australia they are to live. But the father's consent is required before the child is removed by the mother from Australia. It seems clear that this consent could be limited both as to the period of absence and as to the place to which the child could be taken. Thus, to take an example, the father could consent to the child residing with the mother for a period of a year or so in England or some other agreed country or even at some particular address.

I am satisfied that this right to give or withhold consent to any removal of the child from Australia, coupled with the implicit right to impose conditions, is a right to determine the child's place of residence, and thus a right of custody within the meaning of Articles 3 and 5 of the Convention. I am satisfied that this conclusion is in accordance with the objects of the Convention and of the Act of 1985. Until last August this child was habitually resident in Australia. In 1986 the family court of Australia made orders relating to his custody, which included an agreed provision that he should not be removed from Australia without the father's consent. In my judgment, the enforcement of that provision falls plainly within the objects which the Convention and the Act of 1985 were seeking to achieve.

LORD DONALDSON MR: I agree that, for the reasons given by my Lords, the removal of this child from the Commonwealth of Australia was wrongful within the meaning of the Hague Convention which is set out in Schedules to the Child Abduction and Custody Act 1985. I also agree with the terms of the order proposed by Butler-Sloss LJ.

I give a separate judgment only because I wish to emphasise the international character of this legislation. The whole purpose of such a code is to produce a situation in which the courts of all contracting states may be expected to interpret and apply in similar ways, save insofar as the national legislatures have decreed otherwise. Subject then to exceptions, such as are created by section 9 of the Act in relation to Article 16 and section 20(4) of the Act in relation to paragraph (b) of Article 10(2), the definitions contained in the Convention should be applied and the words of the Convention, including the definitions, construed in the ordinary meaning of the words used and in disregard of any special meaning which might attach to them in the context of legislation not having this international character.

We are necessarily concerned with Australian law because we are bidden by Article 3 to decide whether the removal of the child was in breach of "rights of custody" attributed to the father either jointly or alone under that law, but it matters not in the least how those rights are described in Australian law. What matters is whether those rights fall within the Convention definition of "rights of custody". Equally, it matters not in the least whether those rights would be regarded as rights of custody under English law, if they fall within the definition.

"Custody", as a matter of non-technical English, means "safekeeping, protection, charge, care, guardianship" (I take that from the Shorter Oxford English Dictionary); but "rights of custody" as defined in the Convention includes a much more precise meaning which will, I apprehend, usually be decisive of most applications under the Convention. This is "the right to determine the child's place of residence". This right may be in the court, the mother, the father, some caretaking institution, such as a local authority, or it may, as in this case, be a divided right -- insofar as the child is to reside in Australia, the right being that of the mother; but, insofar as any question arises as to the child residing outside Australia, it being a joint right subject always, of course, to the overriding rights of the court. If anyone, be it an individual or the court or other institution or a body, has a right to object, and either is not consulted or refuses the Convention. I add for completeness that a "right to determine the child's place of residence" (using the phrase in the Convention) may be specific -- the right to decide that it shall live at a particular address or it may be general, eg, "within the Commonwealth of Australia".

We have also had to consider Article 13, with its reference to "psychological harm". I would only add that in a situation in which it is necessary to consider operating the machinery of the Convention, some psychological harm to the child is inherent, whether the child is or is not returned. This is, I think, recognised by the words "or otherwise place the child in an intolerable situation" which cast considerable light on the severe degree of psychological harm which the Convention has in mind. It will be the concern of the court of the state to which the child is to be returned to minimise or eliminate this harm and, in the absence of compelling evidence to the contrary or evidence that it is beyond the powers of those courts in the circumstances of the case, the exception case, our concern, is the concern of these courts, would be limited to giving the child maximum possible protection until the courts of the other country - Australia in this case - can resume their normal role in relation to the child.

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