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[30/09/1993; High Court of New Zealand at Hamilton; Appellate Court]
A. v. W. [1993] 11 FRNZ 270

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**A. v W.**

**High Court at Hamilton - AP 136/93**

**29, 30 September 1993**

**30 September 1993**

**Hammond J.**

**This is an appeal from an order of a Family Court Judge under s 12 of the Guardianship Amendment Act 1991 that R.W. (born on 15 June 1990) be returned by his mother to Queensland, Australia on the terms contained in that order. The matter was heard by the Family Court Judge on 9 September 1993 in the District Court at Hamilton. He delivered a Reserved Decision on 10 September 1993. In view of the urgency which ought to attend these matters, I agreed to hear the appeal at short notice. I heard counsel yesterday afternoon in the presence of the appellant and her mother. The hearing concluded at 5 pm; I said that I would dictate a judgment that evening. I have done so. I am giving directions to the Registrar of the High Court that the judgment is to be released as soon as it has been signed by me today.**

**The facts**

**J.A. (then aged 18) met P.W. (then aged 24) in Britain in June 1989. R. - the subject of these proceedings - was born a year later, on 15 June 1990. There were difficulties between Ms A. and Mr W. Ms A. returned to New Zealand in February 1991. R. was then approximately eight months old. Attempts were made at reconciliation between Ms A. and Mr W. in New Zealand. They moved to Australia together on 28 September 1991. However, things did not work out and the parties separated on 30 November 1991.**

**Orders were made by consent in the Brisbane Family Court on 20 December 1991. Ms A. was to have custody of R. until the further order of the Court. Mr W. had specified daytime access. Certain passport and restraining orders were also made at that time.**

**Final orders were made by consent in the Family Court of Australia at Brisbane (B 10031/91) on 1 May 1992. I will not repeat all of those orders. They include orders:**

**(1) That the father and mother have joint guardianship of R.**

**(2) That Ms A. have sole custody of R.**

**(3) Mr W., until he departed for England in May 1992, was to have access to the child each Sunday.**

**(4) Access provisions as to the position on Mr W.'s return from England were provided for.**

**(5) There were various provisions relating to information about telephone numbers and addresses so that each party could keep in proper contact with the child.**

**(6) "That without any admissions, the father and the mother be restrained from removing the child from Australia without the consent in writing of the other party, witnessed by a solicitor or an order of this Honourable Court."**

**(7) Ms A. was however to be entitled to remove the child from Australia for a period of two weeks from the end of May to 14 June.**

**(8) There were quite extensive passport conditions.**

**Ms A. in fact flew to New Zealand with R. in June. But she decided to remain in New Zealand. Mr W. flew to England and then returned to Australia, following his arranged trip. Ms A., through her legal advisers, reported that she was not going to return to Australia with the child; she applied ex parte in New Zealand for an interim custody order of the child on 1 July 1992. This was to the Family Court in Te Awamutu. No order has in fact been made on that application.**

**Mr W. responded by making an application to the Family Court in Hamilton for the return of R. to Australia, on 14 August 1992. Ms A. in fact travelled to Australia on 12 August 1993 following receipt of New Zealand legal advice; she returned to New Zealand on 29 August 1993 after receiving Australian legal advice. Mr W.'s s 12 application was prosecuted to the judgment which is now appealed to this Court.**

**When Ms A. visited Australia, Mr W. somehow became aware that she was in Queensland, and he applied to the Family Court of Australia at Brisbane. On 21 December 1992 he had obtained an order granting him continuous access to R. and an order prohibiting his further removal from Australia. On 3 September 1993 he was granted an order for the custody of R. in the Brisbane Family Court, on an ex parte application. The District Court Judge records, "Neither of these orders had been executed by the time Ms A. returned to New Zealand."**

**The relevant legislation**

**The Guardianship Amendment Act 1991 was enacted to give effect to New Zealand's obligations under the Hague Convention on the Civil Aspects of International Child Abduction. The amending Act forms part of the Guardianship Act 1968.**

**Under s 12(1) & (2) of the Act, it is provided that:**

**12. Application to Court for return of child abducted to New Zealand -**

**(1) Where any person claims -**

**(a) That a child is present in New Zealand; and**

**(b) That the child was removed from another Contracting State in breach of that person's rights of custody in respect of the child; and**

**(c) That at the time of that removal those rights of custody were actually being exercised by that person, or would have been so exercised but for the removal; and**

**(d) That the child was habitually resident in that Contracting State immediately before the removal, -**

**that person, or any person acting on that person's behalf, may apply to a Court having jurisdiction under this Part of this Act for an order for the return of the child.**

**(2) Subject to section 13 of this Act, where -**

**(a) An application is made under subsection (1) of this section to a Court; and**

**(b) The Court is satisfied that the grounds of the application are made out,-**

**the Court shall make an order that the child in respect of whom the application is made be returned forthwith to such person or country as is specified in the order.**

**Section 13 of the Act sets out the grounds for refusal of order for the return of the child. Section 13(1) is in issue in these proceedings:**

**(1) Where an application is made under subsection (1) of section 12 of this Act to a Court in relation to the removal of a child from a Contracting State to New Zealand, the Court may refuse to make an order under subsection (2) of that section for the return of the child if any person who opposes the making of the order establishes to the satisfaction of the Court-**

**(a) That the application was made more than one year after the removal of the child, and the child is now settled in his or her new environment; or**

**(b) That the person by or on whose behalf the application is made -**

**(i) Was not actually exercising custody rights in respect of the child at the time of the removal, unless that person establishes to the satisfaction of the Court that those custody rights would have been exercised if the child had not been removed; or**

**(ii) Consented to, or subsequently acquiesced in, the removal; or**

**(c) That there is a grave risk that the child's return -**

**(i) Would expose the child to physical or psychological harm; or**

**(ii) Would otherwise place the child in an intolerable situation; or**

**(d) That the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views; or**

**(e) That the return of the child is not permitted by the fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedoms.**

**I should also mention that under s 14 of the amendment Act, where an application is made to a Court under s 12(1), "The Court shall, so far as it is practicable, give priority to the proceedings in order to ensure that they are dealt with expeditiously."**

**Jurisdiction**

**It appeared to me that the broad facts of this matter were that Ms A., whatever the merits of her recent actions, on these facts had had sole custody of R., at least down to 3 September 1993 when Mr W. obtained his ex parte order for custody. In effect, Mr W. had what, in common parlance at least, were only access rights under the May 1992 consent order converted into a custody order in September 1993. I was particularly concerned as to whether this was a device on the part of Mr W. to gain Jurisdiction under s 4 of the Guardianship Amendment Act 1991 in New Zealand. That section speaks of "rights of custody in respect of a child ... under the law of the contracting state in which the child was immediately before his ... removal ... habitually resident." (My italics). And I was also concerned whether an ex parte order for custody ought to be fully respected.**

**I had observed that no argument was addressed to the District Court Judge under these heads; I put them to Mr de Jong in this Court in arguendo. He again expressly said that he had put his mind to the matter and that, at least under the law of Australia, Mr W. had "custody rights" within the meaning of s 4. Mr Geoghegan also referred me to L. v L. [1992] NZFLR 523. In that case Judge Boshier held that: "It seems plain that in Australian federal law, a parent who is a joint 'guardian' has rights of 'custody' for the purposes of the Convention. A sole custodian does not necessarily have such rights."**

**Counsel expressly not having wished to pursue the matter further, I do not myself pursue the point further in this judgment. My concern simply was that, in principle, a right of access per se should not I think support an application under s 12, although I emphasise that I have not heard full argument on that matter.**

**The basis of the appeal**

**Having regard to what I have already said, in this Court Mr de Jong pursued the appeal on two bases:**

**(a) That the Court ought to have exercised its discretion under s 13(1)(c)(i) to refuse to order the return of the child:**

**(b) That even if the child were ordered to be returned, appropriate undertakings should have been, but were not in fact, imposed by the learned Family Court Judge.**

**I think it appropriate to note here also the position of an appellate Court on an appeal from the Family Court. That Court is of course a specialist Court, with particular expertise and a distinct jurisdiction in Family Court matters. In my view the normal appellate principle applies: it is not open to me simply to substitute my judgment, even if I were to disagree with the Family Court Judge, for that of the learned Judge. No authority was cited to me upon this point by counsel, but it seems to me that I should proceed on the footing that I should not interfere unless it can be demonstrated that the learned Judge erred in law; or that there is no or no reasonable evidence (having regard to the usual civil standard of proof) upon**

**which the learned District Court Judge could have exercised or refused to exercise his discretion. The result is that it will normally be very difficult to overturn a decision of a Family Court Judge where what was involved was essentially the exercise of a discretion.**

**Ms A.'s case in the Court below was based on the propositions that she would be ineligible for a social services benefit for a period of some time from her return to Australia, or that she would be very unlikely to get it; that there was a question as to her eligibility for legal aid in Australia; that it would take some time- perhaps a matter of months - for a custody case to be dealt with in the Family Court of Australia; that shortly after she departed New Zealand, her New Zealand benefit would terminate; that she would, in her straightened circumstances, have to stay with her father, his second wife and their four children in a three bedroom house; that R. would be placed in his father's custody immediately on arrival in Australia; that this would be damaging and traumatic for him, he not having seen his father since 1992; and that she could well face proceedings for contempt for having abducted R.**

**It was also contended that the imposition of undertakings if R. were ordered to be returned should be required. Mr de Jong had cited C v C [1989] 2 All ER 465 to the learned Family Court Judge. On that point, the Family Court Judge held that C v C was not authority for the proposition that the Court may require undertakings.**

**On the merits Mr Geoghegan contended, both in the lower Court and here, that the s 13 defence had not been made out by Ms A.; that there was no jurisdiction to require undertakings; and that even if there were, it was inappropriate to order same in this Court.**

**The District Court Judge disposed of the matter by holding against Ms A. on the s 13 grounds.**

**As to the undertakings point, he said:**

**It would, in my view, go too far to say that this Court would never contemplate the requiring of undertakings before ordering return in appropriate cases but to do so to the extent that an Applicant was obliged by this Court to discard perfectly properly made orders in a foreign Court against his wishes would be a rare step indeed. (p 6)**

**It is convenient to take the s 13 matters and the undertakings issue separately.**

**Section 13**

**The Hague Convention was a distinct response to a clearly identified social evil: the abduction across international boundaries of children where custody orders had been made in the state in which that child was habitually resident. The normal principle in I think every common law jurisdiction with respect to children is that the benefit of the child is to be the predominant consideration. At first blush, the Convention provisions, as enacted by the Amendment Act in New Zealand, cut across that provision in a particularly draconian way.**

**The normal provision in New Zealand is s 23 of the Guardianship Act 1968:**

> **23 Welfare of child paramount - (1) In any proceedings where any matter relating to the custody or guardianship of or access to a child, or the administration of any property belonging to or held in trust for a child, or the application of the income thereof, is in question, the Court shall regard the welfare of the child as the first and paramount consideration. The Court shall have regard to the conduct of any parent to the extent only that such conduct is relevant to the welfare of the child.**

**[(1A) For the purposes of this section, and regardless of the age of a child, there shall be no presumption that the placing of a child in the custody of a particular person will, because of the sex of that person, best serve the welfare of the child.]**

**(2) In any [proceedings under subsection (1) of this section] the Court shall ascertain the wishes of the child, if the child is able to express them, and shall, subject to subsection (9) of section 19 of this Act, take account of them to such extent as the Court thinks fit, having regard to the age and maturity of the child.**

**But s 3(3) as amended by the 1991 Act provides that "Nothing in this section shall limit the provisions ... of Part 1 of the Guardianship Amendment Act 1991".**

**The result is not a particularly happy piece of drafting. However, on any view of it, Mr de Jong conceded that in a Hague Convention case the usual principle that the welfare of the child is paramount must be displaced to a significant extent. But, he said, not entirely. He argued that the welfare of the child is still a relevant consideration. I have to say that in the time available to me I have not had the opportunity to research the English legislation in detail, and I do not know whether a like provision obtains in the United Kingdom. I cannot say that I view with any enthusiasm at all legislation which subordinates the best interests of the child. However, it seems plain enough that, as Mr Geoghegan contended, the critical considerations in an application removal are the specific provisions of s 13 of the 1991 amendment, and that the legislation must surely be read with regard to the usual principle that a specific statutory provision prevails over a more general one, even one with the importance in our law enshrined in s 23 of the Guardianship Act 1968. So I proceed on the basis that the welfare of the child is relevant, but the statutory provisions in s 13 are the critical factors.**

**As to s 13, a number of authorities were cited to me: In Re A (A Minor) (Abduction) [1988] 1 FLR 365; Gsponer v Johnstone 12 Fam LR 753; C v C (supra); Director-General of Family and Community Services v Davis 14 Fam LR 381; and in New Zealand, W. v W. [1993] FRNZ 174, and D. v D. [1993] NZFLR 548.**

**In W. v W. Judge Carruthers said:**

**I take note in passing that the language used [in s 13] is forceful and vigorous. It is not a 'best interests' test. That must await the substantive Court hearing The onus of proving the existence of such a grave risk is on the respondent. (at 178).**

**This, of course, suggests (in my view rightly) that the philosophy behind the 1991 amendment is that s 12 applications are not concerned with the disposition of custody cases on the merits; they are really a modern set of conflict of laws provisions, coupled with a statutory mechanism to give effect to those rules. What s 12 is designed to do is to return a dispute to the appropriate forum. But because that reverter can have such a damaging effect on a little person, what amounts to an escape mechanism has been enshrined in s 13. The decisions to which I have referred above show clearly (in my view correctly) that s 13 is not to be read down; the tests to be met by a person asserting a s 13 "defence" are very stiff indeed.**

**And what C v C and other cases show is that, as one might have expected, in a pragmatic way, where appropriate, Courts have also thought it appropriate to (on occasion) impose terms or undertakings. Mr Geoghegan's objection that there is nothing specific in the legislation allowing undertakings is not, I think, dispositive of that issue. Indeed, I would have said that the general principle is precisely the opposite: unless a statute specifically provides that an order cannot be made on terms or with certain undertakings, then such can**

**be required. That has always been the equity principle; and it is a principle which has routinely been invoked in family law matters (as witness the very orders made in Australia in this case).**

**The instant case**

**Ms A. had to establish, against the stiff test posited by the legislation, that there is a "grave risk"" that the child's return would expose that child to physical or psychological harm or would somehow otherwise place the child in an intolerable situation.**

**It will be noted that the emphasis here is on the situation of the child. The fact that Ms A. would be placed in an admittedly extremely distressing situation by the return of the child for her personally; that she would be substantially personally disadvantaged (given her now situation) in pursuing her rights (if any) to custody of her son, are not relevant. It is the effect on the child which has to be evaluated. As to that, there was some evidence in the affidavits - not referred to by the District Court Judge - that there had been some abusive behaviour by Mr W., but such evidence as there is under that head falls far short of the test posed by s 13.**

**Common sense suggests that R. will be extremely distressed and that inevitably he will suffer some psychological effects from being removed from his mother. However, the onus in an application of this kind lay on Ms A. to demonstrate that he would suffer psychological harm and there is no expert evidence which was produced to show that this would happen or that there was a "grave risk" that it would happen.**

**I have to confess to real concern at the prospect of a three and a half year old child, who has not seen his father for many months (apart from a very brief period in Hamilton), being separated from his mother. But of course what the Amendment Act presupposes is that it will be immediately open to Ms A. to have that position reviewed by the Family Court in Brisbane. There is no such thing as a final custody order; in any event, it is plain that the Family Court in Brisbane was cognisant of the problem and made it plain that Ms A. could move to set aside the ex parte order on short notice.**

**As to whether R. will be placed in an "intolerable situation", Mr W. married Mrs W. on 21 May 1993. Since 1985 she has been a registered nurse. She was for a time employed in *** Hospital and *** Hospital in the intensive care unit. Then she worked with the *** Nursing on a part-time basis. For a period of nine months she was a nanny in London and looked after three girls for an English family, who were aged two months, three years and five years respectively. She works 24 hours per week and her shifts are rotating and relatively flexible. She has not yet met R. She and Mr W reside at ***, which is a suburb of Brisbane. They have a comfortable two bedroom home with modern facilities; there is a fully fenced yard and the yard is of a reasonable size. There is a "kindy" located close to where they live and a pre-school. Mr W. is employed with an adequate weekly take-home pay.**

**As I have said, it is not possible to view with total equanimity - and indeed one can only view with a good deal of concern - a child of three and a half being taken from his mother and "returned" to a father who is largely a stranger to him, and another woman he has never met. But I do not think that it can be said that this could amount to placing R. into "an intolerable situation". All too often, Judges seek to substitute another set of words for the precise words used by a statute. This is sometimes dressed up by saying that it is necessary to give content" to the words of the statute. I cannot see that that assists in this case: what is necessary is that the statutory words be applied to the particular facts. In this case, when that is done, the statutory test is not met.**

**In the result, in my view there clearly was ample evidence on which the learned District Court Judge could have reached the decision he did reach; and he did not err in law with respect to s 13 of the statute.**

**Undertakings**

**The learned Family Court Judge, with respect, clearly has to be correct in saying that he cannot undo the work of an Australian Family Court by means of undertakings now extracted from the respondent. And it is difficult to see, as Mr Geoghegan put to me, what undertakings ought to be imposed in the particular case. The appellant cannot possibly ask that she be financed or supported by the respondent as a quid pro quo for R. returning to Australia, or whilst she is pursuing custody issues with respect to him. Despite the difficulties she faces, she does at least have a father there, and like the learned Family Court Judge I would be surprised if she were not able to visit long enough to have the custody issues resolved.**

**There is really nothing of substance in the contempt argument: Courts understandably and properly become very concerned about breaches of Court orders but contempt is a remedy of last resort, which is rarely resorted to. In my view the Family Court Judge was correct to say that he had jurisdiction to impose undertakings; he was also correct to decline to do so in the instantcase.**

**Costs of returning child**

**Where a Court makes an order under s 12, "the Court may, if it thinks just, make an order directing that the whole or any part of the costs of or incidental to returning the child in accordance with the order, including the costs and travelling expenses of any necessary escort, shall be paid by the person who removed the child to New Zealand." In this case the learned District Court Judge ordered Ms Adams to pay the costs of returning Ricky to Queensland.**

**There is a wide discretion in the Court under that head, but on this point I have to say that I differ with the learned Family Court Judge. In essence, what has happened here is that Mr W.'s (former) access position has in practical terms been turned (at least in the meantime) into a custody position. And it seems apparent that Mr W. now asserts (contrary to the May 1992 orders) that he should have ongoing custody of R. Given both that factor, and the fact that he appears to be in a much better position than Ms A. to meet this cost, notwithstanding her conduct, I think it appropriate that he meet the costs of R. being returned to Australia.**

**It will be observed that the principle I am acting on here is that the party taking the benefit of a very real change in position should meet the cost of same. I appreciate that it could be said that R. had been taken from Australia and this cost would not have been incurred but for Ms A.'s actions. But I think one has to look past that to the substance of the benefit. And, it may well be that raising the necessary funds would have some effect on the practical ability of the appellant to have R. returned to Australia.**

**Conclusions**

**In the result, the appeal must be dismissed, but I modify the terms of the order slightly.**

**I think it safer to set out hereafter the orders made by the Family Court Judge, modified as necessary by my own rulings in the course of this judgment.**

**(1) Pursuant to s 12 of the Guardianship Amendment Act 1991, R.W. (born on 15 June 1990) is to be returned by his mother to Queensland, in the Commonwealth of Australia, upon the following terms.**

**(2) Mr W. is to deposit the cost of returning R. to Australia - by a standard economy class air fare - with his New Zealand solicitors. Such solicitors are to advise the solicitors for Ms A. when those funds have been deposited in their trust account.**

**(3) Within 48 hours of the advice of deposit of those funds with her solicitors, Ms A. will advise the solicitors for Mr W. of the date, time of departure, and flight number of the flight on which it is proposed to return Ricky to Queensland.**

**(4) That flight must be no earlier than four days and no later than 14 days after the receipt of the advice by Ms A. as per para 2, above.**

**(5) The order made on 6 September 1993 preventing the removal of R. from New Zealand until further order of the Court is discharged. There will be an order that R. not be taken out of New Zealand, save in terms of the foregoing orders.**

**(6) The case is remitted to the Family Court in Hamilton. Leave is reserved to either party to apply to that Court on three hours notice for further or other orders to complete the order made under s 12 for the return of R. to Australia. For the avoidance of any doubt, the Family Court Judge is authorised to modify these terms, as may be required, to give practical effect to this judgment, but consistent with the tenor of it.**

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