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[16/11/1994; Inner House of the Court of Session (Scotland); Appellate Court]
Soucie v. Soucie 1995 SC 134, 1995 SLT 4148, 1995 SCLR 203

S. v S.

Court of Session

Inner House (Extra Division)

16 November 1994

Lords Sutherland, Morton of Shuna and Osborne

Lord Sutherland: This is an action by a father for return to Canada of his daughter, now aged three, wrongly retained in Scotland by her mother. The action is based on the Child Abduction and Custody Act 1985 and the Hague Convention on the Civil Aspects of International Child Abduction which under that Act has the force of law in the United Kingdom. Article 3 of the Convention defines wrongful retention and it is not disputed by the respondent that the child has been wrongfully retained. Article 12 provides:

"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment . . ."

Article 13 provides that, notwithstanding art 12, the judicial authority is not bound to order the return of the child if the person who opposes its return establishes that the person seeking return had consented to or subsequently acquiesced in the removal or retention. Article 18 provides that the provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Two issues were before the Lord Ordinary who heard a proof. The first was whether there had been acquiescence on the part of the petitioner and, if so, should the court's discretion be exercised in favour of non-return. The second issue was whether the child is now settled in her new environment, this petition not having been brought within one year of the retention. The Lord Ordinary held that there was no acquiescence and that even if there had been he would have exercised his discretion in favour of ordering the return of the child. He also held that the respondent had not demonstrated that the child is now settled in its new environment and that accordingly art 12 applied, making an order for return mandatory.

We deal first with the matter of acquiescence. The facts as disclosed in evidence of the petitioner, which was accepted by the Lord Ordinary, are broadly as follows. The parties lived together in Canada along with the child until July 1992. Under Canadian law they had joint custody of the child. In July 1992 the parties came to Scotland to visit the respondent's parents. After two weeks, as had been arranged, the petitioner returned to Canada, the intention being that the respondent and the child should remain for a further week in Scotland. On 31 July the respondent telephoned the petitioner, saying that she did not intend to return with the child. From then until September 1992 the petitioner frequently wrote and telephoned the respondent but eventually stopped because his letters were returned and the respondent's parents, with whom she was living, changed their telephone number. The petitioner then contacted an organisation called Child Find who said that he should go to a solicitor to obtain a custody order. The petitioner then went to a solicitor and legal aid was applied for. Legal aid was refused both initially and on appeal. The petitioner then decided to go ahead with his action for custody even though he would have to pay for it himself. On 12 January 1993 the petitioner commenced proceedings in Canada seeking custody and the action was intimated to the respondent on that date. On 25 February 1993 a hearing was arranged but the action appears to have been sisted sine die for unclear reasons. As far as the petitioner was concerned he was told by his solicitor that the solicitor had received a telephone call from someone in Scotland asking that the matter be put off to enable the respondent to apply for legal aid. The petitioner's evidence was that he contacted his solicitor regularly and that it was due to his own efforts that the case eventually came back to court. On 23 September 1993 the petitioner obtained an award of interim custody. In October 1993 the petitioner learned about the Hague Convention and forms were completed and given to his solicitor. It appears that the solicitor took no action whatever, as the forms completed by the petitioner were still on the solicitor's file when the petitioner visited him shortly before coming to Scotland for the proof to obtain his file. After October 1993 the petitioner contacted his solicitor at regular intervals to find out what was happening and was fobbed off with various explanations. Ultimately the petitioner became wholly dissatisfied with his solicitor and went to visit the Attorney General's office where he was given proper advice and completed the necessary documentation to enable the present petition to be lodged. The present petition was served on the respondent on 10 May 1994.

Acquiescence may be active or passive. It was not contended by the respondent in this case that there was active acquiescence but it was argued that by reason of inactivity during substantial periods within the total period from August 1992 to April 1994 acquiescence should be inferred. For a definition of what could constitute passive acquiescence counsel for the respondent referred to Re A (Minors). Stuart-Smith LJ at [1992] Fam, p 119 said: "If it is passive it will result from silence and inactivity in circumstances in which the aggrieved party may reasonably be expected to act. It will depend on the circumstances in each case how long a period will elapse before the court will infer from such activity whether the aggrieved party had accepted or acquiesced in the removal or retention.

"A party cannot be said to acquiesce unless he is aware, at least in general terms, of his rights against the other parent. It is not necessary that he should know the full or precise nature of his legal rights under the Convention: but he must be aware that the other parent's act in removing or retaining the child is unlawful. And if he is aware of the factual situation giving rise to those rights, the court will no doubt readily infer that he was aware of his legal rights, either if he could reasonably be expected to have known of them or taken steps to obtain legal advice."

Lord Donaldson MR in the same case (p 123) said: "In each case it may be expressed or it may be inferred from conduct, including inaction, in circumstances in which different conduct is to be expected if there were no consent or, as the case may be, acquiescence."

We would entirely accept that acquiescence may be inferred from unexplained inactivity. Where, however, apparent inactivity is explained and that explanation is accepted, no such inference can necessarily be drawn. The Lord Ordinary has accepted the petitioner's explanation in this case and in our view was entitled to hold that acquiescence is not the proper inference to be drawn. Throughout the period the petitioner has been trying to get his child returned to Canada. He was delayed initially by the refusal of legal aid, but then paid for the litigation himself. He was delayed by the wrong advice that he should seek custody first, but he can hardly be blamed for accepting the advice of his solicitor as to the proper steps to be taken. He was delayed by the solicitor apparently acceding to the action being sisted for no very good reason, but he continued to visit his solicitor to try to get the action going. Having obtained a custody order he then learned for the first time of the Hague Convention and completed the necessary forms which should have led to this action being raised in about November 1993. The subsequent delay was however attributable to the fact that his solicitor apparently put the forms in his file and failed to lodge them. The petitioner continued to press his solicitor for action and eventually became dissatisfied, leading to his visit to the Attorney General's office where at long last he received proper advice. The whole picture is clearly one of the petitioner being anxious throughout to obtain the return of his child and taking all steps within his power to achieve that end despite being thwarted by conduct or misconduct of his legal adviser. To suggest that this history shows inactivity on his part from which it should be inferred that he acquiesced in the wrongful retention of the child is in our view virtually unstatable. We are therefore entirely satisfied that the Lord Ordinary came to the correct conclusion on this aspect of the case.

The second issue relates to the proviso to the second paragraph of art 12. It is accepted on behalf of the respondent that the onus lies on her to establish that the child is now settled in its new environment. Counsel for the respondent referred to Re N (Minors) where Bracewell J endeavoured to define what was meant by settlement: "I find that word should be given its ordinary natural meaning, and that the word 'settled' in this context has two constituents. First, it involves a physical element of relating to, being established in, a community and an environment. Secondly, I find that it has an emotional constituent denoting security and stability . . . What factors does the new environment encompass? The word 'new' is significant, and in my judgment it must encompass place, home, school, people, friends, activities and opportunities, but not, per se, the relationship with the mother, which has always existed in a close, loving attachment. That can only be relevant in so far as it impinges on the new surroundings. Every case must depend on its own peculiar facts."

The constituents of settlement identified by Bracewell J were accepted and adopted in Perrin v Perrin. Counsel for the respondent distinguished Perrin on its facts as in that case the period beyond one year was very short and also the child had only enjoyed a new environment in respect of housing for about three or four months before the proceedings were raised. In the present case counsel founded on the fact that the delay beyond one year in raising these proceedings was about eight months. The evidence indicated that the child had a close relationship with her grandparents, had several friends in the area, was enrolled in a local playgroup, was shortly to go to a nursery school and had been living in the same house with her mother since January 1993. It was argued that these facts established a degree of settlement which would satisfy the proviso in art 12. Counsel for the petitioner argued that all of these matters were before the Lord Ordinary who determined that they were insufficient to demonstrate that the child was now settled in a new environment. As it was not suggested that the Lord Ordinary had applied the wrong test or misdirected himself as to the applicable principles, the respondent's position would have to be that the facts found by the Lord Ordinary lead necessarily to establishment of settlement as a matter of fact. Accordingly the respondent must demonstrate that the Lord Ordinary's conclusion was not open to him on the facts which he found proved. Counsel argued that the facts founded

upon by the respondent were insufficient to establish settlement and that in any event they were certainly not so powerful that it could be said that the Lord Ordinary was necessarily wrong in coming to the conclusion of fact which he did. Furthermore the question of settlement had to be considered in the context of the spirit of the Convention whereby the fundamental duty of the court is to order a return of the child to the proper jurisdiction when there has been a wrongful removal or retention.

The Lord Ordinary, having set out the relevant facts, says that the question at the end of the day must be one of degree and he considered that the age of the child was relevant. With a child who at the material time was still under three years of age the important relationship in terms of both emotional and physical environment must be the connection with the mother. He considered that the fact that there had been continuous residence in one place for over a year where there are friends present in a stable environment did not establish the degree of settlement that the proviso envisaged, given that the whole spirit of the Convention is to deny a parent who wrongfully removes a child the benefit of that removal by refusing to order the child's return. Having regard to the context of this proviso he considered that it would only be in exceptional circumstances that the welfare issue as encompassed by the proviso to art 12 would come into play.

In our opinion the challenge to the Lord Ordinary's opinion must fail. Having regard to the context we consider that the proper question is whether the child is so settled in her new environment that the court would be justified in disregarding an otherwise mandatory requirement to have the child returned. This is another way of saying that the interest of the child in not being uprooted is so cogent that it outweighs the primary purpose of the Convention, namely the return of the child to the proper jurisdiction so that the child's future may be determined in the appropriate place. We agree with the Lord Ordinary that this is not just a balancing exercise between the requirements of the Convention on the one hand and the interests of the child on the other. Such a balancing exercise may be appropriate when considering the discretionary powers of the court under art 18, which will come into play if the proviso to art 12 is established or indeed if any of the matters contained in art 13 are established. Even in discretionary cases it has been said that it is for the court to conduct the necessary balancing exercise between what would otherwise be required by the Convention and the interests of the children, but only where it can clearly be shown that the interests of the children require it, should the court refuse to order their return. See Re A (Minors) (No 2). In our view the position is a fortiori when what is being considered is an exception to an otherwise mandatory provision. It follows in our view that in considering the proviso to art 12 what must be clearly shown is that the settlement in a new environment is so well established that it overrides the otherwise clear duty of the court to order the return of the child. In our opinion the respondent has failed to demonstrate that such a settlement has been established. The facts founded on by the respondent are such as might be expected to be found in any case of a young child living with its mother. Because of the age of the child it is unlikely that the child can properly be said to be established in a community involving such matters as school, people, friends, activities and opportunities, to use the words of Bracewell J. As far as the emotional constituent denoting security and stability is concerned the overwhelming security and stability which is provided for the child will be provided by the presence of her mother. It is clear from the facts of this case that if an order is made for the return of the child the mother will go with the child and accordingly that emotional security and stability can be maintained. For these reasons we are satisfied that the conclusion to which the Lord Ordinary came on the facts was one which he was entitled to reach and therefore this reclaiming motion must be refused.

We should add that we were addressed on the matter of discretion which would have arisen under art 18 if we had been satisfied that either of the main issues should be decided in

favour of the respondent. In view of the conclusion which we have reached we do not consider it necessary to refer further to the matter of discretion, particularly as the Lord Ordinary also dealt with it very briefly because of the view which he had reached. Accordingly we do not express any opinion on what conclusion we might have reached on the matter of discretion.

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