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[29/09/1993; Inner House of the Court of Session (Scotland); Appellate Court]
Perrin v. Perrin 1994 SC 45, 1995 SLT 81, 1993 SCLR 949

P. v P.

Court of Session

Inner House (Extra Division)

29 September 1993

Lord Murray, Lord Milligan, Lord Wylie

Lord Murrary: The petitioner and the respondent married in France on 18th May 1991. They lived together in Myans, Savoie, France. Their child [C] was born on 19th September 1991 in France. On 17th June 1992 the respondent left the petitioner and returned to Scotland with [C] to the respondent's parents' home in the Lockerbie area. She raised proceedings for custody of [C] in Dumfries Sheriff Court, service being made upon the petitioner. He did not defend the action and the respondent was awarded custody on 19th November 1992, decree being extracted on 4th December 1992. On 8th January 1993 the respondent was served with divorce papers in French court proceedings against her raised by the petitioner. The French court dismissed that action as incompetent on 12th March 1993 on the basis that jurisdiction was determined by the residence of the spouse having care of the child. The petitioner appealed against that decision. Following this judgment the petitioner took steps to invoke the Hague Convention on child abduction in order to obtain [C's] return to France. The petitioner applied to the central authority under the Hague Convention, who then formally requested the relevant United Kingdom central authority, Scottish Courts Administration, to return [C] to France. On 30th June 1993 the petitioner presented this petition to the Court of Session seeking an order for the return of [C] under the Child Abduction and Custody Act 1985 which applied the provisions of the Hague Convention within the United Kingdom. The petition was served on 7th July 1993 and the respondent lodged answers. A hearing took place before the Lord Ordinary on 23rd July 1993 in which he pronounced the interlocutor which is now reclaimed. At that hearing it was agreed by the parties that the Lord Ordinary should proceed to decide the disputed issues on affidavits and other documents which had been lodged, without hearing evidence. Thereafter the Lord Ordinary granted the prayer of the petition and made an order for the return of [C] to France.

The material provisions of the Convention for the purposes of the present case are the following:

Article 3 of the Convention provides inter alia:

'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 . . .'

Article 12 provides inter alia:

'Where a child has been wrongfully removed. . . 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 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 demonstrated that the child is now settled in its new environment . . .' Article 14 provides:

'In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.'

Article 15 provides inter alia:

'The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State . . .'

Article 17 provides:

'The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.'

Article 18 provides:

'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.'

In the second paragraph of his opinion . . . the Lord Ordinary narrates that before him the parties were agreed that the only issues in dispute were whether the removal of the child from France was wrongful within the meaning of article 3; whether, if so, the child was now settled in its new environment in terms of article 12; and, depending on the decision of these issues, whether an order for the return of the child should be made.

As appears from . . . the Lord Ordinary's opinion, he had little difficulty in concluding that the removal of the child was wrongful. As he points out, it was not disputed that the child was habitually resident in France prior to 17th June 1992. The only information before him regarding the French law applicable as in the French Ministry of Justice letter which referred to article 37 of the French civil code and states that the removal of the child was in direct contravention of the joint custody enjoyed by both parents under article 372.

In his opinion the Lord Ordinary deals with the second issue. He points out that, as more than a year had elapsed between the removal and the start of the proceedings, the court had a discretion not to order the return of the child if the respondent could demonstrate that the child was now settled in its new environment. The Lord Ordinary then quotes a passage from the judgment of Bracewell J in the case of Re N (Minors) (Abduction) at p 418 between C and E. The material part of that passage is in the following terms.

'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 . . . whether or not the mother herself is settled in the UK is not a relevant factor. It is not the welfare test that I am concerned with in applying Article 12.'

The Lord Ordinary agrees with this approach but comments that it is difficult to apply to a child under two years of age. He then proceeds [in] has opinion a follows.

'With a very young child the environment is difficult to distinguish from the relationship with the person actually caring for the child. After careful consideration of the affidavits, which showed little more than that [C] is healthy, I do not consider that settlement in the new environment is established.'

Accordingly, he pronounced an order for [C] to be returned to France. The grounds of appeal for the respondent were as follows.

'1. The Lord Ordinary erred in law when determining whether the child was settled in its new environment under article 12 of the Convention by

(i) failing to take account of the relevant factor of the child's relationship with its mother, and

(ii) having regard to irrelevant factors such as school, people, friends, activities and opportunities, which are inappropriate factors on which to assess a child of twenty-two months of age.

2. That the decision of the Lord Ordinary that the said child was not settled in its new environment was one which no Lord Ordinary properly directed and acting reasonably could arrive at.

3. That the Lord Ordinary exercised his discretion unreasonably in refusing to seek a further direction from the French Ministry of Justice under article 15 of the Convention after the respondent had challenged whether the removal of the child was properly classed as a wrongful removal under French law.'

At the outset of his address senior counsel for the respondent moved the court to allow two additional affidavits to be lodged. One was a further affidavit from the respondent and the other was an affidavit from a Dr Koenig, dealing with the relevant French law on parent and child and contesting that the removal of the child had been wrongful. If Dr Koenig's affidavit was disallowed, the respondent's further affidavit should nevertheless be received. Senior counsel for the petitioner opposed the motion in both its branches. First, the motion came too late and the affidavits had not been before the Lord Ordinary. If lodged, the petitioner might require to reply to the affidavits, which would require the present hearing to be adjourned. Secondly, neither affidavit was relevant to the grounds of appeal for the

respondent. Thirdly, on inspection Dr Koenig's affidavit did not appear to support the respondent's contention. There would be prejudice to the petitioner if the motion were granted. In reply it was further urged for the respondent that Hague Convention proceedings were sui generis and should not be burdened by technicalities appropriate for adversarial proceedings: see the case of Re N.

The court adjourned for a few minutes to consider the motion. We decided to reject the motion in both its branches as coming too late.

Senior counsel for the respondent then submitted that the petition raised two separate issues. (1) Had there been a wrongful removal of the child [C] by the respondent from France? (2) As it was now over one year since the child was removed, had the child settled in its new environment as at the commencement of these proceedings?

On the first question it was submitted for the respondent that the Lord Ordinary was not entitled to hold that the French Ministry of Justice's letter had relevantly averred that [C's] removal was wrongful. The letter did not say so in terms nor was it a matter of necessary inference from what was said. It was for the present court to decide whether the removal had been wrongful. In the case of In re J (Minor)(Abduction: Custody Rights) the Court of Appeal had decided itself that removal of a child from Western Australia was not wrongful although a Western Australian court had held that it was wrongful (see also Clive on Husband and Wife (3rd edn) at pp 634-635). The Lord Ordinary had misdirected himself as to the sufficiency of the French Ministry of Justice's letter. In any event, once it had been challenged on behalf of the respondent that the removal was wrongful, he should have sought an authoritative determination within the meaning of article 15 of the Convention.

As regards the second question, it was submitted on behalf of the respondent that the Lord Ordinary had misdirected himself in regard to the material before him indicating that [C] was now settled in her new environment. He had founded strongly upon the reasoning of Bracewell J in the case of Re N (Minors) (Abduction) at p 418. But he had failed himself to take proper account of all the relevant factors in this particular case. What was significant in Dr Hill's [C's GP's] affidavit was not just the health matters to which he referred but the extent to which what he said showed that [C] had been integrated into local health and welfare care in her new environment. The Lord Ordinary had ignored or discounted that aspect. He had also failed to give due weight to the young age of the child and the fact that fourteen out of the twenty-three months of her life had been lived in the Lockerbie area. He had said nothing about the award of custody which the respondent had obtained in Dumfries Sheriff Court, but under article 17 of the Convention that was a proper factor to take into account. Following Bracewell J, the Lord Ordinary had held that it was not relevant that the mother had settled in the new environment. However, it was relevant that the mother had obtained a secure council house tenancy for herself and the child which had become the child's settled home. The Lord Ordinary's conclusion that the child had not settled in her new environment could not stand. Thus it was open to the present appeal court to conclude on the affidavits and documents that the child had so settled. There was in any event no good reason for the court to order the return of the child in the exercise of its discretion under article 18.

In reply senior counsel for the petitioner pointed out that even if the respondent succeeded in showing that the child had settled in Scotland, the court still had a discretion to order her return under article 18. The Lord Ordinary had not explicitly dealt with this matter. Counsel for the petitioner contended that underlying the provisions of the Convention was the principle that the proper forum in which parents should litigate about the custody of children was that of the place in which the child was habitually resident at the time of

removal. The Convention was not concerned with the finer points of law about parental custody, which could be decided in the appropriate forum. The Convention was concerned with wrongful removal of children in a more immediate factual sense (see the observation of Lord Donaldson MR in the case of In re J at p 570. In that case the Court of Appeal were in just as good a position as the West Australian court to consider how the West Australian statute applied to undisputed facts). In the present case, the only interpretation of French law before the Lord Ordinary, and before the present court, was the French Ministry of Justice's letter with its reference to the French civil code whose terms were clear and incontradicted. There was no substance in the respondent's challenge of the Lord Ordinary's conclusion that the removal of [C] was wrongful.

As regards the question whether [C] had settled in her new environment, the Lord Ordinary was quite correct that there was nothing definite in the affidavits to show that [C], as distinct from her mother, had settled in the new environment. They had been resident in the new council house for only part of the fourteen months in which [C] had resided in Scotland. The Lord Ordinary had correctly applied the two guiding principles set out at the top of p 418 in the case of Re N (Minors) (Abduction) in reaching his decision. In any event, the Lord Ordinary was entitled to reach the conclusion which he did on the factual material before him. An appeal court could not interfere with such a decision simply because a different view could be taken on the facts available: see Lord President Emslie in Britton v Central Regional Council at p 208. As regards the contention that an article 15 request should have been made by the Lord Ordinary for determination whether or not the removal was wrongful, no motion to that effect was made before the Lord Ordinary. The article was permissive only and when articles 14 and 15 were read together it was clear that a request for a determination was an option which was open in event of difficulty. There was clearly none in the present case. The reclaiming motion should be refused and the court should adhere to the interlocutor of the Lord Ordinary.

We have considered carefully the arguments advanced on behalf of the respondent in support of her reclaiming motion but they have failed to persuade us that the Lord Ordinary erred in law, misdirected himself on the material before him or exercised his discretion in a way that no reasonable Lord Ordinary would do.

Dealing with the first matter in issue, whether [C's] removal was or was not wrongful, we agree with Butler-Sloss LJ at p 405 of Re C (A Minor) (Abduction), to which we were referred, that it is helpful to have in mind the intention of the Convention as set out in the preamble as follows.

'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.'

and also the provisions of article 1, giving the objects of the Convention as:

'(a) 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 access under the law of one contracting State are effectively respected in the other contracting State'.

We also respectfully adopt the observations of Lord Donaldson MR at p 412 of Re C, where he says:

'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 it in similar ways, save in so far as the national legislature have decreed otherwise. Subject then to exceptions, such as are created by section 9 of the 1985 Act in relation to Article 16 and section 20(4) of the 1985 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' and in the case of In re J (A Minor) (Abduction: Custody Rights) at p 567, where he says:

'The mischief at which the Convention and the Act of 1985 are directed, and it is a very serious mischief, is the wrongful removal of a child from, or its wrongful retention outside, the territorial jurisdiction of the courts of a Convention country. Where this occurs, it is the duty of the courts of any other Convention country where the child may be to order its return. Furthermore, this duty is almost absolute . . .'

Reading the wording of the Convention as a whole, and having regard to the provisions of articles 14, 15 and 18 in particular, we consider that wrongful removal or retention within the meaning of article 3 means something less than a full legal determination of custodial rights of parents and whether they have been breached. If so, the requirements of article 3 may be sufficiently met in a case where it is not challenged, or not seriously challenged, that removal or retention has been wrongful. If the removal or retention is prima facie wrongful this, in the absence of any more specific determination, may also be sufficient to bring into effect the provisions of the Convention. We consider that the present case falls into this category. Though it was suggested on behalf of the respondent that the French Ministry of Justice's letter was deficient in certain technical respects, in our opinion its sense, including the reference to article 372 of the French civil code, is clear and unambiguous. Indeed, counsel for the respondent was driven to concede, quite properly, that if parents did have joint custody it might prima facie be wrongful for one parent to remove a child covertly and unilaterally. Alt1hough the effect of this letter was challenged before the Lord Ordinary and wrongful removal was at least formally disputed in the respondent's answers, no affidavit or other material document was placed before the Lord Ordinary to controvert it. In these circumstances we have little difficulty in reaching the conclusion that the Lord Ordinary was entitled to find that the removal of [C] from France was wrongful.

Turning to the issue of whether it was demonstrated before the Lord Ordinary that [C] had settled in her new environment in the Lockerbie area -- the issue which was pressed most vigorously on behalf of the respondent -- we note that this is a case in which proceedings were commenced only a very short time after the expiry of one year from the original removal. It would in general terms appear to be the case that the longer the lapse of time after the first year, the more likely it is that a child will have settled in a new environment. Where the lapse of time after expiry of the year is short, a matter of days or weeks, it would appear to us that the quality of the evidence relied upon to establish settlement would have to be good. Having considered all that was said by counsel for the respondent in criticism of the Lord Ordinary's discussion of this matter in his opinion, we think that there is really only one point of substance which might indicate that [C] had settled in her new environment. This is that [C] has lived for more than half of her young life in Scotland and now has a secure home with her mother in a council house. Adopting the two constituents of settlement identified by Bracewell J, namely physical element of relating to a community and an environment and an emotional element denoting security and stability, we now consider what force there is in that point. It is clear from the aspect of Dr Hill's affidavit

emphasised by counsel for the respondent, and similar matters raised in other affidavits, that [C] has at least started a process of relating to the community and environment in the Lockerbie area. Equally she now enjoys a secure and stable home with her mother in the council house which has been allocated to them. But in considering the weight to be attached to these factors in a case which is on the very borderline of discretionary rather than mandatory return to the place of habitual residence, the dimension of time is of critical importance. Counsel for the respondent put the emphasis on having lived fourteen out of the twenty-three months of her life in Scotland. What is of importance, however, for settlement in a new environment is not the time spent in Scotland or even in the Lockerbie area but the time in which [C] has lived in her new and secure home. The affidavit of the respondent's father discloses that the respondent obtained the council house which she and [C] now occupy in March 1993, so that [C] strictly enjoyed her new environment there for only three or four months before the petitioner raised the present proceedings. This circumstance in our opinion fully justified the Lord Ordinary in reaching the conclusion that, on the facts before him, he could not hold that [C] had settled in her new environment within the meaning of article 12 of the Convention.

The one remaining matter, covered by the third ground of appeal, is that the Lord Ordinary ought to have requested a decision or other determination from the French authorities that the removal of [C] was wrongful within the meaning of article 3. We agree with counsel for the petitioner that this provision is permissive only and that it would not be appropriate to invoke it in the absence of a substantial challenge supported, for example, by an adequate affidavit or other documentation. Furthermore, it is not evident to us from the wording of article 1 that it is for the court to make the application to the authorities of the other contracting State for such a decision. We conclude that no sufficient reason has been presented to us on behalf of the respondent for the Lord Ordinary or this court to operate the provisions of article 15.

The reclaiming motion accordingly fails. In the last sentence of his opinion the Lord Ordinary mentions that counsel for the petitioner undertook that if the respondent returned with [C] to Myans, the petitioner would move out of his home to allow the respondent and the child to live there in peace while the question of custody and access were disposed of either amicably or by the French court. In light of this undertaking the question arises whether it is appropriate to leave the Lord Ordinary's interlocutor of 23rd July 1993 in the form in which it now stands ordaining the respondent within fourteen days to return the child to the petitioner's said address in France. We propose to alter the interlocutor to the extent of inserting between the words 'child' and 'to' [in] the reclaiming print the words 'in the company of the respondent herself'. We consider that this wording properly reflects the effect of the undertaking which was given on behalf of the petitioner while retaining essential safeguards against a failure by the respondent to comply with the order of the court.

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