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[18/08/1994; Outer House of the Court of Session (Scotland); First Instance]
Bordera v. Bordera 1995 SLT 1176

B. v B.

Court of Session

Outer House

18 August 1994

Lord Coulsfield

Lord Coulsfield: The petitioner resides in Ibiza and was married there to the respondent on 6 August 1983. There is one child of the marriage, J.F., who was born on 28 August 1985. The parties resided together in Ibiza until May 1991 when they ceased to live together. On 28 February 1992, they entered into an agreement, the terms of which are set out below, which dealt with, inter alia, the care and control of, and access to, J. In terms of the agreement, the respondent had the actual care and control of J. The petitioner last exercised access to J. on 23 November 1993. He was due to have access again on 4 December 1993 but before that date the respondent and J. left the house in which they were residing. On 6 December 1993, the respondent came to Scotland with J.. The first order in the present petition was made on 23 February 1994, following a request dated 27 January 1994 made by the Spanish authorities under the Convention on the Civil Aspects of International Child Abduction.

The case came before me for a hearing on 17 August 1994. At earlier stages in the proceedings, a number of issues had been raised or hinted at, but by the time of the hearing the only live issue was whether J. had been wrongfully removed from Spain in terms of art 3 of the Convention. That issue depends on whether at the date of the removal, the petitioner was entitled to rights of custody, within the meaning of the Convention, in respect of J.. It is agreed that both the United Kingdom and Spain are signatories to the Convention, and that J. is habitually resident in Spain for the purposes of the Convention. It is also conceded that the agreement, to which reference has been made, is, by Spanish law, a binding agreement. It was not suggested that there was a grave risk that the return of J. would expose him to an intolerable situation or that any other exception under the Convention was applicable.

Article 3 of the Convention provides:

The removal or the 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.

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 . . .

Article 5 of the Convention 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; (b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence . .

Certain other provisions of the Convention should also be mentioned. Article 14 provides that, in ascertaining whether there has been a wrongful removal, the judicial or administrative authorities of the requested state may take notice directly of the law of, and certain decisions in, the state of the habitual residence of the child, without recourse to proof of that law. Article 15 provides that the judicial or administrative authorities of a contracting state may, before making an order for the return of a child, request that the applicant obtain from the authorities of the state of the child's habitual residence a decision or determination that the removal or retention was wrongful within the meaning of Art 3. Article 21 provides: "An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child." Article 21 further requires authorities to co-operate to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which they may be subject.

With regard to the relevant Spanish law, I was provided with copies and translations of extracts from the Spanish Civil Code and with two reports by legal practitioners in Spain, Matilde Valdes and Carlos Roig de la Cruz, both described as members of the Ilustre Colegio de Abogados de Baleares. The reports were written in Spanish but certified translations were provided, as also was a certified translation of the agreement of 28 February 1992. I was also referred to a letter written in English by Senora Valdez. The translations provided could be described as clumsy, in parts, but I do not think that there is any substantial doubt as to the meaning of the agreement, the reports and the relevant provisions of the Civil Code. In quoting from these documents, I have therefore used the words of the translation provided to me. It was, somewhat faintly, suggested on behalf of the respondent that the qualifications and experience of Senora Valdez and Senor de la Cruz had not been explained or established. However, both Senora Valdez and Senor de la Cruz specify their membership of their professional organisation in the body of their reports and the report by Senor de la Cruz is attested by a notary in Palma de Mallorca. The respondent did not offer any competing legal opinions nor was it suggested that on any particular point the reports misstated the Spanish law. In these circumstances, in my opinion, I am entitled to proceed upon the basis that these reports correctly express the Spanish law relevant to this case.

The agreement dated 28 February 1992 begins by recording the names and addresses of the parties and the date of the marriage and the birth of the child. It further records that the economic regime of the marriage was one of community of property and that, because of circumstances which had made continued cohabitation impossible, the spouses had decided to separate, and to regulate their relationship according to a number of stipulations, including the following:

"First. Both spouses have been living apart for one year and they mutually consent not to interfere in the life or activities of the other.

"Second. Each one of the parties has designated his or her respective place of domicile as indicated in the heading to this document. Nevertheless, they are both free to change their domiciles.

"Third. With regards to the patria potestas over the child of the family the spouses have expressly concurred that this exercise should be shared jointly in accordance with Law 11/1981 of 13 May which modified the Civil Code in the matter of filiation, patria potestas and economic regime of the marriage.

"However, the mother has been entrusted with the care and custody of the family child, without prejudice to the exercise of the patria potestas which shall be shared by both parents".

Clause fourth made provision for payment by the petitioner of a sum in name of aliment and Clause fifth dealt with the sale of the matrimonial property and division of the proceeds. Clause sixth provides:

"As co-appointee to the duties of patria potestas, access between father and son has been set up in accordance with the following details:

(a) During the course of the school year the father may have access to his son on alternate Saturdays. The week he does not have the child on Saturdays he shall have him on Tuesdays.

(b) With regards to the school Christmas holidays, the child will spend half of the holidays with his father and half with his mother.

(c) The husband has given his wife authorisation to travel abroad during the period of holidays that the minor spends with her, as long as she notifies him in good time.

(d) With regards to the school summer holidays, the child will spend half of the holidays with his father and half with his mother. The communication set up between father and son shall be subject to the child's school needs, illnesses, forces majeures etc in which case the spouses, by mutual agreement, shall decide what is not beneficial for the child. Likewise, it is stipulated that any ailment or disease that the child may suffer while in the care of one spouse must be immediately notified to the other spouse, who shall be able to visit without limitation."

Article 81 of the Spanish Civil Code provides for a judicial decree of separation on the petition of both spouses or of one with the consent of the other after the first year of marriage, but requires that the petition should be accompanied by a proposed regulatory separation agreement in compliance with arts 90 and 103 of the Code. Article 90 requires that the regulatory agreement should at least deal with certain specified matters including the determination of the person who will be awarded care and control of the children subject to the patria potestas of both, the exercise of the same and the regulations for visitation, communication and sojourn of the children with the parent not living with them. Article 90 further provides that the agreement made between the spouses will be approved by the court unless it is injurious to the children or gravely prejudicial to one of the spouses. In the event of disapproval, the spouses must propose a new agreement. The judge also has power under art 91 to deal with the matters required to be regulated under art 90, in default of an acceptable agreement. Article 92 provides, inter alia, that a decree may provide for deprivation of the patria potestas when cause for it has been revealed during the proceedings, and, further, that, when it is in the interests of the children, it may be agreed that patria potestas should be exercised wholly or in part by one of the spouses.

The provisions defining patria potestas are found in art 154 and following. Article 154 provides, inter alia: "Unemancipated children are subject to the potestas of their father and mother. The welfare of the children is a first consideration in the exercise of the patria potestas, in accordance with their personality, and includes the following rights and duties: (i) to protect, keep, nurture, educate and procure an integral formation for them. (ii) to represent them and administer their effects".

The article also provides that the children should be consulted when they have sufficient judgment and that the parents may obtain the assistance of the authorities in the exercise of their potestas. Article 155 deals with the duties of children. Article 156 provides, inter alia: "The patria potestas shall be exercised jointly by both progenitors or by one alone with the express or tacit consent of the other. The acts undertaken by any one of them shall be valid in accordance with social custom and circumstance or in situations of urgent necessity.

"In the event of disagreement, either of the two may resort to the judge who will grant the faculty of decision to the father or the mother without subsequent appeal, after hearing them both and the child, should the latter have sufficient sense of judgment and, in any case, should he or she be over the age of 12 years. Should the disagreements be reiterated or any other causes concur that might gravely obstruct the exercise of the patria potestas, he may grant total or partial faculty to one of the parents or distribute the duties among them. This measure shall be valid for the term fixed, which will never be in excess of two years . . . Should the parents be living apart, the patria potestas shall be exercised by the parent awarded care and control. Nevertheless, the judge may, at the founded request of the other progenitor and in the interests of the child, award patria potestas to the petitioner in order that it may be jointly exercised with the other progenitor or distribute the duties inherent to the exercise of the same between the father and the mother."

Article 159 provides that if the parents are living apart and are unable to agree which of them should have care and control of the children the judge may decide that question.

The opinions of the Spanish lawyers make it clear that the agreement of 28 February 1992 is to be regarded as a separation agreement entered into to deal with the matters which require to be regulated under art 90 of the Code, even though, in the present case, there appear to have been no actual proceedings for separation. It is on that basis that the agreement is regarded as valid and legally binding under Spanish law. Both Senora Valdez and Senor de la Cruz discuss the provisions of the Code. It is, I think, reasonably clear that the effect of the provisions is that the patria potestas as defined in art 154 belongs to both parents unless a judge should take the step, which would be exceptional, of depriving one or other parent of that power altogether. However, the actual exercise of the rights and duties comprised in the patria potestas may be divided between the parties, within reasonable limits, as they agree between themselves. Accordingly, the rights and duties enjoyed by each of the parents under the heading of patria potestas may vary very considerably. It follows, I think, that in order to decide whether a parent enjoys rights of custody, for the purpose of art 3 of the Convention, it is not sufficient simply to point to the fact that that parent enjoys the patria potestas without considering what rights and duties are actually enjoyed under that heading under whatever agreement or order may be in force. On the other hand, where, as in the present case, the care and control of the daily life of the child is entrusted to one of the parents, it does not follow that the other parent may not still enjoy rights which can be classified as rights of custody and, again, regard must be had to the particular rights and duties enjoyed by each of the parents respectively. Accordingly, it seems to me that the issue in the present case depends primarily upon the meaning and effect of the agreement of 28 February.

With regard to that question, Senora Valdez first refers to art 154 of the Code and points out that the rights inherent in the patria potestas may be distributed between the parents, and continues:

"So that in the case of a separation one of the parents is ruled as the guardian or custodian of the minor, with the purpose of ruling with which of the two the child will have to live his daily life, ruling also the system of visits and means of getting in touch with the child for the other parent and the rules for the stay during holidays maintaining the rest of the joint rights-inherent duties of the paternal authority so that they are still shared.

In this particular case, the parents have ruled in the usual manner that both of them will continue exercising their paternal authority, granting guardianship and the custody of the child to the mother and the system of visits. So much so, such an agreement decreases in some way the paternal authority of the father towards the underaged child."

Senora Valdez then expresses the view that the action of the mother in taking the child out of Spain interfered with the father's right to "jointly decide from a fundamental point of view the life of the child". Her opinion continues:

"For one thing, it infringes the already signed agreement by the couple, in which even though the mother is granted the guardianship and custody of the child, bearing in mind when ruling the holidays of the child with the mother (stipulation s c) states 'the husband authorises the wife during holiday period to take the child with her allowing her to leave the country with the child, provided that he is notified well beforehand'. The said Clause establishes the clear intention of the couple in relation to the child leaving the country: only in vacational period after the father has been notified beforehand.

It is equally clearly ruled in the same section of the agreement, that it is intended for the mother to live with the child in Ibiza, otherwise it would be quite difficult for the father to exercise his rights to visits every other Saturday."

The opinion of Senor de la Cruz is to the same effect. With regard to the general position under art 156 he says:

"Paternal separation conveys an alteration in the arrangement of the exercise of patria potestas, but upholds the safeguarding of a series of rights and duties in favour of the progenitor who does not have care and control, which in a certain way implies a limitation with regards to the conduct of the other spouse. Such a situation is a consequence of the current configuration of patria potestas as a dual function relevant to both parents. In this manner, the progenitor who has been deprived of the care and control of the minor continues to be co-appointee of patria potestas even though his exercise has been suspended in part, which places him in a legal position that implies the preservation of certain rights and duties inherent to patria potestas.

The progenitor who does not have care and control of the minor is supported by some very important rights, such as the right of control and supervision over the role exercised by the progenitor awarded care and control of the child by consensus, as well as the right to keep the company of the child -- visiting rights -- the objective of which is a series of diverging relations to encourage the rapport and emotional liaison between father and son."

Later in his opinion he says:

"The intention of the spouses on subscribing to the agreement of proceedings is clear: a system of care and control with visitation rights is agreed upon based on the circumstances

existent at the time and expressed concretely in a series of communications between son and father, established in relation to the circumstance of both mother and child residing in the island of Ibiza. I refer back to the contents of the Sixth stipulation of the agreement from which it is evident to deduce that the communications between father and son were accorded bearing in mind the aforementioned extreme.

"If one were to plead for the wife, the last paragraph of the Second stipulation determines texturally that 'they are both free to change their domicile'. The latter must be interpreted in relation to the existing legal limitations, in as much as the rights and duties of the father towards the minor, in the understanding that the change of domicile referred to will be subject to the visiting system agreed to in the Sixth stipulation in the sense that the change of domicile brought about by the wife shall not demean the exercise of the visiting system, that is to say, that she may take up residence at a different domicile, but within the locality of Ibiza".

He then goes on to express the opinion that before removing J. from Spain the respondent should have requested authorisation from the petitioner or from the court.

It seems to me that the effect of the opinions put before me can reasonably easily be understood and can be paraphrased as follows, that although under the agreement of 28 February 1992 the respondent had care and control of the child and freedom to change her domicile, nevertheless the petitioner retained the patria potestas in important respects which went beyond the access to the child to which he was entitled and included the right to a degree of supervision over the child's upbringing. Further, it was implicit in the terms of the agreement taken as a whole that the child's residence should not be changed from Ibiza. In arriving at that construction of the agreement the provision that the child might be taken out of Ibiza on holiday subject to certain limitations is particularly important. The construction and effect of the agreement are, I think, clearly matters to be determined by Spanish law. I would observe, however, that there seems to me to be nothing unreasonable in the construction given to the agreement or the process by which that construction is reached.

The question then is whether the petitioner's rights under the agreement so understood amount to rights of custody for the purposes of art 3 of the Convention. In Seroka v Bellah Lord Prosser approached the question in a similar case on the basis that the existence and nature of the petitioner's rights was to be determined according to the law of the state of habitual residence of the child, but that the interpretation of the expression "rights of custody" as used in the Convention was a matter for this court. I am content to adopt the same basis for the purposes of the present case, although it seems to me that in view of art 15 there may be a question whether the approach of the courts of the requesting state or that of the state to which the request is made should prevail, if there is any difference between them.

Once the question has been identified in this way, the respective submissions of the parties can be summarised quite shortly. For the petitioner, it was contended that although care and control of the child on a day to day basis was given to the mother, the father retained important rights including a right along with the mother to regulate the residence of the child and therefore that he enjoyed what amounted to rights of custody. For the respondent, it was submitted that there was nothing express in the agreement which gave the father the power to withhold consent to the removal of the child from Ibiza and there was indeed provision in the agreement that the mother could change her domicile and therefore by implication the domicile of the child. Further, it was submitted that the opinions of the Spanish lawyers said nothing more than that the petitioner enjoyed rights of access under the agreement, but rights of access were to be sharply distinguished, in terms of the Convention, from rights of custody. The basis for this argument was the provision of art 21

dealing with the enforcement of rights of access. The agreement did not, therefore, imply that the father had any control over the place of residence of the child. In so far as a share of the patria potestas was concerned, all that the father had was some sort of nebulous right of control or oversight and to say that he shared in the patria potestas meant nothing more than that he retained general parental rights. Such rights, however, did not give him anything that could be considered to be custody and the true effect of the law and the agreement was that custody belonged entirely to the mother.

I have some doubt whether a sharp distinction can be drawn between rights of custody and rights of access in the manner suggested by the respondent but I am prepared to assume for the purpose of this case that the enjoyment of a right of access by itself would not amount to rights of custody for the purposes of the Convention. It seems to me, however, that where, as under Spanish law, the rights and powers conferred by the law on parents in respect of their children may be shared between the parents, in the case of separation, in many different ways, the only possible approach is to look at the whole situation, and determine whether the rights enjoyed by a parent, taken as a whole, amount to rights of custody. In the present case, in terms of the agreement, the petitioner is entitled not only to access and to the general supervisory rights inherent in the patria potestas but also, by implication, entitled to share in the determination whether the child should reside in Ibiza or elsewhere. In these circumstances, I have come to the conclusion that the rights enjoyed by the petitioner under the agreement amount to rights of custody for the purposes of the Convention. It follows that the removal of the child from Ibiza without his consent was in breach of his rights and accordingly a wrongful removal for the purposes of the Convention.

I was referred to a number of authorities in addition to the case of Seroka v Bellah mentioned above. Counsel for the petitioner referred to Re J, Re H and C v C (1992). Counsel for the respondent referred in addition to C v C (1989). The first three cases mentioned, however, appear to me to be concerned with circumstances quite different from those of the present case. As regards C v C (1989), I do not think it necessary to go into the circumstances of the case in detail and it is sufficient to say that it seems to me that the view I have taken in the present case is consistent with the decision in that case.

In all the circumstances, it seems to me that I am obliged to order the return of the child to Spain forthwith, in terms of art 12 of the Convention.

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