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[03/09/1992; Outer House of the Court of Session (Scotland); First Instance]
Taylor v. Ford 1993 SLT 654

T. v. F.

Court of Session

Outer House

3 September 1992

Temporary Judge J. M. S. Horsburgh, Q.C.

J.M.S. Horsburgh, Q.C.: From the facts admitted in the pleadings, so far as adjusted, in this petition and answers, and from unchallenged information given at the bar, it appears that for about 10 years ending on 16 September 1991 the petitioner and the respondent cohabited in Canada. They both have Canadian nationality, although the respondent is of Maltese origin. They had two children, now aged 10 and eight. In January and June 1991 the petitioner left the respondent for short periods.

On 16 July 1991, by ex parte application, the respondent obtained an order from an Ontario court prohibiting the petitioner from removing the children from that province. She again left the respondent, taking the children with her. On 19 July 1991 he similarly obtained an award of their custody and an order for their delivery from the same court. On 6 August 1991 he obtained an order for delivery from a court in British Columbia, where the petitioner and the children then were. Numbers 7 (2), 7 (3) and 7 (5) of process are copies of these orders.

On 8 August 1991 the petitioner and the children returned to live with the respondent in Ontario, in an attempted reconciliation. On 16 September 1991 the petitioner again left, leaving the children with the respondent. The petitioner's averments that she left because of abuse and violence by the respondent are denied.

On 1 October 1991 the respondent left Canada with the children and travelled to Malta. On 2 October 1991 the petitioner obtained an order in the Ontario action at the respondent's instance prohibiting his removal of the children from the province. On 4 October 1991 she obtained a similar restraining order and an order for access. On 17 October 1991, on the petitioner's application, the order of 19 July 1991 granting custody to the respondent was rescinded, and she was awarded interim custody of the children. Numbers 7 (6), 7 (7) and 7 (9) of process are copies of these orders.

On 31 March 1992 the children left Malta with the respondent, and travelled to Paisley where he has since lived with a woman.

In this petition the petitioner seeks an order under s. 5 of the Child Abduction and Custody Act 1985 that the respondent return the children to Ontario, with associated interdict and

orders to facilitate delivery of the children to her. She avers that with the attempted reconciliation between 8 August and 16 September the court order of 19 July in the respondent's favour fell, and her equal entitlement to custody with the respondent under s. 20 (1) of the Canadian Children's Law Reform Act 1980 (hereafter referred to as the 1980 Act) revived. She also avers that the children's removal was in breach of her rights of custody to which art. 3 of the Hague Convention applied, and which she was actually exercising. She maintains that the removal of the children from Canada was wrongful.

On the other hand the respondent avers that at the time of the children's removal he had an award of custody, while the petitioner had no such right, and in any event, she was not exercising any right she might have at the material time. Thus his removal of the children was not wrongful.

On 11 August 1992 the vacation judge granted interim interdict against the removal of the children from Scotland by the respondent. On 12 August he ordered the respondent to return the children to the petitioner, who had come to Scotland, and directed that her subsequent care of them be subject to social work department supervision. The petitioner recovered care of the children, and they presently live with her.

Motions by the respondent for recall of these interlocutors, and for delivery of the children to him, were argued before me on 26 and 27 August. In essence the arguments presented followed the parties' respective averments, and were directed chiefly to the issue of the effect of the attempted reconciliation on the order of 19 July 1991.

I am of the opinion that the respondent is entitled to recall of the interim interdict pronounced on 11 August.

I have reached that conclusion upon the view that the respondent's removal of the children was not wrongful within the meaning of art. 3 of the Hague Convention. On 19 July 1991 he had obtained an order giving him custody of the children. Under s. 20 (7) of the 1980 Act the petitioner's equal entitlement to custody then ended, and she had no custodial rights. In terms of art. 5 of the Convention the rights the respondent then had included that of determining the place of residence of the children. He was thus entitled to take them out of Canada on 1 October 1991. The respondent's right remained effective till rescinded on 17 October, since which date the petitioner has had an interim order for custody in her favour.

The petitioner's argument was first that resumption of cohabitation by the parties had revoked the court order of 19 July, and secondly that the respondent's lawyer's letter of 1 August 1991, which was no. 7 (4) of process, also might have compromised that order. The effect was that the equal custody entitlement given parents by s. 20 (1) revived. Thirdly, she argued that in removing the children the respondent was in breach of both his and the petitioner's custody rights, and so the removal was wrongful.

I consider that first argument to be incorrect. As to Canadian law on the matter, I was referred to Hatt v. Hatt. That case decided that under ss. 1 (1) and 2 (1) of the Infants Act, which gave parents equal entitlement to custody unless otherwise ordered by the court, a resumption of cohabitation did not terminate a court order for custody. The Infants Act seems to have been the statutory predecessor of the 1980 Act. In an opinion obtained from Canadian counsel Hatt was relied on, and in another opinion reference was also made to a decision of Pat Wallace J. in August 1991 to the effect that an interim order for custody and/or support remained effective until changed by the parties. Both opinions supported the view that the attempted reconciliation had not terminated the order of 19 July.

The petitioner's assertion that the reconciliation revived equal custody entitlement relied upon passages in a research memorandum in process. These were to the effect that it was possible that the courts might be persuaded by analogy with Mongrain v. Mongrain and Grail v. Grail that the order of 19 July 1991 fell and Hatt would be overruled or not followed.

In my opinion that is an inadequate basis for contending that the respondent's removal of the children on 1 October 1991 was wrongful, for two reasons. First, the memorandum merely puts forward the possibility that in the future Canadian courts might not follow Hatt. Secondly, the cases of Mongrain and Grail dealt with a different statute, and related to spouse and child support, not to custody. According to the reports, nos. 9 (4), 9 (5) and 9 (6) of process, Hatt was not cited or considered. They therefore provide an insufficient basis for the contention that at the time of the removal of the children there were directly conflicting decisions on the issue in the Canadian courts.

The petitioner's argument was also based on an opinion of Canadian counsel which was to the same effect as the memorandum. It does not refer to Hatt. It states that Ontario law on the effect of reconciliation on custody orders is unclear, and that judges take different views. I do not consider that variation in practice forms an adequate foundation for finding the respondent's removal of the children to have been wrongful. Even if, as averred by the petitioner, the respondent had been advised by his lawyers that removal of the children would be wrongful, standing the information available to me, that advice cannot be regarded as sound. Accordingly, I do not consider that as a matter of law at least, the respondent's action can be regarded as wrongful.

Counsel for the petitioner also argued that since the question was an open one, I should request a decision from the Ontario court on whether the removal was wrongful. I am not prepared to take that course for two reasons. First, I was not referred to any reported case which disapproved of or did not follow Hatt. Secondly the Hague Convention is designed to achieve the speedy return of children wrongfully removed from a jurisdiction, and in the Inner House in MacMillan v. MacMillan and Dickson v. Dickson the need for expedition in deciding applications under the Convention has been emphasised. A request to Ontario would cause delay, and I think that course would only be justified if there was a real doubt about the effect of attempted reconciliations on custody orders under Ontario law at the time of the removal. On the information before me such a doubt has not been shown to exist.

I also consider the petitioner's second argument to be unsound. It was maintained that there might be an agreement which revoked the court order of 19 July. I reject the argument because first it is based on speculation. Secondly, I find nothing in s. 20 to indicate that one or other party can compromise a court order. Thirdly, on its face no. 7 (4) of process does not constitute an agreement between the parties, nor is it a separation agreement such as is referred to in s. 20. In any event, its proposals were superseded by the attempted reconciliation.

Lastly, I consider that the respondent's argument receives powerful support from the fact that the petitioner sought an obtained orders for rescission of the order of 19 July on 4 and 17 October respectively. These steps strongly indicate that at the time of the removal of the children the order of 19 July was regarded as being in force. Counsel for the petitioner had no satisfactory explanation for why that was done if the petitioner's equal right of custody had been revived and the respondent's sole right lost.

I do not consider the petitioner's third contention to be sound.

The argument that the respondent breached his own rights of custody was founded on Re H (A Minor) (Abduction). That case is clearly distinguishable however. In it the award of custody to the mother who removed the child had contained a prohibition against her removing the child from the jurisdiction without the court's leave. The removal was wrongful because she acted in breach of that prohibition. The order of 19 July contains no such prohibition. The respondent, having an order in his favour had the right to determine the residence of the children, and by removing them, he was within his rights. That he did so knowing, as the petitioner avers, that a hearing on custody was imminent, may not be to his credit, but it did not make his actions wrongful in law.

The argument that the respondent acted in breach of the petitioner's own custodial rights was put on the footing that Canadian concepts of custody and access might differ from those of Scots law. I reject that as speculation. It was also contended that the petitioner's right of access was a custodial right. However s. 20 of the 1980 Act distinguishes between custody and access. The Ontario court orders produced also make that distinction, as does art. 5 of the Convention. It was also suggested that under s. 20 (4) and (5) the non-custodial parent had a right to be consulted as to the whereabouts of the children. That reading cannot be supported. It gives no right of consultation or determination in relation to the children's place of residence. No more than a right to inquire and to receive information is given. Accordingly I reject this argument.

It thus becomes unnecessary to decide if the petitioner was actually exercising rights of custody at the time of the children's removal, but I observe that the letter founded on to support that argument, no. 7 (4) of process, deals only with access for the respondent.

Reliance was placed by the petitioner on C v. C (Minor: Abduction: Rights of Custody Abroad) to suggest that custody rights should not be interpreted narrowly. However the basis of that decision was that the mother's removal of the child breached a provision in the order in her favour that neither party would remove the child from the jurisdiction without the other's consent, which had not been obtained. The need for the father's consent was held to be a right to determine the child's place of residence, and hence a custody right. Again the order of 19 July gave the petitioner no such right.

For these reasons I am satisfied that the removal of the children by the respondent was not a wrongful act within the meaning of the Hague Convention. Dismissal of the petition was not sought. Since the respondent was acting within his rights, I consider that he is entitled to recall of the interim interdict, that being designed to protect against his removal of the children from Scotland, he having allegedly wrongfully removed them from Canada.

It does not follow however that an order for the return of the children to him should be made. The petitioner has an interim award of custody in her favour, and that has not been recalled. My decision merely settles that the petitioner's retention of custody cannot depend on the provisions of the Hague Convention. The issue of custody will have to be resolved either in Ontario or in another process in this court, founding on the presence of the children within Scotland.

It should be added that the respondent argued that if his removal of the children was held to be wrongful, I should exercise my discretion under art. 13 (b) and the third proviso of that article, and refuse to order the return of the children. In view of my decision it is not necessary to do so. However, I consider that only in the clearest of cases should this means of escaping the mandatory provisions of art. 12 of the Convention be entertained by the court. I would not have been prepared to do so on the basis of objections to their return by the children, since I consider that the averments made about this are inadequate. It would only

have been with much hesitation that I would have considered that the averments relating to art. 13 (b) itself were apt for proof by parole or affidavit evidence.

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