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[07/05/1997; Inner House of the Court of Session (Second Division) (Scotland); Appellate Court]
Robertson v. Robertson 1998 SLT 468, 1997 GWD 21-1000

R. v R.

Court of Session

Second Division

7 May 1997

The Lord Justice Clerk (Cullen), Lords McCluskey, Coulsfield

In this application under the Child Abduction and Custody Act 1985, the mother of three young children seeks their return to Germany in terms of art 12 of the Convention on Civil Aspects of International Child Abduction, set out in Sched 1 to that Act. Her husband, the children's father, opposes the prayer of the petition. The decisive issue both before the Lord Ordinary and on appeal has been whether or not, as at 6 January 1997, the children were "habitually resident" in Germany within the meaning of arts 3 and 4 of the Convention. That was the date when, according to the petitioner, the respondent breached what she claims to be her custody rights under German law. The petitioner was a native of Germany and was residing there when she married the respondent.

The Lord Ordinary was invited by the parties to decide the issue on the basis of the facts as appearing from the averments of the parties and from the affidavits and other material reproduced in the appendix. The Lord Ordinary accordingly resolved certain issues of primary fact and drew other inferences of fact from this material. He decided that "the critical question was whether it was possible to infer the consent of the respondent to what the petitioner intended at the material time, namely that she should keep the children with her in Germany where she intended to settle and to make her ordinary home. The Lord Ordinary concluded that such consent was to be inferred from the respondent's actings, most notably his agreement, on or about 5 October 1996, to return the children to the petitioner in Germany on 6 January 1997, at the end of a three month holiday stay there.

Before this court, counsel for the father submitted, and counsel for the mother did not dispute, that the Lord Ordinary not having taken any oral evidence, enjoyed no advantage over the Inner House in deciding matters of fact, whether of primary fact or of inferences of fact: Cumbernauld and Kilsyth District Council v Dollar Land, 1992 SC at p 364; 1992 SLT at p 1040B-C. Furthermore, as the Lord Ordinary himself had observed, there was very little dispute on relevant matters of fact between the parties. Counsel for the father also submitted, under reference to Re F (A minor) (Child Abduction), that if the material put before the court by the parties failed to establish any relevant matter of fact, the party on whom the onus lay in relation to that matter of fact was to be the one to suffer in respect of such failure. This submission was not challenged. In these circumstances this court is entitled to reach its own view upon the evidence in order to resolve the decisive issue.

As to the meaning of "habitually resident" within arts 3 and 4 of the Convention, counsel for both parties accepted that the Lord Ordinary was right to apply the law as found in the passages quoted in his opinion from the opinion of the court in Dickson v Dickson, 1990 SCLR at p 703, and in the opinion of the court in Cameron v Cameron, 1996 SC at p 24; 1996 SLT at p 313G-H. In the present case, given the very young ages of all the children, the crucial issue was whether or not it had been established that the father by 5 October 1996 had consented to the children's becoming habitually resident in Germany.

On the basis of the primary facts as narrated by the Lord Ordinary, counsel for the father accepted that the children could have become habitually resident in Berlin if the father had in fact consented to that; and also that such consent might, in certain circumstances, be inferred from acquiescence in or acceptance of a certain state of affairs, namely that the children should continue to reside with their mother in Berlin. He submitted, however, that such consent or acquiescence had to be established by the petitioner and that she had failed to do so. He drew the court's attention to Re H (Minors). "Habitual residence", he pointed out, was not the issue in that case: it was concerned with the meaning of consent or acquiescence in the context of art 13 of the Convention; that article permitted the judicial or administrative authority of the requested state not to order the return of the child if those opposing the return of the child established that "the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention".

In that context the House of Lords held that acquiescence depended on the actual state of mind of the person said to have acquiesced and not upon the other parent's perception as to whether or not he had acquiesced, and that the burden of proof lay upon the abducting parent who sought to rely on art 13. In considering the state of mind of the person said to have consented or acquiesced their Lordships had held that it was relevant to take into account the state of his information and belief; an apparent consent, if based upon a material error as to his rights and the relevant law, was not to be treated as a true consent or acquiescence.

In the present case, counsel for the father submitted, it was perfectly clear that when the mother decided to remain in Berlin with the children, shortly after she took them there on holiday in March 1996, her keeping the children with her in Berlin amounted to a wrongful retention of the children within the meaning of art 3 of the Convention. Had the father been made aware immediately of his rights under the Convention and had he then applied to the appropriate German court to secure the prompt return of the children, the mother, as the abducting parent, could have had no statable basis under art 13 for opposing the father's application, because there was at that juncture nothing to suggest that he was then consenting to or acquiescing in their retention by her in Berlin. It would be bizarre, it was submitted, if the court were to approach the concept of consent and acquiescence as an element for determining the question of habitual residence in any different way from the approach taken in relation to determining the same concept under art 13. On the basis that the approach ought to be the same, it was argued that it was for the petitioner in the present process to establish that, in fact, the respondent had consented or accepted by 5 October 1996 that the children had become habitually resident in Berlin. But, as the supplementary affidavit of the respondent made quite clear, the respondent consulted a solicitor (Mr David Steele) in Northern Ireland after he returned from his first visit to his wife and children in Berlin in about July 1996, to ascertain what action he could take to have the children returned to him. The affidavit contained the following passage:

"3. Mr Steele listened to my arguments and advised me that I could only wait until my wife divorced me. I was informed that until then both myself and my wife would continue to have actual custody of the children until the divorce was made final.

"4. At no point did my solicitor in Northern Ireland mention the Hague Convention or the provisions contained therein. I did not become aware of the Hague Convention until the current petition was served upon me in Scotland by messengers at arms on Monday 7 February 1997."

Against this background, it was submitted, there was nothing to warrant any conclusion that before 5 October 1996 the respondent had consented to the children's making their habitual residence in Berlin; and his agreement on or about that date to return them there at the end of a three month stay in Scotland was dependent on his erroneous belief, based upon inadequate legal advice, that he had no effective choice as to where the children stayed. There was thus no basis for any finding that the respondent truly consented to any change in the habitual residence of the children so as to make them habitually resident in Berlin. Neither the respondent's omission to take formal legal steps to seek the return of the children in the short period before 5 October 1996, after his attempt at reconciliation had failed, nor his agreement on or about 5 October 1996 to return the children to their mother in Berlin after their three month stay in Scotland, could properly be treated as yielding an inference of actual consent, because both the alleged inaction and the admitted agreement were based upon the respondent's understandable ignorance of his rights in relation to the children. Furthermore, the Lord Ordinary was plainly in error in supposing that he could draw any inference in favour of the petitioner from the respondent's evidence, which the Lord Ordinary described as "consistent with a position that although reluctant initially (in particular having regard to the steps he took in or about August 1996), he thereafter accepted, at least for the foreseeable future, until there was any divorce (at which time no doubt he contemplated seeking the return of the children to live with him) that these very young children would continue to live with their mother ordinarily in Germany".

It was plain that the Lord Ordinary had not even considered the relevance of the erroneous advice in determining the question of the respondent's actual state of mind. The same error vitiated his treatment of the respondent's agreement to return the children on or about 6 January 1997 to Germany.

In reply, counsel for the mother founded upon the Lord Ordinary's reasoning both in relation to the significance of the agreement to return the children on 5 January 1997 and also in relation to the matter of implied consent from about August 1996. Even if the Lord Ordinary was wrong on this matter of implied consent from August, it was not a necessary part of his reasoning, and the decision could properly rest upon his inference from the agreement to return the children.

In our opinion the approach urged upon us by counsel for the respondent is the correct one. 7he conclusion of the Lord Ordinary that the respondent's evidence was "consistent with a position that . . . he . . . accepted . . . that these very young children would continue to live with their mother ordinarily in Germany" appears to us to be flawed in two respects. In the first place, we consider that it was for the petitioner to show that the respondent accepted that the children were to continue to reside with her. Mere consistency between the respondent's own evidence and the petitioner's wishes is not enough. In the second place, the Lord Ordinary failed to attach any weight to the circumstance that when the respondent "agreed" to return the children to Germany on 5 January 1997 he did so in the belief that he had no choice. The respondent accepted that he had to return the children because his solicitors advised him that he could do nothing to obtain return of their actual custody until

his wife divorced him. He was excusably ignorant of his rights under the Convention. In these circumstances, the so called agreement to return the children is explained by his acceptance of his solicitors' advice, and his actual belief, that he had no other choice. While we accept that an agreement to return the children was capable of yielding an inference that he accepted that the children were to reside ordinarily in the place to which they were to be returned, we do not consider that that is a necessary inference. In our view the acceptance that the children had to be returned, which was obviously a reluctant acceptance, does not warrant an inference that the respondent accepted that the children had been ordinarily resident in Berlin at any time prior to 5 October 1996 or that they should be habitually resident there in the future. The respondent's true intentions in relation to the care and custody of the children appear to us not to have changed even after he realised that there was to be no reconciliation. He continued to intend to seek the care and custody of the children as soon as the law permitted him to do so.

The Lord Ordinary inferred that the respondent had consented to the children's acquiring a new habitual residence in Germany. His decision on that crucial matter is, in our view, vitiated by his failure to give appropriate consideration to the respondent's state of knowledge at the time in October 1996 when he was seeking to take the children to Scotland and considered that he had no choice but to agree to returning them. In our opinion, however, it has not been shown by the petitioner that the respondent truly consented to the children's becoming habitually resident in Germany or acquiesced in that situation. It follows, in our opinion, that the Lord Ordinary reached the wrong conclusion. We have accordingly decided to recall his interlocutor and refuse the prayer of the petition.

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