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[18/05/1990; Family Court of Australia (Brisbane); First Instance]
In the Marriage of Brandon v. Brandon (1991) 14 Fam LR 181

FAMILY LAW ACT 1975

IN THE FAMILY COURT OF AUSTRALIA, Brisbane

BEFORE: Bulley J.

18 May 1990

No. B3144 of 1990

IN THE MARRIAGE OF:

Stephen Michael Brandon, Husband

-and-

Amanda Therese Brandon, Wife

REASONS FOR JUDGMENT

APPEARANCES:

Mr F. Wilkie Counsel, instructed by Robertson O'Gorman, Solicitors, on behalf of the Wife.

Ms M. May Counsel, instructed by Crown Solicitor, on behalf of the Director-General of the Department of Family Services.

JUDGMENT:

Bulley J: This is the determination of an Application for Review of a decision made by Judicial Registrar Hilton on the 11 April 1990. This Application is made by the wife and it arises out of an Application filed in this Court by the Director-General of the Department of Family Service and Aboriginal and Island Affairs in the State of Queensland representing the Central Authority for the State of Queensland pursuant to the Family Law (Child Abduction Convention) Regulations. The Director-General's Application was filed on the 6 April 1990 and sought inter alia an order for issue of a warrant for the possession of the child D.B. born 17 December 1986 and delivery of the child to the Director-General pending further order, an order that the child be returned to his father S.B. in England, an order that the expenses incurred in respect of the return of the child to his father be paid by the child's mother A.B., and an order that A.B. pay the costs of the applicant.

The Director-General's Application came before me on the 6 April 1990. I then made an order for the issue of the warrant as sought, for confidential counselling to take place

between the parents, and for the further hearing of the Application to take place on the 11 April 1990.

After a hearing which took place on the 11 April 1990 Judicial Registrar Hilton made orders that upon the undertaking of the Applicant to return the child to the husband if an appeal has not been lodged by the wife within 14 days, the child be returned to the husband, and that the wife pay the necessary expenses incurred by or on behalf of the husband including travelling expenses and expenses incurred in respect of the return of the child.

The wife filed the Application for Review of this decision of the Judicial Registrar on the 24 April 1990. In it she seeks that the Director-General's Application be dismissed.

On the 6 April 1990 the wife had filed an Application for custody of the child. This Application is still pending in this Court.

The husband was born in England on the 17 March 1953. The wife was born in Australia in 1966. The wife has lived all her life in Australia apart from the period between September 1989 and March 1990 when she lived in England. D., the only child of the husband and wife was born in Australia.

The parents of the child had lived together for about six months prior to their marriage. In October 1987 they were living with D. at the home of the wife's parents at Beenleigh. On the 19 October 1987 the wife was at this home alone with D. when D. suffered severe burns from water scalding. D. was then hospitalised until the 3 April 1988.

On the 30 December 1987 the wife was charged with grievous bodily harm in respect of the incident in which D. sustained his injuries. On that same date an application was made to the Magistrates Court pursuant to the Children's Services Act for a Care and Protection Order in relation to D. The child was placed in the temporary custody of the Director-General pending a full hearing into the guardianship of the child and the matter was subsequently remanded on a number of occasions.

During a visit for D. arranged away from the hospital on the 3 April 1988 the child was without the consent or knowledge of the Director-General taken by the husband to London by aeroplane. This taking away was arranged by Mr B., the wife and the wife's parents all of whom were actively involved in the plan to have D. taken to England and in the execution of that plan.

Mr B. lived in England for the first two years of his life. He then spent nine months in North America before returning to live with his parents in England. He later went to New Zealand in 1971 and he stayed there until about 1978 when he returned to England. He migrated to Australia in December 1979 and remained here until he returned to England in April 1988.

The husband deposes to taking the child away when he did because of information given to him by the Department of Family Services that they may have D. placed in foster homes after his release from hospital. Immediately on his arrival in London the husband who took up residence with his parents made arrangements for proper medical care for D. and he sets out his son's progress in his Affidavit together with a letter from his son's medical advisor in London. Mr B. had the Department of Family Services in Brisbane informed of the fact that the child was with him in London. The Director-General took no action to have D. returned to Australia. The wife apparently kept in touch with the husband whilst he was in London.

In about early May 1988 the wife whilst attempting to board a flight from Brisbane to London was arrested and charged with child abduction in relation to D.'s removal to London.

In March 1989 the husband came to Brisbane to give evidence at the wife's grievous bodily harm trial. However, the trial was adjourned so the husband returned to England.

He came to Brisbane again in June 1989 to give evidence. On this occasion, he was arrested for child abduction in relation to D.'s removal to London. Mr B. gave evidence at the wife's trial in the Supreme Court in relation to the grievous bodily harm matter. The wife was acquitted. The child remained in London with the husband's family during his visits to Australia.

After the wife's acquittal the husband remained with her in Queensland at her parents' home and they attempted to renew their relationship. Upon submissions being made to the Attorney General it was decided not to proceed with any further charges against either the husband or the wife.

In September 1989 Mr and Mrs B. returned to London to reunite with D. They moved in with the husband's parents.

In November 1989 Mr and Mrs B. moved in to their own home. Soon afterwards the wife's mother arrived for a visit and the husband says that the marriage thereafter became difficult.

In December 1989 the wife and the child left with the wife's mother for a visit to Austria. This visit took longer than the husband had thought and eventually lasted about six weeks.

On the 14 March 1990 the wife without the consent or prior knowledge of the husband left the matrimonial home in London and departed for Australia.

The husband did on the 21 March 1990 obtain an order from the Family Division of the High Court of Justice in London awarding him interim care and custody of D. This order was obtained on an ex parte basis.

The husband subsequently came to Brisbane on the 30 March 1990 in order to seek the return of the child to him to take back to London and subsequently as a result of representations made by the husband the Director-General brought the present Application.

The care and protection order and the temporary custody order in favour of the Director-General ceased to have effect from the 23 February 1990. On that date the matter was withdrawn by the Director-General.

There is no evidence before me as to whether or not either parent knew of the termination of the Director-General's custody order at any time prior to the wife's departure from England on the 14 March 1990. The wife had by deceit obtained a substitute passport for D. for his departure from England to come to Australia. When she first came to Australia she says she telephoned the husband in England making out to him that she was in Austria.

The wife took up residence with her parents when she returned to Australia with D. and she deposes to proposing to continue to stay with them. She also deposes to D. regularly attending a plastic surgeon in England and to his having a couple of young relatives he saw occasionally in London. She mentioned the fact that the husband was in employment when they lived together in London and how she acted as homemaker and carer of D. in London.

The wife also deposes to having decided to separate from the husband in London and of her fear not to tell him in advance because he would take D. from her.

The husband deposes that shortly before the final separation he and the wife had taken a two year lease on a house in London and that they decided to wait until the expiry of the lease before deciding whether to return to Australia.

The wife holds both Australian and Austrian citizenship. She regards Australia as her permanent home. D. is an Australian citizen. The husband holds Australian and English citizenship. When in England the wife held only a temporary visa.

I note the contents of the Affidavit of the paediatrician Dr. Eckert who was involved with the treatment and welfare of D. when he was in hospital in 1987 and 1988. Dr. Eckert expresses unfavourable views of the wife and her parents relating to their attitude to the nutritional needs of D. and his medical needs.

The Application of the Director-General for the possession of D. has been made pursuant to the provisions of the Family Law (Child Abduction Convention) Regulations. Both England and Australia are "Convention countries". The Application is made pursuant to regn. 15. Regulation 16 provides:-

"16. (1) Subject to sub-regulation (3), a court shall order the return of a child pursuant to an application made under sub-regulation 15(1) if the day on which that application was filed is a date less than one year after the date of the removal of the child to Australia.

(2) Subject to sub-regulation (3), a court shall order the return of a child pursuant to an application for an order of the kind referred to in paragraph 15(1) (d) if the date of which that application was filed is a date that is at least one year after the date of the removal of the child, unless it is satisfied that the child is settled in its new environment.

(3) A court may refuse to make an order under sub-regulation (1) or (2) if it is satisfied that-

(a) the person, institution or other body having the care of the child in the convention country from which the child was removed was not exercising rights of custody at the time of the removal of the child and those rights would not have been exercised if the child had not been removed, or had consented to or acquiesced in the child's removal;

(b) there is a grave risk that the child's return to the applicant would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation;

(c) the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views; or

(d) the return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms.

(4) For the purposes of sub-regulation (3), the court may take into account such information relating to the social background of the child as may be provided by the Central Authority of the convention country from which the child was removed.

(5) A court may stay or dismiss an application for an order of the kind referred to in paragraph 15(1)(d) in relation to a child if it is satisfied that the child is no longer in Australia".

Regulation 25 provides:-

"25. Nothing in these Regulations shall be taken to prevent a court of competent jurisdiction, at any time, from making an order for the return of a child to an applicant otherwise than under these Regulations".

Article 3 of the Convention (a copy being Schedule 1 to the Regulation) provides:

ARTICLE 3

"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 4 provides:-

ARTICLE 4

"The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years".

Article 5 provides:-

ARTICLE 5

"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".

It is the submission of the Director-General by her Counsel that when the temporary custody order terminated, the husband and wife had by force of law in England equal rights and authority to the legal custody of D. This state of affairs commenced on the 23 February 1990. This proposition is not disputed.

It is then submitted by Miss May for the Director-General that by removing D. on the 14 March 1990 from England the wife did so wrongfully and thus the Regulations and the Convention come into play. It is further submitted that D. was habitually resident in England immediately prior to the removal by reason of his having lived in that country from early April 1988. It is further submitted that at the time of the removal the husband was actually exercising either jointly or alone rights of custody to D. attributed to him.

Article 12 of the Convention provides:-

ARTICLE 12

"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 the 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.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child".

Thus it is argued that the Court should return the child to the husband forthwith.

It is the submission on the wife's behalf as I understand it that as the original removal of D. from Australia to England was wrongful being in breach of the Director-General's temporary custody order and because such wrongfulness must continue to be attributed to D.'s subsequent stay in England at least up to the 23 February 1990 it was not "wrongful" for the wife to return the child to his country of origin, Australia, soon afterwards. On this argument any habitual residence attained by D. in England was a false one tainted as it was by the illegality of the residence in custody terms throughout all but the last three weeks of his stay there.

It is apparent from the terms of regn. 16(2) and Article 12 of the Convention for example that a concern is expressed inter alia in relation to the aspect of a child having settled in a new environment. Certainly as expressed this relates to a new environment to which a child has been wrongfully removed. On the wife's argument of course the initial wrongful removal was to England. In any event on the present evidence the child seems to have settled into the environment in England.

There seems little doubt that D.'s removal to England was in breach of the temporary custody order. Thus it was wrongful. However the temporary custodian, the Director-General, chose to take no legal action to have the child returned even though this Authority became aware of the child's whereabouts soon after his removal to England. The Director-General it seems monitored the child's welfare and treatment. One notes paragraph 13 of the Director-General's Affidavit filed 6 April 1990:

"13. Due to the child's medical condition, I am informed by officers of my Department and verily believe that he has been undergoing constant medical treatment and supervision since his release from Hospital in April, 1988, and that the continuance of this treatment and supervision is essential for his health and well-being".

Later the authorities chose not to proceed with the child abduction charges against the husband and wife. And later still the Director-General withdrew the application for custody.

This history of the matter indicates to me that when D. was removed to England the Director-General initially chose not to take legal action for return of the child but to keep a close eye on the situation. As time progressed the Director-General became more and more content with D.'s situation as I interpret the available evidence. Certainly by September

1989 at the latest I am satisfied the Director-General had to all intents and purposes acquiesced in the environment which had been provided for the boy. The withdrawal of the temporary custody proceedings on the 23 February 1990 in effect simply gave the concrete badge of approval to this environment, a formal recognition of the long period of acquiescence in the English situation provided for D. However, any taint of wrongfulness in the removal of the child to England in custody terms had long before been cleansed and overcome in the eyes of the Director-General by reason of what it regarded as the apparent good progress of the child in its new environment over a lengthy period of time. In other words any original taint of wrongfulness attaching to D.'s removal to England faded away completely.

There is no doubt that by March 1990 England had become D.'s usual habitual place of residence. The issue of residence is a question of fact: as to this see for example the decision of Barry J. in Keil v Keil (1947) VLR 383 and the cases therein cited. More importantly it had become his new settled environment. Appropriate procedures were over a lengthy period of time set in place for his medical and other welfare. It had also become progressively over the previous nearly two years the environment in which the Director-General, the temporary custodian, had acquiesced. As such the Director-General had progressively come to acquiesce in the removal of the child to England.

Mr Wilkie for the wife placed reliance on the following general observations made by Balcombe L.J. in Re: Evans (Court of Appeal, 20 July 1988, unreported) as set out in Gsponer v Director-General, Department of Community Services Vic 1989 FLC 92-001 at p 77,160 as follows:-

"I stress once again that the whole purpose of this Convention is not to deny any hearing to a father in the circumstances of this father; it is to ensure that parties do not gain adventitious advantage by either removing a child wrongfully from the country of usual residence, or, having taken the child with the agreement of the other party who has custodial rights to another jurisdiction, then wrongfully to retain that child. The purpose of the Convention, and of the Act which embodies it as part of the law of this country, is to ensure that the right court should deal with that sort of issue. The right court in this case is the South Australian Court ...".

In response to these remarks in the context of this case I can only say that I tend to consider that the right Court to determine the contested custody issue is the English Court. As an aside one can validly comment that it hardly lies in the mouth of the wife to complain of this since she was an active participant in initially choosing England for the future home for her son in April 1988 and being apparently content with that environment thereafter until such time as she decided to get out of the marriage for personal reasons and to act in such a way as to make it difficult for the husband to take the child from her.

I share the views expressed by the Judicial Registrar as set out in his Reasons for Judgment as to the applicability of regn. 16 in this case. I too am not satisfied that any of the exclusions therein referred to are applicable to the facts of this case. Indeed it was not argued otherwise before me.

My view is then that the wife wrongfully removed D. in terms of Article 3 from England on the 14 March 1990, that at that time the child was habitually resident in England, that such removal was in breach of the husband's equal rights of custody to the child under the law of England which rights he was then actually exercising.

Thus in my opinion the child should be returned forthwith pursuant to Article 12.

This result accords with the result arrived at by Judicial Registrar Hilton.

I therefore dismiss the wife's Application for Review and I make a formal order accordingly.
