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[22/05/1991; Full Court of the Family Court of Australia (Perth); Appellate Court]
In the Marriage of R. v. R., 22 May 1991

FAMILY LAW ACT

IN THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA, Perth

BEFORE: Barblett A.C.J., Fogarty and Anderson JJ.

May 22, 1991

Appeal No. 52 of 1991

IN THE MARRIAGE OF:

J.R.

(Appellant - Husband)

-and-

M.R.

(Respondent - Wife)

REASONS FOR JUDGMENT

JUDGMENT: Barblett A.C.J., Fogarty and Anderson JJ.

Fogarty J.: By notice of appeal dated 24th April this year, the husband has appealed against an order which was made by Justice Ferrier on 19th April, by which he dismissed an application seeking a declaration under Reg. 17 of the Hague Convention Regulations.

As the point ultimately of significance in the appeal is a relatively narrow one, the facts giving rise to the application before his Honour and the appeal before us can be relatively briefly stated. The parties were both born in France and married each other in June 1982. There are two relevant children. The first was a child V. who was born in August 1981, that is, a year prior to the marriage, and the appeal proceeded on the basis that that child should be treated as not being a child of the father. She has lived with the parties since their marriage and she was one of the subjects of the application. The second was the child M. who was born in 1983. She is a child of the parties to the marriage that we are concerned with.

The parties came to Australia in 1984 and lived in Australia from that time on until the events that we are concerned with arose. It appears that they had in the meantime acquired Australian citizenship. They separated in July 1989 after which the two children continued to live with their mother. There was then a series of proceedings in the Court, commencing with

an application which the wife filed in December 1989 when she sought orders relating to custody, maintenance and property. That was met by an answer by the husband which he filed early the following year.

It is unnecessary to follow through the history of most of those orders. The critical one was the order which was made on 27th April, 1990 and, as that has some significance, I should refer to that. By those orders, which were made by consent, the wife was to have the custody of M. and the husband to have reasonable access to that child. There was an order made in respect of maintenance of that child against the husband. None of those orders related to the first child. However, in paragraph (d) an injunction was granted restraining each of the parties from removing either of the children from the State of Western Australia and the Commonwealth of Australia. That order has continued to apply through to the present time.

However, on 23rd January, 1991 the two children were taken from Australia, apparently in the company of the wife's parents, and taken to France where they have remained since that time. There were then further applications made by the husband arising from that circumstance. Indeed, the wife appeared in proceedings on 5th February in which she gave certain undertakings as to her passport and her remaining in Australia and orders were made, the effect of which was to restrain her from leaving Australia. However, the fact is that she left Australia on 22nd February, 1991 and she then went to France where she has been reunited with her two children and it would appear that she is living in France with those children.

The husband applied to the Central Authority in Australia to take proceedings in France under the Convention for the return of those children to Australia and it would appear that that request has been transmitted to the French authorities and proceedings have commenced in France but have not been dealt with.

The present application was filed by the husband on 9th April. That was an application under Reg. 17 of the Australian Regulations which provides:

> **"A court having jurisdiction under the Act may, if requested by the responsible Central Authority, by order declare that the removal of a child from Australia to a convention country was wrongful within the meaning of Article 3 of the Convention."**

It would appear from the material and the submissions before Justice Ferrier that that application was made in order to aid or assist in the prompt determination of the proceedings in France.

Obviously, although the French Court would be comforted and assisted by a declaration from the original country as to its view of the wrongfulness of the removal of the children from, in this case, Australia, it still remains a matter ultimately for the French Court to be satisfied under its laws that it should or should not make the orders which are sought there.

His Honour refused the application and this appeal has been brought. In the ultimate that appeal turned on one fundamental issue but there are two matters which are of importance and to which reference should be briefly made.

The first relates to the matter to which I have just referred, namely, that this is an application under Reg. 17 but it was an application brought by the husband himself, whereas the actual wording of Reg. 17 envisages an application by the Central Authority.

Justice Ferrier did not see that as a difficulty and he was referred to Reg. 25 which, it was said, justified the application being brought by a private citizen. Reg. 25 reads:

> **"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 the applicant otherwise than under these Regulations.**

It appears to me doubtful whether Reg. 25 justified that approach. It is unnecessary to finally determine the matter but I draw attention to it. It is unnecessary to determine it because the relevant State Central Authority has in the meantime intervened in these proceedings and seeks an order under Reg. 17. That may not technically assist the appeal but it would enable this Court to exercise that original jurisdiction if it otherwise thought it appropriate to do so. Section 28 of the Family Law Act demonstrates that the Court composed as this Court may, if it chooses to do so, exercise not only appellate jurisdiction but the original jurisdiction of the Court.

However, the attention of the Central Authority should be brought to this uncertainty. The material before Justice Ferrier suggested that the Central Authority, for the reasons that were explained, at least knew about and perhaps encouraged this application by the father. They may be right in their view that this course is permissible. I think it doubtful. If it is a course which is thought to be appropriate then the regulations could be expressed in clearer terms.

It may be that there is a policy which supports the view that these applications under Reg. 17 should only be brought by the Central Authority so that they have the imprimatur of that authority. If so then regulations could be clearer about that. So I draw attention to that area of uncertainty. As I say, in this case it appears to me in the final analysis not to be a serious issue. It may be fatal to this appeal but this Court could, and I think should in this particular case, intervene to make a declaration itself if it is appropriate to do so rather than to involve the parties and this family, in the further delay which would be necessary if this matter were remitted to a single Judge for reconsideration.

The critical question then is whether the removal of the two children was wrongful. His Honour's conclusions about that are expressed at pages 12 and 13 and they were the reasons which were challenged on this appeal. I will come back separately to that. Before one reaches that, there is another issue of interest relating to the elder child. This question does not arise in relation to M. because, on any view, the father had the joint guardianship of that child.

However, in relation to the older child one proceeds on the basis that if the applicant is not the father of that child then in Western Australia he would have no statutory rights of custody or guardianship in respect of that child except the right to apply to a competent Court for such an order. The husband in this case at no stage sought any positive orders in respect of the older child. The question then arises whether there was a "right of custody" in respect of V. as that is an essential component of the concept that that child had been wrongfully removed from this Country.

That point arose squarely in the case of C. v. C. (Abduction: Rights of Custody) (CA) (1989) 1 WLR 654. That case had a long and unusual history but for relevant purposes it is the judgment of the Court of Appeal given in December 1988 which is important. In that case there was an order restraining the parents from removing the relevant child from Australia. There was also in that case quite a strong argument that, in any event, the father had rights of custody in respect of that child, but that issue became extremely confused in the English proceeding and I set that aside in order to crystallise the significance of the judgment of the Court of Appeal both in this case and generally.

When the matter came to the Court of Appeal, which was an appeal from the refusal of Justice Latey to direct the return of the children to Australia under the Convention, the argument directed to the question that there was a "right of custody" turned on the injunctive order to which I have referred, which for all relevant purposes is identical with the paragraph to which

I have referred of the orders which were made in April 1990 in this case. Justice Butler-Sloss at page 658 examined that matter in some detail and I think for the purposes of today's proceedings I need not set out that passage. However, her Lordship concluded:

> **"The expression 'rights of custody' should be extended to concepts of custody beyond the ordinarily understood domestic approach. "**

I might say, in parenthesis, that I think until we have had the advantage of the judgment of the Court of Appeal it would not have been likely that one would have concluded that an injunction of the type which was relevant there and which is relevant here would have been understood in Australian domestic law as conferring rights of guardianship or custody. Her Lordship said:

> **"Consistently with the aims of the Convention it ought to be understood in a somewhat wider term."**

Her Lordship then went on to examine the application of that and I should quote from the following passage at page 658, which is in the following terms:

> **"The father does not have the right to determine the child's place of residence within Australia but has the right to ensure that the child remains in Australia or lives anywhere else outside Australia only with his approval. Such limited rights and joint rights are by no means unknown to English family law and no doubt to Australian family law. Indeed, in article 3 rights of custody are specifically recognised as held jointly or alone. The Convention must be interpreted so that within its scope it is to be effective. For my part I consider that the child was wrongfully removed from the jurisdiction in breach of clause 2 of …"**

the relevant orders. In other words, the view was adopted that the injunction should be treated as amounting to a "right of custody."

Neill L.J., at page 663, in a brief passage adopted the same view, and the Master of the Rolls in his judgment agreed with that approach and emphasised the twin components of the Convention, namely, the importance of uniformity and the importance of courts in countries giving full faith and credit, if one may use the Australian term, to orders made in overseas countries.

So the conclusion was reached on that appeal in that case that an injunction of the same type as was granted here amounted to a "right of custody" which, in relevant circumstances, would form the basis for a wrongful removal.

For my own part I must say that when I first read the judgment of the Court of Appeal I thought it amounted to something of a quantum leap from what had hitherto been the understood interpretation of that term. However, I think there are a number of reasons why this Court should, at least as at presently advised, adopt that view. I say "as at presently advised" because this was in the nature of an uncontested appeal where we had only the benefit of argument of one side. It is possible that a later Full Court of this Court may on a fuller analysis of the issue wish to consider the matter further. In saying that, I do not in any way suggest that Dr Dickey has not assisted us fully in the presentation of that issue, but I think it is legitimate in uncontested matters to make reference to a caveat of that sort.

There are two reasons, I think, why as presently advised one should follow the Court of Appeal approach.

Firstly, uniformity itself is highly desirable, particularly between common law countries and, secondly, it appears to me to be a result which is in conformity with the spirit of the Convention which is to ensure that children who are taken from one country to another wrongfully, in the

sense of in breach of court orders or understood legal rights, are promptly returned to their country so that their future can properly be determined within that society.

I might add a third one perhaps; namely, that there would be some irony in a situation where the Court of Appeal in England declared the Australian Court to be one thing and the Australian Court declared it to be another, but one need not pursue that.

For my part, although I must say that I approached this issue with some reservations, I think it appropriate to adopt that course. It is in my view critical to a declaration in relation to the older child, so it is important, but I am content to approach it in that way.

I should add as a footnote that in the ultimate the French courts would need to be satisfied of the same issue and there would be little point in expressing any view in relation to that.

Once one goes past those issues, which on a reading of the appeal book loomed as difficulties confronting the appeal in any event, one then comes to the central point of the appeal as shaped in the amended notice of appeal and as argued ultimately by Dr Dickey.

I might say that Justice Ferrier had been satisfied of those various matters - that is, Reg. 17 and the right of custody issue, but his Honour rejected the application in passages which are set out at pages 12 and 13.

This arose broadly speaking in this way: the wife in the earlier proceedings - that is, in the pre-Convention proceedings - had sworn an affidavit while she was still in Australia and in which she sought to explain how it came about that the children had, in breach of previous orders, been in the meantime removed from Australia. She referred to what she asserted was an agreement between herself and her husband made at the end of last year that in return for certain arrangements as to their property, the wife should be free to take the children to live with them permanently in France. Indeed a minute setting out the wife's understanding of the agreement had been forwarded to the husband but it was returned by the husband on 30th January with a notation correctly pointing out that in the meantime the children had been taken from Australia and it was not signed by him. No attempt had been made to vary the orders which represented barriers to the children's lawful removal from this Country.

His Honour was referred to that material and I think it was quite proper of Dr Dickey in that ex parte application to refer his Honour not merely to the formal material in support of the application but to other material on the file which may have assisted the Judge in that difficult task. I need not refer to the established authorities and practice about the importance of full disclosure in relation to ex parte proceedings. It was in those circumstances that his Honour became aware of this.

There was then discussion about that and his Honour was informed from the bar table of what the husband's response was to the wife's affidavit. He had not replied to it in formal affidavits because in effect it had been unnecessary for him to do so, but His Honour was informed from the bar table of what the husband's response or attitude was to it had he be called upon to respond in a more formal way.

That matter was not taken any further but it forms one of the two bases upon which his Honour ultimately rejected the application. At the bottom of page 12 of the appeal book his Honour said that the husband had made no reference to that part of the record before the Court of the allegations made by the wife in her affidavit of 16th February, 1991 relating to an agreement reached between them in December 1990. His Honour then went on to say:

> **"I can only take it that these allegations so far as they are within his personal knowledge are admitted by him for the purposes of this application."**

His Honour then expounded further upon that. I do not think his Honour was justified in treating it in that way. Indeed the position was to the contrary; namely, that it had been made clear from the bar table that the husband, far from admitting those matters, denied essential aspects of them, so that I think his Honour was in error in considering that it was appropriate to approach the matter in that way.

His Honour then went on to set out what his final reason or his essential reason for dismissing the application, and although the quotation is lengthy I should refer to it. It reads as follows on page 13:

> **"Those allegations indicate that the husband prior to the departure of the children had signified to the wife that upon her undertaking to discontinue her proceedings for settlement of property and to allow him access to the children in France and in Australia, he would agree to the removal of the ban created by the injunction on her moving the children from Australia. By signing the minute evidencing her consent to orders being made to give effect to those agreements and transmitting them to the husband, the wife had excuse to believe that the injunction restraining her removal of the children from Australia would no longer be operative. It is to be noted that the minute as amended by the husband leaves intact liberty to the wife to remove the children from Australia to reside in France on a permanent basis."**

One should say that in contradistinction to what his Honour said there, in the immediately following paragraph his Honour said:

> **"It may be that the wife acted improperly as relates to the behaviour of the litigant in failing to delay the departure of the children from Australia until the order had been formally discharged and improperly towards the husband in failing to give him notice of the actual date of departure of the children from Australia."**

That last reference is a reference to the fact that the children were removed without any pre-warning to the husband by the grandparents.

The fact of the matter, however, appears to be this: there were clearly negotiations between the parties towards the end of last year. The wife, rightly or wrongly, concluded that an agreement may have been reached and minutes were sent to the husband which sought his signature. Those minutes represented what the wife presumably understood to be the arrangement. However, the fact of the matter was that those minutes were not signed by the husband at all and certainly not prior to the removal of the children on 23rd January.

His Honour seems to be drawing a distinction between the wife being led, as it were, into a false position of belief that the husband agreed to this course and, on the other, the formality of having the orders varied or discharged. I do not think that the facts of this case justify any such distinction.

There was an order in existence at that time which amounted to "rights of custody", the breach of which would have amounted to a wrongful removal. The negotiations had not reached such a point of formality that the wife was in my view justified in proceeding on the basis that the orders were no longer to be treated as effective.

The proper course in these cases would have been to have applied for the variation or discharge of those orders. That was not attempted in this case. It is possible to visualise cases where, although that formality did not occur, nevertheless the conduct of the parties had been such and their agreement such that a party would be estopped now from placing reliance upon the orders, but the material in the file to which his Honour referred appears to me to fall far short of that.

Consequently, in my view his Honour being satisfied, rightly or wrongly, of the other matters to which I have referred ought not to have concluded that for those reasons the removal was not wrongful. The removal was in my view, on the evidence before the Trial Judge, wrongful. It was a clear breach of the orders which had been made. It could not be I think legitimately said that the husband's conduct had led the wife into such a position that it would be bad faith by the husband now to seek to rely upon the original orders. That being so, in my view it was appropriate to make the declaration.

I turn then back to the technicalities of the matter. I remain unconvinced that the husband is entitled to make an application under Reg. 17 and I think that was a concern shared by Dr Dickey who did not seek seriously to support that. That was, as we have been told, a reason for the intervention by the State Central Authority. I do not think that it saves the appeal. The appeal is an appeal from the correctness of the original order. The original order dismissed the application. It may have dismissed it for the wrong reason, but it is not an appeal against the reasons for the decision but an appeal against the orders themselves. His Honour would have been justified in dismissing the application upon that threshold issue.

That would lead to the view that the appeal should be dismissed. However, it would be shutting one's eyes to the realities of the situation to leave it at that. Applications under the Convention are required to be dealt with promptly. In other circumstances, one would remit the present application by the State Central Authority to be dealt with at first instance in the ordinary way. That involves further delay and expense to the parties and the community. There seems to be no purpose in doing that. The material is otherwise clear.

In those circumstances, it appears to me that the preferred course would be for this Court, exercising the original jurisdiction of the Court and on the application of the intervener, to make an order under Reg. 17. Although I have not considered the precise format of that, it would seem to me that a declaration that the removal of the two named children from Australia is wrongful within the meaning of Article 3 of the Convention, would be the form that commends itself to me but counsel might like to turn their minds to the question whether they need any greater particularity about that.

Barblett A.C.J.: I agree with the reasons just given by Justice Fogarty and also with the orders which he proposes. I only want to add that I see no uncertainty at all in the construction of Regs. 17 and 25. Reg. 17 allows in both the subsections a responsible Central Authority to apply for an order under that regulation. Reg. 25 I think I should quote in full:

> **"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."**

The words I would underline are "otherwise than under these Regulations." There is no suggestion that an application under Reg. 17 in any way is the same matter as an application under Reg. 25 which is for the return of a child to an applicant, otherwise than under the regulations.

If it is the policy of the executive arm of government that both a person and the Central Authority ought to have the right to make an application under Reg. 17, then Reg. 17 will have to be amended accordingly.

Anderson: I have nothing to add. I agree.

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