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[12/04/1994; Full Court of the Family Court of Australia (Perth); Appellate Court]
Baxley v. Bull, 12 April 1994

FAMILY LAW ACT 1975

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

BEFORE: Ellis, Baker and Kay JJ

12 April 1994

Appeal No. WA3 of 1993 / No PT5557 of 1993

BETWEEN

C. Baxley

Appellant

-and-

B. Bull (Commissioner of Western Australian Police)

Respondent

REASONS FOR JUDGMENT

APPEARANCES:

Ms Braddock of Counsel, instructed by Messrs Paynes, Solicitors, appeared on behalf of the Appellant Wife

Mr Robbins of Counsel, instructed by The Crown Solicitors Office, appeared on behalf of the Respondent

JUDGMENT:

Baker J: This is an appeal from an order made by Tolcon J on 18 January 1994 that the children of the marriage, D.S.B. and C.E.B. born 8 September 1987 and A.M.B. born 28 June 1991 be returned to the United States of America.

The facts, shortly stated, as set out in his Honour's reasons for judgment, were that the husband and wife met in Perth, Western Australia, at a time when the husband was in the United States Navy on leave. They married on 29 January 1983 and had three children - twins, D.S.B. born 8 September 1987, C.E.B. III born 8 September 1987, and A.M.B. born 28 June 1991.

The husband was born 16 June 1954 in the State of Indiana in the United States. The wife was born in Western Australia on 12 April 1963. The husband and wife settled in the United States following the marriage and it was in that country that all three children were born.

The wife and the children returned to Australia on 8 February 1993 and at the time of the trial were living at Mandurah.

Prior to the wife's return to this country, the husband and the wife were apparently having difficulties in relation to their marriage caused by:-

(a) The husband being away from the matrimonial home for lengthy periods;

(b) The wife becoming homesick; and

(c) The husband having employment problems.

Some months prior to the wife's return to Australia, she claimed, the husband was not happy in his employment and he agreed with the wife to move to this country. The evidence was that the husband later changed his mind, which resulted in the wife herself becoming further unsettled.

Whilst they were resident in the United States, the husband and wife lived in five different states and there were apparently lengthy periods of time when the husband, due to his employment, was away from the matrimonial home.

In an affidavit filed on 10 January 1994, the wife set out the circumstances of her travelling to this country on 8 February 1993 and remaining here with the children. In summary, she stated that her father had offered to assist the husband, the children and herself to come to Australia for a holiday. The husband was not able to accompany the family because of his then employment.

A few days prior to the wife and children's departure for Australia, the husband apparently lost his job. He was not prepared to accompany the wife and children, so it was said, because his parents did not agree that he should go. However, he apparently advised the wife that if she found employment for him in Perth he would then move to this country. He in fact gave the wife a resume so as to enable her to make the necessary employment inquiries on his behalf.

The wife did in fact make inquiries and ascertained that in order for the husband to secure employment in this city he would need to be present.

The evidence before the trial judge was that when the wife spoke to the husband on the telephone on 20 February 1993 regarding his travelling to Perth he informed her that he would not come and that he never in fact intended to travel to Western Australia. He stated that he only made such a statement in order to keep the wife happy. It was then that the wife took the decision apparently not to return to United States.

Prior to her leaving the United States, the wife had obtained discounted return air tickets which were in fact cheaper than a one-way ticket to Western Australia. In paragraphs 10 and 11 of her said affidavit sworn on 10 January 1994 she set out the circumstances of her leaving the United States and coming to this country. In the months of August, October and December 1993, the husband and/or his parents had sent to Australia the children's clothes, toys, bedding and the like. Eventually the husband became aware of his rights under the Hague Convention on the Civil Aspects of International Child Abduction and proceedings were instituted by the Commissioner for the Western Australia Police, being the relevant authority in this State, seeking the return of the children to the United States. That application eventually came before the trial judge on 17 January 1994.

As I have said, his Honour delivered his reasons for judgment on 18 January 1994 and it is from that order that the wife now appeals.

THE GROUNDS OF APPEAL

The principal argument raised on the appeal by Ms Braddock on behalf of the appellant is the meaning to be ascribed to the word "acquiescence" in Regulation 16(3)(a) of the Child Abduction Convention Regulations which incorporate, in effect, the Hague Convention on the Civil Aspect of International Child Abduction. Regulation 16(1) provides:-

"Subject to subregulation (3), a court shall order the return of a child pursuant to an application made under subregulation 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."

Subregulation (3) of Regulation 16 provides:-

"The court M refuse to make an order under subregulation (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."

No issue was raised by the appellant that at the time of the removal the husband was not exercising rights of custody at the time of such removal and the only point, as I have indicated, which the appellant seeks to raise in relation to this appeal is the manner in which the trial judge construed the meaning of the word "acquiesce".

On page 17 of the appeal book, the trial judge identified the gravamen of the dispute before him in the following passage:-

"The only matter for determination is whether the husband consented to or acquiesced in the children's removal. In the circumstances of this case, I am satisfied that:-

The husband consented to the wife and children going to Western Australia for a holiday and to ascertain the likely prospects of the husband obtaining employment in Australia; On 11th February 1993 the wife had enrolled the two elder children in a local school without the husband's consent; On 20th February 1993 the wife informed the husband that she did not intend to return to the United States."

The findings which his Honour made in relation to this aspect of the dispute before him appear in the following passage on pages 17 and 18 of the appeal book:-

"It was evident to me that there was no firm agreement between the parties that the wife and children would stay in Western Australia. In that regard I refer to the earlier passages that I have mentioned and in particular to paragraphs 10 and 11:-

'10. ... I only brought enough belongings for a holiday because I believed that, if there was no hope of finding a job for my husband then the children and I would return. I thought that if there was hope of his getting a job he would move out and bring our belongings with him.

11 ... I thought that he was agreeing to a move to Western Australia if there were prospects of work. It was only when it became clear that he had no intention of doing so, and when I felt that he had tricked me into believing he did intend to do so, and further with my great happiness at being back with my family which all together prompted my decision to stay here.'

The wife had unilaterally decided to remain in Western Australia. The wife and children had a return ticket to the United States. When considering those circumstances I am satisfied that the husband had not consented to the wife remaining permanently in Western Australia and that he only consented to the wife and children holidaying in Perth for a limited period, his consent being withdrawn on 20th February 1993 when the wife unilaterally decided to remain in Western Australia."

His Honour in that passage, in my opinion, correctly identified the factual situation, which was that although there had not been a wrongful removal of the children from the United States there had nevertheless been a wrongful retention of them in this country.

All those findings, in my opinion, in relation to retention and removal were open to the trial judge, having regard to the evidence, and in fact there is no complaint raised by the appellant on this appeal in relation to such findings.

On page 18, however, of the appeal book the trial judge came to consider the meaning of the word "acquiescence" in the following passage:-

"We now deal with the expression "acquiesce". That word is defined in the sixth edition of the Concise Oxford Dictionary in these terms:-

'Acquiesce - agree tacitly, raise no objection, accept arrangements.'

In Bell v Alfred Franks and Bartlett Co Ltd and Another (1980) 1 All ER 356 at p360 Shaw LJ commented:-

'What is meant by acquiescence? It M involve no more than a merely passive attitude, doing nothing at all. It requires as an essential factor that there was knowledge of what was acquiesced in.'

As to whether the husband had acquiesced in the wife and children remaining in Australia, the wife relies upon the following:-

- her length of stay in Western Australia prior to the husband invoking the provisions of the Hague Convention;

- the husband and/or his parents sending to the children their clothing and toys;

- the proceedings instituted by the husband in the Circuit Court for the County of Muskegon on 15th September 1993 and the interim orders made relating to joint custody and access on 20th September 1993;

- the husband had legal representation in September 1993 and was aware, or should have been aware, of his rights pursuant to the terms of the Hague Convention.

The husband relies upon the fact that he was unaware of the provisions of the Hague Convention and if he had, he would have instituted proceedings immediately. His actions in instituting proceedings in the United States are consistent with a person anxious to have his children returned to him. Likewise, the forwarding of the children's clothing and toys are consistent with a parent ensuring that the children had their clothes, toys and the like."

It was submitted that the trial judge misconstrued the meaning of the word "acquiesce" and therefore fell into error.

In the course of her arguments to us, Ms Braddock relied upon a decision of the Court of Appeal in the United Kingdom in the matter of Re A Minors Abduction and Acquiescence

(1992) 2 FLR 14 and, in particular, to the comments made by Balcombe LJ concerning the meaning of the word "acquiesce" or "acquiescence".

It is important, in my view, to record what Balcombe LJ said on page 21 of the report, both in relation to the meaning of the word "acquiesce" and in relation to the scheme of the Hague Convention. I now quote that passage:-

"It will be seen that the scheme of the Convention is that where a child has been wrongfully removed or retained under art 3, then, where the proceedings to recover the child are commenced within a period of less than one year from the date of the wrongful removal or retention, the court of the country to which the child has been taken is under an obligation - there is no discretion - to order the immediate return of the child. However, if consent to - which in the context must mean prior consent - or subsequent acquiescence in the removal or retention of the child by the other parent is established, then, as it was put in argument, the door is unlocked and the court is not then bound to order the return of the child, but has a discretion whether or not to do so. The scheme of the Convention is thus clearly that, in normal circumstances, it is considered to be in the best interests of children generally that they should be promptly returned to the country whence they have been wrongfully removed, and that it is only in exceptional cases that the court should have a discretion to refuse to order an immediate return. It is in that context that I turn to consider the meaning of 'acquiesced' in art 13(a).

The relevant meaning of 'acquiesce' in the Oxford English Dictionary is 'to agree tacitly to, concur in; to accept (the conclusions or arrangements of others)' The corresponding meaning of 'acquiescence' is 'silent or passive assent to, or compliance with, proposals or measures'. Since French and English are both official languages of the Convention, we were referred also to the French version of art 13(a), where the relevant words are:-

'Ou avait consenti ou a acquiesce posterieurement' and to a French dictionay definition of 'acquiescer', where the relevant meaning is:-

'B. Dans un cont. de nature jur. Donner une adhesion tacite ou expresse a un acte.'

We were also referred to a judgment of Deane J in the High Court of Australia in Orr v Ford (1988-1989) 167 CLR 316, where at pp. 337-338 he gave a comprehensive dissertation on the various meanings which 'acquiescence' can have at common law. Since we are here concerned with the meaning of 'acquiesced' in an international convention to which many countries, not only those with a common law background, have adhered, it cannot be right to attempt to construe 'acquiesced' by reference only to its possible meaning at common law or equity. Nevertheless, Deane J's first definition appears to me to have general force:-

'Strictly used, acquiescence indicates the contemporaneous and informed ('knowing') acceptance or standing by which is treated by equity as 'assent' (ie consent) to what would otherwise be an infringement of rights.'"

It is necessary for us to determine therefore whether the trial judge was entitled to find that the husband had not acquiesced in law, having regard to the findings of facts upon which an assertion was based.

It must be said, as Balcombe LJ on the page cited above, that if a period of less than twelve months has elapsed since the removal, then the return of the child is mandatory unless the provisions of s16(3) of the Child Abduction Convention Regulations is brought into play. If acquiescence is to be alleged pursuant to s16(3), then in my opinion the onus of proving acquiescence is upon the wife, in which event the trial judge must be convinced to his reasonable satisfaction that the husband has by his conduct acquiesced in the retention by the wife of the children in this country.

The husband's case was that although he initially consented to the wife and children travelling to Western Australia for a holiday and for her to ascertain the likely prospects of him obtaining employment in this country, he did not consent to the wife remaining in Australia indefinitely.

The evidence which the wife adduced before the trial judge to support her submission that the husband had acquiesced in the wrongful retention was as follows:-

(a) The length of time that the wife remained in this country before the husband took any proceedings;

(b) That the husband and/or his parents sent the children's clothing and toys of the children over a period of time;

(c) That proceedings had been instituted by the husband in a circuit court in the United States which sought orders for joint custody and access in September of 1993;

(d) That the husband had legal representation by September 1993 and was aware or should have been aware of his rights pursuant to the terms of the Hague Convention.

The trial judge, having considered all the evidence which was before him and having heard submissions from counsel, came to the conclusion on page 19 of the appeal book that he was not satisfied that the husband acquiesced in the wife remaining in Australia and therefore that the wife had not discharged the onus of proof.

It must first be said that unfortunately the trial judge appears to have been favoured with very few authorities in relation to Hague Convention cases. The only decision to which he made reference was a Court of Appeal decision in England but in a different context. If one reads the comments of Balcombe LJ to which I have referred earlier, with which the Master of the Rolls agreed, one can see that the definition of "acquiescence" which his Honour relies upon is a much less strict definition than one finds in cases in other jurisdictions.

For the appellant to succeed in this appeal she must convince us that the findings which the trial judge made were not open to him, having regard to the evidence that was before him. It is not disputed that although the wife removed the children from the United States, that was by consent of the husband. The argument is whether the retention has been wrongful and whether the acquiescence has been proved.

It seems to me, scant though the evidence was, that his Honour was entitled to come to the conclusion that the wife had not been able to prove acquiescence to his reasonable satisfaction. Once this court comes to such a conclusion, the appeal in my opinion cannot succeed. In my view, the trial judge correctly considered the evidence which was before him and, having considered that evidence, came to the conclusion that the husband had not acquiesced in the wife and children remaining in this country. The finding by the trial judge in that respect, in my view, was clearly open to him on the evidence and therefore, and for all the above reasons, I would dismiss the appeal.

Ellis J: I agree that the appeal should be dismissed for the reasons given by Baker J. The conclusion of the trial judge that he was not satisfied that the husband had acquiesced in the children's retention in Australia within the meaning of Regulation 16(3) as alleged by the wife was, as his Honour has already mentioned, clearly open to the learned trial judge on the evidence. There is nothing further that I wish to add.

The order of the court then is that the appeal be dismissed.

Kay J: I agree with the observations of my brethren and I wish to add only a couple of matters. This is an international statute and it should be interpreted with regard to international decisions.

The return of a Convention child is mandatory unless the court is satisfied that the Regulation 16(3) exceptions apply. This places an onus on the respondent to the application. That onus was clearly identified by Judge Hepner of the Family Court of the State of New York in the decision of Re David S delivered on 31 January 1991. That is available through the Hilton House Reports as David-S.NY. In it her Honour says the following:-

"It is the petitioner's burden to show, by a preponderance of the evidence, that the removal was wrongful ... The respondent has the burden of showing, by clear and convincing evidence, that the child should not be returned because of the exceptions set forth in in Articles 12 and 13(a)."

In the case before us, the exception is that of Article 13(a), which is again reflected in Regulation 16(3)(a) and, in my view, her Honour's observations that the burden is upon the respondent to satisfy the court is an apt one.

Similarly, in the decision of Levesque, a decision of Judge Saffels of the United States District Court for the District of Kansas handed down on 2 March 1993 and available through Hilton House Reports as Levesque.FED his Honour there said:-

"The court now turns to the question of acquiescence. As stated above, if the mother consented or subsequently acquiesced to the child's removal or retention the court is not bound to order the return of the child. All of the exceptions which allow courts to deny return of children under the Convention are intended to be construed and applied very narrowly to effectuate the objectives of the Convention."

In my view, the appeal should be dismissed.

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