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[18/12/1998; Court of Appeal of New Zealand; Appellate Court]
D. v. C. [1999] NZFLR 97

D. v. C.

Court of Appeal

CA 55/97

6 October, 18 December 1998

Henry, Keith and Tipping JJ

JUDGMENT OF THE COURT DELIVERED BY KEITH J.

The issue and the course of proceedings

Ms C. took her two-year-old son A. from New Zealand to Western Australia on 22 November 1995. The father, Mr D., contended that that was a wrongful removal of A. in terms of art 3 of the Hague Convention on the Civil Aspects of International Child Abduction to which both New Zealand and Australia are parties and which is implemented in New Zealand law by the Guardianship Amendment Act 1991. (The English text of the Convention is scheduled to the Act.)

So far as is relevant, art 3 is as follows:

The removal . . . 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 . . .; and

(b) at the time of removal . . . those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal . . . .

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.

"Rights of custody" are defined in art 5(a) in this way:

"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.

At the request of Mr D.'s solicitors, the Australian Central Authority sought a declaration under art 15 of the Convention from the New Zealand Family Court that the removal was wrongful. Such a declaration is apparently not binding on the requesting Authority or the

Courts of that country; rather it is designed to assist them; see eg C v S (minor: abduction: illegitimate child) [1990] 2 All ER 961, 964 HL. (The related provision of the 1991 Act is s 18.)

On that application the Family Court made a declaration that the removal was wrongful because it was in breach of rights of custody attributed to Mr D. under an agreement having legal effect under the law of New Zealand, the place of A.'s habitual residence immediately before his removal. That was the only basis on which the father's argument was put in the High Court and this Court, an argument based on guardianship (involving rights in respect of residence) having been rejected by the Family Court.

The "agreement" on which the father relied is set out as follows in a document from the Fraser Clinic (a Family Court appointed counselling service), dated 10 November 1995 and signed by a counsellor:

J.C. & F.D.

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J.C. and F.D. have a shared relationship for three years. They have one son A. aged 18 months.

CARE OF THE CHILD

J.C. says for her peace of mind she needs a Custody Order. F.D. says he can agree to this.

ACCESS

F.D. asks that access be every Wednesday from 9.00am to 4.00pm plus one weekend day every three weeks with overnight stays being introduced in December.

J.C. is asking F.D. to have an adult present if he has to work while A. is in his care. F.D. says he will arrange this.

DECISIONS REACHED

That J.C. have the day to day care of A., that access be on a regular basis plus one week in January 1996, and that the access arrangements be reviewed six monthly.

Robertson J in the High Court allowed the mother's appeal for two independent reasons:

• the rights in the agreement were not rights of custody; and

• the agreement did not have legal effect.

Leave to appeal

The father has applied for leave to appeal to this Court on a question of law under s 31(4) of the Guardianship Act 1968. That provision, as enacted in 1980, was in force when the appeal was filed. It has been replaced by s 31B which is to the same effect.

Although Mr Pidgeon as counsel for the mother opposed the granting of leave, stressing the long delays which occurred since his client and the child went to Australia, both he and Mr Howman, as counsel for the father, each with experience of the operation of the Convention, indicated there would be value in the resolution or at least the clarification of the legal issues

raised by this appeal. We accordingly consider the issues and return to the question of leave at the end of the judgment.

"Rights of custody"

The 1991 Act does not provide for the direct application of the definition of "rights of custody" to be found in art 5(a) when read with art 3(a). Rather, in s 4, it enacts a definition which brings together the substance of those two provisions:

4. Rights of custody – For the purposes of this Part of this Act, the term "rights of custody", in relation to a child, 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, attributed to a person, institution, or other body, either jointly or alone, under the law of the Contracting State in which the child was habitually resident immediately before the removal or retention of the child.

That definition was enacted on 15 December 1994 too soon after this Court decided G. v B. [1995] 1 NZLR 569 for the legislature to take advantage of the judgment in that case and especially of the comment of McKay J that "it is unfortunate that for reasons which are not readily discernible the Act [in the original s 4] has departed from the wording of the Convention, instead of simply adopting it as has apparently been done in other countries".

We should of course endeavour to interpret s 4 and the other provisions of the Act consistently with the Convention. That follows from the statement in the long title to the 1991 Act that it is amending the Guardianship Act 1968 "in order to implement the Hague Convention", and from established authority, recently recalled in Sellers v Maritime Safety Inspector (Court of Appeal, CA 104/98 5 November 1998). In addition there is, among the parties to the Convention, a growing body of case law and official and other commentary on the provisions of the Convention. We should if possible interpret the Convention in the same way as others do, in this matter of international concern, as Lord Denning indicated in a case about the Warsaw Convention on carriage by air, Corocraft Ltd v Pan American Airways [1969] 1 QB 616, 655. The Hague Convention is similarly designed to operate on a uniform basis between the 50 or more parties to it. In the earlier case Lord Denning was hearing an appeal from Donaldson J who 20 years later, as Master of the Rolls, in a case under the Abduction Convention explained that he was giving a separate judgment only because he wished to emphasise the international character of the legislation implementing the Convention:

The whole purpose of such a code is to produce a situation in which the courts of all contracting states may be expected to interpret and apply it in similar ways, save in so far as the national legislatures have decreed otherwise. Subject then to exceptions, such as are created by s 9 of the Act in relation to art 16 and s 20(4) of the Act in relation to article 10(2)(b), the definitions contained in the convention should be applied and the words of the convention, including the definitions, construed in the ordinary meaning of the words used and in disregard of any special meaning which might attach to them in the context of the legislation not having this international character.

We are necessarily concerned with Australian law because we are bidden by article 3 to decide whether the removal of the child was in breach of "rights of custody" attributed to the father either jointly or alone under that law, but it matters not in the least how those rights are described in Australian law. What matters is whether those rights fall within the convention definition of "rights of custody". Equally, it matters not in the least whether those rights would be regarded as rights of custody under English law, if they fall within the definition. C v C (minor: abduction: rights of custody abroad) [1989] 2 All ER 465, 472-473.

We accordingly now turn to the particular provisions of the Convention in issue in this case. In his judgment Robertson J recalled that this Court in G. v B. had rejected the proposition that "rights of custody" and access rights are mutually exclusive and held that the parent in that case, with "substantial interim access rights", did have rights of custody. Counsel for the mother had, in addition, accepted that "rights of custody" in the context of the Hague Convention is a more expansive concept than that of custody under New Zealand domestic law. Robertson J nevertheless held that the rights of access relied on in this case did not amount to rights of custody since, as a matter of law, an essential aspect of the rights of custody was the right to determine the child's place of residence and, as a matter of fact, the father did not have that right.

For Robertson J the legal requirement followed from the very wording of s 4 (and art 5(a)) which he quoted and emphasised in this way: ["rights of custody"] shall include . . . the right to determine the child's place of residence.

We do not think that the wording of the provision inexorably produces that result.

In its literal terms, the provision does not have to be read as requiring that the claimants in question have the right to determine the child's right of residence. Rather, it can be read in this alternative way: claimants may succeed if they show that they have any qualifying rights relating to the care of the person of the child, one of which rights may be the right to determine place of residence. That particular right, on this reading, is just one of the qualifying rights of custody, or, to adapt a common expression, the existence of that right is sufficient but not necessary.

That wider reading gains strong support from a consideration of the words which the Judge omitted from art 5(a) at the critical point of his judgment. We emphasise them:

"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.

The emphasised words support. the proposition that the residency right is just one particular qualifying instance and not a necessary qualification.

The Judge's interpretation essentially removes the emphasised words from the definition. As well it would produce the most unusual result of treating an inclusive definition ("shall include") as exclusive or exhaustive, cf eg J F Burrows Statute Law in New Zealand (1992) 190-193.

The Judge also drew support for his interpretation from G. v B. "where the Court found that the father and mother had joint rights [to determine residence]". While that was so, that cannot be decisive in the present case since the version of s 4 in force at the time required that the claimant establish both the right to the possession and care of the child and, to the extent permitted by that right, the right to determine where the child is to live. As noted, since that case was decided the wording of s 4 has been amended so that it more closely matches that of the Convention and it no longer has an express cumulative element.

More significantly, the Court held that the father's "reasonable rights of visitation . . . to include every other weekend, alternating holidays and summer vacation" granted under an Indiana court order which also gave the mother sole care and custody meant that he had a (joint) right to determine the child's residence. That had been breached by the mother's bringing the child from Indiana and the Court directed an order for return.

Following his reference to G. v B. mentioned above, Robertson J concluded his discussion of the present issue in the following way:

I also accept that Mr D., as a non-guardian with limited and informal rights of access, does not have any right to determine A.'s place of residence. I am persuaded that access rights alone (even if substantial) do not constitute "rights of custody" within the meaning of art 3 without the additional right to determine the child's place of residence, which is an incident of guardianship. G. v B. is not contrary to that conclusion. The emphasis in child abduction law on the right to determine where the child resides necessarily means that questions of guardianship will be at the forefront of the enquiry. As noted in Trapski's Family Law (vol iv, para GM4.06):

In cases of abduction from New Zealand, the definitions of custody and guardianship in terms of s 3 Guardianship Act 1968 are relevant. Also pertinent is the issue of whether the "person" is a guardian in terms of s 6 of the Guardianship Act or whether the mother is a sole guardian by virtue of s 6(2).

In Re MacCall ([1995] FLC 81, 501 at 81, 516) the Full Court of the Family Court of Australia referred to a passage from Overall Conclusions of the Special Commission of October 1989 on the Operation of the Convention:

The first point to be clarified was that "rights of custody", as referred to in the Convention . . . constitutes an autonomous concept, and thus such rights are not necessarily coterminous with rights referred to as "custody rights" created by the law of any particular country or jurisdiction thereof. Thus, for example, in Australia it is customary for "custody" to be granted to one parent, but even in such cases Australian law leaves "guardianship" of the child in the hands of both parents jointly; the parent who has not been awarded "custody" under this legal system nonetheless has the right to be consulted and to give or refuse consent before the child is permanently removed from Australia.

This again demonstrates how notions of guardianship and its attendant rights are central to the concept of "rights of custody" under art 3. It confirms my conclusion that the learned Family Court judge erred in finding that A.'s removal was in breach of rights of custody.

We disagree with that passage, for three reasons. The first relates to the alleged requirement, already considered in part, that the claimant must have the right to determine residence (the second sentence), the second is the connection of "rights of custody" to guardianship (the bulk of the passage) and the third concerns the assessment of the facts of the present case against the law as we understand it to be (the first sentence).

The first and second reasons are linked, in that Robertson J emphasises the centrality in the inquiry under the Convention and the 1991 Act of the role of guardianship and the definitions of it and of custody in the 1968 Act. With respect, we disagree if by that it is being said that national concepts govern the interpretation of the Convention. The Convention is not directly concerned with guardianship, or even with custody. Nor does it use national concepts directly – as indeed the quoted 1989 Conclusions indicated. As those Conclusions also say, the Convention established an autonomous concept. While the rights arising under national law must plainly be central in the application of the Convention definition, they do not determine its meaning.

Accordingly, while a guardian under national law may well qualify under the Convention, that would be because the rights of the guardian under that law include "rights relating to the care of the person of the child" in terms of the Convention.

The breadth of the concept used in the Convention is stressed in the Explanatory Report on the Convention prepared by Professor Elisa Perez-Vera who had been the Reporter of the Hague Conference on Private International Law which prepared the Convention. The Report was published by the Permanent Bureau of the Conference in 1982. It begins with a statement of its purpose:

On the one hand, it must throw into relief, as accurately as possible, the principles which form the basis of the Convention and, wherever necessary, the development of those ideas which led to such principles being chosen from amongst existing options. . . .

This final Report must also fulfil another purpose, viz to supply those who have to apply the Convention with a detailed commentary on its provisions. Since this commentary is designed in principle to throw light upon the literal terms of these provisions, it will be concerned much less with tracing their origins than with stating their content accurately. (paras 5 and 6)

The discussion of the General characteristics of the Convention begins with this passage:

The Convention reflects on the whole a compromise between two concepts, different in part, concerning the end to be achieved. In fact one can see in the preliminary proceedings a potential conflict between the desire to protect factual situations altered by the wrongful removal or retention of a child, and that of guaranteeing, in particular, respect for the legal relationships which may underlie such situations. The Convention has struck a rather delicate balance in this regard. On the one hand, it is clear that the Convention is not essentially concerned with the merits of custody rights (art 19), but on the other hand it is equally clear that the characterization of the removal or retention of a child as wrongful is made conditional upon the existence of a right of custody which gives legal content to a situation which was modified by those very actions which it is intended to prevent. (para 9).

Article 19 provides as follows:

A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

Consistently with that, the Explanatory Report at the end of its discussion of the Objects of the Convention underlines the fact that, as is shown particularly in the provisions of art 1.

The Convention seeks to be more precise by emphasizing, as an example of the "care" referred to, the right to determine the child's place of residence. However, if the child, although still a minor at law, has the right itself to determine its own place of residence, the substance of the custody rights will have to be determined in the context of other rights concerning the person of the child. (para 84 emphasis added)

Professor Perez-Vera confirms with that example what appears to be the ordinary meaning of the words when read in context and in the light of their purpose (referring to art 31 of the Vienna Convention on the Law of Treaties) – that is, to repeat, that the (shared) right to determine residence is one but not the only qualifying right.

To summarise to this point:

• claimants under the Convention and 1991 Act do not have to establish that they have the right to determine the place of the child's residence;

• the expression "rights of custody" and the part definition of "rights relating to the care of the person of the child" are to be given their ordinary meaning in their context and in the light of their purpose;

• they are broad expressions and are not necessarily confined to national concepts of "guardianship" or "custody";

• while rights under national law are obviously critical in the application of the international wording those rights and related concepts are not to be substituted for that wording and they do not determine its meaning.

We now turn to the facts of this case and to the question whether Mr D. has "rights of custody" and whether they were breached by the removal. That question assumes a positive answer to the question, considered in the next part of the judgment, whether the "agreement" had legal effect. We have to consider the facts ourselves since the Judge approached his assessment of the facts on a basis of law which we have rejected.

Under the first part of the "agreement", Mr D. asked to have the care of A. for seven hours each Wednesday and a weekend day every three weeks, with overnight stays being introduced the following month. The extent of those rights was not precisely stated under the heading Decisions Reached, but it is stated that while the mother was to have the day-to-day care of A. the father was to have regular access (with corresponding responsibilities of care) plus a week in January 1996, with the access arrangements to be reviewed six monthly. Those rights, involving the direct "care of the person" of A., would plainly be defeated by his removal to another country.

Accordingly we conclude that the removal was in breach of Mr D.'s rights of custody – assuming that he had rights arising "by reason of an agreement having legal effect under the law of [New Zealand]". We now turn to that assumption.

"An agreement having legal effect"?

Robertson J held that "all the indications are that it [the alleged agreement] was intended as an informal, reviewable arrangement and was not intended to affect Ms C.'s guardianship rights". (There was no challenge in the High Court, nor accordingly in this Court, to the Family Court's conclusions that the father was not a guardian of A.) The Judge ruled that "An informal agreement reached in the context of private counselling cannot be elevated to the status of an agreement 'having legal effect' by virtue of sl 8 of the Guardianship Act".

Section 18 is as follows:

18. Effect of custody agreements – An agreement between the father and mother of a child with respect to the custody or upbringing of or access to the child shall be valid, whether or not either of the parties is a minor, but shall not be enforced if the Court is of opinion that it is not for the welfare of the child to give effect to it.

That provision can be traced back, although in a different form, to s13 of the Laws Amendment Act 1882. A principal reason for the original provision was to nullify the rule of the common law that an agreement by a father to part with custody was void as being contrary to public policy; see eg In re Besant (1879) 11 Ch D 508. Such agreements were now valid, but the Court retained its power to make decisions in the interests of children (as it did in removing the daughter of Annie Besant and the Rev. Frank Besant from the custody of the former, notwithstanding that the parties had agreed that she should have custody). The Judge discussed possible differences between "valid" in s 18 and "legal effect" in the

Convention and concluded that the interpretation of the latter phrase that best accords with the International Child Abduction statutory scheme is "an agreement which is legally enforceable". The qualification to s18 meant that any agreement in this case did not have that characteristic.

We are inclined to doubt whether that ruling gives sufficient significance to the remedial purpose of s18 and its predecessors, or to the inclusion in the Convention of the reference to agreements having legal effect. In addition is of course the essential difference in principle between the validity or legal effect of an agreement, on the one hand, and the methods of enforcement of it, on the other.

We do not however pursue those matters since, largely for the reasons indicated by Robertson J, we conclude that the "decision reached" in the 1995 document does not amount to an agreement at all:

• it is not in the form of an agreement;

• it is not signed by the mother and father;

• it is, to quote the Judge, "expressed somewhat awkwardly and ambiguously";

• it is imprecise in its terms, for while it records the father's request in relatively precise terms the "decision reached" is for access on a "regular basis plus one week in January 1996";

• moreover it was to be reviewed six monthly, the first review arising at about the time of the Family Court hearing.

The context in which the document was prepared also supports the conclusion that it does not incorporate an agreement with legal effect. Ms C. requested the Family Court to arrange for her and Mr D. to meet with a counsellor to discuss difficulties within their relationship. A Family Court coordinator wrote to the parties and mentioned the two-fold purposes of counselling.

The purpose of counselling is two-fold. Firstly to find out if the problems that have been causing so much unhappiness could be altered, would you both wish to continue your marriage? If so support and help in re-establishing a worthwhile relationship would be offered to you both.

Secondly, if it is not possible for you to continue to live together the counsellor will encourage you both to reach understandings on issues that need to be decided upon if you separate.

Those purposes essentially match s 11(2) of the Family Proceedings Act 1980:

(2) As soon as reasonably practicable after the matter has been referred to the counsellor, the counsellor shall submit a written report to the Registrar stating –

(a) Whether or not the husband and wife wish to resume or continue the marriage; and

(b) If not, whether any understandings have been reached between them on matters in issue.

Also to be read with that provision is s 12:

12. Duty on counsellor – A counsellor to whom a matter is referred under section 9 or section 10 of this Act –

(a) Shall explore the possibility of reconciliation between the husband and wife; and

(b) If reconciliation does not appear to be possible, shall attempt to promote conciliation between the husband and wife.

Those provisions are in turn to be read with the definition of "marriage" in s 7A. The definition includes, for the purposes of s 9 under which initial requests for counselling are made and also accordingly for the purposes of ss 11 and 12 (the only other possibly relevant provisions), a relationship in which the parties are or have been living together as husband and wife, although not legally married to each other. There is a dispute between the parties in this case whether they were in that relationship. Nevertheless, the counselling appears to have proceeded in that statutory context.

Counsel sharply disagreed about whether counselling under the 1980 Act should be able of itself to generate an agreement of legal effect. On one view, to deny such a possibility would greatly reduce the value of the counselling process. It should be capable of producing a real, effective result by way of legal effective agreement. If it did not there would be little incentive to become engaged. On the other view, to recognise an agreement which came from counselling without any further step would limit its conciliatory exploring value. It would put a weaker party at the risk of being overborne. That might particularly be so in the context of the break up of a marriage or relationship.

These matters were not pursued in any detail before us and in particular we were provided with no factual information about the operation of the various processes under the 1980 Act. We would say however that the latter view, that is that the process of counselling does not by itself produce an agreement of legal effect, is amply supported by provisions of the 1980 Act. As already noted, under s 11(2)(b) the counsellor submits a report to the Registrar stating whether any "understandings" have been reached. The Registrar then sends a copy of the report to the parties or their lawyers (s 11(3)). By contrast the mediation provisions, set out next in the Act, state as the objectives of the mediation conference, first, the identification of the matters in issue and, second, trying to get an "agreement" between the parties on the resolution of the issues (s 14(2)). By contrast to the counselling provisions the parties have an express statutory right to have their lawyers present to assist and advise them (rather than simply receiving the report after the event) and, if custody or access to a child is in issue, the lawyer appointed to represent the child may also be present (s 14(3), (4)). The chairman of the conference, a Family Court Judge, is to record in writing the matters in issue at the conference showing separately the matters on which agreement is reached between the parties and the matters on which no agreement is reached (s 14(7)).

The chairman also has the power to make consent orders which for all purposes have the same effect as if they were made by the consent of the parties in proceedings before a Family Court (s 15(1) and (3)). Again, there is a safeguard not reflected in the counselling provisions. If that process is proposed and a party does not have a lawyer present, a consent order is not to be made unless the party states expressly that that party does not wish the conference to be adjourned to provide an opportunity for legal advice to be taken (s 15(2)).

That legislative background provides, as indicated, a substantial further reason for our holding that the document prepared in this case was not an agreement having legal effect. It follows that the removal was not in breach of the Convention.

Discretion to refuse a declaration

The conclusion we have reached on the substantive issues means that we do not have to go on and consider whether there is a discretion to refuse a declaration under s 18 of the 1991 Act and art 15 of the Convention. Relevant to the existence of such a power, and if it exists its exercise, would be the emphasis in the Convention on expeditious decision making ("prompt return" in preamble, arts 1(a) and 7, "expeditious procedure" in art 2, "without delay" in art 9, "expeditiously" in art 11 and the one year period in art 12). The delay in the present case would clearly also be highly relevant.

Result

Leave to appeal is granted but the appeal is dismissed. Any question of costs can be subject of memoranda.

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