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[22/12/1994; Alberta Court of Appeal (Canada); Appellate Court]
Hoge v. Hoge [1994] AJ No. 1036, (1994) 162 AR 397, (1994) 10 RFL (4th) 1

Alberta Court of Appeal

Kerans, McFadyen and O'Leary JJ.A.

December 22, 1994

File No. 94-15539 Calgary

A.H.

Respondent (Applicant)

-and-

G.H.

Appellant (Respondent)

REASONS FOR JUDGMENT

APPEARANCES:

P. McMillan for the Respondent

R. Ruston for the Appellant

KERANS, J.A: This is an appeal from an order declaratory that children of the appellant and respondent are being wrongly detained in Alberta.

The parties were married in Alberta in 1980. Two children were born of that marriage, also in Alberta. The parties and the children resided in Alberta until 1987, when unhappy differences arose and they separated. At that time, the mother moved to Montana with the children. In 1989, she commenced a divorce action before the Court of Queen's Bench of Alberta, and in that proceeding, she sought and received custody of the children. She continued to reside in Montana with the children until 1993, with the access arrangements that seemed not to cause any difficulty. In that year, the mother decided to pursue a venture which made demands on her that meant that she could not for one year give the children the care they needed. She approached the father, to ask him to keep the children for one year. He agreed, and they signed a piece of paper. There has been some dispute about the terms of that agreement, but the fact of the matter is that he took over daily custody and control. Neither of them at that time went to Court for any kind of a variation order to affirm these arrangements.

During the course of the year the children were with him, the father came to the conclusion that it was in the best interests of the children that his care and custody become permanent. He applied on notice to her to the Court of Queen's Bench of Alberta for a variation order. She was represented at the hearing to determine interim custody and made submissions on the merits. In other words, she attorned to the jurisdiction of the Court of Queen's Bench of Alberta. On August 30, 1994, a judge of the Court of Queen's Bench of Alberta made an interim variation order giving the father interim custody pending a full hearing.

On September 30, 1994, the mother filed material with the Government of Montana and the Government of the United States alleging a wrongful abduction under the Hague Convention. That matter was processed in the normal way and came to the attention of the father in Alberta. On November 15, 1994, the mother caused an application to be brought in Queen's Bench to vacate the order made on August 30 and direct the immediate return of the children as wrongly retained under the Convention. Her application was heard in Queen's Bench, and the judge directed the father to return the children before the end of the year. As a result, this appeal was launched, which we have heard on an emergent basis. The notice of appeal was filed on December 14 and we have heard this matter today, December 22.

In our view, the learned Queen's Bench judge who has made the order appealed from has erred. We should observe that, no doubt because of the rush of events, we do not have a formal order. We do understand that the burden of his order was to declare that the children were wrongly retained in Alberta, as those words are used in the Convention.

Article 1 of the Convention, which is now part of the law of Alberta pursuant to the International Child Abduction Act , S.A. 1986 Chapter 1-6.5, provides that the objects of the Convention are to secure the prompt return of children wrongfully removed or retained. Article 3 provides: 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 learned chambers judge found that the children were habitually resident in Montana and had been wrongfully retained.

On the facts that I have just summarized, it is at best arguable whether the children were habitually resident in Montana on the day of the hearing.

We do not, however, need to deal with that issue because, even assuming that the children on that day were habitually resident in Montana, it seems to us there was under the Convention no wrongful retention. First, there is no finding. nor any material before us to indicate, that, under the law of Montana, the children were in Alberta on the day of this order in breach of a right of custody. On the contrary, it may very well be that the Montana courts, if their jurisdiction were ever invoked, which it has not been, might very well conclude that there was no breach of any right of custody because, under Montana law, the Alberta courts had jurisdiction and had made lawful orders.

Second, there is no evidence, as I have mentioned, of any actual exercise of any right of removal or retention under any Montana law. Under private international law, the Court of Queen's Bench here had jurisdiction to deal with the best interests of these children because there was a substantial connection between Alberta and these children. This was true in 1989 when the mother herself invoked the jurisdiction of the Alberta courts to give her

custody and it was in our view also true on August 30, 1994 when the father invoked the same jurisdiction to ask for an interim order for variation.

In any event, it ill lies in the mouth of the mother to make a contrary submission because she attorned to the jurisdiction of the Alberta courts on August 30, 1994 when she made submissions on the merits on the variation order.

Accordingly, in our view, there was no wrongful retention within the meaning of the Convention.

We have also asked ourselves the question in this case whether, aside entirely from the Convention, Alberta should step back from claiming any jurisdiction over these children to permit the Montana courts to exercise jurisdiction. The fact of the matter is, however, that nobody has invoked the jurisdiction of the Montana courts. There are no pending claims in Montana. The mother lives in or near Kalispell and the father lives near Lethbridge. Having regard to the history of the matter, it seems to us to be at least as satisfactory as not for the Alberta courts to retain jurisdiction.

We would like to add one more point in support of our contention that the learned chambers judge erred. The burden of his order, as we have said, is that Alberta lacked jurisdiction to make a variation order by reason of the Convention. But the time to raise that objection was at the time of the hearing in Queen's Bench in August, not later in a separate application. In effect, then, this chambers judge was put in the position of sitting in appeal from a decision asserting jurisdiction by one of his brother judges. He has no authority to do that. If an error had been made in August, the matter should have come to us, not to another Queen's Bench judge.

Accordingly, we allow the appeal and vacate the order. As a result, the interim order made on August 30 stands. The interim custody arrangements then made stand, and any further order about custody or access should be brought before a Queen's Bench judge.

. . .

We are all of the view that costs should follow the event here and below in the sum awarded by the learned chambers judge and in Column 2 here.

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