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[29/05/2001; Family Court of Papakura (New Zealand); First Instance]
G. v. J. [2001] NZFLR 593

IN THE FAMILY COURT HELD AT PAPAKURA

FP NO 055/43/01

G.

Of *

Hampshire, United Kingdom, Marketing Manager

Applicant

J.

Of *, Papakura,**

Mother

Respondent

Date of Hearing: 24 April 2001

Date of Judgment: 29 May 2001

Counsel: C R Pidgeon QC for Applicant

D A Burns for Respondent

RESERVED JUDGMENT OF JUDGE J G ADAMS

[Hague Convention: Access]

Solicitor for Applicant: Smith & Partners, P O Box 104065, Lincoln North, Waitakere City

Solicitor for Respondent: Styants Earley, P O Box 77116, Papakura,

Introduction

This case is about access, and the enforcement of an overseas access order pursuant to the Guardianship Amendment Act 1991, where the children are now habitually resident in New Zealand.

This case has raised issues about:-

The foundation of jurisdiction,

The effect of the overseas order, and

The standing of the Central Authority.

Additionally there is argument as to whether the overseas order was part of a bargain which included a child support term and whether a child support term should be introduced into the access order.

Background

The parties were never married to each other. They have two children - B.G., born 3 February 1991 (10 years) and K.G., born 25 June 1992 (almost 9 years).

The respondent married Mr J. and sought permission from the High Court (Family Division) in England to remove the children to New Zealand so that her husband might work in New Zealand.

By consent Singer J in the High Court (Family Division) on 19 April 2000, made a Residence and Contact Order under s 8 Children Act 1989. The full text of the order is as follows:-

UPON HEARING counsel for the Official Solicitor, solicitor for the father, M.G., and the mother, V.J. appearing in person

AND UPON the father undertaking that he will fund the cost of contact with the said children in June/July every year

AND UPON the mother undertaking that she will:-

(i) ensure that the ** Account No. ** is kept with a minimum balance of £2,000.00 at all times;

(ii) advise the father in writing of her travel arrangements by no later than 31 July 2000;

(iii) use the surname "G." as the surname of each of the children in the future for all purposes and that she will authorise and require all persons, institutions and others to do likewise;

(iv) make the children available for contact with the father on two separate occasions each year, each occasion of contact to be for a duration of not less than 3 weeks (unless impracticable in the light of the children's educational requirements);

(v) ensure that at least one such period of contact will take place in England every year;

(vi) encourage the said children to reply to all letters or other communications (including when practicable on the Internet) from the father;

(vii) encourage and permit the children to make to and receive from the father all reasonable telephone calls;

(viii) write to the father at least once every year in July, giving him a general report on the well being and progress of the children;

(ix) ensure that the father is supplied promptly with the copies of the children's school reports;

(x) take all the necessary steps to obtain Orders in New Zealand no later than December 2000 mirroring the terms of this Order, and once obtained to provide the father and the Official Solicitor with copies of the mirror Orders;

(xi) at all times keep the father informed of the children's address in New Zealand and of their telephone number.

THE COURT ORDERS THAT:-

1. There be leave to the father to withdraw his application dated 25 January 2000.

2. The children do reside with the mother.

THE COURT FURTHER ORDERS THAT:-

3. There be leave to the mother, V.J., to remove the children from the United Kingdom permanently to New Zealand, subject to the proviso that such leave will lapse on 31 December 2000 if the children remain resident in England and Wales at that date, unless meanwhile extended by this Court on application or by the parties written consent.

THE COURT FURTHER ORDERS THAT:-

4. The children shall have contact with the father as follows:-

UNTIL THE CHILDREN GO TO NEW ZEALAND

(i) One weekend every 3 weeks and half of each school holiday, including half-terms;

(ii) Reasonable telephone contact.

WHEN THE CHILDREN RESIDE IN NEW ZEALAND

(iii) In England for a period of not less than 3 weeks in the long school holidays (December/January) every year, the children shall spend the festival days in December (24 – 26) with the father on alternate years commencing with Christmas 2001. The mother shall be responsible for the costs of this travel;

(iv) For a period not less than 3 weeks during the school holidays in June/July each year. This period of contact will take place in England or New Zealand and the father shall be responsible for all the costs of the travel;

(v) In New Zealand on any other occasion, provided that the request is made by the father in writing, with reasonable notice to the mother and that the costs of travelling to New Zealand is at the father's own expense;

(vi) At all reasonable times by telephone;

(vii) By letter and (if and as practicable) via the Internet.

5. There be liberty to all the parties to apply, and in particular, in the event that the mother has not left the country or made firm travel arrangements by the end of July 2000.

6. There be no Order as to costs including the costs of the Official Solicitor.

AND IT IS RECORDED THAT:-

1. The ** Account No. ** has been set up to provide funds to facilitate contact between the children and the father on one occasion every year.

2. The ** Account is not to be conducted so as to go into Overdraft.

3. The parties and P.C. (the mother's brother-in-law) will agree between themselves as necessary:-

(i) Precisely how the said account is to be used from time to time for funding the children's travel to and from contact with the father in England and the father's travel to and from New Zealand for contact;

(ii) Any fiscal consequences of maintaining the said account;

(iii) The effect, on the ownership of the credit balance, of any additional sums paid into it from time to time."

The respondent failed to take steps to obtain any orders in New Zealand pursuant to item (x) of her undertakings and she did not fund the costs of the children's travel in December 2000 / January 2001 so that funds were deducted from the ** Account, and therefore that account fell below the minimum balance of £2,000.00.

The applicant requested assistance from the Child Abduction Unit in London who sent the application to the Central Authority in New Zealand. The Central Authority instructed Mr Pidgeon QC to bring an application for the applicant. In early March 2001 the applicant applied for access orders along the lines provided in the English order, or alternatively for an access order pursuant to s 23 of the Guardianship Act 1968.

In early April 2001 the respondent filed an affidavit in response in which she asserted that she believed that she had kept to her obligations "under the agreement". She asserted that the applicant had "failed to keep to his obligations". She said, "The arrangement we had clearly provides that he was to continue paying child support. He has failed to do so." She said, "I can no longer trust him in keeping to his side of the agreement."

The respondent filed an application dated 4 April 2001 noting that she had been "directed by the [English] Court to obtain a mirror order in the New Zealand jurisdiction." She completed her application in the following terms – "I therefore ask the Court to make a custody order on the same terms and conditions contained in the order of the Family Division of the High Court dated the 19th April 2000 with one variation to these conditions – that I will only be required to pay the travel costs for the children's annual visit to see their father in the United Kingdom if the respondent is making child support payments as agreed." She also applied for an order varying the mirror order "…with regard to the child support issue."

Both parents presented their cases upon the basis that contact between the children and their father at the frequency established by the United Kingdom orders would be for the welfare of the children.

Hague Convention and New Zealand Legislation - Introductory

Section 22A Guardianship Act 1968 provides for the registration in New Zealand of overseas custody orders. The relevant provisions imply that access terms of an overseas custody order will be comprised within the registration package. Section 22A does not apply to orders made in the United Kingdom because that country has not been prescribed under s 22K.

Both New Zealand and the United Kingdom are signatories to the Hague Convention on the Civil Aspects of International Child Abduction. Article 1 of the Convention describes its first object as "To secure the prompt return of children wrongfully removed to or retained in any Contracting State". The second object is "To ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."

In New Zealand, the Guardianship Amendment Act 1991 is described in its long title as "An Act – (a) To amend the Guardianship Act 1968 in order to implement the Hague Convention on the Civil Aspects of International Child Abduction; and (b) To provide for matters incidental thereto". Section 1 of the Guardianship Amendment Act 1991 prescribes that it "shall be read together with and deemed part of the Guardianship Act 1968 …" The Convention itself is attached as a schedule to the Guardianship Amendment Act 1991 and is an aid to interpretation.

In Gross v Boda [1995] NZFLR 49, the Court of Appeal (5 judges) considered the interpretation of this legislation. The first judgment was delivered by McKay J who, having quoted the long title stated (p 50):-

That being its declared purpose, it should so far as possible be construed in a manner which will implement the Convention and accord with its terms.

McKay J noted that the Hague Convention had not been simply adopted, as had been done in some other countries [including England].

Richardson J said (p 51):-

"While there are some differences in expression [between the Convention and the 1991 Amendment Act] I cannot discern in the statute a legislative intent to depart in matters of substance from the Convention and to modify the obligations which New Zealand accepted in acceding to the Convention."

The other judges were of a similar view.

In S v S [1999] NZFLR 625, Fisher J commented (in a case where the children were returned to Australia, their country of "habitual residence"), as follows (p 631):-

"As the Convention preamble and objects suggest, primary emphasis is placed upon prompt return of children wrongfully removed or retained. The Court of the country of the child's residence is presumed to be the appropriate forum for determining custody and access issues."

I respectfully agree. A central theme of the Convention is to give primacy to the forum of habitual residence of the child.

Hague Convention and New Zealand legislation – rights of access

Article 21 of the Convention on the civil aspects of international child abduction provides as follows:

An application to make arrangements for organising or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child. Central Authorities are bound by the obligations of co-operation which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of all conditions to which the exercise of those rights may be subject. Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights. The Central Authorities, either directly or through intermediaries, may initiate or assist in the institution of proceedings with a view to organising or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject.

Section 20 Guardianship Amendment Act 1991 provides as follows:

20. Application for access to child in New Zealand –

Where the Authority receives, in respect of a child, an application in which the applicant claims –

(a) To have rights of access in respect of a child; and

(b) That the child is habitually resident in New Zealand; and

(c) That the child is present in New Zealand, -

the Authority shall make such arrangements as may be appropriate to organise or secure the effective exercise of the applicant's rights of access."

Section 8 Guardianship Amendment Act 1991 provides as follows:-

8 Courts having jurisdiction to entertain applications under Convention -

(1) The duties, powers, and functions that, under the Convention, are conferred or imposed on the judicial authorities of a Contracting State shall be exercised or performed, in New Zealand, by a Family Court or a District Court.

(2) Subject to the provisions of this Part of this Act and to any rules made under section 32 (4) of the principal Act, every Family Court and every District Court shall have such jurisdiction, and shall have and may exercise such powers, as is or are reasonably necessary or expedient to enable the Court to carry out its functions and duties under the under the Convention.

In New Zealand, a parent who does not have custody of their child may apply for access pursuant to s 15 Guardianship Act 1968.

Jurisdiction, legal effect of overseas order, standing of the Central Authority

The problem with a case like the present is to determine how the principles and law apply where the habitual residence of the child has lawfully changed after the access order was made. In this case, the habitual residence of the children was in the United Kingdom at the time the English orders were made. Those orders permitted the children to be brought to New Zealand and prescribed what access the children would have with their father thereafter. In the scheme of the Convention the English Court was the appropriate forum to determine those issues at that time. Nevertheless upon arrival in New Zealand pursuant to those orders, the habitual residence of the children must be in New Zealand.

The questions of the legal effect of an overseas access order, the correct foundation of jurisdiction, and the standing of the Central Authority in these proceedings has been considered or noted in three cases which have been referred to me. The first such decision was of the English Court of Appeal in Re G (a minor) (Enforcement of Access Abroad) [1993] 3 All ER 657 (CA). Five days later, Judge Bremner in the New Zealand Family Court decided Secretary for Justice v Sigg [1993] NZFLR 340. In the Family Court of Australia, Lindenmayer J in Director-General, Department of Families, Youth & Community Care v Reissner (1999) FLC 86, 173, considered the issues in the Australian context.

In all three cases it was determined or accepted that the party with the benefit of the overseas access order had, "rights of access" pursuant to Article 21 of the Convention. In particular, I note the carefully reasoned discussion of Hoffmann L J in Re G [p 665 (h) to p 667 (c-d)].

The English Court of Appeal in Re G, distinguished the Convention's mandatory provisions for the support of custody rights from its provisions for protecting and securing respect for access rights. The English Court of Appeal distinguished the duties of the Central Authority (clearly spelt out in Article 21 and New Zealand's s 20) and the jurisdiction of the Court. Butler-Sloss L J was of the view (p 663) that –

providing for legal aid and instructing [local] lawyers to act on behalf of the applicant … exhausts the direct applicability of the Convention.

At p 664, she observed

"There are no teeth to be found in art 21 and its provisions have no part to play in the decision to be made by the judge."

In Re G the child had been habitually resident in Ontario, Canada when the Ontario Court granted custody to the mother and access to the father. The Ontario order permitted the mother to live with the child in England which she did. Because the child's "habitual residence" then became England, it was held that the English Court was then the proper Court to impose an access order. Butler-Sloss L J, whilst agreeing that Article 21 applied, nevertheless held (p 664) –

In a case where the child is habitually resident in the contracting state, being England, before the breach, the Convention does not directly affect the jurisdiction of the English court.

In Re G the father argued unsuccessfully that the English Court was bound under the Convention to give effect to the Ontario order. The Court found no independent basis for jurisdiction under the Convention. The resultant order was in similar terms to the Ontario order but with deferred implementation. I think it is fair comment that the three judgments and the result in Re G reflected a fusion of international comity and child welfare, despite the determination that the English jurisdiction was unfettered.

Thus the English position is that Article 21 has application so that the Central Authority should facilitate action to obtain respect for the "rights of access", but, as a matter of plain jurisdiction, the Court is not fettered; the appropriate jurisdictional base is an ordinary application for access [under section 8 Children Act 1989]; but the Court nevertheless regards the overseas order as relevant and, to that extent, the Convention has some effect.

In Director-General, Department of Families, Youth & Community Care v Reissner, Lindenmayer J considered Re G and distinguished the Australian position from the English position because (para 73; p 86/185):-

In the United Kingdom, of course, the provisions of the Convention have been effectively adopted into the law of the United Kingdom directly, rather than, as in Australia, through the enactment of Regulations."

His Honour did not give any explanation as to why that formal difference should produce a different result. His Honour also robustly disagreed with the approach in Re G, saying at para 76 (p 86/185):

that approach differs from the approach which is appropriate in Australia, given that the Convention has been adopted here in a different way, and the words of the provisions of the Convention itself, in my view, also support the different approach which I regard as being more appropriate here.

Lindenmayer J said at para 72 (p 86,184) :-

"the aims of the Convention are, amongst other things, to ensure that access rights created in one Contracting State are respected in another Contracting State to the extent that that is possible."

At para 86 (p 86,186) he observed that he -

"should pay proper regard to the purpose and intention of the Convention, and in fact that is perhaps the most significant matter to be taken into account in the exercise of that discretion. I should also, of course, have regard to practicalities. I should have regard to the welfare of the child, without making it the paramount consideration. And I should have regard to the relative recency and the circumstances of the making of the orders in the Superior Court of Arizona which defined the rights of access of the maternal grandmother,"

In that case Lindenmayer J made orders giving broad effect to the Arizona orders, but with some amendments.

The Australian position appears to accept that the Regulations and the Convention provide a jurisdictional basis for the making of an order which broadly respects the overseas access order; but the Australian Court may adjust the order at the Court's discretion.

In Secretary for Justice v Sigg, Judge Bremner noted (p 348):-

"Counsel are agreed that I cannot vary or otherwise alter the decree and there the matter rests until the mother and father resolve the issue."

Accordingly, that issue was not the subject of argument and determination.

In Secretary for Justice v Sigg, Judge Bremner rejected a submission that the Court had no jurisdiction to make an order where the application was advanced under s 20 of the Amendment Act (which gives effect to Art 21). He held that jurisdiction was found in s 8 (1) of the Amendment Act which confers on the Court powers and functions set out in the Convention. With respect I observe that s 8 does not confer powers and functions which are not conferred on judicial authorities under the Convention, and therefore I do not see s 8 as a fount of jurisdiction. Section 8 (1) merely specifies the Court (Family or District). Even s 8 (2) is expressed in terms that go no further than to provide jurisdiction and powers "to

enable the Court to carry out its functions and duties under the Convention". It must be remembered that the Family Court and the District Court are creatures of Statute and have no inherent powers.

With respect, I do not see that the fact that the Convention has been adopted into New Zealand law by enactment makes, of itself, any difference to the jurisdictional question. Sections 8 and 20 Guardianship Amendment Act 1991 seem to add nothing of significance on this point to the terms of the Convention. In my respectful view the English Court of Appeal's distinction between the duties of the Central Authority (under Article 21 and s 20 of our Act) and the jurisdiction of the Court is well made. Nevertheless, at least for New Zealand, I do not regard that as the end of the matter.

Clearly, the applicant can claim "rights of access" under New Zealand law from the English orders by virtue of s 20 of the Amendment Act (which "… should so far as possible be construed in a manner which will implement the Convention and accord with its terms": per McKay J in Gross v Boda). In my view, those "rights of access" are inchoate in New Zealand until an order is made to give some effect to them.

In New Zealand, the statute which gives effect to the provisions of the Convention, is to be "read together with and deemed part of the Guardianship Act 1968" [Section 1 Guardianship Amendment Act 1991]. Thus, in New Zealand, the statute which embodies the Convention is part of the same statute which provides jurisdiction to apply for (among other things) access orders. This is a significant difference from the English position where the Convention has been adopted, but has not been statutorily linked to the Children Act 1989.

With respect, I would articulate the jurisdictional situation in New Zealand as follows:-

Where s 20 Guardianship Amendment Act 1991 applies, and there is no access order in New Zealand, the New Zealand Central Authority must give effect to s 20 and "…make such arrangements as may be appropriate to organise or secure the effective exercise of the applicant's rights of access."

In the New Zealand legislative context, s 20 should be construed so as to sufficiently authorise the Central Authority to apply for an access order under s 15 of the Guardianship Act 1968 (which is part of the same statute). In my view it does not matter whether the Central Authority applies in its own name or in the name of the applicant. After all, the Central Authority is acting on the request made from another Contracting State initiated by request from the applicant himself. I find authority for this procedure sufficiently implied in, and to give effect to, s 20 and the Convention; and I find jurisdiction for the specific application (access) in s 15 of the principal Act.

Because New Zealand is now the "habitual residence" for the children, the New Zealand Court may impose an access order of its own choice [in this respect I respectfully agree with the reasoning in Re G].

Because the issue arises under the general umbrella of the Convention, and because this involves our international obligations, it will generally be appropriate for the Court to fast-track these matters as it does with custody issues which arise under the Convention. Moreover, the Court should be guided by the intention of the Convention that access orders, in these situations, should be accorded "respect". Although Article 21 (and s 20) lay the active burden on the Central Authority, the Court does not have to be deaf to that message. Indeed, I do not think that the English Court of Appeal in Re G was deaf to that message.

These cases will quite commonly arise for the purpose of enforcement of access orders made by a Court which, at the relevant time, was the "habitual residence" of the child. It is for the welfare of children that access arrangements are reliably observed and enforced. Prima facie in these cases, the Court can generally assume that the order was for the welfare of the child at the time it was made. Such an approach gives practical effect to the Convention. To delay such matters, particularly in international situations, can be prejudicial for the welfare of children. But the access order which is ultimately made by a New Zealand Court is a New Zealand Court order, even if in exactly the same terms as the overseas order. As in England, the welfare of the child will be the paramount consideration where the child's habitual residence is New Zealand. If the New Zealand Court is persuaded by reasons of the welfare of the child or another sufficient reason, the order may be modified. In an appropriate case the Court may decline to order access at all.

Was the English order subject to an implied term regarding child support?

The order of 19 April 2000 is silent as to child support. At the time the order was made the applicant was voluntarily paying £250 per month. The respondent asserts that it was part of the bargain struck on 19 April 2000 that child support at that rate would continue. The applicant asserts this was ten times greater than the child support he was liable to pay, and that he had only paid at that rate to persuade the respondent to remain in the United Kingdom. One of the two annual access visits under the order was to be at his expense and he says he ceased the voluntary child support payments to accumulate money for the travel costs. The applicant's English solicitor wrote a letter in which he recalled a discussion over the issue of maintenance during negotiations which led to the orders of 19 April 2000. The respondent seems to have been represented by her brother-in-law rather than by a lawyer in those negotiations. The applicant's lawyer referred to communications with the respondent's brother-in-law, but cannot throw any light on what may have actually been said directly to the respondent herself.

Each party presents as having operated on a different understanding. Neither view is patently unreasonable. The letter from the applicant's solicitor is produced as an exhibit. It is hearsay. It has been filed at a point in time when no effective counter could be made. On the evidence available to me, I do not find myself moved towards either view on the balance of probabilities. Accordingly, the respondent has not made out her case that the consent orders as to residence and contact were agreed to be subject to performance of the prior child support arrangement.

Should the order be subject to a child support term?

At present there is no order for child support. The discrete issue which commenced these proceedings related to enforcement of or compliance with the English order for contact. The only basis for enlarging the ambit of that issue is if the respondent can demonstrate that it is just to do so. She accepts that it is for the welfare of the children to have the contact with the applicant as set out in the English order. She has not been able to establish, in this proceeding, that there was a common understanding that the child support would continue at £250 per month, or that the performance of the contact order was contingent upon a continuation of that child support arrangement.

I decline to vary the contact order to make it subject to the child support arrangement as contended for by the respondent. In my view the child support issue is more appropriately dealt with by separate proceedings – either by an application for a provisional maintenance order in New Zealand for confirmation in England, or by an application for child support directly in England.

Orders

In the present case it is a matter of concession between the parties (save for the respondent's arguments about child support conditions) that the English order satisfactorily answers the children's welfare needs. Having rejected the respondent's counter-arguments I now make an access order in terms which give effect to the English order.

I therefore make the following access order:

(a) The children shall have contact with the father as follows:-

(i) In England for a period of not less than 3 weeks in the long school holidays (December/January) every year, the children shall spend the festival days in December (24 – 26) with the father on alternate years commencing with Christmas 2001. The mother shall be responsible for the costs of this travel;

(ii) For a period not less than 3 weeks during the school holidays in June/July each year. This period of contact will take place in England or New Zealand and the father shall be responsible for all the costs of the travel;

(iii) In New Zealand on any other occasion, provided that the request is made by the father in writing, with reasonable notice to the mother and that the costs of travelling to New Zealand is at the father's own expense;

(iv) At all reasonable times by telephone;

(v) By letter and (if and as practicable) via the Internet.

(b) The mother shall:-

(i) ensure that the ** Account No. is kept with a minimum balance of £2,000.00 at all times;**

(ii) use the surname "G." as the surname of each of the children in the future for all purposes and she will authorise and require all persons, institutions and others to do likewise;

(iii) make the children available for contact with the father on two separate occasions each year, each occasion of contact to be for a duration of not less than 3 weeks (unless impracticable in the light of the children's educational requirements);

(iv) ensure that at least one such period of contact will take place in England every year;

(v) encourage the children to reply to all letters or other communications (including when practicable on the Internet) from the father;

(vi) encourage and permit the children to make to and receive from the father all reasonable telephone calls;

(vii) write to the father at least once every year in July, giving him a general report on the well being and progress of the children;

(viii) ensure that the father is supplied promptly with the copies of the children's school reports;

(ix) at all times keep the father informed of the children's address in New Zealand and of their telephone number.

(c) It is recorded that:-

(i) The ** Account No. ** has been set up to provide funds to facilitate contact between the children and the father on one occasion every year.

(ii) The parties and P.C. (the mother's brother-in-law) will agree between themselves as necessary:-

(aa) Precisely how the said account is to be used from time to time for funding the children's travel to and from contact with the father in England and the father's travel to and from New Zealand for contact;

(bb) Any fiscal consequences of maintaining the said account;

(cc) The effect, on the ownership of the credit balance, of any additional sums paid into it from time to time.

Costs

The respondent was in default of her undertaking to the English Court. She should have obtained mirror orders without prompting. Her defaults have required this litigation. The applicant is entitled to an order for costs. I invite counsel to file memoranda within 14 days and I shall then determine quantum.

J G Adams

Family Court Judge

Signed at am/pm on 29 May 2001.
