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[25/01/2002; Family Court at Christchurch (New Zealand); First Instance]
Anderson v. Paterson [2002] NZFLR 641

Anderson v. Paterson

FP 009/799/01

Family Court Christchurch

14 December 2001, 25 January 2002

Before: Bisphan, J.

Counsel: Mrs Walshe for the applicant; Mr Hales for the respondent

BISPHAN, J.: Does the applicant have "rights of custody" in respect of B.P., born 20 July 1994? That is the question for the Court.

The respondent, who is the natural mother, took the child to the United States of America on 19 December 2000. The respondent and the child had until that time been living in New Zealand.

Hague Convention proceedings have been issued. The Central Authority of the USA has requested a declaration in terms of s 18 of the Guardianship Amendment Act 1991 as to whether the removal from New Zealand was wrongful within the meaning of art 3 of the Convention.

The applicant, who claims to be the child's father, contends that the removal is wrongful and in breach of his rights of custody. The respondent, for her part, contends that the applicant does not have rights of custody and therefore her removal of the child to the USA was not wrongful. The applicant asserts that he is a guardian of the child, ie that he and the respondent were living together as husband and wife at the time the child was born. The applicant has the onus of establishing that fact on the balance of probabilities; he who asserts must prove. He must satisfy me in terms of s 6(2) of the Guardianship Act 1968 that he was so living.

The case proceeded by the reading of affidavits and submissions were made by counsel. There was no cross-examination of witnesses and this was no doubt considered appropriate because one of the parties, the respondent, remains in the USA and could not be cross-examined. It would have been inappropriate to have allowed cross-examination of other deponents.

I find that the parties were in a relationship which started in 1993 and ended in 1995. The child was conceived and born during this time. There can be no doubt that the applicant is the father of the child and I so find. From 1995 to 1997 there was spasmodic communication and association between the applicant and the child. From 1997 until the child was taken to

the USA the applicant had the care of the child every second weekend from Saturday morning (sometimes extending back to Friday evening) to Sunday night. I find he also had the care of the child during holidays. The applicant made child support payments. None of the foregoing was greatly disputed.

There is a conflict as to whether the parties were living together as husband and wife at the date of birth of the child. The deponents (including the parties) dealt with this by simply stating that the parties were or were not (as the case may be) living together at the relevant time. There is little indication as to what the deponents meant by "living together" and little or no supporting evidence as to why the deponents held their respective views. There was, for instance, little or no evidence of the usual indicia such as sharing household responsibilities, financial support, moral support or holding out as a "married couple". I suspect all deponents equated "living together" with "residing under the same roof" which is only one factor, albeit an important one.

In her affdavit the respondent said that she and the applicant were not living together as husband and wife at the material time. The respondent indicated that the applicant lived nearby and said that they had lived together shortly after the birth of the child.

G.M., who is a friend of the respondent, recalled the respondent living in Scargill when the child was born. He said that the parties had lived together in Parnassus prior to the child being born and lived together for a short time at Cheviot after the birth. He gave evidence of problems in the parties' relationship.

Mr W.S., the respondent's stepfather, stated that he had lived in Scargill for about 13 years. His evidence was that the applicant was not living with the respondent in the relevant relationship at the time of birth and that the parties only lived together in Parnassus some months after that event. M.L. confirmed that the respondent occupied a farm cottage on the deponent's farming property from 24 January 1994 to 8 December 1994. She makes no mention of the applicant.

E.C., the respondent's eldest daughter, was 11 years of age at the time the child was born. In her affidavit she stated that the applicant was not living with the respondent in a relationship in the nature of marriage at the time of the birth.

In his affidavit the applicant stated that he was living with the respondent at Scargill at the time the child was born and that he attended the birth. He disputed much of the evidence of the respondent and her deponent witnesses. The applicant's brother, C.A., and the applicant's mother, L.A., also asserted that the parties were living together at that time.

The respondent in her affidavit pointed to the fact that paternity was denied by the applicant. The applicant said there were reasons for this but this denial is a matter which must weigh in my consideration of the applicant's contentions.

The applicant made the point that Ms C. was only 11 years of age at the time of the child's birth. I take into account Ms C.'s age and also her relationship to the respondent when considering her evidence. I attach some weight to her evidence because she resided in the respondent's household throughout the relevant time.

It is difficult to assess credibility but doing the best I can with the evidence, I find that the respondent and her deponent witnesses, despite there being some internal conflicts in their evidence, provide a marginally more cogent picture of the position at the birth than the applicant and his witnesses. find that the relationship between the parties, both before and

after the birth, was fragmented and inconstant. The applicant has not satisfied me that he was living with the respondent as husband and wife at the birth of the child.

Counsel referred me to two cases Gross v Boda [1995] 1 NZLR 569 and Dellabarca v Christie [1999] 2 NZLR 548. The first of those cases was decided before the amendment to s 4 of the Guardianship Amendment Act 1991, and dealt with a child abducted to New Zealand. It was held that a USA visitation order created rights of custody in terms of the then s 4. That section now reads:

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.

The Court of Appeal in Dellabarca v Christie provided a summary of the law as follows (p 555):

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.

Article 3 of the Convention is as follows:

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 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.

Article 5 states:

For the purposes of this Convention -

(a) "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;

(b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

Bearing in mind the provisions of art 3 of the Convention is my finding that the applicant is not a guardian of the child fatal to his application? If I had found he was a guardian and had the rights of "guardianship", as defined in s 3 of the Guardianship Act 1968, it would probably follow that he had rights of custody in terms of the Convention.

But, why should a non-guardian father be in an inferior position to a father who is a guardian, even a married one? Apart from the fact that it is in the statute, what is so significant about living together as husband and wife at the time of the child's birth? The notion harks back to a time when marriage was seen as the ideal - living together at the birth was the next best option. I fail to understand its current significance. It is not necessarily a matter which enhances the welfare of the child and I doubt whether the Convention would be concerned with such a nicety. What surely is important is the relationship between the "non-custodial parent" and the child after birth and as the child is growing up.

The notional concept of "guardianship" is not necessarily determinative. What is necessary is the existence of a right or rights of custody and the actual exercise of such rights. If a right can be defined as an interest or expectation guaranteed by law the touchstone is enforceability. That is implicit in art 3 of the Convention which describes how rights of custody may arise; certainly the ones specifically referred to are all legally enforceable.

If a non-guardian father is actually exercising rights of custody by caring for a child it seems paradoxical to say that he has no rights of custody; if he has no rights he can hardly be exercising them. What was the applicant exercising? He had care of the child because he is the father. He was exercising a "right of custody" by caring intermittently for the child as the father - a person who, in terms of the New Zealand legislation, has the right to apply for custody and/or access.

Under s 11 of the Guardianship Act 1968 a father or mother " . . . may apply for custody orders" and under s 15 a parent of a child may apply for an order granting access to the child. I am prepared to hold that they are rights of custody.

If I accept that the rights in s 11 and s 15 of the Guardianship Act 1968 are rights of custody, were they being effectively exercised? The rights under ss 11 and 15 are to apply for custody and/or access. Are they too abstract to qualify under the Convention and Amendment Act because they require the exercise of a judicial function before they can formally be established?

I take the view that a right in abstract form is sufficient provided it can effectively be exercised and, ultimately, enforced. I am satisfied that the applicant under New Zealand law has rights of custody and access pursuant to those sections; they arise by operation of law. They are not too abstract to qualify as rights of custody under the Convention and the Amendment Act. They are enforceable through the Courts. Furthermore there is no logical reason why a non-guardian father who exercises "rights of custody" by informal agreement with the mother should be in a worse position than a similar father who has a legally enforceable agreement or for that matter a custody or access order. Both would be obliged to bring proceedings in Court if their expectations were thwarted. I kind a non- guardian father need not have an enforceable agreement or a custody or access order in his favour to establish "rights of custody".

I am aware that my finding runs counter to what is implicit in Dellabarca v Christie but the point specifically was not addressed in that case. What was in issue there was the legality of a

care agreement. It was held that as there was no enforceable agreement as to the care of the child the non-guardian father had no rights of custody. There was an informal arrangement that the father have care of the child regularly, which he exercised. Again, and with respect, there is no logical reason why a child in such circumstances should be disadvantaged simply because parents have agreed informally rather than by an enforceable agreement or Court order. Whilst the Convention respects the rights of custody and access in other signatory States its primary function is to protect children's rights.

Support for my conclusion can be found in Re B (A minor) (Abduction) [1994] 2 FLR 249 CA at p 260 where Waite J said:

The purposes of the Hague Convention were, in part at least, humanitarian. The objective is to spare children already suffering the effects of breakdown in their parents' relationship the further disruption which is suffered when they are taken arbitrarily by one parent from their settled environment and moved to another country for the sake of finding there a supposedly more sympathetic forum or a more congenial base. The expression "rights of custody" when used in the Convention therefore needs to be construed in the sense that will best accord with that objective. In most cases, that will involve giving the term the widest sense possible.

. . .

The difficulty lies in fixing the limits of the concept of "rights". Is it to be confined to what lawyers would instantly recognise as established rights - that is to say those which are propounded by law or conferred by Court order: or is it capable of being applied in a Convention context to describe the inchoate rights of those who are carrying out duties and enjoying privileges of a custodial or parental character which, though not yet formally recognised or granted by law, a Court would nevertheless be likely to uphold in the interests of the child concerned?

The answer to that question must, in my judgment, depend upon the circumstances of each case. If, before the child's abduction, the aggrieved parent was exercising functions in the requesting State of a parental or custodial nature without the benefit of any Court order or official custodial status, it must in every case be a question for the Courts of the requested State to determine whether those functions fall to be regarded as "rights of custody" within the terms of the Convention.

The case concerned an unmarried father of a child. I agree with and adopt Waite J's statement but in the context of New Zealand law am content to maintain that ss 11 and 15 of the Guardianship Act 1968 provide the necessary rights of custody for non-guardian fathers for the purposes of the Convention. Had it been necessary I would have held that the applicant had the inchoate rights referred to, because he was "exercising functions of a parental or custodial nature" before the child was taken to the USA.

It might be argued that implementation of my approach will unduly open the door and allow, for instance, step-parents similar rights. I see no difficulty with that. The exercise of the rights is the important and controlling factor. A floodgates criticism is not justified.

I am satisfied that the applicant, as father, had rights of custody in respect of the child and that at the relevant time was exercising those rights by having regular periodical and holiday care of the child.

Pursuant to s 18 of the Guardianship Amendment Act 1991 I make an order declaring that the removal of the child from New Zealand to the United States of America was wrongful within the meaning of art 3 of the Convention.

All questions of costs are reserved.

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