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[28/10/1996; Court of Appeal for Ontario (Canada); Appellate Court]
Kinnersley-Turner v. Kinnersley-Turner (1996), 140 D.L.R. (4th) 678 (Ont. C.A.)

Re Kinnersley-Turner and Kinnersley-Turner

Ontario Court of Appeal

File No. C25145

Houlden and Osborne JJ.A. and Campbell J. (ad hoc)

October 28, 1996

OSBORNE J.A.: On the respondent father's application under the Hague Convention on the Civil Aspects of International Child Abduction, the Honourable Mr. Justice Sedgwick found that the appellant, mother, had wrongfully removed her 8-year-old daughter from her habitual residence in England. He thus ordered that the child be returned from Canada to the Judicial District of the County of Bath in England within four weeks of his June 24, 1996 order. The child's mother appeals from the motion judge's order. For ease of reference I will refer to Mrs. K-T as the appellant and to Mr. K-T as the respondent.

In order to put the issues in some kind of understandable perspective it is necessary to refer briefly to some of the relevant facts, including the history of the custody/access proceedings in England. I do not intend to refer to that part of the evidence that is relevant to the issue of which of the parties should have custody. The Hague Convention should not be used to determine custody or the terms of access. The central issue on this appeal is whether the motions judge was correct in ordering that the child be returned to England. If he was correct in making that order, the issue of custody and access will be determined in England.

BACKGROUND

The parties were married in England in September, 1985. They separated in March, 1998 and were divorced by decree absolute issued in England in September, 1988. They have one child, A., born February 26, 1988.

At the time of their divorce, the parties settled the issues of custody and access. A consent order, issued on November 11, 1988, provided that the appellant would have custody of A. and that she was at liberty to remove A. from England and Wales "permanently to Canada". The order contained the appellant's undertaking to return A. to "the jurisdiction of the court if called upon to do so". The order did not specify who had the authority to call upon her to return the child to the jurisdiction of the court. The order also provided that the respondent have access in both England and Nepean, Ontario. It is apparent that the appellant and respondent accepted that the appellant might move to Ontario with A. and that the appellant approved of such a move. The custody and access provisions of the consent order both reflect that potential development. It is on the basis of the custody provisions of this order that the appellant contends that she did not wrongfully remove A. to Ontario.

In 1989, the appellant moved to Ontario with A. She obtained landed immigrant status in Canada on December 19, 1989. She moved into her own residence in Nepean in February 1990.

The appellant and A. returned to England in April 1990. At that time she was dissatisfied with her employment arrangements at a daycare centre in Nepean. In addition, her parents urged her to return and they promised to help her financially. Things did not work out in England. The appellant put it in this way in her affidavit:

They [her parents] can be very controlling and strict with all their children. This has caused a great deal of tension in my family .... I realized once I returned to England, that I was unwilling to accept their financial support if it meant being controlled.

As a result of her problems in England, the appellant decided to return to Canada. She left A. with her aunt in Devon, England for six weeks and returned to Canada to find accommodation and employment. A. returned to Canada with her maternal grandmother in June, 1990.

At Christmas, 1990, the appellant's parents came to Canada for a visit. At that time they suggested that the appellant should return to England where they promised to provide the appellant and A. with a self-contained flat in their home. The appellant stated that she thought carefully about this offer because of her family's involvement with it. She was concerned that her family was "dysfunctional", as the appellant described it in her affidavit.

Notwithstanding her misgivings, in March, 1991, the appellant returned to England with A. Once there, she discovered that her parents had no intention of providing the flat that they had promised. As a result, she returned to Nepean very shortly after she had arrived in England. She rented a house in Nepean and placed A. in daycare. Once she had established herself in Nepean, she returned to England to bring A. back to Ontario.

In about February, 1995, the appellant was again invited to return to England, this time by her uncle and her half-brother's wife. It was suggested that she stay with her half brother and his wife and seek employment in England. She was attracted by this offer. She contacted Immigration Canada to determine how long she could remain out of Canada before she would lose her landed immigrant status. She was told that she could be away for six months without losing that status. In the result, she returned to England with A. in September, 1995. Upon her arrival, she applied for employment, however, she was not successful in securing a job. She also enrolled A. in school.

Shortly after the appellant returned to England she commenced a relationship with her half-brother's 17-year-old son. This relationship came to the attention of the respondent as a result of reports of it in the British tabloid press. On the basis of press reports the respondent concluded that his former wife was not fit to have custody of his daughter. He applied for a residence order (a custody order) in the Norwich County Court on November 27, 1995. On December 4, 1995, the respondent's application was transferred to the Bath County Court. On December 29, 1995, the appellant applied for custody of A. in the Bath County Court. At that point both parents had invoked the jurisdiction of the English courts.

The December 4, 1995 order of the Norwich County Court provided that the respondent serve and file a written summary of the oral evidence he intended to adduce and witnesses' statements by January 2, 1996. The order required the appellant to serve and file similar statements by January 16, 1996. The order further required both the parties to attend before the District Judge at the Bath County Court on the first available date after March 4, 1996.

On January 13, 1996, without notice to the court or the respondent, the appellant left England and returned to Canada with A. She did, however, write her solicitor in England just before her departure. In that letter dated January 13, 1996, the appellant wrote:

This past few days a friend of mine has made it possible for me to return. I feel I must do it and I strongly believe that it is A.'s best interests. ... I knew that G.K. etc. would influence I.K.T. [the respondent] and I do not want to risk I.K.T. getting contact [access]

...

When the respondent learned that the appellant had returned to Canada with A., he commenced a Hague Convention Application through the Child Abduction Unit of the Lord Chancellor's department. In due course a notice under Article 16 of the Hague Convention was issued and forwarded to the local registrar of the Ontario Court (General Division) in Ottawa. On February 13, 1996, His Honour Judge Batterbury of the Bath County Court made an order which I assume was thought to be necessary as a result of the appellant's departure from the jurisdiction with A. on January 13, 1996. In the February 13th order the appellant's solicitor was required to disclose her client's address to the court. This information was provided in a sealed envelope. The appellant was also ordered to "file statements within 28 days to reply to the respondent's application for residence and contact". Finally, the court ordered the appellant to return A. to the jurisdiction. The custody and access proceedings were further adjourned to March 21, 1996. On March 21, 1996, the proceedings were adjourned to May 10, 1996 and the appellant was ordered not to remove the child from England and Wales, once she had returned to England as she had been ordered to do in the court's previous order. She was also ordered, upon her return, to surrender her passport and A.'s passport to the court.

On May 10, 1996 the applications before the Bath County Court were adjourned for three months pending the outcome of the Hague Convention application made by the respondent in Canada. On June 24, 1996, the respondent's Hague Convention application came before Sedgwick J.

THE HAGUE CONVENTION APPLICATION

The motion judge's order was made under Article 3 of the Hague Convention which provides:

The removal or 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.

In the circumstances of this case two principal issues arise in respect of the application of Article 3 of the Convention. They are:

1. Was the motions judge correct in concluding that A. was habitually resident in England before the appellant took her to Canada in January, 1996.

2. Was the motions judge correct in concluding that A. was "wrongfully removed" from one contracting state (England) to another (Canada).

(i) Habitual Residence

The Hague Convention does not define "habitual residence". Neither does s. 40 of the Children's Law Reform Act, R.S.O. 1990, c. C.12, which makes the Hague Convention part of the law of Ontario.

In my view, there was ample evidence to support the trial judge's conclusion that in January, 1996 A. was habitually resident in the United Kingdom. The appellant took her to England in September, 1995 by use of one-way air tickets. She applied for employment upon her arrival in England. She enrolled A. in school in England. She made arrangements in advance for accommodation.

It would appear that the appellant's plan was to stay in England if things worked out satisfactorily there. Put another way, the appellant was not merely visiting her relatives in England when she returned in September, 1995. Although the appellant seems to have moved about with some frequency after her return to England, A. clearly resided in England from September, 1995 to January, 1996. The duration of her residence was sufficient to render it "habitual".

Moreover, when the respondent applied for custody in November, 1995, the appellant opposed his application and did not dispute the jurisdiction of the court. On the contrary, she brought her own application for custody in the Bath County Court. Why she did this is something that need not be explored, although it is puzzling in that the appellant already had a valid custody order at that time. When the appellant returned to Canada with A. both applications for custody were before the Bath County Court.

I would, therefore, not give effect to the appellant's submission that in January, 1996 (when the child was removed from England to Canada) the child was not habitually resident in England.

(ii) Wrongful Removal

The objects of the Hague Convention are clearly set out in Article 1 of the Convention.

Article 1

The objects of the present Convention are:

(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

What is included in the term "rights of custody" is set out in Article 5 of the Convention.

Article 5

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.

I have little difficulty in concluding that A. was wrongfully removed from England in January, 1996. The appellant's letter to her solicitor makes it clear that she left England because she did not wish to run the risk of being unsuccessful in the custody/access proceedings that were then before the Bath County Court.

Article 3 of the Hague Convention recognizes that rights of custody may be attributed not only to a person (a mother or father), but also to an institution, or any other body (a court). The significance of this provision in the Hague Convention was made clear in the Supreme Court of Canada's judgment in Thomson v. Thomson (1994), 6 R.F.L. (4th) 290, 119 D.L.R. (4th) 253. In Thomson, the court emphasized the objects of the Convention and Canada's commitment, as a contracting state, to those objects. La Forest J., in referring to Article 3 of the Hague Convention wrote at p. 316:

The breach of rights of custody described in Art. 3, it will be remembered, are those attributed to a person, an institution, or any other body by the law of the state where the child was habitually resident immediately before the removal or retention.

And at p. 322 he considered the circumstances when rights of custody will be attributed to a court. He wrote: It seems to me that when a court is vested with jurisdiction to determine who shall have custody of a child, it is, while in the course of exercising that jurisdiction, exercising rights of custody within the broad meaning of the term contemplated by the Convention.

In my view, these comments of La Forest J. have direct application here. The Bath County Court was vested with jurisdiction to determine with which parent A. would reside. In my view, A.'s removal from the court's jurisdiction breached rights of custody vested in the court under Article 3. At the time of the child's removal, rights of custody attributed to the court were being actually exercised by the court, as referred to in Article 3(b) of the Convention.

Accordingly, the motions judge was correct in concluding that A. was wrongfully removed from England in January, 1996 and in ordering that A. be returned to England. This will not give rise to a grave risk of harm to the child as referred to in Article 13(b) of the Convention. It will be for the court in England to deal with the issues of custody and access. That was not the issue before the motions judge and, as I have said, is not the issue before this court, although the significant part of the affidavit evidence filed by both appellant and respondent has relevance only to that issue.

CONCLUSION

Sedgwick J.'s order required that A. be returned to the Bath County Court within four weeks of June 24, 1996, the date of his order. That provision will obviously have to be varied. A. should be returned to the jurisdiction of the Bath County Court by November 30, 1996. Subject to that variation, I would dismiss the appeal with costs.

Appeal dismissed.

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