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[06/08/2004; Family Court of Australia at Melbourne (Australia); First Instance]
State Central Authority v Keenan [2004] FamCA 724

FAMILY LAW ACT 1975

FAMILY LAW (CHILD ABDUCTION CONVENTION) REGULATIONS 1986

FAMILY COURT OF AUSTRALIA AT MELBOURNE

NO. MLF 7307 of 1999

IN THE MATTER OF STATE CENTRAL AUTHORITY (APPLICANT) and KEENAN (RESPONDENT MOTHER)

JUDGMENT DELIVERED BY THE HONOURABLE JUSTICE MORGAN

CORAM: THE HONOURABLE JUSTICE MORGAN

DATE OF HEARING: 22 JULY 2004

DATE OF JUDGMENT: 6 AUGUST 2004

APPEARANCES: Mr Strum, counsel instructed by Middletons, Solicitors, DX 405, Melbourne appeared on behalf of the State Central Authority; Ms Smallwood, counsel, instructed by Counsel & Kelly, Family Lawyers, DX 38229, Melbourne appeared on behalf of the mother.

1. This is an application filed on the 7th of July 2003 by the Secretary of the Department of Human and Services in the capacity of State Central Authority ("SCA") under the Family Law (Child Abduction Convention) Regulations 1986. The application seeks the return of the child L born on the 13th of April 1999 to the United States of America ("USA"). The requesting applicant is the child's father C who is resident in the USA. The respondent is the child's mother, K.

CHRONOLOGY

2. The mother was born in Australia in 1968. The father was born in the USA in 1972. The parties met through the Internet in 1998. In mid-1998 the mother went to the USA for three weeks to visit the father. She then returned to Australia and the child was born in April 1999.

3. On the 9th of September 1999 orders were made in the Family Court of Australia which provided inter alia that the child live with the mother and that she be solely responsible for his short-term and long-term care, welfare and development. The father's contact was reserved. In November 1999 the mother and child went to the USA for a three-month visit.

She and the father decided to marry. She returned to the United States with the child to live with the father in October 2000. The parents were married in December 2000. Thereafter they resided together in the State of Virginia, USA. On the 31st of October 2002 the mother, without notice to the father, removed the child from the USA and returned with him to Melbourne, Australia. On the 26th of November 2002 the mother filed an application in this Court. On the 20th of December 2002 the United States Central Authority forwarded a request to the Australian Central Authority to issue proceedings for the return of the child. On the 7th of January 2003 orders were made in this Court staying the mother's application for parenting orders and interim orders and directions were made pursuant to the Family Law (Child Abduction Convention) Regulations. On the 26th of March 2003 it was directed that as an issue of jurisdiction needed to be determined in the USA the matter be listed upon application by the SCA. The regrettable delay in this matter has not been occasioned by the conduct of either the SCA or the respondent mother.

GENERAL PRINCIPLES OF LAW APPLICABLE TO APPLICATIONS PURSUANT TO THE FAMILY LAW (CHILD ABDUCTION CONVENTION) REGULATIONS 1986

4. 1. The Family Court has jurisdiction to hear and determine questions arising under applications pursuant to the Family Law (Child Abduction Convention) Regulations 1986 ("the Regulations"). (Section 31 and section 39(5)(d) Family Law Act 1975.)

2. The jurisdiction is conferred for the purposes of giving effect to the Regulations. (McCall and McCall: State Central Authority (1995) FLC 92-551 at 81,507).

3. The purpose of the Regulations is to enable the performance of the obligations of Australia under the Convention on the Civil Aspects of International Child Abduction. (Section 111B Family Law Act 1975.)

4. An object of the Hague Convention is to secure the prompt return of a child wrongfully removed or retained in any Contracting State. (Regulation 2(2); Section 111B Family Law Act 1975).

5. The principle that the best interests of the child is the paramount consideration does not apply in the consideration of applications under the Regulations. (McCall op cit). The issue in a Hague Convention application is purely one of forum. The Application is concerned with where and in what Court issues in relation to the welfare of the child are to be determined. (Murray v Director, Family Services, ACT) (1993) FLC 92-416 at page 80,258-9 (Per Nicholson CJ and Fogarty J.).

6. The Regulations provide a mechanism for the return of the child to the country of its habitual residence from which it was wrongfully removed or retained, so that issues of custody and access can be dealt with by the courts of that country.

7. "The object of the Convention is to protect children from the harmful effects of their wrongful removal from the country of their habitual residence to another country or their wrongful retention in some country other than that of their habitual residence." (Re H (Abduction: Acquiescence) [1998 AC 72]).

THE RELEVANT REGULATIONS

5. Regulation 14 sets out the orders the Court may make. Regulation 14 (1) (1) provides as follows:

(1) In relation to a child who is removed from a convention country to, or retained in, Australia, the responsible Central Authority may apply to a court in accordance with Form 2 for:

(a) an order for the return of the child to the country in which he or she habitually resided immediately before his or her removal or retention; or

(b) an order for the issue of a warrant for the apprehension or detention of the child authorising a person named or described in the warrant, with such assistance as is necessary and reasonable and if necessary and reasonable by force, to:

(i) stop, enter and search any vehicle, vessel or aircraft; or

(ii) enter and search premises;

if the person reasonably believes that:

(iii) the child is in or on the vehicle, vessel, aircraft or premises, as the case may be; and

(iv) the entry and search is made in circumstances of such seriousness or urgency as to justify search and entry under the warrant; or

(c) an order directing that the child not to be removed from a place specified in the order and that members of the Australian Federal Police are to prevent removal of the child from that place; or

(d) an order requiring such arrangements to be made as are necessary for the purpose of placing the child with an appropriate person, institution or other body to secure the welfare of the child pending the determination of an application under Regulation 13; or

(e) any other order that the responsible Central Authority considers to be appropriate to give effect to the Convention.

6. "Removal" is defined in Regulation 3 (1).

A reference in these Regulations to the removal of a child is a reference to the removal of that child in breach of the rights of custody of a person, an institution or another body in relation to the child if, at the time of removal, those rights:

(a) were actually exercised, either jointly or alone; or

(b) would have been so exercised but for the removal of the child.

7. "Rights of custody" is defined in Regulation 4 (1).

(1) For the purposes of these Regulations, a person, an institution or another body has rights of custody in relation to a child, if:

(a) the child was habitually resident in Australia or in a convention country immediately before his or her removal or retention; and

(b) rights of custody in relation to the child are attributed to the person, institution or other body, either jointly or alone, under a law in force in the convention country in which the child habitually resided immediately before his or her removal or retention.

8. Regulation 15 provides.

Orders

(1) If a court is satisfied that it is desirable to do so, the court may, in relation to an application made under Regulation 14:

(a) make an order of a kind mentioned in that Regulation; and

(b) make any other order that the court considers to be appropriate to give effect to the Convention; and

(c) include in an order to which paragraph (a) or (b) applies a condition that the court considers to be appropriate to give effect to the Convention.

9. Although Regulation 15 (1) uses the word "may" the Full Court has determined that where there has been a wrongful removal, the direction is "almost absolute". (Hanbury-Brown and Hanbury-Brown (1996) FLC 92-671 at page 82,976)

10. Regulation 16 (1) provides that:

Orders for the return of children (1) (1) Subject to subregulations (2) and (3), on application under Regulation 14, a court must make an order for the return of a child:

(a) if the day on which the application was filed is less than 1 year after the day on which the child was removed to, or first retained in, Australia; or

(b) if the day on which the application was filed is at least 1 year after the day on which the child was removed to, or first retained in, Australia unless the court is satisfied that the child is settled in his or her new environment.

11. This matter clearly falls within Regulation 16 (1) (a). It is unfortunate that the evidence is that the child is very well settled in his present environment having been in Australia for almost two years. However, as I have said, the best interests of the child is not a relevant consideration once it is determined that his removal was wrongful.

THE ISSUES

12. The issues to be determined in this case were:

(1) Whether the removal of the child was a removal within the meaning of the Regulations, that is whether it was in breach of a right of custody in the father.

(2) If it was whether the respondent could rely upon the "grave risk" exception contained in Regulation 16 (3) (b).

13. Certain matters were common ground. It was not disputed that prior to his removal the child was habitually resident in the USA, and, that subject to the issue of the status of the Australian order of the 8th September 1999, the father was exercising normal parental rights and obligations.

THE REMOVAL ISSUE

(i) The orders of the US Court on the 9th of April 2004.

14. As I have said final orders were made by consent by the Family Court of Australia on the 8th of September 1999 which provided that the child reside with the respondent mother and that the father's contact be reserved. It was common ground that that order, apart from the effect of this application, is enforceable in Australia, no application having been made to vary or discharge it. The parties married after the order was made. The mother and child left the USA on the 31st of October 2002. On the 19th of May 2003 the father filed a complaint in the County Court of Franklin County, Virginia, USA seeking inter alia an order that the respondent return the child to the USA and an order for custody. The hearing was fixed for the 21st of August 2003 to address the question of jurisdiction but was adjourned. It was finally heard by Judge William Alexander on the 9th of April 2004. His Honour determined that he had no jurisdiction. That was because the child had resided in Australia for more than six months before the filing of the application. Virginia was not the "home state" of the child as defined in the relevant legislation of the State of Virginia which required that the child be resident in that State for six months prior to the making of the application. His Honour did, however, direct that the matter remain on the court "docket". It is clear that that decision is not determinative of the removal issue. In particular, an Article 15 declaration was not sought by the Central Authority. Thus there was no judicial determination that the child's removal was wrongful. If the child returns to the USA the jurisdiction of the Court will be revived.

(ii) the status of the Australian order in the context of Regulation 4 (1)(b).

15. The issue is whether the father had, on the 31st of October 2003 a right of custody under a law in force in the USA. Under the Uniform Child Custody (Jurisdiction and Enforcement) Act of the Code of Virginia a child custody order of a foreign State is (save for some exceptions not submitted to be pertinent to the present application) enforceable as if it were an order of a State of the USA. (Article 20-146. 4). Thus if that were the end of the matter the Australian order would have full force and effect in the State of Virginia and the father would have no legal right of custody under the law of the State of Virginia. Thus the child would not have been wrongfully "removed".

(iii) the effect of the parents' marriage upon the enforceability of the Australian orders in the USA.

16. The respondent relied upon the expert opinion of Leisa K Ciaffone, an attorney whose professional qualifications were not challenged. She acted for the mother in the proceedings in the USA. She provided three affidavits. The SCA relied upon the evidence of John Crouch, a member of the Virginia State Bar specialising in International Family Law. He does not act and has not acted for the father. He was requested to provide an expert opinion by the SCA. He provided two affidavits. There was a difference of opinion between Ms Ciaffone and Mr Crouch as to the effect of the parents' subsequent marriage upon the enforceablity of the Australian orders in Virginia. That is critical to the determination of the ultimate issue to be decided which is whether the child was "removed" within the meaning of Regulations 3 and 4.

17. In her first affidavit sworn on the 31st of May 2003 Ms Ciaffone relied upon the provisions of the Code to which I have referred in support of her opinion that the child had not been "removed". In a second affidavit Ms Ciaffone provided details of the proceedings in Virginia to which I have referred.

18. In his first affidavit sworn on the 1st of July 2004 Mr Crouch responded to Ms Ciaffone's affidavits. He said his response was "simply that she does not deal with the question of how the remarriage affects the Australian custody order". It was clear that he meant, "affects the

order's enforceability in the State of Virginia". He said there was no decision of a Virginia Court directly in point and therefore he looked to the case law of other US states. He referred to the American Law Review Annotation which, having analysed decided cases, stated that the rule was that remarriage nullified the effect of a prior custody order. The Annotation cited 20 cases from 15 states. He said that the American Law Review was an encyclopaedia and not a periodical as its name might imply. He said it was especially valuable on questions that did not often arise and which may be a "first impression". He said that in Virginia decisions from other states are persuasive and that he believed that "a Virginia court would find it extremely persuasive that 15 other states had considered the question and all had answered in the same way". He conceded that the cases cited in the Annotation all involved couples who were married, divorced, then remarried to each other but said that that was what "we call a distinction without a difference". He said "the logic of a marriage operating to merge the parents' formerly individual custody rights into a joint right,…. works just as well with formerly out of wedlock parents as with formerly married parents. If any public policy consideration is involved, the marriage of unmarried parents would seem just as desirable a goal as the remarriage of the divorced".

19. Ms Ciaffone swore a further affidavit in which she said that she disagreed with Mr Crouch's opinion that the Australian order became void when the parents married. She said that no Virginia court had ruled on the issue and that the determination of other State courts were not binding on a Virginia court. In my view, that is no response to Mr Crouch's expert opinion because he conceded that the decisions of other states were not binding upon the Virginia court. Ms Ciaffone went on to say that Virginia had chosen not to exercise jurisdiction over the child and referred to the decision of the 19th of May 2004. That is also no answer to Mr Crouch's opinion. As I have already said the decision of the US Court of the 19th of May 2004 was based upon the fact that the child had not been resident in State of Virginia for six months prior to the filing of the application. It did not determine the issue of "removal" of the child.

20. Mr Crouch responded by an affidavit sworn on the 21st of July 2004. He said, that whilst it was true that the question of remarriage nullifying the custody order had never been decided by a Virginia court, in making its decision the Virginia court would look first to Virginia case law and finding none would turn to common-law digests such as the one which he had cited namely the American Law Review, to see how the common-law had developed on this point in other states and in England. He repeated that in so far as the order of the Virginia court of the 19th of May 2004 was concerned it was not determinative of the issue of jurisdiction in the future if the Australian court ordered the return of the child.

21. It was submitted by counsel for the mother that the onus was on the SCA and that it was not discharged because Mr Crouch's evidence was not evidence of what the law is but at best an opinion as to what the law might be. She submitted that there being no authority directly in point the Australian order survived the parents' marriage. She said that Mr Crouch's view of what the court might do was not relevant. She said "it was his opinion only".

22. Counsel for the SC submitted, in my view correctly, that Mr Crouch is an expert and is therefore entitled to and did say that in his expert opinion the distinction between marriage and remarriage was an "distinction without a difference". His view that the Virginia court would so find is an expert opinion. Ms Ciaffone did not address that issue. She offered no opinion as to how the Virginia court would decide the question in the absence of any direct authority.

23. As I have said Ms Ciaffone acts for the respondent in the USA. She must therefore be seen to be promoting the case for the respondent mother rather than fulfilling the role of an

independent expert. Mr Crouch, on the other hand, is an independent expert engaged by this SCA and has no connection with either parent. I therefore accept his evidence in preference to that of Ms Ciaffone.

24. Therefore, I find on the balance of probabilities that the father was exercising a right of custody within the meaning of Regulation 4 and that the child was removed from the USA within the meaning of Regulation 3.

THE SCA'S ALTERNATIVE ARGUMENT

25. Counsel for the SCA relied upon an alternative argument, which was that the list of criteria for a right of custody set out in Regulation 4 (3) was not exclusive. He relied upon Re B (a Minor) (Abduction) [1994] FLR 249. The parents in that matter were unmarried and thus the father did not, under the laws of Western Australia then pertaining, have a legal right of custody. Waite LJ said (at page 260G):

"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 are 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 of that will best accord with that objective. In most cases, that would involve giving the terms the widest sense possible."

26. His Lordship went on to say that the difficulty lay in fixing the limits of the concept of "rights". Was it to be confined to what lawyers would instantly recognise as established rights, namely those propounded by law and conferred by court order or was 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? He said:

"The answer to that question must, in my judgement, depend on 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."

27. That decision was cited by Cazalet J (Re O (Child Abduction: Custody Rights) [1997] 2 FLR 702). He said that Waite LJ had clearly based his finding that rights of custody existed on a consideration of the extent of the actual privileges enjoyed and the duties carried out by a particular parent. He went on to say that that the test which His Lordship propounded was "whether the individual concerned was exercising functions of a parental or custodial nature without the benefit of any official custodial status." Cazalet J concluded that rights of custody were not confined to the specific situations set out in Regulation 4 and that the court may "step beyond them as the court did in Re: B"

28. I now apply those principles to the present case. The child lived with his parents in the USA from November 1999, or thereabouts, until the 31st of October 2002. The affidavits of the parties address issues not relevant to this application. It is clear that they had their differences. The respondent mother may indeed have been the primary caregiver. However, it is also clear and it was not disputed, that the father had a fatherly relationship with the child and cared for him and fulfilled the ordinary everyday functions of a parent with whom the child is living. In other words he was exercising a de facto right of custody.

29. I am satisfied that even if I am wrong about the enforceability of the Australian order in Virginia the father was exercising a right of custody when the child was removed. I find on the balance of probabilities, (to paraphrase the words of Lord Justice Waite in Re B,) that it was a status which a court would refuse to allow to be disturbed abruptly or without due opportunity of a consideration of the claims of the child's welfare merely at the dictate of the sudden assertion by the mother of her official rights (at p 373). In my view the father's status falls properly within the provisions of Regulation 4. The child's removal was therefore wrongful.

THE "GRAVE RISK" EXCEPTION

30. I now consider the submission for the mother that the exception contained in Regulation 16 (3)(b) applies, and the return of the child would expose him to a "grave risk" of physical or psychological harm. The respondent has the onus of proof here and the discretion not to make an order for the child's return will be exercised only where there is a grave risk of harm (D. P. v Commonwealth Central Authority (2001) FLC 93-081). The requesting country possesses courts and welfare systems congruent with this country. The mother makes allegations about the father and his mother but not about any mistreatment of the child. There was no expert evidence to suggest any risk of psychological harm to the child. The child will be returned not to the father but to the country of the USA. The Full Court said in Murray v Director Family Services ACT (1993) FLC 92-416:

New Zealand has a system of Family Law and provides legal protection to persons in fear of violence which is similar to the system in Australia. It would be presumptuous and offensive in the extreme for a court in this country to conclude that the wife and the children are not capable of being protected by the New Zealand courts or that relevant New Zealand authorities would not enforce protection orders which are made by the Courts".

31. The USA can readily be substituted for New Zealand in that statement. I find on the balance of probabilities that the respondent mother has not satisfied the onus of establishing that the exception is made out.

32. It is most unfortunate that there has already been such a delay in this matter. The child is well settled here. It was occasioned by the delay in the USA Court's determination. It was not an Article 15 determination, although it appears that there was an expectation that it would be. However, as I have said, the best interests of the child do not govern applications under the Hague convention. I have determined that the child was wrongfully removed on the 31st October 2002 and an order that he be returned to the USA must necessarily follow.

I certify that the previous 31 paragraphs are a true copy of the reasons for judgment herein of The Honourable Justice Morgan

Associate: Sandi Herkes Date: 6th August 2004

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