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[28/05/1997; British Columbia Court of Appeal; Appellate Court]
Thorne v. Dryden-Hall, (1997) 28 RFL (4th) 297

COURT OF APPEAL FOR BRITISH COLUMBIA

Before: The Honourable Mr. Justice Macfarlane

The Honourable Madam Justice Rowles

The Honourable Mr. Justice Donald

Hearing: May 31, 1996

Judgment: May 28, 1997

Docket: CA021135, Registry: Vancouver

BETWEEN

S.T.

PETITIONER

(RESPONDENT)

AND

J.D.H., formerly known as J.T.

RESPONDENT

(APPELLANT)

REASONS FOR JUDGMENT

APPEARANCES:

E. Keith Jones Counsel for the Appellant

William R. Storey Counsel for the Respondent

JUDGMENT:

[1] This appeal is from the order of Mr. Justice Williamson in Chambers, made 26 October, 1995, pursuant to the provisions of the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October, 1990, and to s.42.1 of the Family Relations Act R.S.B.C. 1979 ch. 121.

[2] S.42.1(2) of the Family Relations Act provides that the provisions of the Convention have the force of law in British Columbia.

[3] Mr. Justice Williamson ordered that two infants, the children of the appellant and the respondent, be returned forthwith to the United Kingdom, the place of their habitual residence.

[4] Mr. Justice Williamson made his order after finding that the appellant had wrongfully removed the children from their habitual residence.

[5] The order was stayed, pending appeal to this Court.

[6] On 31 May, 1996, the appeal was heard and decided. The order of Mr. Justice Williamson was affirmed and, we understand, carried out. Reasons were said to follow.

[7] The relevant facts are that the children resided with the appellant, their natural mother, in the United Kingdom pursuant to orders made under the The Children Act, 1989 (U.K.) on "10- 6-93".

[8] The Children Act speaks of residence, rather than custody, and of contact, rather than access. The order made in respect of each child was that the child "live with" the appellant and that the respondent have "contact to the child" as specified in the order.

[9] The order is described in The Children Act as a "residence order". S.13 of the Act provides:

(1) Where a residence order is in force with respect to a child, no person may -

(a) cause the child to be known by a new surname; or

(b) remove him from the United Kingdom

without either the written consent of every person who has parental responsibility for the child or the leave of the court.

(2) Subsection (1)(b) does not prevent the removal of a child, for a period of less than one month, by the person in whose favour the residence order is made.

(3) In making a residence order with respect to a child the court may grant the leave required by subsection (1)(b), either generally or for specified purposes.

[10] The English court did not grant leave but, to the contrary, said:

AND IT IS ORDERED THAT THE APPLICATION BY J.D.H. TO REMOVE THE CHILD FROM THE JURISDICTION BE DISMISSED - BY CONSENT.

[11] The appellant removed the children from the U.K. on 12 October, 1994, without obtaining the consent of the respondent (who, under s.2 of the Act, was a person "who has parental responsibility"). Neither did she obtain leave of the court to do so.

[12] There is one ground of appeal and it is stated by the appellant in this way:

The learned Chambers Judge erred in holding that the retention of the children in Canada in breach of the Children Act (UK) was a breach of custody rights under the Convention on

the Civil Aspects of International Child Abduction (hereinafter referred to as "the Convention")

[13] The appellant concedes that her removal of the child to Canada was in breach of The Children Act, but submits that it was not in breach of "rights of custody" as defined in the Convention.

[14] The appellant submits that the breach of The Children Act was a breach of rights of access, and not of rights of custody.

[15] The primary object of the convention is the enforcement of custody rights. The following articles of the Convention are relevant:

Article 3

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

For the purposes of this Convention -

(a) "right 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;

[16] The judgment of the Supreme Court of Canada in Thomson v. Thomson (1994), 119 D.L.R. (4th) 253 provides guidance. At pp.274-275 La Forest examined the purpose of the Convention, and the effect of a non-removal order:

It is clear from the wording of the preamble and art. 3 of the Convention, ... that the primary object of the Convention is the enforcement of custody rights. ... Such rights of custody are given effect through proceedings for the return of the child under art. 12.

By contrast, the Convention leaves the enforcement of access rights to the administrative channels of central authorities designated by the state parties to the Convention. ...

Custody

Custody, as understood by the Convention, is a broad term that covers the many situations where a person lawfully has the care and control of a child.

...

From the preparatory work, it seems clear, at least in some cases, that the removal of a child from a country in the face of a court order prohibiting it was intended to be covered by the Convention. ...

It by no means follows, however, that the Convention applies to every case where a child is removed from country to another where a court order prohibits it. ...

[17] Thomson was a case where a child had been removed from Scotland to Canada in breach of an interim order that provided that the child remain in Scotland pending further court order.

[18] In considering the effect of a non-removal clause in a custody order, La Forest J. observed that three approaches had been taken in the case law; at pp.276-279 he considered those three approaches.

[19] At p.276 he said this:

... The first is to the effect that a removal in breach of a non-removal clause is contrary to the terms of the Convention because such a removal is in breach of the custodial parent's own right of custody.

At p.278 he said this:

The second and third approaches mentioned hold that "the right to determine the child's place of residence" is a custody right divisible from the right to care for the person of the child, and by virtue of a non-removal clause, this right vests in either the access parent (the second approach), or the court (the third approach). These approaches gain support from the open-ended wording of art.5: "'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" (emphasis added).

[20] La Forest J. observed that the second approach is illustrated in C. v. C., [1989] 2 All E.R. 465 (C.A.). He found that C. v. C. presented more compelling facts than Thomson because the parents were joint guardians under an agreed provision that the child should not be removed from the country. He observed that in Thomson the father appears to have had only a right of access, which the Convention does not equate with custody.

[21] At p.279, La Forest J. said:

The third approach, that the effect of the insertion of a non-removal clause in an interim custody order is to retain a right of custody in the court, was adopted by the English Court of Appeal in B. v. B. (abduction: custody rights), [1993] 2 All E.R. 144.

[22] After referring to the judgment of the English Court of Appeal in B. v. B., La Forest J. said, at p.280:

... It seems to me that when a court has before it the issue of who shall be accorded custody of a child, and awards interim custody to one of the parents in the course of dealing with that issue, it has rights relating to the care and control of the child and, in particular, the right to determine the child's place of residence. It has long been established that a court may be a body or institution capable of caring for the person of a child.

[23] At p.281 he said this:

It will be observed that I have underlined the purely interim nature of the mother's custody in the present case. I would not wish to be understood as saying the approach should be the same in a situation where a court inserts a non-removal clause in a permanent order of custody. Such a clause raises quite different issues. It is usually intended to ensure permanent access to the non-custodial parent.

[24] The other members of the court agreed that, in the circumstances, the removal of the Thomson child was in breach of rights of custody protected by a convention.

[25] Mr. Justice Williamson referred to Thomson, and relied in particular upon *B. v. B.*, which was approved by La Forest J. Mr. Justice Williamson concluded:

The order itself states simply that "the child shall live with J.D.H.". It does not grant the mother all of the rights encompassed by the word custody. It leaves to both parents the remaining parental rights and responsibilities set out in s. 3(1) of the Children Act. It reserves to the Court the final say on whether the children may be removed permanently from the jurisdiction.

I conclude the children were "wrongfully removed".

As the action in this Court was commenced before one year had elapsed from the date of the wrongful removal, the Convention requires that I order the return of the children forthwith subject only to the considerations enumerated in Article 13 of the Convention.

In our opinion that was a correct application of the law, having regard to the factual situation in this case.

[26] Custody, according to the Convention, is a broad term. In particular, the right to determine the child's place of residence is a "right of custody" (Article 5). It may vest in "a person, an institution or other body ..." (Article 3).

[27] On the facts of this case a "right of custody", i.e. the right to determine the child's place of residence, was reserved by the English court to be exercised with the consent of the respondent or by leave of the court. Neither was obtained.

[28] In our view, the removal of the children in breach of that "right of custody" was a wrongful removal within the meaning of the Convention.

[29] It was for those reasons that we affirmed the order of Mr. Justice Williamson, and dismissed the appeal.

"The Honourable Mr. Justice Macfarlane"

"The Honourable Madam Justice Rowles"

"The Honourable Mr. Justice Donald"

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