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[01/13/1995; Court of Appeal of Manitoba (Canada); Appellate Court]
C. v. C., 13 January 1995, transcript, Court of Appeal of Manitoba (Canada)

Manitoba Court of Appeal

Huband, Lyon and Helper J.J.A.

January 13, 1995

File No. AI 94-30-01920

BETWEEN

C v. C

REASONS FOR JUDGEMENT

Helper J.A.: The appellant (Mr. C.) seeks the return to England of his children, M.C., born October 30, 1979 and N.C., born November 26, 1991, pursuant to the Convention on the Civil Aspects of International Child Abduction (the Hague Convention). His application was dismissed in Queen's Bench and he appeals from that decision.

The parties were married in Manitoba on August 28, 1990, and moved to England in November, 1990. M., Mrs. C.'s child from a previous relationship, was adopted by Mr. C. on December 14, 1992. N., the natural child of the parties, was born in England.

Mr. and Mrs. C. were experiencing marital difficulties in late 1993. As a result of these difficulties, Mr. C. removed himself from the marital home on January 3, 1994. The parties did not initiate any court proceedings in England and had not reached any accord on the terms of a separation agreement or the custody of the children. Between January 3 and February 10, 1994, Mrs. C. remained in the family home with the children and Mr. C. visited from time to time. Mrs. C. concedes that the children were habitually resident in England immediately before she removed them to Canada on February 10, 1994 without her husband's knowledge or consent.

In Manitoba, the Hague Convention is a schedule to The Child Custody Enforcement Act, R.S.M. 1987, c. C360. Its provisions have the same force as any other piece of legislation. The motions judge correctly found that Mrs. C.'s removal of M. and N. from England was in breach of Mr. C.'s custody rights under English law and was, therefore, "wrongful" as that term is used in Article 3 of the Hague Convention. He then went on to consider Article 13 of the Hague Convention as it applied to each of the children. Article 13 deals with circumstances in which a "requested State" is not required to return children wrongfully removed from a participating country. It reads as follows:

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that

(a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

- a. there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.**

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

The motions judge found there was no evidence that N. had been adversely affected by the parties' conflict or by the legal proceedings and went on to state:

... if M. had not been involved, the law would require the return of N. to England pursuant to the Hague Convention.

The child, M., was born with spina bifida, a condition that results in the malformation of the spine and nerves at the base of the skull. Her condition has resulted in many physical complications for her and considerable medical intervention. She has a partial vocal cord paralysis which has caused her breathing difficulties on occasion. At times of severe emotional stress, the paralysis becomes more apparent and her ability to speak becomes considerably diminished. She does not have the use of her legs below the knee and requires crutches to walk. She requires daily care and supervision. Her physician cautioned against exposing M. to severe emotional stress.

The evidence persuaded the motions judge that returning M. to England would result in a grave risk to both her psychological and physical health and would place her in an intolerable situation. There was ample expert and other evidence to support that finding. Additionally, the motions judge found that M., who was 14 years of age at the time of the hearing, should not be returned given her strong preference to remain in Canada. The evidence supports his conclusions as they relate to her.

However, I cannot agree with his interpretation of Article 13 as it applies to N. He concluded that:

M. is an exceptional child. There is grave risk that an order requiring the return of M. and/or N. to England would expose M. to grievous psychological harm. An order to return M. and/or N. to England would place M. in an intolerable situation.

He applied the expert evidence as it related to M. to his consideration of Mr. C.'s application for N.'s return. In this respect, he erred.

Article 13 of the Hague Convention speaks of the "child" who is the subject of an application for return. It does not speak of "children" or "siblings." The provisions of the legislation are to be applied separately and distinctly to each child who is wrongfully removed from his or her country of origin. The evidence to be considered is the evidence relevant to that child and the risk to that child, not the evidence as it relates to a sibling or other family member. That is not to say a court should ignore evidence of the possible adverse effect on each individual child who is the subject of an application under the Hague Convention of treating siblings differently. However, in order to successfully oppose her husband's application for N.'s return, Mrs. C. was required to establish that N.'s return to England would result in a grave risk of N.'s being exposed to physical or psychological harm or place her (N.) in an intolerable situation. The evidence relating to N. fell far short of meeting the exceptions set out in Article 13(b).

Dr. Mills' report that M. felt "suicidal at the thought of herself, her mother or sister returning to Great Britain" is not the kind of evidence required to support a finding that N. should not be returned under Article 13(b). Nor is her opinion that Mrs. C.'s removal from M., even in the short term, would have an adverse effect upon her. Finally, her recommendation that neither M. nor N. return due to M.'s fragile make-up does not support the motions judge's conclusion regarding N. There is no evidence that N.'s separation from M. would create any kind of risk for N. All the evidence in opposition to Mr. C.'s application relates to M.

The motions judge's application of the evidence as it concerned M. to his consideration of N.'s return was in error. The result of this appeal is that N. and M. may be separated, at least on a temporary basis. This unfortunate result arises as much from the disparity of the children's ages and the circumstances of each of their births as from M.'s exceptional medical condition. This Court, however, must order the return of N. to England forthwith in accordance of Article 12 of the Hague Convention.

The appeal as it relates to M. is dismissed. The appeal as it relates to N. is allowed.

Lyon, J.A.: I AGREE

Huband, J.A.: I AGREE

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