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[19/10/1995; Ontario Court (General Division) (Canada); Appellate Court]
Re Medhurst and Markle; Attorney General of Ontario Intervenor,
(1995) 26 OR (3d) 178

Ontario Court (General Division)

Jennings J.

October 19, 1995

File No. 143/95

BETWEEN

D.M. v. S.M. and The Attorney General of Ontario Intervenor

REASONS FOR JUDGMENT

D.M. (the appellant) appeals from a decision of His Honour Judge Weisman of the Provincial Division dismissing his application under Article 8 of the Convention on the Civil Aspects of International Child Abduction (the "Hague Convention") as being an abuse of process. The application was for the return to Germany of M.M., born December 16, 1994. The child is the only child of the appellant's marriage to S.M. (the respondent).

If the appeal is allowed, the respondent asks by cross-appeal that the finding of Judge Weisman that the child's habitual residence was Germany be set aside, and that the application be therefore dismissed.

It is necessary to set out a brief history of the proceeding to date.

1. The application came on for hearing before Judge Weisman on May 5, 1995. As is the practice in these matters, he heard submissions that day on the affidavit material filed. He reserved his decision.

2. On May 11, 1995, Judge Weisman gave oral reasons in court for his finding that at the material time the child was habitually resident in Germany, that the appellant had custody rights, and that there was a wrongful retention of the child in Ontario by the respondent. Recognizing that under the Hague Convention those findings required the court to return the child unless the respondent could show there was grave risk of so doing (Article 13(b) of the Hague Convention), Judge Weisman proceeded to a hearing on that issue. I am told by counsel that a review of the evidence and submissions took the balance of the day. Judge Weisman reserved his decision.

3. On May 15, 1995, Judge Weisman gave further oral reasons in court. He determined that the application was an abuse of the process. He dismissed it with costs if demanded. As a result, he stated that he did not find it necessary to decide whether the respondent had succeeded in establishing grave risk under Article 13(b).

4. On May 18, 1995, a notice of appeal from the decision to dismiss the application was delivered.

5. On May 31, 1995, Judge Weisman gave written reasons for judgment.

6. On June 29, 1995, Ellen Macdonald J. by order permitted the Attorney General to intervene in the appeal. On the appeal, counsel for the Attorney General strongly supported the position of the appellant.

The Hague Convention

Canada became a signatory to the Hague Convention in 1980, and the Convention came into force on December 1, 1983. The Convention is somewhat distinct from other international treaties to which Canada is a signatory, because the subject matter is within provincial jurisdiction and, as a result, the Convention has been enacted into the law of the provinces of Canada. The object of the Convention is to protect children from the harmful effects that can result from their wrongful removal or retention from their state of habitual residence and to establish procedures "to secure the prompt return of children wrongfully removed to or retained in any Contracting State. . . ." (Article 1(a))

The provisions of Articles 3 and 4 of the Hague Convention require an applicant to satisfy three conditions, as follows:

1. that the applicant had custody rights to the child;

2. that the child was wrongfully removed or retained;

3. that the child was habitually resident in a Contracting State immediately before any breach of custody or access rights.

If those three conditions have been satisfied, Article 12 of the Hague Convention mandates an order for the return of the child to the place of its habitual residence. On the facts relevant to this case, the sole exception to that mandatory order would be if the respondent could show on the balance of probabilities that there is a grave risk that the return of the child would expose the child to physical or psychological harm or would otherwise place the child in an intolerable situation (Article 13(b)).

It is, I think, important to keep in mind the principal' objective of the Hague Convention. It is to prevent the harmful practice of unilateral removal or retention of children from their habitual residence and to require that what is in the best interest of the child be determined by the jurisdiction of the child's habitual residence at the time of the removal or retention. An application under the Hague Convention is not an application for custody. The welfare of the child, on a Hague application, is relevant only to the question of whether the return of the child would expose him or her to grave risk of physical or psychological harm as provided in Article 13(b). I believe it to be the intention of the Hague Convention to severely limit the discretion of the court in the country to which the child has been taken, or in which the child is retained, to do other than order the return of the child once it is found that the threshold conditions have been met: Thompson v. Thompson, [1994] 3 S.C.R. 551; see also for an interesting discussion of the intention of the Convention, and the limitation of

discretion, Director-General of Family and Community Services v. Davis, [1990] 14 F.L.R. 381 (Family Court of Australia).

It is to be presumed that the courts of another Contracting State are equipped to make, and will make, suitable arrangements for the child's welfare: see C. v. C. [1989] 1 W.L.R. 654 (C.A.).

Facts

The trial judge found that the parties moved from Canada to Berlin. They were not there as tourists or visitors. Their daughter was born in Berlin on December 16, 1994. In February 1995, the wife returned to Canada with the child for a brief vacation for the purpose of visiting the husband's mother on her 80th birthday. Whilst in Canada, she decided the marriage was over and that she and the child would not return to Berlin. He found that prior to leaving Berlin ". . . the child was clearly habitually resident in Germany."

The Judgments

As mentioned at the outset, I had before me three separate "judgments". One, certified by the court reporter, is the transcript of a "ruling" delivered orally by Judge Weisman on May 11, 1995; the second, also certified by the shorthand reporter, is headed "Reasons for Judgment" and was delivered orally by Judge Weisman on May 15, 1995; the third is what might be called written reasons for judgment dated May 31, 1995. It refers to hearings conducted on May 5 and 11, 1995.

It is normally the case that where reasons are given orally to be followed by written reasons, it is the written reasons that govern and to which reference is made on any subsequent appeal. In this case, however, although there is no change in the result between the two oral judgments and the written reasons for judgment, some of the reasoning, and findings of fact, in pages 2 through 4 of Judge Weisman's oral reasons delivered May 11 do not appear to have found their way into the written reasons delivered May 31.

Counsel were unable to find any authority on the question of whether I could look to the two oral judgments. They were content that I do so. Subsequently, I have been unable to find any authority on that point, and I have concluded that under the circumstances it would be unjust not to look at the oral reasons where they expand findings contained in the written reasons. I have done so.

The Appeal

Having found that the applicant had custody rights to the child, that there had been a wrongful retention of the child, and that the child was habitually resident in Germany immediately prior to the wrongful detention, the trial judge quite properly determined that the child must be returned to Germany unless the respondent could show that to do so would expose the child to grave risk. I am told by counsel that in hearing argument on that issue, the trial judge also heard argument that the proceedings under the Hague Convention constituted an abuse of process. Judge Weisman found that an abuse of process had been established and dismissed the application.

It is conceded by all counsel that courts in Ontario have inherent jurisdiction to prevent an abuse of process by dismissing an action which is an abuse of the process of the court: Orpen v. Attorney General for Ontario, [1925] 2 D.L.R. 367; Foy v. Foy (1978), 9 C.P.C. 141 (C.A.). The inherent jurisdiction of the court to dismiss an action for abuse of process is to be used sparingly and only in the clearest of cases. Traditionally, the power is exercised where an

action has been so groundless as to be frivolous and vexatious or, in more modern times, where the court process is being used to coerce or influence someone in a way entirely outside of the ambit of the legal claim before the court: Tsopoulious v. Commercial Union Assurance Company (1986), 57 O.R. (2d) 117; Goldsmith v. Sperrings Ltd. et al., [1977] 1 W.L.R. 478 (Eng. C.A.); Foy v. Foy, supra.

It was apparently that more modern jurisdiction, discussed in Goldsmith v. Sperrings Ltd., supra, that Judge Weisman purported to exercise, although the case is not referred to in his judgment.

At page 1 of his oral reasons for judgment delivered May 15, 1995, Judge Weisman says:

> **This case does not fit that usual pattern. In the first place, while I have found that Ms. M. is in breach of the Hague Convention, hers was not a flagrant breach. On the contrary, her action was wrongful only in that it interrupted Mr. M.'s custody and access rights to Marika Noelle. I note that in January of 1995 there was no tug of war over the child, no ongoing custody or access litigation, and no flight or abduction to gain an advantage in court or to sidestep due process.**
>
> **I observe at that this point that in my opinion mala fides is not a constituent ingredient in determining whether or not there has been a wrongful retention. If the retention is wrongful, the retainer's view of the situation is irrelevant. The Convention is directed towards the prevention of the very act that the trial judge held Ms. M. had committed -- the interruption of Mr. M.'s custody and access rights to his daughter.**

At page 4 of his reasons, the learned trial judge continued:

> **The evidence indicated that the very essence of these proceedings, indeed the main reason for Mr. M.'s having invoked the Hague Convention is to force Ms. M. back to Berlin where she is dependent upon him for food and shelter, where he can hold her captive and where he has an overwhelming tactical advantage over her, not so much for potential custody or access litigation as in aid of his ongoing campaign to force a marital reconciliation.**

The trial judge went on to find that Ms. M. did not speak the German language, would have no income in Germany, and would be dependent upon Mr. M. for support; and that she had no shelter for herself and the child and would be dependent upon him in that regard as well. At page 5 of his reasons, the learned trial judge concluded:

> **This brings me to the central question of whether the Hague Convention was intended to be used for the purpose for which Mr. M. is endeavouring to use it. The short answer is that the Convention is concerned with custody rights. It was clearly not designed to preserve and protect male prerogatives.**

I am not sure that I know, in this day and age, of what male prerogatives consist, but I agree that male prerogatives are not addressed in the Hague Convention.

I also agree that the primary object of the Hague Convention is the enforcement of custody rights, but those rights of custody ". . . are those attributed to a person . . . by the law of the state where the child is habitually resident immediately before the removal or retention": Thompson v. Thompson, supra, per La Forest J., page 580.

In my opinion, what the learned trial judge found to be evidence of an intention to misuse the process to coerce Ms. M. to comply with a goal outside the ambit of the issues raised in the Hague Convention application was the consequence of the application of the Hague Convention. It was the natural result of the trial judge's finding that the Hague Convention applied. If there was a wrongful retention, which the trial judge found was the case, it is difficult to accept that the mandatory return of the child in consequence of a breach of the Hague Convention can somehow be construed as an abuse of the process. Undoubtedly, Mr. M. seeks to retain custody of his daughter. Undoubtedly, he would prefer that the issue of custody be determined by the courts of the country where he and his daughter were habitually resident prior to the wrongful retention. The Hague Convention gives him that right and I cannot accept that his seeking to enforce it should be construed as something other than that, whatever tactical advantage it may give to him in the subsequent custody proceedings. Those ancillary tactical advantages will necessarily flow from the vast majority of Hague Convention applications, if the child is returned to the state where he or she was habitually resident.

The trial judge expressed his distaste for what might be described as overly aggressive attempts by the appellant to gather evidence against the respondent. That evidence will be directed at the issue of custody, which is yet to be tried. Without condoning the appellant's efforts, I observe that they are not unknown in the emotional climate of a custody dispute. In that dispute, when it is heard, a court may have regard to them on the issue of parental fitness, but they should not be used as a foundation to avoid the Convention.

In my opinion, the courts of signatory states should be vigilant to enforce the terms of the Convention and should not seek to undermine the goals for which it stands by looking for ways to prevent its application, other than those that are set out in the Convention itself. That is not to say that the jurisdiction to dismiss the application for abuse does not exist. In my opinion, however, that discretionary jurisdiction should be rarely exercised and only upon clear and overwhelming evidence of abuse.

An appellate court has the jurisdiction to set aside a finding of abuse of process if it determines that the court of first instance acted on a wrong principle: Murray Duff Enterprises Ltd. v. Van Durne et al. (1981), 23 C.P.C. 151 (Ont. Div. Ct.). In my opinion, in finding that the consequences of the application of the provisions of the Hague Convention constituted in themselves an abuse of the process, the learned trial judge made an error in principle which may be reviewed by an appellate court. Further, in implying improper motive to the appellant for offering to support Ms. M. in Germany until she found employment, the learned trial judge, in my opinion, converted the appellant's proposal to give an undertaking of the very kind that might be expected in this case, and as was required by the Supreme Court of Canada in Thompson v. Thompson, supra, into evidence of a subsidiary purpose. In so doing, the learned trial judge made a further error in principle.

Accordingly, the appellant succeeds on this aspect of his appeal and the order dismissing his application as an abuse of the process is set aside.

Habitual Residence

It will be convenient now to turn to the cross-appeal. In an ingenious and well-developed argument, Ms. Morris submits that the trial judge erred in law in finding that the child was habitually resident in Germany prior to leaving Germany with her mother. She submits that the error in law consisted of applying domestic law to interpret an international treaty.

The phrase "habitually resident" in Article 4 of the Hague Convention is nowhere defined in the Convention. In determining that the child was habitually resident in Germany, Judge

Weisman applied section 22(2) of the Children's Law Reform Act, R.S.O. 1990, c. C.12, which reads:

A child is habitually resident in the place where he or she resided,

(a) with both parents;

Ms. Morris submits that the case of Re Regina and Palacios (1984), 45 O.R. (2d) 269 (C.A.), is authority for the proposition that the principles of public international law, and not domestic law, govern the interpretation of treaties incorporated into domestic law. She relied on the leading English decision of Re J., [1992] 2 A.C. 562, and Dicey and Morris, The Conflict of Laws, 12th ed. (London: Sweet & Maxwell, 1993), at pages 158-163, to support her position that habitual residence is not to be treated as a term of art but given the ordinary and natural meaning of the two words, and that habitual residence may be something other than ordinary residence. I was urged to find that Ms. M. never had the intention to make Germany her habitual residence and as she had lawful custody of the child when she came to Canada, it was her intention that governed and her intention was that Canada was her habitual residence.

The first answer to that argument is, I think, that the Hague Convention is incorporated into the law of Ontario by section 46 of the Children's Law Reform Act. As a result, the law of Ontario will govern the interpretation of the language of the statute, as appears to me to have been recognized by the Supreme Court of Canada in Thompson v. Thompson, supra. In that case, the Supreme Court of Canada was dealing with the Hague Convention as incorporated into the law of Manitoba by its Child Custody Enforcement Act. At page 578 of his judgment, La Forest J. said:

> **It would be odd if in construing an international treaty to which the legislature has attempted to give effect, the treaty were not interpreted in the manner in which the state parties to the treaty must have intended. Not surprisingly, then, the parties made frequent references to the supplementary means of interpreting the Convention and I shall also do so. I note that this court has recently taken this approach to the interpretation of an international treaty in Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689.**

The Hague Convention being, by enactment, part of our domestic law I do not believe the trial judge erred in interpreting the language of the statute according to our domestic law.

Secondly, and regardless, as I read the trial judge's reasons at pages 2 through 4, it is clear that, having found that the child resided in only one place with both her parents, Germany, he went on to make various findings of fact which satisfied him that in the ordinary and natural meaning of the words "habitual residence" that residence was in Germany. There was ample evidence before the trial judge to enable him to make those findings of fact and it is not appropriate for me to review those findings on appeal. I should perhaps add that having reviewed the record that was before the learned trial judge, I am in agreement with his findings of fact with respect to habitual residence.

The cross-appeal is dismissed.

Article 13(1)(b)

During argument I suggested to counsel that if the appeal was allowed and the cross-appeal dismissed, the appropriate course would be to refer the matter back to the Provincial Division for a determination on the issue of whether the respondent had established that returning the child would expose her to grave risk of physical or psychological harm or otherwise place her in an intolerable situation. Counsel for both the Attorney General and Mr. M. urged me not to do that. The matter has been before the courts since the spring of this year. I was advised by counsel that an appointment in the Provincial Division to continue the hearing could not be had for several months. I was further advised that all of the evidence that was before Judge Weisman, and would be before the Provincial Division if the matter was referred back, was before me. Accordingly, having regard to the expense to which the parties have already been put, and the intent of the Hague Convention that matters under it proceed with dispatch, I heard submissions on this issue.

Counsel are agreed that under section 134(1) of the Courts of Justice Act, R.S.O. 1990, c. C.43, I have jurisdiction to make any order that ought to or could have been made by the Provincial Division. Counsel for the appellant and the respondent are in agreement that the onus is on the respondent to bring the matter within the saving provisions of Article 13(b).

The standard to be met is a serious one. In Re A. (A Minor) (Abduction), [1988] 1 F.L.R. 365 (Eng. C.A.), Lord Nourse L.J. said at page 372:

> **. . . the risk has to be more than ordinary risk, or something that would normally be expected on taking a child away from one parent and passing him to another. I agree . . . that not only must the risk be a weighty one, but that it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words "or otherwise place the child in an intolerable situation."**

That standard was approved by the Supreme Court of Canada in Thompson v. Thompson, supra, per La Forest J. at page 597. La Forest J. went on to say

> **. . . it would only be in the rarest of cases that the affects of "settling in" to the abductor's environment would constitute the level of harm contemplated by the Convention. By stating that before one year has elapsed the rule is that the child must be returned forthwith, Article 12 makes it clear that the ordinary effects of settling in, therefore, do not warrant refusal to surrender.**

Ms. Morris submits:

> **(a) the threat of physical abuse to the mother can cause psychological damage to the child; and**
>
> **(b) severe economic hardship to the mother creates psychological pressure upon her which will necessarily be harmful to the child.**

She also submitted, in general terms, and pointed to the psychological opinions that were in the record that anything that would now break the bond between mother and child, such as physical separation, would cause the child grave psychological harm.

Dealing with the first point, it is sufficient to say that although there is a suggestion of some physical altercations between the appellant and the respondent when they were living together, there is no evidence to suggest any probability of future physical abuse sufficient to give rise to fears of physical or emotional damage to the child. There is

absolutely no evidence of any past physical abuse of the child and nothing to suggest any apprehension of any future abuse.

With respect to the question of psychological harm, I found assistance in and respectfully adopt the opinion of Butler-Sloss L.J. in C. v. C. (Abduction: Rights of Custody), [1989] 1 W.L.R. 654. Having found that in that case the mother had wrongfully taken the child from Australia and that it was appropriate that as a condition of the return of the child the father give undertakings for the support of the mother and the child, she says at page 661:

> **The grave risk of harm arises not from the return of the child, but the refusal of the mother to accompany him. The Convention does not require the court in this country to consider the welfare of the child as paramount, but only to be satisfied as to the grave risk of harm. I am not satisfied that the child would be placed in an intolerable situation, if the mother refused to go back. In weighing up the various factors, I must place in the balance and as of the greatest importance the effect of the court refusing the application under the Convention because of the refusal of the mother to return for her own reasons, not for the sake of the child. Is a parent to create a psychological situation, and then rely upon it? If the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied upon by every mother of a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and four through the Convention, at least in respect of applications relating to young children. I, for my part, cannot believe that this is in the interests of international relations. Nor should the mother, by her own actions succeed in preventing the return of the child who should be living in his own country and deny him contact with his other parent.**

No one has suggested in the argument before me that if the child is to be return to Germany, the mother will not accompany her. The gist of Ms. Morris's argument appears to me to be that if the mother and the child are returned, the mother will be living in a country with which she is not familiar, away from her family and the friends that she had prior to leaving for Germany, and dependent upon her estranged husband for support. That will make her unhappy, and her unhappiness will affect her relationship with, and be deleterious to, the child. For the reasons stated by Butler-Sloss L.J., I cannot accept that argument, even if the facts upon which it is based are proven, as being a sufficient reason to avoid the Hague Convention.

I find no evidence of a grave risk that the return of the child to Germany would expose her to physical or psychological harm or otherwise place her in an intolerable situation.

Undertakings

The requirement that the applicant for an order under the Hague Convention give undertakings as a condition of the return of the child has been widely applied, and approved in this country by the Supreme Court of Canada in Thompson v. Thompson, supra. On the evidence before me, it is clear that when Ms. M. and her daughter were living in Germany with her husband the two of them were dependent upon him. It is probable that she will be unable to work in Germany without securing a visa or permit, which she does not presently have. It accordingly seems sensible to impose

undertakings for her support and that of the child of the marriage which will be communicated to the German court and which will stay in place unless and until varied by that court in the custody proceedings presently before it.

Accordingly, I order that M.M. be returned to Germany on or before the 20th of November, 1995, upon Mr. M. entering into the following undertakings:

1. **To provide ten days before departure a prepaid airline ticket for Ms. M. and their daughter for travel between Toronto and Germany;**

2. To obtain for his wife and daughter a comfortably furnished one-bedroom apartment of a reasonable standard, and in a neighbourhood similar to that in which the matrimonial apartment was situated, and to maintain that apartment at his expense until further order of the German court. Written confirmation that the apartment has been rented and particulars of its location are to be delivered to Ms. M. ten days prior to her departure.

3. To provide for the support of Ms. M. and their daughter the sum of $ 2,000 Canadian per month payable on the 20th day of each month. In view of the uncertainty as to Mr. M.'s present income, caused in no small part by the extremely unhelpful financial statement that he placed before me on the hearing of this appeal, Mr. M. should deposit in the trust account of his wife's solicitor, ten days prior to her departure, $ 6,000, representing support payments for the months of November and December 1995 and January 1996.

4. To use his best efforts to find employment for Ms. M. in Germany and in the event that such employment is obtained, to provide the services of a nanny to care for his daughter while Ms. M. is at work.

5. To pay directly the cost of any medical, hospital or dental services required by his daughter.

Conclusion

In the result, the appeal is allowed and the cross-appeal is dismissed. Provided the appellant enters into the undertakings set out in my judgment, the child is to be returned to Germany on or before November 20, 1995.

The appellant is entitled to his costs of the hearings before Judge Weisman, and on this appeal, payable by the wife forthwith after assessment. If demanded, the Attorney General, as intervenor, is entitled to costs of this appeal payable by the wife after assessment.

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