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[29/04/1992; Inner House of the Court of Session (Second Division) (Scotland); Appellate Court]
Whitley v. Whitley 1992 GWD 22-1248

INNER HOUSE OF THE COURT OF SESSION (Second Division)

29 April 1992

Lord Justice Clerk (Ross), Lord Murray, Lord Morison

L.W. v J.W.

Counsel: Act: A Smith et Davie, Dundas & Wilson; Alt: Martin, QC et Liddle, Drummond Miller

LORD JUSTICE CLERK (ROSS), (Reading the Opinion of the Court): The petitioner is a Petty Officer in the United States Navy. He is the husband of the respondent. The parties are the parents of two children, T, who was born on 19 March 1988 at Oakland, California, and L, who was born on 14 December 1989 at Novalo, California. Both children are citizens of the United States of America. Until the children were brought to Scotland by the respondent on 24 October 1991, they were habitually resident in the United States of America and latterly in Norfolk, Virginia.

In the petition, the petitioner seeks an order under the Child Abduction and Custody Act 1985 and the Articles of the Hague Convention set out in Schedule 1 to the Act. The respondent opposes the return of the children.

In the pleadings it is admitted by the respondent that in terms of section 31-1 of the Code of Virginia (as amended) both the petitioner and the respondent were joint natural guardians of the children at the material time with equal legal rights in regard to them. It is also admitted that such rights are custody rights and include the right to determine the place of residence of the children; and that the removal of the children to Scotland by the respondent was a breach of the petitioner's custody rights. The Minute of Proceedings shows that before the Lord Ordinary it was expressly conceded on behalf of the respondent that the removal of the children was wrongful in terms of Article 3 of the Convention. At the commencement of the hearing in the Inner House, counsel for the respondent sought leave to amend the Answers by withdrawing the concession made and by denying that the removal of the children to Scotland by the respondent was a breach of the petitioner's custody rights. After hearing parties, we refused leave to make that amendment. Accordingly, it remains the position that the respondent concedes that the removal of the children is to be considered wrongful in terms of Article 3 of the Convention.

Article 11 of the Convention provides that the judicial or administrative authorities of Contracting States shall act expeditiously for the return of children.

Article 12 provides inter alia --

"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith".

Article 13 provides inter alia --

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

(b) 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".

Before the Lord Ordinary the respondent contended that in the present case there was grave risk that the return of the children to the United States of America and to the petitioner would expose them to physical or psychological harm or would otherwise place them in an intolerable situation. Before the Lord Ordinary both parties relied upon affidavit evidence and other documentary material produced by them. Before this court, it was suggested that the respondent had invited the Lord Ordinary to allow a proof into parties averments, but there is no record of any such motion in the Minute of Proceedings, nor in the Lord Ordinary's Opinion. From the Minutes of Proceedings, it appears that parties may initially have expected a proof to take place, but both parties appear to have acquiesced in the hearing before the Lord Ordinary proceeding upon the basis of affidavits and other documentary material.

After considering the terms of the affidavits and documentary material and hearing the submissions of parties, the Lord Ordinary concluded that no case had been made out for the operation of Article 13 of the Convention. He accordingly pronounced an interlocutor holding that the petitioner was entitled to an order for the return of the children to the United States of America under the Child Abduction and Custody Act 1985. Against that interlocutor of the Lord Ordinary the respondent has reclaimed.

Before the Lord Ordinary the respondent advanced three principal heads of criticism against the petitioner's conduct, and submitted that because of certain defects in the petitioner's past conduct and in his character there was a grave risk that the return of the two children to him would expose them to physical or psychological harm and would otherwise place them in an intolerable situation in terms of Article 13. Before this court counsel for the respondent submitted that the Lord Ordinary had erred in concluding that the material before him did not establish that the children would be exposed to such grave risk of physical or psychological harm and would be placed in an intolerable situation. Mrs Smith for the respondent repeated the criticisms advanced before the Lord Ordinary, and subjected the affidavits of the witnesses to a close analysis. She drew the attention of the court to numerous passages in the affidavits of the parties and the other witnesses.

Although the Lord Ordinary in this case did not have the advantage of seeing and hearing the witnesses, Mrs Smith accepted that before this court would be justified in interfering with the decision of the Lord Ordinary, this court would require to be satisfied that the conclusion of the Lord Ordinary on the facts was one at which no reasonable Lord Ordinary could have arrived. She sought to satisfy this court that having regard to the terms of the affidavits, the only proper conclusion which could be drawn was that returning the children to the United States of America would involve a grave risk of physical or psychological harm, or would otherwise place the children in an intolerable situation.

We do not find it necessary to rehearse the submissions made by counsel in support of the criticisms of the petitioner's conduct and character. Suffice it to say that these fell under three heads; it was said that he was financially irresponsible; it was also contended that he had abused alcohol although Mrs Smith explained that she did not suggest that he was an alcoholic; it was also maintained that the petitioner had abused drugs, and that this showed that he was an immature, irresponsible and unpredictable young man.

As regards the allegation of financial irresponsibility, the Lord Ordinary accepted that there had been financial problems, but his conclusion was expressed as follows

"I find that the petitioner's explanations about the reasons for the parties' financial difficulties up to this point (summer of 1988) more convincing than those of the respondent".

As regards suggestions of the petitioner's extravagance in the purchasing of clothing, and the respondent's use of welfare shops for the purchase of clothing for the children, the Lord Ordinary found the petitioner's explanation in relation to these matters to be more credible. The Lord Ordinary also found that the petitioner's explanation of the outlays which the respondent would have to meet from the money allotted to her by him was more compelling. The Lord Ordinary found it of significance that there was no suggestion that the parties were ever substantially in debt or that they were lacking in the necessities of life. The Lord Ordinary also observed that the petitioner remains enlisted in the United States Navy, and that there is nothing to suggest that his service pay is insufficient to maintain his family. He accepts that the petitioner is able to provide accommodation in which the children can live with him and his mother.

As regards the allegations of alcohol abuse, the Lord Ordinary expressed his conclusion as follows

"On this matter I consider that the balance of the material before me indicates that on occasions during the marriage the petitioner was drunk or affected by alcohol, that he could behave stupidly when in drink and that this distressed the respondent. However I consider it as of some importance that the respondent did not feel

that she could suggest that there were any substantial problems with the petitioner's drinking habits at interview in August 1991 and further that there is no suggestion that these have affected his service duties or career".

As regards the allegations of drug abuse, the Lord Ordinary noted that it was never suggested that the petitioner was a drug addict. The suggestion was that he occasionally dabbled in hard drugs, and this was expressly denied by the respondent in his affidavit. On thiis issue the Lord Ordinary stated

"I do not find it possible on the conflicting material on affidavit to resolve this matter so far as the petitioner's past conduct is concerned".

The Lord Ordinary also observed that it is not suggested by the respondent that the petitioner has indulged in taking drugs since returning from a world cruise in US Enterprise in March 1990.

The Lord Ordinary also expressed the view that the criticisms of the petitioner's character and conduct appear to be exaggerated. He expressly applied his mind to the question of whether it had been shown that there was a grave risk that returning the children to him would expose them to physical or psychological harm, and he concluded

"Such defects as there may be in the petitioner's past conduct and in his character are not such as to constitute such grave risk, in my opinion".

In our opinion on the material before him, the Lord Ordinary was fully entitled to arrive at such a conclusion, and nothing which has been put forward by Mrs Smith would persuade us that the Lord Ordinary had arrived at any wrong conclusion in this regard.

Before this court Mrs Smith at one stage appeared to be contending that the petitioner on occasions had exhibited violence towards the children. In her affidavit the respondent maintained that at one stage he had begun "to get physically over-rough with the girls". The respondent, however, has made no averments to that effect in her pleadings, and the Lord Ordinary in his Opinion records that counsel for the respondent had made it clear to him that she did not suggest that there had been physical or sexual abuse of the children, and there was no suggestion of danger to the children while the petitioner had been with them. In these circumstances we are not prepared to consider the suggestion now being made to the effect that the petitioner had exhibited some violent behaviour towards the children.

Before the Lord Ordinary it was contended that in the light of the criticisms made of his conduct and behaviour, the petitioner was an immature, irresponsible and unpredictable young man. Although it is not specifically mentioned in the pleadings, before the Lord Ordinary the respondent founded upon the terms of a letter dated 5 January 1990 which the petitioner had sent to the respondent's friend Miss Wendy Smith. Although the Lord Ordinary's attention was drawn to this letter, he makes no mention of it in his Opinion. Before this court Mrs Smith contended that this letter gave rise to great concern, and that it demonstrated immaturity on the part of the petitioner; she maintained that the letter was of significance when consideration was given to the question of whether the children should be returned to the petitioner. She submitted that the letter showed that the petitioner was immature and had been indulging in a dual fantasy, in that he fantasised that he was in loco parentis in relation to Miss Wendy Smith, and that he had a sexual relationship with Miss Wendy Smith.

There is no doubt that this letter reflects no credit upon the petition. It contains indecent material, it is a silly letter, and must have been highly offensive to Miss Wendy Smith. The petitioner in his affidavit recognises that the letter was a stupid one; he states that he did not mean it to be taken seriously and that it was written from Singapore after a tedious trip across the Pacific Ocean. If the letter was meant to be a joke, it was a joke in very bad taste. However, it is to the petitioner's credit that subsequently in October 1991 he apologised to Miss Wendy Smith for the letter although she appears to have been surprised that he should have raised the subject at that stage. However that may be, and however reprehensible it may be that the letter was ever sent, we are not persuaded that it demonstrates that returning the children to him would involve any grave risk that the children would be exposed to physical or psychological harm.

In considering the respondent's allegation about the petitioner's conduct and character, it is also necessary to have regard to his evidence on these matters and, perhaps more importantly, the evidence which has been provided by others in the United States Navy including the petitioner's superior officers. Chad Dotson who serves in the United States Marine Corp and was apparently a neighbour of the parties at Norfolk has deponed that he frequently saw the parties together, that he had never seen the petitioner use drugs or abuse alcohol, and that he has never observed any indication of financial problems, and that the children have always

appeared well clothed and fed. Annette Harrod states that she worked in the same office as the petitioner and spoke to the respondent almost every day. She never saw anything which would lead her to believe the allegations now being made against him. There is also evidence regarding the random testing of United States Navy personnel for drugs, and it is stated that the petitioner has participated in numerous urinalysis testing always with negative results. Three is also a report from the Psychiatry Department of the Naval Hospital Portsmouth, Virginia explaining that the petitioner was seen for evaluation and recommendations for treatment after a motor cycle accident, and with particular reference to possible alcohol involvement. He was apparently seen along with the respondent who corroborated his assertion that there was no known family history of alcoholism and that his average consumption of alcohol was moderate. The conclusion of the report was that the petitioner had no indications of alcohol dependence at that time (August 1991). In her affidavit, the respondent maintains that she falsely informed the person interviewing them that the petitioner did not have a drink problem, and that his consumption of alcohol was moderate, she maintains that she did this because the petitioner threatened her that if she did not assist him he would never allow her to leave with the children. We do no regard this as a convincing explanation on the respondent's part. In any event, we agree with Mr Martin for the petitioner that what is most important in the report from the Psychiatry Department is that it contains an objective conclusion that there was no indication of alcohol dependence on the part of the petitioner.

Number 19/10 of process is a reference from a Leading Chief Petty Officer to the effect that the petitioner by February 1992 has been assigned as Assistant Leading Petty Officer in the Military Acute Care Department. This position is said to be one of high responsibility and is reserved only for "top notch" performers. The writer comments favourably upon the petitioner's sustained superior performance at his work. Number 19/11 is another reference from a Chief Petty Officer to the effect that the petitioner has never come to work under the influence of alcohol or drugs, and that his work has always been of the highest calibre. It describes him as "one of the US Navy's top Petty Officers". Number 19/14 of process is a letter from Captain Smith of the Medical Service Corp. It confirms his reliability at his work. In the course of the letter it is stated

"Petty Officer W. has not demonstrated any tendency towards alcohol abuse and the Navy policy regarding drug testing/drug abuse is strictly enforced. Petty Officer W. is considered to be reliable in all aspects relating to his military functions, responsibilities, and assignments".

We agree with Mr Martin that that material from the US Navy is inconsistent with the criticisms alleged against the petitioner by the respondent, and supports the Lord Ordinary's view that the respondent has failed to make out a case for the operation of Article 13 of the Convention.

Before the Lord Ordinary the respondent advanced a distinct submission to the effect that there was a grave risk that the children if returned would be exposed to psychological harm in respect of reports obtained from the Director of Clinical Psychology Services at the Royal Hospital for Six Children, Edinburgh. The Lord Ordinary has dealt with these reports in his Opinion. As the Lord Ordinary recognised these reports depend upon an assessment of the petitioner which he considered was not justified in the material before him. As the writer of the report recognised, she proceeded solely upon the basis of information provided to her by the respondent concerning the petitioner's attitude and behaviour; she had never met the petitioner nor heard his account of the marriage. In these circumstances, the reports appear to us to be defective. Moreover it is clear that the reports were written with the issue of custody in mind. In the first report, the writer makes several general comments about the appropriate parenting of young children in custody and access disputes; she comments that the welfare of the children should be paramount in such situations. The conclusion which is expressed at the end of the day is in the following terms

"On balance it would seem that the better arrangement from the childrens' point of view would be for the care and custody of the children to be provided by their mother".

The present proceedings do not relate to the custody of or access to the children. All that the court is being invited to do in the present proceedings is to order that the children should be returned to the United States of America. Questions of custody or access will then be determined by the competent court in the United States of America. As the Lord Ordinary remarks, it has been observed by Butler Sloss LJ in C v C [1989] 2 All ER 465, that 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. It is significant that in the original report provided by the clinical psychologist, the report is stated to be an assessment of the psychological risk which might be incurred by returning the children to the custody of their father, and yet it is not stated in that report that there would in the view of the writer be any such psychological risk. Nor is there any suggestion in the second report that there would be any such psychological risk. In the final report from the clinical psychologist No 30/1 of process, the clinical psychologist does express a view upon this matter. In the course of the report it is stated

"If either of these children were to be permanently separated from their mother, I would suggest that there would be grave risk that they would suffer at least temporary psychological damage which could last for a period up to months if not longer. They would both exhibit a grief reaction, become bewildered, show regression to an earlier stage of development and exhibit some of a range of difficult behaviours, from withdrawal, anger and fear through to aggression and 'bad' behaviour as described in para 3 of my original report, eg loss of toilet training, speech regression etc".

At the end of the report the following conclusion is expressed --

"If the children were returned to the United States, and L.W.'s behaviour did not change from that reported, both personally and towards his daughters, then the worst solution intolerable for his children would have been arrived at and the children would be at risk of severe psychological and physical harm".

This report, however, appears to us to be based on a number of false premises. On the basis of information provided to her by the respondent, the clinical psychologist describes the petitioner as having a tendency to seek immediate gratification of his wishes, to spend extravagant amounts on alcohol and other goods, and indeed to have required treatment for alcoholism, and to be not unfamiliar with hard drugs. We are not satisfied that these premises are correct. In particular there is no justification for the statement that he ever required treatment for alcoholism. Apart from that, the report appears to proceed upon the view that the children are to be returned to the petitioner who alone is to be responsible for looking after them. The report ignores what the clinical psychologist had been given to understand at the time when she wrote her first report, namely, that the petitioner was to make arrangements for his mother to care for the children. In these circumstances we agree with the way in which the Lord Ordinary has treated these reports. The Lord Ordinary accepted that some psychological harm to the children was inherent in the situation where it was necessary to consider operating the machinery of the Convention, but he was not satisfied that any grave risk of psychological harm would arise if the children were returned to the United States of America. The whole problem in this case has arisen from the fact that the respondent wrongfully removed the children from their home in the United States of America. She is now contending that the children would suffer psychological harm if they were to be removed from her and returned to the United States. In C v C (supra) Butler Sloss LJ said

"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 on 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 a child who should be living in his own country and deny him contact with his other parent. As Balcombe LJ said in Re E (a minor) (Abduction) (1989) 1 FLR 135 at 142

' . . . the whole purpose of this Convention is . . . to ensure that parties do not gain adventitious advantage by either removing a child wrongfully from the country of its usual residence, or, having taken the child, with the agreement of any other party who has custodial rights, to another jurisdiction, then wrongfully to retain that child'".

In the course of the hearing before this court a number of authorities were cited including Viola v Viola 1988 SLT 7; Macmillan v Macmillan 1989 SLT 350; Dickson v Dickson 1990 SCLR 692; Re A (a minor) (Abduction) [1988] 1 FLR 365; Re C (a minor) (Abduction) [1989] 1 FLR 403; Re G (a minor) (Abduction) [1989] 2 FLR 475 and Re F (a minor) (Abduction: Jurisdiction [1991] 1 FLR 1. We were also referred to the unreported case of Slamen v Slamen (23 August 1991). Some of these cases were cited for the purpose of showing that on occasions the court has only made an order for the return of a child to the country from which he has been taken on undertakings being given by the party seeking their return. If the court is satisfied that returning the child would expose the child to a grave risk of physical or psychological harm or would otherwise place the child in an intolerable situation, one can readily understand that the party seeking the return of the child might then seek to persuade the court that the harm apprehended might be diminished if certain undertakings were given. In the present case, where we are satisfied that the Lord Ordinary was entitled to conclude that there was no such grave risk, there does not appear to us to be any need to consider whether or not undertakings might be put forward. No question of offering undertakings was in fact raised before us.

It is plain from the terms of Article 13 that the onus of establishing that there is a grave risk that returning the child would expose the child to physical or psychological harm or would otherwise place the child in an intolerable situation rests upon the party opposing the return of the child, that is, in this case the respondent.

For the reasons already expressed we are satisfied that the Lord Ordinary was fully entitled to conclude the respondent had failed to discharge that onus. Indeed if the matter had been at large for this court, in the light of the material before the court, we too would have concluded that the respondent had failed to discharge the onus incumbent upon her in terms of Article 13.

For the foregoing reasons we have refused the reclaiming motion and have made an order in terms of Article 12 of the Convention for the return of the children to the petitioner. In terms of Article 12, the court is required to order the return of these children subject only to the exceptions set out in Article 13. As the respondent has failed to establish the exception upon which she founded under Article 13, this court is obliged to make the order. The petitioner is presently in this country, and we have ordered that the children should be delivered to him within 48 hours.

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