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[13/01/1993; Supreme Court of Ireland; Superior Appellate Court]
P.F. v. M.F., unrep., Supreme Court, 13 January 1993

The Supreme Court of Ireland

13 January 1993

Finlay CJ, Hederman, Egan, Blayney, Denham JJ

In the Matter of the Child Abduction and Enforcement of Custody Orders Act 1991; P.F. v. M.F.

FINLAY CJ: This is an appeal by MF (the mother) against an order made in the High Court on the 25 November 1992 pursuant to the provisions of the Child Abduction and Enforcement of Custody Orders Act 1991, directing the return to the jurisdiction of the Family Court of Worcester in the Commonwealth of Massachusetts, United States of America, of two infant children of the father and the mother.

A stay to that order was granted and the matter came on for hearing before this Court on Tuesday, 12 January 1993. The Court has ruled that notwithstanding the termination by PF (the father) of his retainer to his solicitor and counsel and his non-appearance on the hearing of this appeal, that the appeal should proceed.

The facts

The parties consisting of the father and mother were both born and grew up in Ireland and are Irish citizens. They both emigrated to the United States of America, and in May 1987 were married in Massachusetts. The two infant children who are concerned in these proceedings were both born in the United States of America and are two sons now aged five and four respectively. Differences in the marriage between the parents arose and have been the subject matter of proceedings for divorce and other related proceedings in the courts of Massachusetts. On the 21 November 1991 an order on consent was made by the courts in Massachusetts directing that the mother should have physical custody of the children and that the parents should have joint custody. The order provided for maintenance to be paid by the father to the mother for the upkeep and maintenance of the children and it also provided that the children could be taken to Ireland for a holiday by the mother between January 1992 and April 1992, that the children and mother could live in the family home and that the husband should not reside there but should have access to the children there. The amount of maintenance was to be 100 dollars a week plus the payment of all household bills, and whilst the children were in Ireland, the amount of maintenance was to be 125 dollars per week in US currency. The date of the holiday in Ireland was altered by agreement between the parents, to commence on the 14 June 1992 and to cease at the commencement of September 1992.

The mother came to Ireland with the children in June of 1992. Up to that date she had not been paid any sum by way of maintenance as provided for in the order of November 1991,

though the fare for her and the children to come to Ireland on return air tickets was provided by or on behalf of the father. The father had ignored the provisions of the order and had resided in the family home during that period.

The mother did not return with the children to Massachusetts in September of 1992, but instead applied in the District Court in Dublin for an order granting to her custody of the children. The father then instituted these proceedings claiming an order pursuant to Article 12 of the Convention on the Civil Aspects of International Child Abduction, signed at The Hague on the 25 October 1980 (The Hague Convention) which by virtue of the provisions of the Child Abduction and Enforcement of Custody Orders Act 1991 is to have the force of law in the State, returning the children to Massachusetts. The material provisions of The Hague Convention which are relevant to the proceedings, are contained in Article 3, Article 12 and Article 13 of The Hague Convention, and are as follows:

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 the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

Article 12 reads as follows:

"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 in so far as its provisions are relevant 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."

And at sub-clause (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."

The learned trial judge was satisfied that the children had been retained by the mother in Ireland in breach of rights of custody attributed to her and to the father by the order of the court of Massachusetts of November 1991 and that the children were habitually resident immediately before that retention in Massachusetts. Against that finding of the trial judge there has been no submission made on this appeal. By virtue of that conclusion the learned trial judge reached the further conclusion that the retention of the children in Ireland had to be considered wrongful pursuant to Article 3 of the Convention, and against that conclusion there has been no challenge, either, on the hearing of this appeal. The hearing in the High Court was exclusively had on affidavit.

The mother has prosecuted the appeal upon the basis that the affidavit filed by her established clearly that within the meaning of Article 13(b) of The Hague Convention there was a grave risk that if these children were returned to Massachusetts that that return would expose them to an intolerable situation.

The evidence on which it is submitted that the onus placed upon the mother to establish that fact has been discharged may thus be summarised. During an extended period since the birth of these children the father, who was the basic earner in the family, so managed his affairs that on no less than nine occasions the entire family had to move from rented accommodation and go into other different accommodation solely arising from his failure to pay the rent, the removal being in some instances actually as a result of processes of eviction for non-payment of rent, and in other instances, being in anticipation of such processes and leaving the rent unpaid; that, in addition, throughout the same period there was a total insecurity and instability about the actual provision of maintenance for the children and for the family in general; that bills remained unpaid, proceedings were instituted in respect of them and there was insufficient money for food and ordinary necessaries on many occasions in the house. The facts deposed to by the mother include also the fact that during the same periods when the children and herself were deprived of ordinary support and maintenance by the father's actions he was spending money on himself on luxuries, on the purchase of a new motor vehicle, and on one occasion, on the taking of an expensive holiday outside the United States, which was quite disproportionate and recklessly irresponsible, having regard to his failure to provide for the family. In addition, the affidavit contains evidence of violence by the father to the mother on a number of occasions, in the presence of the children, and a limited evidence of violence by the father to one of the children.

It is submitted that all this evidence, none of which has been contradicted by the father in any affidavit, or by any oral evidence, raised a probability that if the children were returned to Massachusetts that there was a grave risk that that return, even pending the determination of the provisions for their custody and support and maintenance which would be necessary in the courts of that area, would put them again in the intolerable situation which they had suffered in the past. No evidence was adduced by way of supplemental affidavit or by oral evidence to contradict these statements of fact contained in affidavit of the mother, and it does not appear that any application was made to cross-examine her on that affidavit.

I am satisfied that the evidence contained in these averments which I have summarised, if uncontradicted, must lead to a conclusion that there was a grave risk that a similar situation would occur again if the children were returned to Massachusetts and that such an event would clearly constitute an intolerable situation within Article 13(b).

The onus which was clearly placed upon the mother as the person opposing the return of the children by virtue of the provisions of Article 13, had, therefore, been discharged by these averments contained in the affidavit.

It seems to me that the father could only disprove the conclusion inevitable from those averments and avoid the consequential finding that there was grave risk that the children would be put into an intolerable situation by either of two methods. He could have adduced evidence himself either with or without a cross-examination of the mother on her affidavit which satisfied the Court that these statements of fact were untrue. That he did not attempt to do. In the alternative, it might have been possible for him to establish, by very cogent proof, that notwithstanding the past history of his attitude towards the responsibilities he had for the children and for their maintenance and support and accommodation, that the situation was now entirely changed and would be wholly different if they were returned to

Massachusetts pending the period during which the courts would decide upon their future custody and welfare. In paragraph 35 of his affidavit, originally filed in support of this application, the father stated as follows:

"I say that I am willing to properly discharge any reasonable expenses or maintenance payable in respect of the Respondent and our two children."

At paragraph 42 of the same affidavit he stated as follows:

"I say that in the event that this honourable court should determine to order the return of the two minors the subject matter of this application to the jurisdiction of Worcester County Family Courts, I hereby agree and undertake to abide by any terms or constraints imposed by the Courts of Ireland in the implementation of any such order."

We are informed that counsel on behalf of the father at the hearing in the High Court stated that the father was willing to abide by any conditions that might be imposed. We have further been informed that the father was present at the hearing in the High Court. In the course of his judgment the learned High Court judge stated as follows:

"Mr McEnroy conceded that any return of the children could be made subject to stringent conditions and I would have required advance provision to be made for air fares and maintenance, including rent for at least three months. I do not, however, attach any conditions to my order as I am told my substantive decision is to be appealed. I make an order in the terms of paragraph 5 of the Special Summons with a stay pending appeal on the usual terms."

He did not, however, impose any conditions on the order and the order stands as an unconditional order.

I am satisfied, having regard to the uncontested evidence of the mother and the inferences which must be drawn from it that if the father were to have avoided the application to his claim for an order for a return of the children of the provisions of Article 13(b) of The Hague Convention that it was not sufficient for him to have expressed a willingness in general terms to abide by any orders of the Court and to make provision for his wife and children pending the order of the Massachusetts court, but that he would have had to prove that he had made the appropriate provisions by producing, for example, money necessary for their maintenance, money necessary for the purchase of the airline tickets for their journey, and evidence that he had established a residence separately from his own for them to which they had a proper title and in respect of which rent in advance had been paid. On the failure of the father to establish any of those facts, in my view, the making of any order for return of the children, even with the rider that it might be necessary at a later stage to apply conditions to it, was incorrect, and accordingly I would allow the appeal, set aside the order made in the High Court and dismiss the father's application.

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