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[16/01/1995; Full Court of the Family Court of Australia (Melbourne); Appellate Court]
Cooper v. Casey (1995) FLC 92-575

FAMILY LAW ACT

IN THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA, Melbourne

BEFORE: Nicholson CJ, Kay and Graham JJ

16 January 1995

Appeal No. EA102 of 1994 No. CA2586 of 1994

IN THE MATTER OF:

Deborah Ann Cooper

Appellant/Mother

-and-

Dermot Casey Respondent/Director of Family Services A.C.T

as Australian Capital Territory State Central Authority

REASONS FOR JUDGMENT

APPEARANCES:

Ms. Smallwood of Counsel, instructed by Legal Aid Office (ACT), appeared for the appellant/mother.

Mr. Killalea, instructed by ACT Government Solicitor, appeared for the respondent/Director of Family Services ACT as Australian Capital Territory State Central Authority

JUDGMENT:

Nicholson CJ: This is an appeal against a decision of Ellis J arising out of his Honour's order that certain children be returned to the United States, pursuant to the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention"). That order was made on 5 December 1994. Before turning to the detail of the matter it is necessary to say something about the background although it is more than adequately covered in his Honour's judgment.

The husband in this matter was born in the United States on 29 October 1947 and the wife was born in Australia on 16 July 1956. The coupleapparently met in March 1988 or shortly before that time and left together for the United States of America on 16 March. They returned later that year to Australia and were married in Australia on 26 September 1988. They left for the United States on 4 October 1988, returning early in 1989 when the eldest child, B, was born on 5 February. On 18 May 1989 they left for the United States of America and remained until 25 April 1990, and they returned some five months later in September 1990 to the United States of America.

They came to Australia over Christmas, leaving again in February the following year and apart from two short visits to Australia, lived in the United States until July 1993. The child H was born during one of those visits. In July 1993 the wife went to France with the two children with the husband's consent. She later purchased a house in France. There were considerable negotiations and discussions between them and she eventually returned to the United States in February 1994 and remained there until her departure with the children for Australia on 5 July 1994, which departure gave rise to the present proceedings.

Proceedings were eventually taken by the Central Authority for the Australian Capital Territory following representations by the husband in the United States of America and the matter was heard by Ellis J on 5 December of last year. His Honour ordered, and I paraphrase his order, that the Central Authority make such arrangements as are necessary for the return forthwith of the two children to the United States of America; that the registrar deliver up relevant papers; that the wife be permitted to travel to the United States of America on the same aircraft as the two children. His Honour also ordered:

"That upon the arrival of the children in the United States of America and provided that the wife is then in the United States of America, pending any further order by a court in the United States of America, the respondent wife have the care and control of each of the said two children."

Various consequential orders were made in relation to the Federal Police removing the copy of the orders of the court from the PASS system at airports, liberty to apply was granted and orders were made for the return of exhibits. The operation of that order was stayed by Finn J following the filing of a Notice of Appeal on 23 December 1994. This matter was brought on for an accelerated hearing of the appeal on 16 January 1995, being this day.

The judgment of Ellis J records in detail the various movements of the parties and the circumstances of the appellant's departure from the United States in July 1994. His Honour found that she left with the children without the husband's knowledge or consent, having left the husband a few days before and then having obtained temporary restraining orders and custody orders in California. It appears that on 5 July 1994, following her departure from the home, orders were made in the Superior Court of California on the application of the husband involving a temporary restraining order and possibly, temporary custody in his favour. However, nothing turns on this point. That matter was apparently adjourned several times thereafter and as Ellis J records in his judgment the matter was listed for hearing in California on 7 December 1994, two days after his Honour delivered judgment in the matter.

The appellant conceded before Ellis J that, at the time that she took the children from the United States, the husband was exercising rights of custody. She also conceded that if the children were habitual residents of the United States of America, then her removal of them was wrongful and that the Convention would operate. However, she submitted before Ellis J and before this Court, that the children were not habitual residents of the United States and in fact were not habitual residents of any State. She did not argue that the children were habitually resident in Australia, nor did she argue that their stay in France constituted habitual residence in that country.

In his judgment Ellis J pointed out that habitual residence is not defined either in the Regulations or the Convention and is in each case a question of fact. His Honour referred to the observations of the majority of the United States Court of Appeal, Sixth Circuit in Friedrich v Friedrich, 983 F2d 1396, decided 22 January 1993, as to the meaning of habitual residence as follows at page 1401:

"We agree that habitual residence must not be confused with domicile. To determine habitual residence the court must focus on the child not the parents and examine past experience not future intentions.

...

A person can have only one habitual residence. On its face habitual residence pertains to customary residence prior to the removal. The court must look back in time not forward."

After agreeing with those observations Ellis J found:

"Notwithstanding the period that the children spent in France, namely from 9 July 1993 until 22 February 1994, and the periods that they spent in Australia to which I have already referred, they finally returned to the United States of America from France on 22 February 1994. Between that date and the date of their removal from the United States of America to Australia, they continually resided in the United States of America, they attended a pre-school in that country, being the pre-school in B.'s case at which he commenced in January 1992. They spent in all only seven and a half months in France in circumstances where they had gone to that country initially for a limited period, at least so far as the husband was concerned. The fact that perhaps they were to spend the summer months in France does not mean that their place of habitual residence changes or that they have no place of habitual residence. Prior to their removal to Australia on 5 July 1994, the children were last in Australia in November 1992. The period that they spent in Australia, coupled with the period they spent in France, does not in my view mean that they have no habitual place of residence. Indeed, I am satisfied that each child was immediately, before his removal from the United States of America in July 1994, habitually resident in that country. It follows that each child should be returned to the United States of America forthwith pursuant to Regulation 16(1) as no other matters referred to in Regulation 16(3) have been raised by the wife."

I am in full agreement with His Honour's finding as to habitual residence. Ms Smallwood, of counsel, for the appellant, valiantly argued that the various authorities that she cited, supported the proposition that on the facts and at law his Honour should have found that the children had no habitual place of residence. In my view, however, the remarks made in those cases and the facts of this case point inexorably to the correctness of his Honour's finding. In Re B (Minors) (Abduction) (No 2)1993, 1 FLR 993, Waite J, after referring to a number of authorities, summarised (at page 995) the principles relevant to the case before him as follows:

"1. The habitual residence of the young children of parents who are living together is the same as the habitual residence of the parents themselves and neither parent can change it without the express or tacit consent of the other or an order of the court.

2. Habitual residence is a term referring, when it is applied in the context of married parents living together, to their abode in a particular place or country which they have adopted voluntarily and for settled purposes as part of the regular order of their life for the time being whether it is of short or of long duration. All that the law requires for a "settled purpose" is that the parents' shared intentions in living where they do should have a sufficient degree of continuity about them to be properly described as settled.

3. Although habitual residence can be lost in a single day, for example upon departure from the initial abode with no intention of returning, the assumption of habitual residence requires an appreciable period of time and a settled intention. The House of Lords in Re J, sub nom C v S (above) refrained, no doubt advisedly, from giving any indication as to what an 'appreciable period' would be. Logic would suggest that provided the purpose was settled, the period of habitation need not be long. Certainly in Re F (above) the Court of Appeal approved a judicial finding that a family had acquired a fresh habitual residence only one month after arrival in a new country."

It may be commented in relation to the above passage, that the period with which we are presently dealing is a much longer one than that in Re F (A Minor) (Child Abduction) (1992) 1 FLR 548 and it may also be commented that, although evidence was given that the wife and children were planning to return to France, the evidence suggested that that was for a limited period only, for the summer holidays. In those circumstances, it seems difficult to argue that the period that had elapsed following their return to France did not amount to a "settled purpose" within the meaning of the term as used in the above passage.

In Re F, supra, Butler-Sloss LJ delivering the principal judgment of the Court of Appeal, pointed to conflicting evidence which could conceivably have justified a finding that the children in question had abandoned their principal place of residence of the United Kingdom and not acquired one in Australia and said, at pages 555-6:

"The judge was entitled to make the finding that the family did intend to emigrate from the UK and settle in Australia. With that settled intention, a month can be, as I believe to be in this case, an appreciable period of time. Looking realistically at the position of A, by the time he left Sydney on 10 July 1991, he had been resident in Australia for the substantial period of nearly three months. Mr Setright, wearing two hats, on behalf of the mother and of the Lord Chancellor as the central authority, reminds us that it is important for the successful operation of the Convention that a child should have, where possible, an habitual residence, otherwise he cannot be protected from abduction by a parent from the country where he was last residing. Paraphrasing his argument, we should not strain to find a lack of habitual residence, where on a broad canvas, the child has settled in a particular country."

As was pointed out during the course of argument in the present case, the making of a finding that a child has no habitual residence could easily operate to defeat the purpose of the Convention and leave children open to the possibility of repeated abductions by both parents. In regard to the issue of habitual residence: see also the remarks of Sir Stephen Brown, P. in V v B (A Minor) (Abduction) 1991 FLR 266, particularly at 271-2. For the reasons stated by Ellis J it seems clear that on any view these children acquired an habitual residence in the United States of America on their return from France in 1994, if indeed they ever lost it prior to that date.

I would not on the evidence be satisfied that they ever did lose it. It seems to me that they became and remained habitual residents of the United States of America from the time that each of them first visited that country following their birth until they were abducted by the mother in July 1994.

That conclusion would normally be enough to dispose of the appeal. However, the mother applied to introduce fresh evidence relying upon certain affidavit material, much of which had been filed prior to the hearing before Ellis J but not relied upon at that hearing.

This material was relied upon now in support of an argument that reg. 16(3)(b) of the Family Law (Child Abduction Convention) Regulations applied to the present case and that the court should be satisfied that the return of the children would expose them to a grave risk that their return would subject them to physical or psychological harm or otherwise place them in an intolerable situation.

It should be noted that regulation 16(3)(b) mirrors, albeit not in the precise words, the terms of Article 13(b) of the Convention. It should also be noted that the affidavit material relied upon by the appellant is not only voluminous but is deposed to by a large number of witnesses, mainly residents of the United States of America. It alleges a number of serious acts of violence of both a physical and psychological nature perpetrated by the husband on the appellant, on occasions in the presence of the children and she herself deposes to leaving the husband and the United States of America because of her fear of the consequences to herself and the children of his violence.

It is not necessary for the purpose of these proceedings to canvass the detail of the allegations but it is obvious enough that if true, they would provide a strong case for protecting the wife and the children from the husband. The claims are, however, largely disputed by the husband and it is obvious that before any decision could be made concerning the matter it would be necessary for a court to hear and weigh all of the relevant evidence from both sides.

Counsel for the appellant explained that the appellant had not sought to rely upon such of this material as had been filed prior to the hearing before Ellis J because it was recognised that his Honour would be bound to apply the approach adopted by this court in cases such as Gsponer v. Director General , Dept. Community Services, Vic. (1989) FLC 92-001 and Murray v Director Family Services ACT (1993) FLC 92-416.

It is perhaps useful at this stage to refer to several of the passages first from Gsponer's case and secondly from Murray's case.

At page 77,160 Fogarty, Frederico and Joske JJ, who constituted the Full Court in Gsponer's case said:

"So understood, reg. 16(3)(b) has a narrow interpretation. It is confined to the "grave risk" of harm to the child arising from his or her return to a country which Australia has entered into this Convention with. There is no reason why this Court should not assume that once the child is so returned, the courts in that country are not appropriately equipped to make suitable arrangements for the child's welfare. Indeed the entry by Australia into this Convention with the other countries may justify the assumption that the Australian government is satisfied to that effect. That is partly why in Re A, supra, Nourse LJ at page 372 said that the trial judge was bound to consider "the practical consequences of his making an order to that effect". His Lordship re-emphasised that at page 373 where he said:

"Two further points have been debated in relation to Art. 13(e). First Mr Johnston has submitted that the 'return' contemplated in that and the other provisions of the Convention, as it applies to this case, is a return to the custody of the father. On a consideration of the Convention as a whole, in particular of the preamble, I think it clear that what is contemplated is a return to the country of the child's habitual residence... In the present case it is enough to say that the judge was entitled to proceed, as he did, on the footing that an order for G's return would result in the mother returning with him and also that there would be a further application to the British Columbian Court as soon as practicable thereafter".

Similarly in Re Evans (supra) Balcombe LJ quoted with approval the following passage from a judgment of the Judge at first instance: "I am not at all satisfied, on the material I have seen, that it could possibly be said that there is a grave risk that the child will be placed in an intolerable situation by him being removed to Australia. Australia is a common law country and the courts have ample powers to protect children. The father can either take proceedings of his own accord - which he says he will - or he can alert the appropriate local authority in Australia and the Australian court can make whatever order is required, if any, to protect the children".

In an earlier passage in his judgment Balcombe LJ made these more general observations:

"I stress once again that the whole purpose of this convention is not to deny any hearing to a father in the circumstances of this father; it is ensure that parties do not gain advantageous advantage by either removing a child wrongfully from the country of usual residence, or, having taken the child with the agreement of the other party who has custodial rights to another jurisdiction, then wrongfully to retain that child. The purpose of the convention of the Act which embodies it as part of the law of this country, is to ensure that the right court shall deal with that sort of issue. The right court in this case is the South Australian court..." We agree with the comment of Kay J in Re Lambert (3 April 1987, unreported) that "the Convention is clear. In my view the exceptions to it are likely to be few and far between..."".

Similarly in Murray's case Nicholson CJ and Fogarty J (with whom Finn J concurred as to these matters) said at 80,258:

"The fact that issues relating to the welfare of the child are not relevant to a Hague Convention application is because such an application is concerned with where and in what court issues in relation to the welfare of a child are to be determined."

They continued at 80,259:

"The issue in a Hague Convention application is purely one of forum, subject to those exceptions and the paramountcy principle is accordingly not relevant.

...

Finally, it was argued that his Honour was wrong in failing to find that the exception contained in Regulation 16(3)(b) applied, namely, that there was a grave risk that the children's return to the applicant would expose the children to physical or psychological harm or otherwise place them in an intolerable situation. In addition to the evidence to which we have already referred as to past violence and the propensity for violence on the part of the husband and his associates of the "Mongrel Mob", it was sought to introduce fresh evidence before us designed to reinforce this

evidence and to confirm the danger in which it was asserted the wife would be in if she was to return to New Zealand."

I interpolate there to say that there are similarities between that case and the present case although it may well be in that in Murray's case the threats of violence were rather more immediate and perhaps more serious than is suggested in the present case.

Nicholson CJ and Fogarty J continued in Murray's case at page 80,259:: "As his Honour pointed out, New Zealand has a system of family law and provides legal protection to persons in fear of violence which is similar to the system in Australia.

It would be presumptuous and offensive in the extreme, for a court in this country to conclude that the wife and the children are not capable of being protected by the New Zealand Courts or that relevant New Zealand authorities would not enforce protection orders which are made by the Courts.

In our view, and in accordance with the views expressed by this court in Gsponer's case, the circumstances in which Regulation 16(3) comes into operation should be largely confined to situations where such protections are not available."

After citing authority they said:

"For us to do otherwise would be to act on untested evidence to thwart the principal purposes of the Hague Convention, which are to discourage child abduction and, where such abduction has occurred, to return such children to their country of habitual residence so that the courts of that country can determine where or with whom their best interests lie."

Similar considerations obviously apply in the present case. However, what was said in the present case was that the situation had changed markedly from that which would have applied because of the orders made by Schnider J in the Superior Court of California on 8 December 1994.

To paraphrase those orders,.it seems that on that day his Honour ordered that there should be sole legal custody of the children to the petitioner. It also appears that sole legal custody in Californian terms may be broadly equated to an order for guardianship made under the Family Law Act.

His Honour then ordered that the joint physical custody be awarded to the parties and that the petitioner, namely, the husband, should have the custody of the children during reasonable times and for reasonable periods so that the children are assured of maintaining frequent and continuing contact with the parents.

The order then specified periods of time which were really predicated upon the children arriving in Los Angeles prior to Christmas and access with the father was intended to take place on the day after their arrival for three hours between 5 and 8 pm. Orders were then made for consecutive access and for Christmas Eve and the like, and weekend access.

The critical part of the order for the purposes of the present argument was that the respondent was ordered to immediately notify the petitioner as soon as she and the children arrive in the Los Angeles and to give the petitioner the telephone number and the physical location of the children and to notify the petitioner within 12 hours of any change of address and telephone number. The order provided that she should have physical custody of the children at all times that the husband did not have custody and the matter was adjourned until 12 January 1995.

It should be noted that the mother had prior notice of the Californian hearing and her solicitors in the Australian Capital Territory had in fact written to Schnider J seeking an adjournment of those proceedings. However, none of the material placed before this court alleging misconduct on the part of the husband was ever filed in the Californian court. Although no sworn testimony was given before us as to this point, we were informed by counsel that the reason for the failure to appear and file testimony in the Californian court was that the appellant had insufficient funds and she had been unable to otherwise obtain pro bono legal representation in California.

It was also said that the Australian Legal Aid Authorities had no power to aid legal proceedings abroad and that therefore, the appellant, who is legally aided here, would not and could not be granted legal aid by the ACT Legal Aid Office for proceedings in California.

It was said before us that the effect of Schnider J's order of 8 December was to place the children at risk within the meaning of reg. 16(3)(b) because of the provision for the disclosure of the appellant's US address and telephone numbers and because of the access (visitation) orders made.

As to this, it first should be said that it is difficult to criticise Schnider J for making the order that he did in the absence of an appearance or any material filed on behalf of the appellant. As I see it, he made precisely the sort of order that an Australian judge would be likely to have made in similar circumstances.

Secondly, it is apparent that Schnider J's orders were not final. The matter was adjourned by him to 12 January and, it is apparent from the transcript of the proceedings before him, that it was adjourned in the expectation that the appellant would have returned to the United States of America and would appear in court on that date. Neither of the parties before us was able to inform us of what in fact occurred on 12 January but we assume that the situation is unlikely to have changed markedly in that the fact of the stay of Ellis J's order and the fact of this appeal was no doubt communicated to Schnider J on 12 January as providing an explanation for the appellant's non appearance.

Thirdly, given the fact that the appellant on her return would obviously have access to the Californian courts, whether represented or not, and given, as Schnider J said in the course of discussions, as the transcript reveals on 8 December, that his only concern is for the welfare of the children, we would not be satisfied on the basis of the tests provided in cases such as Gsponer and Murray and the other relevant authorities, that the appellant has brought herself within the exception provided by reg. 16(3)(b). I consider that the appeal accordingly must fail and the children must be returned to the United States of America.

One other matter is our concern about order number 4 as stated by Ellis J. It will be recalled that that order said:

"That upon the arrival of the children in the United States of America and provided that the wife is then in the United States of America, pending any further order by a court in the United States of America, the respondent wife have the care and control of each of the said two children."

This court said in Schwarz v Schwarz (1985) FLC 91-618 at 80001:

"It is true that the usual practice, as applied in Reihana and Mittelman, has been to make an order that the husband or wife, as the case may be, have custody of the children of the marriage for the purpose of taking them from the Commonwealth of Australia to the foreign country and that from the time that the custodian arrives in that country the order ceases to have effect, leaving all questions to be determined there. In view of the fact that foreign courts may not always understand the position as regards interim orders under our law, it may have been preferable if his Honour had framed his order in those terms."

Accordingly, we will vary order number 4 of Ellis J to express it in those terms.

I would add, however, and reiterate concerns that I have expressed in earlier cases, in particular in my reasons for decision in, the ZP v PS (unreported, Full Court of the Family Court at Melbourne, 16 February 1994). I consider that there is a problem about the present operation of the Hague Convention in that it is not the practice of the receiving States to accept direct responsibility for the welfare of children after their return following a successful Convention application. I think that, arguably, such a legal obligation can be found in Article 7 of the Convention. I say this irrespective of whether the requesting State is properly to be regarded as the applicant as this Court has found in Gsponer and Murray or whether it is the parent who is properly regarded as the applicant for that purpose.

The fact is that the Convention is an agreement between the relevant States and the children are returned pursuant to that agreement. In such circumstances, particularly in circumstances where there are allegations of violence or child abuse, it seems to me more than time that the receiving States accepted a more positive obligation for the welfare of children so returned. I make these criticisms not of any particular party to the Convention but rather of all of them. In this country, the situation that arose in the case of McOwan and McOwan (1994) FLC 92-451 is a case in point.

I can well understand that the Convention, as it presently operates, without States accepting that sort of obligation, can give rise to hardship and injustice in individual cases. However, this is not to say that I am critical of the policy of the Convention generally; rather my comments are intended as pointing to a present that should be remedied. Some of these factors may be present in this case but the material before me does not enable me to reach any final conclusion as to that. However, as I have said, and for the aforementioned reasons, I consider that the appeal must be dismissed.

Kay J: I agree. I wish only to say that nothing in the effect of the orders that we are creating should in any way suggest to the Californian court that we in any way reject the evidence that is brought forward on behalf of the wife, some of which is most chilling in its detail. It appears to be corroborated from a strange source, namely, some of the father's admissions in his letters and rather extravagant claims. I have every confidence that the matter will be properly dealt with by a Californian court applying appropriate principles focusing on the welfare of the child once the children are returned to California. I view the orders of the Californian court to date as being made in circumstances where there was no opposition to them and as orders which I would expect, once opposition is raised and material is put before the Court, would be reconsidered in light of that material.

Graham J: I agree with the reasons given by the Chief Justice and there is nothing I wish to add.

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