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http://www.incadat.com/ ref.: HC/E/UKs 189
[20/01/1995; Outer House of the Court of Session (Scotland); First Instance]
McKiver v. McKiver 1995 SLT 790

M. v M.

Court of Session

Outer House

20 January 1995

Lord Cameron of Lochbroom

Lord Cameron of Lochbroom: The petitioner was married to the respondent in Perth, Western Australia, on 23 November 1985. R.M., the only child of the marriage, was born in Perth, Western Australia, on 27 November 1986. On 12 August 1994 the respondent flew with him from Perth to Glasgow. The petition seeks return of R. to Western Australia. It is presented under s 1 of and Sched 1 to the Child Abduction and Custody Act 1985. Schedule 1 sets out the Convention on the Civil Aspects of International Child Abduction signed at the Hague on 25 October 1980. Australia is one of the contracting states.

Article 3 provides:

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

"The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years."

On 12 August 1994 R. was habitually resident in Australia and was thus a child to whom the Convention may apply. It is agreed between parties that on 12 August 1994 under the law of Australia there was no judicial or administrative decision by way of court order operative in relation to any rights of custody concerning R., nor any agreement having legal effect in relation to such rights. The petitioner contends that the removal of the child was wrongful in that it was in breach of the rights concerning R. attributed to him under the law of Australia on 12 August 1994 which rights arose by operation of law in terms of art 3(a) and which

rights were being actually exercised by him at the time of removal. It remains only to note that art 5 of the Convention provides as follows:

"Article 5

For the purposes of this Convention -- (a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence; (b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence . . ."

There is a large measure of agreement as to the facts immediately relevant to this application. After the marriage the parties lived together until January 1992 when they separated. Both trained and worked as social trainers. The marriage had become increasingly unhappy prior to that date. While some evidence was directed to this matter and the nature of the parties' relationship and conduct, it was not suggested that this bore upon the issue which I have to decide. Upon the separation R. lived with the respondent, initially with the petitioner's mother for some months in Perth, and then for a shorter passage of time with friends in Perth. In August 1992 the respondent decided that she wished to return to Scotland, and to do so with R.. The petitioner consented to her doing so, understanding that the respondent was intending to settle down there with R.. There was dispute in the evidence of the parties as to whether an agreement was reached between them concerning R. visiting Australia to see the petitioner thereafter. I do not require to resolve this dispute other than to state that my impression from the evidence was that both parties had in mind that in due course this was to happen, but no definite agreement was reached before the respondent left with R. in August 1992. I consider also that there was some passage between parties thereafter about a possible visit to Australia at the Christmas period of 1992, but that the petitioner, who had shortly before the end of 1992 formed an association and was cohabiting with a colleague, D.N., did not press the matter.

In the event the respondent did not settle down in Scotland, but decided that it would be better in her own and R.'s interests to return to Perth to attempt to make her life there. This she did in May 1993. She also had in mind that this move would enable R. to resume contact with the petitioner, though there was no intention on the part of either party that there would be any reconciliation between them. On their return to Australia R. continued to live with the respondent, initially with friends for a few weeks, and thereafter in accommodation rented by the respondent. The respondent also found employment again as a social trainer. Within a short time of R.'s return with his mother an arrangement was come to between the parties at the instigation of the petitioner and with the full cooperation of the respondent, whereby every second weekend the petitioner picked up R. on a Saturday morning from the respondent's home. R. then stayed with the petitioner and D.N. for two nights, being returned to his school on the Monday morning. In the intervening period he stayed a further two nights a week with the petitioner and D.N., being picked up from school on the Monday afternoon and returned to school on the Wednesday morning during school term. In April 1994 R. became interested in playing football and again at the instigation of the petitioner, by mutual agreement of parties, the petitioner would take him out each Wednesday evening for training with a local team, and also take him to play in football matches each Sunday, whether or not R. was then staying with the petitioner. R. had his own bedroom in the house in which the petitioner and D.N. live. He kept clothing there, including items bought for him, and also other personal possessions, such as collections of memorabilia. During periods when he stayed with the petitioner and D.N. they supervised R., including his homework The petitioner was also to an extent involved in R.'s dental and health care, although the major part of this responsibility was undertaken by the respondent.

For various reasons, including a feeling of separation from her family in Glasgow, more particularly following her father's death in September 1993 and concern about her health which arose in about March 1994, at around which time the respondent learnt that her married sister was pregnant, the respondent became disenchanted with her life in Australia. Furthermore, at about the same time she began an association with a man named Craig. He came from Scotland. He was then visiting Australia but was only permitted to remain until his visa expired in September 1994. Shortly after they met he and the respondent began to cohabit. As a consequence of her feelings of disenchantment the respondent decided that she wished to return to Scotland, and to do so with R.. There was considerable dispute as to when and on what basis this matter was raised by the respondent with the petitioner. My clear impression of the evidence, including that from the respondent's sisters, was that the respondent's mind was made up on the matter by May 1994 or thereby, but that she recognised that the petitioner might raise difficulties at the prospect of R. leaving Australia with her, and that at least initially she presented the matter as one of a return for a limited period.

However that be, I am satisfied that by June 1994 a request was made of the petitioner by the respondent that she should take R. to Scotland with her. By this stage the petitioner was aware that D.N. was pregnant and, on a balance of the evidence, I consider it likely that in the discussion between the parties that followed the request, this was an aspect which concerned the petitioner and which led the respondent to the view that he was agreeing to her request. I am satisfied further on the balance of the evidence that in the discussion the parties also considered the matter of R. returning to Australia to see the petitioner if he was to accompany the respondent to Scotland, and that this had included the prospect that the petitioner should hold over any money that would otherwise be paid by him for maintenance of R. to meet the air fare. I am also satisfied that in the course of the discussion the possibility that R. might live with the petitioner and D.N. was also mooted by the petitioner on the basis that the respondent might only be staying in Scotland for a period of time and would then return to Australia, but that he explained that this depended in part upon the attitude of D.N. That the petitioner was not then intending to give a positive answer is consistent with evidence from his solicitor, Robin Hadley, given on affidavit. She records that she attended upon the petitioner on 23 June 1994 when he sought general advice in relation to a range of issues, including custody and the Hague Convention. She was instructed that the respondent wished to return to Scotland with R. for a period of 12 months, that the petitioner did not consent to R. going to Scotland with the respondent and that he wanted R. to remain in Western Australia. I also accept the petitioner's evidence that because he had been concerned about the damaging effect which the period in Scotland between August 1992 and May 1993 had had upon R.'s schooling I for some time after his return to his old school in Perth in May 1993, he had spoken to both the head teacher and R.'s teacher at this time and received advice that a further break in his schooling would adversely affect R.'s future education. I am also satisfied that the petitioner took soundings of D.N. and within his own family about the advisability of allowing R. to leave Australia. These matters all suggest that the petitioner did not initially give any final and positive answer to the respondent to her request that he agree to her leaving Australia with R. and returning to Scotland.

In the event the matter came to head on an occasion which I am satisfied occurred a short time after 23 June 1994. The petitioner was returning R. to the respondent. He was informed by R. that the respondent had told him that he was returning to Scotland with his mother. The handover had been arranged to take place at a restaurant. When R. was handed over the petitioner spoke to the respondent outside the restaurant and informed her that he did not consent to R. going to Scotland with her and said that she should not have told R. to believe that he had agreed to it. In evidence the respondent agreed that she understood from

what the petitioner had said that he was not consenting to her leaving Australia with R., but she considered that he had changed his mind from what he had earlier said.

The respondent's evidence was that she had very shortly after the incident gone to a legal advice centre and been told that there being nothing to stop her, she should get on a plane and go with R. to Scotland and then fight the matter out there. She agreed however that she had then deliberately deceived the petitioner and concealed from him her preparations for leaving. She had said nothing to him about the matter, nor to his mother or sister who also lived in or around Perth and whom she would see from time to time. She had not given any notice to her employers that she was leaving her employment as a social trainer in case her colleagues learnt of it and told the petitioner. She went to work as normal on 12 August 1994, the day that she was to fly out of Perth with R. She agreed that the petitioner was expecting to collect R. for the weekend on the day following her departure and that this would have included a football match at which R. was expected and was expecting to play. She agreed that although it was still term tune, she had given no notice to R.'s school that he was leaving. She agreed that she had left a note on the back door of her house informing the petitioner that by the time he got the note she would already be in Scotland with R. and that this would be the first intimation to the petitioner of her departure. In the note the respondent also wrote: "I guess I don't know what your next step will be -- if it's in Court -- then I will see you there I guess but I'd rather it wasn't, obviously for R.'s sake, but time will tell."

She agreed that if the petitioner had known of her intention to leave with R. he would have taken legal steps to stop her from doing so. She indicated that she was proceeding on the basis that he would not do so because he would believe that having told her that he was not consenting she would accept this and therefore would assume that she was not going. I am also satisfied that the petitioner had no suspicion following the conversation outside the restaurant at about the end of June 1994 that the respondent was intending to leave Australia, let alone to do so with R.. The respondent endeavoured to suggest at one point in her evidence that because she was disposing of furniture and her car, the petitioner would have been aware of these preparations for departure. It is significant that she agreed that she could not leave until she had sold her car and that she did not achieve a sale until a short time before her departure. She then, and only then, had money for the air fare for herself and R.. She immediately purchased tickets. These were purchased only a few days before her departure. The lateness of her arrangements to leave was also consistent with evidence from her sister, Mrs Maguire, that it was possibly in August that she was asked, because she was a shipping clerk, to make inquiry and set up arrangements to ship the respondent's possessions home by sea. I believe the petitioner's evidence that the respondent gave every appearance of having accepted that R. would remain in Australia in the light of his refusal, and that she was in truth dissembling.

It only remains to note that on 9 November 1994 the petitioner applied to the Family Court of Western Australia in Perth for sole custody and guardianship of R., that on 15 December 1994 in the Court of Petty Sessions at Perth an order for service of the application upon the respondent was made and that it was also ordered that until further order of the court and in the event that the respondent returned to the State of Western Australia, she be restrained from removing R. from Australia. The application was otherwise transferred to the Family Court of Western Australia for further hearing on 8 February 1995. Against that background fall to be considered the competing submissions of the parties. These began with the consideration of the parties' rights under the law of Australia. There was no dispute that as set out in the affidavits given by two qualified Australian lawyers, Mr James on the petitioner's behalf and Mr Talbot on the respondent's behalf, in the State of Western Australia the Family Law Act 1975 (Australia) is the source of statutory law regarding the

guardianship, custody and access of a child of a marriage by his parents. Nor is it in dispute that the terms of ss 63F(1) and 63E(1) and (2) of that Act applied. Section 63F(1) provides as follows: "Subject to any order of a Court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section) each of the parents of a child who has not attained 18 years of age is a guardian of the child and the parents have the joint custody of the child."

Section 63E(1) provides as follows: "Guardianship of child. A person who is the guardian of a child under this Act has responsibility of the long-term welfare of the child and has, in relation to the child, all the powers, rights and duties that are, apart from this Act, vested by law and custom in the guardian of a child other than (a) the right to have the daily care and control of the child; and (b) the right and responsibility to make decisions concerning the daily care and control of the child."

Section 63E(2) provides as follows: "Custody of child. A person who has or is granted custody of a child under this Act has (a) the right to have the dally care and control of the child, and (b) the right and responsibility to make decisions concerning the daily care and control of the child."

It is common ground that while living in Australia each was a guardian of R. and that the two parents had the joint custody of R. by operation of law, there being no court orders or child agreements registered with the Family Court of Western Australia pursuant to the Act which altered either party's rights of guardianship or of custody of R..

The legal opinions diverge on the facts as perceived by each upon the legal position. In his affidavit Mr Talbot states: "In May 1993 the wife returned to Australia and thereafter the husband had access to R.. The wife continued to have the daily care and control of the child." Further on he says this: "Having regard to the provisions of s 63F(1) of the Family Law Act I am satisfied that at the time the parties were living in Australia each of them was a guardian. For the same reason I am of the opinion that when the parties were living in Australia the husband and the wife had de jure joint custody of the child. But having regard to the components which comprise 'custody' as set forth in s 63E(2) of the Family Law Act I am of the opinion that at the time the parties were living in Australia the husband was not exercising the rights of custody because he had effectively and over a period of time forsaken and surrendered de facto daily care and control of R. to the wife."

On the other hand, in para 8 of his affidavit dated 12 January 1995, Mr James says this: "In making his application for sole custody P.M. seeks to obtain the right to have the sole daily care and control of R., and the sole right and sole responsibility to make decisions concerning the daily care and control of R.. These rights have ostensibly been held by F.M. in as much as R.'s formal address was F.'s address, although until the date of the child's abduction P.M. had been exercising substantial access and remained responsible for supervising R. for significant periods during each week. During those periods P.M. was exercising his existing legal rights of custody of the child R., including the right to have the daily care and control of the child R. and the right and responsibility to make decisions concerning the daily care and control of R.."

Furthermore, in para 5 of his affidavit dated 17 January 1995 Mr James says this: "I do not agree with the opinion expressed by Mr Talbot at the end of para 4 of his affidavit. There appears to be agreement that each party is a guardian of the child R. and both parties have de jure joint custody of R.. I am not aware of any authority supporting Mr Talbot's opinion that a person in Mr M.'s position was not exercising the 'rights of custody' which he had in law. I note that Mr Talbot makes no reference to any authority for his opinion." He then

continues: "It is the case of Mr M. that his frequent and his substantial contact with R. up to the abduction by Mrs M. was in fact an exercise of his rights of custody in that he was responsible for the daily care and control of R. during those periods of contact, including making decisions concerning that daily care and control. There is nothing in the facts of this case which indicate that Mr M. had 'forsaken and surrendered de facto daily care and control of R. to the wife' as suggested by Mr Talbot."

Not surprisingly, counsel for the petitioner took his stand firmly on the basis of the opinion expressed by Mr James. The facts were in support of that opinion. The petitioner was, for the purposes of art 3 of the Convention, actually exercising rights of custody jointly with the respondent, which rights were of a character which fell within the ambit of the definition of rights of custody in art 5 since they related to the care of the person of the child. This conclusion was supported by the fact that subsequent to the removal of R. from Australia the petitioner had founded upon such rights in seeking and obtaining the order dated 15 December 1994. Furthermore, in refusing consent to the respondent's request to allow her to take R. with her to Scotland, the petitioner was exercising the right given under Australian law to a guardian. In this regard counsel founded upon paras 15 and 16 of the affidavit of Mr James dated 17 January 1995 where he said this: "Finally on this point I refer to the decision of R v R [1984] FLC 91-571, where the Full Court of the Family Court of Australia considered a situation where the orders existed for the wife to have sole custody and sole guardianship of the children and the husband to have periodic access. The wife undertook not to take the children overseas without the husband's prior consent. The wife applied to the court to be released from her undertaking and this was refused at first instance as the court felt that the wife had a negative attitude to the child's ongoing access to the husband. On appeal in R v R the decision was confirmed. However it was acknowledged that one of the powers of the guardian of a child that is vested by law and custom is the power to determine the place of residence of the child. This power is not absolute however and is subject to limitation by an order made under s 64(1)(c) of the Family Law Act. In the M. case Mr M. remains a guardian of the child as per R v R. He has the right to determine where R. shall live, similar to the right of Mrs M., until the court orders otherwise under s 64(1)(c) of the Family Law Act. This right of Mr M. was acknowledged by Mrs M. in seeking the approval of Mr M. before removing R. from Australia. It appears that Mrs M. did not seek orders of the court for sole custody or sole guardianship or permission to remove R. from Australia. Mr M. had not abandoned his right to determine where the child should live and in fact Mr M. exercised that right by refusing Mrs M.'s request."

Such a right was within the ambit of the definition of rights of custody in art 5 of the Convention. Reference was also made to C v C and Seroka v Bellah. The petitioner was exercising that right both by refusing to allow R. to leave Australia with the respondent and by continuing with that refusal from the time of meeting at the restaurant onwards. The respondent left without the petitioner's consent. Accordingly the removal was wrongful as being in breach of rights of custody, which at the time of R.'s removal were actually exercised or would have been so exercised but for the removal.

Counsel for the respondent, on the other hand, founding on Mr Talbot's opinion, submitted that prior to the departure of the respondent and R. in August 1994 the respondent was the only party actually exercising rights of custody as defined in art 5. She had been exercising those rights in electing to return to Australia and thereby determining R.'s place of residence. She thereafter continued in her pre-existing daily care and custody of R. throughout the period between May 1993 and August 1994. What the petitioner enjoyed in that period, and exercised in fact, were no more than rights of access within the definition of that phrase in art 5 of the Convention. His refusal of the respondent's request to agree to her taking R. with her to Scotland was no more than an expression of those rights in that he

would cease to enjoy those rights in Australia upon R.'s departure, and such was the only reason for that refusal. It was not based upon any right as a guardian accorded to him by Australian law to determine the place of residence of R.. Rights of custody did not under the Convention include and were to be distinguished from rights of access. Reference was made to art 21 of the Convention, Police Commissioner of South Australia v Temple and Taylor v Ford. Counsel in passing made reference to Seroka v Bellah and more especially to the passage in which Lord Prosser considered an argument based upon B v B to the effect that removal might be in breach of a right of custody exercisable by the court in the sense of a right to determine a child's place of residence. I have some difficulty in seeing how the case of B v B bears upon the present issue since it is not suggested in this case that either at or prior to the removal of R. any court was seized of an application concerning custody rights to R. in which it could be said that it was being invited to exercise a right to determine R.'s place of residence. In the result, counsel argued that it had not been demonstrated that the removal was in breach of any rights of custody which might otherwise be accorded to the petitioner and therefore that the removal was not wrongful.

I am bound to say that I find the opinion of Mr James more persuasive than that of Mr Talbot for this reason, that I do not understand what is meant by "de facto custody" applied to any of two parties in an issue involving a question of rights allocated jointly to the parties, when on the facts the respondent on her return to Australia, by agreement with the petitioner, enabled him to exercise for periods daily care and control of R.. It may be convenient to refer to those periods as access, but they do not arise from some other right given to or claimed by the petitioner by virtue of a judicial or administrative order or legal agreement, or by operation of law other than that right of custody which the petitioner jointly enjoyed by the law of Australia with the respondent. Thus there are no orders of a court producing a distinction between custody and access as in Taylor v Ford. If that be so, it follows that R. was wrongfully removed and counsel for the respondent did not contend otherwise. However, even if I had been prepared to accept that at least prior to the petitioner's refusal to permit the respondent to take R. with her to Scotland, the petitioner was at best exercising rights of access, I do not agree with counsel's submission that that refusal was founded upon exercise of such rights. Insofar as rights of access fall to be distinguished from rights of custody under the Convention, it is proper to note that in Temple's case where it was held that under English law the husband had the parental right to give or withhold consent to his child's removal from England and hence the right to determine the child's place of residence, the court said at p 79-827 this: "The husband therefore as the person with parental responsibility has the right under English law to give or withhold consent to S's removal from England. It follows that the husband has a right to determine the child's place of residence C v C, Minor Abduction, Rights of Custody Abroad [1989] 2 AER 465-471 and I hold accordingly. I am further of the view that as of the date of S's retention the husband had not abandoned that right, although he took no steps to alter the status quo. Without abandonment of that right I am of the view that the husband must be actually exercising it. The McQuarry Dictionary defines actually as an existing fact; 'really'. The husband's right to determine S's removal from England was an actual existing fact at all relevant times. I do not see how, in any event, he could abandon that right without the knowledge of wife's decision to retain S permanently something which did not occur until 31 July."

The present case is a fortiori of Temple's case because the petitioner has expressly exercised the right available to him as guardian under Australian law to refuse a change of residence and has not abandoned that decision. His refusal was based upon, and took into account, the prospect that the petitioner was prepared to have R. come to live with him and D.N. if the respondent left Australia. No doubt it was also based upon a preparedness to accept the status quo ante and to allow it to continue, but that was not all, as the respondent recognised,

since she did not wish to provoke the petitioner into making any application to the court to prevent her from removing R. with her. This was clear from her evidence and from the terms of the letter written by her. To that extent she was endeavouring to avoid having the issue determined by and before the court in Western Australia, which was the court of R.'s habitual residence prior to his removal. The issue could only be raised before that court if and because the petitioner was provided with the rights of a guardian and the rights of custody held jointly with the respondent under Australian law. Accordingly I am of the opinion that the submissions for the respondent fall to be rejected.

I therefore find that R.'s removal from Australia was wrongful for the purposes of the Convention and that an order for his return falls to be made. No argument was presented to the effect that R. would be placed in an intolerable situation on his return and in these circumstances I shall repel all the pleas standing for the respondent. I shall however hear further submissions on the matter of what further procedure should follow the findings that I have made.

I have now heard counsel on what procedure should be followed. I will make an order in general terms for return of R. to the jurisdiction of the court for Western Australia. I was informed by counsel for the respondent that it is the respondent's intention to return with the child. In these circumstances, and bearing in mind also that I am informed that amicable arrangements have been reached for the petitioner to have contact with R. in the period at least prior to the petitioner's return to Western Australia, what I propose to do is to put the case out by order in one week's time. This will enable parties to consider their respective positions and to make reasonable arrangements whereby R. is returned to the jurisdiction. In these circumstances I shall make no further order at this juncture, other than that having heard parties upon the motion for expenses on the petitioner's behalf, I am satisfied that this is not a case in which any order for expenses should be made, and I so order.

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