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[17/07/1991; Superior Court of the State of California, County of Contra Costa (United States); First Instance]
Bickerton v. Bickerton, No. 91-006694 (Cal. Super. Ct. July 17, 1991)

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF CONTRA COSTA

July 17, 1991

Before: Sepulveda, J.

Bickerton and B. Bickerton

The parties and children lived in Canada from the children's birth to 4 July 1986. At that time the parents entered into a written separation agreement which was never made an order of any court. The children then spent July 86 to July 87 in California, July 87 to July 88 in Canada, July 88 to July 89 in California, July 89 to July 90 in Canada and July 90 to July 91 in California. In June 1991 the mother brought an action for exclusive custody in the California court. The father filed an action under The Convention on the Civil Aspects of International Child Abduction, done at the Hague on 25 Oct 1980 in July 1991 which stayed the Mother's action for exclusive custody. The Father argued that Canada was the Habitual Residence of the children under the Convention. The Mother admitted in the Convention hearing that her retention would be wrongful if in fact Canada was the Habitual Residence (she was not represented in the California action). The Father, in his argument, presented United States Federal Case Law holding that the domicile of a child was that of the father absent a court order and therefore all absences from Canada would be considered temporary in nature.

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This matter came on before Department 16 on Father's "Petition for Return of Children to Petitioner", pursuant to the Hague Convention and I.C.A.R.A. (42 U.S.C. sections 11601, et. seq.). The matter stood submitted in approximately one hour, based upon the declarations filed (subject to objections thereto by Petitioner and rulings thereon by the court, infra. Neither side requested a Statement of Decision/Findings pursuant to C.C.P. Section 632. Based upon the information present, the court finds and orders that:

1. Petitioner's objections to certain of Respondent's declarations or parts thereof, on hearsay, foundational and other grounds as set forth fully in the record, are granted in their entirety. All objections to declarations, or parts thereof, are stricken and shall not be considered by this court in making its determinations herein. The only exception to this is Petitioner's objection to Respondent's representations of the wishes of the children re: returning to Canada. To the extent that her declarations refer to direct statements by either of the children in this regard, the court shall consider such statements by the children (obviously considering the potential bias of the party reporting such statements). As to Respondent's opinions re: this same issue, the objections are sustained and those portions of the declarations are stricken.

2. As set forth in the U.C.C.J.A. declaration filed by Petitioner in this matter, the two minor children who are the subject of this Hague Convention petition (L., age 12 and B., age 10) were born to the parties in British Columbia. Both children resided with their parents in British Columbia until the parties separated in August of 1984. L. has lived in British Colombia approximately 75% of her life; B. has lived in British Columbia approximately 70% of his life.

3. After separation (8/84) Respondent moved to the United States and Petitioner remained in British Columbia.

4. On July 4, 1986, the parties entered into a Separation Agreement (a written contract no approved by the court, nor made a part of the dissolution proceeding in Canada) which provided for joint custody and guardianship of both children. This agreement further provided that the children would reside with each parent in alternating years (from 7/1/86 to 7/31/87 with the Respondent, the next year with Petitioner and so forth).

5. This agreement was complied with by the parties to date. By the terms of this agreement, the children are at this time with Respondent in California, due to be returned to Petitioner in Canada on 8/1/91.

6. On 6/10/91, Respondent filed with this court (action No. D91-06080) an O.S.C. requesting custody of the children.

7. On 7/1/91, Petitioner filed this Hague Convention action and docket D91-06080 was stayed.

8. There is little case law interpreting the Hague Convention provisions re: international child abduction and retention. Both parties have fully presented their positions re: their own interpretation of the various provisions thereof. All future references to the Hague Convention or the "Convention" hereinafter ar references to the provisions of the Hague Convention, as implemented by the terms of the International Child Abduction Remedies Act (ICARA), 42 U.S.C. sections 11601 et seq.

9. Based on the evidence presented by Petitioner, the court finds that he has made a prima facie showing of "wrongful retention" within Article 12 of the Convention (see, however further discussion in paragraph 10, infra re: "retention" in this case) in that he has proven by a preponderance of the evidence that:

(a) Canada is the habitual residence of both children immediately before the retention under Article 3, subsection (a), and

(b) Petitioner has a right of custody of the children within the meaning of Article 3, subdivision (a). Though there was no custody order in Canada, merely a Separation Agreement setting forth his right to joint custody, it is not clear that within agreement had absolutely no legal effect in Canada. Even if the court accepted Respondent's representations in this respect re: Canadian law, under California law Petitioner clearly has a right to custody, even in the absence of a court order or agreement with legal effect (see Civil Code Section 197).

The burden of proof thus shifts to Respondent to prove the applicability of an exception to the requirement under the Hague Convention that the children be returned to Petitioner.

10. Article 12 of the Convention provides that where a child has been wrongfully retained in terms of Article 3, and "...at the date of the commencement of the proceedings before the

judicial...authority of the Contracting State where the child is wrongfully retained, the authority concerned shall order the return of the child forthwith." That provision goes on to provide that where, however, the proceedings have been commenced after the expiration of the period of one year referred to above, return shall be ordered unless the court finds that "...the child is now settled in its new environment." This latter exception must be proven by Respondent by a preponderance of the evidence.

This potential exception raises an interesting technical issue with regard to the particular facts in the case before the court. Of course, no case authority can be found directly on point. The issue relates to the date of filing, of both this Hague petition and of Respondent's O.S.C. for custody. She filed her O.S.C. before the children were due to be returned to Canada by the terms of the Separation Agreement (8/1/91). Petitioner argues that the children have thus not been in California for a full year. However, this is an argument that he is hard pressed to pursue to its logical conclusion, as until the children are due to be returned to Canada, there is not a "wrongful retention". Respondent, appearing in pro per at today's hearing, stipulated that there was a wrongful retention if the court found Canada to be the habitual residence of the children. This is contrary to the position taken in her responsive pleadings on this issue, wherein she argued that there is no "retention" whatsoever until 8/2/91. Of course the court could conclude that both sides (note that Respondent was previously represented by counsel here, is now represented in Canada, is receiving advice from both, and appeared to be a very intelligent an capable advocate during the hearing) timed the filing of their respective cases before this court purposely. That is, since Respondent was represented by counsel at the time she filed the O.S.C., she may have intentionally timed that filing so that she was not "retaining" the children. Of course, even if that intent existed in her or her counsel's mind, it may have been from a desire not to potentially violate the law and the previous Separation Agreement. Similarly, a suspicious mind might conclude that Petitioner filed his Hague Petition prior to 8/2/91 so that the provisions of the possible exception when the child has been retained outside the habitual residence country would not, arguably, apply. Of course, with the timing of today's hearing, if this court denied the Hague Petition and allowed Petitioner 15 days to file responsive pleadings to Respondent's O.S.C. (as he requested), the hearing on her O.S.C. would have to be beyond 8/2/91, of necessity.

Because of all the foregoing factors, the court is going to consider this a matter properly under the Hague Convention provisions, despite the technical argument that there has not yet been a retention. Similarly, the court is going to treat this matter, for purposes of evaluating the one year, "settling-in" exception referred to above, as though the children have in fact been here for a year. Even so, the court does not find that Respondent has met her burden of proving that the children have in fact "settled-in" within the meaning of Article 12. The children are no more "settled-in" in California than they are in Canada. The court does not find that the degree of "settling-in" that has occurred would warrant not ordering the return of the children to Canada.

12. The only other potentially applicable exceptions are contained in Article 13, which provides at subdivision (b) that the children do not have to be returned (at the discretion of the court) if there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. This exception must be proven by clear and convincing evidence and Respondent has not met her burden. There is no evidence of psychological threat to the children, nor of psychological danger (but for the potential if the court were to order one child's return but not the other's). There is no evidence of an intolerable situation of any sort if the children are returned to Petitioner's custody in Canada. The circumstances cited by Respondent simply do no rise to the level of risk or circumstances contemplated by the Hague Convention. Whether the boy or girl will have to share a bedroom and whether other people must go through that room to reach

other parts of the home are issues which can be adequately addressed in the custody proceeding, wherever that may take place. The children are not at risk in the meantime.

The last possible exception, which need only be shown by a preponderance of the evidence, is also contained in Article 13, that being whether the children object to being returned and whether they are of sufficient maturity and age for the court to take account of their views. There is little, if any, evidence that B. indeed does not wish to return to his father (at least if his sister also goes). There is evidence that L. does object to returning. However, he is insufficient evidence that either the 10 year old boy or the 12 year old girl, are of sufficient age and maturity for the court to take account of their views. No expert evidence was presented on this point by Mother, even though there was sufficient time to obtain the same. Her representation that she could not get an appointment with such an expert until day before yesterday does not explain why she did not do so and then call the person as a witness today. Age alone is not a sufficient means for making this determination; if it were, the drafters of the language in Article 13 would not have added the conjunctive requirement of "degree of maturity". At some age level, the court could possibly make such a determination, based solely upon age (i.e., if the child were 15 and a half years old). However, even those circumstances, evidence of lack of ordinary maturity could negate such a finding. At the ages of 10 and 12, the court simply cannot assume the children are of sufficient maturity to give credence to their desires in this regard. Insufficient additional evidence of their maturity was presented.

13. The children are therefore ordered to be returned to Canada pursuant to Article 12 of the Convention. The court is cognizant that this Separation Agreement would not call for their return until 8/1/91. Respondent put into motion this proceeding, by filing her O.S.C. to change the arrangements set forth in the Separation Agreement. The Hague Convention makes no provision for delay of return. However, given the unique factual scenario of this case (wherein the children are not truly "wrongfully retained" until 8/2/91), and considering the best interests of the children, the court shall order that they be returned on 8/1/91. To suddenly take the children from their Mother (who has done no wrong save to express through her O.S.C. and her statements in court today her intent to wrongfully retain the children after 8/1/91), cannot be found to benefit the children in any way. Such a sudden disruption of their lives would undoubtedly do them some emotional harm. Furthermore, the additional period that the children will remain in California (from today's date of 7/17/91 until the otherwise agreed-upon return date of 8/2/91) is relatively short.

14. For the same reasons stated above (paragraph 13), the court shall not award attorney fees to Petitioner. This is not the usual case of a parent who literally "steals" a child away from the other parent or retains the child beyond a scheduled visitation. This is the case of a Mother who tried to handle this matter through legal channels, by filing her O.S.C. re: Custody before the date the children were to be returned to Canada. The court finds that it would inequitable to punish her further through the awarding of fees/costs.

15. For the information of the parties, the court did not find it necessary to contact either the Central Authority in Canada nor Judge Oliver.

16. Counsel for Petitioner to prepare the formal order.

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