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http://www.incadat.com/ ref.: HC/E/NZ 246
[06/10/1995; High Court of New Zealand at Auckland; Appellate Court]
C. v. C. [1996] 1 NZFLR 349

C. v. C.

High Court, Auckland

5, 6 October 1995

ELIAS J.: This is an appeal from a decision of the Family Court concerning an application pursuant to s 12 of the Guardianship Amendment Act 1991. That Act implements the obligations undertaken in New Zealand under the Hague Convention on the Civil Aspects of International Child Abduction 1980. The convention is itself scheduled to the Act. Its purpose is apparent from the preamble and art 1.

The preamble records the desire of the signatory states "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access".

Article 1 provides that:

The objects of the present Convention are --

> **A to secure the prompt return of children, wrongfully removed to or retained in any Contracting State; and**
>
> **B to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.**

It is clear that the function of a New Zealand Court hearing an application under the 1991 Act is circumscribed. It is not its function to determine the underlying merits of whether the child is better off in one country or another. That is emphasised by s 35 which displaces the injunction contained in s 23(3) of the principal Act that in proceedings under it the welfare of the child is the first and paramount consideration. Rather, the Act is designed to achieve international cooperation in preventing the wrongful removal of children and proceeds on the basis that, except in the special circumstances provided for by s 13, the appropriate place to determine questions of custody, access and residence is the country from which the child was wrongfully removed. Where the Act applies, the Court is directed by s 12 to order that the child be returned "forthwith" unless s 13 applies.

Section 13 sets out the only circumstances which constitute grounds for the refusal of the order for return. Where those grounds are made out to the satisfaction of the Court by the person resisting the order for return (here, the mother), the consequence is not that the order will be refused but that the Court is no longer obliged to return the child but has a

discretion whether or not to do so. That discretion must be exercised in the context of the Act under which it is conferred and the convention which it implements and schedules. (See Re A (Minors) (Abduction: Custody Rights) [1992] 2 WLR 536, 550 per Lord Donaldson of Lymington MR.) It therefore requires assessment of whether decisions affecting the child should be made in the Court from the country from which the child has been wrongfully removed or the country of the Court in which it is wrongfully retained. That requires consideration of the purpose and policy of the Act in speedy return and consideration of the welfare of the child in having the determination made in one country or the other. (See Re A (Minors) (Abduction: Custody Rights) (No 2) [1992] 3 WLR 538, p 547 per Sir Stephen Brown P, at p 548 per Scott LJ.) Some balancing may be required, as is indicated by the fact that art 13 of the convention (from which s 13 of the Act is derived) requires consideration of "information relating to the social background of the child".

The present appeal concerns two boys, K. aged 11 and K.I. who is nearly eight. The children were brought to New Zealand by their mother, the appellant, under authorisation given by the Superior Court of the State of Washington in and for the county of Kitsap. The authorisation to remove the children from the United States was required because both children are the subject of a parenting order made in the Kitsap County Court, Washington by which the appellant has custody and the respondent father, Mr C., and his parents have access rights.

The authorisation to remove the children from the United States was by agreement between the parties. The appellant specifically consented to the condition that she would return the children to Kitsap county, Washington, on or about 9 February 1995. She did not do so.

On 21 February 1995, Mr C. applied for an order in the Kaikohe District Court pursuant to s 12 of the Guardianship Amendment Act 1991. That order was granted by the District Court Judge on 3 May 1995, the Judge declining under s 13 to refuse the order. The mother, now Mrs C., comes before me on appeal from that decision. It is conceded by her that the provisions of s 12 of the Guardianship Amendment Act 1991 apply.

Three grounds are advanced in support of the appeal. They follow the wording of s 13 and are:

> **"1) that Mr C. has acquiesced in the removal of the children;**
>
> **2) that there is a grave risk that the children's return would expose them to psychological harm; and**
>
> **3) that the children object to being returned and have attained an age and degree of maturity at which it is appropriate to take account of their views."**

Only the third of those grounds was advanced in the District Court. As a preliminary point in the appeal, Mr Blaikie, for Mr C., objected to the appellant advancing the new grounds -- acquiescence and risk of emotional harm.

A hearing on an appeal under the Guardianship Act 1968 by s 31 is a hearing de novo "as if properly commenced in the High Court" (see H v H (High Court, Wellington, AP 359/94, 12 April 1995, Greig J); B. v B. (1994)12 FRNZ 89 (CA).

Mr Blaikie did not point to any prejudice in the enlarged grounds beyond the fact that it had been necessary at the last minute to obtain further affidavit evidence from Mr C.. I have received that additional evidence. In those circumstances, and in a matter involving children, I did not consider it appropriate to prevent the appellant raising matters of further

concern, particularly as the material providing the foundation for the additional grounds is material not available until after the hearing in the District Court: in the case of the ground based on acquiescence, the acquiescence alleged took place after the hearing in the District Court, in the case of the ground based on grave risk of psychological harm, there was no expert evidence to such effect available before the hearing in Kaitaia.

Three points were therefore raised on the appeal. Although this was a hearing de novo, I have been greatly assisted by the very careful decision of the District Court Judge. With the agreement of the parties, the appeal was dealt with mainly on the papers including the notes of evidence in the Family Court. The only witness to give evidence was the psychologist, Mr Gray, an expert engaged by the appellant but called by the counsel for the children. In addition, I have had further affidavits updating the position since the time of the District Court hearing from both the appellant and the respondent. Unusually, they included material relating to the attempts by the parties to settle their differences. At the invitation of all counsel, I saw the children in the presence of their counsel, Ms Young. I have been helped by the careful written and oral submissions from all counsel. They referred me at some length to the relevant authorities. I am grateful for the care taken and for the willingness of counsel to sit late yesterday so that this distressing matter could be resolved. Because of the circumstances of urgency (all parties agreeing that it is preferable for me to give an oral judgment this morning), I do not refer to all the material put before me and confine my judgment to the reasons which are essential to the decision to which I have come.

To the extent relevant to the grounds raised by the appellant, s 13 provides:

13. Grounds for refusal of order for return of child -- (1) Where an application is made under subsection (1) of section 12 of this Act to a Court in relation to the removal of a child from a Contracting State to New Zealand, the Court may refuse to make an order under subsection (2) of that section for the return of the child if any person who opposes the making of the order establishes to the satisfaction of the Court.

I deal with the three grounds advanced.

Acquiescence

The acquiescence of Mr C. is said to arise out of a conversation between him and the children after the District Court hearing. The District Court Judge, acutely conscious of the disruption to the family that would be entailed in returning the children and concerned about the consequences for the relationship of the children with their father, suggested that the father reconsider his right to have the children returned to the United States. The telephone call was a direct consequence of that suggestion. Mr C. had had no contact with his sons since their removal. He says in his affidavit that it was, and I accept that it would have been, an emotional discussion. The boys firmly opposed their return to the United States (a matter I refer to later) and I accept that they made that very clear. Exactly what was said is not known but the boys reported to their mother and to Mr Gray, the psychologist, that they understood their father had agreed to their staying in New Zealand. Mr C. says that he told the boys he would try his best to sort things out with their mother so that they could stay in New Zealand and that they seem to have taken from that his agreement that they remain.

I have serious doubts whether a representation in such circumstances even if proved and unambiguous should be taken as acquiescence. But here there is no evidence upon which I can successfully rely. The impression gained by the children is unsafe, given their ages and level of maturity. I can well believe that they could have heard what they wanted to hear in such a situation. The evidence of acquiescence in such circumstances it seems to me should

be clear and compelling (a view also expressed in Secretary for Justice v P. [1995] NZFLR 827. Nothing approaching that is available here.

Accordingly, the first ground is not made out.

Psychological harm

This ground is put forward largely on the basis of, assessment by the psychologist, Mr Gray. The language of both the section and the convention upon which it is based ("grave risk", "psychological harm") imposes a high standard which it is for the appellant to meet. At the time of the first hearing, the appellant's affidavit expressly indicated that she did not rely on this ground in the absence of expert opinion. That the position is changed from the date of the District Court hearing is due, in part, to the firming up of the children's views with the lapse of time, the new family in which they now find themselves (the appellant having remarried and the children having established a good relationship with their stepfather) and disappointment with their father arising out of the telephone conversation, the expectation that the dispute between their parents had been resolved and their perception that their father had failed to keep other promises of a relatively trivial nature, for example by failing to send a "Dungeons and Dragons" book that K. had expected. It is clear from the evidence of Mr Gray that the Court case and its threat to disrupt the life the boys are now living is a source of great stress, as one would expect.

If the purposes of the Hague Convention are not to be wholly eroded, it is necessary to recognise that the situation in which children who have been removed wrongfully find themselves will almost inevitably cause stress to them. Often that stress may be substantial and may have psychological effects. For that reason the standard set by the convention and the section is high and is stringently tested (see Re F (minor: abduction: rights of custody abroad) [1995] 3 All ER 641; A. v W. [1994] NZFLR 132; D. v D. [1993] NZFLR 548; M. v M. [1995] NZFLR 225). Such an approach is also prompted by the distinct grounds provided by s 13(1)(a) which provides that the fact that a child is settled in his or her new environment is not itself sufficient grounds where application for an order for return is made within a year of the removal of the child (as is the case here). Where children are settled, it seems to me that stress attendant upon the dislocation which results from an order for return is almost inevitable.

Counsel for the children, who supported the mother in her resistance to the order sought, urged me to look at the whole of the evidence of Mr Gray in considering whether the ground is made out; including his evidence in the District Court. I have done that. I am left with the view that the standard required by the section has not been made out. Rather, Mr Gray recognised that the children's stress is largely related to the proceedings and the return. He saw the children on three occasions. His evidence is that there is risk to them which he describes as "enormous" and that they will need help to overcome the dislocation and the meeting with their father. But he acknowledges that if the reintroduction is handled sensitively, it need not cause harm although "it would certainly be a tricky time". Mr C. himself recognises that and has indicated that he will seek counselling if necessary.

Objections of the children

This remaining ground is the only one upon which the matter was advanced before the District Court Judge. There is no doubt that both children express opposition to the prospect of their return to the United States quite vehemently. That was the opinion of the District Court Judge, is amply confirmed by the evidence (particularly of the psychologist), was demonstrated by the children in their interview by me and is accepted by counsel for the father. The District Court Judge also accepted that the second limb of the ground was made

out. That requires not only that the child objects to being returned but also that the Court is satisfied that he or she "has attained an age and degree of maturity at which it is appropriate to take account of the child's views". With that assessment, all counsel before me initially agreed. In a number of decided cases cited to me, the views of children as young as nine years have been taken into account (see, for example S v S (High Court, Nelson, M 12/94, 28 July 1994, Ellis J). I myself have had some difficulty with this aspect of the matter. It did not seem to me that children of 11 and eight generally can be of a level of maturity to have their views taken into account on a matter such as this or, indeed, should have the burden and responsibility of expressing their views put upon them.

The psychologist gave evidence of the maturity of these boys but it was clear that he meant his assessment to be relative to their age. He certainly did not suggest that some of the attitudes expressed and views held by the boys (including some relating to their father) would be understandable or acceptable in a teenager or older child. My initial inclination was that the purpose of this ground is to protect older children. On reflection and after more careful consideration of the wording of the section and the convention article on which it is based, I recognise a wider purpose. It is to be noted that the section does not require the children's views to be given effect but rather that they be taken into account. The position at which it is right to take into account the views of children seems to me in the normal course to be the time when they are able to reason. That is a position supported by the convention on the rights of the child. Here, on the whole, the reasons put forward by the children for their objections are reasonably held. Even though there are indications that some reasons are affected by their lack of maturity and even though I have doubts as to their capacity to see the whole picture (so that I would not accept that their views should be determinative), I accept that both children are of an age and degree of maturity which makes it appropriate to take their views into account.

It follows that this ground is made out. The question remains whether the jurisdiction to refuse the order should be exercised. I accept that in coming to that determination, it is necessary to balance a range of circumstances including, most importantly, the purposes of the convention and the welfare of the children. It should be noted that those matters may well not conflict. On the basis of the evidence before the District Court Judge, I have no doubt that he came to the right decision. The evidence of psychological risk to the children was no more than that inevitably associated with implementing the international obligation in circumstances where children are comfortable in their new life and have strong wishes about remaining in it. To permit such considerations to compel refusal to return would be to undermine the convention.

In those circumstances, while the best interests of the children may well be served by their remaining in New Zealand, that is in general a decision to be made by the Court of the country from which they were wrongfully removed. That approach would have the advantage of permitting the father to put full evidence about his relationship with the children before the Court. In circumstances of international abduction, it is almost impossible for the Court in the country to which the children have been removed to be as well informed about the circumstances of the parent left behind. The District Court Judge was obviously concerned about the effect of return on the children. That is why he urged the father to reconsider He recognised, however, that the situation has been brought about by the ill-advised and unlawful actions of the mother, which the policy of the convention does not permit to be turned to advantage.

The views of the children are firm on the point of return. It was evident in my conversation with them, however, that they do not properly understand the implications. They thought, for example, that discussions about a bond as security for access in the United States was a

device thought up by their father to get money and that his interest in them was to use them for financial advantage. They were also concerned that on their return to the United States, their father would have custody of them. Such a suggestion has never been made by Mr C. While the children do have reason to consider that their father has not been a satisfactory parent to them to date, they lack the maturity to be able to assess the potential prize for them in re-establishing their relationship with him and with their grandparents. They lack the maturity to choose between their United States and New Zealand heritages. Their reasons and views, in the context of their age and maturity, would not have persuaded me that the order should have been refused.

The circumstance not before the District Court Judge which has now emerged, however, and which persuades me that the order should not be made is the proposals which have passed between the parents in an effort to settle the matter. It is clear from the father's affidavit and annexures that he is now prepared to contemplate that if he is able to secure a satisfactory visiting regime in the United States by way of access, the children can remain living in New Zealand. The parties have not yet been able to reach agreement, so there is no acquiescence in the children's remaining in New Zealand but the implication of the material put before me is that the dispute between the parties in substance is now one of access in a situation where it is more than likely that the children eventually will be permitted to remain in New Zealand on that basis that they visit their father in the United States. The question then is, as was posed in Re A [1992] 2 WLR 536, what is the proper forum in which that question of access and its arrangements should be resolved? Even placing great emphasis on the policy of the Act and the convention, once the welfare of the children is brought into the balance it seems to me that returning the children is likely to entail a shuttle which is relatively empty. It will disrupt the family and cause substantial emotional and financial stress quite disproportionate when the likely outcome is considered. It would be punitive and unnecessarily damaging to the welfare of the children for them to be taken back to have the matter resolved in the Washington Court in such circumstances.

I am of the view that the matter should not be left on a totally open-ended basis with refusal of the order for return. Pursuant to s 17 of the Guardianship Amendment Act 1991, the Court of its own motion can make such interim or permanent order with respect to the custody of the child as it thinks fit.

Questions of custody are best dealt with in the Family Court. I propose to remit the case to the Family Court for it to consider the making of orders pursuant to s 17. Any such order may be made subject to such conditions as the Court thinks fit. That power to impose conditions is a power which falls to be exercised in the context of the Guardianship Amendment Act 1991, with its policy of implementation of the Hague Convention. A condition the Family Court should consider on the making of any interim or final custody order is that the mother should bear any costs of making the children available for access in the United States. Further, it may be that the Court would be minded to impose as a condition of any interim order that the mother pay the costs of the father in attending any hearing necessary finally to resolve matters of custody and access.

In declining the order sought and in directing that the matter be remitted to the Family Court for further consideration of custody and access pursuant to s 17, I do not overlook the fact that in the end it will be necessary if the father is to have access in the United States for the Washington Court's orders to be dealt with in that jurisdiction.

Because counsel for the parties appear by agents for the taking of this judgment I reserve the question of costs. If it arises, I will consider any application on memoranda of the

parties. I also reserve leave to any party to apply further if any issue arises relating to the remission of questions of custody and access to the Family Court.

Appeal allowed.

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