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[30/06/1994 ; District Court of New Zealand at Christchurch; First Instance]
M. v. H., 30 June 1994, transcript, District Court of New Zealand at Christchurch

**IN THE DISTRICT COURT HELD AT CHRISTCHURCH, NEW ZEALAND**

**FP 009/478/94**

**Applicant: THE CENTRAL AUTHORITY FOR NEW ZEALAND for P.L.M.**

**Respondent: L.H. (aka S. H.)**

**Date of Hearing: 09 and 21 June 1994**

**Date of Decision: 30 June 1994**

**Counsel: Mr O'Donnell for applicant**

**Ms Mitchell for respondent**

**Mr Rout for child**

**DECISION OF JUDGE J J D STRETTELL**

**This application under s12 of the Guardianship Amendment Act 1991 relates to A.M., a female child born in Bentley, Western Australia on 3 April 1989. Pursuant to application made on 31 March 1994 P.M. applies to have the child returned to Australia.**

**Apart from a visit to her maternal grandmother in New Zealand in 1991, A. since birth, has been domiciled in Australia initially, in the care of the applicant and respondent and more recently, since their separation in 1990, in the custody of her mother.**

**Mr M. by way of affidavit states that A.'s removal from Australia was in breach of his rights of custody of the child which he was exercising at the time of her removal.**

**The facts are that the applicant and respondent lived in a relationship for some years from 1984 to 1990. A. was born on 13 April 1984, the only child of that relationship.**

**The parties separated in May 1990. Following separation A. and Miss H. lived in Western Australia while Mr M. returned to Canberra. Between 1990 and May 1992 Mr M. maintained his relationship with his daughter, several times visiting her from Canberra and also telephoning on a weekly basis.**

**While living in Perth A. attended a day-care centre, while there she was sexually abused by the husband of a day-care worker. From affidavits filed there appears little dispute that the abuse took place, although, no person was ever convicted of that abuse.**

**Possibly as a result of the abuse Miss H. moved, in May 1992, to Byron Bay, New South Wales. Care of A. initially was shared but after a period of some weeks, Miss H. again took over the**

**day-to-day care of A. with Mr M. actively assisting, including, providing long term relief care both in Byron Bay and latterly in Canberra.**

**In June 1993 Miss H. says that A. disclosed to her that Mr M. had played "a sexual game with her". Miss H. says she confronted Mr M. with this allegation. He cried, and stated that he would not do it again. This allegation is denied by Mr M. Later A. stated it was a cousin who had played the game with her and not her father. Whatever the strength of the allegation, it did not appear to result in any restriction on the contact Mr M. had with A.**

**Over Christmas 1993-94 Mr M. cared for A. for a week in Canberra. In January Miss H. went to live in Coffs Harbour to be closer to her then boyfriend, J.H., to whom she was pregnant. It is apparent that Mr M. was unaware of this move until well after it had taken place.**

**After the move to Coffs Harbour, Miss H. stated in her oral evidence that she became concerned as to A.'s sexualised behaviour. In February 1994 she came to the conclusion that Mr M. had abused A. She confronted Mr M. with that allegation and became frightened when she says he made threats to kill her, her boyfriend and A. This Mr M. denies and says that he indicated he would apply for sole custody. Miss H. says she initially attempted to obtain nonmolestation orders through the Magistrate's Court but was unable to obtain them. She then spoke to a solicitor by phone who advised her to leave Australia and return to New Zealand. This she did.**

**Since flying to New Zealand on 25 March 1994 she has resided in Christchurch with her mother.**

**Because of her concerns about A., she arranged for therapy with Sarah Crane, a qualified therapist in Christchurch. Miss Crane says that on 16 May A. disciosed sexual abuse of her by her father. Resulting from that disclosure an evidential interview was arranged at the Department of Social Welfare. This interview was undertaken by Katherine Crawford, a specialist interviewer with some 11 years experience as a social worker and five years experience as a member of a sexual abuse team. Miss Crawford had conducted a large number of previous evidential interviews.**

**The interview was video taped and the court has had the opportunity of viewing the tape. During the interview A. stated that she had been sexually abused by her father. She was able to provide quite some detail in relation to the abuse, as to the manner of the abuse and as to how it felt.**

**The disclosure by A. left the interviewer in little doubt that Angela had been sexually abused and that she had named her father as the person who had abused her.**

**It is against that factual background that the application under s12 of the Guardianship Amendment Act needs to be considered.**

**Section 12 states:**

**"Application to Court for return of child abducted from New Zealand**

**(1) Where any person claims**

**(a) That a child is present in New Zealand; and**

**(b) That the child was removed from another Contracting State in breach of that person's rights of custody in respect of the child; and**

**(c) That at the time of that removal those rights of custody were actually being exercised by that person, or would have been so exercised but for the removal; and**

**(d) That the child was habitually resident in that Contracting State immediately before the removal,**

**that person, or any acting on that person's behalf, may apply to a Court having jurisdiction under this Part of this Act for an order for the return of the child.**

**(2) Subject to section 13 of this Act, where**

**(a) An application is made under subsection (1) of this section of a Court; and**

**(b) The Court is satisfied that the grounds of the application are made out, the Court shall make an order that the child in respect of whom the application is made be returned forthwith to such person or country as is specified in the order.**

**(3) A Court hearing an application made under subsection (1) of this section in relation to the removal of a child from a Contracting State to New Zealand may request the applicant to obtain an order from a Court of that state, or a decision of a competent authority of that state, declaring that the removal was wrongful within the meaning of Article 3 of the Convention as it applies in that state, and may adjourn the proceedings for that purpose**

**(4) Where**

**(a) An application is made to a Court under subsection (1) of this section in respect of a child; and**

**(b) The Court**

**(i) Is not satisfied that the child is in New Zealand**

**or**

**(iii) Is satisfied that the child has been taken out of New Zealand to another country,**

**the Court may dismiss the application or adjourn the proceedings."**

**It is not disputed by Ms Mitchell, as counsel for Miss H., that the preconditions for the return of A. to Australia are made out.**

**1 A. is present in New Zealand**

**2 The applicant has a right of custody in respect of A. in that in the terms of s4 he had a right jointly with Miss H. to possession and care of the child and that he was resident in a Contracting Country namely Australia.**

**3 At the time of removal the child was habitually resident in Australia.**

**The issue to be decided is whether the court has grounds in terms of s13 to refuse the return of the child. Section 13 states:**

**"Ground 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.**

**(a) That the application was made more than one year after the removal of the child, and the child is now settled in his or her new environment; or**

**(b) That the person by or on whose behalf the application is made**

**(i) Was not actually exercising custody rights in respect of the child at the time of the removal, unless that person establishes to the satisfaction of the Court that those custody rights would have been exercised if the child had not been removed; or**

**(ii) Consented to, or subsequently acquiesced in, the removal; or**

**(c) That there is a grave risk that the child's return**

**(i) Would expose the child to physicai or psychological harm; or**

**(ii) Would otherwise place the child in an intolerable situation; or**

**(d) That the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views; or**

**(e) That the return of the child is not permitted by the fundamental principles of New Zealand law relating to the protection of human rights and fundamental freedoms.**

**(2) In determining whether subsection (1)(e) of this section applies in respect of an application made under section 12(1) of this Act in respect of a child, the Court may consider, among other things,**

**(a) Whether or not the return of the child would be inconsistent with any rights that the child, or any other person, has under the law of New Zealand relating to political refugees or political asylum:**

**(b) Whether or not the return of the child would be likely to result in discrimination against the child or any other person on any of the grounds on which discrimination is not permitted by the United Nations International Covenants on Human Rights.**

**(3) On the hearing of an application made under subsection (1) of section 12 of this Act in respect of a child, a court shall not refuse to make an order under subsection (2) of that section in respect of the child by reason only that there is in force or enforceable in New Zealand a custody order relating to that child, but may have regard to the reasons for the making of that order."**

**In terms of s13, therefore, the question to be asked is whether in the light of the disclosure of allegations of sexual abuse by A., the return to Australia would result in a grave risk to the child in that it (1) would expose the child to physical or psychological harm or (2) would otherwise place the child in an intolerable situation.**

**The thrust of the respondent's case is that given the evidence of the sexual abuse disclosure and the absence of orders being in place in the Australian jurisdiction ensuring that the child remained in the care of the mother until matters had been fully investigated in Austraiia there was such a grave risk.**

**For the applicant, Mr O'Donnell quite properly submitted that the issue of whether there was a grave risk would only apply if A. was exposed to the father prior to enquiry in Australia. Mr**

**O'Donnell submitted that Mr M. was not seeking the return of A. into his care in either an access or custodial basis and that an order could therefore be made for the return of A. The difficulty for the court was whether reliance on an undertaking was sufficient or whether in fact the court could make an order for return on conditions.**

**In the end the issue did not have to be determined by the court, consent orders were made in the Australian Family Court which overtook the necessity of the court considering this specific issue - as I will later refer.**

**Setting the consent orders to one side, as I indicated to counsel, I had initial concerns as to whether a return could be ordered on conditions having regard to the wording of the Act. Subsequently I have had the benefit of considering the decisions of Hammond J in A. v W. 11 FRNZ 270 and Judge Bouchier's decision in D. v D. (1993) NZFLR 549.**

**In A. case, Hammond J considered that the Family Court had jurisdiction to impose such conditions.**

**At page 276 he stated:**

**"What C and C and other cases show is that as one might have expected, in a pragmatic way, where appropriate, courts have also thought it appropriate to (on occasions) impose terms or undertakings. Mr Geoghetan's objection that there is nothing specific in the legislation allowing undertakings is not, I think, dispositive of that issue. Indeed, I would have said that the general principle is precisely the opposite; unless a statute specifically provides that an order cannot be made on terms or with certain undertakings, then such can be required. That has always been the equity principle; and it is a principle which has routinely been involved in family law matters."**

**His Honour then went on to impose conditions relating to the return of the child to Australia.**

**In D., Judge Bouchier imposed what he stated to be "reasonable safeguards" on the return of a child to Canada including, an order as to occupation of the matrimonial home by the mother and child in Canada, and supervision of access unless otherwise ordered in Canada. It is difficult to know what force such orders could have in the Canadian jurisdiction unless they came within s22(L) of the Guardianship Act, but they are at least an indication of the court having regard to the welfare of the child as a subsidiary issue to the issue of forum.**

**Despite the authors of Butterworth's Family Law in New Zealand commentary stating (see para 6.111 p328) that a court cannot make an order subject to conditions, there appears to be authority for the view that in fact the court can make such an order for return of a child subject to conditions. For the purposes of this case, such conditions or undertakings were not in fact required.**

**In the case before this court, the facts prima facie disclose sexual abuse, although such a disclosure has not been subject to testing in court in any way, nor has the court heard from Mr M. To the extent that the allegation is before the court however, it is noteworthy that neither counsel nor myself have been able to refer to any other case determined under the Hague Convention in New Zealand dealing with sexual abuse allegations involving a parent who sought the return of a child to its country of domicile. The only relevant matter on the facts appears to be the decision of Judge Carruthers in W. v. W. (1993) NZFLR 277, although, there the allegations appeared spurious.**

**There is no doubt that in the case before this court, that the allegations are serious, they have a basis and will need thorough investigation. It was on that foundation that the court proceeded.**

**Initially the court's concern was that all evidence of disclosure was in New Zealand. The position was unclear as to the approach to be taken by Mr M. should A. be returned pending determination of the allegations in Australia.**

**A. v W. and W. v W. emphasise the heavy burden and onus upon the respondent in satisfying the presence of a grave risk in terms of s13(c)(i) and (ii). If there was to be a case which satisfied that onus that a respondent carries then it must most easily be met within the category where abuse, and more particularly sexual abuse, of a child is raised. But it is not merely the allegation of the risk that is relevant but consideration of the consequences of this risk. As Judge Bouchier said in D. v D. at page 554:**

**"I think also relevant to the establishment of risk, is not merely the factual situation from which a child may have come, but also the nature of the Family Law of the country of origin and the ability of the law to afford protection."**

**The New Zealand courts could undoubtedly have confidence that an Australian Family Court had both the ability and inclination to afford protection once the child was within jurisdiction and the evidence available.**

**Our own approach to such allegations of sexual abuse as stated by the Court of Appeal in recent cases of M v Y 1994 NZFLR pg 1 and S S v S 1994 NZFLR pg 26 adopted the formulation of "unacceptable risk of sexual abuse" stated in the Australian High Court decision of M v M 1988 166CLR pg 69.**

**Clearly, therefore, the child would not be at an unacceptable risk once the evidence was available in Australia and before the Family Court. The court's only concern was that intermediate period pending the investigation. There is no evidence of any disclosure in Australia, all relevant evidence relating to the disclosure emanated in New Zealand and remained in New Zealand. In the case before the court that initial concern was met by the making of consent orders in the Australian Family Court in these terms.**

**"BEFORE THE HONOURABLE JUSTICE FINN**

**The 17th day of June 1994.**

**UPON APPLICATION MADE TO THE COURT THIS DAY AND UPON HEARING**

**Mr Brewster on behalf of the applicant father and Mr Burnett on behalf of the respondent mother,**

**IT IS ORDERED:**

**1. That by consent orders be made in terms of the attached copy of minutes of consent orders which were before the Court this day and which bear the signature of the father and the facsimile signature of the mother and to which minutes are also attached copies of affdavits from each party (as provided for under Rule 9A of the Family Law Rules).**

**THE COURT NOTES IN CONNECTION WITH THE ORDERS MADE BY CONSENT REFERRED TO IN ORDER 1 OF THESE OP~[DERS:**

**That it is the understanding of the legal representatives for the parties:**

**(a) that the reference to "Community Services of Australia" in order 2 of the minutes of consent orders, is a reference to the various departments in each state and territory of Australia responsible for child welfare matters; and**

**(b) That arrangements have been made with the Director of Court Counselling of the Canberra Registry of this Court for the conduct of the counselling referred to in the minutes of consent orders.**

**2. That each party have liberty, through his or her solicitor, to apply to the Canberra Registry of this Court for a further listing of this matter on short notice."**

**The orders sought are as follows:**

**1. That without prejudice to the position of either party in respect for their competing applications for custody of the child, A.M., (born 3 April, 1989), the child remain in the care of L.H. until further order of the Family Court of Australia.**

**2. Without any admission of liability to do so, until further order, that the father, P.M. should not have access to the child A.M. as or by way of supervised access or by telephone or other contact unless Community Services of Australia, the Family Court Counselling Service or the Family Court of Australia has sanctioned or indicated the same.**

**3. That L.H., the Respondent Mother, be ordered to appear with A.M. at a Family Court Counselling session in Sydney within one week of their return to Australia from New Zealand.**

**4. That all supervised access sessions and any further counselling sessions be reportable and received in evidence pursuant to Section 62(A) of the Australian Famiiy Law Act (1975)."**

**It is an indication of the close relationship that the two family courts enjoy that there can be, within a period of eight days, consent orders made in the Australian Court to guarantee the protection of a child pending investigation of the matter.**

**It follows, as in the end counsel for Miss H. and Miss H. herself accepted, that the provision of such safeguards overcame any potential concerns arising from the allegations and therefore A. should be returned to Australia in the custody of her mother.**

**Two subsidiary issues arose. Firstly, the Act in terms of s12 of the Guardianship Amendment Act requires the return of the child forthwith. In this case A. had disclosed sexual abuse and was in therapy. The therapist considered the return to be to A.'s disadvantage if she was not able to conclude therapy. The therapy was likely to take up to three to six months and at the very least needed time to disengage.**

**In this case some time was available to discontinue, though not sufficient to avoid the need for further therapy in Australia with the accompanying difficulties resulting from the introduction for a stranger to her. It might be said that A., who is a very mature and bright child for her age, may cope better than most, but such state of affairs highlights the displacement of the paramouncy principle under s23 of the Guardianship Act by the specific wording of s12 and s13 with its emphasis of forum.**

**In the end the return without completion of therapy is to A.'s disadvantage but not such as to invoke the preconditions set out in s13 to require the court to refuse the return of the child.**

**The second issue that arises relates to the availability of the video tape disclosure interview to the Australian Family Court if it is requested. The conducting of interviews and the availability of the tape as evidence is subject to s23(i) of the Evidence Act and the Evidence Video Taping of Child Complaints Regulations 1990. The Regulations provide a code for the use, availability, and storage of tapes.**

**For the purpose of this case it suffices to say, pursuant to Regulation 11(b) of the Evidence Video Taping of Child Complaints Reguiations 1990, that the Family Court can require a copy of the video tape for proceedings inter alia under the Guardianship Act. The Regulations go on to provide (Regulation 14) that subject to the availability of copy tapes to the Family Court all tapes shall be held by the police until destruction being the date of final determination of any criminal case or failing a criminal case, seven years.**

**Any copy made available to the Family Court is obliged to be held by the Family Court on the same terms.**

**If the Regulations apply, then there appears to be no right of access to the tape by the Australian courts should they seek such access.**

**Regulation 3 of the Regulations governs the application of the Regulations. It states:**

**"These Regulations apply where, in any case described in section 23(c) of the Evidence Act 1908 or section 185(C)(A) of the Summary Proceedings 1957 the complainant's evidence is to be admitted in the form of a video tape.**

**Section 23(c) of the Evidence Act relates to child complainants in offences against persons charged with offences under the provisions of ss128-142 of the Crimes Act or any other offence against a person of a sexual nature or being a party to the commission of such an offence or conspiring with any person to commit such an offence."**

**Section 185(C)(A) of the Summary Proceedings Act details the manner in which child complainants may give evidence by way of video tape.**

**The purpose of the interview of A. in this case was not to elucidate information upon which criminal proceedings might be based. There is no evidence of a crime having been committed within the New Zealand jurisdiction. The purpose of the disclosure interview was to simply ascertain whether or not there was evidence of abuse which might be used in family proceedings or to assist A. in therapy.**

**That being the case, the Child Complaint Regulations are not applicable and therefore should the Family Court of Australia find it to be of assistance to have a copy of the video tape disclosure interview then subject to an application being made I see no reason to prevent the tape being made available for use.**

**Section 28 of the Guardianship Act gives the court a discretion as to the costs resulting for the return of the child. I do not consider that this is an appropriate case for the court to order contribution by the mother for costs of return of A. or the costs of counsel appointed to represent the central authority.**

**The formal orders I make are:**

**1 That A. is to be returned to Australia not later than 1 July 1994.**

**2 That the child is to be escorted to Australia by her mother.**

**3 That the interim orders made requiring the surrender of all travel documents, passports and airline tickets for A.M. is cancelled.**

**4 I grant leave to the applicant and respondent to bring the matter back on 24 hours notice should any further orders be required to implement this decision.**

**J J D Strettell**

**Family Court Judge**

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