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[14/02/1995; District Court of New Zealand at Hamilton; First Instance]
S. v. O.D., 14 February 1995

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District Court Hamilton FP 019/675/94

14 February 1995

D R BROWN J.

The parties to these Hague Convention proceedings are the mother and father of A.O.D. born 30 August 1991. Ms O.D. is English by birth and Mr S. is a New Zealander. They were in a relationship from 1986 until September 1993 and during that relationship lived in both Australia and New Zealand. At the time of their separation they were living in Brisbane.

The first 16 months of A.'s life were spent in New Zealand. By the time he was two he had travelled between Australia and New Zealand several times. After separation both Mr S. and Ms O.D. remained in Brisbane for a short while before Ms O.D. left Australia with A. for New Zealand. This move had Mr S.'s approval and he in fact took Ms O.D. and A. to the airport. About two months later (January 1994) Ms O.D. contacted Mr S. She asked him to take A. After further discussions and the signing by Ms O.D. of various papers at Mr S.'s request, he came to New Zealand on 1 March 1994 and collected A.

Mr S.'s mother and father live in Brisbane. His father lives in the same block of apartments as Mr S. Mr S. ceased his employment and went on a benefit.

Ms O.D. had however changed her mind about A. living with his father in Australia soon after his departure. On 11 May 1994 she asked Mr S. to agree to A. returning to her. He refused. On 16 June 1994 she applied to the New Zealand Central Authority pursuant to s 9 (1) of the Guardianship Amendment Act 1991 for A.'s return. In her application she pleaded that she was A.'s sole guardian and that Mr S. had no rights of custody. This is manifestly so by New Zealand law as it is accepted that the parties were not living together at the date of A.'s birth and no order has been made appointing Mr S. a guardian. Ms O.D. went on to plead that she did not consent or acquiesce to A.'s removal to Australia or retention there. Ms O.D. was required by the Australian Central Authority to obtain an order from the New Zealand Court declaring that A.'s removal from New Zealand was wrongful and she filed an application for such a declaration on 12 September 1994. On 14 September 1994 however Ms O.D. travelled to Brisbane. She gave no notice of her arrival and went to Mr S.'s home at about seven in the morning. She was able to see A. playing and to uplift him. By 9.45 am she was on an aircraft with A. bound for New Zealand. Mr S. was unable to stop her as he had no order. Mr S. obtained that same day from the Brisbane Family Court an order granting him interim custody and a Warrant to Take Possession of Ayrteton. Ms O.D. applied to the Hamilton Family Court for an order that A. not be removed from New Zealand pending further order of the Court and such was granted to stabilise the situation pending its resolution. Mr S. applied to the Australian Central Authority for an order for A.'s return.

That application and Ms O.D.'s earlier application for a declaration are the subject matter of the present judgment.

It is logical to deal first with Mr S.'s application pursuant to s 12 of the Guardianship Amendment Act 1991. By that provision return of a child is mandatory (in the absence, as in the present case of any of the special defences in s 13) if the applicant can establish that the child is present in New Zealand, that he or she was removed from another contracting state in breach of the applicant's rights of custody, that at the time of that removal those rights of custody were actually being exercised and that the child was habitually resident in the contracting state immediately before the removal.

A.'s presence in New Zealand was obviously not an issue. A realistic and sensible concession was made that if A. were found to have been habitually resident in Queensland at the time of his removal, his father had rights of custody in relation to him. The background to this concession is to be found in the fact that in 1990 the State of Queensland passed legislation which effectively brought into effect in that state the provisions of the Commonwealth Family Law Act 1975 relating to ex nuptial children. Section 63F of that Act ascribes joint guardianship and custody of an ex nuptial child to both its parents unless there is a Court order to the contrary. By the law of Queensland Mr S. had therefore joint custody of A. This means in my view that Mr S. would have had rights of custody under the original definition thereof in s 4 of the Guardianship Amendment Act even before a much broader construction was placed upon that definition by the New Zealand Court of Appeal in G. v B. [1995] NZFLR 49. Now that the definition of rights of custody in s 4 has itself been amended by the Guardianship Amendment Act 1994 to follow the wording of the Convention itself, the matter is beyond doubt.

The only question then is whether A. was habitually resident in Queensland at the time of his removal by Ms O.D. I am satisfied on the evidence that A. left New Zealand with his father on 24 March 1994 with his mother's agreement for an indefinite stay. It is quite clear that at the time she first requested Mr S. to have A, Ms O.D.'s life was in difficulty in various ways and I think it likely that she did initially attempt to impose some time limit or control on how long he would be with his father. I think it clear though that his father was quite resolved that he would only take A. if the boy was coming to him in the long term. He demanded and got from Ms O.D. a written acknowledgement from Ms O.D. that it was her "intention that A. should now reside with A.S. his natural father". The absence of the word "permanently" from that acknowledgement (which Mr S. ascribes to a request from Ms O.D. that the word be omitted lest the boy at any time in his life saw the document and felt he was abandoned) is not in my view definitive: residence with the father was not in any way time limited in that document or elsewhere. While I think that it is necessary to look with caution at the correspondence Mr S. has exhibited (it is my view that he has consciously omitted at least one page of a letter posted by Ms O.D. on 18 August 1994) the letters sent by Ms O.D. at the time when it was agreed he would come to his father graphically and conclusively demonstrate that the intention was that he stay with his father indefinitely.

It is clear law that the question whether the person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. That proposition was established by the House of Lords in Re J (a Minor) (Abduction: Custody Rights) [1990] 2 AC 562 along with the proposition that habitual residence can be terminated in a single day. It was also said (at 578) "an appreciable period of time in a settled intention will be necessary to enable him or her to become so (habitually a resident). During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have become habitually resident in country B". I think that this proposition does not apply to the present situation.

It is settled law that the habitual residence of a child of A.'s age will be the habitual residence of the parent who has his care. There can be no question that Mr S. has been habitually resident in Queensland for some years. It is my view that when A. left New Zealand with his mother's agreement to stay indefinitely with his father his country of habitual residence changed immediately. In my view, such circumstances are properly and necessary distinguishable from the situation where a parent takes a child to a new country (as was the situation in In re J) and in the present circumstances there will be no "appreciable period of time" before the child becomes habitually resident in the country to which he or she is taken.

I am therefore satisfied that an order for A.'s return to Queensland should be made. I believe that in all the circumstances the trauma for all involved will be lessened if his departure is earlier rather than later. In terms of s 12(2)(d) of the Guardianship Amendment Act I make an order that A.O.D. born 30 August 1991 shall be returned to his father A.S. at 12 noon on Saturday, 18 February 1995 and is thereafter to be returned by his father to the State of Queensland in Australia by Malaysian Airlines flight on Sunday, 19 February 1995. The order of the Court made on 16 September 1994 that A. not be removed from New Zealand will be varied to read: A.O.D. is not to be removed from New Zealand without the prior consent of the Court until further order of the Court except in the company of his father by Malaysian Airlines flight on 19 February 1995 between Auckland and Brisbane. It will be plain that Ms O.D.'s application for a Declaration must be refused

At the request of Counsel for the Central Authority I reserve the question of costs. I also reserve leave to either or both parties to seek further directions from the Court.

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