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[25/06/1993; Full Court of the Family Court of Australia (Adelaide); Appellate Court]
Police Commissioner of South Australia v. Temple (No 2) (1993) FLC 92-424

FAMILY LAW ACT 1975

IN THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA, Adelaide

BEFORE: Strauss, Baker and Butler JJ

25 June 1993

Appeal No. SA10 of 1993 /File No. AD5055 of 1992

BETWEEN

Police Commissioner of South Australia

Appellant

-and-

Mary Agnes Temple

Respondent

REASONS FOR JUDGMENT

APPEARANCES:

Mr Moss (instructed by the Crown Solicitor's Office), appeared on behalf of the Applicant.

Mr Strickland (instructed by JK and JR Alderman, Solicitors), appeared on behalf of the respondent.

JUDGMENTS:

Strauss J: The relevant facts are set out fully in the report of the Judgment at first instance which is published at 1993 Family Law Act 92-365. This case has several unusual features. One of these features is that the procedures adopted in this case were inappropriate. Cases under the Hague Convention are to be dealt with expeditiously. There is no room for the leisurely procedures which have been pursued in this case. Ordinarily, these matters should be dealt with in a summary fashion. The delays which affidavit trials involve should be avoided and oral evidence should be received whenever practicable.

This matter first came before this Court as long ago as the middle of October 1992. In my opinion it should have been dealt with and determined well before now. In fact, it should have been determined before the month of November 1992. Article 11 of the Convention on the Civil Aspects of International Child Abduction ("The Hague Convention") provides:

"The judicial or administrative authorities of contracting states shall act expeditiously in proceedings for the return of children. If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of the commencement of the proceedings the applicant or the Central Authority of the requested state on its own initiative, or if asked by the Central Authority of the requesting state, shall have the right to request a statement of the reasons for the delay."

That seems to me to indicate some sort of time limit which is imposed on the duration of the proceedings between the time of their institution and the time when they are to be finalized. This case has been pending for too long by that standard. Article 12 provides:

"Where a child has been wrongfully removed or retained in terms of article 3 that the date of the commencement of the proceedings before the judicial or administrative authority of the contracting state where the child is, a period of less than one year has elapsed from the date of the wrongful removal or detention, the authority concerned shall order the return of the child forthwith."

Now, that is what it says, "Return of the child forthwith," and that is not what has happened in this case.

Another unusual feature of this case is that the husband is a resident of Portugal and the mother is presently in Australia. The child's habitual residence is in the United Kingdom to which place the child has to be returned. Unfortunately, the trial Judge adopted a view of Regulation 15(3) of the Family Law Child Abduction Convention Regulations which, in my opinion, was wrong. However, it was the view advanced to her Honour by counsel for the Central Authority and counsel for the wife. In my view, Regulation 15(3) does not enable the Court to place conditions on the return of the child. It merely enables the Court to place conditions on the temporary removal of the child from one place to another before the return of the child is ordered.

It is conceded that her Honour was in error in thinking that she could impose conditions of the kind she imposed. In any event, I consider that the substance of her Honour's orders went far beyond what could be required legitimately on the facts of this particular case in order to avoid a grave risk, if indeed there was any such risk, of exposing the child to psychological harm or of otherwise placing her in an intolerable situation if she were returned to the United Kingdom. The Court in Maidstone is already seized of the matrimonial dispute between the parties, including all matters of ancillary relief.

In the circumstances of this particular case, the husband should not be subjected to a continuing order for a fixed sum for periodic maintenance determined by this Court, even if such an order would be subject to review by the Maidstone Court. So too, it was not necessary to obligate the husband to assist financially in the repair or provision of a motor car for the wife in order to ensure that the child would not be placed in an intolerable situation. If a motor car is required by the wife and the husband is in the position to contribute to its cost, then the Maidstone Court can order that promptly. I do not think that this Court should impose that kind of condition lightly except for much more compelling reasons. I bear in mind that such an order was not opposed by the Central Authority. Nevertheless, having regard to the intent of the Hague Convention, I do not think such a requirement was appropriate in this particular case.

In all the circumstances and having regard to the fact that the husband resides in Portugal, it is appropriate to ensure that the child is returned to England in the mother's care and that the mother has the financial means to provide for herself and the child in the short term. The undertakings which the husband will be required to give will provide the wife with an initial sum of 1400 pounds, which should suffice to cover reasonable expenses until an interim order can be made by the Maidstone Court, if that is required. I would hope that it will take less than a month from now until the child is returned to the United Kingdom in the mother's care.

The result is that the appeal is allowed. The orders of Murray J made on 8 April 1993, will be set aside and orders should be made in the terms of the draft orders which we have handed to counsel and which are as follows:

1. Upon the Central Authority being satisfied that the father has, on or before 9 July, given undertakings to the Maidstone Country Court in the United Kingdom in proceedings 90D 714 as follows:

(a) That he will pay on or before 16 July 1993 into a bank account nominated by the wife, the sum of 1400 pounds.

(b) That he will pay to the Central Authority on or before 16 July 1993 sufficient moneys to enable the wife M.T. and child, S.T., born 8 March, 1984, to travel by air from Adelaide to London then the Central Authority shall, as soon as reasonably practical, cause the child to be returned to the United Kingdom in the company of the mother.

2. Liberty to apply to a single Judge of the Adelaide Registry on three (3) days notice.

There will be no order as to costs.

Baker J: Yes, I agree with the reasons given by the learned presiding Judge, with the orders which he proposes, and I have nothing to add.

Butler J: I also agree and the orders as set out by the learned presiding judge are those which I would also intend.

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