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[03/05/2002; Outer House of the Court of Session (Scotland); First Instance]
O.R. v. O.R.

OUTER HOUSE, COURT OF SESSION

P292/02

OPINION OF LORD WHEATLEY in Petition of O'R (Petitioner) against O'R (Respondent)

Counsel for Petitioner: Kelly; Drummond Miller, W.S.

Counsel for Respondent: Halley; Balfour & Manson

3 May 2002

[1] The petitioner currently resides at an address in County Kerry in Ireland. She was married to the respondent in Ireland in January 1981, and they have six children. This petition is only concerned with the two youngest children, who were born respectively on 11 January 1993 and 26 December 1994, and who are therefore presently 9 and 7 years of age. The children currently live with the respondent at an address in Aberdeenshire.

[2] The petitioner and respondent separated in March 1999. Until that time the family home had been in Ireland. There are differing accounts given by the parties for the separation, which cannot satisfactorily be resolved at this first hearing of the petition. It is agreed however that for whatever reason the petitioner left the respondent in 1999, leaving the children with him in the matrimonial home. Thereafter, the petitioner made a formal written application to Tralee District Court for custody and access to the children on 10 June 1999. This application does not appear to have been proceeded with. A further application, again for custody and access to the children, was made by the petitioner to the same court on 7 November 2000. On 6 December 2000 this application was considered by the court and the case was continued for a report on the children. On 7 February 2001 the court directed that supervised access to the children be allowed to the petitioner. A further order was made by the court at the same time to review the case on 6 June 2001. At that stage the petitioner had only sought access and not custody. The access did not take place because the respondent failed to deliver the children for access in terms of the court order. On 25 April 2001 a hearing took place in respect of the respondent's failure to allow access to take place, and that hearing was continued until 9 May 2001 for further reports, and on that date the respondent was sentenced in his absence to three months imprisonment in respect of his breach of the court's order. Shortly afterwards the respondent told his solicitor by telephone that he had left Ireland permanently with the children and his new partner, and would not be returning. Since then he and the children have been living in Scotland.

[3] The petitioner now seeks an order under the Child Abduction and Custody Act 1985 requiring her husband to return the children to Ireland. In essence she maintains that both she and the respondent possessed joint custody rights to the children. In addition, she submits that the District Court at Tralee also had custody rights to the children. In these

circumstances, her submission is that in terms of Article 3 of the Convention on the Civil Aspects of International Child Abduction signed at the Hague on 28 October 1980 (hereinafter referred to as "the Convention") the removal of the children by the respondent was wrongful and the children should accordingly be returned to the jurisdiction of Tralee District Court in order that the outstanding questions of custody and access should be determined. The respondent's position was firstly that neither the petitioner nor Tralee District Court possessed custody rights in the children, because the substantive application before the court made by the petitioner had been an application for access, and this was insufficient to confer custody rights on either the petitioner or the court in terms of the Convention. Accordingly, the Convention did not apply, as the respondent's action in taking the children outwith the jurisdiction of the Irish court could not be described as wrongful. Further, the respondent argued that even if the petitioner did have custody rights in respect of the children, she had not exercised these rights since the parties separated in 1999. Finally, the respondent argued that to order the return of the children to Ireland would create a great risk of intolerable harm to them.

[4] The relevant provisions of the Convention are as follows. Article 3 of the Convention which is conveniently found in Schedule 1 to the Child Abduction and Custody Act 1985, provides:

"The removal or the retention of a child is to be considered wrongful where -

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph (a) above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State."

Article 5 provides:

"For the purposes of this Convention -

(a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

(b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

[5] Articles 7 to 12 of the Convention are concerned with provisions for obtaining the co-operation of central authorities to achieve the return of children to whom the Convention applies.

[6] Article 13 provides:

"Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

(a) the person, institution or other body having the care of the person or the child was not actually exercising the custody rights at the time of removal or retention, or had it consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds 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 its views.

.....".

[7] The first question which requires to be determined in this petition is whether the removal or the retention of the children by the respondent in the circumstances is to be considered wrongful in terms of Article 3 of the Convention. The petitioner's position was that an action which bore to be for both custody and access had been raised in Tralee District Court before the removal of the children had taken place. While it was clear that the petitioner was not in a position at that time to seek custody of the children because she had no accommodation for them, her request for access was, on her averments, a first step in the process of obtaining custody of the children. The substance of the application therefore was to determine the question of custody as well as of access. Further, by lodging this application, the court itself became seized of the issue of custody and required to determine it. A report had been ordered by the court to deal in terms with the question of both custody and access. The award of access did not detract from the petitioner's custody rights. The respondent did not have an award of custody in his favour.

[8] For the respondents it was argued that in substance the petitioner's application before the Tralee Court was for access only. The petitioner was not in a position to ask for custody because she had no accommodation to offer the children. That remained her position at the time of the presentation of this petition. If the application is for access only then there is no wrongful removal in terms of the Convention. Article 3 makes it plain that removal of a child is wrongful only where it is in breach of a right of custody. Article 5 of the Convention carefully distinguishes between the rights of custody and the rights of access. The rights of custody include rights relating to the care of the person of the child and in particular the right to determine the child's place of residence.

[9] A number of authorities were considered in the course of argument. The case of Re H (Abduction Rights of Custody) [2000] 1 F.L.R. 201; [2000] 1 A.C. 291 was concerned with a child born in April 1992 whose parents were both Irish but were not married. They separated in 1995. The father had some irregular contact with the child and in 1998 filed an application in an Irish district court under the Guardianship of Infants Act 1964 seeking guardianship and access. The court application form contained the pre-printed words "for the court's direction regarding the custody of the infant and the right of access thereto of the applicant". Thereafter, without the father's knowledge or consent, the mother took the child to live in England. In the mother's absence, the Irish court heard the father's application and made orders appointing him the guardian of the child and granting him access. The father then initiated proceedings in the Family Division of the High Court in England seeking an order for the child's return to Ireland in terms of the Convention. In allowing the father's application, it was observed in the Appeal Court that the frontier between acts or events which were sufficient to give rights of custody to the court and those which were not could not be clearly defined, and depended upon the particular circumstances of each case, subject to the general principles established by the authorities; that an application seeking

only the determination of contact could not vest rights of custody in the court, and that an application seeking the court's determination might or might not vest rights of custody in the court of issue, depending upon the nature of the application, the merit of the application and the applicant's commitment to its pursuit. In that case, in the event, the petitioner's case was weaker than in the present case. In the proceedings in the Irish District Court in Re H the petitioner had agreed a custody order in favour of the mother, and plainly the petitioner's principal claim at the time the children were removed was for access. Nonetheless, the Appeal Court in England held that the removal of the children had been wrongful in terms of the Convention, because of the residual custodial rights possessed by the father, and concluded that the Irish court also possessed rights of custody in the children. This view was upheld in the House of Lords.

[10] Moreover, it seems clear that the term "custody" should be given the widest sense possible (see Lord Justice Waite in B v B (Child Abduction: Custody Rights) [1993] 1 F.L.R. 238 at 260). In the case of in Re H Lord Justice Thorpe described what is meant by the term "custody" for the purposes of the Convention at p.205, by reference to the opinion of Lord Donaldson (M.R.) in the case of Re C (A Minor) (Abduction) [1989] 1 F.L.R. 403 at 412-413:

"'Custody', as a matter of non-technical English, means 'safe-keeping, protection, charge, care, guardianship' (I take that from the Shorter Oxford English Dictionary); but 'rights of custody' as defined in the Convention includes a much more precise meaning which will, I apprehend, usually be decisive of most applications under the Convention. This is 'the right to determine the child's place of residence'. This right may be in the court, the mother, the father, some caretaking institution, such as a local authority..... If anyone, be it an individual or the court or other institution or a body, has a right to object, and either is not consulted or refuses consent, the removal will be wrongful within the meaning of the Convention."

[11] It does appear therefore that where the court is actively concerned in proceedings to determine custodial rights, the removal of the child from the jurisdiction without the leave of the court is a breach of the rights of custody attributable to the court (see Re W (Abduction: Father's Rights) [1998] 2 F.L.R. 146 per Hale J., at 160; see also the judgment of the Supreme Court in HI v MG (unreported) referred to in Re H at p.215). Equally, as Lord Justice Thorpe points out at p.211, an application that in its substance seeks only the determination, definition or quantification of contact cannot vest rights of custody in the court (see Re V-B (Abduction: Custody Rights) [1999] 2 F.L.R. 192). Whether such rights are vested in the court or not will depend on the facts and circumstances of the case and a consideration of the law of the country of residence.

[12] I conclude from the foregoing that where a parent does not have physical custody of a child and lodges an action for custody and access with the court, but only seeks access at the material time, the court nonetheless acquires rights of custody in respect of the children. Even if custody cannot at that time be awarded to that parent, the responsibility of the court to deal with questions of custody as well as of access is triggered at the time of the application. Once the court had been asked by a parent to consider the question of custody and access, then among the duties that the court has to discharge is a decision as to where the child would reside. That responsibility confers rights of custody to the court in terms of Article 5(1) of the Convention. If that is so, then the subsequent removal of the children from the jurisdiction would be wrongful in terms of Article 3 of the Convention. In the present case it was suggested that the petitioner does not have a strong case. It is true that she lodged an application for custody and access in June 1999 and did not proceed with it. However, she currently has tabled what must be regarded as a stateable case for custody. She lodged an application before the District Court of Tralee in December 2000, requesting the court to deal with the matter of custody and access. The court made due enquiry into her request and

concluded that she was entitled to access. In these circumstances, the court could already have been said on one view to have begun its consideration of the question of custody, as matters of access cannot properly be considered unless the question of custody has been settled. Also the court in its decision continued the case for review until June 2001, so all issues before it in terms of the application remained live. In all the circumstances therefore, I am satisfied that the District Court of Tralee had rights of custody in the two children concerned in the present petition, and had made decisions in respect of those children, at the time when the respondent removed them from the jurisdiction of the court. I therefore conclude that the removal of the children was wrong in terms of the Convention, and that the petitioner has made out her primary case for return of the children to Ireland.

[13] I think it is also clear that the petitioner herself had custody rights in the children in terms of the Convention. Under Irish law the petitioner is a joint guardian of the children in terms of section 6(1) of the Guardianship of Infants Act 1964 as amended. As such she has rights and duties including the duty to take care for the children, which includes the right to custody, as well as the right to make decisions about the child's religious and secondary education, health requirements and general welfare (per Lord Justice Thorpe at p.214 in Re H). In the present circumstances she has specifically asked the court to deal with questions of custody and access. Again, while it may be that the court would not be disponed to grant her custody at this time, she is in my view exercising her rights of custody in terms of Irish law. I do not believe that it can be said that the present application before Tralee District Court in substance seeks only the determination, definition or quantification of contact.

[14] I am reinforced in this general view by the view of Lord Justice Thorpe in Re H, which indicates a reluctance, echoed in subsequent cases, to deny custody rights to a parent accept in the most extreme circumstances. It seems clear that the principle of wrongful removal in terms of the Convention will operate if the party from whose potential company the children were removed had at that time a right to ask the court or the other parent for an order or an agreement on the question of custody. Put another way, if a parent retains the right to ask the court to determine the question of custody, and in particular the question of residence, then that parent retains rights of custody. Similarly, if a parent raises a court action which only seeks access before the court of original jurisdiction, the right to seek return of any children under the Convention cannot be invoked. However, actions of access by themselves are rare, and normally proceed on the basis at least of an understanding or acceptance, if not an agreement or court order, that the other party has custody. In this country it is almost invariable practice that court awards of access proceed against the backcloth of an award of custody. It is also usual for actions of custody and access to remain live even after custody has been determined at any particular point in time. Awards of custody to children are never final; on a change of circumstances, custody awards can be reversed. In these circumstances, it is arguable that where a parent who does not have custody nevertheless continues to exercise access based on an action or application to the court which seeks to regulate the question of custody that parent may still have custody rights in terms of the Convention.

[15] In the present case therefore, as I have indicated, it is my view that the petitioner in the present case can claim that she retains custody rights in terms of the Convention. The action which she raised in Tralee District Court was specifically for custody and access. The court forms on which she applied to invoke the court's jurisdiction specifically say that custody and access are to be the subject of the action. The petitioner has a stateable case for seeking access, and eventually custody. Once that has been said, then the court which has jurisdiction in the area to which the children have been removed has no further role to play. It is not the function of this court to place any value on the competing versions advanced before it by the petitioner and the respondent and on that basis to decide whether the

petitioner's claims to rights of custody are frivolous or non-existent. Unless such matters are evidently or manifestly established, it is for the original court of jurisdiction to determine these issues. It is also important that a generous interpretation is given to applications of this kind. An examination of the complex issues that normally attend the break-up of a family should not be conducted as a paper exercise, which is all that is available to this court.

[16] I was not persuaded by the respondent's submission that the petitioner's application to the Irish court was essentially one for access only. Not only is that contrary to what the petitioner claims, but it seems to me that in the present circumstances the respondent's actions are precisely what the Convention is designed to control. The issue of custody was formally placed before the Irish court. The court might have awarded custody to the respondent or it might have decided that the respondent was unsuitable to be granted such an award. By removing the children from the jurisdiction of the court the respondent plainly usurped not only the function but the duty of the court to deal appropriately with the issue of custody and access placed before it. In all the circumstances I have concluded that the application before the Irish court was one concerned with both custody and access; that therefore the removal of the children from the jurisdiction in defiance of the court order for access was in fact a breach of the custody rights, which by that time had vested in the court and also in the petitioner; and that the removal of the children from the jurisdiction of the Irish court was wrongful in terms of the Convention.

[17] I am aware, as the respondent's counsel suggested, that the operation of this view of how the Convention should work might cause difficulties in cases where a mischievous, frivolous or delaying application was lodged purely for the purposes of taking advantage of the Convention. As indicated by Lord Justice Thorpe in Re H, crucial factors in assessing whether rights of custody are vested in a court or a parent will depend upon the merits of the application and the enthusiasm with which it is pursued. If applications are lodged and not insisted on, or are plainly dilatory or worthless, then applications such as the present will not be granted. However that is not the case here.

[18] There is, however, another aspect of Article 3 which requires to be considered. Article 3 (b) provides a further condition which must be satisfied before the removal of a child can be considered wrongful. In particular, it stipulates that at the time of the removal of the child the rights of custody must actually be exercised, either jointly or alone, or would have been so exercised but for the removal or retention. The question of the exercise of custody rights was fully considered in Friedrich v Friedrich 78 F. 3d 1060, a case heard before the United States Court of Appeals for the Sixth Circuit in 1996. The court was faced with an application by a German citizen to have his son returned to Germany from the United States in circumstances where the child's mother had removed the child to America. The court considered the question of common law definition of the word "exercise" and concluded that any definition or description of that term should be liberal. The reasons for that conclusion was that the court felt unsuited to determining the consequences of parental behaviour under the law of a foreign country, was reluctant to get involved in a decision about the adequacy of one parent's exercise of custody rights, and recognised the difficulties of an alien jurisdiction in assessing the complex issues that arise out of questions of custody and access. The court therefore noted, with approval, the principle that the Convention leaves the full resolution of custody issues to the courts of the country of habitual residence and went on to suggest that a person cannot fail to exercise custody rights under the Hague Convention short of acts which constitute clear and unequivocal abandonment of the child. While it might be going too far to suggest that only clear and unequivocal acts of abandonment may constitute a failure to exercise custody rights to a child in every case, it is I think appropriate that the court of habitual residence at the time of removal of children should normally be the court that will determine the complex issues of custody and access.

As the court in Friedrich indicated, that it is consistent not only with the clear spirit of the Convention but also with common-sense. (It should be noted that in the case of Friedrich the parent guilty of removing the child from the jurisdiction had in fact an award of custody in her favour). The purpose of the Convention is to prevent the frustration of a court process involved in examining issues of custody and access of children by the simple expedient of removing those children from the jurisdiction of the court. It may well be, as has been pointed out in the past, that such situations will produce difficult and unfortunate consequences, where children require to return to their place of residence as a result of applications such as the present. But it is clear that the Convention recognises that the consequences of a departure from such a principle of protection of the custody rights of parents in jurisdictions covered by the Convention is far more important. I therefore think that it can only be in the most extreme cases that a parent can be said to have failed to exercise his or her custody rights. In considering such a situation, a number of issues will have to borne in mind. For example, a parent will not be failing to exercise custody rights even although that parent has not made an application to the court. Contact between a parent and children may not have taken place because of the actions of the other parent. Children can be, and frequently are, manipulated by one parent for the purpose of excluding contact with the other. In all of these issues it is extremely rare for the receiving court to be able satisfactorily to decide where the truth lies.

[19] In the present circumstances, and granted that the petitioner and the court was in possession of custody rights to the children, it is I think impossible to maintain that those rights were not being exercised. In particular the court had before it an application which sought to have determined the questions of access and custody. The court was in the process of doing that. In this country, and I have no doubt in Ireland, the court would have concerned itself at some point in the course of this process with the question of custody. In these circumstances I do not consider that it can be said that such rights of custody were not being exercised in the present case, and there is therefore no defence available to the respondent in terms of Article 3(b).

[20] The final part of the case was concerned with what is in effect a further defence available to a respondent in this sort of process. Article 13(b) provides that the judicial and administrative authority of the requested State is not bound to order the return of the child if the respondent establishes that "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Article 13 also provides that the authority may also refuse to order the return of the child if it finds 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 its views. However, it is not suggested that the children in the present application would be subject to this latter provision.

[21] The question that therefore arises is whether or not the children in the present application would be exposed to physical or psychological harm or be placed in an intolerable situation if they were returned to Ireland. The standard which a respondent has to overcome in establishing this defence is a high one. In particular, if there is no reason to suppose that the court of residence would not be able satisfactorily to protect the interests of the children, then it is difficult to see any reason for suggesting that physical or psychological harm, or an intolerable situation, would be caused. In a series of cases it has been made clear that it is only where there are grounds to believe that the courts of the children's original domicile cannot, or will not, protect the children from the harmful consequences of returning to the jurisdiction of their original domicile that this sub-section of the Convention will apply. It is true that what constitutes a grave risk has not been comprehensively defined. However, in DI, Petitioner 1999 Fam. L.R. 126, Lord Abernethy held that a respondent was

not able to show that the Italian authorities could not deal appropriately with the risks allegedly presented by a father who was violent and suspected of trafficking in drugs and illegal firearms. In Starr v Starr 1999 S.L.T. 335 Lord Abernethy again held that mere financial and family difficulties faced by a respondent in returning to the country of domicile did not result in the child being placed in an intolerable situation in terms of Article 13(b) of the Convention. He also held that as the respondent had created the risk of psychological harm to the child by removing her wrongfully, she could not rely on that risk to bring herself within Article 13(b). In Q, Petitioner 2000 S.L.T. 243 Lady Paton held that it had been established that there was a genuine risk that the children, if returned, might lawfully be re-delivered into the unsupervised care of an alleged sexual abuser and in such exceptional circumstances the defence outlined that Article 13(b) was sustained. It is therefore clear that it is only in the most unusual cases, where the court in effect finds that it is being asked to return children to a situation where they will be subject to serious physical or psychological harm without any hope of protection from the legal system operating in the jurisdiction from which they were removed, that such a defence be established. In the present case, all that is said is that the children would find difficulties in returning to County Kerry. Reference was made to the fact that there are other children involved, including three children of the respondent's new partner, who all live in family with him. But this falls far short of the kind of situation figured in the cases cited above. While I am not wholly convinced that in every case a party who has removed children from their place of residence is precluded from arguing that their return would be harmful, it does seem to me to be very difficult in normal circumstances for a party to remove children from their place of habitual residence and then claim it would cause them physical or psychological harm to be returned there. In any event, in the present case, no specific or definite physical or psychological harm has been suggested, much less established. There was no suggestion that the children would be placed in an intolerable situation by returning to their earlier place of habitual residence. In all the circumstances I cannot hold that the defence available to the respondent in terms of Article 13(b) has been made out.

[22] For all these reasons I am satisfied that this petition should be granted. As suggested by counsel, I shall put the case out By Order to allow for arrangements to be made for the return of the children to Ireland.

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