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[09/03/2001; Family Court at Lower Hutt (New Zealand); First Instance]
H v. C, 9 March 2001

IN THE FAMILY COURT FP No. 368/00

HELD AT LOWER HUTT

BETWEEN: W.C (Applicant) and N.C. (Respondent)

Date of Hearing: 15 February 2001

Date of Decision: 9 March 2001

Counsel: J D Howman for Central Authority; Ms M Baker for the Respondent

RESERVED JUDGMENT OF JUDGE J F MOSS

Introduction

[1] This case concerns the wrongful removal from Australia to New Zealand of four children in respect of whom both parties have rights of custody. They range in age between 4 3/4 and 16 months. They were brought to New Zealand by their mother in August 2000. A month later their father applied to the Central Authority in Australia for an order for the return of the children.

[2] The Hague Convention on the Civil Aspects of International Child Abduction (the Convention) was adopted into law in New Zealand by the Guardianship Amendment Act 1991. The jurisdiction for an order for return, contained in s 12 of the Amendment Act and Article 12 of the Convention are conceded.

[3] The mother has invoked in her defence, s 13 of the Act and Article 13 of the Convention. In particular, she has asserted that s 13(1)(c) of the Act applies and that there is a grave risk that the children's return would expose the children to psychological harm and would place the children in an intolerable situation.

THE FACTS

[4] The father and mother had a six-year de facto marriage relationship ending in around June 2000. There were a number of separations. Each admitted intimate relationships with another or others. Each admitted the use of non-prescription drugs, and the mother alleged each was addicted to various drugs.

[5] It is also agreed that the relationship was characterised at times by domestic violence. The nature and extent of it is not agreed. The father has conceded that on one occasion (1995) an incident of violence led to the wife being injured on the chest by a knife wielded by the husband, and on that occasion that she also suffered a cut lip. There is corroborating

evidence of that event, from the doctor who stitched the lip. The extent of the injury from the knife is contested -the father describing it as a scratch, the mother as a stab. At all events, it does not appear that the wife had medical attention for that aspect of her injuries.

[6] The mother attributed the responsibility for the domestic violence to the father. The father claimed responsibility for some violence, but alleged other violence, most verbal abuse, on the part of the mother. The months surrounding the final separation in June 2000 were characterised, in the father's account, by the escalating drugs problem of the mother. In the mother's account, the last months were characterized by a deteriorating state of well being for her, increased physical violence by the father, a period of intense jealousy about a separate relationship which she believed the father was having, and in the early months of last year, management issues in relation to the children.

[7] Particularly, in the weeks between separation in June and her leaving Australia in September, the mother recounted two incidents of violence and threats by the father against her. There is corroboration of one of the occasions provided in the Family Support Service's document, where three days after a highly distressed phone contact, Ms C. was seen at the Service with bruising on her face. However, the police report of that incident refers to a minor verbal disagreement, argument over custody of the children, and no violence or fears for the safety of Ms C. Ms C. takes issue with that account. In her affidavit evidence she amplified the incident thus:

[para 2 affidavit 12 February]

When the police came I was hiding up at the neighbour's house. I told them that W. had chassed me with a hammer. The Police called and told me that there were a few hammer holes in the walls but W. had agreed to go. I went back to my flat and W. came back about half all hour later and beat me up, punching me all over my body and face. He also hit R. when R. tried to stop him. I did not ring the Police again.

[8] The mother is a New Zealander. She was brought up in New Zealand by her maternal grandmother, and moved to Australia in 1986 after the death of her maternal grandfather. Some eight years later she formed the relationship with Mr H.

[9] The mother's biological mother also lived in Melbourne, and after the end of the relationship the mother went to live with her for some time prior to the removal from Australia. There were previous periods during 1995 and 1998 when the family lived with Ms C.'s mother, Miss U. She has provided to the Court a letter which was annexed to the evidence of her daughter. That is not sworn, but forms part of the evidence of Ms C. Again, it was not tested in cross-examination, but on the face of the document it provides some corroboration of Ms C.'s account of the domestic violence. Her mother describes seeing her daughter bruised on many occasions during the pregnancy with L. (1995) and after an incident in June 2000 at the time of separation. She also described observing Mr H. discipline L., aged 21 months, with a slap quite hard across her face (December 1998).

[10] Ms C. has described, in her evidence, becoming increasingly depressed and reliant on a non-prescription medication. In December 1999 she sought assistance from the City of Melbourne's Family Support Service. She was referred to that Service by the Maternal and Child Health nurse. The referral centred on providing support for Ms C. coping with newborn under-weight twins, while her own condition was fragile, physically and emotionally, and while managing a household with a two-year-old and three-year-old. The intervention of the Family Support Service lasted until February by which time Ms C. was reported to be feeling stronger and coping well.

[11] In June 2000 she sought assistance again, and in July 2000 a Family Support worker was concerned about the safety of Ms C. and the children during a phone call from home. Three days after that contact, as noted in paragraph 7 of this judgment, Ms C. was seen, bruised and distressed. She was frightened, and concerned about the impact for the children of the detrimental environment.

[12] During her time of contact with the Family Support Services Ms C. was part of a group convened for women who have experienced domestic violence. The facilitator of that group wrote her observations of Ms C., in unsworn form. In that letter, Ms Lewig, the facilitator, recounted Ms C.'s account of physical assault, property damage, verbal abuse and threats from Mr C. She recorded that Ms C. felt confident of family support in New Zealand and of New Zealand offering an opportunity for herself and the children to live violence-free, supported by family, and connected to her cultural roots.

[13] Late in August the mother applied without notice to the father, to the Magistrates' Court in Melbourne for an intervention order. That was granted. The Court ordered any access to the children was to be supervised.

[14] In her evidence, Ms C. described her own personal and emotional state shortly prior to leaving Australia. She described herself as an emotional wreck, depressed, suicidal.

[para 18 AffIdavit of 8 December 2000]

I was constantly afraid that W. would turn up and attack me and I remained certain that if W. had been able to hurt me he would have. Indeed on two occasions after we separated W. did attack me.

[15] None of the evidence was cross-examined before me. In general the evidence presents a congruent and disturbing picture of a home life which will have left serious consequences on all of the members, It is, however, not possible or necessary for the determination of this application to resolve any of the outstanding questions of fact,

[16] In support of her defence the mother submitted to the Court a report of a senior and highly regarded psychiatrist who has, for very many years, been retained by the Family Court in New Zealand to provide psychiatric advice as a Court-appointed specialist, While the report was obtained by and doubtless paid for by the mother, the psychiatrist, Dr A B Marks, is a person whose credibility as an expert adviser, is well established.

[17] Dr Marks was asked to address four questions, namely:

1. Do you believe Ms C. was suffering from a clinically diagnosable condition before he left Australia?

2. Do you believe Ms C. is currently suffering from a clinically diagnosable condition?

3. What do you believe the effect of being ordered by the Court to return to Australia would be on Ms C. and in particular what is the likely effect on Ms C.'s ability to parent the children?

4. Is there a risk of any of the .following if Ms C. returns to Australia

(a)Suicidal thoughts and/or actions.

(b) Drug use.

(c) An attempt to resume the relationship with Mr H.

(d) Onset of any psychiatric condition.

[18] In formulating the brief, particularly in questions 3 and 4, counsel for Ms C. has accurately framed the issues, as the Court is required to decide them, being focused on the affect on the mother of a return to Australia, rather than the effect on the mother of contact with or renewed cohabitation with the father.

[19] In reaching his conclusions Dr Marks opined that currently Ms C. is not suffering any major psychiatric disorder or a clinically diagnosable condition, He considered that she was, at the time of departure from Australia suffering an adjustment disorder, which opinion he reached considering her sleep disturbance, appetite disturbance, reduced emotional and physical functioning, intense jealousy, and drug use. He describes her as suffering an adjustment disorder with depression which, he says, is present when someone is suffering depressive symptoms as they struggle to adjust to difficult circumstances and their consequences.

[20] Dr Marks answered questions 3) and 4) specifically, and I reproduce that part of his report in full as follows:

4.3 What do you believe the effect of being ordered by the Court to return to Australia would be on Ms C and in particular what is the likely effect on Ms C's ability to parent the children?

Based on this assessment I do not have a firm opinion about this. There is a distinct possibility that Ms C could return to her disorganized way of functioning and this would then definitely jeopardize her ability to care for the children. It is possible that she would return to old social contacts, substance abuse, her impaired adjustment and even possibly return to involvement with Mr H. I have not had the opportunity in this assessment to learn in detail about what social support, assistance from her Australian based relatives and other avenues would be available to assist Ms C. live satisfactorily in Australia. The most important and obvious factors are that Ms C is well supported by her Mum here and with family and other contacts she has she probably stands a more satisfactory chance of adjusting well in New Zealand. This would in turn be in the interests of the children.

4.4 Is there a risk of any of the following if Ms C returns to Australia:

a. Suicidal thoughts and/or action – This is a possibility, I do not consider the risk is high and cannot make a stronger prediction about this.

b. Drug use – There is considerable risk of Ms C returning to drug use and for instance intravenous drug use. She has a very significant history of substance abuse and has been supported by her family and contact here away from this.

c. An attempt to resume the relationship with Mr H – There is a definite possibility of this occurring in a characteristic cycle of dependence, abuse and regression which she has already shown in her history and which is commonly presented by other women with similar histories.

d. Onset of any psychiatric condition – There could be recurrence of substance abuse, depression of an Adjustment Disorder sort and there is a small possibility that the positive family history and history of jealousy last year means that Ms C could develop Psychotic Disorder. I do not expect this.

Establishing the Section 13 defence

[21] The policy of the Convention is that a parent left behind when children are wrongfully removed ought hot to be obliged to follow the children in order to re-establish that parent's relationship and role with the children. The decision for this Court in a case invoking the Convention is primarily a decision relating to forum for resolution of the issue, rather than for consideration of the welfare of the children.

[22] There is an exception to that which is contained in s 13. However, the exception is drafted in peculiarly strong terminology, using the terms "grave risk" and "intolerable situation ", In the High Court decision in 8 v 8 (Auckland Registry, AP 39/SW99 Fisher J, 28 May 1999), His Honour described the defence at page 11 thus: -

(d) The Convention is concerned with the appropriate forum for determining the best interests of children, not with determining their best interests per se. Consequently, where the legal system of the country of habitual residence can be relied upon to give paramountcy to the interests of the child, a Convention application may not be used as an occasion for rehearsing those matters which would be relevant if and when custody and access issues fall to be determined.

(e) Nevertheless the Convention would not have included the s 13(1)(c) exception unless it were contemplated that in some exceptional cases it would be in the greater interests of the child that return should be refused.

(f) It will not be sufficient to satisfy s 13(1)C) that allowing the applicant parent custody of, or access to, the child would gravely risk physical or psychological harm or otherwise place the child in an intolerable situation. The absconding parent must go on to show why the legal system of the habitual residence country would fail to protect the child against that risk pending the outcome of custody and access issues there on their merits.

[23] In that case His Honour restricted his consideration of the conditions for the child to the legal system of the home country.

[24] The psychological or physical harm must be to the child. However, it is now well established that a grave risk of psychological harm may occur to a child if the primary caregiver abductor's state is so vulnerable that, upon return, he or she will be unable to cope adequately with the day to day business of securely parenting the children. (S v S supra, Bates v Bailey (English Court of Appeal No. 2000/3506/B1, Laws, Hale and Arden LJ, 19 December 2000), and Director-General, Department of Families, Youth and Community Care v Bennett (Full Court of the Family Court of Australia, No, BR9671/99, Kay, Coleman and Barlow JJ, 16 March 2000), and Armstrong v Evans ([1999] NZFLR 984, New Zealand Family Court, Judge Jan Doogue).

[25] These cases establish that the defence will be made out if:

1) The risk to the mother is immediate, connected with the return to the country, not to the domestic situation, and will lead to her inability to adequately parent the children.

2) The legal system in the home country is not adequate to provide a protective legal structure to assist the mother's maintaining her parenting ability.

3) That the social services and medical systems cannot be relied on to provide adequate treatment and support to assist to maintain the mother's health sufficiently to maintain the parenting ability.

4) The situation for the mother must be one precipitated by return, rather than one which would have continued in which ever state she lived.

5) The risk to the mother's adequate functioning cannot be one which has been created by her leaving.

[26] These factors set a high barrier indeed to the successful invoking of the s 13 exception. As Fisher J confirmed in S v S [supra] there must be occasions upon which the situation for a fleeing parent and children is such that the test can be met. The matter which delineates the successful domestic violence type discretion applications from the unsuccessful will be a matter of degree. Bates v Bailey can usefully be contrasted with Armstrong v Evans to demonstrate this, although in Armstrong v Evans the Court did not consider domestic factors in the home state other than protections available in the legal system. Specifically, the Court did not consider the treatment and support services available to the fleeing parent. In that case as in this case, the fleeing parent was the primary caregiver mother who was the victim of domestic violence.

Can the defence be invoked in this case?

[27] It seems plain that both parents agree that the situation in which the children lived prior to separation was detrimental to their well being. It plainly posed a grave risk to the children's ordinary development. The children were displaying signs of distress sufficient to lead to the mother consulting a paediatrician early in 2000. Over the months after the birth of the twins it is clear that the mother's own state was poor. However, she accessed and made good use of the family support services. She was able to receive and take up the advice of the paediatrician.

[28] Both parents have now stated their commitment to end the domestic violence which beset their lives -the father has undertaken positive steps in that regard by attendance at a violence prevention programme; the mother's more settled lifestyle in New Zealand appears to lend weight to her ability to avoid the use of non-prescription drugs and to take advantage of support offered to her. While that is family support in New Zealand, and it is not clear that her biological mother has the same psychological significance to her as the grandmother who brought her up, and whom she refers to as 'Mum', nevertheless she has demonstrated in the evidence that she has been able to make use of support services and, to a limited extent, the legal system in Australia.

[29] If the mother's only option on return to Australia was to resume the relationship with Mr H., it would be a more straight forward matter to say that that would pose a grave risk to the children. However, the parents agree that the relationship is over. What they do not agree about, and what will remain to be addressed by the Court wherever the children are, is the nature and extent of access. The Australian Court is obliged to consider access in the light of the welfare of the children. The Melbourne Magistrates' Court has already, in making an interim intervention order in August 2000, ordered that any access should be supervised. That was an order made without notice to Mr H., and has since lapsed, but it demonstrates the immediate preparedness of the legal system to provide protections to the mother and children.

[30] In the critical fields of the legal system protections and the social and medical services support and treatment, the mother has been unable to establish the s 13(b) defence.

[31] There will be an order for the return of the children, but prior to the making of that order, I consider it necessary that the initial legal structure should be in place in Australia. It is not, in my view, sufficient for the Court in New Zealand to rely on the father's statement

that he would not contact the mother except to discuss the children. It appears that it was in the context of that discussion that the serious incident of violence broke out on 14 July 2000. Further, I am concerned that the father's evidence has greatly under-stated his responsibility for and involvement with the domestic violence.

[32] I consider that the minimum terms upon which the Court can be satisfied as to the immediate safe return of the children to Australia are as follows:

-Interim orders from the Australian Courts providing for protection of the mother, custody of the children in her favour, with supervised access to the father.

-The supervision arrangements will require to be set up professionally.

-Alternatively, if that supervision is to be provided by a family member, the structure around the supervision must be such that the supervisor can safely assist these four very small children and contain Mr H. in the event of difficulties.

[33] The matter is now adjourned for four weeks. Once the Court is satisfied as to the legal structure around the children in Australia, an order will be made for their return to Australia.

Judge J F Moss

Family Court Judge
