

K v K 1999 (4) SA 691 (C)

Headnote : Kopnota

The parties had been divorced in the United States and custody of the parties' minor son had been awarded to the respondent, the mother, with liberal visitation (access) provisions in favour of the applicant, the father. Following an incident of alleged abuse during one of the access periods, the respondent had suspended the applicant's visitation with his son. The applicant had approached the York County Family Court for relief but the respondent had not attended the hearing, having left the state and then the country with the minor child. The applicant finally traced the respondent and the minor child to Cape Town and instituted proceedings for the return of the child to the United States and into the applicant's care.

At the hearing of the matter both parties incorporated aspects of the Hague Convention on the Civil Aspects of International Child Abduction (1980) into their arguments, which had been incorporated into South African law in terms of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996. The Court, however, requested specific argument by the parties on the issue of whether the Convention applied to an alleged wrongful removal from one State to another occurring prior to the entry into force of the Convention between those States. The applicant referred the Court to the provisions of s 39 of the Constitution of the Republic of South Africa Act 108 of 1996, arguing that, when applying the common law and constitutional 'best interests of the child' principle in the matter, the Court should do so against the background of the principles underpinning the Hague Convention.

Held, that although art 35 of the Hague Convention provided that the Convention would only apply as between contracting States to wrongful removals or retentions occurring after its entry into force in those States, the States could agree among themselves that the Convention would apply retroactively. (At 700I-I/J.)

Held, further, however, that Act 72 of 1996 made it clear that, as far as South Africa was concerned, the Convention only applied from the date of such legislation, ie 1 October 1997. Although the respondent's removal of the minor child from the United States was therefore prima facie wrongful for the purposes of the Convention, such removal had taken place at the end of June 1996, more than a year prior to the date on which the Convention had come into force between South Africa and the United States. The Convention was accordingly not directly applicable to the matter. (At 701D-D/E and 702F-G.)

Held, further, that under the common law the Court's paramount consideration in exercising its discretion as the upper guardian of minor children was always the best interests of the child or children in question in the particular circumstances of the individual case. Furthermore, both constitutional and international law enshrined 'the best interests of the child' standard as the primary consideration in all matters concerning children in South Africa. (At 702G/H-H/I and 704C.)

Held, further, that the Convention was premised on the assumption that the abduction of a child would generally be prejudicial to his or her welfare and that in the vast majority of cases it would be in the best interests of the child to return him or her to the State of his or her habitual residence. The idea was therefore that the authorities best placed to resolve the merits of the custody dispute were the Courts of the State of the child's habitual residence and not those of the State to which the child had been removed or in which the child was being retained. Even in this decision, however, the paramount consideration still had to be the best interests of the child. (At 706B-C/D.)

Held, further, that, if the Convention had been directly applicable to this matter, the Court would have been constrained to return the minor child to the United States without delay. The removal of the minor child from the United States appeared to have been a 'wrongful removal' for the purposes of the Convention, no exceptions to the mandatory return of the child had been established, the child was not yet settled in his new environment and it had not been satisfactorily shown that there was a grave risk that the child's return to the United States would expose him to physical or psychological harm or otherwise place him in an intolerable situation. As the Convention was, however, not directly applicable, the question arose as to the extent to which the Convention's principles were applicable. (At 706I/J - 707C/D and 707D/E-E.)

Held, further, that in non-Convention cases of international child abduction, the best interests of the child concerned remained the paramount consideration and the principles of the Convention were applicable only to the extent that they indicated what was normally in the interests of such child. (At 707F/G-G/H.)

Held, further, that the vast majority of expert and other witnesses upon whose evidence the respondent relied in respect of the alleged abuse of the minor child were located in the United States. It was therefore impossible for the Court to properly evaluate the evidence of the abuse in the absence of the relevant persons for examination and cross-examination. In addition, the incidents resulting in the allegation of abuse had all occurred in the United States, both parties and their families had spent most of their lives in the United States and the Family Court in the county where the parties had resided had detailed records of relevant legal history of the parties' relationship. The York County Family Court was accordingly the Court best suited to investigate the merits of the case in the detail required and to determine the orders in respect of the minor child's future care which would best promote and ensure his physical, moral, emotional and spiritual welfare. (At 710I-J and 711A/B-C/D.)

Held, further, applying the best interests of the minor child as the paramount consideration, that the best interests child required that his future be adjudicated upon by the United States Court and that he should not have to spend the time in this country which necessarily had to elapse before all the evidence could be assembled for the matter to be adjudicated here. To

provide for the maximum protection of the minor child until the United States Court could resume its normal role in relation to him, the parties were required to make certain undertakings to facilitate the maintenance, welfare and safety of the minor child. (At 711D-E and G.) The respondent was accordingly ordered to return the minor child to the jurisdiction of the York County Family Court.