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<http://www.incadat.com/> ref.: HC/E/UKs 116  
[24/12/1986; Outer House of the Court of Session (Scotland); First Instance]  
Kilgour v. Kilgour 1987 SC 55, 1987 SLT 568, 1987 SCLR 344

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**OPINION OF LORD PROSSER in petition of:**

**M.K. Petitioner,**

**against**

**J.K., Respondent**

**Act: Sir Crispen Agnew, McClure Naismith, Anderson & Gardiner**

**Alt: Mcfadyen QC, Brodies**

**24th December 1986**

The petitioner and the respondent are husband and wife. There are two children of the marriage, a boy and a girl born on 26th July 1983 and 13th September 1985 respectively. The parties were married in Canada in 1981. Both children were born in Canada and they are Canadian Nationals. Prior to the events which are the subject matter of this petition the children lived with the parties in Ontario. On or about 24th January 1986 the respondent left the family home in Ontario. She took both children with her and came to Scotland where she herself had formerly lived. Since coming to Scotland she and the children have evidently remained in Scotland although their exact whereabouts have been concealed. The petitioner seeks an order "in terms of Article 12 or the Convention on the Civil Aspects of International Child Abduction as given the force of law in Scotland by the Child Abduction and Custody Act 1985" inter alia for delivery of the children into the custody or the petitioner. Answers having been lodged and a plea having been taken by the respondent to the competency of the petition in so far as seeking orders in terms of the 1985 Act I heard counsel for the parties on that issue.

On behalf of the petitioner Sir Crispen Agnew drew my attention to the terms of an Ontario statute, the Children's Law Reform Act 1982, and in particular section 20(1) to (5) of that Act. I was provided with a photocopy of what bears to be that provision, according to which section 20(1) provides that except as otherwise provided in this Part the father and the mother or a child are equally entitled to custody of the child. The statute was said to apply to the parties and their children and to show that as at 24th January 1986 the petitioner was a person entitled (jointly with the respondent) to the custody of the two children. I was also referred to a photocopy bearing to show the terms of Clause 250.2(1) of the Canadian Criminal Code providing that "Everyone who, being the parent...or a person under the age of 14 years, takes, entices away, conceals, detains, receives or harbours that person in relation to whom no custody order has been made by a court anywhere in Canada, with intent to deprive a parent or guardian...of the possession of that person is guilty or...an indictable offence." The 1982 Ontario Act, it was contended, showed that the petitioner had rights of custody at civil law, these were fortified by the Criminal Code and the respondent

had breached both the petitioner's civil rights and the criminal law by her removal of the children from the family home. In addition to his general right to joint custody under the 1982 Ontario Act the petitioner had subsequently obtained orders from the Canadian Courts giving him sole custody of the children. He had been granted such custody on an interim basis on 16th May 1986 and on a final basis on 25th August 1986. Productions 11 and 12 bear to be copies of these Court orders.

Mr Macfadyen for the respondent accepted that I could take notice of these copy orders as showing the terms or the relevant orders. Moreover while he was unable normally to concede that the law applicable was as set out in the copies of section 20 or the 1982 Ontario Statute and Clause 250.2 of the Criminal Code he was content that in the argument on competency I could proceed on the basis that it was so. Reference was made to Article 14 of the Convention on the Civil Aspects of International Child Abduction (which hereinafter I refer to as "the Convention") which Article is set out in Schedule 1 to the Child Abduction and Custody Act 1985 ("the 1985 Act"). I am satisfied that it is right for me in relation to any issue concerning the Convention to proceed on the basis of the documents which I have mentioned and to deal with matters on the hypothesis that under the relevant Canadian law the petitioner had indeed joint rights of custody as at 24th January and a sole right or custody from 16th May onwards, that sole right being made final on 25th August 1986.

I turn to the provisions of the 1985 Act and the provisions of the Convention set out in Schedule 1 to that Act. By section 1 of the Act it is provided that subject to the provisions of Part 1 of the Act the provisions of the Convention set out in Schedule 1 shall have the force of law in the United Kingdom. By section 2 provision is made for the coming into force state or territory specified in an Order in Council. In terms of the Child Abduction and Custody (Parties to Conventions) Order S.I. 1159/1986, the date of the coming into force of the Convention as between the United Kingdom and Ontario is 1st August 1986. There being no other provisions the Convention applies as between the United Kingdom and Ontario "only in relation to wrongful removals or retentions occurring on or after" 1st August 1986 (see section 212) of the 1985 Act). In terms of Article 3 of the Convention as set out in Schedule 1 to the 1985 Act the removal or retention of a child is to be considered wrongful where "(a) it is in breach of rights of custody attributed to a person...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." Article 3 further provides that the rights of custody mentioned in sub-paragraph (a) may arise in particular by operation of law or by reason of a judicial or administrative decision. Article 4 provides that the Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights and that the Convention shall cease to apply when the child for the purposes of the Convention "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.

By Chapter III of the Convention provisions are made for the return of children in certain circumstances. In particular Article 8 provides inter alia that any person claiming that a child has been removed or retained in breach of custody rights may apply either to a Central Authority of the child's habitual residence or to the Central Authority of any other contracting State for assistance in securing the return of the child. The relevant Central Authority in the United Kingdom in the present case is the Secretary of State for Scotland. By Article 11 it is provided that the judicial or administrative authorities of contracting states shall act expeditiously in proceedings for the return of children and if the judicial or administrative authority concerned has not reached a decision within six weeks from the

date of commencement of proceedings various steps may be taken to request a statement of the reasons for the delay.

Article 12 contains the following provision: "Where a child has been wrongfully removed or retained in terms of Article 3 and, at 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 retention, the authority concerned shall order the return of the child forthwith." It is further provided in Article 12 that the judicial or administrative authority even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph shall also order the return of the child "unless it is demonstrated that the child is now settled in its new environment". By Article 13 it is provided that notwithstanding the provisions of Article 12 the judicial or administrative authority is not bound to order the return of the child if the person...which opposes its return establishes that "(a) the person...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 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 parties were at one in proceeding on the basis that the relevant removal for the purposes of the Convention is a removal in breach of custody rights rather than a removal from the country where the child previously lived. The need for the remedies of the Convention will only arise when the child has been thus removed from that country but the relevant removal is the prior one in breach of the custody rights of the parent. There was no real dispute in the present case that the respondent's departure from the family home on 24th January 1986 constituted a wrongful removal for the purposes of the Convention. It was however common ground that at the date of that removal the convention was not in force as between the United Kingdom and Ontario and that having regard to the provisions of section 2(2) of the 1985 Act the remedies provided by the Convention were not available in respect of that wrongful removal in January 1986. The issue between the parties as to the applicability of the Convention thus turned not on "removal" but on the meaning of "retention" and in particular the meaning of the references in the Convention to the date or time of wrongful retention.

On behalf of the petitioner Sir Crispin Agnew contended that while "removal" was a single event occurring at a particular time or on a particular date "retention" was something different in kind. "Retention" was something continuous, it occurred not merely when it began but so long as there was a retention of the children in breach of custody rights. A wrongful removal at a date prior to the coming into force of the Convention as between the United Kingdom and Ontario would not be caught by the Convention's provisions. A wrongful retention commencing before the Convention thus came into force would not initially be caught but would be caught upon the Convention coming into effect, as a retention which then became a wrongful retention. Further and in any event in the present case there was a new wrongful retention which commenced on 26th August 1986 (after the Convention had come into force) when the petitioner was granted the order for full custody. This was a new event which constituted a new disobedience on the part of the respondent since on that date for the first time she was in breach of new rights then conferred on the petitioner in respect of the children's custody. In these circumstances while the Convention did not apply to the original removal or to the original retention it could and did apply to the retention which became wrongful as at 1st August or in any event to the retention in breach of the petitioner's full custody rights on 25th Aug 1986. In these circumstances the Convention applied to the present case and the present application was accordingly

competent. I should so determine and having done so should put the case out By Order at an early date so that the further procedure could then be determined. Counsel further moved me ad interim to suspend a Sheriff Court action which has been raised by the respondent and in which an interim interdict has been pronounced against the petitioner. I should further interdict the respondent ad interim from removing the children from the Scottish jurisdiction having regard to the history of concealment and changes of addresses. I should moreover grant such suspension and interdict at common law if I were not satisfied that the Convention applied and that I had the requisite powers by virtue of the 1985 Act and the Convention.

On behalf of the respondent Mr Macfadyen contended that on a proper construction of the 1985 Act this was not a case to which the Convention applied. In so far as the petition founded upon the Convention it was therefore incompetent. The question was whether the petitioner could point either to a wrongful removal or to a wrongful retention "occurring on or after" 1st August 1986 for the purposes of section 2(2) of the 1985 Act. Any question in relation to "removal" could be set aside as irrelevant since the only removal was in January and that was plainly not within the terms of section 2(2). It was unsurprising that for an individual act such as removal the procedures of the Convention were not applied retrospectively to catch an act before the law in question came into force but in the present case the whole issue turned on questions relating not to "removal" but to "retention".

Mr Macfadyen considered first whether the word "retention" as used in the Convention could have any sensible content other than the "continuing" meaning which had been contended for on behalf of the petitioner. He submitted that it was not difficult to think of situations where wrongfulness arose during rightful possession. Obvious examples were the case where a parent exercising residential access fails to return a child. In such cases there is nothing that can properly be described as a removal. What occurs is rightly described as retention not in any continuing sense but in a sense which can be regarded as a single event analogous to removal as a denial of the other parent's rights. The presence of the word "retention" along with the word "removal" was thus sensible and understandable to cover such cases where wrongfulness arises without removal. There was no need for any notion of continuity in relation to retention any more than in relation to removal.

Mr Macfadyen acknowledged that this was not enough for the respondent to succeed. It might be that retention was intended to mean some continuing state of affairs rather than or as well as such a single event of emerging wrongfulness. There were however, according to Mr Macfadyen, various indications that in the Convention wrongful retention was indeed seen as a single event occurring at a specific point in time rather than as a continuing state of affairs. Counsel drew attention in particular to the provisions of Article 12. It was plain having regard to those provisions that retention, like removal, was seen as having a particular date since a period of twelve months had to be measured from that date. If retention was regarded as a continuing wrong it would never have such a specific date. Indeed it could never be that twelve months would have elapsed since the wrongful retention so as to give rise to the change provided for in Article 12 as to the criteria for return. Mr Macfadyen maintained that this concept of retention as a single wrongful act or event found further support in Article 13(a) of the Convention which refers to a person "not actually exercising the custody rights at the time of removal or retention" and which moreover refers to that person having consented to or "subsequently acquiesced in the removal or retention". These provisions demonstrated that while retention like removal would produce a state of affairs which continued it was like removal seen as a single event occurring at a particular time and with a period after its occurrence ("subsequently") in which an acquiescence in that prior event and its consequences might occur. Counsel also referred to the terms of section 2(2) itself. The concept of wrongful removals or retentions "occurring"

on or after the date when the Convention came into force between two States suggested that retention like removal was an occurrence which would arise identifiably after after that date rather than consist in a mere continuance of a retention or wrongful retention which was already in existence. In reply counsel for the petitioner accepted that in Article 12 "the date of the wrongful... retention" must mean a specific date. He maintained however that these words could be read as meaning the date when the retention started. He contrasted the use or the word "date" in Article 12 with the use of broader expressions such as "at the time of" in Article 13. He contended that this contrast showed that while in Article 12 the reference was to a specific start date elsewhere the concept of retention had its natural continuing sense.

I do not consider that the Convention is as unambiguously drafted as it might have been. I have however come to the view that the contentions for the respondent are well-founded. As counsel for the respondent submitted the emphasis in the statute and the convention is upon abduction. It seems plain to me that any Act dealing with abduction in the sense of removal would sensibly attempt to regulate in the same way as it regulates removal those cases where there is an act of omission or commission which achieves the same result as removal and constitutes an inversion of existing custody rights. There will be a variety of situations in which one has such an equivalent of abduction by removal. There is perhaps no one word which is ideally suited to describing all such equivalents. However the word "retention" appears to me to be quite naturally used and a quite accurate expression to use in such a context and for such a purpose. After any such initial act (whether by positive removal or by some failure to hand over or return a child) there will be a state of affairs which can appropriately be described as "retention". In that sense it has the continuing meaning which was emphasised by counsel for the petitioner. I would accept that that is a natural meaning for the word. I do not however consider that it is an unnatural use of the word "retention" to use it for an initial act of omission or commission. Having regard to the way in which the word is coupled with removal throughout the Act I would be disposed to think that the word was used in this sense of an original act even if there were no more positive indications that that is its intended sense. Having regard to the terms of Article 13 one is in my view given a very firm indication indeed that the retention in question is an initial act of retention comparable in its effects to the act of removal, and that the Convention is not primarily concerned (either in cases where the initial act is one of removal or in cases where the initial act is one of retention) with the new state of affairs which will follow on such initial acts and which might also be described as retention. The submission by counsel for the petitioner that Article 13 could be read as referring to the date of the start of retention needs very little-rephrasing to amount to a concession that in speaking of the date of retention that article is speaking of an initial retention without regard to continuance. If in Article 12 use of the word "retention" thus refers to initial intention it should in my view be so understood elsewhere in the Convention and in the Act unless there was some very firm indication to the contrary. Even in Article 13 reading the article as a whole it seems to me that the references to "the time of" retention and to events occurring "subsequently" positively bear out the construction which I have suggested is appropriate for Article 12.

Moreover in the present case we are concerned primarily with the construction of Section 2 (2) of the Act which regulates the coming into force of the Convention as between the United Kingdom and Ontario. That sub-section like Article 13 uses the word "date" and is plainly referring to a specific date for the coming into force of the Convention. In referring to wrongful removals or retentions "occurring" on or after that date the sub-section in my view plainly envisages that removals or retentions will indeed occur on a specific date be it the date when the Convention comes into force or a date thereafter. I would add too that if retention is to be given its continuous meaning, then in any case where it is necessary to invoke the Convention after it has come into force there would almost necessarily be a

continuing retention at the time when proceedings under the Convention were raised. If that was all that was required it would not apparently be necessary to exclude from the scope of the Convention wrongful removals prior to its coming into force since the retention which follows on the removal would give a sufficient ground for action. In my opinion there is a contrast in the Act and in the Convention between "removal" cases and "retention" cases and section 2(2) is excluding from the scope of the Convention both categories of case if the original wrongful act occurred prior to the Convention coming into force. It will thus be of no avail in relation to either type of case that there is a continuing retention at the date when the Convention comes into force between any two States.

In relation to the alternative submission by counsel for the petitioner that there was a new wrongful act on 25th August when full custody rights were granted to the petitioner I have come to the view that there is no real force in this submission. The Convention is not concerned with the basis of custody rights but with their existence regardless of basis. The closing words of Article 3 make it plain that the relevant rights of custody may "arise" in a variety of ways. In the present case the petitioner's rights of custody "arose" initially by statute jointly with the respondent and may be seen as having "arisen" in the form of a sole right of custody when the interim order was obtained in May. I do not require to consider whether a petitioner who had joint rights before the Convention came into force and had obtained his first grant of sole custody rights after that date could claim that this latter event was a new "retention". My impression is that he could not do so. In any event I do not consider that a person who already has sole rights on an interim basis before the coming into force of the Convention can validly claim that the final decree making those rights permanent is an event upon which his rights of custody can be said to arise or to give some new basis for alleging a new "retention". Quite apart from the ordinary meaning of the language it appears to me (as was submitted by counsel for the respondent) that it would produce very strange results in the operation of Article 12 if a person whose rights of custody had been breached long before could obtain a grant of custody from the Court for the first time and thus provide himself with a new base date for the running of the year which determines the criteria for return of a child. That consideration would apply quite apart from the particular problems which arise in relation to the coming into force of the Convention. I should mention finally that counsel for the petitioner contended that the very fact that the fact that the Canadian Central Authority had issued a request under the Convention was an indication that there had been a wrongful removal or retention. It does not appear to me that an executive act of this kind carries any particular weight when one comes to construing the Convention. If there had been a determination under Article 15 that would be a different matter. I do not however see any need in the present case to seek such a determination.

On the whole matter I have considerable sympathy with the petitioner. The respondent's actions in January appear to be precisely the type of wrong, which the Convention is designed to control. I do not however consider that those actions or their consequences are controlled by the Convention in the present case, having regard to the date from which the Convention came to have the force of law in the United Kingdom. I accordingly uphold the contentions for the respondent, I sustain the plea to competency and dismiss the petition in so far as it is founded upon the Convention. In the circumstances I see no requirement for interim orders.

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