---

http://www.incadat.com/ ref.: HC/E/UKs 188
[30/10/1996; Outer House of the Court of Session (Scotland); First Instance]
Pirrie v. Sawacki 1997 SLT 1160, 1997 SCLR 59

Pirrie v Sawacki

Court of Session

Outer House

30 October 1996

Lord Coulsfield

Lord Coulsfield: The petitioner and the respondent were married on 18 March 1983. There are two children of the marriage, A., who was born on 18 March 1984, and V., who was born on 29 September 1985. The parties separated in 1986 and were divorced on 12 December 1989. The action of divorce proceeded at the instance of the present respondent, and custody of the two children was awarded to her in the decree of divorce. On 13 June 1994, the respondent took the two children to the United States of America, where she and they remain. In this petition, the petitioner seeks declarator that the removal of the children furth of Scotland and their retention in the United States of America was wrongful within the meaning of art 3 of the Hague Convention. There are also proceedings in progress in the United States, instituted at the petitioner's request, seeking the return of the children in terms of the Hague Convention.

It is convenient, in the first place, to set out the history of what followed after the separation, insofar as it is not materially in dispute. After the separation, the petitioner remained in the matrimonial home for some months. Thereafter he went to live with his parents, A.P., senior, and Mrs H.P., at their home at *. At some time, he left that address to live with another woman, but after a relatively short period he returned to his parents' house where he still resides. The petitioner had a period of unemployment, but has generally been in employment. After the separation, the respondent stayed with her mother, Mrs J.A., at her house at ***, for about six months. She then obtained a house of her own at ***. The respondent was unemployed until about October 1986 when she undertook a 12 week course of further training. From January 1987 until June 1987 she was employed by a firm called C** and then from August 1987 until June 1988 she undertook a further period of training. From June 1988 until March 1989 she was again unemployed, and from March until August 1989 she worked at a number of temporary jobs. In August 1989 she obtained permanent employment with the S*** social work department. Some time thereafter, she formed an association with an American citizen, Mr S., to whom she is now married. In 1992, she moved to live with Mr S. at his house in Westerwood, Cumbernauld, where they remained for a short time before moving to another district of Cumbernauld, Abronhill, where they remained from about March to September 1992. Mr S., although working in Scotland, was employed by an American firm and there was some uncertainty, during this period, as to whether he would be continuing to work in Scotland or be recalled to America. In the event,**

he did return to America in the autumn of 1992 and, at first, was employed in Iowa. From 3 November 1992 until 29 January 1993, the respondent was in America, with Mr S., in Iowa. During this period, the two children remained in Scotland. During her absence, the respondent gave up her tenancy of the house at 17 Longwill Terrace. On her return to Scotland, the respondent lived with her mother, but in May 1993 she went back to America and at this point she gave up her employment with the social work department. She was in America from May until October 1993. By this time, Mr S. had moved to Michigan and the respondent lived with him there. Between October 1993 and June 1994, the respondent was in Scotland and during this period she was unemployed. On 13 June 1994, as I have already mentioned, she returned to America with the two children.

In most other relevant respects, the evidence of the parties and the witnesses called on each side diverged very greatly. Two principal issues arose on the evidence. The first was concerned with the extent to which the petitioner had contact with the children. The petitioner and his mother and father maintained that he had at all times had ample contact with the children and had seen them whenever he, or they, wanted. Further, they maintained that the children had slept at the petitioner's parents' house from time to time, that they did so increasingly as time went on, and that for approximately two years before June 1994 they had more often than not slept at the petitioner's parents' house, that they had gone to school from there, that they had returned from school to that house, and done their homework and slept there. The petitioner and his parents, however, accepted that even during this period, the children spent some nights in each week with the respondent's mother. On the other hand, the respondent, who gave evidence on commission in America, her mother and her sister, T.A., maintained that during the entire period following the separation the children had only spent two nights at the petitioner's parents' house, although they accepted that the petitioner had enjoyed generous access to the children.

The second main controversy between the parties concerned the circumstances in which the children were removed to America and the question whether the petitioner had consented to that removal. The petitioner said that he had been aware that the respondent was interested in going to live in America, and in taking the children with her, but that he had never consented to her doing so. He said that during the period immediately preceding the removal, the children had been staying with him at his parents' house; that on two Sundays before 13 June the respondent had come and asked to take the children out, which he agreed to; that she had again asked to take them out on the day on which they were removed; that he had agreed and that the respondent had taken the children away. He had next been informed that they were in the air, on their way to America. On the other hand, the respondent and her witnesses maintained that although the petitioner had been angry and had refused to consent when the question of taking the children to America had first been raised, there had been a conversation in which he had indicated that he did consent, after he had discussed the matter with the children and found that they wanted to go. There was some difference between the witnesses, to which I shall later refer, as to the date of this conversation. Further, during the period immediately before the removal, the children had, in accordance with the evidence to which I have already referred, been living with the respondent and her parents, and they had visited friends on the day before their departure and returned to the respondent's mother's house, from where they had left to go to America. The respondent's witnesses, however, agreed that steps had been taken to prevent the petitioner from knowing exactly when they were to depart for America and that, by arrangement, the information that they had left had been communicated by Mrs A. to Mrs P. in a telephone call, after the respondent and the children were already in the air on the way to America.

There were only two witnesses who could be described as wholly independent of either side in the dispute, namely Mr Gordon Millar, a senior social worker formerly with Strathclyde Regional Council and now with Glasgow City Council, and Mrs E.G., the head teacher of the village primary school which the children attended. Mr Millar's involvement arose as a result of an anonymous communication made by a woman to the duty social worker on 9 November 1992 to the effect that the two children were temporarily living with "an aunt" in filthy conditions. After preliminary investigations, it was concluded that the matter was not one of urgency, but a visit was made to the house of Mrs A. on 13 November 1992. Mr Millar did not himself carry out the visit but he had studied the records kept in the department and the report by the social worker who did visit the house. The social worker concluded that there was some superficial untidiness in Mrs A.'s house but that conditions were broadly satisfactory. There was no later social work involvement and Mr Millar seemed inclined to suspect that the reference might have been malicious. In any event, the significance of the evidence is that it would appear from the social work records, according to Mr Millar's evidence, that the children had given the impression that they were staying with their grandmother while their mother was in America. However, the social worker who actually made the visit, Sue Clarke, was not called as a witness and no reports or records were produced, so that it is difficult to test the accuracy of the impression that the children indicated that they were staying with Mrs A.

Mrs G. had been head teacher of the school since January 1993. She had had no previous involvement with the school or the children but she had examined the school records and discussed the matter with their class teachers. So far as the school records went, it appeared that the school was aware that the parents were separated and that the respondent was the only person who had legal custody of the two children. In addition, Mrs A. was recorded by the school as the person to contact in any emergency. Mrs G. described the arrangements usually made for the collection of children from the school in cases in which there is some doubt or difficulty about custody, but it appeared, later in her evidence, that A. and V. normally left the school on their own, because they had only a short distance to go. They were actually collected from school only on occasions such as a dentist's appointment, or the like, and on those occasions it appears that it was Mrs A. who collected them. The respondent was the person who attended parents' evenings and the school communicated, invariably, with the respondent or her mother. The normal channel of communication was that the letters or invitations were put into the children's bags to take home and the implication of Mrs G.'s evidence was that such communications reached the respondent. A. had mentioned, from time to time, that he was going to his father's, but there was nothing to indicate whether he was going there overnight or merely for a visit. Mrs G.'s evidence on these matters was clear and its value is only slightly diminished by the fact that some of it was obtained from records or from conversations with other persons who were not witnesses.

Mrs G. also gave important evidence about the circumstances which led up to the children leaving to go to America. She said that the respondent had come to see her on two occasions shortly before June 1993. Initially, her evidence was that the first occasion was about Easter 1993, but that evidence was later modified, and I think it is unlikely that the visit was as early as Mrs G. originally thought. Whatever the timing of the visits, Mrs G.'s evidence about what took place was quite clear. On the first occasion, the respondent told her that she wanted to take the children to America for a holiday, that she would like to have them there for longer but she was not sure if it would work out. She wanted to know what papers and reports would be required if the children were to go to another school. Mrs G. explained to her that the whole file on the children could not be given unless a request was received from another school but that teachers' reports could be supplied. On the second occasion, the respondent came to the school and collected the reports and, at least according to Mrs G.'s

first impression, the children left with her, and, it being a Friday, did not return to the school. There was some examination and cross examination of Mrs G. directed to ascertaining her opinion as to whether the children might have known about an imminent trip to America and whether, if they had known, they would have been likely to have talked about it to their teachers or classmates. Mrs G.'s opinion was generally to the effect that such young children, particularly the younger child V., would have been likely to speak about an anticipated trip to America; there was no evidence that the children had told anyone at the school that they were about to go to America. What did, however, ultimately emerge in Mrs G.'s evidence was that the respondent specifically asked her not to tell the children that they were going to America and to tell the class teachers not to tell the children that they were going to America. The only other points to be added in respect of Mrs G.'s evidence are, first, that when the petitioner came to the school about a week after the children had left, seeking information about their whereabouts, she was surprised to discover the extent of contact which the petitioner had had with the children: and, secondly, that she was not aware that the respondent had been in America during the year before the children left. She had been aware that the respondent was working away from home.

It is convenient, next, to assess in the light of Mrs G.'s evidence, the evidence relating to the question whether the petitioner consented to the removal of the children to America. The evidence of the petitioner and the witnesses called on his behalf was unanimously to the effect that, although he had been aware that the respondent wished or might wish to go to America, and take the children there at least for a time, he had never consented to their removal on a permanent basis. In her answers the respondent avers that in about March 1992 she advised the petitioner of her relationship with her boyfriend and that they had discussed moving to the United States of America, that the petitioner was furious but that about three or four weeks later he told the respondent that he had spoken to the children, that they had told him that they wished to go to America and that he would not stop them going to America. The respondent herself gave evidence to that effect. The respondent's mother and sister, however, gave quite different evidence. Mrs A. said that she had talked to the petitioner about the children going to the United States on two or three occasions between September 1992 and June 1993. In these discussions, the petitioner's suggestion was that the children could stay in Scotland and the respondent could go to America on her own, but Mrs A. said to him that the respondent would not go without the children. She was then asked, in examination in chief, whether the petitioner's position had changed at all and said that it had not. Mrs A. had just said that the respondent would never agree to what he proposed and added "there was nothing much he could say really". She was then asked again what she thought the petitioner's view was at the time the children left in 1994 and replied that in April or May he had said to the respondent that he had been talking to the children, they seemed to want to and he would just let them go. When asked why she had not previously said that his position had changed, she replied that she had forgotten. When asked, later, whether she thought that it was in the spring of 1992 that the petitioner had given his consent, she said that that would, she thought, be wrong but she added that the respondent had a better memory for dates than she did. T.A. gave some rather vague evidence about having overheard, or partly overheard, a conversation between the petitioner and her mother in the kitchen of her mother's house. She said that she had been in the livingroom with the door open, had got up to close the door and had only heard part of the conversation. She later said that she was not sure if she had heard any conversation; she thought she had heard a conversation in the kitchen but was not sure whether she had heard it or had been told about it. In any event, the suggestion in this part of her evidence was that the conversation had been to the effect that the petitioner agreed to the children going to America. She also said that the children knew that they were going to America, that all their friends knew and she was sure that the petitioner had known. Both witnesses seemed to be put in some difficulty when asked to explain the steps taken to ensure that the children were

not told that they were leaving at the time when they left. Both attempted to explain that it had been necessary to avoid the petitioner knowing the exact date of the children's departure because he might change his mind and said that the petitioner might say one thing one day and another thing another day. I was not impressed by the evidence of T.A. who seemed to me very hostile to the petitioner. As regards Mrs A., while I would not suspect her of deliberately telling an untruth, I was not at all impressed by her explanation that she had forgotten such an important matter as the alleged conversation in which the petitioner expressed his consent to the children going. The commissioner who heard the evidence of the respondent was reasonably satisfied as to her credibility but he did not have the advantage of being able to compare her evidence with the other evidence to which I have referred. On the whole matter, I am clearly of opinion that the petitioner never consented to the children being taken to America and I do not think that either the respondent or T.A., at least, ever thought that he had consented. The evidence as to the steps which were taken to prevent the petitioner knowing that the children were on the point of leaving, and indeed to prevent the children themselves from knowing about their departure, clearly points, in my view, to the conclusion that the respondent was well aware that if the petitioner knew that the children were to be taken to America on a basis which might be permanent he would have attempted to prevent it.

As I have mentioned, the other matter on which there was a conflict of evidence was the extent to which the children did or did not spend time with the petitioner and his family while they were in Scotland and in the sole legal custody of the respondent. I do not think that it is possible to resolve all the conflicts of evidence in this part of the case and I do not think that it is necessary to do so for the purposes of reaching a decision. There was, as I have indicated, a very direct conflict of evidence between the petitioner and his witnesses on the one hand, and the respondent and her witnesses on the other. There was even a conflict about what precisely took place on the day the children left. The petitioner and his mother, as I have mentioned, said that the respondent had come and asked for the children and taken them away, apparently to go on an expedition with their bicycles to a park. The evidence on the other side was that the children had spent time with the respondent and a friend, the witness Mrs Bone, during the day before their departure, had gone from there to the respondent's mother's house and from there had been taken to the airport. I might note, in passing, that Mrs Bone's son was a friend of A. and that, according to her evidence, he was not told A. was leaving for America until after A. had gone on the Sunday. Mrs Bone's son was distressed at the news and Mrs Bone and he went to the airport, according to her evidence, to see A. off. There was no reason to disbelieve the evidence of Mrs Bone. I have already described Mrs G.'s evidence, which seems to imply that the children were predominantly in the care of the respondent and her mother, even during the years preceding their departure. On the other hand, I am entirely satisfied that Mrs P., at least, sincerely believed the evidence which she gave, and there was no real reason to disbelieve that evidence or that of the petitioner and his father. I am also of opinion that the respondent and her sister and mother set out to minimise the extent of the contact which the petitioner and his parents had with the children. I would add that the precautions taken to prevent the children knowing that they were going to America strongly suggest that the respondent knew that they would be in contact with the petitioner and feared that they would tell him. For the present purpose, it is sufficient to say that, in my opinion, it can safely be concluded that, at least during the two years before June 1994, the children saw the petitioner very often, that they spent a considerable amount of time in his company and that they stayed overnight at his parents' house on very many occasions. The petitioner therefore actually enjoyed very full access to the children during a substantial period before their departure for America.

The question then is whether, for the purposes of the Hague Convention, the petitioner had any rights of custody in respect of the children which were breached by their removal to America. Article 3 of the Hague Convention 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, inter alia, that for the purposes of the 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".

The Scottish law as to parental rights at the material time is found in s 2 of the Law Reform (Parent and Child) (Scotland) Act 1986, which provides:

"2. (1) Subject to sections 3 and 4 of this Act -- (a) a child's mother shall have parental rights whether or not she is or has been married to the child's father; (b) a child's father shall have parental rights only if he is married to the child's mother or was married to her at the time of the child's conception or subsequently . . ."

By virtue of s 8 of the Act, it is clear that parental rights include guardianship, custody and access.

In the circumstances of this case, there is no doubt that the petitioner was the father of the two children and married to their mother at the time of their conception and birth, or that he was actually exercising access to the children. The question therefore comes to be whether, in view of the order granting custody of the children to the respondent, the petitioner could be said to have any remaining or surviving right or rights which might be considered to fall within the description "rights of custody" for the purposes of the Hague Convention. I was referred to a number of authorities in which Scots judges have had to consider the rules of a foreign system in order to determine whether or not those rules conferred rights of custody, including Taylor v Ford, Seroka v Bellah and McKiver v McKiver. However, the fundamental problem in this case is to determine what the petitioner's rights under Scots law, if any, are and on this there is a dearth of helpful authority. There is old authority cited in Fraser, Parent and Child (3rd ed), p 80, which seems to indicate that at that time the father of a legitimate child was held to have an absolute right to custody of the child and that this included an absolute right to determine the child's place of residence. The cases cited include McIver v McIver, Moncreiff Petr, and Fenwick v Macmillan. Even those cases, however, were not concerned with any question of a right to remove a child from Scotland, the child having been habitually or normally resident there, and in view of the vast changes in the approach to the determination and exercise of custodial rights which have taken place since the last edition of Fraser was published, I do not think that they can be taken, without more consideration, as ruling the present question. Both Wilkinson and Norrie (Parent and Child, p 174) and Thomson (Family Law in Scotland (2nd ed), p 178) describe the concept of custody in Scots law as vague or undeveloped. In Clive, Husband and Wife (3rd ed), pp 198 et seq, much of the emphasis is on parental rights as a source of responsibilities and on the modern approach to the sharing of

those rights and responsibilities, and there is no discussion, so far as I am aware, of the precise question which arises in this case. I think that it is fair to say, also, that some differences of approach can be detected in the discussions of custody in these textbooks, but it is not an issue which was addressed in the argument before me and I do not therefore propose to explore it further.

In these circumstances, the only course is, I think, to try to go back to first principles and see what can be said as to the effect of an order for custody both in regard to the parent in whose favour it is made and in regard to the other parent. Even in this respect, there is no direct authority, apart from the old cases to which I have referred. The more recent cases do however give an indication of what has been assumed to be the law. It has certainly been assumed that the custodial parent is entitled to make major decisions about the care of the child, such as where and how the child is to be educated, and where the child is to live, within Scotland at least, without reference to the other parent (Clive, supra, p 198; Zamorski v Zamorska). There is, so far as I am aware, no authority to suggest that the custodial parent must, or even should, inform or consult the other parent before taking such decisions, in the absence of some special provision in the order granting custody. Again, in Robertson v Robertson it seems to have been assumed that the grant of an unqualified order for custody to one parent might allow that parent to remove the child from Scotland. On the other hand, it has long been accepted that an order for custody is provisional and always subject to review, as was recognised by the practice of reserving leave to apply in the same process until the child's 16th birthday (Sanderson v Sanderson, per Lord Skerrington at 1921 SC, pp 693-694; 1921 2 SLT, p 66). However, there are other persons who may apply to the court anent custody (see Wilkinson and Norrie, supra, p 202) so that, apart from the procedural speciality that the parent may not require to raise a new action, the parent's entitlement to apply to the court does not per se place him in a special or unique position. It seems to be clear that the development of the law has all been in the direction of recognising that parents continue to share responsibilities and rights in relation to their children after divorce and also in the direction of discouraging the making of unnecessary orders for custody or access. That, however, has not been translated into the recognition of positive rights in the non-custodial parent. It is, I accept, going a long way to hold that a custodial parent can remove a child from the jurisdiction of the Scottish courts without the consent of the non-custodial parent or the court. My impression also would be that, as a matter of practice, it has been usually thought advisable to apply to the court before taking a child abroad: but as counsel for the respondent pointed out, such advice might arise from a prudent wish to avoid any risk of being found in contempt of court, if the parent should ever have to return to Scotland.

Weighing these considerations as best I can, I have come to the conclusion that the non-custodial parent in the position of the petitioner in the present case does not have any rights which could be regarded as rights of custody within the meaning of the Hague Convention. The non-custodial parent does not have a right to determine the child's place of residence; nor does he have any right relating to the care of the person of the child. The non-custodial parent might be regarded as having a right to object to the removal of the child from Scotland, and certainly has a title to apply to the court to prevent such removal; but I do not think that a right or title of that character is enough to come up to the requirement of the Convention that there should be a right "of custody", which has been breached. In the circumstances of this case, the result is unfortunate, since the practical situation before the respondent went to America was, in many ways, the situation at which the modern law aims, that so far as possible the rights and responsibilities of both parents should continue, after a separation, without the burden of unnecessary interference by the court. The problem for the petitioner in the present case will be met by s 3 of the Children (Scotland) Act, but that

does not assist him in these proceedings. I have therefore come to the conclusion that I am obliged to uphold the first and third pleas in law for the respondent and dismiss the petition.

[http://www.incadat.com/] [http://www.hcch.net/] [top of page]
