CALIFORNIA Family Law Monthly

Noergaard v. Noergaard

Another Hague convention case. This one in state court. Embedded in this "undeniably complex" case is an enlightening and disturbing discussion of the trial court's fumble of ESI email evidence. Something strange went on in this Orange County trial court, which led to a reversal and remand.

We know that to combat the harmful effects of international child kidnapping, the Hague Convention requires the judicial or administrative authorities of a signatory nation to order a child be returned to his or her country of habitual residence, if the child has been wrongfully removed to or retained in the contracting state. Implementation of the Hague Convention in the United States is pursuant to the Child Abduction Remedies Act (ICARA; 22 U.S.C. § 9000 *et seq*.), which grants federal and state courts concurrent jurisdiction, and directs those courts to decide cases under the Hague Convention protocols.

In this case, father filed a Hague Convention petition seeking the minor child's return to Denmark. Mother asserted defenses that the child would be subjected to grave risk of physical harm if she was returned to Denmark and father's custody. The trial court denied mother's repeated requests for an Evidence Code section 730 psychological evaluation of the daughter, refused to admit evidence of father's physical abuse of mother and the minor child in Denmark, refused to permit mother to testify or to call witnesses, and conducted an *in camera* interview with the 11 year old child. Mother contended father had made death threats in a recent email. The parties disputed the authenticity of the email, but the trial court declined to hold an evidentiary hearing on the admissibility of the email, explaining that it doubted it would be able to determine its authenticity. The trial court reviewed both parties' declarations on the issue, and those of respected technology experts. The court did not permit the parties or their experts to testify, apparently concluding that the unheard testimony was beyond the court's expertise ("The court will not be able to make a finding" on the email). With respect to the ESI email, the trial court concluded simply that neither side could prove it was an original, or that it came from father, or that it wasn't an email that originated from father.

There is a teachable moment here. Last year, the State Bar Standing Committee on Professional Responsibilities and Conduct issued Formal Opinion No. 2015-193. The issue posed was: What are an attorney's ethical duties in the handling of discovery of electronically stored information? The Committee's conclusion was that electronic document creation and/or storage, and electronic communications, have become commonplace in modern life and discovery of ESI is now a frequent part of almost any litigated matter. Attorneys who handle litigation may not ignore the requirements and obligations of electronic discovery. Depending on the factual circumstances, a lack of technological knowledge in handling e-discovery may render an attorney ethically incompetent to handle certain litigation matters involving e-discovery,

absent curative assistance under rule 3-110 (C), even when the attorney may otherwise be highly experienced. It may also result in violations of the duty of confidentiality, notwithstanding a lack of bad faith conduct. It is true that ethics opinions from the State Bar Standing Committee are advisory only. Notwithstanding that fact, we have been warned and admonished as to our ethical and professional responsibilities. Based on what occurred in the *Noergaard* case, perhaps it is not impertinent to suggest that a similar ethics advisory be included for bench officers as part of the Standards of Judicial Administration of the California Rules of Court.

The Court of Appeal criticized the trial court's decision not to decide the issue of death threats. The appellate tribunal was also bothered by the trial court denying mother's repeated requests to testify, eliminating her right to cross-examine father, dispensing with his testimony, excluding any testimony from her extensive list of witnesses, excluding mother's voluminous exhibit binders with documentation to support her claims, admitting father's exhibits from two Danish court orders, *sua sponte* quashing mother's subpoena of an Orange County social worker by precluding any witness testimony whatsoever, holding in abeyance and effectively excluding a social worker's report that the court conceded "I have not read it and neither will you," and denying mother's request to be present or to review a transcript of the trial court's *in camera* interview with the minor child. Considered together, the Court of Appeal concluded the mother did not receive a fair or adequate hearing.

In its detailed opinion, the *Noergaard* court acknowledged that a trial court in a Hague proceeding has a substantial degree of discretion in determining the procedures necessary to resolve a petition, and further acknowledged that neither the Hague Convention, nor ICARA, nor the Due Process Clause of the Fifth Amendment of the U.S. Constitution, require that discovery be allowed or that an evidentiary hearing be conducted *as a matter of right* in cases arising under the Convention. It was also acknowledged that a plenary evidentiary hearing may not be required where circumstances warrant, and that the trial court may utilize "the most expeditious procedures available" in proceedings for the return of children. Here, however, the Court of Appeal concluded that due process required a reversal and remand so that the mother could have her day in court. The reversal was to ensure that the parties' triable issues were in fact determined on a full and fair presentation of the evidence. In its final observation, the court stated that in this case, with its international law dimension and fraught issues of a family torn apart across borders, that the factual and legal complexity, given that the parties were unable to resolve their differences, constituted all the more reason not to short-circuit the adjudicative process.

Thank goodness for a forthright and perceptive Court of Appeal in this case!

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