Court of Queen's Bench of Alberta

Citation: CCO v JJV, 2019 ABQB 461

2019 ABQB 461 (CanLII)

Date: 20190620
Docket: 4803 181886
Registry: Edmonton

Between:

C.C.O. also known as C.C.V.

Applicant

\- and -

J.J.V.

Respondent

Reasons for Decision
of the
Honourable Mr. Justice James T. Neilson

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[1] This application is brought by CCO, also known as CCV ("the mother"), pursuant to the Alberta *International Child Abduction Act*, RSA 2000, c I-4, which adopts as law in this province the provisions of the *Convention on the Civil Aspects of International Child Abduction* (the "*Hague Convention*"). The Respondent is JJV ("the father").

[2] The Applicant and Respondent are the parents of JRV, the only child between them ("the child"), who was born in January of 2011. The mother is an American citizen and resides in Norwood, Massachusetts, a municipality in the greater Boston region. The father is an American and Canadian citizen and currently resides just outside Edmonton, in Lancaster Park, Alberta. The child has dual American and Canadian citizenship.

Background to this Application

[3] The mother and the father were married on January 1, 2010 in the province of Quebec. Approximately two months before the child was born, the parties moved to Boston for the child's birth. The parties separated in April of 2011, with the mother and child residing in Boston and the father residing in Quebec.

[4] On December 15, 2017, the father filed a Statement of Claim for Divorce and an Amended Statement of Claim for Divorce in the Court of Queen's Bench of Alberta, Court File No. 4803 181886.

[5] On December 15, 2017, the Court issued a Without Notice Order for Service outside of Canada. An Affidavit of Personal Service of the Statement of Claim for Divorce on the mother at her address in Norwood, Massachusetts was filed with the Court on April 11, 2018. The mother was noted in default in the divorce proceeding on June 14, 2018 and a Request for Divorce (Without Oral Evidence) was requested by the father on that date.

[6] The original Statement of Claim had sought, among other things, shared custody for the child. However, the Amended Statement of Claim for Divorce sought sole custody for the Plaintiff.

[7] The divorce materials were reviewed by a Justice without oral evidence, based on the Affidavit in Support of the Request for Divorce. By Order granted on October 29, 2018 and filed on January 3, 2019, the Court ordered, among other things, that the father shall have sole custody of the child of the marriage with reasonable and generous access to the Defendant, as agreed between the parties.

[8] However, the Affidavit in Support which was sworn by the father and filed on June 14, 2018 stated, among other things, as follows: "There is one child of the marriage, as defined by the *Divorce Act*, namely [the child], born [January 2011], living with [JJV]".

[9] As I will note later in these Reasons, the child, in fact, resided with the mother in Norwood, Massachusetts since July 2017 and up until the date that the father removed him from Massachusetts, on or about January 8, 2019. Therefore, the Divorce Judgment Without Oral Evidence had been issued, providing for sole custody to the father, based on the misrepresentation as to the residence of the child at the time that the Affidavit in Support was sworn by the father.

[10] On January 7, 2019 the father travelled to Norwood, Massachusetts for the stated purpose of visiting with the child. The mother testified that he was to bring the child home at the end of the day on January 8, 2019. The father contacted the mother on January 9, 2019 to inform her that he had taken the child with him back to Edmonton, and that he had the Divorce Judgment issued by the Court in Alberta which provided that he had sole custody of the child.

[11] The mother promptly contacted the *Hague Convention* authorities in Massachusetts and these proceedings were commenced by Originating Application filed on February 6, 2019 in the Court of Queen's Bench of Alberta, Judicial District of Edmonton.

[12] On February 5, 2019, Justice Ross, the Justice appointed to be case manager for these proceedings, granted an *ex parte* Order which provided, among other things, that clause 2 of the Divorce Judgment and Corollary Relief Order (Without Oral Evidence) granted on October 29, 2018 and filed on January 3, 2019, that the father shall have sole custody of the child, shall be

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vacated on an interim basis pending the determination of the mother's *Hague Convention* application, and the parties shall have joint custody of the child on an interim without prejudice basis.

[13] This application proceeded and the mother and father gave oral evidence before me in Edmonton, on May 16 and 17 and June 4, 2019, supported by some documentary exhibit evidence.

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Jurisdiction to hear the *Hague Convention* Application

[14] The Court is satisfied that it has jurisdiction to hear this *Hague Convention* application. Before the Court is an application with all necessary information for its decision. The *Convention* is enacted in the Province of Alberta and is in force between the requesting state, the United States of America, and Canada at the time of the removal of the child. Also, the child is under the age of 16.

[15] The Court having established its jurisdiction to hear this application, it must decide whether the child was habitually resident in Massachusetts at the time of the removal of the child, and whether there was a breach of the rights of custody being exercised by the mother at the time of the removal. Article 3 of the *Hague Convention* provides as follows:

> *Article 3*
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> 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.

[16] The *Hague Convention* does not define the phrase "habitually resident". However, the Supreme Court of Canada in the case of ***Office of the Children's Lawyer v Balev***, 2018 SCC 16, described a "hybrid approach" to habitual residence. Under this approach:

> ...the application judge determines the focal point of the child's life – "the family and social environment in which its life has developed" – immediately prior to the removal or retention... The judge considers all relevant links and circumstances – the child's links to and circumstances in country A; the circumstances of the child's move from country A to country B; and the child's links to and circumstances in country B. (para 43)

[17] The Court went on to state in para 44 that these considerations include:

> ..."the duration, regularity, conditions and reasons for the [child's] stay in the territory of [a] Member State" and the child's nationality... No single factor dominates the analysis; rather, the application judge should consider the entirety of the circumstances...

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Habitual Residence of the Child

[18] Since the child's birth, he has resided with the mother, principally in the state of Massachusetts. Over the years, there has been generous access exercised by the father and the father's mother, whereby, in certain years, the child spent several weeks visiting in Canada with his father and grandmother.

[19] However, the child has lived with the mother solely since July 2017 except for one week in July 2018 when the child was visiting his grandmother.

[20] Although the mother was investigated by the Department of Children and Families ("DCF"), Commonwealth of Massachusetts, as the result of an allegation of possible parental abuse, the DCF social worker who has been working with the mother, provided correspondence dated March 1, 2019 and March 18, 2019, stating that she has been working with the mother and child since September 2, 2018. During the incidents giving rise to complaints made in February of 2017 and March of 2018, the child was never removed from the mother's care. In her letter of March 18, 2019, the social worker states in part as follows:

> Mother has been compliant with working with the department and makes the family available monthly for home visits. Mother is addressing the concerns of why the department became involved with no further concerns at this time. If/when [the child] does return to mother's care, the department has no protective or safety concerns. During monthly home visits, [the child] is well taken care of and mother is able to meet his needs. [The child] is seen visibly in the community as he attends school daily and on time. The family also utilizes other family supports when needed.

[21] The DCF has never taken custody of the child away from the mother.

[22] Considering the entirety of the circumstances, I find that the child was habitually resident with his mother in Massachusetts at the time of his removal by the father on or about January 8, 2019.

Exercise by the Applicant of Custody Rights

[23] Furthermore, the Court must consider whether the removal of the child was in breach of the rights of custody attributed to the mother, and that her custody rights were being exercised at the time of the removal. Article 14 of the *Hague Convention* provides in part as follows:

> In ascertaining whether there has been a removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested state may take notice directly of the law of...the state of the habitual residence of the child, without recourse to the specific procedures for the proof of that law...

[24] Counsel for the Applicant cited the *General Laws of Massachusetts*, Ch. 208 section 31 regarding custody of children, which provides that "...until a judgment on the merits is rendered, absent emergency conditions, abuse or neglect, the parents shall have temporary shared legal custody of any minor of the marriage." The mother, therefore, had lawful custody of the child.

[25] I find that the removal of the child was in breach of the mother's rights of custody under the law of Massachusetts, which rights were being exercised by the mother at the time of the removal. The child was wrongfully removed under Article 3.

Exceptions Under Article 13

[26] In this case, at the date of the commencement of proceedings in this Court, a period of less than one year has elapsed from the date of the wrongful removal of the child. Pursuant to Article 12, the authority concerned shall order the return of the child forthwith, subject of Article 13 which provides as follows:

> *Article 13*
>
> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that --
>
> *a* the person, institution or other body having the care of the person of 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 judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
>
> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Consent or Acquiescence in the Removal

[27] As I have ruled, the mother was exercising her custody rights at the time of removal. The evidence is that she had not consented to nor subsequently acquiesced in the removal of the child.

[28] Indeed, the mother moved promptly to commence proceedings in this jurisdiction for the return of the child.

Grave Risk of Harm

[29] The Court is left to consider the remaining issue under Article 13 which has been raised by the Respondent, whether there is a grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

[30] Evidence was led before me on this subject, the onus being on the father to prove the exception.

[31] The leading case on the "grave risk" exception is the Supreme Court of Canada decision of ***Thomson v Thomson***, [1994] 3 SCR 551. The Court stated as follows at paragraph 28:

> It has been generally accepted that the Convention mandates a more stringent test than that advanced by the Appellant. In brief, although the word "grave" modifies

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> "risk" and not "harm", this must be read in conjunction with the clause "or otherwise place the child in an intolerable situation". The use of the word "otherwise" points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of Article 13(b) is harm to a degree that also amounts to an intolerable situation....In *Re A (A Minor) Abduction*, Nourse L.J., in my view correctly, expressed the approach that should be taken, at page 372:
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>> ...the risk has to be more than an ordinary risk, or something greater than would normally be expected on taking a child away from one parent and passing him to another. I agree...that not only must the risk be a weighty one, but that it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words "or otherwise place the child in an intolerable situation".

[32] In short, there is a stringent test to be applied to the "grave risk" exception. The risk must be weighty and not trivial.

[33] Much of the evidence led by the Respondent was an attack on the character of the Applicant, putting into question her fitness to parent the child. The Respondent cited the Applicant's frequent relocation of residence in the past. Her former fiancé has a criminal record. Newspaper reports were cited of crimes committed in Norwood, including a crime in the neighbourhood of the Applicant's residence. The Applicant herself has a record of several motor vehicle violations. There were allegations of past drug use. The Applicant denies current drug use. She has no record of drug related convictions. She has a conviction for an impaired driving charge which is now subject to conditions that she is to follow programs and abstention which will entitle her to reinstatement of her operator's license in a year's time.

[34] The Applicant now resides in permanent housing, providing a stable family environment.

[35] Much of the evidence that was lead, including text messages which were selectively presented, going back to as early as 2012, was not particularly helpful for the Court in deciding the child's circumstances up to the date that he was removed from Massachusetts. As cited previously in these reasons, the Department of Children and Families, Commonwealth of Massachusetts, has no concerns at this time. During monthly home visits, the child was well taken care of and the Applicant was able to meet his needs. For example, there is in evidence a report by a DCF staff person dated March 22, 2018. Her Assessment of Existing Safety states: "Mother has been able to meet the basic needs of the children [including the child] by providing them with food, shelter, clothing, medical and education care. Mother has demonstrated a close bond with her children."

[36] The child is seen visibly in the community and attends the neighbourhood school. There is in evidence the child's attendance records and report cards. He was performing satisfactorily as a grade 2 student before the removal. There is in evidence correspondence from the Principal of the school dated February 1, 2019, who states: "[The child] was a full time student here at the [school], Norwood, MA. [The child] was enrolled here from December 8, 2017 to January 10, 2019. [The child] had a great attendance record and was a fabulous addition to our student body."

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[37] Newspaper articles placed into evidence by the Respondent concerning crimes committed in Norwood do not establish that the child, himself, is in grave physical danger. Crimes are committed in every community, and in Norwood the laws are enforced by the local police department.

[38] On the evidence before me, I find that the Respondent has not established that there is a grave risk that the child's return would expose the child to physical or psychological harm, or otherwise place the child in an intolerable situation. Under the stringent test established by the Supreme Court of Canada in ***Thompson***, *supra*, a grave risk of harm has not been proven.

[39] Lastly, I find that the child, age 8, has not yet attained an age and degree of maturity at which it would be appropriate for this Court to take into account the views of the child.

[40] Accordingly, an exception to the provisions of Article 3 under Article 13 has not been made out. The child has been removed wrongfully from Massachusetts to Alberta. The application by the mother under the *Hague Convention* is allowed.

[41] Under the *Hague Convention*, this court is charged with jurisdiction over return of a child who has been removed from the custody of a parent in the place where he habitually resides. I order that the child, JRV, be returned to the Applicant in Norwood, Massachusetts. The Alberta Central Authority is to liaise with the Massachusetts authority in order to effect the return, in accordance with this order and the provisions of the *Hague Convention*.

[42] I emphasize that this Court is not making a determination as to custody rights which would involve an analysis of the best interests of the child. Any determination as to future custody of the child upon his return to Massachusetts must be made before the Massachusetts court of competent jurisdiction.

Costs

[43] I award costs of this application and hearing to the Applicant under Column 1 of Schedule C under the Alberta Rules of Court, together with reasonable disbursements. The Respondent is responsible for the travel and accommodation expenses which were incurred in order for the Applicant to appear in Edmonton, Alberta for the hearing of this application.

Heard on the 16th and 17th days of May, and the 4th day of June, 2019.
Dated at the City of Edmonton, Alberta this 20th day of June, 2019.

James T. Neilson
J.C.Q.B.A.

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Appearances:

Goli L. Yohannes
Legal Aid Alberta Family Office
for the Applicant

Anita Allen-Lloyd
Alberta Law Group
for the Respondent

Denise Burke Harwardt
Social Enhancement Legal Team
for Justice and Solicitor General

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