In the Court of Appeal of Alberta

Citation: RVW v CLW, 2019 ABCA 273

Date: 20190709
Docket: 1901-0096-AC
Registry: Calgary

Between:

R.V.W.

Respondent
(Applicant)

- and -

C.L.W.

Appellant
(Respondent)

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice Kevin Feehan

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice A. Woolley
Dated the 7th day of March, 2019
Filed on the 5th day of April, 2019
(2019 ABQB 175, Docket: FL01 28628)

Memorandum of Judgment

The Court:

[1] The appellant mother appeals an order requiring the return of a child to Texas, in accordance with the *Convention on the Civil Aspects of International Child Abduction*, adopted by the *International Child Abduction Act*, RSA 2000, c. I-4 (the "*Hague Convention*"): ***R.V.W. v C.L.W.***, 2019 ABQB 175.

Facts

[2] The parties commenced cohabitating in Calgary in about 2015. The father, an American citizen, had overstayed his visitor's visa. The parties married in January 2017 and took other unsuccessful steps to allow him to remain in Canada. The father was denied permission to stay, and he returned to the United States in February 2017. The mother, a Canadian citizen, followed him to Texas, where their child was born in September, 2017.

[3] The respondent was denied permission to remain in Canada at least in part because of his criminal record. In 2014, prior to the cohabitation of the parties, the respondent was convicted of a domestic assault of a prior partner. In December 2016, during the cohabitation but prior to the marriage, he was convicted of failing to provide a breath sample.

[4] The marriage was very dysfunctional. The chambers judge outlined at para. 4 a number of incidents involving physical and verbal conflicts between them. There was no evidence of direct aggression against the child. The parties separated in December 2017, but reconciled for about two weeks in January 2018. The father denied the mother any contact with the child for about 3½ weeks because of concerns she would leave the United States with the child.

[5] Both of the parties commenced matrimonial proceedings in Texas before the mother left Texas with the child. The father issued a Petition for Divorce in the District Court in Harris County in December, 2017. It proposed that both of the parents be appointed as "joint managing conservators" of the child, with the father to have the right to determine primary residence. It alleged a risk that the mother would relocate with the child to Canada, and asked for relief to prevent abduction. The mother issued a Petition for related relief on December 29, 2017. It too proposed that the parents be appointed as "joint managing conservators", but the mother was to have the right to determine primary residence. No mention was made of relocating to Canada. The mother was denied a restraining order.

[6] In mid-January 2018, the mother returned to Calgary with the four-month old child, without the father's consent.

[7] The chambers judge found that the child was habitually resident in Texas under Article 4 of the *Convention*, applying the hybrid, non-technical test in ***Office of the Children's Lawyer v Balev***, 2018 SCC 16, [2018] 1 SCR 398. His removal was in breach of the father's rights under the law of Texas and so was wrongful.

[8] The chambers judge held that the mother had not demonstrated that the child would be exposed to a grave risk of harm, so as to invoke the exception in Article 13(b) of the *Convention*:

> (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 mother raised three concerns; the respondent's alcohol abuse and the risk it could pose to the child, his physical abuse of his former domestic partner, and his withholding of the child from his mother for three weeks. The chambers judge found these concerns were not baseless. She expressed reservations about the respondent's suitability as a parent and about whether being with the respondent was in the child's best interests. However, the chambers judge concluded:

> 16 Nonetheless, this evidence is not sufficient to meet the very high standard imposed by Article 13(b). RVW and CLW had a high conflict and dysfunctional relationship. Both parties were physically aggressive and conflictual with each other as their relationship broke down. But even taken at face value, the evidence of CLW does not suggest a pattern of abuse or violence by RVW against her. The evidence of RVW's drinking is not clear or unambiguous, and does not support a finding of alcohol abuse or alcoholism. Further, and more importantly, it does not suggest any issues that cannot be addressed by the Texas courts and law enforcement.

The chambers judge recognized that parenting was the issue to be decided by the courts of Texas.

[9] The chambers judge at para. 19 rejected the argument that requiring the mother to return to Texas would create an "intolerable situation", because she had no ability to work there, and no means of support:

> . . . In my view treating intolerability as an independent ground related to the difficulty for the removing parent returning to the child's habitual residence would undercut the exceptional nature of Article 13(b).

While the circumstance of the mother were relevant, the analysis of an "intolerable situation" must consider the direct or indirect impact on the child. She found that the record did not support a finding that the mother's situation in Texas would be "intolerable".

[10] The chambers judge concluded there was no basis for displacing the presumption that the child's parenting should be determined by the courts of Texas. The child was ordered returned.

Issues and Standard of Review

[11] The appellant raises two issues on appeal: (a) whether the child was "habitually resident" in Texas, and (b) whether the record discloses a "grave risk of harm".

[12] The proper interpretation of the *Hague Convention* is a question of law reviewed for correctness. The place of "habitual residence" of the child, and the existence of a "grave risk of harm" are mixed questions of fact and law which are reviewed on appeal for palpable and overriding error: ***Balev*** at paras. 32, 38; ***A.S. v A.W.***, 2013 ABCA 133 at para. 18, 544 AR 246, 84 Alta LR (5th) 62; ***Kong v Song***, 2019 BCCA 84 at paras. 49-50, 21 BCLR (6th) 284.

Habitual Residence

[13] The appellant argues the child was too young to form any connection with Texas, and that the chambers judge erred in finding the child was habitually resident there. The *Convention* does not contemplate a child with no habitual residence. The child was born in Texas and had never lived anywhere else. Prior to his abduction he had never been to Canada. An infant of his age could not be expected to have any greater involvement in Texan society than to live there with his parents: ***Sampley v Sampley***, 2015 BCCA 113 at para. 17, 69 BCLR (5th) 286. The father could only lawfully reside in Texas, and the mother's decision to follow him there displayed a sufficient intent to make Texas the family residence for the indefinite future. The chambers judge was entitled to conclude that any indefinite long-term parental plans to relocate to Canada were not sufficient to displace the child's present habitual residence in Texas.

[14] The mother's argument would make the *Hague Convention* effectively inapplicable to very young children. That cannot have been the intention. The appellant has not shown any reviewable error on this finding.

The Exception for Risk of Harm

[15] The *Hague Convention* requires that the child be returned to the jurisdiction of his habitual residence, subject to a few narrow exceptions. One exception is if "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": Article 13(b).

[16] The Supreme Court discussed the interpretation of Article 13(b) in ***Thomson v Thomson***, [1994] 3 SCR 551 at pp. 596-7 [emphasis in original]:

> 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 "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. Examples of cases that have come to this conclusion are: [authorities omitted]. *In Re A. (A Minor) (Abduction),* [[1988] 1 F.L.R. 365 (CA)] Nourse L.J., in my view correctly, expressed the approach that should be taken, at p. 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'.

The courts of other contracting states have not all adopted this conjunctive interpretation of Article 13(b). Some jurisdictions recognize three distinct grounds for invoking the Article, (see para. 17, *infra*), although all the courts agree that the phrase "physical or psychological harm" is coloured or influenced by the phrase "intolerable situation": ***E. (Children), Re*** [2011] UKSC 27 at paras. 30-1, 34, [2012] 1 AC 144; ***D.P. v Commonwealth Central Authority***, [2001] HCA 39 at paras. 9, 43-5, 206 CLR 401; ***Director-General of Family and Community Services v Davis*** (1990), 14 Fam LR 381(Fam Ct Aust (Full Ct)); ***Gsponer v Johnstone***, [1988] 12 Fam LR 755 (Fm Ct of Australia); ***Walsh v Walsh***, 221 F 3d 204 at p. 217 (1st Cir. 2000), leave to appeal to the US Supreme Court denied 221 F 3(d) 204; ***T.L.M.P., Re Orders Under The Child Abduction and Custody Act 1985***, [2013] ScotCS CSOH 40; ***L.P.Q. v L.Y.W.***, [2014] HKCFI 2324; ***Abbott v Abbott*** (2010), 560 US 1 at p. 22: ***Pliego v Hayes***, 843 F 3d 226 (USCA 6th Cir. 2016).

[17] The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, held in October 2017, developed a *Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention*. The *Draft Guide* is designed to promote good practices and consistency in interpretation, but it has not been adopted by the Contracting States. It confirms that most courts have held that the level of risk required to trigger the Article 13(1)(b) exception is high, in line with recommendations of past Special Commissions. The *Draft Guide* noted:

> 59 Article 13(1)(b) contains the following three different categories of risk:

- a grave risk that the return would expose the child to physical harm;
- a grave risk that the return would expose the child to psychological harm; or
- a grave risk that the return would otherwise place the child in an intolerable situation.

While the three risks are inter-linked by the term "otherwise", the *Draft Guide* indicates at para. 62 that each category can be raised independently, in its own right, to justify an exception to the duty to secure the prompt return of the child. The *Draft Guide* recommends at para. 18 that: "All Contracting States are encouraged to review their own practices in the application of Article 13(1)(b) and, where appropriate and feasible, to improve them."

[18] The reasoning of the chambers judge is consistent with the interpretation of Article 13(b) in ***Thomson***, but she also held at para. 20 that the outcome would be the same if "intolerable situation" was treated as an independent ground. The chambers judge concluded that returning the child to Texas would not create a grave risk of exposure to physical or psychological harm, or otherwise place the child in an intolerable situation within Article 13 of the *Convention*. The marriage was clearly dysfunctional, but there was never any aggression directed at the child. The courts of Texas could and should make the appropriate parenting orders. The mother, as the parent who wrongfully removed the child, had to demonstrate a significant risk of harm or an intolerable situation, so as not to undermine the objectives of the *Hague Convention*. These findings were available to the chambers judge on the record.

[19] The philosophy behind the *Hague Convention* is that a parent cannot unilaterally take a child and go forum shopping: ***Balev*** at para. 26. Parenting is to be decided by the court of habitual residence, here the court of Texas. The exception for "grave risk" must not be turned into an assessment of the "parenting arrangement that is in the best interests of the child". As observed in ***Thomson*** at p. 578, the primacy in family law of best interests of the children ". . . should not be interpreted as giving a court seized with the issue of whether a child should be returned to the jurisdiction to consider the best interests of the child in the manner the court would do at a custody hearing". The issue is not directly what is in the best interests of the child, but the jurisdiction or court in which that decision should be made: ***Balev*** at paras. 24, 34; ***E (Children), Re*** at para. 13. Parenting issues are left to the court of habitual residence, which must decide on primary residence, protection orders, spousal support, and related issues: ***Sampley*** at para. 41; ***Cannock v Fleguel***, 2008 ONCA 758 at paras. 29-31, 65 RFL (6th) 39.

[20] The welfare of children, especially infants, is often tied up with the welfare of their parents. Thus, "intolerable" circumstances faced by the parent who wrongfully removed the child, might well be a factor in determining if there is a "grave risk that return would expose the child to physical or psychological harm amounting to an intolerable situation": ***Sampley*** at paras. 32-6;

E. (Children), Re at para. 52; ***Pollastro v Pollastro*** (1999), 43 OR (3d) 485, 171 DLR (4th) 32 (CA); ***H.E. v M.M.***, 2015 ONCA 813 at paras. 124-5, 70 RFL (7th) 350, leave to appeal refused [2016] 1 SCR xiii. The *Hague Convention*, however, does not recognize a discrete exception for "intolerable" circumstances of the parent who wrongfully removed the child, such as immigration problems, or the inability to support himself or herself in the original jurisdiction. While courts have been reluctant to consider assertions of grave risk to the child resulting from separation because of the inability of the parent who wrongfully removed the child to return to the requesting state, courts have proposed mitigating measures to limit or eliminate the likelihood of this transpiring. Where the parent who wrongfully removed the child is not allowed to return to the requesting state, the court may consider the assertion of "intolerable circumstances" resulting from a separation of the child from that parent: ***Sampley*** at para. 48.

[21] Nevertheless, the conclusion of the chambers judge that the child would not be exposed to "grave risk" if returned to Texas was available on this record, and does not disclose reviewable error. Both parents had invoked the jurisdiction of the District Court in Harris County. If the mother wished to return to Canada, she should have awaited the ruling of that court on the issue.

Conclusion

[22] In summary, the appellant has not demonstrated any reviewable error in the decision under appeal, and the appeal is dismissed. Issues respecting parenting and support should be dealt with by the courts of Texas. The mother must return the child to Texas.

[23] The appellant's immigration status is unclear. This litigation has proceeded on the assumption that the appellant will return to Texas with the child. If the appellant is denied entry to the United States, the parties will have to return to the trial court for further directions, and the Central Authority should be kept informed.

[24] Reasonable arrangements must be made for the return of the child to Texas, in order to protect his best interests. The following conditions are imposed:

(a) in accordance with his agreement, the respondent must pay the sum of US $1,500 to the appellant be used by her to cover expenses related to the return of the mother and the child to Texas;

(b) the respondent must provide a written undertaking that:

(i) he will allow the child to reside with the mother until the court in Texas is able to rule on the issue of his primary residence;

(ii) he will pay the mother support of US $2,500 per month, commencing on August 1, 2019, unless and until the Texas court directs otherwise.

(c) The mother must return the child to Texas within 15 days of the respondent paying the US $1,500 to the appellant and filing the undertaking with the trial court.

Any issue with respect to the wording of the undertaking can be resolved by any member of the panel of this Court. The American attorney representing the respondent advises that hearings for temporary orders can be arranged expeditiously in Texas, perhaps within a few days of the return of the child. The appellant will, of course, require a reasonable amount of time to retain and instruct counsel, and prepare for that hearing. This Court, however, assumes that all parties will act reasonably in scheduling the necessary hearings without delay.

Appeal heard on June 10, 2019. Written submissions filed on July 3, 2019.

Memorandum filed at Calgary, Alberta
this 9th day of July, 2019

Paperny J.A.

Authorized to sign for: Slatter J.A.

Authorized to sign for: Feehan J.

Appearances:

D. Gee/C.B. Erickson
for the Respondent

D.F. Gordon
for the Appellant