In the Court of Appeal of Alberta

Citation: DY v KY, 2022 ABCA 90

Date: 20220315
Docket: 2101-0188AC
Registry: Calgary

Between:

DY

Appellant

- and -

KY

Respondent

The Court:

The Honourable Justice Peter Martin
The Honourable Justice Patricia Rowbotham
The Honourable Justice Anne Kirker

Memorandum of Judgment

Appeal from the Decision of
The Honourable Justice A.D. Grosse
Dated the 17th day of June, 2021
Filed on the 6th day of July, 2021
(Docket: FL01-34345)

Memorandum of Judgment

The Court:

[1] The appellant father appeals a chambers judge's decision refusing to order the return of his child to their habitual residence in Connecticut pursuant to the *Convention on the Civil Aspects of International Child Abduction* adopted by the *International Child Abduction Act*, RSA 2000, c I-4 (*Convention*). The child currently resides in Calgary with the respondent grandmother. The chambers judge found that the child had been wrongfully retained in Alberta and that there were factors favouring the appellant's application. However, the child objected to being returned. After considering all the factors, including the objection, the chambers judge declined to order the return of the child to Connecticut.

[2] Article 13 of the *Convention* provides, in part: "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."

[3] The main issue on appeal is the interpretation and application of Article 13. The appellant also contends that the *Convention* does not recognize the respondent's status to retain the child as she is not a parent.

[4] For the reasons that follow, we dismiss the appeal.

Background

[5] The child was born in the United States and is currently 13 years of age. The appellant has been the child's primary caregiver in Connecticut since approximately 2010. He has sole custody of the child. The child's mother has not had any meaningful contact with the child since 2011 and is not a party to these proceedings.

[6] The respondent is the child's step-grandmother. She was married to the appellant's father until his passing in 2014. She remarried, and in and around 2017 she moved to Calgary to be with her husband. The child and the respondent are close and by all accounts enjoy a grandmother/grandchild relationship. Before moving to Calgary, the respondent was a caregiver for the child, and later in 2017 to 2019, the child spent summer holidays in Calgary with the respondent.

[7] In February 2020, the appellant was struggling financially and had no place to live. As a result, the appellant and the child stayed with friends, and at times slept in separate homes. The appellant found himself unable to care for the child and it was that precarious situation that

prompted the child to contact the respondent and ask if she could stay with her in Calgary. As described by the chambers judge:

> The child and her father had lost their home, there was at least what she perceived to be a significant incident of abuse by her father, she and her father were living separately with different friends, and then her father placed her in a home - without warning her - where she was exposed to domestic conflict that made her uncomfortable. She recognized that she was in a difficult situation and she called her grandmother…[the child] was left to identify and raise her own challenge in her own existing living situation.

[8] On February 22, 2020, on the understanding that this would be a temporary move perhaps until the end of the 2020 school year, the appellant executed a permission letter authorizing the child to fly to Calgary to live with the respondent.

[9] On February 25, 2020, the respondent brought an *ex parte* application in the Provincial Court of Alberta for guardianship of the child and on March 6, 2020, the respondent obtained an Interim Guardianship Order. The order was reviewed and confirmed on June 4, 2020. The order permitted the respondent to enroll the child in school and apply for health coverage. There is a dispute about whether the appellant was advised of these Provincial Court appearances. He was not present at either the March 6 or June 4 appearances. Both the March 6 and June 4 orders dispensed with the consent of the appellant.

[10] By July 29, 2020, the dispute had crystallized: the respondent sought permanent guardianship of the child and the appellant opposed. Counsel was appointed for the child and a trial date was set.

[11] On December 8, 2020, a trial on the merits of jurisdiction, guardianship, and parenting took place in Provincial Court. The court reserved its decision. On December 9, 2020, the appellant's *Convention* application seeking return of the child to Connecticut arrived in Alberta. The Provincial Court is holding its decision in abeyance pending the outcome of the *Convention* proceedings.

Decision of the Chambers Judge

[12] Although the chambers judge had concerns that the respondent engaged in "repudiatory retention" as early as March or April 2020 because the respondent was not transparent with the appellant about her intention to retain the child in Alberta, she accepted the parties' agreed date of retention: July 29, 2020. The chambers judge found that on July 29, 2020, the child's habitual residence was in Connecticut under Article 3 of the *Convention*. The child's retention in Alberta was in breach of the appellant's custody rights under the laws of Connecticut and so was wrongful.

[13] The chambers judge then considered exceptions set out in Article 13. The chambers judge declined to invoke the Article 13(b) exception regarding "grave risk of harm". While there was

concerning evidence about possible physical and verbal abuse by the appellant towards the child, many of the allegations made by the respondent against the appellant were not borne out by the conflicting evidence. Further, the chambers judge was satisfied that there were sufficient institutional protections in Connecticut to protect the child if she was returned.

[14] The chambers judge then turned to the child objection exception under Article 13. The chambers judge had the benefit of a Practice Note 7 Voice of the Child Report and the child was represented by counsel.

[15] The chambers judge first addressed whether the child had attained an age and degree of maturity at which it is appropriate to take account of her views. At the time of the retention, the child was nearly 12 years old, considered to be at the low end of the range in which the child's age and maturity meets the test. Nevertheless, the chambers judge concluded that the evidence, including the expert report, and representations from counsel for the child led "to the inescapable conclusion that [the child] has attained an age and degree of maturity at which it is appropriate to take her views into account." Regarding the objection, the chambers judge held: "I am also satisfied that [the child] objects to being returned ... She has been consistently clear that she does not want to return to live in Connecticut and that she wants to remain in Alberta."

[16] The chambers judge then balanced the factors that favoured ordering the child's return to Connecticut with those that favoured the child's retention in Alberta. The factors that favoured ordering her return included:

- The appellant's living situation had improved;
- The child was young enough that "we would not assume she necessarily can think through all the long-term consequences of moving permanently" and she may be influenced heavily by her father's past lifestyle;
- The appellant raised concerns about undue influence;
- The respondent's conduct in the course of litigation was troubling;
- The child had not seen her father for a long time and wanted to visit her father and friends in Connecticut;
- The respondent had no legal entitlement to the child by the laws of Connecticut;
- The purpose of the *Convention* is to discourage parties from "taking the law into their own hands" and obtaining benefits, and declining to order a return provides the respondent a benefit; and
- It is good policy to encourage parents to seek help without fear that they will be left fighting for custody in a foreign court.

The factors that went against ordering the return to Connecticut included:

- The child's concerns about physical abuse, verbal abuse, instability, and volatility from her father;
- The risk that the child would return to Connecticut only to stay with friends or be placed in the custody of the state;
- The child's maturity and independence given that she had been required to live apart from her father on more than one occasion and she had adapted to different living situations;
- The child's maturity, selflessness, and concern for her father, despite that they had stopped speaking; and
- The child's initiative at a young age to take responsibility and address her difficult living situation and her own well-being by reaching out to the respondent for help, as the adults in her life had failed to do so.

Weighing all the factors and circumstances in consideration of the *Convention*'s purpose, the chambers judge concluded "the balance weighs in favour of exercising my discretion not to return [the child] to Connecticut over her objection."

[17] Accordingly, the appellant's application for return of his child was dismissed.

Grounds of Appeal and Standard of Review

[18] The appellant father submits that the chambers judge: (1) placed undue weight on the child's objection; (2) failed to consider the respondent's conduct throughout these proceedings; and (3) failed to consider that the retaining party held no "legal status" towards the child.

[19] The proper interpretation of the *Convention* is a question of law reviewed for correctness: *CCO v JJV*, 2019 ABCA 356 at para 11. Deference is owed to a judge's exercise of discretion under the child objection exception, absent an error in law or principle or an unreasonable decision: *RM v JS*, 2013 ABCA 441 at paras 35-36.

Analysis

The Child's Objection

[20] The author of the Practice Note 7 Report concluded: "[The child] has expressed a clear preference to remain in Canada with her grandmother. She appears to understand that the decision regarding her future residence is not hers to make and as such, while she has not objected outright

to being returned to her father, she has expressed that this outcome would leave her feeling ‘sad’ and ‘worried’.”

[21] The appellant submits that the chambers judge erred in placing undue weight on the child’s objection, having regard to the nature and strength of this objection, such that it did not rise to the level required by the *Convention*. He contends that the child’s view is a custody preference and not a true objection to return to the jurisdiction.

[22] In *Office of the Children’s Lawyer v Balev*, 2018 SCC 16 at para 81, the Supreme Court summarized the test for the objection exception:

> If the elements of (1) age and maturity and (2) objection are established, the application judge has a discretion as to whether to order the child returned, having regard to the “nature and strength of the child’s objections, the extent to which they are ‘authentically her own’ or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations” (citations omitted).

[23] The court directed trial judges to assess children’s objections in a straight-forward fashion without the imposition of formal conditions or requirements: *Balev* at para 80.

[24] In *Wilson v Challis*, [1992] OJ No 563 (ONCJ), 1992 CanLII 6301 (ON CJ) at paras 12 and 24, the court found that in order to apply the objection exception, the child’s wishes had to be more than a mere preference and go beyond the usual ascertainment of a child’s wishes in a custody dispute.

[25] The chambers judge recognized this distinction and noted that her role was to consider whether the child was merely stating a preference or actually objecting. After considering *Wilson*, she said:

> In keeping with the underlying premise of the Hague Convention, and the fact that non-return is an exception, I agree that the Court should consider whether the child is merely stating a preference or is actually objecting. That said, it would be inconsistent with the fact-based, common sense approach confirmed in *Balev* to require a child to use some particular words or to apply a rigid test.

[26] The chambers judge correctly recognized that there is no requirement that a child use specific words to express an objection. There is no reviewable error in her determination that the child objected to returning to Connecticut.

[27] The balance of the appellant’s argument is about the weight to be given to the child’s objection. The weight that ought to be granted to the objections and wishes of a child depends on the circumstances. It is an important factor but should not be the controlling factor: *RM* at para 36.

[28] The consideration of this factor was described by the House of Lords in *Re M,* [2007] UKHL 55, [2008] 1 All ER 115 (Eng HL) at para 46:

> Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are "authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances.

[29] Although the child's objections are not controlling, they are "an important factor, to be considered amongst others, including the importance of ensuring the children are not wrongfully removed from their home jurisdictions or wrongfully retained elsewhere": *Beatty v Schatz*, 2009 BCCA 310 at para 20.

[30] In keeping with the jurisprudence, the chambers judge considered a wide range of factors and circumstances in exercising her discretion, including the child's maturity, the child's age, the possibility of influence on the child's objection, concerns about harm, the child's prospects in Connecticut, the child's reasons for objection, the circumstances leading up to the child being in Canada, the purpose of the *Convention*, concerns about encouraging bad conduct, and concerns about discouraging parents from seeking assistance. The chambers judge's thorough consideration does not indicate that she treated the child's objections as the "controlling" factor or neglected other important considerations.

[31] The chambers judge recognized the objects set out in Article 1 of the *Convention*: to secure the prompt return of children and to ensure that the rights of custody under laws of contracting states are respected in the other states: see *Thomson v Thomson*, [1994] 3 SCR 551, 1994 CanLII 26 (SCC); *Beatty* at para 20.

[32] We find no reviewable error in the chambers judge's determination. The chambers judge meticulously considered all the factors which favoured the return and went against the return. We dismiss this ground of appeal.

Failure to Consider the Respondent's Conduct

[33] The chambers judge made several findings regarding the respondent's conduct throughout the proceedings. The respondent had not been transparent with the appellant as to her intention to keep the child in Alberta. She involved the child in the proceedings, disclosing to the child her "history" with the appellant. She gathered evidence against the appellant by asking the child to contact a witness. She went out of her way to denigrate the appellant on matters that were of little relevance to the application.

[34] The appellant submits that the respondent engaged in precisely the conduct that the *Convention* seeks to deter but gained the outcome she sought. The appellant contends that the chambers judge failed to take the respondent's conduct into account when considering the child's objection. He submits that the chambers judge failed to recognize the potential that the child's views were influenced by the respondent's actions. Moreover, it was evident that the respondent holds antipathy toward the appellant, but the chambers judge failed to consider the extent to which that may have coloured the child's views.

[35] We are satisfied that the chambers judge appropriately addressed these concerns:

> [The appellant] has raised concerns of undue influence on [the child's] views. I am certainly concerned about some of [the respondent's] conduct in the course of this litigation. [The author of the Practice Note 7 Report] notes that [the child] reported to him [the respondent] having shared with her past difficulties with [the appellant]. [The] report also reveals that [the child] is stressed because this litigation is making her grandparents stressed. Further, I am troubled by the way that [the respondent] engaged [the child] in the gathering of evidence against her father for these proceedings. The record is clear that [the child] contacted [the witness], armed with contact information for [the respondent's] counsel. That is completely unacceptable.
>
> All of that said, none of these factors necessarily mean that [the child's] objection is not her own. [The] report does not raise any flags about influence.

[36] The chambers judge also recognized that the child had the benefit of independent counsel, who submitted that the child had relayed a consistent position throughout. When taken with the opinion of the author of the Practice Note 7 Report and that the child had the opportunity to consult other counsellors, the chambers judge concluded that the child's objection had not been unduly influenced and was her own independent view.

[37] The chambers judge also considered the purpose of the *Convention:*

> Many of the same concerns I outlined in respect of the application of Article 13(b) apply with respect to the child objection exception. The purpose of the Convention is to discourage parents or those in the place of [the respondent] from taking the law into their own hands. I am concerned that failing to order return results in [the respondent] gaining a benefit by doing exactly that. That is not what the Convention is designed to do. In fact, it is the opposite of what the Convention is designed to do.

[38] The chambers judge was alive to the possibility of the respondent's influence and to the concern that the respondent would gain a benefit from her conduct. The chambers judge weighed this factor as she was entitled to do. It is not our role to reweigh this factor, absent palpable and overriding error. We are not persuaded of any such error. This ground of appeal is dismissed.

The Respondent's Status under the Convention

[39] Usually, the parties to an application under the *Convention* are the parents of the child. The appellant submits that the respondent has no status under the *Convention* to retain the child. The respondent would not be able to apply for guardianship in Connecticut. In Alberta, she may apply for guardianship, provided that she had the care and control of the child for over six months and either she or the child resides in Alberta: *Family Law Act*, SA 2003, c F-4.5, ss. 23(1)(a) and 23(4).

[40] The chambers judge acknowledged "[u]nder the laws of Connecticut, there would be no parenting contest between [the appellant] and [the respondent]. But for the wrongful retention, [the child] would not be heard on whether she wished to stay with one or the other." She also noted that, "[m]any teens might prefer to live with their grandparents at various points in their lives, but the option is simply not available to them without their parent's consent."

[41] The appellant submits that the chambers judge failed to consider that the retaining party was not a parent to the child, such that it was not appropriate to treat the child's objection as determinative. Further, failing to consider the respondent's lack of legal status runs contrary to the objects of the *Convention*, which are to secure the prompt return of children wrongfully retained and to ensure that the rights of custody and access under the law of one contracting state are effectively respected in the other contracting state: *Convention*, art 1. The appellant submits that the use of the word "custody" shows an intention that the parties must have custody rights. He has these rights, the respondent does not.

[42] Article 8 addresses who may be an *applicant* under the *Convention*: "Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply." There is no corresponding section dealing with who may be a respondent.

[43] The respondent relies upon *Re R (Abduction: Hague and European Conventions)*, [1997] 1 FLR 633 (EWHC (Fam)), aff'd [1997] 1 FLR 673 (EWCA), a case involving a grandparent *applicant*. It does not, however, address the situation of a non-parent respondent.

[44] Our survey of Canadian cases suggests that courts do not give significant weight to the fact that the retaining party is a non-parent. There is very little to suggest that parents' rights are necessarily superior to non-parent's claims in the context of the *Convention.* Often the court does not address the specific issue of the differing relationships. Rather, courts appear to give more weight to the nature of the relationship between the child and the parties.

[45] In *van Dijk v van Dijk-DeVos*, 2019 BCSC 1968, the grandmother retained the child in Canada and the mother applied for the return of the child to the Netherlands. The 16-year-old child strongly objected to returning. The objection was based on "a poor relationship with his mother, missing his family and friends in Abbotsford, and his comfort with his Canadian life": at para 28. The court held that it was appropriate to exercise discretion not to order the return based on the child's age and maturity, objection and his overall welfare. The court noted the child's "desire to continue living with his grandparents and aunt, with whom he has strong emotional bonds", but

did not comment on the weight to be given to the fact that the retaining party was not a parent: at para 32.

[46] In *Espiritu v Bielza*, 2007 ONCJ 175 the maternal aunt retained the child in Canada after the death of the child's mother. The father sought the child's return to the United States. The court was not satisfied that the child was wrongfully retained and concluded that even if the child was wrongfully retained, returning to the United States would place him at grave risk of psychological harm amounting to an intolerable situation: at para 79. Although the court did not comment on the status of the aunt versus that of the father in considering Article 13 of the *Convention*, the court did not accept the father's suggestion that the child should return because the father is "his sole surviving natural parent": at para 76. Rather, the court placed more weight on the support, consistency and normalcy each party provided to the child: at para 74.

[47] In *Wilson*, the grandparents retained the child in Canada and the father applied for return to the United Kingdom. The court declined to return the child because the 11-year-old child expressed an objection and the child had attained an age and a degree of maturity at which it was appropriate to take account of his views. The reasons for objection centered around the child's perception that his father used and trafficked drugs, drank excessively, used physical discipline, engaged in sexual intercourse with many people, and did not pay him much attention: at para 25. The court did not comment on the weight to be given to the fact that the retaining party was not a parent.

[48] Disputes involving parents and non-parents heard in South Africa, the United States, the United Kingdom and Australia do not appear to weigh, as a specific factor, the fact that the retaining party is not a parent. *Central Authority v Reynder and Another*, [2010] ZAGPPHC 193; *March v Levine*, 249 F (3d) 462 (6th Cir 2001); *AS v EH & MH (Child Abduction) (Wrongful Removal)*, [1999] 4 IR 504, aff'd [1997] UKHL 32; and *Director General, Department of Community Services Central Authority v JC and JC and TC*, [1996] FamCA 123 all involve disputes where a grandparent or aunt was the retaining party. In these cases, the courts do not specifically address the status of the grandparent or aunt. Rather, the focus is on the nature of the relationship with the child.

[49] We note a decision from El Salvador that distinguishes between grandparent and parent. In Tribunal de Apelaciones [Appellate Court], 10 September 2019, *05-J2(230)-2012-3*, INCADAT No HC/E/SV 1422 (El Salvador), the grandparents retained the children in El Salvador and the father sought their return to the United States. The court of first instance and the appellate court ordered the return, noting that parental responsibility lies with the father and mother. The courts relied upon the notion of ownership of parental responsibility, according to the norms in Articles 206 (and following) of the Codigo de Familia [The Family Code], Decreto No 667, La Asamblea Legislativa de la Republica de El Salvador, which stated that ownership of children lies with the father and mother. The court also had regard to the national law for the comprehensive protection of children and adolescents, Ley de Protección Integral de Niños, Niñas y Adolescentes (LEPINA), which establishes that it is the father and mother who are responsible for exercising the parental

role in order to promote the development of their children. The Family Code and LEPINA are specific to El Salvador where notions of "ownership" are very different than the approach in other jurisdictions, including Canada.

[50] In summary, it is the nature of the relationship between the child and the retaining party, rather than the fact that they are not a parent, that is important in determining whether to order a child returned. The chambers judge was alive to the issue and weighed it in her overall balancing of the factors that informed her decision. We see no reviewable error in the manner in which she considered the respondent's status. This ground of appeal is dismissed.

Conclusion

[51] The appellant has not persuaded us of any reviewable errors in the chambers judge's decision declining to order the child's return to the United States. The sole issue before the court below and before this court is the appellant's application under the *Convention* for the return of the child. The chambers judge dismissed the appellant's application, and we dismiss the appeal. The issue of guardianship is not before us and will be decided on its merits in the Provincial Court of Alberta.

Appeal heard on January 12, 2022

Memorandum filed at Calgary, Alberta
this 15th day of March, 2022

Martin J.A.

Authorized to sign for: Rowbotham J.A.

Kirker J.A.

Appearances:

F. Gordon
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