In the Court of Appeal of Alberta

Citation: MacDermid v Aqunio, 2024 ABCA 202

Date: 20240614
Docket: 2403-0001AC
Registry: Edmonton

Between:

Scot MacDermid

Appellant

- and -

Edilenia Lopez Aqunio

Respondent

-and-

The Minister of Justice for Alberta, being the central authority for The Hague Convention on International Child Abduction for The Province of Alberta

Not a Party to the Appeal

The Court:

The Honourable Justice Michelle Crighton
The Honourable Justice Anne Kirker
The Honourable Justice Jane A. Fagnan

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice S.E. Richardson
Dated the 24th day of November, 2023
Filed on the 14th day of December, 2023
(Docket: FL03-71484)

Memorandum of Judgment

The Court:

I Introduction

[1] The appellant claimed that the respondent had wrongfully removed his children from the Dominican Republic (DR) to Canada or wrongfully retained them in Canada in an application under the *International Child Abduction Act*, RSA 2000, c I-4 and *The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (*Hague Convention*).

[2] Following a *viva voce* hearing, a justice found that the children's habitual residence is in Canada, not the DR.

[3] The appellant's appeal of that decision is dismissed for the following reasons.

II Background

[4] The appellant is 40 years old, born and raised a Canadian citizen. He is a successful businessman with corporations in Alberta and business interests in the DR. He travels to the DR on a tourist visa. His extended family members reside in Canada.

[5] The respondent is 32 years old, born and raised a DR citizen. She has been a permanent resident of Canada since 2018. The respondent's extended family, being her mother, lives in the DR.

[6] The parties married in 2016 in their home in Edmonton, Alberta and permanently separated on June 26, 2023 in Edmonton. They have two children, now 7 and 4 years old, both Canadian citizens but born in the DR. The respondent has an 11-year-old child from a previous relationship who lives full-time with the respondent in Edmonton.

[7] During the marriage, the parties spent time at their homes in Edmonton and Puerto Plata, DR.

III Grounds of Appeal

[8] The appellant argues that the justice's conduct gave rise to a reasonable apprehension of bias, the reasons are so inadequate that they prevent effective appellate review, and the justice erred in determining that the children were habitually resident in Alberta notwithstanding that the parties had lived in the DR for approximately 57% of the duration of their relationship while they had at least one child.

IV Standard of Review

[9] Issues of procedural fairness, natural justice and reasonable apprehension of bias are reviewed on a correctness standard: ***FJN v JK***, 2019 ABCA 305 at para 46, leave denied [2019] SCCA No 351 (SCC No 38859).

[10] The test for a reasonable apprehension of bias is whether there are substantial grounds such that reasonable and right-minded persons, having obtained the required information, thought the matter through, and reviewed the matter realistically and practically, would conclude that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly: ***R v de Grood***, 2023 ABCA 182 at para 7, leave denied [2023] SCCA No 440 (SCC No 40897), and cases cited therein.

[11] Whether "habitual residence" is viewed as a question of fact or a question of mixed fact and law, appellate courts must defer to the application judge's decision, absent palpable and overriding error: ***Office of the Children's Lawyer v Balev***, 2018 SCC 16 at para 38, citing ***Housen v Nikolaisen***, 2002 SCC 33 at paras 10, 25 and 36.

V Bias

[12] The appellant submits that the justice demonstrated bias by frequently interrupting the appellant's counsel during the hearing, failing to voice her concerns regarding the appellant's credibility and Dr. Wallerstein's letter, and failing to disregard problematic evidence from the respondent.

[13] We have thoroughly reviewed the transcript of the oral hearing and the oral reasons for decision. We do not find that the justice's interjections during the hearing reflect a reasonable apprehension of bias in favour of the respondent. The justice did not interfere unduly in the proceedings. She admonished both lawyers at various points in the hearing.

[14] The appellant also argues that the justice concluded that the appellant was not credible because he was unlikeable. The justice was required to make credibility findings in the face of the parties' contradictory positions and evidence. She was critical of aspects of both parties' evidence. She gave a number of examples and reasons in support of her conclusion that the appellant lacked credibility. She also did not accept the respondent's allegations of bad conduct by the appellant except where there was corroboration.

[15] Further, the justice explained why she attributed no weight to the Dr. Wallerstein letter. Her observations and concerns regarding the letter arose in relation to aspects of the letter that are apparent to any reader on the face of the letter itself. The fact that she remarked on these aspects and drew inferences about or questioned the letter's provenance does not support a finding that she exhibited a reasonable apprehension of bias. It bears noting that the appellant had not fulfilled an undertaking to take steps to validate the letter.

[16] There are no grounds upon which a reasonable, informed and right-minded person would conclude that it is more likely than not that the justice, whether consciously or unconsciously, failed to approach the matter impartially.

VI Habitual Residence

[17] Although the justice's oral decision is not lengthy, the reasons are sufficient to permit appellate review.

[18] The justice was required to determine the children's habitual residence by examining the shared parental intention, and by taking a child-centered view of the circumstances of the children's lives before the alleged wrongful retention or removal: ***Balev*** at paras 48, 59. She was required to consider when the alleged retention or removal took place and where the children were habitually resident immediately prior to the alleged retention: ***Ludwig v Ludwig***, 2019 ONCA 680 at paras 13-15.

[19] The justice reviewed over 2,000 pages of material – including affidavits and transcripts of questioning – and listened to a full day of cross-examination of each party.

[20] The appellant's position was that the parties had spent most of their time with the children in the DR and had a shared intention to raise the children in the DR which was their habitual residence.

[21] The respondent's position was that the children's lives had revolved around Edmonton since at least May 2022, except for a four-month vacation in the DR from December 2022 to May 2023. She presented evidence to the effect that the parties had planned to raise the children primarily in Canada, where they wanted the children to attend school.

[22] In each of his Affidavits sworn for the purpose of the hearing, the appellant identified himself as: "… Scot MacDermid, of the City of Edmonton, in the Province of Alberta." He testified that he had never obtained any sort of residency or immigration status for himself in the DR as it was not required.

[23] The respondent obtained her Alberta driver's licence and Alberta Health card and applied for permanent residency. Her eldest child was registered for school in Alberta. The parties had renovated their house in Alberta to accommodate the mothers-in-law.

[24] There was evidence that the parties had separated in 2021 while in the DR, reconciled in December 2021 and waited out COVID-19 lockdowns until they could return to Edmonton in February 2022. They lived in Edmonton for 10 months during which time they separated due to alleged domestic violence by the appellant against the respondent. The parties reconciled after two months and travelled to the DR in December 2022 where they stayed until around May 2023 when they returned to Edmonton on one-way plane tickets. The appellant and the two children came to

Canada first. The respondent, her elder daughter and her mother followed a few weeks later. The respondent travelled to Ontario to spend time with her mother-in-law. The parties hosted the youngest child's birthday party at their Edmonton home in June 2023. The justice heard that the children had their most important possessions with them in Edmonton, they lived with their older sister in Edmonton, and they participated in organized and informal activities in the community.

[25] There was evidence that the respondent had obtained an Emergency Protection Order (EPO) against the appellant arising from an incident on June 26, 2023, leading to the parties' permanent separation. They began a shared parenting regime in Edmonton, the appellant staying in the family home while the respondent resided with a friend.

[26] In August 2023, while bound by an EPO, the appellant applied under the *Family Law Act*, SA 2003, c F-4.5 to relocate the children to the DR. He later changed the application to bring it under the *International Child Abduction Act*, claiming that that the respondent was wrongfully retaining the children in Edmonton.

[27] The respondent's position was that the appellant took the children to Ontario in August 2023 for over three weeks without her knowledge. The appellant did not tell the respondent that he had booked flights for himself and the children to go to the DR departing from Montreal. This was discovered during a King's Bench hearing on September 7, 2023. The appellant was ordered to immediately return to Alberta with the children and relinquish their passports to the Central Authority. The appellant took the position that he had reserved the flight to the DR from Montreal in anticipation of a favourable *Hague Convention* ruling.

[28] The respondent also asserted that she had discovered the appellant had obtained a fraudulent divorce judgment in the DR and had contacted immigration to try to cancel his sponsorship for the respondent and her child. The justice held that this disputed evidence was not material to the issue before her.

[29] The appellant submitted that the justice should have considered the proportion of the parties' lives spent in the DR with their children and should not have taken into account periods of time when the parties' ability to travel was restricted due to COVID-19. He has not pointed to any authority for the proposition that "habitual residence" requires a mathematical calculation of the proportion of a child's life spent in various places.

[30] He also argues that the justice should not have drawn any inferences from draft pre- and post-nuptial agreements from 2017 and 2018. The justice noted that the 2018 post-nuptial agreement drafted by the appellant's counsel in Edmonton on the appellant's instructions contained clauses providing that the appellant would enjoy all decision making in relation to all of the children in the event of a divorce, and that he would have the sole and exclusive right to bring the children back to Canada if they were outside of Canada and a dispute arose.

[31] The justice had read and heard a considerable amount of evidence from both parties spanning their entire shared history. Having considered all the evidence, she determined that when the parties came to Canada, they were not visiting but rather were always returning to the family home that the appellant had purchased in 2015, one year before he met the respondent; in the justice's words, "they were returning to their fully stocked, fully engaged homelife here".

[32] The appellant submits that the justice ignored evidence that the respondent only developed an intention, for nefarious reasons, to come to Canada in or around December 2021.

[33] Even attributing significance to this evidence as suggested by the appellant, it does not raise a reviewable error in the justice's conclusions on all of the evidence that the appellant's own intention in coming to Canada in May 2023 was to declare Alberta as the habitual residence of the children just in time for the parties' eldest child to start Grade 1 in Edmonton in September 2023, the appellant's own intention was to reside with the children in Edmonton, and the children's habitual residence prior to the application immediately prior to the alleged retention was in Edmonton.

[34] The justice considered the history of the parties' travels between Canada and the DR and the parties' intentions, weighed the evidence and provided reasons. Her credibility findings are entitled to deference. The appellant has not established that she committed any palpable and overriding error.

VII Conclusion

[35] The appeal is dismissed.

Appeal heard on June 3, 2024

Memorandum filed at Edmonton, Alberta
this 14th day of June, 2024

Crighton J.A.

Kirker J.A.

Fagnan J.A.

Appearances:

R.B. Hajduk
R.C. Gibbs (no appearance)
for the Appellant

L.E. Sherry
for the Respondent