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[24/04/1997; British Columbia Court of Appeal (Canada); Appellate Court]
Hoskins v. Boyd, (1997) 28 RFL (4th) 221

COURT OF APPEAL FOR BRITISH COLUMBIA

Before: The Honourable Mr. Justice Finch

The Honourable Mr. Justice Donald

The Honourable Madam Justice Newbury

Hearing: March 18, 1997

Judgment: April 24, 1997

Docket: CA022297

Registry: Vancouver

BETWEEN

D.H.

PETITIONER

(RESPONDENT)

AND

M.B.

RESPONDENT

(APPELLANT)

REASONS FOR JUDGMENT

APPEARANCES:

Jeffery Huberman Counsel for the Appellant

Jessie MacNeil Counsel for the Respondent

JUDGMENT: The Honourable Mr. Justice Donald:

Concurred in by: The Honourable Mr. Justice Finch, The Honourable Madam Justice Newbury

[1] This is an appeal by the mother of a child, A., born 22 March 1995, from the order of Sigurdson J. returning the child to Oregon pursuant to the Hague Convention (Convention on the Civil Aspects of International Child Abduction, made part of the law of British Columbia by s. 42.1 of the Family Rela- tions Act, R.S.B.C. 1979, c. 121 and amendments).

[2] No issue is taken with the reasons for judgment which concluded that the child's place of ordinary residence, prior to his removal, had been the state of Oregon. The issue now raised on appeal is that the child will suffer grave risk of psychological harm if removed from his mother, who lives in an aboriginal community in Quesnel, and placed with the father, the petitioner, in a non-aboriginal community in Oregon until final resolution of custody.

[3] A. was conceived in Oregon in the summer of 1994 while his mother was there visiting relatives. She returned to her home in Quesnel, and A. was born there on 22 March 1995. He and his mother lived there, in an aboriginal community, until February 1996. Then, she took him to Oregon, apparently in an attempt to involve the father in A.'s life. Her relations with the father and his parents broke down after several months. The father obtained an interim custody order, and the mother absconded with the child during an access visit in July 1996, returning with him to British Columbia.

[4] The grave risk now said to be facing the child is the psychological harm likely to be caused by his dislocation from the aboriginal culture in which he and his mother have again lived since they returned from Oregon on 19 July 1996.

[5] Article 13 of the Hague Convention provides exceptions to the general rule that there must be prompt removal if there has been a wrongful taking and retention of a child contrary to the Convention. Article 13(b) reads as follows:

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:

...

(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.

[6] The matter came before us on an amended Notice of Appeal and fresh evidence with leave given by Mr. Justice Lambert in Chambers on 27 January 1997. The amendment raised the Article 13(b) exception for the first time in this court. The fresh evidence goes to that issue.

[7] We gave our decision at the conclusion of the hearing with reasons to follow. We dismissed the appeal and affirmed the removal order on undertakings from the father to ameliorate the disruptive effects of transferring the child. Those undertakings are:

1) Respondent will co-operate in expediting a cus- tody hearing on the merits, and will not raise the default order as a bar to the full examin- ation of the best interests of the child;

2) Appellant will have supervised access to the child pending disposition of the merits, includ- ing daily access if requested;

3) Respondent to bear the costs of air travel of appellant and child to Oregon;

4) Appellant will return the child to respondent upon forty-eight (48) hours notice that the arrest warrant for appellant has been either vacated or set aside, but not earlier than Tuesday, 25 March 1997.

[8] These are the reasons for our decision.

[9] Mr. Huberman for the mother did not invite us to determine the question of risk, rather he asked us to find that the fresh evidence demonstrated a serious question to be tried and sought a trial of the issue.

[10] The Convention calls for prompt judicial action: Thomson v. Thomson, [1994] 10 W.W.R. 513 (S.C.C.) per La Forest J. at 533. This appeal was the mother's single opportunity to make out a case of grave risk and she did not succeed.

[11] The appeal failed for several reasons. First of all, the risk of harm alleged must go beyond the normal disruption expected on the removal of a small child. The situation must be intolerable: Thomson, supra at 545-6. This is a severe test which the mother could not satisfy in the light of the fact that she took the child herself from the aboriginal community in which the child was born to live in the father's non-aborig- inal culture. In addition, A. is a very young child and his enculturation in the aboriginal community has developed only over the last 7-8 months.

[12] Secondly, the expressions of alarm in the affidavits by psychologists, elders and others concerning the removal of the child from the community speak to arguments about the child's best interests and ignore the racial fact that A. is half aboriginal and half Caucasian. As to the first observation, I quote from Mr. Justice La Forest's judgment in Thomson at 532:

I now turn to a closer examination of the pur- pose of the Convention. The preamble of the Conven- tion thus states the underlying goal that document is intended to serve: "the interest of children are of paramount importance in matters relating to their custody". In view of Helper J.A.'s remarks on this matter, however, I should immediately point out that this should not be interpreted as giving a court seized with the issue of whether a child should be returned the jurisdiction to consider the best inter- ests of the child in the manner the court would do at a custody hearing. This part of the preamble speaks of the "interests of children" generally, not the interest of the particular child before the court. This view gains support from art. 16, which states that the courts of the requested state shall not decide on the merits of custody until they have determined that a child is not to be sent back under the Convention.

[Emphasis added]

[13] The best interests question is for the custody hearing in the proper forum, in this case, Oregon. The force and urgency of the opinions based on race are much diminished by the child's mixed parentage.

[14] The longer the child remains in one culture the more difficult it becomes to shift to another. This child has lived in both at the mother's choice. These proceedings cannot be allowed to drag on indefinitely, otherwise the mother's case for grave risk gathers strength and the objects of the Conven- tion are frustrated.

[15] Nothing in these reasons should be taken as a commentary on the custody questions facing the Oregon court. There is a world of difference between the best interests of the child and whether an intolerable situation would result from removal.

"THE HONOURABLE MR. JUSTICE DONALD"

I AGREE:

"THE HONOURABLE MR. JUSTICE FINCH"

I AGREE:

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