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[06/01/1989; Supreme Court of Ontario (Canada); First Instance]
Parsons v. Styger, (1989) 67 OR (2d) 1

Supreme Court of Ontario

Shapiro D.C.J. (L.J.S.C.)

6 January 1989

Court File No. 1119/88

BETWEEN

E.P. and S.S.(P.)

REASONS FOR JUDGMENT

SHAPIRO D.C.J.: The marriage was over, after two and a half years. Its most valuable asset would appear to be a 21-month-old baby boy named C. Both parents want custody. The father, E.P., resides in the State of California. The mother, referred to in the proceedings as S.S., lived in California. At least that was so, until the separation on September 6, 1988. At that time she returned to her native Province of Ontario. She took C. with her. For ease of identification the father/husband will be referred to as P. The mother/wife will be referred to as S.

C. was born in the United States, in San Jose, California on March 20, 1987. He has dual Canadian/U.S. citizenship. The parents had been married in Reno, Nevada, on February 5, 1986. They resided together in California during their marriage and up to the time of separation.

On September 8, 1988, S. commenced custody proceedings in Ontario, in the Provincial Court (Family Division).

On October 13th, P. instituted a divorce petition in the Superior Court of the State of California for the County of Los Angeles. He claimed, inter alia, custody of C. in these proceedings. On October 25th and 26th the matter came on for hearing. S. did not attend although duly served with a court order dated October 14th.

On October 31st, P. brought an application in the Supreme Court of Ontario. Among other things he asked for the return of C. to Los Angeles County. On November 14th, S. brought a counter-application seeking dismissal of the main application and asking for interim and permanent custody of the child.

On November 15th, the Honorable Judge J.A. Muuen, as local judge of this court ordered that the application and counter-application be adjourned to permit cross-examination on affidavits filed by P. and S. These examinations were held. Portions of the cross-examinations were extensively referred to by counsel when the application and counter-application came before me. In addition I had before me the order of Judge Mullen, and the transcript of the California hearings of October 25th and 26th, the affidavits of the parties, factum of counsel and respective case books of law and authorities. I also had the benefit of able and thorough argument of counsel. I reserved my decision which I now deliver with reasons.

It should be noted that the order of Judge Mullen contained, inter alia, an order that the Provincial Court (Family Division) application for custody brought by S. be stayed. It also contained provision for supervised access by P. at the home of S. parents in the City of Mississauga, Ontario, "or at any other place agreed upon between the parties pending determination of this matted', as well as telephone access by P.

As for the California hearing, the court presided over by the Honourable Judge Jill S. Robbins very properly observed:

I am not making any order today, other than the findings, because I do not want to be in a position of conflict. The Court believes it is inappropriate to do anything more until Canada has determined whether it will return the minor child to the state of California.

The Court has made a finding of wrongful retention and removal as required by articles 3 and 4 of The Hague Convention, but this Court's determination is not biding upon the Province of Ontario or the Country of Canada.

The California court did however make the following pertinent findings:

The court makes the following findings pursuant to the Convention on the Civil Aspects of International Child Abduction, also known as The Hague Convention. In addition to the findings made earlier this morning and in addition to the testimony elicited on October 25, 1988, the court finds that the removal and retention of C., born March 20, 1987, is and continues to be wrongful; that the conduct of the respondent S.P., in removing said child is actionable conduct and constitutes a breach of the custody rights of the petitioner.

The court further finds that at the time of the removal and/or retention and the continuing retention the custody rights of the petitioner were actually exercised by the petitioner and would have continued to be exercised but for the wrongful removal and retention.

The court further finds that the rights of custody as referred to herein arise by operation of law in California, particularly Civil Code Section 197 granting mothers and fathers equal rights to custody.

The court further finds pursuant to the testimony as well as the written declaration that pursuant to art. 4 of The Hague Convention, the minor child, C., was habitually resident in the contracting State, which is the United States of America and in the Territory which is California and in particular in Los Angeles County, and that he was, in fact, a habitual resident immediately before the breach of custody rights.

The Court further finds that the policy of the Convention which is to protect children from the harmful effects of their wrongful removal or retention would in fact be served by the prompt return of C. to the State of his habitual residence and the territory of his habitual residence which is the State of California.

These findings are made pursuant to art. 3, art. 4, and art. 13 of The Hague Convention of October 25, 1980.

The court makes the further additional findings that the petitioner is a resident and domicile of the State of California, County of Los Angeles; that the petitioner, respondent and the minor child since birth resided in the State of California; that were this a matter brought under The Uniform Child Custody Jurisdiction Act the court would find that California is the home state of said child.

While the court cannot find significant connections in California due to the youth of the child and the work schedule of the petitioner, the Court can find a variety of connections to [this state more predominant that any possible connection to] the Country of Canada. The mere presence of party in another state or country is not sufficient to confer jurisdiction in that country.

The court believes that California and particularly Los Angles County is an appropriate forum to hear and determine the merits of the custody issue.

Counsel has requested that this court make certain findings pursuant to The Ontario Children's Law Reform Act. Just as I would not pretend to make findings of another country's statutes with which I haven't been provided, I would certainly hope that other countries would not try to do the same with respect to our statutes with which they have not been provided. The court declines to make any findings as requested concerning The Ontario Children's Law Reform Act, believing that the appropriate judicial authority in the Ontario Province is certainly more skilled in that area than this court could ever be.

The court does not believe that any other state or country has significant contact with C.. The Court further finds that at the time of his wrongful retention and removal C. was living in a stable, healthy and wholesome environment with both the petitioner and respondent.

The court further finds that notwithstanding the petitioner's alleged disability which prevents him from parenting, that in fact petitioner is capable of and has indeed taken care of daily needs of the minor child without requiring assistance, except to the extent parents require baby-sitting assistance.

The California court very courteously offered to confer with this court to discuss the application of The Hague Convention. Although I appreciate the spirit of the offer and I am sure it would have been of assistance, since neither of the parties nor their counsel would perforce be present, I am obliged to decline. Therefore, I must conclude that the responsibility of interpretation and application of The Hague Convention on the matter before this court must rest solely with this court.

Both Ontario and California are signatories to the aforementioned Convention, Ontario in 1983 and California as of July 1, 1988. The Hague Convention is incorporated in The Children's Law Reform Act (Ontario). Section 47 of The Act specifically declares the Convention to be "in force in Ontario and the provisions thereof are law in Ontario".

The portions of the Convention that are applicable to the facts of this case are the Preamble and arts. 1, 2, 3, 12, 13 and 14.

The heading and the Preamble read:

CONVENTION OF THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions:

The Convention is then divided into chapters. Chapter I is the "Scope of the Convention" and contains five articles.

Articles 1, 2 and 3 are relevant and read:

Article 1

The objects of the present Convention are--

(a) to secure the prompt return of children wrongfully removed to or retained in any contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

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.

The next relevant Articles are 12, 13 and 14. They are found within Chapter III - "Return of Children".

The first paragraph of art. 12 reads:

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith...

Article 13 reads in part:

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--...

(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...

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.

Article 14 reads:

Article 14

In ascertaining whether there has been a wrongful 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, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Applying the Convention and thus the Children's Law Reform Act to the facts of this case, I have no difficulty in making the following findings of fact:

1. The child C., immediately before his removal, was habitually resident in the State of California.

2. At the time of his removal C. was in the joint custody of P. and S. and lived with both parents at their matrimonial residence.

3. The removal was in breach of the custodial rights of P. which were "actually exercised at the time".

4. P. not having consented, the removal was wrongful and designed to deprive him of his joint custodia] right.

5. The right of custody of P. is entitled to secure protection and to be effectively respected.

6. The removal being from the State of California to the Province of Ontario was international in nature and came within the ambit of The Hague Convention on the Civil Aspects of International Child Abduction.

The Province of Ontario is a contracting state to the Convention. Therefore "a judicial authority" (a competent court) within the province coming to the aforesaid conclusions and making the above-mentioned findings, is obligated to "(shall) order the return of the child forthwith".

There is, however, a saving provision. This is found in the "notwithstanding" clause of art. 13. If "there is a grave risk that [the] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation", the judicial authority is not bound to order the return of the child.

Mr. Brannigan, counsel for S., argues that the present case is a proper one wherein this court should exercise this discretion and not order the return. In the alternative, Mr. Brannigan suggests that the least I should do is order a trial of an issue on this point. In the very full and ample material before me, there is no direct evidence that P. ever harmed the child either physically or psychologically. Indeed I would find, if called upon to make a conclusion upon the material before me, that both P. and S. are loving and concerned parents. I do not go beyond this because I am not dealing with the matter of permanent custody. That will be for another tribunal at another time, no doubt on additional evidence.

I specifically referred to there being no direct evidence that P. ever harmed the child. Mr. Brannigan asks me to draw the inference that C. would be exposed to harm or placed in an intolerable situation on the basis of certain allegations of S. as to the propensity or capacity of P. for violence. In support of this, it is alleged that P. had threatened to kill S. The evidence on this point is contradictory. Even if accepted, it cannot be taken out of context and at best it was one isolated instance. Not unexpectedly in a matrimonial matter, both spouses make uncomplimentary allegations against each other. It would be rather unusual in a strongly contested case, if this were not done. Particularly if custody were an issue.

The onus is upon the party making the allegation that the child would be harmed or in an intolerable situation. I find that this onus has not been made out directly or by inference if if the alleged isolated past threat had in fact been made. Cynically, it might be said that the marriage is a rare one wherein in the heat of anger, such expressions might not have been used. That is a far cry from evidence of actual intent. There was no such supporting evidence here. In any event there was never any expression, verbal or otherwise, of any harm to the child. I must therefore find that the "notwithstanding' clause has not been established.

I do not accede to the request for the trial of an issue on this point. It would entail additional delay and expense. Had the evidence been stronger, I may have considered such request as having more merit. In refusing it, I have also considered the wording of the Convention which in the Preamble refers to procedures to ensure "prompt return" and in art. 2, that the contracting states "shall use the most expeditious procedures available". Nor do I think that in this case justice is being sacrificed on the altar of expediency.

Article 13 in its concluding paragraph states that

"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."

Although parents would certainly be competent to give social background and they have done so in their evidence in this case, art. 13 refers no doubt to independent professionals. The transcript of the California hearing of October 25th and 26th was all that was available to me from California, "the child's habitual residence". There was in our court file a psychological report of an Ontario psychologist, Dr, Barbara Landau of Toronto. Attached

to it was a most impressive curriculum vitae as to the qualifications of Dr. Landau. The report is dated October 28, 1988. In it Dr. Landau addresses herself to the "probable impact on a child of approximately one and a half . . being removed from his family setting and separated for more than two months from a parent".

Dr. Landau forthrightly states that she has seen neither the parents nor the child. Her observations are based on clinical experience and researched literature. They may be quite pertinent on the issues of custody and access, but they do not assist me very much on the question of return.

Miss Powell, counsel for P., draws attention to art. 14 and the finding of the California court that the removal of the child was wrongful. Although under art. 14 I may take notice of this, I should state that I have arrived at my similar conclusion independent of this finding.

It seems today that it is a rare case indeed in which reference is not made to some aspect of the Canadian Charter of Rights and Freedoms.. The present case is therefor no exception. Mr. Brannigan cites ss. 6(1) and 7 of the Charter.

Section 6(1) reads:

(6)1 Every citizen of Canada has the right to enter, remain in and leave Canada.

Counsel agreed that the child C.P. has dual citizenship. As a Canadian citizen does he have the right to remain in Canada in defiance of The Hague Convention? I think not. No more so than a Canadian citizen could defeat a Canadian court extradition order to a treaty co-signatory member. In addition to the Province of Ontario being a signatory to The Hague Convention on the Civil Aspects of International Child Abduction, the Dominion of Canada was also a signatory. The Convention came into force both federally and provincially on the same date, namely December 1 , 1983.

Section 7 of the Charter reads:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Mr. Brannigan argues that s. 7, particularly when read with s. 6, justifies the trial of an issue before this court. For reasons earlier stated I consider that this case should be decided by this court on the material presently before it, without any further delay or cost. I do not consider the refusal to order the trial of an issue to be a denial of fundamental justice.

Counsel cited reported and unreported cases in their material and argument. Unfortunately there is little case-law on the point in issue and none directly within the present factual situation. I therefore refrain from any references. Fortunately the Convention is clearly worded and its intent and purpose quite obvious. It meets the present situation. An order will therefore go that C. be returned forthwith to Los Angeles County in the State of California. Considering his age and the concerned parenting of the mother, I presume that she will accompany him. If so, he may remain in her temporary custody in Los Angeles County with reasonable access to the father (including telephone access), pending any other interim or permanent order of a California court having jurisdiction.

If the mother does not accompany the child C., then interim custody shall be that of the father with reasonable access to the mother (including telephone access), pending any other interim or permanent order of a California court having jurisdiction.

If, however, there is a reconciliation between the parents and if they can agree, then there could be interim joint custody to the parents. This would also be dependent upon any other interim or permanent order of a California court having jurisdiction.

Counsel spoke to the matter of the costs of the present application and counter-application. Both counsel indicated that if their client were unsuccessful there should be no costs against the client. Their submissions as to costs if the client were successful was otherwise. Considering the nature of this application, the relative novelty of it before our courts and the fact that each parent sincerely believed that he or she was acting in the best interests of the child, I conclude that there should be no costs attached to the order herein and that each party should pay his and her own costs.

Application allowed; counter-application dismissed.

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