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http://www.incadat.com/ ref.: HC/E/CA 369
[17/05/1996; Supeior Court of Quebec; Terrebonne
Family Division (Canada); First Instance]
D. v. B. (17 May 1996), transcript, Supeior Court of Quebec; Terrebonne
Family Division (Canada);

Canada Province of Quebec

District of Terrebonne; Superior Court (Family Division)

R. Baker, J.S.C

May 17, 1996

700-04-001386-967

D.

-and-

B.

REASONS FOR JUDGMENT

J.B.C. Y. (Y.) DIAB, domiciled and residing at *, in the City of Cupertino, State of California, United States of America (Petitioner) vs J. BENOIT, presently at *, District of Terrebonne, Province of Quebec (Respondent)

JUDGMENT

The Court is seized with a Motion to Obtain the Forced Return to California of the children L.D. and K.D. in virtue of Articles 18 and following of the Law on the Civil Aspects of International and Interprovincial Abduction of Children (R.S.Q. c. A-23.01) (the Act).

The Motion alleges the following:

1. The Petitioner married the Respondent on September 9, 1989, City Of Montreal, Province of Quebec;

2. During the common life of the parties the Respondent gave birth to two children, namely, L.D., born on the 16th day of September, l990, at Montreal, and K.D., born on the 20th day of September, l992, at Laval;

3. Since December 31, 1992, the parties and their children have been domiciled and residing at *, in the City of Cupertino, in the State California, United States of America;

4. According to the laws in force in the State of California, both parents exercise jointly the custody and the parental rights with regard to any child born from of their marriage;

5. On January 18, 1996, Respondent, without the consent or knowledge of Petitioner, illegally removed the children of the parties, L. and K., from their domicile situated at *, in the City of Cupertino, in the State of California, United States of America;

6. Respondent took the children to her sister's residence situated at *, in the city of Ste-Therese, District of Terrebonne;

7. Respondent has refused to return the children of the marriage to their domicile and residence situated in Cupertino, California notwithstanding having been requested to do so;

PRIOR PROCEEDINGS BETWEEN THE PARTIES:

1. Mme B. initiated separation and custody proceedings on January 22, 1996 in St-Jerome, Quebec;

2. On January 23, 1996, Mr. D. instituted divorce proceedings against his wife in California.

PRIOR JUDGMENTS:

1. On January 25, 1996, Judge James W. Stewart of the Superior Court of California ordered that Mme B. and the children be present at an emergency screening hearing on February 7, 1996;

2. On February 7, 199s, Judge Stewart recognized California jurisdiction and ordered the return Mme B. and the children for March 7, 1996.

3. On February 22, 1996, Mr. Justice Durand, sitting in St-Jerome, Quebec, refused to decline jurisdiction aver the children, and awarded provisional custody to the mother.

At the hearing before Justice Durand, Mr. D. did not appear and was represented by counsel only for the purpose of contesting Quebec jurisdiction, On March 7, 1996, Judge Stewart awarded interim custody to the father. At this hearing, Mme B. was not present but was represented by counsel.

The relevant sections of the Act are the following:

WHEREAS the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980 aims to protect children internationally from the harmful effects of their wrongful removal or retention;

Whereas the Convention establishes procedures to ensure the prompt return of children to the State of their habitual residence and to secure protection for rights of access;

Whereas Quebec subscribes to the principles and rules set forth in the Convention and it is expedient to apply them to the largest possible number of cases;

1. The object of this Act is to secure the prompt return to the place of their habitual residence of children removed to or retained in Quebec or a designated State, as the case may be, in breach of custody rights. A further object of this Act is to ensure that the rights of custody and access under the law of designated State are effectively respected in Quebec and the rights of custody and access under the law of Quebec are effectively respected in a designated State.

2. For the purposes of this Act, (1) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence; (2) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence; (3) "designated State" means a State, a province or a territory designated under section 41.

3. The removal or the retention of a child is to be considered wrongful, within the meaning of this Act, where it is in breach of rights of custody attributed to one or several persons or bodies under the law of Quebec or of the designated State in which the Child was habitually resident immediately before the removal or retention and where, at the time of removal or retention, those rights were actually exercised by one or several persons or bodies or would have been so exercised but for the removal or retention. The rights of custody mentioned in the first paragraph 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 Quebec or of the designated State.

Where a child who is in Quebec has been wrongfully removed or retained and where, at the time of commencement of the proceedings before the superior Court, a period of less than one year has elapsed from the date of the removal or retention, the Superior Court shall order the return of the child forthwith. The Superior Court, even where the proceedings have been commenced after the expiration of the period of one year, shall also order the return of the child, unless it is demonstrated that the child is now settled in his or her new environment.

The Superior Court may refuse to order the return of the child if the person who opposes his or her return establishes that (1} the person having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or (2) 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 Superior Court, after having been notified that a child has been wrongfully removed or retained in Quebec, shall not decide on the custody of the child if the conditions set out in this Act for the return of the child may be fulfilled or if an application for his or her return may be made within a reasonable time.

The sole fact that a decision relating to custody has been given in or is entitled to recognition in Quebec shall not be a ground for refusing to order the return of a child, but the Superior Court may take account of the reasons for that decision which are relevant to the application of this Act.

In ascertaining whether there has been a wrongful removal or retention, the Superior Court nay take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the designated State in which the child is habitually resident, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable. The basis for the Act is the Hague Convention signed in 1980 ("the Convention") and it is therefore useful and necessary to briefly describe its purpose.

THE CONVENTION

The first objective of the Convention is to protect children 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. Canada being a signatory to the Convention, effect was

given to it by provincial legislation. The Government of Quebec adopted the Act in 1984, and by so doing integrated the principles of the Convention as the law of the Province of Quebec.

The objectives of the Convention are expressed in Chapter I, article l: (1) securing the return of the children wrongfully removed or retained in any contracting state; (2) ensuring that the rights of custody and access under the law of one contracting state are effectively respected in other contracting states. A document described as "Questionnaire and Report on international child abduction by one parent" (or the "Dyer Report"), prepared in support of the Convention, outlined five circumstances where the removal of a child from a country in breach of a custody right should be covered by the Convention. One which is particularly relevant reads as follows:

"The child was removed by a parent from the country of the child's habitual residence to another country without the consent of the other parent, at a time when no custody decision had yet been handed down but serious problems between the parents already existed". [FN1]

This is clearly the situation in the case before me. The parties were still living together under the same roof in Cupertino, California, when the Respondent without any notice to her husband, removed the children and brought them to Ste-Therese, Quebec, on January 18, 1996. A fundamental question before this Court is whether there was a wrongful removal on January 18, 1996.

In order to succeed in this Motion, the Petitioner must establish four elements: (1) the children are under the age of 16 (article 5 of the Act), (2) the United States is a contracting State of the Convention, (3) the Petitioner had a right of custody over the children at the date of their removal, (article 3 of the Act), and (4) the habitual residence of the children immediately before their removal was California. (art. 3).

The parties do not contest the first three elements. K. is three and a half years old and L. will be six years old in September 1996. The United States Government ratified the Convention or July I, 1988. As no proceedings had been taken by either parent, and as they were not separated, the parties had joint custody over the children on January 18, 1996, according to the laws of the State of California. The only issue in dispute as to the applicability of the Act is whether the habitual residence of the children was in California or in Quebec . Neither the Convention nor the Act have defined the tern "habitual residence". It is evident that the notion of habitual residence must be distinguished from that of domicile. In the case of Re: J (1990) 2 A.C. 562, Lord Brandon wrote that "this expression must be understood according to the ordinary and natural meaning of the two words it contains."

Accordingly, the Court must be vigilant in respect of testimony of one or both parents characterizing their intent. Unlike the concept of domicile, where intention is critical, the notion of residence should be determined only by where the children lived immediately before their removal. The evidence clearly demonstrates that at the time of their move in January 1993, the parties had taken all their belongings with them to California and had left nothing behind in Quebec. Mr. D. had obtained a three-year work visa. At the time of the present hearing, the father is waiting for his green card in order to remain in California on a permanent basis. Whether the Petitioner indicated to his wife his intention to stay in California for only three years is of no importance in determining the habitual residence of the children. Both children had been living with their parents in Cupertino, California for three years. L. was registered at * School since September 1995, and the child K. attended ** Playschool since September 1994.

Respondent's counsel has argued that the two children were not habitually residents, but "temporary" residents of Cupertino, California, thus creating a distinction not existing in the Act or in the Convention. Respondent, in asserting that California was only temporary and therefore not habitual, would make the children entirely without residence anywhere in the world. These children, from 1993 to 1996, were not refugees in California who had temporarily sought refuge after fleeing a hostile and tyrant state. On the contrary, all the evidence leads to the inescapable conclusion that as of January 18, 1996, the day of their removal from California to Quebec, the habitual residence of L. and K. was California. The Court is of the opinion that the members of this family were neither visitors nor tourists in California. Therefore, the children's habitual residence immediately before their removal was California. The court concludes that the removal of the children K. and L., on January 18, 1996, without the consent or the knowledge of their father, and in violation of his custody rights, constitutes wrongful removal in virtue of Section 3 of the Act.

According to Section 20 of the Act, the Court "shall" order the immediate return of the children. However, Section 21(2) creates an exception if the Respondent can establish that the return of the two children to California would expose them to a grave risk of psychological or physical harm or would otherwise place them in an intolerable situation. In Thompson v Thompson, Mr. Justice La Forest describes the term "grave risk" in correlation with the notion of intolerable situation as follows:

"In brief, although the word "grave" modifies "risk" [. . . .], this must be read in conjunction with the clause "or otherwise place the Child in an intolerable situation". The use or the word "otherwise" points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of Section 13(b) [of the Convention] is harm to a degree that also amounts to an intolerable situation." [FN2]

In other words, there must be a grave risk of physical or psychological harm caused to the Children. Once a determination in made that the Act applies, the burden of proof shifts to Respondent (under section 21). In its written brief (Rule 18), Respondent alleges that a return to California would expose the children to grave risk of physical or psychological harm for three reasons: (1) custody has already been granted to the Respondent who has no employment in the United states and thus the children would be placed in an intolerable situation; (2) Mr. D., the Petitioner, told Mme B. on many occasions that he intended to take the children to live in Egypt which is not a signatory to the Convention; (3) the Petitioner (the father) does not have the financial means to support the children. In respect of the first two above, there is not a scintilla of evidence. As to the Respondents third reason not to return the children, that is the financial incapacity of the father, the evidence discloses that Petitioner earned $16,000.00 U.S. in 1994, and $40,000.00 in 1995. This latter amount was unsubstantiated by any documentation. I have no hesitation whatever in saying that the signatories to the Convention did not have in mind the protection of children of well-off parents only, leaving exposed and incapable of applying for the return of a kidnapped child, the parent without wealth whose child was so abducted. The assertion by Respondent that financial weakness is a valid reason not to return a child under the Act is repugnant. Therefore, this Court concludes that the Respondent has not shown that the returning the two children to California would result in exposing them to a grave risk of physical or psychological harm or would otherwise place them in an intolerable situation. As such, the Respondent has not met the onus to establish the exception set out in Section 13(b) of the Convention or in Section 21 (2) of the Act.

Respondent, by serving a Notice of Intention on the Attorney General of Quebec under Art. 95 C. C. P., has asked the Court to declare unconstitutional Sections 1 and 20 of the Act as being in violation of section 6 (1) of the Canadian Charter of Rights and Freedoms. The

essence of the argument is that no Canadian citizen can be forced to leave our soil against his or her free will. Respondent argues that a grant of the application before me would be a violation of the children's Charter rights. In support of its proposition, Respondent cites the case of The United States v Cotroni [1989] 1 R.C.S. 1469. This is an extradition case, and it does not support the proposition raised by Respondent. Sending little children back to a parent from whom they have, under international and domestic law, been illegally abducted, is not quite the same, it seems to me, as forcing an accused criminal off Canadian soil to face justice. The former is for the benefit and protection of the children leaving, while in the extradition situation we have a somewhat unwilling traveler. The Act violates no right protected by the Charter, I listened with great interest to Mme B.'s counsel expression of concern that if the children were ordered to return to California, she might be somewhat at a disadvantage for having refused to comply with Judge Stewart's order to return with the children. It is important to me that the children's beet interest be served. This is the central criteria for any issue relating to a child's care or safety, whether it is in virtue of the Act, or any Canadian legislation and case law of which I am aware. I felt it necessary to inform myself on the procedural status in the California Court system of the parties before me, and whether or not bane Mme B's rights were impaired as a result of her actions. I telephoned Judge Stewart in California who assured me that this would not be the case were I to order the return. He then offered to sign an additional order clarifying his March 7, 1996 Order that would ensure it is an interim order only. What follows is the text of Judge Stewart's Order signed today, May 17, 1996.

FILED MAY 17 1996

STEPHEN V. LOVE

County Clerk Santa Clara County by M. TERRY Deputy

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

In re Marriage of: NO. FL 055808 Petitioner: Y.D. and Respondent: J.B.

ORDER

On May 16, 1996, this Judge spoke with the Honorable Roger Baker, Federal Judge in Canada. He is reviewing the Petitioner's claim that, under the Hague Treaty, California has jurisdiction over the two minor children, L. and K. This Court wishes to clarify the order filed on March 7, 1996. That order greeted the Petitioner father sole legal and sole physical custody of the two children. This was done after the mother refused to return the children to California, and the Judge in Canada, with whom I spoke on the telephone, indicated that he felt he was not bound by the Uniform Child Custody Jurisdiction Act. That custody order filed Match 7, 1996, is a mere interim order until a full and complete evaluation of this case can he made, including psychological testing.

Under California law, a permanent child custody or visitation order cannot be made without mediation first occurring . (California Family Code Sections 3170 and 3175) The former orders the court to set every case for mediation in which custody and access are in dispute. Section 3175 requires that mediation be set before or concurrent with any hearing on custody. By local rule, evaluation follows failed mediation . Thus, the Court Orders as follows:

1. If the Canadian Court returns the children to California, the parties shall report to Department 119 on the first court day after the children return, at 9:00 a.m., for an

emergency screening to set another interim order to establish a parenting plan while this Court does a complete evaluation including psychological testing.

2. The children may remain in the mothers custody pending the emergency screening.

DATED: May 17, 1996

(S) James w. Stewart

JAMES W. STEWART Judge of the Superior Court

The Court is gratified by the clarifying order issued today in California, as it meets the most important concerns of the Respondent. I am advised that the emergency screening to which Judge Stewart refers in para. 1 (page 2) of his order should take approximately one hour, after which a new interim order will immediately issue. I am also advised that under California law there is no legal impediment to the custodial parent leaving the country with the children. In other words, should the Respondent obtain interim custody of the two children in California, she has the right to seek Court permission to reside in Canada with the children, provided I expect that she comply with any order dealing with access rights by the father. The initial process is very expeditious and therefore inexpensive. There appears to be no reason why the entire interim process cannot be completed within a few days of Mme B"s return to California with the children.

FOR THESE REASONS, THE COURT:

ORDERS the return of L. D. and K. D. to Cupertino California no later than May 27, 1996;

ORDERS the Respondent to accompany the children;

ORDERS the Respondent to advise Petitioner as to her arrival date so that both parties may engage legal counsel on a timely basis;

ORDERS Respondent to comply with Judge Stewart's Order of May 17, 1996, referred to herein above;

ORDERS Petitioner immediately to give to Respondent the children's Canadian passports.

ORDERS Provisional Execution notwithstanding appeal;

THE WHOLE WITHOUT COSTS. Roger E. Baker, J.S.C.
