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[04/02/2004; Court of Queen's Bench (District of Calgary, Alberta) (Canada); First Instance]
DeHaan v. Gracia [2004] AJ No.94 (QL), [2004] ABQD 4

Between S.H., plaintiff, and P.G., defendant

Docket No. 0301 04177

Alberta Court of Queen's Bench, Judicial District of Calgary

February 4, 2004

Power J.

[1] POWER J.:-- This is an application under the International Child Abduction Act, S.A. 1986, c. I-6.5. The Plaintiff, S.H. (the "mother") left France on December 31, 2002 with her two children. The Defendant P.G. (the "father"), seeks to have the children returned to France. For the reasons that follow I deny the father's application.

[2] The Defendant (father) is an unrepresented litigant who only speaks the French language and is involved in a child abduction matter proceeding under the Hague Convention. The Court is composed of an English speaking Judge (who understands the French language) and English speaking counsel who represents the mother in this litigation. The Court can communicate with the litigant, but this would be unfair to the English speaking counsel representing the mother and therefore all proceedings in this litigation have been heard in English with the Court providing a French translator to the Defendant. The Defendant has also been refused Legal Aid from his home country in France, and the Alberta Legal Aid Society has refused him Legal Aid.

[3] Under the provisions of section 4 of the Languages Act, R.S.A. 2000, c. L-6 states as follows: Language in the courts

4(1) Any person may use English or French in oral communication in proceedings before the following courts:

(a) the Court of Appeal of Alberta;

(b) the Court of Queen's Bench of Alberta;

(c) repealed RSA 2000 c16 (Supp) s50;

(d) The Provincial Court of Alberta.

(2) The Lieutenant Governor in Council may make regulations for the purpose of carrying this section into effect, or for any matters not fully or sufficiently provided for in this section or in the rules of those courts already in force.

[4] The Court has been made aware that the Defendant has been assisted by a number of Court Services employees who are French speaking including Lise MacKenzie and Suzanne Carrière, Student-at-Law and that the brief prepared by counsel for the Plaintiff has been interpreted for the Defendant including obtaining translations of the Supreme Court of Canada authority and a translation of various Affidavits contained in the brief. The Defendant has indicated to the Court that he is satisfied with the assistance he has received from the Court Administration.

[5] In R. v. Rose, [2002] Q.J. No. 8339 (S.C.) the Court held at para. 15 the following:

...Yes, one has a constitutional right to disclosure of material in the official language in which it is in and of course, if it is not in one of the official languages, then it must be translated. What it will be translated into

will very largely depend on what case it forms part of, where we are, whether in British Columbia, Alberta, Ontario or Quebec, and there is a wide discretion invested in the judge to deal with this principle, and how he does so will depend upon the particular circumstances of each case. The question here involves disclosure in the French language.

[6] The rights extended under section 4 of the Languages Act permit a French speaking person to make oral communications in proceedings before the Court of Queen's Bench of Alberta. The Judge and counsel representing the Plaintiff will have those submissions made in the French language fully explained by the translator so that all parties will be on an equal footing in both languages including the Court.

[7] The parties met in Paris, France in 1994, and lived together shortly thereafter. There are two children of their relationship, both of whom were born in France, namely: J.G., born June 16, 1995, now aged 8 1/2 years; and E.G., born July 15, 1996, now aged 7 1/2 years.

[8] The parties were married on July 28, 1999 in Marseille, France. The mother S.H. is a Canadian Citizen and both children have Canadian Citizenship.

[9] The Plaintiff and the Defendant commenced divorce proceedings in France on or about June 7, 2002. Both were represented by lawyers, and on October 29, 2002 a Judgment of Non-Conciliation was granted by the Court. The Plaintiff and the Defendant were granted joint parental authority over the children. The Plaintiff was granted residential care of the children. The Defendant was granted free visitation rights and in the event of a disagreement access on Wednesdays and Sundays. The Defendant was ordered to pay child support in the amount of 306.00 euros per month ($ 489.00 Canadian). There was no prohibition to removal of the children from the jurisdiction imposed on either party.

[10] The Defendant did not pay child support, and it was necessary for the Plaintiff to apply for and receive financial aid through a program in France called "Help For an Isolated Parent".

[11] At the end of November, 2002, the parties agreed to attempt reconciliation. They discussed and agreed to move to Canada to start a new life. Their lawyers were instructed to discontinue the divorce proceedings which was done. The Defendant signed the childrens' application for Canadian passports. The parties obtained International Driver's Licences, packed their belongings and informed friends, doctors and educators of the move to Canada. The Defendant put his restaurant/bar up for sale. It was agreed that the Plaintiff and the children would leave for Canada on December 31, 2002 and that the Defendant would follow in April 2003. On the day before departure the Defendant drove the Plaintiff and the children to the airport where they stayed in a hotel together. On December 31, 2002, the Defendant accompanied the Plaintiff and the children to the airport where they departed for Canada. Upon arrival in Calgary, Alberta the Plaintiff and the children were met by the Plaintiff's sister, V., and her cohabitation partner, M. The Plaintiff and the children resided with V. and M. until they obtained their own accommodation in September 2003.

[12] The Plaintiff took stepsto establish her and the childrens' residence in Calgary by enrolling the children in school, swimming lessons and gymnastics. The Plaintiff applied for Alberta Health Care Insurance for herself and the children and obtained an Alberta Driver's Licence. She registered a motor vehicle in her own name and made inquiries at SAIT to further her education.

[13] The Defendant maintained contact with the Plaintiff and the children by mail and telephone between December 30, 2002 and March 1, 2003.

[14] On March 2, 2003 without prior notice the Defendant arrived in Calgary and stated that he wanted to take the children back to France. He informed the Plaintiff that he had placed the children on his passport and that he would turn this matter into a Greek tragedy. An incident occurred on March 3, at Chinook Mall where the Defendant attempted to leave the Mall with the youngest child, E. M. approached the Defendant and gained control of E. The Mall security was called and attended at the scene. The Defendant was requested to leave. The incident was reported to the City of Calgary Police.

[15] The Defendant indicated that he had a return airline ticket to France leaving March 28, 2003. The Plaintiff feared that he would attempt to leave with the children against her and their will. The Plaintiff proceeded to bring an application by Notice of Motion returnable in Court on March 19, 2003, requesting custody, care and control of the children, prohibiting the Defendant from removing the children from Alberta, interim access and interim child support.

[16] The Defendant was served with a copy of the Notice of Motion and Affidavit on March 14, 2003. On March 18, 2003 the Defendant and the Plaintiff attended upon a Dispute Resolution Officer at which time the Defendant was advised of his rights. The Plaintiff arranged for a French interpreter to be present in Court on March 19, 2003, so that the Defendant could understand the Court proceedings.

[17] On March 19, 2003, Justice Sullivan granted an Order giving day to day care and control of the children to the Plaintiff, requiring the Defendant to deposit his passport with the Clerk of the Court and ordering that the children not be removed from the Province of Alberta without further order of the Court. Justice Sullivan directed that liberal and generous access be granted to the father in order that he could see his children (the provision referring to liberal and general access was not included in the interim Order granted by Mr. Justice Sullivan, although the Court notes made on April 7, 2003 specifically provide "liberal and general access to Dad effective today"). The balance of the Plaintiff's application was adjourned to Monday, April 7, 2003. The Defendant indicated to the Court that he had an appointment with legal counsel.

[18] On April 7, 2003 the Defendant returned to Court without legal counsel. He brought a friend to translate for him. At that time, Mr. Jonathan Nicholson of the Department of Justice attended and advised the Court that the Department of Justice had received notice of an application from the Central Authority in France for the return of the children to France. As a result, it was agreed that the Plaintiff's application for custody could not go forward pending a hearing of the application pursuant to the Hague Convention. The matter was adjourned for 30 days pending the Defendant's application. It was agreed by the parties that the special chambers application would be required and the date of June 18, 2003 was scheduled for the Plaintiff's application. It was intended that, by that time the Defendant would have made and completed the application under the Hague Convention.

[19] On March 19, 2003 before Justice Sullivan, the Plaintiff volunteered to give the Defendant access to the children. She remained present during the course of the access periods as the children were not comfortable being alone with the Defendant.

[20] On June 18, 2003 the Defendant brought an application for the return of the children to him for return to France pursuant to the International Child Abduction Act (the Hague Convention). On June 18, 2003 an Order was granted by Madam Justice Greckol ordering that the Plaintiff continue to have day to day care of the children, that she deposit her passport with the Clerk of the Court pending further hearing of the applications, that the Defendant pay child support, that the Defendant have specified access to the children, that the Plaintiff be allowed to take the children to British Columbia on a holiday, and that the Defendant's application be adjourned to a special chambers application scheduled for August 25, 2003.

[21] The Defendant was cross-examined on his Affidavit on July 21 and 24, 2003. Counsel for the Defendant commenced cross-examination of the Plaintiff on her Affidavit on July 24, 2003. The Defendant was further cross-examined on August 13, 2003. At that time it became clear that cross-examinations would not be completed in time to proceed with the special chambers application on August 25, 2003. The special chambers application was therefore adjourned to October 24, 2003.

[22] Cross-examination of the Defendant resumed and was completed on August 29, 2003 subject to the Defendant's replies to undertakings. The Defendant's lawyer did not recommence his cross-examination of the Plaintiff.

[23] A pre-trial conference was held on October 10, 2003. At that time counsel for the Defendant sought an adjournment of the special chambers application scheduled for October 24, 2003. The application was granted and rescheduled for January 15, 2004. A further pre-trial conference was scheduled for December 9, 2003.

[24] On November 17, 2003 the Defendant's legal counsel filed a Notice of Ceasing to Act. The last known address for the Defendant as set out in the Notice of Ceasing to Act is c/o R.G., Calgary Drop-In Centre Society, [. . .], Calgary, Alberta.

[25] The Plaintiff's lawyer Mr. Stopa attended at the pre-trial conference on December 9, 2003 and as the Defendant did not appear the pre-trial conference was adjourned sine die pending the receipt of information as to whether the Defendant was eligible for Legal Aid. The Plaintiff's lawyer wrote to the Defendant to ensure he was aware of the date of the application and the Defendant replied to Mr. Stopa by e-mail and confirmed the application date of January 15, 2004.

[26] On January 15, 2004 the Plaintiff and her lawyer appeared, the Defendant appeared without counsel, and with a French interpreter Mr. John Bruno. The Court raised the question with Mr. Stopa and the Defendant as to whether or not the Defendant was eligible to receive Legal Aid assistance, and appointment of counsel. The Court was informed that inquiries had been made with the authorities in France and they had indicated that the Defendant did not qualify for Legal Aid in that country, and therefore the Alberta Legal Aid plan refused to grant Legal Aid and appoint counsel on behalf of the Defendant. The Court reviewed with the parties the number of adjournments that had taken place with respect to the application for the return of the children to France under the International Child Abduction Act and made the parties aware that the purpose of this legislation was to deal with these disputes in as short a period of time as possible and that the application had now dragged on for some seven months without resolution. The Court was informed that the legal brief prepared by Mr. Stopa had been served on the Defendant on January 14, 2004 and considered that he was entitled to a reasonable adjournment in order to review the material and obtain the assistance of Mr. John Bruno or other interpreter in translating the material into the French language. The Court then adjourned the application to Monday, February 2, 2004 at 10:00 a.m. and both Mr. Stopa and the Defendant indicated to the Court that they would be ready to proceed with the application for the return of the children to France pursuant to the International Child Abduction Act.

[27] On February 2, 2004 a full hearing was held and at the completion of the application the Court reserved its decision.

[28] The Hague Convention contains its own code and rules and is intended to be a mechanism for the expeditious enforcement of custody rights; it is not intended to be a forum for the determination of custody on the merits: Thomson v. Thomson, [1994] 6 R.F.L. (4th) 290 (S.C.C.) and; see also Article 19 of the Convention.

[29] An application under the Convention is a summary application. The parties are not entitled to a full trial as this would raise the "spectre of further delay" and; Szalas v. Szabo [1995] O.J. No. 1918 Ont. C.J. (Provincial Division). The usual practice is to present evidence in Affidavit and exhibit form.

[30] I have reviewed all of the Affidavits put forward on this motion. There is a great deal of contradiction between the Affidavits of the two parties, but I am satisfied after reviewing the Affidavit evidence that I am not required to hear oral evidence to reach my decision in this case.

[31] The Plaintiff and the Defendant made a joint decision to move their residence permanently to Canada. They each took steps to advance the joint decision resulting in a physical move of the Plaintiff and the children to Canada on December 31, 2002, and with the intention of the Defendant to follow later once he completed the sale of his business interest in France. The steps included the obtaining of Canadian passports for the children, International Driver's Licences for the Plaintiff and the Defendant and informing friends, doctors and educators of the move. Upon arrival in Canada the Plaintiff took steps to establish herself and the children as residents in Canada by enrolling the children in school and extracurricular activities, obtaining Alberta Health Care coverage, obtaining an Alberta Driver's Licence and inquiring into educational courses at SAIT.

[32] The parties made a specific expression of their intent to establish a permanent residence in Canada prior to the move taking place. The relevant time to determine the parties' intention is that immediately prior to the physical move. There was a settled intention to abandon the prior habitual residence of France. The intention of the parties is demonstrated by their words and conduct.

[33] The childrens' state of habitual residence as of December 31, 2002 is Canada. The Defendant travelled to Canada with the intention of determining whether or not he and his wife would continue their reconciliation and if not, to return to France with the children. He determined on March 14, 2003, that a reconciliation with the Plaintiff was not possible. The Defendant did not bring an application pursuant to the Hague Convention until June 17, 2003. The Defendant's considerations regarding reconciliation and the commencement of an application pursuant to the Hague Convention occurred after the childrens' habitual residence was established in Canada.

THE LAW

[34] France and Canada are signatories to the Hague Convention that this application was brought within one year of the alleged removal or retention and that P.G. was exercising custody rights at the time of the alleged removal or retention.

[35] On February 2, 2004 after reviewing all of the Affidavit evidence and hearing argument and submissions I dismissed the application where the Defendant seeks a declaration that the two children are habitual residents of the country of France.

[36] I find that the two children were habitually resident in the context in which those two words are interpreted under the Hague Convention in France until on or about December 31, 2002, and after that date and certainly at the relevant time the habitual residence of the children became and was and remains that of Canada. The proper forum for the determination of all these matters relating to the children is "Canada".

[37] I find that the two children were neither wrongfully removed to, nor wrongfully retained in, the Province of Alberta, again in the context which those words are used and interpreted in conjunction with the Hague Convention. The Plaintiff and Defendant jointly agreed to move from France to take up permanent residence in Calgary, Alberta in late November or early December 2002, and I further find that there was agreement intended to take up a new habitual residence in Calgary and abandoned the old residence in France as of December 31, 2002.

[38] In Friedrich v. Friedrich, 983 F. 2d 1396 at 1400 (6th Cir. 1993) held that a Hague Convention applicant has the legal burden of showing on a balance of probabilities that the removal or retention of a child was wrongful, that is, that there was removal from or retention outside the child's habitual residence.

[39] I am inclined to favour the approach taken in Friedrich, I need not decide whether P.G. has the legal burden of proving no change of habitual residence from France or S.H., the mother, has the legal burden of proving a change in habitual residence from France to Alberta. When the evidence is evenly balanced the onus is a determining factor (see John Sopinka, Sidney N. Lederman and Alan W. Bryant, The Law of Evidence in Canada (2d ed. (Toronto: Butterworth's, 1999) at para. 3.13). The preponderance of the evidence establishes that the two children were habitually resident in Alberta on and after December 31, 2002.

[40] In Mozes v. Mozes, 239 F. 3d 1067 at 1072 (9th Cir. 2001) a child cannot be wrongfully removed or retained at the jurisdiction to which the child is taken can be considered its habitual residence. I am grateful for the research and judgment of Mr. Justice Rooke of the Alberta Court of Queen's Bench for his decision in Proia v. Proia, [2003] A.J. No. 846 where he stated at para. 19:

The authorities that assisted me in finding that the children were habitually resident in Alberta from June 27, 2000, include Robert D. Arenstein, "The Anatomy of a Hague Case: When a Child[ren] Has Been Abducted to the United States" (New York, circa 1993),...In that article, the author, citing: Cohen and d'Assignies v. Escalante (No. BD 051876, Super, Ct. of Cal. December 9, 1991), said:

If a family decides to move, permanently, to another country and thereafter the parents sell the family home, quit their jobs and purchase a residence in another country, the family has effectively changed the habitual residence of the child[ren]. Therefore, if one parent then decides the move was not what he or she really wanted, the child[ren] cannot simply and unilaterally be removed from the "new" habitual residence.

This is a further quote from Justice Rooke's decision para. 20:

Counsel for Mr. provided Brian L. Webb & Diana S. Friedman, "Hague Convention on International Child Abduction" (Paper presented to the North American Symposium on International Child Abduction, September 30-October 1, 1993, Washington, D.C.), which stated at 10:

The concept of "habitual residence" refers to that place that is the focus of the child's life, where the child's day-to-day existence is centered. ...

A further quote from Justice Rooke's decision at para. 21:

Counsel for Ms. relied heavily on Hon. James D. Garbolino, International Child Abduction: Guide to Handling Hague Convention Cases in U.S. Courts (Auburn, Cal.: Garbolino, 1997). In chapter 4, the author commented at length about the definition of and requirements for habitual residence. His commentary included at 77-80, 83, under the heading "s. 4.3 Habitual Residence - General":

A finding of habitual residence can be determinative in a case, because if the child is already located in the country of its habitual residence, then the Convention does not mandate the child's return to another jurisdiction.

[41] The most quoted definition of the term "habitual residence" comes from the English case of In re Bates, No. C.A. 122/89, High Court of Justice, Family Division Court, Royal Courts of Justice, United Kingdom (1989):

There must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. That is not to say that the propositus intends to stay where he is indefinitely. Indeed his purpose while settled may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode, and there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.

[42] Garbolino's commentary included at 93 under the heading "s. 4.6 Habitual Residence - Duration of stay":

The Convention does not require a minimum period of time for a child to remain in a country in order for that country to become the child's habitual residence. It has been suggested that the time necessary to establish a habitual residence may be as short as one day.

[43] At the time the parties made the joint decision to move to Canada and at the time of the move to Canada the parties were living together as husband and wife. Both parties therefore exercised rights of custody. The Defendant and the Plaintiff as joint custodial parents agreed that the childrens' place of residence would be changed from France to that of Canada.

[44] There was no removable order in existence at the time of the move prohibiting either party from removing the children from France.

[45] The removal of the children from France to Canada cannot be considered wrongful since it was not in breach of the Defendant's rights of custody, rather it was in furtherance of the parties' joint decision and intention to move to Canada.

[46] The evidence establishes, and the Defendant admits, that he consented to the move by the children from France to Canada. The Defendant cannot later change his mind and revoke his consent if he does not subsequently like the result of his decision.

[47] The burden of proof that the Plaintiff obtained the Defendant's consent to the move to Canada by fraud or misrepresentation is upon the Defendant on a balance of probabilities. The Plaintiff's response to the Defendant's allegations are set out in her Affidavit sworn January 12, 2004 specifically in paragraphs 17-29 inclusive. The Defendant has not discharged the burden of proof on him to prove that his consent was obtained by fraud or misrepresentation.

[48] I therefore deny the husband's application under the Convention. The wife has established that one of the exceptions in Article 13 applies, mainly that the husband consented to the childrens' removal from their habitual residence. Under Article 13, I am not obliged to order that the children be returned to France. I am not convinced that returning the children to France would serve the childrens' best interest. At any rate those interests should be determined in the course of an application for custody or expanded access, rather than in a summary application of this nature.

[49] The wife and mother has been successful in this Hague Convention application and she is therefore entitled to costs against the Defendant P.G.

POWER J.

COUNSEL: J. Patrick Stopa, for the plaintiff; P.G., for himself.

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