COURT FILE NO.: 05-FL-3204
DATE: November 5, 2007

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: RAPHAEL BENDITKIS v. MARINA BENDITKIS

BEFORE: Madam Justice J. Mackinnon

COUNSEL: Leonard Levencrown, for the Applicant

Marina Benditkis, for the Respondent

E N D O R S E M E N T

[1] On July 26, 2007, Ms Benditkis obtained an *ex parte* order which declared that Ottawa, Ontario is her son Matthew's ordinary place of residence and that Mr. Benditkis had wrongfully removed and retained the child from Ontario, within the meaning of the *Hague Convention* (*Convention on the Civil Aspects of International Child Abduction*, Schedule to s. 46, *Children's Law Reform Act*, R.S.O. 1990, c. C.12). This order came to the attention of Mr. Benditkis on or about October 5, 2007. He asks that it be set aside or suspended because, in his view, the facts do not support the findings of wrongful removal or wrongful retention, because it is a "chasing order", and because the mother has invoked the jurisdiction of the court in the Czech Republic, pursuant to the *Hague Convention*. Both parents have applied to the Ontario court for sole custody of Matthew, and other relief; the father says that both of these proceedings should be stayed pending the determination of the *Hague* application by the appropriate court in the Czech Republic.

The Facts

[2] The parties moved to Ontario 19 years ago. Matthew was born on July 28, 1994. The parties separated in the year 2000. On June 16, 2006, they signed Minutes of Settlement which were incorporated into an order of the court made that same day. That order provides that the parents have joint custody of Matthew and that the child will reside with each parent for alternating two week periods. In addition, the order provides that, "neither parent shall make a major decision regarding the child (i.e. education, medical, dental, orthodontic) without the other [party's] prior written consent. If the parties cannot agree, they will attend arbitration or court." This order remains in full force and effect.

[3] This summer, Mr. Benditkis left Canada with Matthew, on July 7, for what was to be a vacation during one of the father's two week residential periods with Matthew. They did not

return. Both Mr. Benditkis and Matthew communicated with Ms. Benditkis their intention to reside in the Czech Republic.

[4] In the result, Ms. Benditkis sought the *ex parte* order that was granted on July 26, 2007. She also applied under the *Hague Convention* to the Central Authority for the Czech Republic. And, she has applied in Ontario for sole custody of Matthew and an order for his immediate return to Ottawa.

[5] Meanwhile, the *ex parte* order granted on July 26, 2007 was not served upon Mr. Benditkis. Nor was he aware of the steps taken to invoke the *Hague Convention*. He issued his own motion to change the June 16, 2006 order in the Ontario court, seeking sole custody of Matthew for himself, with access to the mother. In the course of reviewing the court file, his counsel became aware of both the *Hague* application in the Czech Republic and the July 26, 2007 order and sought the relief that is before me now.

[6] Ms. Benditkis appeared on her own behalf. She has no current information on the status of the *Hague* application in the Czech Republic. She submits that the removal of the child from Ontario was wrongful, because it was done under false pretences. She submits that the retention of the child in the Czech Republic is also wrongful because it breaches her custody rights to her son. She maintains that the question of custody should be determined here in Ontario, where all the child's connections are. Finally, she believes that the father has influenced the child to want to live in Europe, for improper reasons not related to the child's best interests.

Is the Removal or Retention Wrongful?

[7] Article 3 of the *Hague Convention* provides as follows:

> 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.

[8] Article 5 provides that:

> For the purposes of this Convention:

> (a) '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;
>
> (b) '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.

[9] There is no question that Matthew Benditkis was habitually resident in Ontario, Canada, immediately before the removal and retention. The father submits that neither is wrongful because the parties had joint custody and the order for joint custody did not contain a non-removal clause.

[10] The order dated June 16, 2006 states:

> 1. The Applicant and the Respondent shall have joint custody of the child, namely Mathew Benditkis born July 28, 1994.
> 2. The Applicant and the Respondent shall have primary care of the child on a two week rotation whereby the child will reside in the respective [party's] care for the 14 day duration. The parties shall have liberal contact to the child in the other's care by telephone.
> 3. Neither parent shall make a major decision regarding the child (i.e. education, medical, dental, orthodontic) without the other [party's] prior written consent. If the parties cannot agree, they will attend arbitration or court.

[11] Mr. Benditkis relies upon two decisions in support of his submission that his retention of Matthew in the Czech Republic is not wrongful, given the wording of this order. The first is *Innes v Innes*, 2005 Carswell BC 1296 (B.C.S.C.). In that case, the parties resided in North Carolina, where they separated. The court there made a joint custody order, with primary residence to the mother and specified access to the father. The order did not contain a non-removal clause. Rather, it specifically contemplated that the mother and children would be moving to Canada. The court stated:

> ¶ 39 The evidence shows that when the North Carolina Court made the January 2, 2003 Order granting the parties joint custody of their children, Mr. Innes was aware of Mrs. Innes' intention to leave North Carolina and move back to Canada with the children. Significantly, that Order does not contain a non-removal clause. In fact, It is apparent that the Court was then aware of her intention because its Order specifically provides that in the event that she "moves out of the Western North Carolina area", Mr. Innes "shall visit during spring break in Canada" and shall "be entitled to visit the children in their community any time" (my emphasis).
>
> ¶ 40 On June 4, 2004, when the North Carolina Court ordered that the Child would visit with Mr. Innes from June 5, 2004 through August 5, 2004, the travel

arrangements prescribed by the Court clearly demonstrate an awareness that Mrs. Innes and the Child were then in British Columbia.

¶ 41 I find that, while Mr. Innes was entitled to exercise "rights of custody" under the terms of the January 2, 2003 Order, there was no breach or violation of those rights. Mr. Innes was aware of Mrs. Innes' intention to return to Canada with the children and, if he did not actually consent to the Child's removal from the State of North Carolina, he took no steps to prevent it.

¶ 42 Furthermore, as I have already noted, there was no non-removal clause in the Order, and I find that the Child was removed from North Carolina with the knowledge and tacit consent of the North Carolina Court.

¶ 43 Mr. Innes suggests that the removal was nonetheless wrongful because it frustrated his rights of access. That is not so. His rights of access in the event that Mrs. Innes moved out of the North Carolina area were specified in the January 2, 2003 Order, including his visit during the Spring Break in Canada.

¶ 44 In any event, the mandatory return dictated by the Convention is limited to cases where the removal or retention of a child is in violation of the custody rights of a person, institution or other body, and a removal or retention of a child in breach of mere access rights is not "wrongful" within the meaning of Article 3 of the Convention; (see Thomson v. Thomson, [1994] 3 S.C.R. 551, paras. 48 and 49).

¶ 45 I find that there was no wrongful removal within the terms of Article 3.

[12] This case does not stand for the proposition that as long as one is a joint custodial parent and the existing order does not contain a non-removal clause, that no wrongful removal or retention can occur, nor that the rights of the other joint custodial parent would always be considered to be rights of access only. Rather, the case holds that the father's rights of custody were not breached because the joint custodial order contemplated that the mother could move the child out of the jurisdiction.

[13] These are not the facts here. There is nothing in the June 16, 2006 order that contemplates that either parent would be moving from Ontario. In addition, ¶3 requires the prior written consent of both parents, or a court order, to permit any major decisions regarding the child. A change of habitual residence to a place outside Ontario, Canada, would clearly be considered to be such a major decision. Here, the father's retention of the child in the Czech Republic breaches both the mother's rights to custody, including the right to determine the child's place of residence, and her rights to access, i.e. to have the child reside with her in alternating two week periods. In my view, *Innes, supra* does not assist the father.

[14] The second joint custody case referred to by Mr. Benditkis is *Wilson v Huntley*, [2005] O.J. No. 1664 (S.C.J.). In this case, the parents had joint custody and their child had an established habitual residence in the United Kingdom (UK) with her mother, and an established habitual residence with her father in Canada. The case held that a retention by the father of the child in Canada, which was a breach of his agreement to return the child to the UK at a certain point of time, was not wrongful within the meaning of the *Hague Convention*, because it did not breach the mother's rights of custody under the law of the place where the child was habitually resident immediately before the retention (Article 3):

> ¶ 69 In summary, I have found that the father did breach the parent's Agreement by not returning Kirah to her mother on October 1, 2004. Nevertheless, in the unusual circumstances of this case where the parents shared legal and residential custody of their child in consecutive, alternating periods, each in a different State, I have concluded that the Convention is not available to the mother for the purposes of returning the child to the United Kingdom. The Convention is not applicable to all cases of removal or retention in breach of rights of custody. It is not applicable in this case because the child was retained in her habitual residence and was not habitually resident in the United Kingdom at that time. In so ruling, I do not condone the father's actions; that breach and the ultimate custody determination will have to be determined without recourse to the Hague Convention.

[15] See also *Jackson v Graczyk* (2007), 86 O.R. (3d) 183 (C.A.) where the Court of Appeal ruled that although the father had the same rights of custody as the mother, her removal of the child from the United States was not wrongful under the *Hague Convention*, because, in the unusual facts of that case, the child had no habitual residence at the operative time.

[16] Neither case assists Mr. Benditkis. Matthew had one habitual residence at the operative time, namely Ontario, Canada.

[17] Accordingly, I find that the retention of Matthew in the Czech Republic is wrongful as defined by the *Hague Convention*. It breaches the mother's rights of custody which included the right to determine his place of residence, not merely her right to have Matthew reside with her for the next and successive alternating two week periods of time. It was not suggested that she had not been exercising her rights of custody as required by Article 3(b), but, if necessary, I would have found that she was, and/or would have exercised them, but for the retention.

The "Chasing Order"

[18] The order dated July 26, 2007 is clearly a chasing order as described in *Thomson v. Thomson*, [1994] 3 S.C.R. 551; that is an order made *ex post facto* for the purpose of bolstering an application under the *Hague Convention*. The headnote to *Thomson*, *supra* states:

> A custody decision made solely to bolster an application under the Hague Convention is called a "chasing order." Under art. 15, a chasing order clarifies for the requested state the requesting state's opinion that the retention was wrongful. Issuance of a chasing order does not result in retention becoming wrongful. Rather, wrongful retention begins from the moment of the expiration of the access period, where the original removal was with the rightful custodian's consent. The custody order granted by the Scottish court to the father, standing alone, would not have grounded an application under the Hague Convention, as it could not, in itself, make the retention wrongful.

[19] Accordingly, it is by reason of the order dated June 16, 2006 that Mr. Benditkis' retention of Matthew in the Czech Republic is wrongful. The order dated July 26, 2007 declares the retention to be wrongful, but does not, in itself, make the retention wrongful.

[20] That this is so is not, in my view, justification to set aside or suspend the July 26, 2007 order, as asked by Mr. Benditkis. He, however, goes on to argue that, based on the decision in *Thomson, supra*, Ms. Benditkis could not properly have sought that order from the Ontario court given that she had also invoked the *Hague Convention* in the Czech Republic.

[21] In *Thomson, supra*, a child habitually resident in Scotland had been brought to Manitoba by the mother. The father applied under the *Hague Convention* and under the *Manitoba Child Custody Enforcement Act.* The Supreme Court of Canada held that unless the father chose to abandon it, the application under the *Convention* applied.

[22] The *Manitoba Child Custody Enforcement Act* is provincial legislation that provides a variety of means to ensure compliance with custody and access orders. It is utilized where children are abducted to Manitoba or are in the process of being abducted from Manitoba. It is not an international convention. In *Thomson, supra*, the Supreme Court of Canada indicated that relief may be sought under either the provincial custody enforcement legislation or under the *Hague Convention*, not both. The specific issue was that the lower court judge had made an order of interim custody in favour of the father pursuant to a provision in the Manitoba Act, in order to facilitate the return of the child. The *Convention* had no such provision and, therefore, the interim custody order could not stand. However, the Supreme Court of Canada found that the court could accept undertakings from the father to achieve the transition of the child in essentially the same manner set out by the impugned interim order. Thus, the interim custody order that the Supreme Court of Canada set aside in *Thomson, supra* was not an order made in the child's habitual residence based upon a determination of the child's best interests on the merits. The *Hague Convention* does not address the merits of competing custody claims. This is made clear in Article 19:

> A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

[23] It is also clear that the *Convention* prohibits the Czech Republic from determining the merits of Matthew's parents' custody claims until after the *Hague* application has been decided:

> Article 16:
> After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

[24] The Convention sets out no similar impediment to the court in the jurisdiction of the child's place of habitual residence.

[25] Nor does the court in *Thomson, supra* state that the chasing order made in Scotland was invalid or improperly made, only that it itself could not make the removal wrongful. Article 15 provides for declarations by the jurisdiction of habitual residence that a removal or retention is wrongful:

> The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

[26] Indeed, in *Thomson, supra,* the Supreme Court of Canada, in ¶98, comments upon a possible effect that a chasing order might have on the outcome of a *Hague* application if it would prevent the restoration of the status quo, which is one of the objectives of the *Convention*.

[27] In my view, both a declaration under Article 15 and a post removal custody order made in the child's habitual residence are clearly distinguishable from commencing two enforcement proceedings in the requested jurisdiction under both territorial legislation and international convention. As such, neither contravenes *Thomson, supra.*

[28] In my view, Mr. Benditkis has wrongfully retained Matthew in the Czech Republic contrary to the provisions of the *Hague Convention,* and I so declare. It is clear that Ontario, Canada is the place of the child's habitual residence. Accordingly, Ontario is the jurisdiction where the issues related to the child's best interests should be judicially determined. Both parents have clearly acknowledged this jurisdiction by invoking it in their individual applications before the Ontario court seeking to change the order dated June 16, 2006. In my view, the fact

that the father's application in Ontario for custody of Matthew was made before he knew about the *Hague* application does not detract from its implicit acknowledgment that Ontario is the proper jurisdiction in which to determine Matthew's custody.

[29] For all of these reasons, I find that the Superior Court order dated July 26, 2007 was made with jurisdiction. In my view, it is a permissible and correct declaration that Ontario is the child's habitual residence and that, in the view of the Ontario court, Mr. Benditkis is wrongfully retaining the child from Ontario. Accordingly, I dismiss the motion to suspend or to set aside the order and amend it to correct the reference to "ordinary place of residence" to "place of habitual residence".

[30] Although Mr. Benditkis was correct to invoke the jurisdiction of this court to seek custody of Matthew, the law of Ontario requires that he should have done so in advance, rather than after the fact of his removal of the child from Ontario. For this reason, I direct that his application in Ontario is stayed until he returns the child here. By returning Matthew to Ontario, he may correct his error and upon doing so, I order that the Office of the Children's Lawyer provide representation for Matthew so that his views and interests can be presented to the court where he is habitually resident, for consideration in the determination of his parents' competing custody claims. I have not stayed the mother's Ontario application and leave the decision whether to pursue it now, to her.

Costs

[31] The parties may make written submissions on costs, first from the Applicant within two weeks of the release of this decision and second from the Respondent within a further two weeks. The Applicant may have one week further to reply. Submissions should include copies of any written offers exchanged between the parties.

J. Mackinnon J.

DATE: November 20, 2007

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ENDORSEMENT

J. Mackinnon J.

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