Katsigiannis v. Kottick-Katsigiannis

[Indexed as: Katsigiannis v. Kottick-Katsigiannis]

55 O.R. (3d) 456
[2001] O.J. No. 1598
2001 CanLII 24075
Docket No. C35389

Court of Appeal for Ontario
Osborne, A.C.J.O., Laskin and Feldman JJ.A.
April 3, 2001*

* Note: This judgment was recently brought to the attention of the editors.

Family law -- Children -- Abduction -- Acquiescence -- "Acquiescence" in context of Article 13(a) of Hague Convention on the Civil Aspects of International Childhood Abduction constitutes subjective consent determined by words and conduct which establishes the acceptance of, or acquiescence in, child's removal or retention -- Mother and children came to Ontario from Greece on return tickets leaving most of their belongings in Greece -- Father promptly brought application under Hague Convention after being served with mother's custody application -- Evidence established that father consented to removal of children from Greece for holiday but did not consent to or acquiesce in their retention in Ontario -- Hague Convention on the Civil Aspects of International Child Abduction, Can. T.S. 1983, No. 35, Article 13(a).

The parties had two children who were habitually resident in Greece. The mother and children flew from Athens to Toronto in April 2000 to visit the mother's family. Their return flight was prepaid, and most of their belongings were left in Athens.

The younger child's christening in Athens, originally scheduled for July 2000, was rescheduled for September 2000. In July 2000, the father was served with a statement of claim in which the mother sought custody of the children. In August 2000, he filed an application under the Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention"). Relying on Article 13(a) of the Hague Convention, the mother submitted that the father consented to, or acquiesced in, the removal of the children from Greece and their retention in Ontario. The applications judge held that Article 13(a) of the Hague Convention did not apply as the mother did not establish that the father consented to, or acquiesced in, the children's retention in Ontario. In reaching that conclusion, she had regard to the fact that mother and children travelled to Ontario on return tickets, that their belongings were left behind in Greece, and that the father commenced the application promptly after he realized that the mother intended to stay in Ontario. The return of the children to Greece was ordered. The mother appealed.

Held, the appeal should be dismissed.

The applications judge's decision was entitled to deference and should not be set aside unless she applied the wrong legal principles or made unreasonable findings of fact.

The words "consent" and "acquiesce" as used in Article 13(a) of the Hague Convention should be given their ordinary meaning. "Consent" and "acquiescence" are related words. To "consent" is to agree to something, such as the removal of children from their habitual residence. To "acquiesce" is to agree tacitly, silently or passively to something such as the children remaining in a jurisdiction which is not their habitual residence. Thus, acquiescence implies unstated consent. Acquiescence is subjective consent determined by words and conduct, including silence, which establishes the acceptance of, or acquiescence in, a child's removal or retention. To establish acquiescence in the context of Article 13(a) of the Hague Convention, the mother had to show some conduct of the father which was inconsistent with the summary return of the children to their habitual residence. To trigger the

application of the Article 13(a) defence, there must be clear and cogent evidence of unequivocal consent or acquiescence. The evidence was clear that the father agreed to the mother's departure for Ontario with the children for a vacation, and that he agreed that their vacation be extended. The evidence that the father consented to the children's removal from Greece passed the clear and unambiguous test. However, the mother failed to establish by a preponderance of evidence that the father consented to, or acquiesced in, the children remaining in Ontario. The applications judge applied the correct legal principles and her findings on the Article 13(a) issues of consent and acquiescence were not unreasonable.

A. (Minors) (Abduction: Custody Rights), In re, [1992] Fam. 106 (B.C.C.A.); A.Z. (Minors) (Abduction: Acquiescence), In re, [1993] 1 F.L.R. 682 (C.A.); H. and others (Minors), In re, [1996] H.L.J. No. 43; M.L.L.C. v. J.L.R.R., [1997] R.D.F. 754 (Que. Sup. Ct.); New Brunswick (Attorney General) v. Majeau-Parsad, [2000] N.B.J. No. 363 (Q.B.); P. v. P. (Abduction: Consent or Acquiescence), [1997] 3 F.C.R. 550 (H. Ct. Fam. Div.), affd, unreported March 6, 1998 (C.A.); S. (Minors) (Abduction: Acquiescence), In re, [1994] 1 F.L.R. 819 (C.A.), consd

Other cases referred to

Carter v. Brooks (1990), 2 O.R. (3d) 321, 41 O.A.C. 389, 77 D.L.R. (4th) 45, 30 R.F.L. (3d) 53 (C.A.); Finizio v. Scoppio-Finizio (1999), 46 O.R. (3d) 226, 179 D.L.R. (4th) 15, 1 R.F.L. (5th) 222 (C.A.); Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996); Gottardo Properties (Dome) Inc. v. Toronto (City) (1998), 162 D.L.R. (4th) 574, 46 M.P.L.R. (2d) 309 (Ont. C.A.); Medhurst v. Markle (1995), 26 O.R. (3d) 178, 17 R.F.L. (4th) 428 (Gen. Div.); Pesin v. Osorio-Rodriguez, 77 F. Supp. 2d 1277 (S.D. Fla. 1999); R., In re, [1995] 1 F.L.R. 716 (H.L.); Thomson v. Thomson, [1994] 3 S.C.R. 551, 92 Man. R. (2d) 161, 107 D.L.R. (4th) 695n, 163 N.R. 69, 79 W.A.C. 81, [1994] 5 W.W.R. 153, 50 R.F.L. (3d) 145n, 6 R.F.L. (4th) 290; W. (V.) v. S. (D.), [1996] 2 S.C.R. 108, 134 D.L.R. (4th) 481, 196 N.R. 241

Statutes referred to

Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 46(2)

Treaties and conventions referred to

Hague Convention on the Civil Aspects of International Child Abduction, Can. T.S. 1983, No. 35, Preamble, Arts. 1, 3, 12, 13

APPEAL from a judgment granting an application under the Hague Convention on the Civil Aspects of International Child Abduction.

Malcolm C. Kronby, Q.C., for appellant.
Sandra Meyrick, for respondent.

The judgment of the court was delivered by

[1] OSBORNE A.C.J.O.: -- This appeal arises out of an application made by the respondent father under the Hague Convention on the Civil Aspects of International Child Abduction, Can. T.S. 1983, No. 35 ("the Hague Convention") [as implemented in Ontario in the Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 46, Sched.]. The central issue on the appeal is whether the applications judge was correct in ordering the return of the father's two children to Greece, their place of habitual residence.

[2] The appellant mother contends that the order of return should not have been made. She submits that the father consented to, or acquiesced in, the removal of the children from Greece and their retention in Ontario. She relies on Article 13(a) of the Hague Convention, which provides:

> Despite 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:

> (a) the person, institution or other body 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;

(Emphasis added)

Factual Background

[3] The evidence on the father's Hague Convention application was entirely by affidavit. None of the deponents were cross-examined. Mr. Katsigiannis ("the father") and Mrs. Kottick-Katsigiannis ("the mother") were married in Toronto on December 18, 1992. They have two children, Ariana Katsigiannis, born in Greece on February 5, 1998 and Evan Katsigiannis, born in Toronto on September 15, 1999.

[4] After their marriage, the parties moved to Athens, Greece where the father, a lawyer, practises corporate and commercial law.

[5] When the mother became pregnant with her second child, she and the father agreed that she should return to Canada for the latter part of her pregnancy and the birth. Accordingly, the mother returned to Canada in early June 1999 with Ariana, and gave birth to Evan on September 15, 1999. Because of respiratory problems Evan encountered shortly after birth, her return to Athens with both of the children was delayed until December 1, 1999.

[6] After the mother returned to Athens in December 1999, her already fragile relationship with the father appears to have further deteriorated. One cause of the parties' marital problems was the father's alleged relationship with another woman and his refusal to end that relationship.

[7] On April 23, 2000, the mother and the children flew from Athens to Toronto to visit the mother's family. The father did not object to this trip. The mother and children flew to Toronto on a return or an open ticket. In either case, their return flight was prepaid. The mother left a large part of her belongings in Athens, as well as much of the children's clothing, toys and other possessions. This is evidenced by the mother's written demand that a significant number of her and the children's personal items be returned to her in Ontario. All of this suggests that the mother intended to return to Greece with the children, and that the father expected her to return with the children.

[8] In June 2000, the father flew from Athens to Toronto on Greek government business and to spend some time with his family. During his visit, the mother and the father met for a weekend in New York. The father claimed the weekend was an anniversary celebration. According to his evidence, at that time the plan was that the mother and children would return with the father to Greece at the end of the month. Instead, at the mother's request, the father agreed that she and the children would stay in the Toronto area with her family for a short time longer. The amended plan, at least from the father's standpoint, was that the mother and children would return to Athens in mid-July 2000, when what he described as their "extended vacation" was over. Because of this extended vacation, Evan's christening in Athens, originally scheduled for July 2000, was re-scheduled for September 2000.

[9] The mother's evidence was that her April 23 trip from Greece to Canada followed an agreement to separate. She said that the father had agreed to accept a separation after refusing to terminate his five-year extra-marital relationship. She stated that, "I left Greece with the children on April 23, 2000. It was clear at that time that we were separating . . . our separation and my return to Canada was a matter of mutual acquiescence and consent."

[10] The mother said that the father came to Toronto on business in May and stayed at a hotel. They met to discuss the

separation. It ended by him saying that she would be hearing from his lawyer.

[11] According to the mother, on the June 23 weekend, she and the father met in New York to explore the possibility of reconciliation. The father refused to give up his extra-marital relationship and the wife refused to reconcile unless he did. He told her not to come back. This was confirmed in a separate affidavit by a friend of the parties who was with them in New York.

[12] By contrast, the father claimed that there was never any discussion about separation after April 23, 2000, when the mother and children were in Ontario.

[13] The father arranged to return to Toronto on August 2, 2000. He planned to go to the mother's family's cottage in Sault Ste. Marie, Ontario. However, to what the father described as his "utter astonishment", on July 31, 2000, he was served with a statement of claim in which the mother sought custody of Ariana and Evan. The custody claim was issued in Ontario on July 19, 2000. Once served with the custody claim, the father responded quickly. He retained counsel and notified the mother of his position. On August 10, 2000, counsel for the father wrote to counsel for the mother setting out the father's position:

> We take the position that the children should be returned to Greece and that this matter must be resolved where the children ordinarily reside.

The Hague Convention

[14] The father's Hague Convention application was filed in Greece on August 21, 2000. In it the father invoked Article 3 of the Hague Convention. He contended that the children had been wrongfully retained by their mother in Ontario and that such retention constituted the wrongful removal or retention of the children within the meaning of Article 3 of the Hague Convention. He thus sought the return of the children under Article 12 of the Hague Convention.

[15] The Hague Convention has been part of the law of Ontario since 1983. See Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 46(2). Since June 1993, Greece has been a Hague Convention Contracting State. The principles underlying the Hague Convention are clearly set out in its preamble:

> 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: . . .

[16] The Convention's objects are set out in 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 the Contracting State are effectively respected in the other Contracting States.

[17] Embedded within the objects of the Hague Convention is the deterrence of abduction. The automatic return of children who have been unlawfully removed or retained is presumed to accomplish this objective. See W. (V.) v. S. (D.), [1996] 2 S.C.R. 108 at para. 36, 134 D.L.R. (4th) 481.

[18] Article 3 deals with the wrongful removal or retention

of children:

> 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.

[19] For purposes of this appeal, it is acknowledged that the children are habitually resident in Greece and that the father at material times exercised a shared right of custody according to Greek law. He thus had standing to bring a Hague Convention application under Article 3.

[20] Article 12 provides for the return of children who are wrongfully removed or retained in accordance with Article 3:

> 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.

[21] Article 13 limits the application of Article 12, and thus gives the alleged abducting parent a defence, in two discrete circumstances:

> Despite 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:
>
> (a) the person, institution or other body 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
>
> (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.

The Parties' Positions and the Judgment Below

[22] The parties' positions and the applications judge's reasons can be briefly summarized. The father contends that although he consented to the children travelling to Ontario from Greece, he did not consent to, or acquiesce in, their retention in Ontario. Apart from his subjective intention, which is clearly set out in his affidavit evidence, he submits that nothing he did or said could be taken as an unequivocal consent to, or acquiescence in, the children's retention in Ontario.

[23] By contrast, the mother contends that she separated from the father when she left Greece on April 23, 2000 and that the father accepted the separation, and that the children would remain in Ontario with their mother. Invoking Article 13(a) of the Hague Convention, she submits that the father consented to, or acquiesced in, the children's removal from Greece or that he consented to, or acquiesced in, their retention in Ontario.

[24] For reasons that follow, I think that the father did consent to the children's removal from Greece, but he did not

consent to, or acquiesce in, their retention in Canada. Thus, I conclude that the applications judge was correct in allowing the father's Hague Convention application.

[25] After finding that the children were habitually resident in Greece, the applications judge considered Articles 3 and 13(a) of the Hague Convention. She concluded that the children should be returned to Greece unless the mother could establish that the father had consented to, or acquiesced in, their retention in Ontario as in accordance with Article 13(a) of the Hague Convention.

[26] After reviewing the evidence, the applications judge found that Article 13(a) of the Hague Convention did not apply. She found that the mother did not establish that the father consented to, or acquiesced in, his children's retention in Ontario. Thus, she ordered the return of the children to Greece on conditions which, with one exception (which will be discussed at the end of these reasons), are not in issue.

[27] The mother takes issue with the applications judge's finding that she had not brought herself within Article 13(a) of the Hague Convention. The mother's submissions focus primarily on the father's credibility. She does not contend that there was no evidence to support the applications judge's conclusion. She accepts that there was such evidence, but submits that the applications judge should not have believed it. The mother's position on the father's credibility is summarized in para. 11 of her factum:

> It is submitted that the respondent in appeal [the father] simply cannot be believed when he denies that the separation was a matter of consent or subsequent acquiescence. . . .

[28] In support of her submissions on the issue of the father's credibility, the mother refers to the father's denial of both a long-term adulterous relationship and the mother's accusation that he infected her with a sexually transmitted disease. She contends that the father's credibility was impugned on these issues and that his assertion he did not consent to, or acquiesce in, the children's retention in

Ontario should therefore not be believed. She also submits that the father's failure to commence his Hague Convention application until he was served with the mother's custody claim suggests that he acquiesced in the children remaining in Ontario.

[29] The applications judge made no findings on the collateral issues of the father's credibility and the mother's venereal disease. Instead, she looked to the evidence that she felt was more directly connected with the issue of consent and acquiescence. In her reasons [at paras. 7 and 12], she said:

> There is no evidence before me to support a finding that there is a grave risk that the children's return would expose them to physical or psychological harm, or otherwise place them in an intolerable situation. [See Note 1 at end of document]
>
> I make no findings with respect to the adultery and the fact of the husband's or wife's credibility on the issue. However, having regard to the facts that the wife's and children's tickets were return tickets, all of the children's and the wife's belongings were left behind in Greece when she came to Canada, and the husband commenced this application promptly after he realized the wife intended to stay, I conclude that the wife did not inform her husband of her intentions to stay in Canada nor did he consent or acquiesce to the children's removal from Greece or retention in Ontario.

Analysis and Conclusion

[30] I begin with the standard of appellate review. While the applications judge heard no oral evidence, and therefore this court is in just as good a position to assess the evidence as she was, this appeal is nonetheless not a rehearing or a de novo review of the evidence as if no decision had been made by the applications judge. See Carter v. Brooks (1990), 2 O.R. (3d) 321 at pp. 329-30, 30 R.F.L. (3d) 53 at p. 64 (C.A.).

[31] The applications judge's decision is entitled to deference and should not be set aside unless she applied the

wrong legal principles or made unreasonable findings of fact. This standard of review applies even though this is an appeal from a decision made on an entirely written record. See Gottardo Properties (Dome) Inc. v. Toronto (City) (1998), 162 D.L.R. (4th) 574, 46 M.P.L.R. (2d) 309 (Ont. C.A.).

[32] As authorities such as Thomson v. Thomson, [1994] 3 S.C.R. 551, 92 Man. R. (2d) 161, make clear, a Hague Convention application does not engage the best interests of the child test -- the test that is universally and consistently applied in custody and access cases. Hague Convention contracting states accept that the courts of other contracting states will properly take the best interests of the children into account. See Medhurst v. Markle (1995), 26 O.R. (3d) 178, 17 R.F.L. (4th) 428 (Gen. Div.) and Finizio v. Scoppio-Finizio (1999), 46 O.R. (3d) 226, 1 R.F.L. (5th) 222 (C.A.). Thus, where there has been a wrongful removal or retention, and no affirmative defence is established within the meaning of the Hague Convention, such as consent or acquiescence under Article 13(a), the children must be returned to their habitual residence. In the circumstances of this case, the children must be returned to Greece so that the issue of their custody can be determined in accordance with the law of Greece.

[33] Under the Hague Convention, if the removal of the children from their habitual residence was consented to, there has been no breach of custody rights unless the children's retention in their non-habitual residence extends beyond the limits of the consent to their removal. It is, of course, possible that a parent may consent to, or acquiesce in, the retention of the children in their non-habitual residence after the period of consent to their removal has ended. This is what the mother says occurred here.

[34] There are few Canadian authorities dealing with the consent/acquiescence provision of Article 13(a) of the Hague Convention. In M.L.L.C. v. J.L.R.R., [1997] R.D.F. 754 (Que. Sup. Ct.), the applications judge considered the issue of acquiescence against a factual background which by any reasonable standard would suggest that the mother's conduct did not constitute acquiescence. In that case, the mother went to

extraordinary lengths to pursue the whereabouts of her son. This perhaps explains why the applications judge's reasons do not consider the proper application of Article 13(a) of the Hague Convention in any depth.

[35] In New Brunswick (Attorney General) v. Majeau-Parsad, [2000] N.B.J. No. 363 (Q.B.), the mother and father were living in New Zealand in an unstable relationship. The mother's parents purchased return airline tickets for the mother and child so that they could fly to Moncton, New Brunswick where the mother's parents resided. When the mother was served with a Hague Convention application, she raised three defences available under the Hague Convention, one of which was that the father acquiesced in the child remaining in New Brunswick. The mother's contention that the father acquiesced in the child's retention was rejected. Robichaud J. held that while the mother did not wrongfully remove the child from New Zealand, by August 1999, she had wrongfully retained the child in New Brunswick in violation of the father's equal custodial rights in New Zealand. Following the decision of the British Court of Appeal in In re A (Minors) (Abduction: Custody Rights), [1992] Fam. 106, the application s judge applied a subjective test to resolve the factual issue of acquiescence under Article 13(a). He concluded that, as a matter of fact, the father did not acquiesce in his child remaining in New Brunswick. The child was therefore ordered to be returned to New Zealand.

[36] A number of cases in England provide some assistance on the proper interpretation of Article 13(a) of the Hague Convention. Until relatively recently, the approach to be followed was governed by a trilogy of cases: In re A., supra; In re A.Z. (Minors) (Abduction: Acquiescence), [1993] 1 F.L.R. 682; and In re S. (Minors) (Abduction: Acquiescence), [1994] 1 F.L.R. 819 (C.A.). These cases establish that acquiescence requires evidence from the alleged abducting parent of some conduct on the part of the wronged parent which is inconsistent with the summary return of the child to the place of [the] child's habitual residence. Summary return, looked at generally, is the relatively immediate, as opposed to the eventual, return of the child. According to these cases, acquiescence for the purpose of Article 13(a) may be active or

passive. Active acquiescence involves some step by the aggrieved parent that is demonstrably inconsistent with insistence on the summary return of the child to the place of the child's habitual residence. Passive acquiescence occurs when the aggrieved parent allows enough time to pass without insisting on summary return. The length of time that must pass before acquiescence will be found will depend on the circumstances of each case.

[37] Beginning with In re H. and others (Minors), [1996] H.L.J. No. 43, the House of Lords, in considering the application of Article 13(a) of the Hague Convention, rejected the characterization of acquiescence as being either active or passive and substituted a strict subjective test with one exception, which they described as extraordinary.

[38] In In re H., Lord Brown-Wilkinson set out several principles to guide the proper interpretation of "acquiescence" in the context of Article 13(a) of the Hague Convention. He stated that the test is entirely subjective. That is, the answer to the question whether a parent has acquiesced in the removal or retention of a child will depend on that parent's state of mind -- not the outside world's perception of the parent's intentions. Lord Brown-Wilkinson noted that his approach -- the subjective intention approach -- is consistent with the one adopted in both the United States and France. In concluding, he referred with approval at para. 25 to Millett L.J.'s comments in In re R., [1995] 1 F.L.R. 716 (H.L.) at p. 733:

> Acquiescence is a question of fact. It is usually to be inferred from conduct; but it may, of course, be evidenced by statements in clear and unambiguous terms to the relevant effect.

(Emphasis added)

[39] Lord Brown-Wilkinson added at para. 35 that "attempts by the wronged parent to effect a reconciliation or to reach an agreed voluntary return of the abducted child" will not generally constitute acquiescence for Hague Convention

purposes. He also stated at para. 42 that "[t]he trial judge, in reaching his conclusion on that question of fact [the consent or acquiescence question of fact] will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. . . . [t]hat is a question of the weight to be attached to evidence and is not a question of law". I agree with this observation.

[40] The exception that Lord Brown-Wilkinson carved out of the subjective test at para. 42 arises:

> [w]here the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced.

[41] Thus, even if a wronged parent has never in fact acquiesced in the child's removal or retention, if he or she has said or done something which is clearly and unequivocally inconsistent with the summary return of the child, the wronged parent's actual subjective intention will be disregarded.

[42] This exception has no application in this case. Even if I were to accept the mother's version of what happened in New York, that is, that the father told her not to come back if she was not prepared to accept his affair, it cannot be said that he clearly agreed that she and the children not return to Greece or that he acquiesced in that arrangement. He may have been suggesting that once back in Greece, she not return to live with him. The father's words and actions, which included the postponement of Evan's christening in Greece to September, could not have led the mother to reasonably believe that the father was not going to assert his right to the summary return of his children. Indeed, as I have noted, when the father first determined what the mother's plans for the children were (when he was served the mother's Ontario custody claim), he quickly launched his Hague Convention application.

[43] P. v. P. (Abduction: Consent or Acquiescence), [1997] 3 F.C.R. 550 (H. Ct. Fam. Div.), affd, unreported, March 6, 1998 (C.A.)), is a relatively recent case which adopts and elaborates on the approach of Lord Brown-Wilkinson in In re H. In affirming the decision of the High Court, Hale J. for the Court of Appeal explained that when considering whether a parent consented to the removal of a child under Article 13(a), the court must determine whether, as a matter of fact, the applicant parent intended to and did give unconditional consent to the removal of the child. In P. v. P., the Court of Appeal held, at p. 555 F.C.R., that although consent does not have to be evidenced in writing or expressly stated, it must "amount to clear and cogent evidence of an unequivocal consent". I see no reason not to require acquiescence to meet the same standard.

[44] Hague Convention authorities in the United States generally follow the subjective approach adopted by the House of Lords in England (and in Canada by Majeau-Parsad, supra). In Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996), the 6th Circuit Court of Appeals held that acquiescence under Article 13 is a question of subjective intent. The court stated at p. 1070:

> [W]e believe that acquiescence under the Convention requires either: an act or statement with the requisite formality, such as testimony in a judicial proceeding; a convincing written renunciation of rights; or a consistent attitude of acquiescence over a significant period of time.

[45] In Pesin v. Osorio-Rodriguez, 77 F. Supp. 2d 1277 (S.D. Fla. 1999), the Florida Southern District Court held that a father who filed a petition under the Hague Convention did not acquiesce in the removal of his children from Venezuela. The court adopted the test for acquiescence from Friedrich, and cited the House of Lords' judgment in In re H. with approval. The court held that the petitioner had not acquiesced in the removal of his children even though he was providing his wife and children with monthly support payments and tuition for the children's private education in Florida when he was also attempting to reconcile with his wife. The court found that the provision of financial support does not necessarily constitute

an unequivocal intention to acquiesce.

[46] The words "consent" and "acquiescence" as used in Article 13(a) of the Hague Convention should, in my view, be given their ordinary meaning so that they will be consistently interpreted by courts of Hague Convention contracting states. In any case, I can see no logical reason not to give those words their plain, ordinary meaning.

[47] "Consent" and "acquiescence" are related words. "To consent" is to agree to something, such as the removal of children from their habitual residence. "To acquiesce" is to agree tacitly, silently, or passively to something such as the children remaining in a jurisdiction which is not their habitual residence. Thus, acquiescence implies unstated consent.

[48] Subject to this observation, I agree with Lord Brown-Wilkinson's approach and analysis in In re H, supra. When Lord Brown-Wilkinson said that "[a]cquiescence is a question of the actual subjective intention of the wronged parent, not the outside world's perception of his intentions", he was, it seems to me, really speaking of the wronged parent's consent to a child's removal or retention based on evidence falling short of actual stated consent. That is what acquiescence is -- subjective consent determined by words and conduct, including silence, which establishes the acceptance of, or acquiescence in, a child's removal or retention.

[49] To establish acquiescence in the Article 13(a) Hague Convention context -- "subsequently acquiesced in the removal or retention" -- the mother must show some conduct of the father which is inconsistent with the summary return of the children to their habitual residence. In my view, to trigger the application of the Article 13(a) defence there must be clear and cogent evidence of unequivocal consent or acquiescence. In my opinion, the evidence on which the mother relies does not meet that test.

[50] The evidence is clear that the father agreed to the mother's departure for Ontario with the children on April 23,

2000, for a "vacation". He also agreed that their "vacation" be extended. Consistent with that agreement, he rescheduled Evan's christening from July 2000 to September 2000. The evidence that the father consented to the children's removal from Greece passes the clear and unambiguous test.

[51] However, the issue here is not whether the father consented to, or acquiesced in, the children's removal from Greece. Rather, the issue is whether the applications judge was correct in concluding that the father did not consent to, or acquiesce in, the children's retention in Ontario in July 2000 once the mother's plans for the children's future living arrangements became clear to him.

[52] The question whether the father consented to the children remaining in Ontario is a question of fact. See In re R, supra. The mother bears the burden of proof on the consent/ acquiescence issues. That is, she must establish that Article 13(a) of the Hague Convention applies. To discharge her burden in the circumstances of this case, the mother must establish by a preponderance of evidence that the father consented to, or acquiesced in, the children remaining in Ontario with her. See P. v. P., supra.

[53] The applications judge reviewed some of the evidence in her reasons. In doing so, she adverted [at para. 11] to the issue of the credibility of the father's assertion that he did not consent to, or acquiesce in, the children's retention in Ontario:

> The Court is asked to conclude that the husband is lying about his lack of consent on the basis of evidence which the wife submits is proof that the husband is lying when he denies his adultery.

[54] The applications judge made no finding with respect to the father's alleged adultery. Instead, she looked to other evidence to determine what the parties' actual intentions were. Her findings in this regard are findings of fact. After her review of the evidence, she concluded that:

> . . . the wife did not inform her husband of her intentions to stay in Canada nor did he consent or acquiesce to the children's removal from Canada for retention in Ontario.

[55] The applications judge concluded:

> In the result, therefore, it is declared that the children are being wrongfully retained in Ontario by the respondent and that such retention constitutes a wrongful removal or retention of the children in Ontario within the meaning of Article 3 of the Hague Convention on the Civil Aspects of International Child Abduction.

[56] There was, in my opinion, ample evidence to support the applications judge's conclusion. She took into account the evidence (including the mother's attack on the father's credibility) that, according to the mother, showed that the father consented to, or acquiesced in, the children's retention in Ontario. She applied the correct legal principles and her findings on the Article 13(a) issues of consent and acquiescence are not unreasonable.

[57] For these reasons, I would dismiss the appeal with costs.

[58] There are two further matters that deserve brief comment. First, counsel have a different view of what the applications judge meant when she imposed a condition concerning the payment of airfare for the mother and children for their return to Greece. I see no reason to attempt to resolve that dispute. If the parties cannot agree on what the applications judge intended, they should seek clarification from her.

[59] Second, Hague Convention applications are typically heard on affidavit evidence. Although a Hague Convention application does not determine custody having regard to the child's best interests, the child's best interests should be taken into account by ensuring that Hague Convention applications are disposed of expeditiously. That consideration militates in favour of Hague Convention applications being

decided on a written record, that is by affidavit evidence. In general, Hague Convention applications should be managed so that cross-examination on affidavits, if any, do not unduly delay the hearing of the application. If credibility is a serious issue, consideration should be given to having the evidence of witnesses whose credibility is in issue (usually the mother and father) heard viva voce.

Appeal dismissed.

Notes

Note 1: This issue was raised below, but is not raised on this appeal. It is accepted that Article 13(b) of the Hague Convention has no application. That is to say it does not provide a basis upon which to deny the father's application to return the children to Greece.