COURT OF APPEAL

CANADA
PROVINCE OF QUÉBEC
REGISTRY OF MONTRÉAL

No: 500-09-012507-026
(505-04-009917-022)

DATE: AUGUST 23, 2002

CORAM: THE HONOURABLE JACQUES CHAMBERLAND J.A.
JOSEPH R. NUSS J.A.
PIERRE J. DALPHOND J.A. (AD HOC)

R... F...
APPELLANT - Petitioner
v.

M... G...
RESPONDENT – Respondent
and
LE PROCUREUR GÉNÉRAL DU QUÉBEC
MIS EN CAUSE – Mis en cause

JUDGEMENT

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[1] **THE COURT**, on an appeal from a judgment of the Superior Court rendered at Longueuil on July 3, 2002 by Mr. Justice Jean-Pierre Senécal which dismissed Appellant's Petition Seeking the Immediate Return to Hawaii of L... La... F... (born […], 2000) pursuant to an *Act Respecting the Civil Aspects of International and Interprovincial Child Abduction,* R.S.Q., Ch. A-23.01;

[2] Having studied the record, heard the parties through counsel and having deliberated;

[3] For the reasons set forth in the hereto annexed opinion of Mr. Justice Chamberland, with which reasons Mr. Justice Nuss and Mr. Justice Dalphond concur;

[4] **MAINTAINS** the appeal, each party paying its own costs;

[5] **SETS ASIDE** the judgement *a quo*;

[6] **GRANTS** Appellant R... F...'s Petition Seeking the Immediate Return to Hawaii of L... La... F..., each party paying its own costs;

[7] **ORDERS** the return of L... La... F..., born […], 2000, to the State of Hawaii, United States of America, accompanied by her father by September 30, 2002, on the condition that Appellant R... F... deposits with the clerk of this Court by noon, September 4, 2002, a signed undertaking which reads as follows:

1) I shall pay for the expenses, if any, of the voyage of L... La... to Hawaii;

2) I shall endeavour to fix the date of my return to Hawaii, with L... La..., between now and September 30, 2002 in order to make it possible for M... G..., should she so decide, to accompany us back to Hawaii;

3) I shall not file, nor cause, directly or indirectly, to be filed any criminal proceedings against M... G... in connection with the removal of L... La... from Hawaii to Canada on October 7, 2001;

4) I shall not act in any fashion so as to prevent, or impede, M... G...'s entry to the United States and, on the contrary, I shall cooperate and assist her in obtaining whatever status is available to her, and to obtain extensions thereof, in order for her to continue to reside in the United States;

5) I shall forthwith file a renunciation from the judgement rendered on July 19, 2002 by William J. Nagle III J., other than the conclusion regarding my paternity of L... La..., which conclusion shall remain valid; the renunciation shall be such that the custody issue, and all related matters, shall be decided anew;

6) I shall provide lodging for M... G... and L... La... (and C...), in the residence I own in Hawaii or, alternatively, should this situation be unacceptable to M... G..., I shall pay for the latter's reasonable accommodations, and that of the children, up to $75.00 U.S. per day which, I warrant, is sufficient to provide suitable and proper lodging for them in Hawaii;

7) I shall also provide for the entire expenses of L... La... (and C...) and supplement M... G...'s social welfare benefits to the extent of

$200.00 U.S. per month during the period necessary for the custody issue to be determined by the Court of competent jurisdiction in Hawaii, unless otherwise directed by such court;

8) I shall consent to a custody hearing at the earliest date, and shall extend my best efforts in that regard; until that date, I consent to having the joint custody of L... La... with M... G... and to sharing the physical custody of L... La... on a 3 day / 3 day basis, unless otherwise decided by the Court of competent jurisdiction in Hawaii;

9) I shall take care of the baby sitting services for L... La... (and C...) during the custody hearing;

10) I shall cover all necessary medical expenses for L... La... (and C...) while in Hawaii for the custody hearing;

11) I shall forthwith file a discontinuance of my motion for the return of the child L... La..., Court File No. 02-01-6546, before the Family Court of the First Circuit of the State of Hawaii which is scheduled to be heard on September 25, 2002;

12) I shall not pursue any legal action regarding C... until the judgment regarding the custody of L... La... is rendered;

13) I consent to travel back to Hawaii, together with M... G... and L... La..., to the extent that it is possible to do so by September 30, 2002;

14) In order for M... G... to be able to travel back to Hawaii with both children, should she so desire, I consent to sign all papers needed in order for a passport to be issued for C... and I shall cover all expenses related thereto, including the fees for the birth certificate and the passport.

JACQUES CHAMBERLAND J.A.

JOSEPH R. NUSS J.A.

PIERRE J. DALPHOND J.A. (AD HOC)

Me Francine Nantel
ROBINSON, SHEPPARD, SHAPIRO
Attorney for Appellant

Me Nathalie Lemée
LAFONTAINE, LAPIERRE & ASSOCIÉS
Attorney for Respondent

Me Nathalie Fiset
BERNARD, ROY & ASSOCIÉS
Attorney for Mis en cause

Date of hearing: August 13, 2002

REASONS OF CHAMBERLAND, J.A.

[8] R... F... appeals from the judgement which dismissed his petition for the immediate return to Hawaii of L... La... F... under the *Hague Convention on the Civil Aspects of International Child Abduction* (The "Hague Convention") and its implementing legislation in Québec, an *Act Respecting the Civil Aspects of International and Interprovincial Child Abduction*, R.S.Q. chapter A-23.01 (the "Act").

[9] L... La... F... was born on […], 2000 while the parties were residing in Melbourne, Australia.

[10] A few weeks later, they moved to Hawaii where they lived, together with L... La..., until Respondent M... G... left with the child and, without the knowledge of Appellant, flew to Canada on October 7, 2001.

[11] Appellant's Motion Seeking the Immediate Return of the Child to Hawaii is dated May 17, 2002.

[12] Articles 3, 20, and 21 of the Act are relevant to the study of this file:

> **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 Québec or of the designated State in which he 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 Québec or of the designated State.
>
> **20.** Where a child who is in Québec 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.
>
> **21.** 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 or 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.

[13] At the hearing in first instance, as well as at the hearing in appeal, it was acknowledged by all parties that the removal of L... La... from Hawaii to Canada, without the knowledge of her father R... F..., was "wrongful" within the meaning of the Act. It was also admitted that Hawaii was the state in which L... La... was "habitually resident" immediately before her removal.

[14] Respondent contested Appellant's right to ask for the immediate return of the child for two reasons:

1) Appellant acquiesced in the removal of the child to Canada, since October 7, 2001, (Article 21(1) of the Act);

2) There is a grave risk that L... La...'s return to Hawaii would expose her to physical or psychological harm or otherwise place her in an intolerable situation (Article 21(2) of the Act).[1]

[15] At the conclusion of a two-day hearing, the judge in first instance concluded that Respondent, who had the burden of proof, had not succeeded in proving that Appellant had acquiesced, subsequent to L... La...'s wrongful removal, to the child staying in Canada. He also concluded that, in the very particular circumstances of this case, there existed a grave risk that the return of the child to Hawaii would expose her to physical or psychological harm or otherwise place her in an intolerable situation.

[16] The judge in first instance concluded that, for various reasons, Respondent would not be able to return to Hawaii with L... La..., should her immediate return to the country of her habitual residence be ordered. He thus looked at the consequences of this conclusion on the situation in which L... La...'s return to Hawaii would place her. The trial judge noted she had lived with her mother since her birth and, qualifying

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[1] Article 21(2) of the Act is the equivalent of Article 13 b) of the Hague Convention and is drafted in the exact same terms, both in English and in French; Article 21(1) of the Act is the equivalent of Article 13 a) of the *Hague Convention* and is drafted in almost identical terms, in both languages.

Respondent as the primary carer of the child, he concluded that it would be problematic for her, if not dramatic, if she had to return to Hawaii without her mother. In addition, the judge noted that the parties have no family whatsoever in Hawaii to whom they could turn for advice, assistance and support with respect to the well-being of the child. The trial judge concluded his judgement by emphasizing on the very exceptional nature of the situation at hand.

[17] In my respectful opinion, the conclusion reached by the trial judge is erroneous. In my view, the evidence was not persuasive enough to justify the conclusion that Respondent would be prevented from returning to Hawaii for the relatively short period of time necessary for the Courts in Hawaii to decide on the merits of the custody issue. Moreover, undertakings by Appellant will facilitate the return of L... La..., hopefully with her mother, to Hawaii. Finally, even if one were to assume that, for various reasons out of her control, Respondent is prevented from accompanying her daughter back to Hawaii, I would still be of the view that L... La...'s return to the care of her father – for the time necessary for the custody issue to be decided – would not amount to placing her in an intolerable situation.

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[18] The reasoning of the judge in first instance is entirely premised on his conclusion that Respondent will not be able to accompany L... La... back to Hawaii even though, as the judge notes, she has more than enough Aeroplan points in her name to acquire a return ticket to Hawaii.

[19] The judge noted that Respondent did not have the financial resources to live in Hawaii, should she return there with L... La..., and that she did not have the permits allowing her to work in the U.S. In addition, the trial judge concluded that, Appellant being without work since July 2001, he could not be ordered to support Respondent financially. At the hearing before this Court, it was confirmed to us that Respondent is presently receiving financial assistance from the Government of Québec to the extent of $709 per month. Counsel acting for the Central Authority[2] informed this Court that the regulations relevant to this program would, according to her, allow Respondent to continue to receive financial support even if she were to be out of the province of Québec, for a maximum of 6 months. In addition, Appellant reiterated the offer made before the judge in first instance to allow Respondent to stay at the family residence; Appellant also undertook to support Respondent financially should the support coming from the social security program prove to be insufficient. Appellant stated to the Court that, contrary to the impression left with the judge in first instance, he had the financial resources to abide by his undertakings in this regard.

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[2] In Québec, the Department of Justice, represented before the courts by the office of the Attorney General for Québec.

[20] The judge noted Respondent's criminal record (in Canada more than 10 years ago) and concluded that this record, combined with Appellant's threat to take the necessary steps for Respondent to be denied access to the U.S. territory, would in all likelihood prevent the latter from returning to Hawaii. The fact is that, despite her criminal record, Respondent never experienced any difficulties to travel throughout the world and, more particularly, to enter the U.S.A. The evidence is to the effect that she went to Hawaii in December 2000, coming from Australia; she also travelled to Canada, and back to Hawaii, in March 2001 in order to have L... La... baptized. It is doubtful that she would have more difficulty this time that in the past years especially if she returns with her child, as a result of an order from this Court and in view of being present for the determination of the custody issue by the Courts in Hawaii.

[21] As far as the threats are concerned, Appellant denies having made any. On this specific point the judge in first instance believed Respondent and we have no reason to set aside this evaluation. However, at the hearing before this Court, Appellant undertook not to do anything to prevent Respondent from entering the U.S.A., including not to cause any criminal proceedings to be launched against her with regard to the abduction of L... La....

[22] Finally, the judge in first instance noted that Respondent's return to Hawaii was made even more problematic due to fact that she had recently given birth to a child[3]. There is no doubt that the birth of a second child creates an additional problem to Respondent's accompanying L... La... back to Hawaii. But the obstacle is far from insurmountable. She can return to Hawaii with the two children for the time necessary for the custody issue regarding L... La... to be determined or return to Hawaii without C..., leaving her in the care of a member of her family. In order to avoid any difficulties, I would make the return order conditional on Appellant's undertaking not to ask for the custody of C..., should she accompany Respondent and L... La... back to Hawaii, until the judgement regarding the custody of L... La... is rendered.

[23] In conclusion, there was clearly insufficient evidence to support the finding that Respondent would be prevented to return to Hawaii. It is also my view that Appellant's undertakings will facilitate the return of his daughter and her mother to Hawaii, should the latter decide to accompany L... La....

[24] In any event, even if Respondent could not accompany L... La... back to Hawaii, I would still be of the view that her return to the care of her father, for the relatively short period of time necessary for the custody issue to be decided, would not amount to placing her in an intolerable situation.

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[3] In fact, C..., a girl, was born on [...], 2002. On the date of the hearing before the Superior Court, the child was not yet born. Respondent testified that the child was that of the Appellant; at that time, Appellant was not prepared to acknowledge his paternity. At the hearing in appeal, this Court was informed that the DNA tests performed on the child and on Appellant were positive and that Appellant would now acknowledge being the father of C....

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[25] The Act was enacted – as was the formulation of the Hague Convention – on the basis that parental abductions are harmful. However, the Act recognizes – particularly in Article 21(2)[4] – that in certain instances the reestablishment of the *status quo ante* could endanger a child. Thus, the few exceptions found in the Act.

[26] The exception of Article 21(2) of the Act comprises three separate components: grave risk of physical harm, grave risk of psychological harm, and the more general category of grave risk of an otherwise intolerable situation.

[27] We are concerned here mainly with the third component of the exception. It is undisputed that the return of L... La... to Hawaii to the care of her father would not expose her to any risk whatsoever of physical harm, nor to any risk of psychological harm except, possibly, to the extent that she might be separated, for a certain period of time, from her mother and from her sister C.... This will be dealt with when discussing the third component of Article 21(2) exception, namely the "grave risk of otherwise placing the child in an intolerable situation".

[28] In the Explanatory Report which she authored at the time the Hague Convention was adopted, professor Elisa Pérez-Vera states, at paragraph 34:

> To conclude our consideration of the problems with which this paragraph deals, it would seem necessary to underline the fact that the three types of exception to the rule concerning the return of the child must be applied only so far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter. In fact, the Convention as a whole rests upon the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition. The practical application of this principle requires that the signatory States be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them – those of the child's habitual residence – are in principle best placed to decide upon questions of custody and access. As a result, a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.

[29] In their monograph on *The Hague Convention on International Child Abduction*, Oxford University Press, 1999, Paul Beaumont and Peter McEleavy write, at page 138:

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[4] The exception of Article 22(2) – the return contrary to the human rights and freedoms – can be said to be in the same vein.

> The battle to ensure that Article 13(1)(b) and Article 20[5] were restrictively drafted was undoubtedly hard fought. However, these efforts would have been in vain if an equal rigour were not displayed by judicial and administrative authorities when interpreting the provisions. The necessity for a strict approach is self-evident, a summary return-mechanism cannot function properly if proceedings automatically become embroiled in a detailed investigation as to the well-being of the child.

[30] I fully agree with these comments by Professor Pérez-Vera and by Beaumont and McEleavy. The Hague Convention is a very efficient tool conceived by the international community to dissuade parents from illegally removing their children from one country to another. However, it is also, in my view, a fragile tool and any interpretation short of a rigorous one of the few exceptions inserted in the Convention would rapidly compromise its efficacy.

[31] There is ample evidence here that Appellant is a good father. The judge in first instance says it when dealing with the fact that Appellant sent back to Respondent, at the end of October 2001, the clothes and other objects belonging to L... La.... The Respondent herself acknowledges, when talking to D… B… (L... La...'s aunt), that Appellant is a "good father" (translation) and that "he loves his daughter" (translation).

[32] In this connection, it is also worth noting that at the end of the trial, as he was taking the matter under advisement, the judge of first instance rendered an interim decision concerning the custody of L... La... whereby he concluded to a shared custody – on a 3 day / 3 day basis – without any restrictions but one forbidding Appellant from leaving the Province of Quebec with the child. The judge in first instance, seized with Respondent's Motion for Custody after he had dismissed Appellant's Petition for the Immediate Return of the Child concluded, again on an interim basis, to the same custodial arrangement (judgement of July 9, 2002). Furthermore, the evidence is to the effect that the child enjoys a very good relationship with both parents. Appellant has developed some very significant bonds with L... La..., especially since July 2001, when he left his job to stay in Hawaii with Respondent and their daughter all the time.

[33] In this context, it is unwarranted to conclude that there exists a grave risk that L... La... will be placed in an intolerable situation should her return to Hawaii be ordered and should Respondent not accompany her. There is also evidence establishing that Appellant can count on the support of his relatives in Québec who, in the past, have shown a willingness to travel to Hawaii when Appellant and Respondent needed help.

[34] The fact that L... La...'s return to Hawaii might separate her from her sibling C... is not significant in the circumstances of this case. C... is simply too young for L... La... to have developed any meaningful bond with her, especially in view of the fact that she

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[5] The equivalent of Articles 21(2) and 22(2) of the Act.

spends half of her time with each of her two parents in accordance with the interim custody orders made by the judge in first instance.

[35] The words used in Article 21(2) – "grave", "harm", and "intolerable" – are strong words and, given the circumstances of this file, I do not find it possible to conclude to a "grave risk" that the return of L... La... to Hawaii, even if it were to be in the sole care of her father, for the time necessary for the custody question to be decided by the courts in Hawaii, would expose her to a "psychological harm" of any significance or would otherwise place her in an "intolerable situation". Although it may be better for L... La... to be with her mother, and her sister C..., the circumstances of this file do not support the argument that she would be placed in an "intolerable situation" should she be in the care of her father until the Courts in Hawaii decide where her best custody interest lies.

[36] Respondent, who acknowledges that L... La...'s habitual residence in October 2001 was Hawaii and that she wrongfully removed the child, within the meaning of the Convention and of the Act, must trust, as the Government of Québec did in designating the State of Hawaii under the Act, that the courts of Hawaii, seized with the question of custody, will decide in light of L... La...'s best interests and in the respect of her rights.

[37] Finally, I wish to set out the conditions that will facilitate the return to Hawaii of L... La... and her mother. At our suggestion, the parties submitted draft undertakings relevant to this issue. I examined these drafts in reaching my conclusion as to the undertakings that the Appellant must subscribe to as a condition to the return of L... La... back to Hawaii, and have concluded that the undertakings should read as follows:

15) I shall pay for the expenses of the voyage of L... La... to Hawaii, if any;

16) I shall endeavour to fix the date of my return to Hawaii, with L... La..., between now and September 30, 2002 in order to make it possible for M... G..., should she so decide, to accompany us back to Hawaii;

17) I shall not file, nor cause, directly or indirectly, to be filed any criminal proceedings against M... G... in connection with the removal of L... La... from Hawaii to Canada on October 7, 2001;

18) I shall not act in any fashion so as to prevent, or impede, M... G...'s entry to the United States and, on the contrary, I shall cooperate and assist her in obtaining whatever status is available to her, and to obtain extensions thereof, in order for her to continue to reside in the United States;

19) I shall forthwith file a renunciation from the judgement rendered on July 19, 2002 by William J. Nagle III J., other than the conclusion

regarding my paternity of L... La..., which conclusion shall remain valid; the renunciation shall be such that the custody issue, and all related matters, shall be decided anew;

20) I shall provide lodging for M... G... and L... La... (and C...), in the residence I own in Hawaii or, alternatively, should this situation be unacceptable to M... G..., I shall pay for the latter's reasonable accommodations, and that of the children, up to $75.00 U.S. per day which, I warrant, is sufficient to provide suitable and proper lodging for them in Hawaii;

21) I shall also provide for the entire expenses of L... La... (and C...) and supplement M... G...'s social welfare benefits to the extent of $200.00 U.S. per month during the period necessary for the custody issue to be determined by the Court of competent jurisdiction in Hawaii, unless otherwise directed by such court;

22) I shall consent to a custody hearing at the earliest date, and extend my best efforts in that regard; until that date, I consent to having the joint custody of L... La... with M... G... and to sharing the physical custody of L... La... on a 3 day / 3 day basis, unless otherwise decided by the Court of competent jurisdiction in Hawaii;

23) I shall take care of the baby sitting services for L... La... (and C...) during the custody hearing;

24) I shall cover all necessary medical expenses for L... La... (and C...) while in Hawaii for the custody hearing;

25) I shall forthwith file a discontinuance of my motion for the return of the child L... La..., Court File No. 02-01-6546, before the Family Court of the First Circuit of the State of Hawaii which is scheduled to be heard on September 25, 2002;

26) I shall not pursue any legal action regarding C... until the judgment regarding the custody of L... La... is rendered;

27) I consent to travel back to Hawaii, together with M... G... and L... La..., to the extent that it is possible to do so by September 30, 2002;

28) In order for M... G... to be able to travel back to Hawaii with both children, should she so desire, I consent to sign all papers needed in order for a passport to be issued for C... and I shall cover all

expenses related thereto, including the fees for the birth certificate and the passport.

[38] For these reasons, I propose to allow the appeal, to set aside the judgement *a quo* dated July 3, 2002 and to order the return of L... La..., born […], 2000, to the State of Hawaii, U.S.A., accompanied by her father, by September 30, 2002, upon the signing by Appellant, and deposit with the Clerk of this Court, of the undertakings mentioned above, each party paying its own costs both in this Court and in Superior Court.

JACQUES CHAMBERLAND J.A.