COURT FILE NO.: 5246/08
DATE: 20081121

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: DOMINIC CRNKOVICH

Applicant

v.

KAREN HORTENSIUS

Respondent

BEFORE: O'CONNOR J.

COUNSEL: Ms. Phyllis Brodkin, for the Applicant

Ms. Monica Scholz, for the Respondent

E N D O R S E M E N T

[1] The broad issue in this Application is whether the provisions of The Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention) apply to require the return to Indiana, USA, of an eleven year old child currently residing in Ontario with his mother. Specifically, this Court must determine whether Article 13 of the Hague Convention applies to permit the child to remain in Canada with the Respondent notwithstanding he was wrongfully removed from Indiana contrary to an order of the Superior Court of Indiana.

[2] The relevant portion of Article 13 at issue permits this Court to refuse to order a child returned to its place of habitual residence if the child objects to being returned and is of an age and maturity at which it is appropriate to take account of its views.

Facts

[3] The parties are the loving and competent, but divorced, parents of eleven year old Bradley Crnkovich. Pursuant to an order of the Indiana Superior Court, they share joint custody of him, his primary residence being with his mother. During the marriage and until recently the parties and Bradley resided in Michigan City, Indiana, USA. The Applicant father is a US citizen, mother is Canadian and Bradley enjoys dual citizenship.

[4] The parties have engaged in protracted litigation in the Indiana Superior Court. A major issue between them involves whether mother would be permitted to relocate with Bradley to Ontario.

[5] In August 2007 mother applied to relocate to Canada with Bradley. Her petition was heard in January 2008 and on April 30, 2008, Indiana Superior Court Judge Kathleen B. Lang denied her petition, giving full reasons for her decision.

[6] On May 15, 2008, mother came to Ontario to renew her driver's license, bringing Bradley with her. On May 23, while returning to the United States, she encountered admittance problems at the boarder because she had a dated relatively minor criminal record, and she was not a US citizen, nor was she any longer married to a US citizen. However she was granted a 7-day humanitarian pardon to re-enter the Unites States.

[7] On May 30, 2008 father obtained an order temporarily restraining the mother from taking Bradley to Canada. This order was temporary, in that it provided that it was in force and effect "…until such time as mother can provide the court with evidence that she can legally enter the United States from Canada."

[8] On June 18, 2008, mother filed a document purporting to cite evidence that she may legally enter the Unites States.

[9] On June 27, 2008, before the issue of the sufficiency of her 'evidence' to stay could be adjudicated, she was ordered deported from the US.

[10] She then moved to have Judge Lange recuse herself from the case. The motion was granted. The file has not yet been re-assigned to another judge.

[11] On June 24, 2008, in violation of this order, mother brought Bradley to Burlington, Ontario. They continue to reside here.

[12] Father has brought this Application in Ontario pursuant to the Hague Convention seeking an order that, *inter alia*, Bradley be returned immediately to Indiana. Mother's cross-motion seeks an order that Bradley be permitted to remain in Ontario.

Parties Positions

[13] Father argues that the intent and specific provisions of the Hague Convention mandate the granting of his Application to return Bradley to the United States. He says Bradley's habitual residence was Indiana at the time the Indiana Court made its orders. He points out that mother's relocation application was denied and that he was successful in his application for an order restraining mother from taking Bradley out of the country to Canada.

[14] Mother does not seriously dispute the jurisdiction of the Indiana Court to make orders respecting Bradley's custody and residency rights, in that he was habitually resident in Indiana when the orders were made. She attended the hearings represented by counsel. Nor does she dispute that she brought Bradley to

Canada on or about June 24, 2008. She says it was their usual summer vacation to visit relatives in Ontario, after which she intended to return to Indiana, but was prevented from doing so by the deportation order. She therefore disputes that her removal of Bradley to Ontario was a 'wrongful removal' of a child as that term is defined by Article 3 of the Convention. She cannot be said to be *willingly* retaining him in Ontario.

[15] However, she argues that even if Bradley's removal was wrongful, this Court should refuse to order Bradley's return to Indiana. She relies on the wording of Article 13 that allows this Court to refuse removal when the child objects to being returned and is old enough and mature enough that it would be appropriate to take his views into account.

[16] The evidence upon which she relies is found at paragraph 40 of her affidavit sworn October 30, 2008, which states:

> As indicated in the June 9, 2008 note of Dr. Begum, Bradley's pediatrician, Bradley has made it clear to her that he wishes to continue to live with me even if at some point I was required to relocate.

[17] On June 6, 2008 Dr. Begum prepared what she refers to as Progress Notes, being a summary of her care of Bradley over the four years she has been his pediatrician. She interviewed him and made the following notation:

> …Since I interviewed the patient separately and I interviewed the mom separately, the response from the child, who is a very smart and very intelligent pre-adolescent almost 11-year old white male, indicated that he would rather be happy living with his mom even though if the mom, as stated by the mother that she is a resident of Canada, that at some point she may have to relocate. The patient did indicate that he would be happy going with his mom, and I did ask about if he would be visiting his dad and he said that he would do that also. His wish at this time is that mom would get a job and he wants his mom to be happy because he thinks that his mom could be a good care giver, his preference will be to stay with his mom. When I confirmed this with the mother, the mother stated that he never did indicate that to his mom, however she was afraid that it was on the contrary that he would prefer rather to stay with his father…

[18] Mother argues that Bradley has done exceptionally well since their move to Ontario. He is enrolled in Fern Hill School in Oakville, where he is happy and prospering. He is involved in extracurricular activities, has a paper route and has close friends here. She says his wish is to remain with her and that evidence of his wishes could be obtained by the appointment of the Office of the Children's Lawyer or a private assessor to interview him and report to the Court.

[19] Finally, she argues that if the Indiana Court is found to have jurisdiction over this matter, she will be severely prejudiced in presenting her case.

The deportation order prevents her from entering the United States to properly conduct a hearing or trial.

[20] Thus, she argues, this court must dismiss the father's motion, allow Bradley to stay in Ontario and adjudicate reasonable access arrangements between the parties.

Analysis

[21] At the conclusion of counsels' oral presentations in this matter, I indicated that it was clear that Bradley was habitually resident in Indiana immediately before his removal to Ontario. Thus, the Indiana Court had jurisdiction to make the orders it did, including the temporary order restraining the mother from removing Bradley to Canada. I asked counsel for written submissions on only the possible effect of the wording of Article 13 of the Hague Convention respecting a child's objections to returning to the jurisdiction from which he has been wrongfully removed.

[22] Article 12 of the Hague Convention provides:

> 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 lapsed from the date of the

> wrongful removal or retention, the authority concerned *shall order the return of the child forthwith*. (emphasis added).

[23] This Article severely restricts the jurisdiction of this Court when considering an application to have a child returned to another jurisdiction. I am limited to determining whether the child was wrongfully removed or detained as those terms are defined in Article 3. As noted, there is no question Bradley was wrongfully removed. His habitual residence was and is Indiana. The Indiana Courts therefore had and have jurisdiction to rule on matters of custody, access and mobility. The Superior Court of Indiana ordered that Bradley not be removed to Canada. Mother removed him to Canada notwithstanding the order.

[24] I find that mother wrongfully removed Bradley from Indiana to Canada.

[25] Article 12 provides that once a finding of wrongful removal is made, this Court "…shall order the return of the child forthwith." This section is an expression of the strong policy of the Hague Convention in favour of ordering the immediate return of wrongfully removed children so as to deter the abduction of children by parents unhappy with the legal process in the jurisdiction of the habitual residence of the child. The use of the word "shall" limits this Court's

remedial jurisdiction where it finds a wrongful removal has occurred to an order of return (subject to the three exceptions in Article 13, discussed below). I may not, therefore, consider evidence of which parent presents the better housing arrangement, the preferable schooling, financial/employment and/or recreational plan, the proximity of extended family, etc., all matters that are important in determining the best interests of the child. These are considerations that were and will be fully canvassed by the Court in Indiana which has jurisdiction to decide Bradley's best interests. Thus, although mother paints a rosy picture of Bradley's situation in Canada, I am precluded from considering this evidence, after having made a finding of wrongful removal. *A.(J.E.) v. M.(C.L.) 2002 CarswellNS 425 (NSCA)* at para. 28.

[26] Article 13 provides three circumstances which this Court to avoid ordering the return of a wrongfully removed child.

[27] Article 13 reads:

> 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 opposed 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
>
> (a) 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 judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.*
>
> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence. (emphasis added)

[28] The parties agree that there is no evidence that might bring sub-articles (a) or (b) into play. However, mother argues there is sufficient evidence of Bradley's age and maturity to warrant taking his wishes into account. He strongly objects to returning to Indiana, she says.

[29] I disagree.

[30] In discussing this issue, although the child's objection to returning and his age and maturity must both be proved, it seems that the age and maturity issue should be analyzed first. The child's age and maturity are preconditions to the

child's objection being considered. It would matter not how adamantly the child was objecting to returning if he was too young and/or immature for the court to consider the objection.

[31] The evidence in this case of both Bradley's maturity and his objection is not extensive.

[32] Respecting first his maturity, Dr. Razia Begum, his pediatrician for the past four years, describes him as "smart and very intelligent" and that "he is communicating very well". On July 9, 2007, Beverly Jones MSW of the Madison Center & Hospital, undertook a clinical assessment of Bradley. She noted he "appears to be intelligent". Sandra Maldonado, a friend of mother, described Bradley as "a smart and very happy little boy". From the description of his interests by mother – singing in the school choir, plays the clarinet, Outdoor Club, Mad Science Club, soccer team, Chess club – it seems he is a well rounded, happy child who is at least age appropriately mature, perhaps slightly more mature than his chronological age would suggest.

[33] Although the evidence is not substantial, I would find that Bradley meets the criteria in Article 13 that "…he has attained an age and degree of maturity at which it is appropriate to take account of his views".

[34] There has been considerable jurisprudence defining and commenting on the meaning and breadth of the verb 'objects'. *In R(A Minor) (Abduction), Re* [1992] 1 F.L.R. 105 (Eng. C.A.), Bracewell J. said, "The word 'objects' imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute." The passage is oft quoted in cases dealing with this Article 13 issue.

[35] To meet the 'objects' criteria, it must be shown that the child displayed a strong sense of disagreement to returning to the jurisdiction of his habitual residence. He must be adamant in expressing his objection. The objection cannot be ascertained by simply weighing the pros and cons of the two competing jurisdictions, such as in a best interests analysis. It must be something stronger than a mere expression of preference.

[36] There is scant evidence of Bradley's alleged objection to returning. Mother says he told Dr. Begum that he wished to continue living with her even if

she were to relocate. Dr. Begum's notes of her interview with Bradley reveal simply that his preference would be to stay with his mom. A 'preference' implies he would be happy with either parent but that if he had to choose he would stay with mother. A preference falls far short of objecting to returning to Indiana to live with his father.

[37] Mother argued that either the Office of the Children's Lawyer or a private assessor should be appointed to ascertain whether Bradley does in fact object to returning. I decline to make such an order because, in my view, there has already been a significant involvement of professionals probing into and reporting on Bradley's life. He has been seen by Dr. Begum, his pediatrician, Ms. Jones of the Madison Center & Hospital and Natalie Buchok, a counselor his mother arranged after the move to Canada. There has been ample time and opportunity to canvas the issue of his feelings about the move here and a move back. The most he has said or done is to express a preference.

[38] Further, the appointment of a professional at this stage of the proceedings runs the risk of producing a skewed result. Bradley lives with mother, who is obviously extremely anxious to continue the status quo. She might be significantly tempted to influence Bradley in what position he should take during

his interviews. I have more confidence that the results of the interviews and assessments completed at a time when the parties were not focusing on, or perhaps were not even aware of, the provisions of the Hague Convention.

[39] One of the important goals of the Hague Convention is to facilitate the prompt return of wrongfully removed children. It is ultimately in the best interests of children to have their rights adjudicated by the legal system of their habitual residence. *Thomson v. Thomson* [1994] 3 S.C.R. 551 (S.C.C.). The appointment of the OCL or an assessor would delay the proceedings considerably and defeat the Convention policy of expeditious remediation of the harm done by a wrongful removal.

[40] Finally, mother argues that she is prejudiced, should Bradley be returned, by her inability to attend in Indiana to prosecute her case for sole custody or for an order allowing her to relocate to Canada with Bradley. However, she is the sole author of her dilemma on this issue. Her criminal convictions are years old. She has been eligible for a pardon for years. She has taken no steps to expunge her criminal record. Judge Lang said in her April 30, 2008 ruling at paragraphs 22 and 23:

> 22 ….Mother is a Canadian immigrant illegally residing in the United States. Because of Mother's personal criminal history, while living in Canada and before meeting Father, she is probably ineligible for United States resident status and is a deportable Canadian immigrant.
>
> 23. Neither Father, nor any other person except Mother, is responsible for Mother's criminal conviction history. Only Mother can address this issue by applying for pardons from the Canadian authorities. Mother admits she did not pursue the possibility of a pardon…

[41] Mother has failed to show Bradley objects to returning to Indiana.

Result

[42] Order to go as follows:

(a) There will be a declaration that Bradley Sutton Crnkovich, born August 18, 1997 (Bradley) was wrongly removed from Indiana, United States, and is being wrongly retained in Ontario, Canada, by the Respondent, Karen Hortensius, within the meaning of Article 3 of the Convention on the Civil Aspects of International Child Abduction (Hague Convention).

(b) Bradley shall be returned to his habitual residence of Michigan City, Indiana, forthwith after he completes the last day of the Fall term at Fern Hill School in Oakville, Ontario on December 18, 2008.

(c) The Respondent is restrained from removing Bradley from Ontario and from obtaining a passport or travel documents for him.

(d) If Bradley is not returned before midnight, December 19, 2008, the Halton Regional Police Service shall locate and apprehend Bradley and deliver him to the Applicant.

(e) The Respondent's Motion dated October 30, 2008 is dismissed.

[43] The delivery date set out in paragraph 39(d) was chosen to permit Bradley to complete his first term at his current school. Father has consented to same.

Costs

[44] Unless the parties agree to costs within fifteen days of this date, they may make written submissions to me prior to January 10, 2009, setting out their position respecting same.

O'CONNOR J.

DATE: November 21, 2008

COURT FILE NO.: 5246/08
DATE: 20081121

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: DOMINIC CRNKOVICH
Applicant

v.

KAREN HORTENSIUS
Respondent

BEFORE: O'Connor J.

COUNSEL: Phyllis Brodkin, for the Applicant

Monica Scholz, for the Respondent

ENDORSEMENT

O'CONNOR J.

DATE: November 21, 1008