Unofficial English Translation

Droit de la famille — 092549 **2009 QCCA 1982**

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
MONTREAL REGISTRY

No. 500-09-019371-095
(450-04-010218-088)

DATE: October 21, 2009

CORAM: THE HONOURABLE JACQUES CHAMBERLAND J.A.
NICOLE DUVAL HESLER J.A.
NICHOLAS KASIRER J.A.

I. V.
APPELLANT – Defendant
v.

W. B.
RESPONDENT – Applicant
and
ATTORNEY GENERAL OF QUÉBEC
MIS EN CAUSE – Mis en cause

JUDGMENT

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[1] THE COURT; – On the appeal from a judgment rendered on February 4, 2009, by the Superior Court, District of Saint-François (Martin Bureau J.), which, in application of the *Act respecting the civil aspects of international and interprovincial child abduction*,

R.S.Q., c. A-23.01 (the Act),[1] ordered the return of the child X to England, with provisional execution of the judgment, notwithstanding appeal;

[2] Having examined the record, heard the parties, and on the whole deliberated;

[3] On February 11, 2009, a judge of the Court refused to suspend the provisional execution of the judgment a quo.

[4] In the first stage of the analysis of an application for return made under the Act, the judge must answer the following four questions:

(a) On what date did the child's removal (or retention) occur?

(b) In what State did the child have his or her habitual residence immediately before the removal (or retention)?

(c) Did the removal (or retention) of the child violate rights of custody attributed to the applicant by the law of Québec or of the State in which the child had his or her habitual residence?

(d) At the time of the removal (or retention), was the applicant exercising rights of custody, or would he or she have exercised them if the child had not been removed (or retained)?

[5] In this case, the child arrived in Canada with his father, the respondent, on December 13, 2007. The plane ticket was issued in the child's name and included a return flight on December 28, 2007, also with his father. In actual fact, the respondent extended his stay, returning to England only in early February 2008, but without the child.

[6] According to the evidence, before his trip to Canada, the child, who was born in England on September 2, 2005, had his habitual residence there, more specifically in Manchester. He had been living there alone with the respondent since June 2006, the date on which the appellant returned to Quebec in order to put her life in order.

[7] The judgment a quo is not very explicit on the question, but it is understood that, faced with contradictory evidence, the trial judge concluded that the child still had his habitual residence in England in early February 2008, when he did not return to Europe with the respondent (paras. 67, 69, 72 and 80).

[8] The trial judge also concluded that the child's retention violated rights of custody that English law attributed to the respondent (paras. 67, 72 and 80-81).

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1 That legislation ensures the application in Quebec of the principles and rules of the *Convention on the Civil Aspects of International Child Abduction*, Hague Conference on Private International Law, October 25, 1980.

[9] The appellant contests that conclusion, but wrongly, since it was the subject of an admission by her at trial (Vol. 4, transcript of January 21 and 26, 2009, at 241-243).

[10] The parties' rights of custody are determined by, as the case may be, the law of Quebec or the law of the State in which the child had his habitual residence immediately before his removal (or retention), thus, in this case, by English law (s. 3 of the Act).[2] The judge must also rule on the matter by taking into consideration the rule of interpretation laid down in s. 2(1) of the Act: "'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".[3]

[11] In the absence of an admission concerning the respondent's rights of custody, the parties could have adduced evidence of English law in a more comprehensive manner than by simply filing a copy of the *The Children Act*, c. 41. They could have obtained the opinion of an expert in English family law and even, if necessary, have had the expert testify. The Act allows the judge to "take notice directly of the [foreign] law … without recourse to the specific procedures for the proof of that law … which would otherwise be applicable" (section 28). The judge can even, where possible, require that the applicant "produce a decision or attestation from the authorities of the designated State in which the child is habitually resident that the removal or retention was wrongful" (s. 29, first paragraph).

[12] In this case, given the appellant's admission, nothing like that was done. Hence, there is no question of resuming on appeal the debate—which did not take place in first instance—concerning the respondent's rights of custody.

[13] In any case, it is clear that the admission the appellant made in first instance was consistent with reality. The respondent had been living alone with the child since June 2006. He took care of him on a daily, ongoing basis. In the appellant's absence, he could certainly decide on the place of residence of the child.

[14] The trial judge then concluded that, at first glance, the respondent was effectively exercising the rights of custody in England before the child came to Canada (paras. 67,

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2 **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 the 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.

3 **2.** For the purposes of this Act:
(1) **"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;
(2) **"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;

72 and 80). There is nothing surprising about this conclusion when we know that the respondent had been living alone with the child for over eighteen months.

[15] Once the wrongful retention of the child was established within the meaning of the Act, it was up to the appellant to prove the existence of one of the six exceptions in the Act to counterf the judge's obligation to order the prompt return of the child.

> (1) the applicant was not actually exercising the custody rights at the time of removal (or retention) (s. 21(1));
>
> (2) the applicant consented to or subsequently acquiesced in the removal (or retention) (s. 21(1));
>
> (3) there was a grave risk that the child's return would expose him to physical or psychological harm or otherwise place him in an intolerable situation (s. 21(2));
>
> (4) the child objected to being returned and had attained an age and degree of maturity at which it was appropriate to take account of his views (s. 22(1));
>
> (5) the child's return was contrary to the human rights and freedoms recognized in Quebec (s, 22(2));
>
> (6) where the return proceedings were commenced after the expiration of a period of one year after the removal (or retention), it was demonstrated that the child was then settled in his new environment (s. 20, second paragraph).[4]

[16] The burden of establishing one of these exceptions rests with the person invoking the exception. The trial judge was therefore correct in saying that, in this case, the burden rested with the appellant (at para. 72).

[17] The appellant's arguments concerning the assessment of the respondent's credibility and the weight the judge in first instance gave the documentary evidence and the disclosures made by the respondent are not convincing. Those arguments are directly linked to the assessment of the evidence, an area where the trial judge enjoys a special position compared with the appeal judges, the former having the advantage of seeing and hearing the witnesses. That advantage is particularly pronounced when, as in this case, it is a matter of determining the parents' intentions regarding their child and the evidence on the subject is clearly contradictory. The appellant has not persuaded the Court that a palpable and overriding error was made that justifies its intervention.

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4 In this case, the appellant could not invoke the sixth exception because the return proceedings were commenced less than a year after the retention (February 2008/December 2008).

[18] At trial, the appellant relied on the exception in s. 21(1) *in fine*:

> **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 … had consented to or subsequently acquiesced in the removal or retention; …

[19] Hence, the appellant had to convince the judge, on a balance of probabilities, that the respondent had "consented" to (before retention) or "acquiesced" in (after retention) the child's remaining in Canada. In any case, it stands to reason that that consent or acquiescence could not have a legal effect unless it was given in a free and enlightened manner.

[20] The trial judge noted that the evidence in that regard was contradictory and that the parties' versions on that point differed significantly (paras. 84-85 and 95). In the final analysis, he felt he was unable to say which of the appellant or the respondent was telling the truth about his or her intentions at the time the child was removed to Canada and thereafter (paras. 103 and 112-113). He concluded that the appellant had not discharged her burden of proving the exception in s. 21(1) *in fine* of the Act (paras. 114-116).

[21] The appellant does not raise an error in law in the trial judge's interpretation of the exception related to the consent or acquiescence of the parent seeking the child's return to his place of habitual residence. Rather, she asks us to review the evidence and conclude that the consent and acquiescence existed. That is a question of fact that the trial judge, after weighing the evidence as a whole, said he was unable to determine one way or the other. It is not appropriate to intervene.

[22] THEREFORE:

[23] **DISMISSES** the appeal, without costs.

JACQUES CHAMBERLAND J.A.

NICOLE DUVAL HESLER J.A.

NICHOLAS KASIRER J.A.

Mtre Céline Gallant
GALLANT, MORIN
Counsel for the appellant

Mtre Anke Beese
ANKE BEESE, ATTORNEY
Counsel for the respondent

Mtre Simon Larose
BERNARD, ROY (JUSTICE-QUÉBEC)
Counsel for the mis en cause

Date of hearing: October 8, 2009