Kitchener Registry No. 632/07
DATE: 2008·IV·11
CITATION: *Lombardi v. Mehnert*, 2008 ONCJ 164

ONTARIO COURT OF JUSTICE

2008 ONCJ 164 (CanLII)

B E T W E E N :

CHRISTOPHER LOMBARDI,
Applicant,

— AND —

ELIZABETH MEHNERT,
Respondent.

Before Justice Margaret A. McSorley
Heard on 14 March 2008
Reasons for Judgment released on 11 April 2008

CONFLICT OF LAWS — Custody of or access to child — Return of wrongfully removed child — Declining return of child — Grave risk of harm to child — Parents of child (now almost 1 year old) had cohabited sporadically but briefly in New York State — Father had been verbally and physically abusive to mother and had repeatedly ignored restraining orders — Evidence suggested that he had at least 2 convictions for domestic assaults and was now facing prospect of third over incident that allegedly occurred while mother was holding one-month-old child — After that incident, mother finally left him to local shelter and eventually ended up in Ontario with child — In his application for child's return under (Hague) *Convention on Civil Aspects of International Child Abduction*, father basically denied or minimized incidents of abuse — Ontario court found and mother did not dispute that child had been habitually resident in New York State when mother removed her to Ontario — While mother was in New York shelter, she had actually started custody application before New York court and had even secured interim custody order but now feared to return to New York to carry on case on its merits — Nevertheless, she had invoked New York court's jurisdiction over child and, despite mother's flight to Ontario, that jurisdiction remained in effect, thereby making her removal of child out of New York wrongful — Once Ontario court finds that child's removal is wrongful, it must order child's immediate return, subject only to 2 exceptions in Article 13 of convention — First exception (father's consent or acquiescence to child's removal) did not apply in this case — As for second exception (grave risk of child's exposure to physical or psychological harm or placement in intolerable situation if returned to New York), mother's situation in this case was as bad if not worse than situation in

***Pollastro v. Pollastro*, 1999 CanLII 3702 (Ont. C.A.) where court allowed child to remain in Ontario because of grave risks to child's safety if forced to return — Moreover, father in this case had shown complete disregard for court orders and Ontario court had no confidence that any undertaking would protect mother and child from him under these circumstances — Ontario court dismissed father's request for order directing mother to return child to New York State.**

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STATUTES AND REGULATIONS CITED

Convention on Civil Aspects of International Child Abduction, [1983] Can. T.S. No. 35, 1343 U.N.T.S. 89, Article 1, Article 3, Article 5, Article 12 and Article 13.

CASES CITED

Finizio v. Scoppio-Finizio (1999), 46 O.R. (3d) 226, 124 O.A.C. 308, 179 D.L.R. (4th) 15, 1 R.F.L. (5th) 222, 1999 CanLII 1722, [1999] O.J. No. 3579, 1999 CarswellOnt 3018 (Ont. C.A.)

Hadissi v. Hassibi, 1994 CanLII 7566, [1995] W.D.F.L. 001, [1994] O.J. No. 4607, 1994 CarswellOnt 2076 (Ont. Gen. Div.).

Pollastro v. Pollastro (1999), 43 O.R. (3d) 485, 118 O.A.C. 169, 171 D.L.R. (4th) 32, 45 R.F.L. (4th) 404, 1999 CanLII 3702, [1999] O.J. No. 911, 1999 CarswellOnt 848 (Ont. C.A.).

Thomson v. Thomson, [1994] 3 S.C.R. 551, 173 N.R. 83, 97 Man. R. (2d) 81, [1994] 10 W.W.R. 513, 79 W.A.C. 81, 119 D.L.R. (4th) 253, 6 R.F.L. (4th) 290, 1994 CanLII 26, [1994] S.C.J. No. 6, 1994 CarswellMan 91.

Phyllis R. Brodkin .... **counsel for the applicant father**
Jason A. Witteveen .... **counsel for the respondent mother**

[1] JUSTICE M.A. McSORLEY:— The matter before the court involves an application brought by the applicant father for a declaration that the child Elizabeth Bayone-Lombardi (born on 18 May 2007) was wrongfully removed from New York and detained in Ontario; that the child is not habitually resident in Ontario; for an order that the child be returned to New York for a determination of the custody and access issues; and for police assistance. The submissions of the parties focused entirely on the *Convention on Civil Aspects of International Child Abduction*, [1983] Can. T.S. No. 35, 1343 U.N.T.S. 89, more commonly referred to as the Hague Convention.

[2] The evidence that is undisputed is that the parties were engaged in a relationship off and on from October 2004. They did not marry. According to the respondent, the parties lived together from January 2006 to March 2006 and then again from April 2007 to June 2007. There is one child of the relationship, Elizabeth Bayone-Lombardi (born on 18 May 2007). The mother's position is that the father verbally and physically abused her during the relationship, that he breached orders for protection and that she left him for the last time after an assault by him on 21 June 2007, approximately one month after the child was born. The father's position is that the mother has exaggerated all of her claims of abuse and that he has only been convicted once of a misdemeanor. He admits to breaking the respondent's cell

phone in response to her receiving an innocent e-mail from a male person. He pleaded guilty to that charge in 2005 and a protection order was granted. Notwithstanding the terms of that order, he continued to have contact with the mother.

[3] In 2006, he indicated that he was arrested as a result of a quarrel to which the respondent overreacted. He did not provide specific dates for the incident. However, in June 2006, the mother reported an assault to the police and attached both a copy of the police report and pictures of bruises that are referred to in the police report. If this was the incident for which the applicant was arrested, it is difficult to understand how the mother overreacted to a quarrel. It is also difficult to understand how the applicant could be convicted if the quarrel was simply verbal. He indicated that he received a one-year conditional discharge and a further protection order was issued. Contrary to Ms. Brodkin's submissions, this means that there were two convictions related to domestic violence. Had there not been a conviction, there could have been no conditional discharge. The protection order to which the respondent refers in his material was to remain in effect until April 2007. This charge cannot still be outstanding if he received a conditional discharge with a protection order and a requirement that he take a domestic violence intervention program.

[4] According to his affidavit, he breached this protection order after it was granted. He had to have done so to impregnate the respondent. His affidavit alleges that he saw the respondent daily during her pregnancy. This too was in clear violation of the order.

[5] The mother alleges the father assaulted her approximately 8 days before the baby was born, although it does not appear that any charges were laid. Then on 21 June 2007, when the child was approximately 5 weeks old, the mother alleges that she was assaulted by the respondent while she held the child in her arms. The next day while the applicant was at work, the mother left with the child to reside in a shelter. On 22 June 2007, the applicant father contacted the respondent and, although a police officer was present, he was heard to yell at her: "You fucking bitch — you better get your ass back in the house if you don't know what's better for you." The applicant was arrested on 23 June 2007 and charged with criminal contempt in the first degree, aggravated harassment in the second degree and endangering the welfare of a child. These are the charges that have not yet been dealt with.

[6] The applicant denies any verbal or physical abuse of the respondent and yet the comments made by him and heard by a third party (police officer) were certainly both abusive and threatening. He denies conviction for any violence except for the breaking of the respondent's cell phone in 2005, yet received a conditional discharge in 2006 as a result of what he termed a "quarrel". Although he is innocent of the June 2007 charges until proven guilty, it is difficult to accept his explanation of what he terms normal arguments when several protection orders were made against him all dealing with domestic violence. Each protection order required Mr. Lombardi to have no contact with the mother. His own evidence was that he did not obey these orders.

[7] This issue becomes important because of Article 13 of the convention with which I will later deal.

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1: THE LAW

[8] The purpose of the convention (Article 1) 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 one Contracting State are effectively respected in the other Contracting States.

[9] Article 3 of the convention states:

> 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.

[10] Article 5 sets out the "rights of custody" include rights relating to the care of the child and in particular the right to determine the child's place of residence.

[11] Article 12 states that, where a child has been wrongfully removed or retained in terms of Article 3, the authority shall order the return of the child forthwith, if less than a year has elapsed from the date of the wrongful removal or retention.

[12] Article 13 provides an exception to Article 12 even in the event that the court finds a wrongful removal or retention, in that a judicial authority of the requested state is not bound to order the return of the child if the person who opposes the 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 judicial 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. Obviously, in this case where the child is approximately 11 months old, this provision is not relevant.

2: ISSUES

[13] The issues before the court are:

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(a) Was the child habitually resident in New York at the time of her removal from that State by her mother?

(b) Was the child wrongfully removed from the State of New York?

(c) Did the father acquiesce to the removal of the child? And

(d) Would the child be at grave risk of exposure to physical or psychological harm or be placed in an intolerable situation if returned to New York.

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3: ANALYSIS

[14] There can be no dispute that the child was habitually resident in New York at the time of her removal by the mother. The child had never lived in any other jurisdiction during her short life. No submissions were made by the mother on this point.

[15] In determining whether the child was wrongfully removed, the court is assisted by the decision of the Supreme Court of Canada in *Thomson v. Thomson*, [1994] 3 S.C.R. 551, 173 N.R. 83, 97 Man. R. (2d) 81, [1994] 10 W.W.R. 513, 79 W.A.C. 81, 119 D.L.R. (4th) 253, 6 R.F.L. (4th) 290, 1994 CanLII 26, [1994] S.C.J. No. 6, 1994 CarswellMan 91. In that case, the parties were married and lived in Scotland. Following separation, the mother obtained an interim custody order, with access to the father. The order also contained a non-removal clause. The mother then left the country a few days after the order was granted and travelled to Manitoba where she applied for custody. On application by the father under the convention, the motions court judge found that the child was wrongfully removed from Scotland under Article 3 and ordered the child returned. The court found that the purpose of the convention was to protect children from the harmful effects of wrongful removal or retention. It was held that the Scottish court preserved its jurisdiction to make a final determination on custody by inserting a non-removal clause into the order.

[16] At the Supreme Court of Canada, the court discussed five types of child abduction, noting that the fifth type was directly relevant to the case before it. The fifth type of abduction is where a child is removed by a parent from one county in violation of a court order that had expressly prohibited such removal. The court held that no *mens rea* was required, only whether the child was removed contrary to a court order. The court went on to say that the insertion of a non-removal clause in an interim custody order retains a right of custody in the court.

[17] The court discussed three approaches regarding rights of custody. The first approach is that removal of a child in breach of a non-removal clause was contrary to the convention because the custodial parent's custody was not unconditional. The second approach holds that the right to determine the child's place of residence is a custody right divisible from the right to care for the child and, by virtue of a non-removal clause, this right vests in the access parent. The third approach was the one relied upon by the father, that being that the right to determine the child's place of residence vests in the court.

[18] It must be remembered that, in the case of *Thomson v. Thomson*, *supra*, the court was dealing with an interim custody order that contained a non-removal clause. At

paragraph [62], Justice Gerald V. La Forest set out that the third approach means that the effect of the insertion of a non-removal clause in an interim custody order is to retain the right of custody in the court. At paragraph [64], Justice La Forest indicated that, when a court has before it the issue of who shall be accorded custody of a child and awards interim custody to one of the parents, it (the court) has rights relating to the care and control of the child and in particular the right to determine the child's place of residence. He went on to say that it seemed clear that the non-removal clause was inserted into the custody order to preserve jurisdiction in the Scottish court to decide the issue of custody on its merits in a full hearing at a later date.

[19] In this case, the mother commenced an application for custody in New York. She obtained an interim order. There was no non-removal clause in that order. She herself attested to the fact that she intended to return to New York to deal with the issue of custody on its merits, but was afraid to return because of the actions of the father. Although a non-removal clause would have strengthened the father's submissions that the New York court retained jurisdiction over this child, I do not believe such a clause is necessary for the New York court to maintain such jurisdiction. This child was habitually resident in New York at the time of her removal. The mother commenced an action in the New York courts thereby invoking their jurisdiction over the child. The court in New York is an institution under Article 3 and the removal of the child was in breach of the rights of custody attributable to that institution. Therefore, I find that the child was wrongfully removed from New York by the mother.

[20] The effect of such a finding is that this court is obliged to return the child promptly to New York. The decision of the court is not to be made on the "best interests" test. The court is to accept that the contracting state is capable of determining the issue of what is in the best interests of the child on a full hearing. This court need only determine the habitual residence of the child, whether the child was wrongfully removed or retained in a contracting state and whether there are any exceptions to the requirement to return the child. Article 13 sets out two exceptions to the rule and provides that a court is not be bound to order the child returned to his or her previous home State if either of these exceptions exist. The first is that the person or institution consented to or acquiesced in the removal or retention and the second is that there is a grave risk that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. Article 13 also provides that a court may refuse to return a child if it finds 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. As indicated earlier, the child in question is a baby whose views are irrelevant to the issue.

[21] On the issue of acquiescence, there is no question that the father did not consent or acquiesce to the mother's taking the child from New York. The mother left the home with the child when the father was at work. She attended a shelter with the child where she remained until she obtained an interim order. Shortly after, she left the state and came to Ontario. The father was unaware that she was leaving and could not therefore have consented to the removal of the child. The mother argued that the father acquiesced to the

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child's remaining in Ontario because he took no steps to have her returned. Although the material shows that the father contacted the maternal grandmother and indicated that he knew where the mother and child were, no steps were immediately taken by him. There was no confirmation that the mother and child were with the grandmother except that the grandmother did send the father pictures. The father then hired a private investigator to find the mother and child. When found, he launched his application. The investigator's invoice is dated 5 September 2007. The father's application was dated 7 November 2007. I do not find that the time spent locating the mother and commencing proceedings to be such that it could be considered acquiescence to the retention of the child in Ontario.

[22] The real issue is whether clause (*b*) of Article 13 is applicable in this case. This issue was dealt with in the cases of *Pollastro v. Pollastro* (1999), 43 O.R. (3d) 485, 118 O.A.C. 169, 171 D.L.R. (4th) 32, 45 R.F.L. (4th) 404, 1999 CanLII 3702, [1999] O.J. No. 911, 1999 CarswellOnt 848, and *Finizio v. Scoppio-Finizio*, (1999), 46 O.R. (3d) 226, 124 O.A.C. 308, 179 D.L.R. (4th) 15, 1 R.F.L. (5th) 222, 1999 CanLII 1722, [1999] O.J. No. 3579, 1999 CarswellOnt 3018, both decisions of the Ontario Court of Appeal.

[23] In *Pollastro v. Pollastro*, *supra*, the mother fled California with her two-year-old child. The mother was the primary caregiver of the child. There was evidence presented of the father's unreliability and evidence of a guilty plea by the father to a charge of possession of methamphetamines. There was evidence of physical abuse, degrading language, screaming on the telephone, persistent calls and persistent abuse. The mother had bruises on her neck and arms. Although witnesses saw the bruises, no one saw the abuse, only the result. There were no charges laid for domestic assaults by the mother or any convictions for domestic assaults. The court found that, although the test to be applied was not best interests of the child, it was difficult to see how the assessment required under clause (*b*) of Article 13 of risk of harm or whether a situation is intolerable can be made without reference to the interest and circumstances of the particular child. The court held that it was a matter of common sense that returning a child to a violent environment places that child in an inherently intolerable situation as well as exposing him or her to a serious risk of psychological or physical harm. The court found that the mother would be returning to a dangerous situation and that the child's interests were tied to her psychological and physical security. At paragraph [36] of the decision, the court stated that the child's safety was at serious risk if he were forced to return to the very volatility that caused his mother to leave with him in the first place. The potential for violence was overwhelming and this would expose the child to the serious possibility of substantial psychological or physical harm and create a grave risk that he would be placed in an intolerable situation.

[24] The case of *Pollastro v. Pollastro*, *supra*, was followed in the same year by *Finizio v. Scoppio-Finizio*, *supra*. In that case, the evidence was that there was one incident of domestic violence. The motions judge found that the children had been wrongfully removed from Italy but invoked clause (*b*) of Article 13 and refused to order their return. The Ontario Court of Appeal found that the situation faced by the wife in Italy did not come within the description of Article 13 because there was no evidence that the father had ever done anything to harm the children, the alleged assault was the only incident of physical

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altercation between the parents in 8 years of marriage and the father continued to have access to the children following the incident until their removal from Italy.

[25] In *Hadissi v. Hassibi*, 1994 CanLII 7566, [1995] W.D.F.L. 001, [1994] O.J. No. 4607, 1994 CarswellOnt 2076 (Ont. Gen. Div.), a case that was decided prior to the Court of Appeal decisions noted above, the court found that there was no corroborating evidence of the allegations of abuse made by the mother and that, even if an intolerable situation of abuse existed, it would no longer exist upon the mother's return to California because the parties would not be living together.

[26] I find that the circumstances of this case are sufficient to invoke clause (*b*) of Article 13 of the convention. Unlike the case of *Finizio v. Scoppio-Finizio*, *supra*, there was not just one isolated incident of abuse. In *Pollastro v. Pollastro*, *supra*, the father had not been convicted of any assaults on the mother. The mother alleged he had assaulted her and, upon her fleeing California, there were several abusive, threatening telephone calls usually made when the father was drinking. In this case, the father has been convicted at least twice of charges related to domestic disturbances. One of those times was in June 2006 when the mother was bruised on her arms. In 2007, a police officer overheard a telephone call from the father to the mother that was not only abusive in its language and volume but included a threat to the mother. The last alleged assault, although not yet proven, occurred when the mother was holding the child. The result was a charge of child endangerment. Unlike *Pollastro v. Pollastro*, *supra*, the mother did not immediately flee New York with the child. She attended a shelter for safety and it was there that the father contacted her. The situation for the mother and child in New York is as bad if not worse than the situation was for Ms. Pollastro in California. Additionally, Mr. Lombardi has shown a complete disregard for court orders in his admitted breaches of several protection orders over the years. I am not convinced that any undertaking would protect the mother and the child from Mr. Lombardi under these circumstances.

[27] For these reasons, I make the following findings:

(a) the child was habitually resident in New York at the time of her removal;

(b) the child was wrongfully removed from New York by the mother; and

(c) returning the child to New York even subject to undertakings would expose the child to a grave risk of physical or psychological harm and place the child in an intolerable situation.

[28] Therefore invoking clause (*b*) of Article 13, I am not prepared to order that the mother return the child to New York.

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