COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Johnson v. Jessel,*
2012 BCCA 393

Date: 20121004
Dockets: CA40161; CA40200

Between:

Douglas Nelson Johnson

Respondent
(Claimant)

And

Behice Jessel

Appellant
(Respondent)

And

Attorney General of British Columbia

Intervenor

Before: The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Chiasson
The Honourable Madam Justice Garson

On appeal from: Supreme Court of British Columbia, July 13 and August 29, 2012 (*Johnson v. Jessel*, 2012 BCSC 1055 (July 13, 2012), Victoria No. 113188)

Counsel for the Appellant:	C.E. Hunter & C.A. DiPuma
Counsel for the Respondent:	A. Duncan & R. Faber
Counsel for the Intervenor:	R. Margetts, Q.C. & B. Mackey
Place and Date of Hearing:	Victoria, British Columbia September 17, 2012
Place and Date of Judgment:	Victoria, British Columbia September 17, 2012
Date of Reasons:	October 4, 2012

Written Reasons by:
The Honourable Madam Justice Garson

Concurred in by:
The Honourable Mr. Justice Lowry
The Honourable Mr. Justice Chiasson

Reasons for Judgment of the Honourable Madam Justice Garson:

Brief Introduction

[1] Behice Jessel appeals two Supreme Court orders made under s. 15 of the *Hague Convention on Private International Law*, *Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, 1343 U.N.T.S. 98, declaring that: her removal of her children from British Columbia was wrongful within the meaning of Article 3 of the *Convention* and, that she breached custody rights attributed to the courts of British Columbia and to Douglas Nelson Johnson by removing her children from British Columbia to Germany. At the conclusion of the hearing, the appeal was dismissed with reasons to follow. These are those reasons.

[2] On July 2, 2011, Ms. Jessel, the appellant, removed the children, then aged six and five from British Columbia to Germany. It is common ground that she did so without the knowledge or consent of Mr. Johnson, the respondent father of the children.

[3] In doing so she relied on an interim order of the Provincial Court pronounced on March 30, 2010, which she obtained *ex parte*, granting her sole custody and guardianship of the children.

[4] Mr. Johnson commenced proceedings for the return of the children under the *Hague Convention* on July 9, 2012. The first British Columbia Supreme Court order that is the subject of this appeal, pronounced on July 9, 2012 (made without notice to Ms. Jessel), found Ms. Jessel's removal of the children to have been wrongful within the meaning of Article 3 of the *Hague Convention*. That order granted liberty to Ms. Jessel to apply to set it aside. She applied unsuccessfully to set it aside on August 29, 2012. Based on the findings of the British Columbia court, the German court ordered Ms. Jessel to return the children to this jurisdiction.

[5] The issue on appeal is whether, in removing the children from this jurisdiction in purported reliance on an interim Provincial Court order, Ms. Jessel breached the court's custody rights or Mr. Johnson's custody rights (which he says he was exercising at the time).

The *Hague Convention*

[6] Article 3 of the *Hague Convention* defines wrongful removal. It provides as follows:

> 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.

[7] Article 5 defines rights of custody and rights of access. Its provision is as follows:

For the purposes of this Convention:

a "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;

b "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.

[8] Article 15 enables a judicial authority of the state requested to return a child, (in this case Germany) to ask the court of the state requesting the child's return to determine if under its laws the removal was wrongful within the meaning of Article 3. It provides as follows:

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

[9] It was a request by the German court, pursuant to Article 15 of the *Hague Convention* for a determination as to whether the children were removed lawfully from British Columbia that led to the chambers decisions under appeal.

Recent Procedural Steps taken under the *Hague Convention*

[10] On Mr. Johnson's behalf the German central authority appointed under the *Hague Convention* commenced an application for the return of the children on June 15, 2012.

[11] On June 26, 2012, in proceedings before the German Court of Schleswig, the Court requested a determination from the British Columbia Supreme Court whether under British Columbia law Ms. Jessel's removal of the Children was a "wrongful removal" within the meaning of Article 3 of the *Convention*.

[12] On an *ex parte* application made to the British Columbia Supreme Court, on July 9, 2012, Mr. Justice Butler found that Ms. Jessel's removal of the children was wrongful within the meaning of the *Convention*.

[13] Having received the British Columbia judgment, the German Court of Schleswig, after interviewing the children, determined in a July 23, 2012, judgment that Ms. Jessel's removal of the children was wrongful. The German court ordered the return of the children within 30 days.

[14] Ms. Jessel applied in British Columbia Supreme Court to set aside the Butler J. *ex parte*

order. On August 29, 2012, Mr. Justice Groves dismissed the application to set aside the earlier order. Both parties were represented and had filed affidavit material before Groves J. No reasons for judgment are available from that hearing.

[15] Ms. Jessel's German counsel appealed the July 23, 2012, decision. On September 7, 2012, Ms. Jessel's appeal before the German appellate court was dismissed.

[16] Ms. Jessel's counsel in British Columbia told us that in the event that this appeal succeeded, she was hopeful that such an order would be considered by the German Constitutional Court, it being the final level of appellate review potentially available to Ms. Jessel in Germany.

Background facts to custody dispute

[17] Ms. Jessel and Mr. Johnson began living together in February 2004.

[18] C. was born in April 2005. K. was born in July 2006.

[19] On March 30, 2010, Ms. Jessel left Mr. Johnson. She took the children with her. She obtained the Provincial Court *ex parte* order already mentioned. There are two orders. Both include restraining orders. Neither pronounce terms of custody. Rather, the first order just records that the children are in her lawful custody. Then on April 1, 2010, the court ordered that Ms. Jessel shall have interim sole custody and interim sole guardianship of the children. The order required that it be personally served on Mr. Johnson by a peace officer. The case was adjourned to April 20, 2010.

[20] On April 20, 2010, both parties appeared before a Provincial Court judge. The restraining order was varied to permit contact between them, but only through a family court counsellor.

[21] At a case conference held on May 8, 2010, both parties appeared and the proceeding was adjourned by consent.

[22] On May 12, 2010, Ms. Jessel signed a requisition asking that her March 29, 2010, application for a final order be adjourned generally.

[23] On May 21, 2010, Ms. Jessel filed another application to re-set the matter for a final custody order for June 22, 2010. Again it was adjourned generally. Mr. Johnson did not appear personally. Ms. Jessel deposed that he was aware of the date.

[24] On June 22, 2010, the matter was reset for Provincial Court. Ms. Jessel appeared but Mr. Johnson did not. She advised the court that Mr. Johnson did want access. She also advised the court that she wanted to visit her family in Germany. The judge stated that he could not then deal with that issue (presumably having in mind the lack of notice to Mr. Johnson), to which Ms. Jessel responded that she did not need to pursue the question then. The court said

that it was now up to Mr. Johnson to apply if he wished to vary the interim orders. No further date was set in Provincial Court and neither party returned to court until the commencement of these proceedings.

[25] In or around June of 2011, Ms. Jessel says she consulted with a legal aid duty counsel and her support worker and concluded that the interim order was sufficient legal authority for her to lawfully leave the country with the children.

[26] Ms. Jessel recounts the circumstances leading to her separation from Mr. Johnson, her move into a transition house and her commencement of proceedings in Provincial Court in which she sought a restraining order. She chronicles her assertions of physical and emotional abuse, and frequent absences of Mr. Johnson. She denies that she reconciled with Mr. Johnson as he asserts. She says that she was pressed by him into permitting him, at the last minute, to join her and the children on a Disneyland holiday. She says when they returned from the holiday and she began living at Whistler, she and Mr. Johnson slept in separate rooms and a few weeks later he left for Calgary, "something he had done before". After a series of unwelcome, and she says frightening, visits from Mr. Johnson she decided to move to Germany.

[27] Mr. Johnson deposes that he understood, admittedly mistakenly, that the interim order granting Ms. Jessel sole interim custody was set aside. He says that following the April 20 appearance in Provincial Court they agreed to reconcile. In June he says she told him she had "cancelled court" by which he assumed the interim order was also cancelled. He says they lived together in Coquitlam, then went on a family vacation to Disneyland, then relocated to Whistler. There they lived together and on one occasion hosted Mr. Johnson's father for a family visit. They separated again in the spring of 2011 and began making plans to move the family to Victoria. He describes what he thought was an amicable separation.

Reasons for Judgment of Butler J. – 2012 BCSC 1055

[28] The order pronounced by Butler J. is as follows:

> This Court orders that:
>
> 1. the requirement to attend a judicial case conference be dispensed with for the purposes of this application.
> 2. the removal or retention of the children, [C] … and [K] … was wrongful within the meaning of Article 3 of the Convention on the Civil Aspects of International Child Abduction.
> 3. the removal or retention of the children, [C] … and [K] … is in breach of rights of custody exercised by the applicant, Douglas Nelson Johnson, and at the time of the removal or retention those rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
> 4. the removal or retention of the children, [C] … and [K] … is in breach of rights of custody attributed to the Courts of British Columbia, Canada and at the time of the removal or retention those rights of custody were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention, an institution, or any other body, either jointly or alone.

5. this Order and the materials filed in support of this Application will be served on the respondent as soon as possible and service may be effected by emailing the materials to the following email addresses belonging to the respondent: …

6. the respondent may apply to set aside this Order in the Supreme Court of British Columbia by providing Mr. Johnson with seven (7) days notice of her application to do so.

[29] As already noted, this was an *ex parte* proceeding and accordingly the judge did not have before him the conflicting evidence of Ms. Jessel. He had only Mr. Johnson's evidence. There seemed no pressing need to conduct these proceedings on an *ex parte* basis. In the result the judge made orders based on the later disputed evidence of Mr. Johnson. By this date, Ms. Jessel's whereabouts were well known and she was participating in the *Hague Convention* proceedings in Germany.

[30] Based on the evidence before him the judge held that:

> [3] ... Following the court appearance on April 20, 2010, Mr. Johnson exercised access to the children until July 2010. At some time in July 2010, the parties resumed cohabitation. From that time until the parties finally separated almost a year later, Mr. Johnson jointly parented the children and was equally involved in all decisions regarding the children.

[31] In reliance on the decision in *Thomson v. Thomson*, [1994] 3 S.C.R. 551, 119 D.L.R. (4th) 253, and *Fasiang v. Fasiangova*, 2008 BCSC 1339, 87 B.C.L.R. (4th) 118, Butler J. held at paras. 13–14 that:

> [13] ... When the rights of custody are in dispute and have been placed before the courts, the right to decide where the children reside must be determined by the court if it is not resolved by consent of the parties. The residence of a child cannot be changed unilaterally by a parent simply because he or she has been granted interim custody.
>
> [14] In the circumstances of this case, as of July 4, 2011, the Courts of British Columbia were continuing to exercise custody rights with respect to the children. No final order had been made. Neither Ms. Jessel nor Mr. Johnson had the unilateral right to change the place of residence of the children.

[32] He concluded that the removal of the children was contrary to rights of custody afforded to the Courts of British Columbia. He specifically held that the interim order did not give Ms. Jessel the "right to determine the province or state in which the children could reside." He continued, at paragraph 16, to hold that while both the custody proceedings and the custody rights remained unresolved, the Courts of British Columbia continued to exercise custodial rights that were engaged by the March 30, 2010, order.

[33] Alternatively he held that Mr. Johnson was actually exercising custody rights between April 20, 2010, and the time of the removal of the children on July 4, 2011. He found as a fact that Mr. Johnson, though separated from Ms. Jessel, continued to exercise joint custody rights up to the time of the children's removal. At paragraph 23 he held that the March 2010 interim order was no longer enforceable because of the material change in circumstances. He found

that at the very least Ms. Jessel was estopped from relying on the interim order to maintain her sole custody rights in the face of the material change in circumstances that had occurred since the date of the order.

[34] Thus, he concluded that the removal of the children was wrongful because it was in breach of the rights of custody of the courts of British Columbia and Mr. Johnson.

Judgment of Groves J. – August 29, 2012

[35] On August 29, 2012, both the parties (represented by counsel) appeared before Mr. Justice Groves on the application of Ms. Jessel to set aside the *ex parte* order of Butler J. With reasons to follow, Groves J. dismissed the application to set aside the judgment of Butler J. Those reasons were not available at the hearing of the appeal.

Issues on Appeal

[36] The question raised on this appeal is whether the trial judge erred in finding that Ms. Jessel's removal of the children was unlawful within the meaning of Article 3 of the *Hague Convention*. The chambers judge (Butler J.) based his decision on two grounds. First that an interim order (that did not include a prohibition against removal from the jurisdiction) was in these circumstances not a lawful authority permitting Ms. Jessel to remove the children to another jurisdiction. And second, that the reconciliation, assuming that is what occurred in this case, operated to vacate the order, or put another way, it was a material change in circumstances such that the interim order could not be relied on by either party. Ms. Jessel says the chambers judges erred on both grounds.

Analysis

[37] I begin by noting that this judgment and those in the Supreme Court do not concern the merits of any custody or access dispute. Rather, the question on appeal and in the courts below is solely whether the removal of the children in the circumstances of this case was unlawful within the meaning of Article 3 of the *Convention*. I note as well that the *Convention* is concerned only with rights of custody, and not with rights of access to children by a non-custodial parent: *Thomson* at 579-580, *W.(V.) v. S.(D.)*, [1996] 2 S.C.R. 108 at 130, 134 D.L.R. (4th) 481.

[38] Ms. Jessel asserts that she alone has the right of custody and that right includes the right to determine the children's place of residence. Mr. Johnson counters that the court retained the right (or jurisdiction) to determine the children's place of residence and in that sense the court also had a right of custody. Mr. Johnson also contends that he was actively exercising his rights to custody of the children.

[39] Though the terminology of the *Convention* in which 'rights of custody' are attributed to an

institution is less familiar in this jurisdiction than the use of the term ‘exercise of jurisdiction’, the law is well settled that a court may exercise the rights of custody within the meaning of Article 3 of the *Convention*: *Thomson* at 588, *Fasiang* at para. 92. This notion of the Court exercising rights of custody was explained by Madam Justice Martinson in *Fasiang* at paras. 92–97:

> [92] The law is clear that the court is an institution that can exercise rights of custody.
>
> [93] Counsel for Mr. Fasiang says that the law also provides that where a foreign court is properly and actively seized of an issue as to where the child should reside, and where, while those proceedings are pending, the child is removed from its place of habitual residence without the consent of the court, the court hearing the application for return must recognize those rights of custody in the foreign court. There need not be an order relating to custody or residency in place.
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> [94] Counsel for Ms. Fasiangova does not dispute that statement of the law.
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> [95] I agree with counsel for Mr. Fasiang. The statement of the law is supported by the following cases: *Thomson*; *Re W, Re B (Child Abduction: Unmarried Father)*, [1998] 2 FLR 146 (H.C.J. Fam.D.); *Richards v. Goldsmith*, (3 July 2001) Case No. FD 01 P 00707 (H.C.J. Fam.D.); *Brook v. Director General Department of Community Services* (2002), 167 FLR 243 (Fam. Ct. Austl.).
>
> [96] There is a sound policy basis for the law. When a parent places issues concerning the child that are in dispute, including the issue of where the child should reside, before a court, the court has the right to decide the disputed issues, including the right to decide where the child should reside.
>
> [97] One parent cannot circumvent the court's right to make that decision by unilaterally deciding to change the residence of the child. To hold otherwise would again defeat the objectives of the *Hague Convention*.

[40] For purposes of the *Hague Convention*, rights of custody may reside in the court, or with the mother or father or both. *Thomson* and *C. v. C. (Minor: Abduction: Rights of Custody Abroad)*, [1989] 2 All E.R. 465 (C.A.), appears to recognize that custody under the *Convention* may be divided so that some rights may lie with the court, as well as with one or both of the parents. (See also *In re H*, [2000] UKHL 6, [2000] 2 A.C. 291 at 302).

[41] Rights of custody are specified by the *Convention*. For convenience, I repeat that portion of Article 5:

> *a* “Rights of custody” shall include rights relating to the care of the person of the child and, <u>in particular, the right to determine the child’s place of residence; ...</u>
>
> [Emphasis added.]

[42] The issue in this case is whether Ms. Jessel had “rights of custody” by virtue of the interim order awarding her sole custody, to the exclusion of the courts, within the meaning of the *Convention*.

[43] Ms. Jessel argues that where there was no order that restricted removal of the children, and no pending application respecting custody before the court at the time of the removal, she alone had the right to determine the children’s place of residence. She says regardless of whether the custody order was interim or final, there is no authority for the proposition that the

court retained custody rights that are breached by the custodial parent's removal of the child, such that the removal is wrongful within the meaning of Article 3 of the *Convention*.

[44] Ms. Jessel says that the chambers judge erred in finding that the courts were actually exercising custody rights of the children at the time of their removal. She notes that the only application before the court was her own adjourned application to make the order a final order. Mr. Johnson had not filed his own application, nor had he defended her application.

[45] Ms. Jessel argues that the court's custodial rights were not being actually exercised at the time of removal because the proceedings were essentially at an end. Ms. Jessel says that there is no authority for the proposition that a custody application adjourned generally creates a custodial right in a court that would be breached upon removal by a custodial parent.

[46] The question is whether at the time the children were removed from British Columbia, the Provincial Court was actually exercising its jurisdiction or rights of custody of the children within the meaning of the *Convention.* This question may be answered by examining the circumstances in which the court granted the interim order in this case. The order on which Ms. Jessel relies was an *ex parte* interim order. June 22, 2010, in the absence of Mr. Johnson, was the last time either party appeared in Provincial Court. The transcript of that day's proceedings reveals that Ms. Jessel raised the question of whether she could take her children to Germany to visit her family, to which the judge said, "Well, I can't deal with -- ". Ms. Jessel then interrupted the judge and said, "No I don't need to do this right now because I am not going anywhere right now." Whereupon the court ordered that her application for a final order of custody be adjourned generally.

[47] Ms. Jessel relies on cases such as *Gurtins v. Goyert*, 2008 BCCA 196, 81 B.C.L.R. (4th) 81, and *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048, 137 D.L.R. (4th) 633, for the proposition that an order must be given its plain and literal meaning. However, both *Gurtins* and *MacMillan Bloedel* are contempt cases that arose under different circumstances than what was before the court in the present case. Because these cases were addressed in the context of contempt, I do not find them helpful here.

[48] On June 22, 2010, the court granted an interim order implicitly reserving to itself the question of the right to remove the children from the jurisdiction. In these circumstances the interim order cannot be construed in the same manner as a final order. Although interim orders often do govern questions of custody and access indefinitely, they are primarily designed to maintain the status quo: *Leung v. Leung* (1998), 44 R.F.L. (4th) 121 (B.C.C.A.) at para. 10, *Eaton v. Eaton* (1987), 11 R.F.L. (3d) 92 (B.C.C.A.), *Prost v. Prost* (1990), 30 R.F.L. (3d) 80 (B.C.C.A., in chambers). Such orders provide a short-term solution to the parties until the court can engage in an in-depth analysis regarding the circumstances of the parties and the children: *Pumphrey v. Pumphrey* (1997), 148 Nfld. & P.E.I.R. 340 (Nfld C.A.), 29 R.F.L. (4th) 283.

[49] Ms. Jessel argues that regardless of whether the June 22, 2010 order was interim or final, the court retained no rights of custody under the *Convention*. She contends that because there was no non-removal clause in the interim custody order, the court did not retain custodial rights over the children. I disagree. In *Thomson*, La Forest J. stated that when custody is a live issue, and a court awards custody on an interim basis, the court does retain custody rights under the *Convention*: *Thomson* at 588. While a non-removal clause *may* be placed in an interim order to preserve the court's jurisdiction, such a clause is not required. In the circumstances of this case, the Provincial Court was actually exercising its custody rights at the time of the removal. It follows that the removal of the children was unlawful within the meaning of the *Convention*. Were this not so it would follow that in any case of spouses asserting competing claims to sole custody of children, either one could simply obtain an *ex parte* order for interim custody on whatever he or she put before the court, and then take the children to another jurisdiction on the strength of that order. That cannot be either the correct interpretation of the reach of such an interim order or of the *Convention*.

[50] It is unnecessary for me to consider the alternative ground of appeal, namely that the chambers judges erred in finding that Mr. Johnson was also exercising rights of custody.

[51] I would dismiss the appeal.

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Mr. Justice Lowry"

I agree:

"The Honourable Mr. Justice Chiasson"