COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Rey v. Getta,*
2013 BCCA 369

Date: 20130813
Docket: CA041085

Between:

Natalia Margarita Rey

Respondent
(Petitioner)

And

Alexander Flavio Getta

Appellant
(Respondent)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice D. Smith
The Honourable Madam Justice Garson

On appeal from: An order of the Supreme Court of British Columbia, July 22, 2013
(*Rey v. Getta*, Vancouver docket E131457)

Oral Reasons for Judgment

No appearing on behalf of the Appellant:

Counsel for the Respondent: W.R. Storey

Place and Date of Hearing: Vancouver, British Columbia
August 13, 2013

Place and Date of Judgment: Vancouver, British Columbia
August 13, 2013

Summary:

Pursuant to the Hague convention, the chambers judge declared that the appellant father had wrongfully removed and wrongfully retained in this jurisdiction the parties' two children, who were found to have been "habitually resident" resident in Naples, Florida immediately before their removal. He also ordered the father to deliver the children to the respondent mother or her agent for return to the Florida, U.S.A., finding no grave risk that their return to the mother would expose them to physical or psychological harm.

The father did not appear at the hearing of the appeal. Based on submissions he advanced in his application for a stay of execution of the orders under the Hague Convention pending appeal, the focus of his challenge appeared to be on the chambers judge's factual findings in regard to the children's "habitual residence" in Naples, Florida, and the absence of any grave risk that the children's return to their mother in Florida would expose then to physical or psychological harm.

Held: Appeal dismissed. The Court was satisfied the evidence supported the chambers judge's findings and the orders under the Hague Convention were correctly made.

[1] **D. SMITH J.A.**: Alexander Getta appeals the July 22, 2013 order of Mr. Justice Kelleher, which granted the respondent, Natalia Rey: (i) a declaration under Article 3 of the *Convention on Civil Aspects of International Child Abduction,* 25 October 1980, Can. T.S. 1983, No. 35 (the "*Hague Convention*") that the appellant wrongfully removed to and wrongfully retained in this jurisdiction, the parties' children (ages 4 and 2), and (ii) an order under Article 12 of the *Hague Convention* that the appellant deliver the children to the respondent or her agent for return to the state of Florida, in the United States of America, at a specified time and place in Vancouver, British Columbia (the "Order"). See *Rey v. Getta,* (22 July 2013) E31457 (S.C.).

[2] On July 31, 2013, the appellant applied for a stay of execution of the Order to August 13, 2013, when a division of the Court was scheduled to sit. After hearing submissions, Mr. Justice Low, in Chambers, identified four issues in the appeal:

1. whether the children were habitually resident in the State of Florida, U.S.A., when they were removed to British Columbia;
2. whether the mother possessed rights of custody;
3. whether the mother consented or acquiesced to the children's removal or retention; and
4. whether Article 13(b) applies, namely, whether the respondent has established that there is a grave risk that the children's return would expose them to physical or psychological harm or otherwise place them in an intolerable situation.

[3] He further noted (at para. 6):

> The judge [Kelleher J.] resolved all these issues in favour of the respondent mother. The appellant says he erred with respect to the residency issue and the risk issue.

[4] In granting the stay application for a brief period only, Low J.A. explained:

> [13] My conclusion with respect to this application would have been entirely different if it were not possible to have this appeal heard quickly by a division of the court. The emphasis in the *Hague Convention* provisions when a child has been removed from the jurisdiction in which the child is habitually resident is an expeditious resolution of the matter in the judicial institutions in which application for return of the child is made. In many cases in which appeal of a restoration order is weak, the appeal cannot be heard expeditiously and, as in the *Grymes* case [*Grymes v. Gaudreault,* 2004 BCCA 495], the stay must be granted. But in the present case, in my opinion, the time line to appellate resolution is such that the expediency requirement of the convention can be met.

[5] To that end, Low J.A. directed that the motion books in the stay application would stand in the place of the appeal books and appeal record that are required by the *Court of Appeal Rules* to be filed in an appeal, and further ordered that the appellant's factum was to be filed by August 7, 2013, and the respondent's factum by August 9, 2013. He also granted the appellant liberty to apply for a further stay of execution of Kelleher J.'s order if the appeal was not heard on August

13, 2013 as scheduled. See *Rey v. Getta* (31 July 2013) Vancouver CA41085.

[6] The appellant did not file his factum as directed and on August 9, 2013, his counsel served counsel for the respondent with an unfiled notice of intention to withdraw. That notice has now been filed with the registry. Nor did he appear before this Court on August 13, 2013.

[7] The respondent filed her factum on August 9, 2013, and wishes to proceed with the appeal. She has yet to have the children returned to her.

[8] We are of the view that this appeal should proceed on the evidentiary record before us in order to comply with the underlying purpose of the *Hague Convention* as stated in *Thomson v. Thomson,* [1994] 3 S.C.R. 551 at p. 559:

> The underlying purpose of the *Convention*, as set forth in its preamble, is to protect children from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the state of their habitual residence.

Background

[9] The circumstances that triggered the mother's petition for orders under the *Hague Convention* may be briefly summarized as follows.

[10] The mother was born in Columbia. She later moved to Canada, was granted refugee status in 2004, and obtained permanent resident status in 2005. In 2009 she became a Canadian citizen, although she also retains her Columbian citizenship.

[11] The father was born in Canada of naturalized Canadian citizens who emigrated from Austria in 1975. The father is a Canadian citizen but lived and attended high school in Naples, Florida where his parents maintain a home. They also own homes in Whistler and Europe.

[12] The parties met in 2007 while both were attending Dalhousie University at Halifax, Nova Scotia, when they began living together in a marriage-like relationship until their separation in February 2013. After university, the father worked as a broker and invested in real estate.

[13] The parties have two sons. The eldest was born on May 15, 2009, at Halifax, Nova Scotia; the younger was born on January 27, 2011, at Naples, Florida, after the parties returned to Naples, Florida for the second time. The children are currently ages four and two respectively.

[14] In September 2009, the couple and their eldest son moved to Naples for the first time. However, in March 2010, the family moved back to Halifax until August 2010 when they returned to live in Naples until their separation. Their second son was born in Naples in 2011. In 2011 they also sold their Halifax home.

[15] After returning to Naples in 2010, the oldest child, in March 2012, and in time the younger

child, in September 2012, were enrolled in pre-school. The children were patients of a local pediatrician who saw them regularly between 2009 (for the oldest child) and since his birth (for the younger child) until 2013. The parties also employed a nanny in September 2010. In January 2013, the children were registered at school in Naples for the September 2013/2014 school year.

[16] Difficulties arose in the relationship and in February 2013 the mother left the home with the children and moved into a local women's shelter. She subsequently filed an application in a Florida court seeking a protection order against the appellant. Her application was dismissed. Thereafter, the father applied in the same court for custody of the children. He withdrew his application when the mother agreed to an informal parenting arrangement of shared custody of the children. The parties also agreed to discuss the resolution of their property and support issues through their respective Florida lawyers.

[17] On April 27, 2013, without notice to or the consent of the mother, the father removed the children from the state of Florida and took them to the home of his parents at Whistler, British Columbia. On the same date, he served the mother with a Notice of Family Claim under the *Supreme Court Family RulesI,* B.C. Reg. 169/2009, in which he sought orders regarding custody of the children. Those proceedings had been commenced in the Supreme Court of British Columbia on April 25, 2013.

The Hague Convention

[18] On May 15, 2012, the mother filed a petition in the Supreme Court of British Columbia seeking an order for the return of the children to Florida pursuant to the provisions of the *Hague Convention.* The material provisions of the *Hague Convention* include :

> **Article 3**
>
> The removal or 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 subparagraph (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.
>
> …
>
> **Article 12**
>
> 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 elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
>
> …

Article 13

Notwithstanding the provision 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 opposes its return establishes that

(a) the person, institution or other body having the care of the person or 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.

…

[19] Section 80(4) of the *Family Law Act,* S.B.C. 2011, c. 25, provides that the *Hague Convention* has "the force of law in British Columbia."

The chambers judge's reasons

[20] The mother's petition was heard on July 19, 2013. On July 22, 2013, Kelleher J. issued oral reasons for judgment in which he ordered that the children had been wrongfully removed to and wrongfully retained in this jurisdiction and that they be returned to their mother in Florida. To implement that order, he further directed the children be delivered to the mother at a specified location in Vancouver, B.C., at noon on July 23, 2013.

[21] In the course of his reasons, Kelleher J. reviewed the "profound difference between the parties on some of the facts" (para. 14) for the purpose of resolving the central issue of whether the parties had a "settled intention" to "habitually reside" in Naples, Florida when they moved to that community. The mother deposed that the parties intended to move permanently to Florida when they returned there in August 2010. The father deposed that they were merely vacationing in Florida for extended periods and intended to move permanently to Whistler, B.C.

[22] On the issue of whether Florida was the "habitual residence" of the children at the material time immediately before the father removed them from that jurisdiction, Kelleher J. considered the jurisprudence from *Fasiang v. Fasiangova,* 2008 BCSC 1339, *Hewstan v. Hewstan,* 2001 BCSC 368, and *Petnehazi v. Kresz,* [1999] B.C.J. 1238, on this "question of fact" under the *Hague Convention.*

[23] After reviewing all of the evidence, the judge concluded that "[t]here is objective evidence supporting Ms. Rey's stance that they were residing in Naples and not simply visiting" (para. 23). In arriving at that determination he relied in large part on four undisputed pieces of evidence: (i) legal proceedings concerning a November 2010 lease entered into by the parties in which the father expressly stipulated the family would be living there with their two children and that the father was "a resident of Collier County, Florida" and in possession of the premises (para. 23-24); (ii) a letter which included the clinical records of a Naples pediatrician who confirmed that the children had been patients of hers from November 11, 2009, (in the case of the oldest child)

and from January 27, 2011 (the birth of the youngest child) until April 2013 (para. 25); (iii) legal proceedings commenced by the father in a Florida court in February 2013 for custody of the children in which he had deposed that Florida was the children's residence, with no mention of Whistler or anywhere else (paras. 26-27); and (iv) the enrollment of both children in a Naples pre-school in 2012 and registration in a Naples school for the 2013/2014 school year (paras. 28-29).

[24] Kelleher J. concluded at para. 45:

> Considering all the circumstances, I conclude that the children are habitually resident in Florida. I find the parties had a settled intention to reside in that jurisdiction for the purpose of being a family.

[25] On the second issue of whether the mother had and exercised custody over the children when the children were removed, he accepted the opinion contained in an affidavit of a licensed attorney from the state of Florida that under Florida legislation both parents are guardians of their children, and that a mother of a child born out of wedlock is the natural guardian of the child and is entitled to residential care and custody of the child unless a court otherwise orders. It was the attorney's opinion that based on Florida law, the mother possessed rights of custody at the time of the children's removal (paras. 48-49).

[26] On the third issue, the judge accepted the mother's evidence that she had not consented to or acquiesced in the father's removal of the children from Florida to this jurisdiction. He also observed there was no other evidence to the contrary (para. 50).

[27] On the fourth issue of whether there was a grave risk that the children's return to the mother would expose them to physical or psychological harm, the father had alleged that the mother had threatened to take the children away and that her brother had sent him a threatening text message after the children's removal. The mother denied the allegation with respect to herself. The father also alleged that the mother could be deported because of her illegal immigrant status in the U.S.A., and that as she had retained her Columbian citizenship when she became a Canadian citizen she could, in such an event, elect to be deported to Columbia "with all its drug-related violence" (para. 53-55).

[28] Kelleher J. rejected each of these arguments, relying on the meaning of "a grave risk" adopted in *Thomson* (at p. 597) from the approach taken in *Re A. (A Minor)(Abduction)*, [1988] 1 F.L.R. 365 (Eng. C.A.) at p. 372:

> … the risk has to be more than an ordinary risk, or something greater than would normally be expected on taking a child away from one parent and passing him to another. I agree … that not only must the risk be a weighty one, but that it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words "or otherwise place the child in an intolerable situation."

[29] Kelleher J. was also satisfied that the father's allegations of threats from the mother and/or her brother was a risk that the father could address through injunctive relief from a

Florida court (noting somewhat ironically at para. 53 that it was the father who did not threaten but actually took the children away). In regard to the allegation that the mother, in the event the U.S.A. ordered her deported, might elect to return to Columbia and thereby “choose to expose her children to risk of harm”, he found that this allegation did not amount to evidence but rather was “speculation at its highest” (para.57). He concluded that “[t]he evidence does not establish a grave risk of psychological or physical harm to [the children]” if they were returned to the mother (para. 58).

Discussion

[30] In his application for a stay of execution of the Order, the father’s submissions on the merits of the appeal focussed on Kelleher J.’s findings of fact that: (i) the children’s “habitual residence” at the time of their removal was in Naples, Florida, and (ii) the children would not be subject to any grave risk of psychological or physical harm if returned to the custody of their mother in that community. The father acknowledges that Article 3 recognizes rights of custody by operation of law (see *Thomson v. Thomson,* [1994] 3 S.C.R. 551 at p. 580) and that the mother did not consent or acquiesce to his removal of the children from Naples and their retention in this jurisdiction.

[31] As previously noted, under Article 3 of the *Hague Convention* the removal or retention of a child is wrongful if it is done in breach of rights of custody held by the parent left behind, either jointly or alone, under the law of the place where the child was “habitually resident” before his or her removal or retention. While the term “habitual residence” is not defined in the *Hague Convention,* it is well established in the jurisprudence that it is a question of fact to be determined on the circumstances of each case.

[32] An habitual residence has been determined to be the place where children, who are wrongfully removed or wrongfully retained, resided for “an appreciable period of time” under the “settled intention or purpose” of their parents. A settled intention requires a “degree of settled purpose” that may include one or several purposes and be specific or general. While the duration of the residency may be a relevant factor, a settled purpose does not require a lengthy period of residency but may vary from a lengthy stay, to a fixed or limited period, or even as short as a day. A settled intention simply requires that “the purpose of living where one does has a sufficient degree of continuity to be properly described as settled” (*R. v. Barnet London Borough Council,* [1983] A.C. 309 (H.L) at p. 344, adopted in *Chan v. Chow*, 2001 BCCA 276 at para. 33). See also *Fasiang, Hewstan* and *Petnehazi.*

[33] After weighing the conflicting evidence adduced by each of the parties on this issue, Kelleher J. concluded that the objective evidence supported the mother’s position that the parties had a settled intention to permanently live in Naples, Florida when they moved there for the second time in August 2010. There is no indication the judge misapprehended the evidence, failed to consider relevant evidence or considered irrelevant factors in concluding that the

children’s habitual residence, before their removal by the father, was in Naples, Florida. It would appear from his reasons that it was the documentary “objective evidence” that tipped the scales in favour of the mother on this issue.

[34] Similarly, in regard to the judge’s finding that the father had not demonstrated there existed a grave risk of physical or psychological harm under Article 13(b), as that provision has been interpreted in *Thomson,* I am unable to find any demonstrable error. The burden of proof was on the father to establish this aspect of the test under Article 13(b). The father does not dispute that he could return to the Florida courts for injunctive relief if he could establish that the mother and/or brother had issued threats against him. Nor can he dispute, in my view, Kelleher J.’s finding that it is mere speculation to suggest that the mother, if deported by the U.S.A., would elect to return to Columbia.

Disposition

[35] In all of the circumstances, I find no merit to the father’s position and I would dismiss the appeal.

[36] **NEWBURY J.A.**: I agree.

[37] **GARSON J.A.**: I agree.

[38] **NEWBURY J.A.**: The appeal will be dismissed. The Court will declare that the stay has now expired and the order of Mr. Justice Kelleher is now restored with the exception that the date of August 6, 2013 will be inserted in place of July 23, 2013, both in paras. 3 and para. 4 of the order.

[39] Costs will follow the event.

“The Honourable Madam Justice D. Smith”