COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Solis v. Tibbo Lenoski,*
2015 BCCA 508

Date: 20151208
Docket: CA43039

Between:

Martha Hernandez Solis

Respondent
(Petitioner)

And

Stefan Mark Gerard Tibbo Lenoski, also known as Mark Tibbo-Lenoski, also known as Mark Tibbo, also known as Mark Gerard Tibbo Lenoski

Appellant
(Respondent)

Before: The Honourable Madam Justice Kirkpatrick
The Honourable Madam Justice Garson
The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated August 17, 2015 (*M.S. v. S.L.*, 2015 BCSC 1446, Vancouver Docket S1410017).

Counsel for the Appellant: L. MacLean, Q.C.
J. Stein

Counsel for the Respondent: W. Storey

Place and Date of Hearing: Vancouver, British Columbia
November 3, 2015

Place and Date of Judgment: Vancouver, British Columbia
December 8, 2015

Written Reasons by:
The Honourable Madam Justice Garson

Concurred in by:
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Goepel

Summary:

The appellant father appeals an order requiring his twin children to be returned to Mexico under the Hague Convention on the Civil Aspects of International Child Abduction, where they habitually resided with the respondent mother. One of the children has autism. The appellant submits that the chambers judge erred in holding that denial of access to autism therapy exposed the child to a risk of harm sufficient to engage the "grave risk" exception under Article 13(b) the Convention. The appellant also applies to admit fresh evidence concerning the respondent's ability to live and work in Canada. Held: Appeal dismissed. Article 13(b) has been interpreted restrictively, and only applies in situations where there is an immediate, real, grave risk of harm. The authorities the appellant relies on do not support a more expansive interpretation. Whether circumstances are sufficient to engage the Article 13(b) exception is a question of fact, determined on a case-by-case basis according to the evidence. The appellant did not show that the chambers judge made a palpable and overriding error in concluding that the exception was not met in this case. Given the dismissal of the appeal, it is unnecessary to consider the fresh evidence.

Reasons for Judgment of the Honourable Madam Justice Garson:

Introduction

[1] This appeal concerns the interpretation of Article 13(b) of the *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, 1343 U.N.T.S. 89, Can. T.S. 1983 No. 35. The general provisions of the *Convention* require that a child who has been removed to a foreign jurisdiction contrary to a court order in their home jurisdiction, be returned to the custodial parent. As an exception to the general provisions, Article 13(b) provides that a foreign court may refuse to return a child in compliance with a foreign court custody order where to do so exposes a child to "grave risk" of physical or psychological harm or would place the child in an "intolerable situation."

[2] In this case, the father of five-year-old twin boys appeals the chambers judge's order requiring that his children be returned to Mexico in accordance with an order of the First Family Court of Colima, Mexico. He relies on Article 13(b), arguing that both children have special needs that cannot be met in Colima, where they ordinarily reside with their mother. In particular, one child is autistic, and appropriate autism therapy is available in British Columbia but not in Colima. The appellant

submits that the chambers judge erred in applying an overly restrictive interpretation of 13(b) leading the judge to conclude that the comparative lack of therapy was not sufficient to engage the exception.

[3] I would dismiss the appeal for the reasons that follow.

Background

[4] The appellant, Mr. Tibbo Lenoski, and the respondent, Ms. Solis, married in Colima, Mexico, on April 24, 2010. The twin boys, D and N, were born in Mexico on October 9, 2010. The parties separated on October 25, 2010, and divorced on July 3, 2014. By consent and in confirmation of their separation agreement, on March 22, 2013, the First Family Court of Colima awarded the boys' primary residence to Ms. Solis. Ms. Solis has been their primary care-giver since birth. The same court authorized Mr. Tibbo Lenoski to take the children to British Columbia for access visits in the summer of 2013 and 2014.

[5] The children have dual Mexican and Canadian citizenship. Mr. Tibbo Lenoski is a Canadian citizen. Ms. Solis is a Mexican citizen. She became a permanent resident of Canada in April 2011. Her permanent resident card expires in June of 2016. Because she has spent less than the requisite number of days in Canada since becoming a permanent resident, there is some uncertainty concerning her ability to continue to work and live in Canada. Pending the conclusion of these proceedings, Ms. Solis is living and working in Canada in order to be close to the children. Her immigration status is the subject of a fresh evidence application.

[6] During the 2013 summer access period, Mr. Tibbo Lenoski arranged a number of assessments for the children because of concerns both parents had about the children's developmental delays. There was some unexplained lack of communication between the parents as to the results of certain diagnostic testing. The children were further assessed during the summer 2014 access visit.

[7] As a result of these assessments, D was diagnosed with autism, and N was diagnosed with significant learning difficulties. They began recommended therapy while staying with Mr. Tibbo Lenoski.

[8] At the conclusion of the summer 2014 access period, Mr. Tibbo Lenoski did not return the children in accordance with the Mexican custody order, citing circumstances posing a risk of psychological harm -- in particular, the lack of access to suitable therapy. Ms. Solis commenced proceedings for the return of the children, arguing that Mr. Tibbo Lenoski's self-help remedy was a breach of the *Convention*.

Issues on Appeal

[9] As noted, this appeal concerns two children. However, D's need for specialized autism therapy has primarily driven these proceedings. There has been no suggestion by any party that D and N should be separated. I address D's circumstances in these reasons on the assumption that any order respecting D will apply equally to N.

[10] The only issue on appeal is whether the chambers judge erred in concluding that returning D to Mexico would not expose him to a "grave risk of harm" or otherwise place him in an "intolerable situation" as contemplated by Article 13(b) of the *Convention*.

Reasons for Judgment of the Chambers Judge: 2015 BCSC 1446

[11] As noted, the principal issue before the chambers judge was whether the lack of available treatment facilities in Colima, Mexico comparable to British Columbia was sufficient to engage the Article 13(b) exception. Mr. Tibbo Lenoski argued that the lack of appropriate therapy rendered Ms. Solis and the Mexican health authorities incapable of protecting D from the lifelong effects of autism, such that he was exposed to a "grave risk" within the meaning of the *Convention* (at para 54).

[12] In assessing this question, the chambers judge made a number of important findings of fact, none of which are challenged on appeal. These facts, found at para. 60 of his reasons, may be summarized as follows: D was receiving appropriate

treatment in British Columbia; British Columbian treatment was significantly better than any comparable program available in Colima; therapists in Colima were not as well qualified as therapists in British Columbia; D would not receive the intensive recommended Applied Behaviour Analysis therapy in Colima; D would receive some occupational and speech therapy in Colima; D was showing some improvement from the therapy in British Columbia; there was no certainty as to D's outcome whether he remained in British Columbia or returned to Colima; D would live in a positive supportive environment in either British Columbia or Colima; and a move back to Colima would not cause D psychological scars or long-term damage, given that his mother's home was an appropriately structured and loving environment.

[13] On the basis of these facts, the chambers judge concluded that there was a "strong probability" that D would suffer in his development without the recommended ABA therapy, and that the absence of such treatment constituted a "serious risk" to him (at paras. 62 to 63).

[14] However, the chambers judge was not able to conclude that the risk to D amounted to a "grave" risk as contemplated by Article 13(b), or that D would be placed in an otherwise "intolerable situation" within the meaning of that phrase.

[15] In reaching these conclusions, the chambers judge distinguished two cases involving children with autism: *J.M.H. v. A.S.*, 2010 NBQB 275, and *Ermini v. Vittori*, (F. 3d) W.L. 3056360 (2d Cir 2014). He found that there were significant factual differences in these cases which also contributed to the risk of harm (at paras. 73 and 92). The chambers judge also noted that he had a different view as to whether the lack of appropriate treatment in the habitual residence of a child, without other "complicating factors", could amount to an intolerable situation as defined in the jurisprudence (at para. 74).

[16] The chambers judge discussed his interpretation of "intolerable situation" at paras. 84 to 92 of his reasons. In doing so, he relied on the leading decision of the Supreme Court of Canada in *Thomson v. Thomson*, [1994] 3 S.C.R. 551, and *Friedrich v. Friedrich*, 78 F. 3d 1060 (6th Cir 1996), a decision of the United States

Court of Appeals adopted in Canada, and the leading American case on Article 13(b).

[17] On the basis of the strict test set out in these authorities, the chambers judge concluded that the situation presented by the appellant did not satisfy Article 13(b). In particular, he held that the concept of "intolerable" circumstances was not intended to encompass a comparative analysis based on affluence or advantage. He cautioned that finding that the availability of autism therapy alone met the test risked turning the Article 13(b) inquiry "into a beauty contest between the facilities or opportunities available in the … [two] countries" (at para. 88). While such arguments could form the basis of a consensual decision to move children from one country to another, the differences were fundamentally best interests considerations properly determined by a court of the child's habitual residence, not under Article 13(b) (at para. 89). His reasons likewise emphasized that Article 13(b) was intended to respond to situations involving more immediate risk to a child, such as returning a child to a war-zone, or a situation of abuse or neglect (at paras. 83, 85-87).

[18] Importantly, the chambers judge found that acceding to Mr. Tibbo Lenoski's arguments would have the effect of undermining the *Convention*. He considered Mr. Tibbo Lenoski's submission analytically flawed in its focus on the best interests of the individual child before the court, and not on the best interests of children generally (as intended by the *Convention*). He held that allowing Mr. Tibbo Lenoski to wrongfully retain D because of the availability of better facilities would encourage other parents from countries with better facilities or opportunities to wrongfully remove or retain children (at para. 91). In other words, it would encourage (rather than discourage) international child abduction.

[19] Finally, the chambers judge held that he would decline to exercise his discretion to dismiss Ms. Solis's petition even if he was incorrect in concluding that Article 13(b) was not satisfied.

Position of the Parties

[20] The arguments on appeal made by both parties are essentially those that were made to the chambers judge.

[21] Subject to the question of Ms. Solis's immigration status (the fresh evidence application), there is no argument that the judge made any palpable and overriding error in his findings of fact.

[22] Mr. Tibbo Lenoski contends that D has an extraordinary dependence on behavioural and developmental support for his autism. He says that removing D from his treatment would cause grave psychological harm. He argues that the lack of facilities in Colima would place D in an intolerable situation akin to serious abuse or neglect.

[23] Ms. Solis says that the grave risk of harm test should not be watered down by allowing it to be equated with the best interest of the child. She says that this would weaken the power of the *Convention* to discourage international parental child abductions. She contends that a best interest argument should be made in custody proceedings in the home state, not in proceedings under the *Convention*. It is worth noting that the appellant has brought a proceeding in Mexico to alter the parenting arrangements but it has not progressed beyond the evidence gathering stage.

Analysis

[24] The objects of the *Convention* are set out in Article 1:

> a) to secure the prompt return of children wrongfully removed 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.

[25] Article 3 of the *Convention* defines the wrongful removal or retention of a child. Article 12 requires the immediate return of a wrongfully removed or retained child, subject to the exceptions set out in Article 13. I note that in this appeal there is

no dispute that the children were wrongfully removed within the meaning of Articles 3 and 12. I set out the relevant portions of these provisions below:

> Article 3
>
> 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.
>
> …
>
> Article 12
>
> Where a child has been wrongfully removed or retained in the 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(b)
>
> *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.

[26] The "Explanatory Report on the 1980 Hague Child Abduction Convention," *Acts and Documents of the Fourteenth Session*, vol. 3 (The Hague: 1981) 426 describes the principles underlying the *Convention*, and provides a commentary on its provisions. The Report cautions that the exception in Article 13(b) should be interpreted in a restrictive fashion:

> 34 To conclude our consideration of the problems with which this paragraph deals, it would seem necessary to underline the fact that the three types of exception to the rule concerning the return of the child must be applied only so far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter. In fact, the Convention as a whole rests upon the unanimous

> rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition. The practical application of this principle requires that the signatory States be convinced that they belong, despite their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them — those of the child's habitual residence — are in principle best placed to decide upon questions of custody and access. As a result, a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.

[27] The starting point of an analysis of Article 13(b) is the Supreme Court of Canada's decision in *Thomson*. *Thomson* states that the "grave risk" of psychological harm contemplated by Article 13(b) is harm of a degree amounting to an "intolerable situation" (at 596). It endorses the following passage from *Re A. (A Minor) (Abduction)*, [1988] 1 F.L.R. 365 (Eng. C.A.):

> . . . 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'.

[28] Additional guidance respecting the restrictive nature of the Article 13(b) exception is found in *Friedrich*. *Friedrich* is authority for the proposition that the risk of harm contemplated in Article 13(b) must be "grave", not merely "serious". Like the chambers judge, I view *Friedrich* as useful notwithstanding that it did not involve denial of access to autism therapy. The following passages (relied on by the chambers judge) clarify the meaning of the phrase "intolerable situation" (at 1068-1069 of *Friedrich*):

> This provision was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child's best interests. Only evidence directly establishing the existence of a grave risk that would expose the child to physical or emotional harm or otherwise place the child in an *intolerable* situation is material to the court's determination. The person opposing the child's return must show that the risk to the child is grave, not merely serious.
>
> A review of deliberations on the Convention reveals that "intolerable situation" was not intended to encompass return to a home where money is in short supply, or where educational or other opportunities are more limited than in

> the requested state. An example of an "intolerable situation" is one in which a custodial parent sexually abuses the child. If the other parent removes or retains the child to safeguard it against further victimization, and the abusive parent then petitions for the child's return under the Convention, the court may deny the petition. Such action would protect the child from being returned to an "intolerable situation" and subjected to a grave risk of psychological harm.
>
> [Emphasis added.]

[29] In support of a broader and more flexible interpretation of Article 13(b), Mr. Tibbo Lenoski relies on the following three cases, each involving a child with autism: *Ermini*, *JMH*, and *DP v. Commonwealth Central Authority*, [2001] HCA 39 (Aust.). Mr. Tibbo Lenoski argues that these cases support his argument that denial of access to autism therapy can (and in this case does) rise to the level of harm contemplated by Article 13(b).

[30] In *Ermini*, the United States Court of Appeal for the Second Circuit held that separating a child from autism therapy, on the facts, posed a sufficiently grave risk of harm to engage the exception in Article 13. The facts, however, provide important context for the decision. Both parents were Italian citizens, and the family moved to the U.S. for the purpose of accessing treatment for their autistic child. The parents separated, and in the midst of a custody dispute, the father (who travelled back and forth between Italy) brought a petition under the *Convention* seeking return of the children to Italy. There was evidence that the autistic child benefitted greatly from therapy in the U.S. However, there was also evidence that the father was repeatedly violent with the mother and had struck the children. The Court found that the violence exhibited by the father was sufficient to meet the "grave risk" exception. It also found that removing the child from autism therapy would almost certainly harm him, and that the exception was engaged. Additional comments also provide important context: first, the Court expressed considerable doubt as to whether it could be said that the children's "habitual" residence was Italy; second, (although not a basis for reversing the decision of the lower court) the Court expressed doubt as to whether the mother breached an Italian court order, since the custody order obtained by the father did not require the children's return to Italy.

[31] *JMH v. AS* is a trial level decision of the Court of Queen's Bench of New Brunswick. One of the children in *JMH* was developmentally delayed, and therapists suspected that he had autism spectrum disorder. Prior to the breakup of the marriage, the family was living in Florida. After separation, the mother returned to New Brunswick with the children where she had work and considerable family support. The father sought the children's return under the *Convention*. Florida courts had issued a warrant for the mother's arrest for non-compliance with a Florida return order. Accordingly, the Court found that the mother's ability to return to Florida with the children was inhibited, exacerbating emotional and psychological trauma. Importantly, the Court found that the father was an alcoholic, disengaged from the children's lives. Relying on the test in *Thomson*, the Court held that ordering the return of the developmentally delayed child would be a "psychological blow", and "would create more than an ordinary risk to his psychological well-being…" (at para. 53). In the totality of the circumstances, the Court found that there was a grave risk of substantial psychological harm, and that the child would be placed in an intolerable situation (at para. 54).

[32] In *DP v. Commonwealth Central Authority*, the mother of an autistic child resisted the father's petition for return to Greece, citing concerns relating to the availability of autism therapy. The Australian High Court determined that there was insufficient evidence regarding a comparison of the available autism therapy in both jurisdictions and remitted the matter for a further hearing. Based on the remittal, one can infer that the High Court was prepared at least to consider the argument that depriving an autistic child of appropriate therapy might come within Article 13(b).

[33] As noted, the chambers judge distinguished *JMH* and *Ermini*. He held that the risk facing D did not meet the high standard set by the authorities, and that return would undermine the object of the *Convention.*

[34] I am not persuaded that *Ermini*, *JMH*, and *DP* expand on the authoritative statements made by the courts in *Thomson*, *Re (A)*, and *Friedrich*. Those cases are consistent in their interpretation of Article 13(b) as requiring real, immediate, and

grave harm. In *Ermini* and *JMH*, the courts were of the view that returning the child posed such harm. In *DP*, there was a remittal based on insufficient evidence. These cases cannot be taken to broadly hold that denying access to autism therapy is itself harm as that term is used in Article 13(b).

[35] The determination of the issue of whether the return of the child exposes that child to a grave risk of physical or psychological harm or otherwise places the child in an intolerable situation is a question of fact to be determined on the evidence on a case-by-case basis. To succeed, the appellant must show that the chambers judge made a palpable or overriding error in concluding that the risk of harm in this case was insufficient to meet the Article 13(b) exception and returning D in compliance with the court order would not effect the kind of real and immediate harm contemplated in *Friedrich, Thomson*, and *Re (A.)*. No such error has been shown. Absent such an error the appeal must be dismissed.

[36] I agree with the chambers judge that refusing to return a child absent a finding that the child faces a grave risk of physical or psychological harm or is otherwise put in an intolerable situation would undermine the effectiveness of the *Convention*. The *Convention* presumes that the best interests of children are met by compliance with domestic court orders. In my view, Article 13(b) is intended to provide a narrow, ameliorative exception to an ordinarily inflexible mechanism for return. It is only intended to respond to situations of intolerable harm. To hold otherwise could encourage the wrongful removal or retention of children by parents living in places with access to superior resources or opportunities.

[37] Article 16 of the *Convention* states in part:

> After receiving notice of a wrongful removal or retention of a child…, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it is determined that the child is not to be returned under this Convention…

[38] While the appellant's dedication to securing the best therapy for D is laudable, Article 16 requires that the merits of the custody dispute be adjudicated, in this case, in Mexico.

Application to Adduce Evidence

[39] As noted, Mr. Tibbo Lenoski applied to adduce new and fresh evidence, largely in support of his argument that Ms. Solis could continue to live and work in British Columbia despite the possible expiration of her permanent residency card.

[40] This argument addresses the chambers judge's alternative grounds for not dismissing Ms. Solis's petition. In summary, the chambers judge noted that D would be able to adapt to the change in surroundings caused by his return to Mexico; that Mr. Tibbo Lenoski offered no reasonable or realistic arrangement for the twins to continue their relationship with their mother; and that Mr. Tibbo Lenoski would have the opportunity to advance best-interests arguments in the future at a custody hearing.

[41] The evidence on the application appears to be directed primarily at the chamber's judge's concern that the children would be deprived of a meaningful relationship with their mother because she might not be able to continue living in B.C.

[42] Given the manner in which I would decide this appeal, it is unnecessary to consider this evidence. In any event, the evidence is inconclusive, and does not address the fact that Ms. Solis lives in British Columbia in poverty with inadequate housing for the children, whereas she has a good job and home in Mexico.

Disposition

[43] I would dismiss the appeal.

[44] I would also dismiss the application for admission of new and fresh evidence.

[45] Ms. Solis seeks costs pursuant to Article 26 of the *Convention*. I would grant liberty to the parties to make written submissions as to the award of costs, including the scale of costs, such submissions to be tendered as directed by the Registrar.

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Madam Justice Kirkpatrick"

I agree:

"The Honourable Mr. Justice Goepel"