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http://www.incadat.com/ ref.: HC/E/CA 370
[12/06/1996; Ontario Court, Divisional Court (Canada); First Instance]
K. Morris and N. Morris v. His Honour Judge J. Nevins and His Honour Judge D. Main of the Ontario Court (Provincial Division), The Attorney General of Ontario ("Central Authrotiy"), and E. Beckett (12 June 1996)

ONTARIO COURT OF JUSTICE, DIVISIONAL COURT

Southey, Steele and Adams, JJ.

Heard at Toronto: May 30, 1996

Decided: June 12, 1996

Court File No. 228/96

Between

K.M. and N.M., Applicant

- and -

HIS HONOUR JUDGE J. NEVINS and HIS HONOUR JUDGE D. MAIN of the Ontario Court (Provincial Division), THE ATTORNEY GENERAL OF ONTARIO ("CENTRAL AUTHORITY"), and E.B., Respondents

REASONS FOR JUDGMENT

SOUTHEY, J.: This is an application for judicial review. The applicants seek an order in the nature of certiorari quashing 3 orders made by judges of the Ontario Court (Provincial Division) in proceedings involving the removal of 2 children from Ontario to England. They also seek an order prohibiting the "Ontario Provincial Court" from hearing any matters in respect of the applicants.

The female applicant, N.M., (the "mother") is the mother of the 2 children, daughters aged 9 and 2. The male applicant, K.M., is the husband of the female applicant. He is the natural father of the younger daughter and the adoptive father of the older daughter, who is the child of an earlier relationship of the mother. I shall sometimes refer to the applicants as the "parents". The respondent E.B. (the "grandmother") is the mother of the female applicant. The respondent The Attorney General of Ontario is the Central Authority for Ontario for the purposes of the Convention on the Civil Aspects of International Child Abduction (the "Convention" or the "Hague Convention") in force as part of the law of Ontario from 1st December, 1983, under s.46 of the Children's Law Reform Act, R.S.O. 1990, c.C-12.

The orders sought to be quashed are:

(i) an Order of His Honour Judge J. Nevins pronounced on September 29, 1995, at a time when the whereabouts of the children and the applicants were unknown, granting interim joint custody of the children to the grandmother and the applicants.

(ii) an Order of the His Honour Judge D. Main pronounced on October 11, 1995, granting final custody to the grandmother, when it became known that the applicants had removed the children to England during an adjournment in the proceedings in Ontario.

(iii) an Order of His Honour Judge Main pronounced on January 22, 1996, on motion without notice, declaring that the removal of the children by the parents to England in September, 1996, was "wrongful pursuant to Article XV of the Hague Convention".

Turning to the factual background, the grandmother had been actively involved with the mother for 4 or 5 years in raising the older daughter. The close relationship between mother and grandmother ended at about the time the mother became involved with the male applicant. The applicants were married on September 16, 1994, after living together for 3 years. The younger daughter was born in January 1994. The grandmother acknowledged the mother to be a good mother, but was concerned that the male applicant was seeking to destroy the relationship between the grandmother and the children. The grandmother had had no contact with the children since the Fall of 1994.

The grandmother brought an application in the Ontario Court (Provincial Division) on June 22, 1995, claiming access to the children. After two adjoumments, the application came before Judge Main on September 19 last, by which time the Children's Lawyer had been appointed as counsel for the children. The application had been amended by the grandmother to claim custody of the children, on the ground, among others, that the parents were about to remove the children to England because of the deportation of the father due to criminal activity.

The transcript of the hearing before Judge Main on September 19 last is critical to the disposition of this application for judicial review. The parents, Mr. K.M. and Ms. N.M. appeared in person. The grandmother was represented by Mr. Pellman. The children were represented by Ms. Marie-Claude Rigaud, who is referred to in the transcript as Mr. or Ms. Marie-Claude. Mr. Duncan appeared as counsel for the Children's Aid Society.

Judge Main had examined the file of the Children's Aid Society and found there was nothing in it that "everyone should not see". A discussion took place as to the possibility of Mr. Pellman and Mr. and Ms. M. sharing a copy of the file. The transcript then records the following:

MR. PELLMAN: It may not be necessary only because we may not - I don't think we're going to deal with the substantive issues today. Mr. Marie-Claude has just gotten involved. I know she's met Mr. M. and Ms. M. and she's going to be meeting my client on Thursday, and I believe the child some time this week - on Thursday.

With that in mind, and with the assurance that I have through Ms. Marie-Claude that Mr. M. and his wife will not be leaving the jurisdiction of Ontario pending the return, I do not have any problems with adjourning the matter approximately two weeks.

MS. M.: Your Honour, we sold all our furniture, I've given up my job, September 27th is my last day. We've given up our apartment September 30th, and our car. Okay. We are destined to leave October 2nd. After October 2nd we have nowhere to live. Okay.

It's imperative that this issue be dealt with before we leave. you know, we also have reserved - we have an apartment in the U.K. so it's imperative that this be dealt with before we go.

THE COURT: Then I am going to have to speak to another judge because after this Friday I am gone for two weeks. Just wait here, please.

[After a recess and statements by Ms. Rigaud as to the length of time required by her for preparation, the transcript continues]

THE COURT: Would it be possible to cram it in by the 29th of September, which is the Friday before the Monday that they leave?

MS. RIGAUD: I think it would. I think I'm in court in the morning, it would have to be in the afternoon. If someone was available.

THE COURT: I have to find a judge.

MS. RIGAUD: - in this court in the afternoon. I'm at court in the morning in Scarborough.

THE COURT: All right. I will see what I can do.

THE COURT: I have spoken with His Honour Judge Nevins and he would be pleased to deal with the matter on September 29th at 2:00 in the afternoon.

After further discussion regarding the material to be filed, including an affidavit from the parents, the matter was adjourned to September 29 at 2:00 o'clock.

When the matter came before Judge Nevins on September 29, the applicants in the case at bar did not appear. The counsel present were Mr. Pellman, on behalf of the grandmother, and Ms. Rigaud for the children. Mr. Pellman reported that the older child had been pulled out of school the previous week, and that the father had obtained an adoption order on very short notice. Mr. Pellman's concern was that the father had done so in order to get a passport and that he had now left the jurisdiction. Ms. Rigaud stated that she had not been able to discharge her duties on behalf of the children, because of unreasonable conditions for interviewing the older daughter that had been imposed by the father and because of the obvious manipulation and coaching of the older daughter. The whereabouts of the children and the parents was unknown. Judge Nevins made an order for joint interim custody to the grandmother and the parents. He gave an order directing the Metropolitan Toronto Police, the Ontario Provincial Police, the RCMP or police authorities in which the child is believed to be present, to locate, apprehend and deliver the child to this court before Judge Main or Judge Nevins. He then adjourned the matter to October 11.

When the matter came before Judge Main on October 11, the parents did not appear, but W.M., a brother of the male applicant, informed the Court that the family had left Toronto on a flight to Gatwick on September 26. He added: "they've been careful not to tell me where they are, and I've been careful not to ask them where they are".

The transcript of the hearing reads in part as follows:

THE COURT: All right. Well, I thank you for the information. I think you should know and I would hope that you would communicate to your brother the extreme displeasure this court is feeling at this moment in time to have a party who is legally before the court abscond from the jurisdiction.

MR. W.M.: That's true.

THE COURT: I mean, in law there is nothing - family law, there is nothing worse than that. If your brother appeared in front of me I would have him clapped in iron so fast it would make his head spin off his shoulders. It is that important an issue.

MR. W.M.: That's right. It was a decision that was made between the whole family.

THE COURT: I know. I know.

MR. W.M.: You have to understand that there were extenuating circumstances.

THE COURT: So he claimed.

MR. W.M.: I think you know what K.'s situation is. You know that he had an order to leave the country on October the 3rd, if I'm not mistaken. That order was –

THE COURT: There is an allegation that - about that, yes, some sort of deportation.

MR. W.M.: He was called actually that Friday the 22nd, if I'm not mistaken, he was called by Immigration, told to show up and prepare for removal from the country. The family made a decision that rather than him going over by himself they would all go together at the time that they left. That's about all.

THE COURT: All right. Thank you very much.

Judge Main then made a final order for sole custody of the children by the grandmother.

On December 18th a summons was issued in the High Court of Justice of England, in which the Ontario Court (Provincial Division) was named as plaintiff, for the heating of an application against the defendant parents for the return of the two children to the jurisdiction of the government of Ontario under the Child Abduction and Custody Act, 1985. The summons contained the following allegation:

The removal of the children from Ontario by the First and Second Defendants was in breach of the Plaintiff's rights of custody. The Plaintiff was seized of the matter of the children's custody and had jurisdiction to determine their place of residence. The removal of the children was, in the circumstances, wrongful.

The naming of the Ontario Court (Provincial Division) as plaintiff in the style of cause in the English proceedings resulted from the concern of counsel for the Attorney General of Ontario that the grandmother may not have had any custody rights at the time that the children were removed from Ontario, but the Ontario Court (Provincial Division) had custody rights as an institution within the meaning of Article 3 of the Convention. The Lord Chancellor's Department advised that they were of the view that an application for the return of the children under the Convention seemed to be well-grounded based on the custody right of the Ontario Court (Provincial Division), and solicitors were retained in England to bring the application under the Convention for the return of the children to Ontario.

The Order of Judge Main on January 23, declaring that the removal of the children to England was wrongful, was obtained without notice by counsel for the grandmother at the request of the Ontario Central Authority. The Ontario Central Authority had been asked to obtain the order by the Lord Chancellor's Department acting in its capacity as the Central Authority for England and Wales. These steps were taken pursuant to Article 15 of the Convention, which reads as follows:

Article 15

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.

When the parents received notice of the proceedings in England under the Convention, they retained solicitors who obtained an opinion from Ontario counsel, Mr. Jeffery Wilson, counsel for the present applicants herein, that the removal of the children to England in September 1995 was not wrongful. In his letter of opinion, Mr. Wilson expressed the view, which he also asserted with great skill in this Court, that the only persons with custodial rights of the time of the removal were the parents, so that the removal "entailed no breach of rights of custody attributed to any institution or other body". Mr. Wilson relied in his opinion on the fact that no order respecting custody, access or removal from the jurisdiction had been made to the date of the removal, and on the status of the Ontario Court (Provincial Division) as a statutory court with no inherent jurisdiction and no parens patriae jurisdiction. Mr. Wilson concluded as follows with respect to the order of Judge Main on January 22, 1996:

"Assuming that the Court intended to render a decision that the removal was wrongful pursuant to Article 3 of the Convention, we are of the opinion that this decision could be successfully judicially reviewed should the parents initiate such an application."

The legal issues raised in Mr. Wilson's opinion were then pleaded by the parents in a Supplementary Statement of Defence in the English High Court. Counsel for the grandmother in England then countered with an opinion of Mary Ann Kelly, counsel for the Attomey General of Ontario that the Ontario Court (Provincial Division) does have jurisdiction to make orders regarding custody rights of children and has authority to make an order under Article 15 of the Convention, as was done by Judge Main.

The application in England has been adjourned because the divergent legal opinions of Mr. Wilson and Ms. Kelly have raised legal issues under Ontario law which are not readily determinable by a court in England.

By Notice of Motion, dated April 3 last, the Attorney General for Ontario brought a motion in the Ontario Court (Provincial Division) for leave to intervene in the proceedings brought in that Court by the grandmother, and for "clarification and confirmation" of the Order of January 22, 1996, that the removal of the children on September 26, 1995, was wrongful within the meaning of Article 3 of the Convention. That motion triggered the within application for judicial review challenging the jurisdiction of the entire Provincial Division, as well as seeking to quash the orders of Judge Nevins and Judge Main.

When the motion of the Attorney General came before Judge Main on April 4, he disqualified himself because of the allegations of the appearance of bias. That motion by the Attorney General is now scheduled for hearing on the 27th instant.

The first question to be decided is whether Judge Main was correct on January 22 last in declaring that the removal of the children was wrongful under the Convention, when they were removed by their parents as part of an intact family, without any order having been made prohibiting such removal, or granting custodial rights to the grandmother.

Article 3 of the Convention defines "wrongful" as follows:

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.

It is clear that the Provincial Division was seized of the issue of the grandmother's claim for custody when the children were removed from Ontario on September 26th last.

In Thomson v. Thomson (1994), 6 R.F.L. (4th) 290, La Forest J., delivering the judgment of the majority of the Supreme Court of Canada, said the following at p.322:

Under Canadian law, a non-removal clause may be placed in an interim order of custody to preserve the court's jurisdiction to make a final determination of custody. It seems to me that when a court is vested with jurisdiction to determine who shall have custody of a child, it is, while in the course of exercising that jurisdiction, exercising rights of custody within the broad meaning of the term contemplated by the Convention. In the words of art. 3(b), "at the time of the removal or retention those rights were actually exercised . . . or would have been so exercised but for the removal or retention." As noted earlier, the travaux preparatoires envision this situation."

It follows from this statement of law that the Provincial Division was exercising rights of custody at the time of the removal of the children on September 26 last. Those rights of custody were breached by the removal.

La Forest J. expressly stated in the paragraph immediately preceding the one containing the passage quoted above that he was not relying on jurisdiction emanating from the doctrine of parens patriae. That being so, it is immaterial whether the provincial Division is without patens patriae jurisdiction, as submitted by Mr. Wilson.

Mr. Wilson candidly conceded that his application must fail, if the removal of the children was in breach of an undertaking given to Judge Main by the female applicant in court on September 19. He submitted, however, that no undertaking was given.

An undertaking is simply a promise. By remaining silent while Mr. Pellman stated that the parents had assured counsel for the Children's Lawyer that they would not leave the jurisdiction of Ontario pending the return of the application for custody, and by the mother's statement that they were destined to leave on October 2nd and it was imperative that the issue be dealt with before they left, the parents, in my judgment, represented that they would remain in Ontario if a date earlier than October 2nd could be obtained for the return of the motion. It was on the strength of that representation that Judge Main arranged for the matter to be heard on September 29 and granted the adjournment until that date. In my judgment, such representation by or on behalf of the parents constituted an undertaking

to the Court, which was breached by the removal. On this ground as well, the removal was wrongful.

It follows that the decision of Judge Main on January 22 was correct.

I turn next to the allegations of reasonable apprehension of bias against Judge Main and the entire Ontario Court (Provincial Division). In the case of Judge Main, the allegation is based on his statement at the hearing on October 11, to the brother of the male applicant that, if the male applicant appeared before him, he would have him clapped in irons so fast it would make his head spin off his shoulder. The context of that remark is given in the passage from the transcript quoted above.

It is apparent that the judge wanted the brother to convey to the male applicant the "extreme displeasure" of the court at his wrongful removal of the children while the issue of custody and access was before the court. it was entirely appropriate for him to send that message. His words were colourful and strong, but no reasonable person would have taken them as expressing literally his intentions. They reflect his disapproval as a judge of the court whose jurisdiction was being flouted. In my opinion, they do not express personal bias or hostility, and could not reasonably be taken as doing so.

The allegation against the Ontario Court (Provincial Division) is based on the use of the name of the Court as plaintiff in the English proceedings. We expressed our doubts during the argument as to the legality of such procedure, because of the nature of the institution. Is the Ontario Court (Provincial Division) a person with the capacity to sue and be sued? Would it not have been more appropriate for the application in England to have been brought by the Central Authority for Ontario or the Central Authority for England and Wales? Be that as it may, the use of the Court's name was a technical legal matter, based on the opinion of counsel for the Attorney General of Ontario after consultation with the Lord Chancellor's Department, and could not, in my judgment, give rise to any reasonable apprehension of bias on the part of individual judges of the Court.

I turn finally to the submission on behalf of the applicants that the orders of September 29 and October 11 should be quashed, because the judges in both cases failed to consider the relevant matter, namely the best interests of the children. The Orders thus attacked were made more than 6 months before the application for judicial review. Neither of them was appealed. The affidavits sworn by the grandmother on August 31 and September 12 and filed in support of her claims for access and custody clearly addressed matters relevant to the question of the best interests of the children. These affidavits were before the judges on September 29 and October 11. I see no merit in this branch of the application for judicial review.

For the foregoing reasons, the application is dismissed. The applicants will pay the costs of the grandmother, hereby fixed at $ 2,500. There will be no order for the costs of the other respondents.

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