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[31/03/1999; Ontario Court of Appeal (Canada); Appellate Court]
Pollastro v. Pollastro (31 March 1999), Ontario Court of Appeal

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Ontario Court of Appeal

Catzman, Abella and Feldman JJ.A.

March 31, 1999, Decided

File No. C30824

A.P.

Applicant (Respondent)

-and-

R.P.

Respondent (Appellant)

REASONS FOR JUDGMENT

APPEARANCES:

Phyllis Brodkin, for the appellant

Roselyn Zisman, for the respondent

Abella J.A. : This is an appeal from an order requiring R.P. to return her child, T., to California. The order was made as a result of an application by the child's father, J.P., pursuant to the Hague Convention on the Civil Aspects of International Child Abduction , Can. T.S.1983 No. 35, which requires the return of children wrongfully removed from their habitual residence. The mother's defence to the application was that she had fled from California to Canada with their 6-month-old child because of the father's violence toward her, and that to return to California with the child would result in the child being exposed to an intolerable situation, thereby justifying the application of the exception to a child's required return found in Article 13(b) of the Hague Convention.

The two Articles of the Hague Convention generally applicable to this appeal are Articles 12 and 13. The particular provision at issue is Article 13(b).

Article 12 Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of 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. The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment. Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13 Notwithstanding the provisions 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 opposed its return establishes that: (a)the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or (b)there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Under Article 12, a child who has been wrongfully removed must be returned forthwith; but under Article 13(b), children need not be returned if the evidence establishes that the return represents a "grave risk" to the children either of serious harm or of an otherwise intolerable situation. The issue in this appeal is whether Article 13(b) is available to resist a child's return when the reason for the child's removal is because there has been violence in the home directed primarily at the parent who removed the child.

Facts

R. O. met her future husband J. P. in Montreal in June, 1995. In October of the same year, she moved to Syracuse to live with him. In April, 1996, they moved to California where J.'s parents lived, and were married there in August, 1996. J. is an American citizen. R. has dual Canadian and American citizenship.

Their child, T., was born on February 27, 1997. It is clear from the evidence that even though she had full-time paid employment as co-manager of a * store, R. was the parent who took primary responsibility for the care of their son. She was also the main breadwinner in the home, as J., a tow truck driver, was employed only intermittently during the marriage.**

Considerable evidence was led about J.'s unreliability: his disappearances for days without letting R. know where he was; his not picking his son up from the daycare facility as anticipated; his regularly being unavailable, without warning, to take care of T. when R. could not, resulting either in her leaving work early or getting emergency baby-sitting help from a co-worker's mother, D.P., and his drug use, including a guilty plea to a charge of possession of methamphetamines on February 6, 1998. While this factual context may be more germane to the ultimate determination of which parent should have custody, it is also contextually relevant to the assessment of whether T.'s return to California puts him at "grave risk" of being exposed to "an intolerable situation" within the meaning of Article 13 (b) of the Hague Convention.

At the heart of R. P.'s claim that she is entitled to invoke the Article 13(b) exception to the otherwise presumptive requirement to return the child, is the evidence of the physical abuse to which she was increasingly subjected by her husband. There was also evidence of his use of degrading language to her, in private and in public. Co-workers gave evidence of J. calling the store and screaming so loudly at R. that they could hear his epithets several feet away. His calls were not only persistent, they were persistently abusive. From time to time, including during the last weekend they were together, he would disable R.'s car so that she could not go anywhere.

The most obvious reflection of his irrational outbursts was his physical violence toward his wife. J. is 5'9" and weighs 175 pounds; R. is 5'5" and weighs 105 pounds. Friends spoke of their own and of R.'s fear of J.'s behaviour. Her co-workers gave evidence of bruises on her neck and arms. D.P., who eventually drove R. and her son to the airport to return to Canada, saw R. when she was getting out of the shower the morning of her departure. In her words: I'm certain that my face betrayed the horror of what I saw, a full grown adult woman, whose emaciated body was bruised front and back.

The incidents of violence escalated on September 4, 1997. On that date, J. assaulted R. when she came home from work, ripping her T-shirt and causing her to bang her head against the floor. He later locked her in the bedroom. The morning of September 6, 1997, R. was scheduled to work for three hours. J. had another temper outburst, refused to look after T., and disabled R.'s car. She was forced to walk the mile to work carrying the baby, frightened because J. followed her most of the way. At work, she decided she had to leave J. for her own and for T.'s safety. D.P. drove R. and T. home after work so R. could collect clothing for herself and her child. Her husband started assaulting her, but she escaped through the bedroom window which was only two feet above the ground. She ran to the waiting car, and ended up at D.P.'s home. When R. called her father to tell him what had happened, he told her to take the next plane home to Canada. She returned to Canada with T. on September 7.

On September 10, R. went with T. to Dr. Alan Kassel who documented not only the significance and extent of the bruises on her neck, arms, back, shoulders and thighs, but noted too the child's agitated state. A practising physician for almost thirty years, Dr. Kassel made the following observations in an affidavit dated August 10, 1998 about changes in T.'s condition over the next several months:

When I first examined T. on the 10th of September, 1997, I found him easily startled and somewhat agitated. Since that appointment I have seen various significant improvements in T.'s disposition. T. seems to have calmed down and no longer behaves like a frightened infant.

The evidence of others who saw R. on her return to Canada confirmed her bruises, her fear for her own and for T.'s safety, and J.'s continuing threats through a pattern of harassing telephone calls. In addition, her former co-workers at the * in California complained to the police because of the harassing and threatening telephone calls they were constantly receiving at work and at home from J.**

J.'s menacing telephone calls to Canada were made to R., to her mother with whom she lives, to her father, and to her cousin C.P. Many of the calls were vituperative and irrational, and reflected J.'s violent temper:

A.) From the evidence of C.P.:

J. became the person that I spoke to more than I spoke to anyone else for a period of about six to eight weeks. I woke up to his phone calls and I went to sleep to his phone calls. I did

everything in my power to calm him and try to make some sort of peace between him and R. For the most part, he was co-operative and willing to listen to what I had to say. There was another side to that coin however. There were many times that he threatened me and gave me terrifying messages to give to R.: These were his exact words on one occasion: "Do not let R. come home. I can't promise that she will be safe". Over the next few weeks, his mood changed every time we spoke. One time he wanted my sympathy and support and told me that I was the only person that cared about him and that he loved me and needed me to help him and the next conversation he would be threatening me, threatening R., T. and our whole family. He told me that if he could not have T. that nobody would. He also told me that he did not give a damn about T. he just wanted revenge on R. for humiliating him. He could always have another baby he told me but he wanted to punish R. and what better punishment than to take the one thing she loved more than life itself. He made death threats to R. and said he would not rest until she was in jail and would never see her son again. He promised to send T.'s clothes and toys that were waiting for him in California and then said that his son did not deserve those beautiful things and that he was going to sell everything and get drunk with the money. During the time that we were getting along, he completely acknowledged his drug abuse to me. Most of our conversations were held with him having a major hangover and slurring his words. ..

(B) From the transcriptions of messages left on R.'s parents' phones:

(Harassing message left)

R. P. applied for and received temporary custody of T. from the Ontario Court (General Division) on September 12, 1997 (from O'Connell J.) and on September 23 (from Benotto J.). A final order was made by Benotto J. on October 28, 1997. J. P. was served with notice of these proceedings but did not respond, thinking he was under no obligation to do so.

He brought an application in California for custody without access, and for the return of his son on October 1, 1997. It is clear from the California court order dated October 14, 1997 granting the relief sought, that in his viva voce evidence, J. P., who was unrepresented, did not tell the court of the outstanding Ontario court orders for temporary custody in his wife's favour. His evidence to the California court was that T. was in danger because his mother was on speed. R. was notified of the California proceedings, but it is unclear whether a letter sent by her lawyer to the California court setting out the chronology of legal proceedings in Ontario ever reached the presiding judge.

On December 1, 1997, J. P. applied in California for the return of the child pursuant to the Hague Convention. Several months elapsed before J. realized he was required to retain counsel in Canada, and it was not until March 6, 1998 that notice of the Hague Convention application was given to the Local Registrar of the Ontario Court (General Division) by the Central Authority in the Reciprocity Office of the Ministry of the Attorney General. The Hague Convention, the provisions of which are set out in the Schedule to s. 46 of the Children's Law Reform Act , R.S.O. 1990, c. C. 12, has been in force in Ontario since December 1, 1983. J. P.'s application in Ontario for T.'s return to California under the Hague Convention was not brought until July 2, 1998.

The application was heard by Beaulieu J. on September 15, 1998. On October 16, 1998, be ordered that R. P. return T. P. to his habitual residence in California, with the right to retain custody of him for 30 days if she accompanies him to California.

The basis for Beaulieu J.'s decision to order the return of the child is stated in his reasons as follows: The Applicant alleges, however, that the threat of physical abuse to a mother can cause psychological damage to the child. She argues that this is one of those exceptional

situations in which the court is not bound by the requirement that the child be immediately returned to the habitual residence. A very forceful argument was made by the Applicant regarding the risks, both psychological and physical, to a child whose mother is living in an abusive situation. The material filed and the position taken by counsel for the Applicant was well-argued and insightful. However, even with judicial notice taken of the psychological harm to children of abused women, it is settled law that "[Emphasis start] evidence of harm generally goes to the merits of a custody hearing [Emphasis end]" and not a Hague Convention application .... Given the alleged stormy relationship between the parties, and the less than flattering picture she paints of the father, her concerns related to the potential hostility and danger to her and the child may or may not be realistically founded. However, as a general rule, [Emphasis start] that issue must be addressed and seen from the perspective and within the context of the very nature of these proceedings. The tribunal of the jurisdiction in which the child habitually resided prior to the removal is the one that can more appropriately deal with such concerns.[Emphasis end] [Emphasis added.]

Analysis

The preamble to the Hague Convention sets out its underlying objectives as follows:

The States signatory to the present Convention, Firmly convinced that the interests of children are of paramount importance in matters relating to their custody, Desiring to protect children internationally 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, as well as to secure protection for rights of access, Have resolved to conclude a Convention to this effect ..

As previously indicated, Article 13(b) sets out an exception to the requirement that a child who is wrongfully removed from his or her habitual residence be returned promptly. It states that an order to return the child can be refused if. [T]here 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.

In Thomson v. Thomson , [1994] 3 S.C.R. 551, the Supreme Court of Canada established the interpretative framework for deciding cases under the Hague Convention generally and Article 13(b) in particular.

In that case, the parent who removed the child from his home was the mother. She had left Scotland with her 9-month-old son to visit her parents on their farm in Manitoba. During this visit, she decided to remain with her family in Manitoba. In resisting the father's request under the Hague Convention for the return of the child to Scotland, the mother invoked the exception in Article 13(b), arguing that since she had been the child's primary caretaker throughout her 13-month stay in Manitoba, her separation from him would cause the child to suffer a grave risk of physical or psychological harm.

La Forest J. concluded at p. 596 that the facts did not meet the threshold of harm contemplated by s. 13(b), namely, the requirement that the harm be "to a degree that also amounts to an intolerable situation". It must be a "weighty" risk of "substantial" psychological harm, "something greater than would normally be expected on taking a child away from one parent and passing him to another" (at p. 597, quoting with approval RE A (a minor) (abduction) , [1998] 1 F.L.R. 365 (C.A.)). Both the risk and the harm must be substantial.

La Forest J. also stated that the source of the harm was not material, that is, it does not matter whether the risk flows from removing the child from his present caregiver, or from

returning the child to the other parent. As La Forest J. said, citing the child-centred perspective in Young v. Young , [1993] 4 S.C.R. 3: "harm is harm."

Thomson held that the determinative rule for interpreting the Hague Convention was in accordance with the ordinary meaning of the treaty's terms "in their context and in the light of [the treaty's] object and purpose .. including its preamble": see: Art. 31 of the Vienna Convention on the Law of Treaties , Can. T.S. 1980 No. 37, Thomson at p. 577. Using this approach, La Forest J. made the preliminary finding that the preamble's clause stating that ".. the interests of children are of paramount importance in matters relating to their custody" means the "interests of children" generally, not of the particular child before the court.

This observation, combined with the requirement in Article 16 of the Hague Convention that the state being asked to return a child "shall not decide on the merits of rights of custody" until a determination is made that the child should not be returned, resulted in La Forest J.'s conclusion that in deciding whether to return a child, the court should not consider the child's "best interests" in the same way as in a custody case.

In my view, what is meant by La Forest J's comments is that the decision whether to return a child pursuant to Article 12 should not be based on who should have custody. That explains why the "best interests" test is not applied at this stage. The presumptive interests which do apply in deciding whether to return a child promptly are those set out in the preamble, namely the interests of children generally in not being wrongfully removed from their habitual residence.

La Forest J. does not, however, state that the interests of the particular child before the court are irrelevant for all purposes under the Hague Convention, including Article 13(b). Indeed, it is difficult to see how the assessment required under Article 13(b) of risk, or harm, or of whether a situation is intolerable, can be made without reference to the interests and circumstances of the particular child involved in the proceedings.

In this case, Beaulieu J. ignored the evidence with respect to the particular child before the court, and in doing so, he erred. By saying that "evidence of harm generally goes to the merits of a custody hearing", Beaulieu J. appears to be saying that evidence of harm is not relevant in deciding whether the criteria under Article 13(b) have been satisfied. This conclusion, with respect, misconstrues Thomson . Justice La Forest said that "the merits of rights of custody" should not be decided until a determination is made that the child should not be returned; he did not say that evidence of harm was irrelevant to an Article 13(b) analysis. By disregarding the evidence of harm, Beaulieu J. disregarded evidence relevant to the assessment he was obliged to undertake pursuant to Article 13(b).

Since this provision refers explicitly to the risk of harm, evidence of such harm is clearly relevant to assessing whether returning a child to his or her habitual residence would likely result in serious harm or an otherwise intolerable situation. One cannot be expected to satisfy the onus that a child not be returned because of a grave risk of physical or psychological harm unless evidence of such harm can be presented and considered by the court deciding whether the s. 13(b) threshold has been met.

The evidence must, of course, be credible and must in addition meet the high threshold of "grave risk" set out in Thomson . This is very different from Beaulieu J.'s conclusion that evidence of harm is admissible only as part of a custody hearing. Such an interpretation essentially deprives s. 13(b) of its content.

While many of the facts and allegations in this case are disputed, the following facts supporting R. P.'s allegations about her husband have been established:

a)He has been verbally abusive and threatening to his wife, family and friends;

b)He has been violent towards her, causing physical harm;

c)He has behaved irrationally and irresponsibly, both during and after their cohabitation;

d)He has a drug and/or alcohol problem;

e)He has been unpredictable and unreliable when he has been responsible for T.'s care;

f)His temper is difficult for him to control; and

g)His hostility towards his wife is palpable.

Although every case depends on its own facts and the onus remains on the person resisting the child's return, it seems to me as a matter of common sense that returning a child to a violent environment places that child in an inherently intolerable situation, as well as exposing him or her to a serious risk of psychological and physical harm.

On the facts of this case, the threatening phone calls reflect a continuing inability on the father's part to control his temper or hostility. This means that the mother, who would inevitably accompany the child if he is ordered to return to California, would be returning to a dangerous situation. Since the mother is the only parent who has demonstrated any reliable capacity for responsible parenting, T.'s interests are inextricably tied to her psychological and physical security. It is therefore relevant in considering whether the return to California places the child to an intolerable situation, to take into account the serious possibility of physical or psychological harm coming to the parent on whom the child is totally dependent.

There is also evidence that returning T. to California represents a grave risk of exposure to serious harm to him personally. The father's hostility, irresponsibility and irrational behaviour are ongoing. Although J. P. has not been overtly physically violent to his son, he has been violent and had temper outbursts when his wife has been with the child. On one occasion, for example, he threw hot coffee at her, narrowly missing their 7-day-old son whom she was holding. T. is barely two years old. His safety is seriously at risk if he is forced to return to the very volatility which caused his mother to leave with him in the first place. He and his mother would be removed from the sanctuary of her family in Canada, and forced to return to California where the potential for violence is overwhelming. This exposes the child to the serious possibility of substantial psychological and/or physical harm and, in addition, creates a grave risk that he would be placed in an intolerable situation.

I am satisfied that R. P., has satisfied the onus under Article 13(b) and that the child should therefore not be returned to California.

I would allow the appeal, set aside the decision of Beaulieu. J., and dismiss J. P.'s application with costs.

Catzman J.A. : I agree

Feldman J.A. : I agree

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