Jackson v. Graczyk

86 O.R. (3d) 183

Court of Appeal for Ontario,
Laskin, Juriansz JJ.A. and Cunningham A.C.J. (ad hoc)
May 24, 2007

Family law -- Children -- Hague Convention -- Mother and father never living together -- Mother living in Florida for less than one year before taking two and a half-year-old child with her to Ontario -- Mother being subject to deportation order in United States and not being able to work there legally -- Father not supporting mother or child -- Father applying in Ontario under Hague Convention for order for return of child -- Application judge not erring in dismissing application -- Evidence supporting application judge's finding that child was not habitually resident in Florida at time of move to Ontario -- Hague Convention not applying as child had no habitual residence at time of move -- Evidence supporting application judge's findings that father was not actually exercising custody rights at time of move and that he later acquiesced to child's removal to Ontario.

The applicant and the respondent met in the United States, where the respondent, a Canadian citizen, was working illegally. They conceived a child, but never lived together. Shortly after the conception, the respondent moved from Michigan to Florida. The applicant did not move with her but visited for about a month around the time of the child's birth. When the child was two-and-a-half months old, the respondent moved with him to Ontario, where her family lived. She was subject to a deportation order in the United States and had been evicted from her apartment for non-payment of rent. The applicant was not supporting the child or her. The applicant

started proceedings in Texas, where he lived, for joint custody of the child. He also brought an application in Ontario under the Convention on the Civil Aspects of International Child Abduction (the "Hague Convention") for an order that the child be returned either to Florida or to Texas. The application judge found that: the child was not habitually resident in Florida immediately before the respondent moved with him to Ontario; at the time of the move, the applicant was not actually exercising custody rights but was merely exercising visitation rights; and the applicant later [page184] acquiesced to the child's removal to Ontario. The application was dismissed. The applicant appealed.

Held, the appeal should be dismissed.

Per Laskin J.A. (Cunningham A.C.J. (ad hoc) concurring): Under the Hague Convention, "habitual residence" is the sole connecting factor triggering a child's return. There was evidence to support the application judge's finding that Florida was not the child's habitual residence. When she moved back to Ontario, the respondent had lived in Florida for less than a year, and the child had lived there for less than three months. The respondent was subject to a deportation order, could not legally work in Florida, and had no other means of support. She had no place to stay in Florida or anywhere in the United States. Most important, she testified that she no longer wanted to stay in Florida after the child was born. Even if the application judge erred in deciding that Ontario was the child's habitual residence by default, the Hague Convention did not apply because the child was not habitually resident in a "Contracting State" under Article 4. The Hague Convention does not say that a child has to have a habitual residence. The child may have no connection to any jurisdiction. In that case, the Convention will not apply. The evidence supported a conclusion that, immediately before he moved from Florida to Ontario, the child had no habitual residence.

Under Article 3(b) of the Hague Convention, a child's removal from his or her habitual residence to another jurisdiction is wrongful only if the parent seeking the child's removal has actually exercised rights of custody. The evidence supported

the application judge's conclusion that at the time the child moved to Ontario, the applicant was not actually exercising custody rights. Although he visited the child in Florida and was present for his birth, he was not actually involved in the child's life in a way that demonstrated the "stance and attitude" of a parent.

Even if the applicant were successful in establishing that Florida was the child's habitual residence and that he had actually exercised custody rights, under Article 13(a) of the Hague Convention, the court was not required to return the child if the respondent demonstrated that the applicant "subsequently acquiesced" to the child's removal to Ontario. The evidence reasonably supported a finding that, by his words and conduct, the applicant led the respondent to believe that he was not asserting a claim for the summary return of the child to the United States. That is, he later acquiesced to the child remaining in Ontario.

Per Juriansz J.A. (concurring): There was evidence to support the application judge's finding that Florida was not the child's habitual residence, and this conclusion provided a sufficient ground to dismiss the appeal. It was preferable to refrain from determining the other two issues, as doing so might be seen to express views about the parties' conduct, the characterization of which was best left to the trial judge who decides the custody issues.

Cases referred to

Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996); H. (Minors) (Abduction: Custody Rights) (Re), [1991] 2 A.C. 476 (H.L.) (sub. nom. Re S.(Minors) Abduction: Custody Rights); H. and Others (Minors) (Abduction: Acquiescence), [1998] A.C. 72, [1997] 2 All E.R. 225, [1997] 1 F.L.R. 872 (H.L.); H.L. v. Canada (Attorney General), [2005] 1 S.C.R. 401, [2005] S.C.J. No. 24, 262 Sask. R. 1, 251 D.L.R. (4th) 604, 333 N.R. 1, 347 W.A.C. 1, [2005] 8 W.W.R. 1, 2005 SCC 25, 29 C.C.L.T. (3d) 1, 24 Admin. L.R. (4th) 1, 8 C.P.C. (6th) 199; J. (A Minor)

(Abduction: Custody Rights) (Re), [1990] 2 A.C. 562 (H.L.); [page185] Katsigiannis v. Kottick-Katsigiannis (2001), 55 O.R. (3d) 456, [2001] O.J. No. 1598, 203 D.L.R. (4th) 386, 18 R.F.L. (5th) 279, 12 C.P.C. (5th) 191 (C.A.); Korutowska-Wooff v. Wooff, [2004] O.J. No. 3256, 188 O.A.C. 376, 242 D.L.R. (4th) 385, 5 R.F.L. (6th) 104 (C.A.); W. (V.) v. S. (D.), [1996] 2 S.C.R. 108, [1996] S.C.J. No. 53, 134 D.L.R. (4th) 481, 196 N.R. 241; Waxman v. Waxman, [2004] O.J. No. 1765, 186 O.A.C. 201, 44 B.L.R. (3d) 165 (C.A.), supp. reasons [2004] O.J. No. 6013, 6 B.L.R.(4th) 167 (C.A.)

Treaties and conventions referred to

Convention on the Civil Aspects of International Child Abduction, 25 October 1980, Can. T.S. 1983, No. 35 (entered into force 1 December 1983), Arts. 3, 4, 5, 12, 13(a)

Authorities referred to

Beaumont, Paul R., and Peter E. McEleavy, The Hague Convention on International Child Abduction (Toronto: Oxford University Press, 1999)

APPEAL from the order of Czutrin J., [2006] O.J. No. 5546 (S.C.J.), dismissing an application under the Hague Convention for return of child.

Joan M. Irwin, for appellant.

Jerry J. Chaimovitz and Tamra A. Mann, for respondent.

LASKIN J.A. (CUNNINGHAM J. concurring):--

A. Introduction

[1] The appellant, Jarious Jackson, and the respondent, Monika Graczyk, are the parents of a little boy named Jailen,

now two and a half years old. His parents have never lived together. Since his birth Ms. Graczyk has been Jailen's sole custodial parent.

[2] Jailen was born in Miami, Florida. Although Ms. Graczyk had lived in the United States for several years, she had been ordered to be deported. In January 2005, when Jailen was two and a half months old, she moved with him from Florida to Hamilton, Ontario where her family lived.

[3] Mr. Jackson then started proceedings in Texas, where he lived, for joint custody of Jailen. He also brought an application in Ontario under the Convention on the Civil Aspects of International Child Abduction, 25 October 1980, Can. T.S. 1983, No. 35 ("Hague Convention" or "Convention"). He asked that Jailen be returned either to Florida or to Texas.

[4] The Hague Convention aims to prevent international child abduction and ordinarily to require that custody rights to children be resolved by the courts of the child's habitual residence. Mr. Jackson contended that Florida was Jailen's habitual residence and that his mother had wrongfully removed him from that jurisdiction. [page186]

[5] Czutrin J., who is a very experienced family law judge, dismissed Mr. Jackson's application. Mr. Jackson appeals that dismissal to this court.

[6] Czutrin J. made three critical findings of fact:

(i) Immediately before the respondent mother, Ms. Graczyk, moved with Jailen to Ontario, Jailen was not habitually resident in Florida.

(ii) At the time Ms. Graczyk moved to Ontario, the appellant father, Mr. Jackson, was not actually exercising custody rights; instead, he was merely exercising visitation rights to Jailen.

(iii) Mr. Jackson later acquiesced to Jailen's removal to Ontario.

[7] To succeed on this appeal, Mr. Jackson must show that each of these findings was infected by palpable and overriding error. He cannot do so. Indeed, in my view, each of these findings is supported by the record before the application judge. I would therefore defer to them and dismiss the appeal.

B. A Brief Summary of the Facts

[8] Hague Convention applications by their nature are fact-driven. The facts of this case are not at all usual.

(a) Ms. Graczyk and Mr. Jackson meet

[9] Mr. Jackson and Ms. Graczyk met in the United States in November 2003. They dated for several months. At the time, he was playing football for the Denver Broncos of the National Football League. She was working in Michigan as an exotic dancer and model, and occasionally as a hairdresser. She was, however, living and working in the United States illegally. Her deportation order did not expire until October 2006.

(b) The pregnancy

[10] Jailen was likely conceived in January 2004. A month later, Ms. Graczyk moved from Michigan to Miami, Florida. Mr. Jackson did not move there with her. Instead, he bought a house in Texas. And, he did not support the pregnancy. Instead, he asked Ms. Graczyk to have an abortion.

[11] At the end of July 2004, Mr. Jackson was cut by the Denver Broncos. He then signed on to play for the British Columbia Lions of the Canadian Football League. Although still employed by the Lions, he maintains his residence in Texas. [page187]

(c) Jailen is born

[12] Jailen was born in Miami on October 24, 2004. Mr. Jackson and his mother came for the birth and stayed afterwards. Mr. Jackson's mother was with Ms. Graczyk

continuously until the end of November. Mr. Jackson also stayed with Ms. Graczyk until the end of November, but during that period left twice to do other things. At the end of November, Mr. Jackson returned to Texas; his mother returned to Mississippi.

[13] Mr. Jackson came back to Florida to see Jailen for six days over the Christmas holiday period. He stayed in a hotel. At the end of December, he once again returned to Texas.

[14] Ms. Graczyk was unemployed and because of her deportation order, she could not work legally in the United States. She testified that now having responsibility for a young son she did not want to work in bars or clubs. For the brief time she was in Florida, she used the money she had received from selling her car to support herself and Jailen. Mr. Jackson paid her apartment rent for December 2004. He gave her no other financial support.

(d) Ms. Graczyk and Jailen move to Ontario

[15] By the end of December 2004, Ms. Graczyk had run out of money. She did not pay her rent for January and was given an eviction notice. She determined that she could no longer stay in Florida and decided to move with Jailen to Hamilton, Ontario. This was not an arbitrary decision. During her pregnancy, she had told Mr. Jackson several times that she was thinking of doing so because of her inability to support her son and herself in Miami. Ms. Graczyk is a Canadian citizen. Her brother, stepfather and mother live in Hamilton. Ms. Graczyk had lived in Ontario from the age of twelve until she moved to Michigan in 2000. Even when she lived in Michigan she returned to Ontario to visit her family every other weekend. On January 5, 2005, Ms. Graczyk and Jailen moved to Ontario. Jailen was about two and a half months old.

(e) Mr. Jackson's conduct after the move

[16] Mr. Jackson's attorney called Ms. Graczyk in early January 2005, seeking joint custody of Jailen. And later, in April 2005, Mr. Jackson started proceedings in Texas for joint

custody. However, from the time Ms. Graczyk and Jailen moved to Ontario until the hearing of the application in September 2005 -- a period of nine months -- Mr. Jackson visited Jailen only once, for three days in August. [page188]

[17] From the time Jailen was born Ms. Graczyk has had sole custody of him. As I have already said, she and Mr. Jackson have never lived together. There are no custody orders or agreements giving Mr. Jackson custody of his son.

C. Mr. Jackson's Hague Convention Application

[18] In April 2005, Mr. Jackson brought an application under the Hague Convention. He asked for an order that Jailen be returned to the United States. In his affidavit material he specified that he wanted Jailen returned either to Texas or Florida. Ms. Graczyk opposed the application. Both Canada and the United States are signatories to the Hague Convention.

[19] I accept that under Florida and Texas law, Mr. Jackson, as Jailen's natural father, has the same rights of custody as the boy's natural mother. To obtain an order returning Jailen to the United States, however, Mr. Jackson must establish two things:

-- Immediately before going to Ontario, Jailen's habitual residence was Florida; [See Note 1 below] and

-- At the time Jailen went to Ontario, Mr. Jackson was actually exercising his custody rights.

[20] Even if Mr. Jackson establishes these two things, Ms. Graczyk can successfully defend the application by showing that Mr. Jackson later acquiesced to Jailen's move to Ontario.

[21] The application judge found against Mr. Jackson on all three matters: habitual residence, actual exercise of custody rights, and later acquiescence. Before examining his findings, I will briefly set out the provisions of the Hague Convention that specify these three matters.

[22] The first matter -- habitual residence -- is a

cornerstone of the Hague Convention. Article 4 provides that the Convention applies "to any child who was habitually resident in a Contracting State" immediately before any breach of custody rights.

[23] The Hague Convention's underlying rationale is that disputes over custody of a child should be resolved by the courts in the jurisdiction where the child is habitually resident; child abduction is to be deterred. The Convention presumes that the interests of children who have been wrongfully removed are ordinarily better served by immediately returning them to the place of their habitual residence where the question of their [page189] custody should have been determined before their removal. See W. (V.) v. S. (D.), [1996] 2 S.C.R. 108, [1996] S.C.J. No. 53, at para. 36.

[24] This rationale for the Convention is enshrined in Article 3(a):

> 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 . . .

[25] The second matter -- actual exercise of custody rights -- is found in Article 3(b):

> (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.

[26] The third matter -- subsequent acquiescence -- is found in Article 13(a):

> 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 opposes 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; [See Note 2 below]

D. Analysis

1. Did the application judge err in finding that Florida was not Jailen's habitual residence?

[27] Under the Convention, "habitual residence" is the sole connecting factor triggering a child's return. The Convention does not define this term. Instead, the definition is found in the case law. In Korutowska-Wooff v. Wooff, [2004] O.J. No. 3256, 242 D.L.R. (4th) 385 (C.A.) at para. 8, Feldman J.A. set out the principles for determining "habitual residence":

-- The question of habitual residence is a question of fact to be decided on all the circumstances; [page190]

-- A person's habitual residence is the place where that person resides for an appreciable period of time with a "settled intention" to do so;

-- A "Settled intention" is an intention to stay in a place, temporarily or permanently, for a particular purpose, such as employment or family; and

-- A child's habitual residence is tied to that of the child's custodial parent.

[28] After finding that "Florida is not the child's habitual residence", the application judge held, at para. 56, "that by default . . . Ontario has to be the child's habitual residence". Mr. Jackson submits that the application judge

erred in law by determining habitual residence by default. He argues that Florida must have been the child's habitual residence because Jailen had never lived anywhere else.

[29] It seems to me, however, that the focus should not be on the application judge's assignment of habitual residence by default, nor should it be on where Jailen was living immediately before he and his mother moved to Ontario. Instead, the focus should be on the application judge's finding that Florida was not the child's habitual residence. Unless that latter finding is palpably and overridingly wrong or unreasonable, we should not order that Jailen be returned to Florida. See H.L. v. Canada (Attorney General), [2005] 1 S.C.R. 401, [2005] S.C.J. No. 24, at paras. 55-56.

[30] At paras. 55, 75 and 81 of his reasons, the application judge applied the proper principles for determining habitual residence. He concluded that "there is doubt that the child was habitually resident in Florida". In so concluding, he expressly and correctly found that Jailen's habitual residence was tied to that of his mother. He expressly considered the two key principles for determining habitual residence: appreciable period of time and settled intention. He found that:

-- "The evidence does not establish an 'appreciable' period that the child resided in the United States"; and

-- "[T]here was no settled intention to stay in Florida."

[31] These findings are amply supported by the record, and especially by the following considerations:

-- When she moved to Ontario, Ms. Graczyk had lived in Florida for less than a year; Jailen had lived there for less than three months. [page191]

-- Ms. Graczyk was subject to a deportation order, which did not expire until 2006 and which required her to leave the United States.

-- Ms. Graczyk had not worked in Florida since March 2004 and

could not legally work there or anywhere else in the United States. She had no other means of support and Mr. Jackson refused to give her any financial assistance so that she could stay in Florida.

-- Ms. Graczyk was not only subject to a deportation order, she had been evicted from her apartment. She had no place to stay in Florida or anywhere else in the United States. Mr. Jackson did not offer to provide her with a residence, and apart from paying her December rent, refused to pay for her accommodation.

-- Most important, Ms. Graczyk testified that she no longer wanted to stay in Florida after Jailen was born.

[32] The finding that Florida was not Jailen's habitual residence is thus not infected by any palpable and overriding error. Far from it. This finding is fully supported by the record and is entitled to deference from this court. See Katsigiannis v. Kottick-Katsigiannis (2001), 55 O.R. (3d) 456, [2001] O.J. No. 1598 (C.A.) at paras. 30-31. This finding means that ordering Jailen to return to Florida is inconsistent with the underlying aim of the Hague Convention.

[33] The application judge's conclusion that Ontario was Jailen's habitual residence makes practical sense and is consistent with Ms. Graczyk's settled intention. What may be said against it is the point made by Mr. Jackson: Jailen had only ever lived in Florida and had never set foot in Ontario.

[34] However, what underlies the application judge's conclusion is his assumption that Jailen must have had a habitual residence. As it was not Florida, it must be Ontario. In substance, Mr. Jackson makes the same assumption and argues for the opposite conclusion. As Jailen had never lived anywhere else, his habitual residence must be Florida.

[35] But there is another way to look at the question of Jailen's habitual residence: immediately before he moved with his mother from Florida to Ontario, he had no habitual residence. This approach is consistent with the application

judge's finding that Florida was not Jailen's habitual residence, and is supported both by principle and authority.

[36] The purpose of the habitual residence requirement under the Convention is to ensure that children have some connection [page192] -- "some strong and readily perceptible link" -- to the jurisdiction to which they are being returned. See Paul R. Beaumont and Peter E. McEleavy, The Hague Convention on International Child Abduction (Toronto: Oxford University Press, 1999) at 101.

[37] The Convention, however, does not say that a child must always have a habitual residence. Indeed, the child may have no connection, no readily perceptible link, to any jurisdiction. If that is the case, the Convention will not apply. In the light of the purpose of the habitual residence requirement this is not an "undesirable lacuna", but a sensible and unavoidable result. In their text, Beaumont and McEleavy explain why this is so, at p. 90:

> While for choice of law purposes, and perhaps as a general ground of jurisdiction, it is important that an individual should always have a habitual residence, it is submitted that this is not necessarily the case for a child in the context of the Hague Child Abduction Convention. Where a child has no habitual residence the Convention will not apply, but this should not immediately be regarded as an undesirable lacuna. If a child does not have a factual connection to a State and knows nothing of it socially, culturally, and linguistically, there will be little benefit in sending him there.

(Footnote omitted)

See also Re J. (A Minor) (Abduction: Custody Rights), [1990] 2 A.C. 562 (H.L.) at pp. 578-79.

[38] Admittedly, cases where a child has no habitual residence will be rare. Courts should not strain to find a lack of habitual residence because that finding would deprive a child of the protection of the Convention. In my view, however, Jailen's situation is that rare case. Ordering him to return to

Florida produces a result that is both unjust and at odds with the aim of the Convention.

[39] I would therefore uphold the application judge's finding that Florida was not Jailen's habitual residence. Even accepting Mr. Jackson's submission that the application judge erred in deciding Jailen's habitual residence by default, I would simply hold that the Convention does not apply because Jailen was not habitually resident in a "Contracting State" under Article 4. On that ground alone I would dismiss the appeal.

2. Did the application judge err in finding that at the time Jailen moved to Ontario, Mr. Jackson was not actually exercising custody rights?

[40] The Hague Convention draws a distinction between rights of custody and rights of access. Article 5 sets out this distinction:

5. For the purpose of this Convention:

(a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence; [page193]

(b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

[41] Under Article 3(b), a child's removal from his or her habitual residence to another jurisdiction is wrongful only if the parent seeking the child's return has actually exercised rights of custody. Exercise in the context of Article 3(b) "must be construed widely as meaning that the custodial parent must be maintaining the stance and attitude of such a parent". See Re H., (Minors) (Abduction: Custody Rights), [1991] 2 A.C. 476 (H.L.) at p. 500.

[42] The application judge expressly found that at the time

Jailen went to Ontario, Mr. Jackson was exercising "visitation" or access rights, not custody rights [at paras. 78 and 82]:

> The father was exercising visitation [sic] in Florida (not custodial rights), but was residing in Texas and working in Canada.
>
> In the circumstances, I find that I am satisfied that the child's habitual residence is tied to the mother's habitual residence in Canada. If I am wrong, however, I am also satisfied that the father was not exercising his custodial rights nor was he seeking to exercise any rights apart from being able to see the child either in Canada or in the United States as evidenced by his application filed in Texas. The father in fact seeks the child's residence to be both in Texas and Canada.

[43] In arguing to set aside that finding, Mr. Jackson points to the decision of the United States Sixth Circuit Court of Appeals in Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996), which establishes a low threshold for the actual exercise of custody rights, to his spending time with Jailen in Florida, and to his retaining a lawyer to negotiate a joint custody arrangement for the child.

[44] In my view, these considerations do not establish that the application judge made a palpable and overriding error in finding that Mr. Jackson was not actually exercising custody rights. The application judge was aware of the decision in Friedrich. He discussed it in his reasons, at para. 68, and acknowledged its "broad and liberal" definition of the word "exercise" under the Convention. He also referred to Mr. Jackson having spent time with Jailen in Florida and to his having retained a lawyer to negotiate a custody arrangement.

[45] Merely because some evidence points against an application judge's finding does not by itself make that finding unreasonable or palpably and overridingly wrong. In virtually every case there will be evidence before the trier of fact both for and against each party's position. Here, the application judge considered the competing evidence and made a

finding contrary to Mr. Jackson's contention. An appellate court is required to accept that finding absent a palpable and overriding error. See Waxman v. Waxman, [2004] O.J. No. 1765, 44 B.L.R. (3d) 165 (C.A.) at paras. 310ff. In my view, the application judge made no such error. [page194]

[46] Indeed, there is a considerable amount of evidence supporting the application judge's finding that at the time of Jailen's removal, Mr. Jackson was not actually exercising custody rights:

-- Mr. Jackson went to Florida for just over a month between late October and the end of November, and for a further week in December 2004. While there, he was never alone with Jailen and rarely assisted in his care.

-- When he visited in October and November, he went out drinking with friends or sat around watching television.

-- During that period, Mr. Jackson left Florida twice, each time for a number of days -- once to go to Colorado and the other time to go to Colorado and Texas. On neither occasion did he have to leave Florida because he was not playing football at the time.

-- Although Ms. Graczyk frequently told Mr. Jackson that she needed financial assistance, he refused to support her and the child (except for the payment of the December rent).

[47] On this evidence it was entirely reasonable for the application judge to find that Mr. Jackson was not actually exercising custody rights. Although he visited Jailen in Florida and was present for his birth, he was not actually involved in Jailen's life in a way that demonstrated the "stance and attitude" of a parent. Instead of caring for his newborn son, he chose to go out socializing with friends and to take two trips out of town. Although the threshold for demonstrating actual exercise of custody rights is low, the application judge did not err in finding that Mr. Jackson was not exercising these rights. On this basis, too, Mr. Jackson's appeal must fail.

3. Did the application judge err in finding that Mr. Jackson later acquiesced to Jailen's removal to Ontario?

[48] Even if Mr. Jackson were successful in establishing that Florida was Jailen's habitual residence and that he had actually exercised custody rights, under Article 13(a) of the Convention the court need not order the child's return if Ms. Graczyk demonstrates that Mr. Jackson "subsequently acquiesced" to Jailen's removal to Ontario.

[49] The application judge found that Mr. Jackson had acquiesced to Jailen's remaining in Ontario [at para. 81]:

> I am satisfied in the circumstances that:
>
> . . . . . [page195]
>
> (iii) The father has, in his Texas application, sought residence of the child in Texas and Canada and has, at least, acquiesced that the mother, in my view, have primary residence of the child. There is nothing to suggest that he would be denied any ability to exercise any or all custodial rights in Canada or that his custodial rights in any way would be diminished by having the determination of best interests in Canada.

[50] The standard for finding acquiescence is high. "Clear and cogent" evidence of "unequivocal acquiescence" is required. See Katsigiannis, supra, at para. 49. Ordinarily the test for acquiescence is subjective, but as Lord Brown-Wilkinson said in Re H. and Others (Minors) (Abduction: Acquiescence), [1998] A.C. 72, [1997] 2 All E.R. 225 (H.L.) at p. 90 A.C.:

> Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to the summary return of the child and are inconsistent with such return, justice requires that the

wronged parent be held to have acquiesced.

[51] It seems to me that the evidence reasonably supports a finding that, by his words and conduct, Mr. Jackson led Ms. Graczyk to believe that he was not asserting a claim for the summary return of Jailen to the United States. In other words, he later acquiesced to Jailen's remaining in Ontario. The following evidence supports this finding:

-- After Ms. Graczyk and Jailen moved to Ontario, Mr. Jackson never telephoned to ask about his son. Ms. Graczyk always initiated the calls.

-- Mr. Jackson had several opportunities to visit Jailen in June and July 2005, but chose not to do so.

-- From January to August 2005, Mr. Jackson visited Jailen in Ontario only once. He missed his son's christening as well as an access visit in May.

-- Most important, even in the Texas custody proceedings he initiated, Mr. Jackson asked, as the application judge found, that Jailen's residence be restricted both to the United States and Canada.

[52] In short, as Mr. Jackson took no real interest in Jailen's life after his son moved to Ontario, and as he was content that Jailen primarily live with his mother in Ontario, he acquiesced to Ms. Graczyk's having custody of Jailen in Ontario. This evidence supporting the finding of later acquiescence is not compelling. The question for this court, however, is whether the [page196] application judge's finding is supportable on the record. I think that it is and I would defer to it. On this ground as well, I would dismiss the appeal.

E. Conclusion

[53] The application judge found that Florida was not Jailen's habitual residence, that Mr. Jackson was not actually exercising rights of custody when Ms. Graczyk and their son

moved to Ontario, and that Mr. Jackson later acquiesced to Jailen's removal to Ontario.

[54] These three findings are entitled to deference from an appellate court unless they are unreasonable or tainted by palpable and overriding error. I have not been persuaded of any error in these findings that would warrant their reversal. Each one provides a basis to dismiss Mr. Jackson's appeal.

[55] Accordingly, I would dismiss the appeal. Ms. Graczyk is entitled to her costs of the appeal, which I would fix at $6,000, all inclusive.

[56] JURIANSZ J.A. (concurring): -- I agree that there was evidence to support the application judge's finding that Florida was not the child's habitual residence in the unusual circumstances of this case and that this conclusion provides a sufficient ground to dismiss the appeal. I consider it preferable to refrain from determining the second two issues. Doing so may be seen to express views about the parties' conduct, the characterization of which is best left to the trial judge who decides the custody issues.

Appeal dismissed.

Notes

Note 1: Mr. Jackson asked in the alternative that Jailen be retured to Texas; that request has no merit because Jailen has never set foot in Texas.

Note 2: Article 12 provides that where a child has been wrongfully removed under Article 3, the court shall order the child returned forthwith.
