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[11/12/1998; Manitoba Court of Queen's Bench (Family Division) (Canada); First Instance] Belton v. Belton (1998), 132 Man.R. (2d) 265 (Q.B. (Fam. Div.))

R. Belton, Petitioner, -and- C. Belton, Respondent.

File No. FD 98-01-51284 Winnipeg

Manitoba Queen's Bench (Family Division)

December 11, 1998

Duncan, J.

DUNCAN, J.: SYNOPSIS

[1] By Notice of Application filed September 23, 1998, the Manitoba Department of Justice, Family Law Branch, as Central Authority for the Province of Manitoba, seeks an order for the return of the child, B.B., to the state of Tennessee, U.S.A.

[2] The order is sought pursuant to The Child Custody Enforcement Act , R.S.M. 1987, c. C360 the "Act" and The Convention on the Civil Aspects of International Child Abduction , the "Convention".

[3] The issue is whether the child, B.B., born March 22, 1995 should be returned to the State of Tennessee from Thompson, Manitoba.

[4] I am prepared to grant the order sought for the reasons which follow.

BACKGROUND

[5] The parties are Canadian citizens. They married in Moose law, Saskatchewan on May 22, 1993 and they have one child, B., born in Moose law on March 22, 1995.

[6] In November 1996, the parties and their daughter moved to Texas so that the wife could pursue her nursing career.

[7] In February 1997, they moved to Tennessee so that the respondent could continue her nursing career. The parties and the child lived together as a family in Tennessee until December 29, 1997; the respondent held a temporary work visa and the petitioner and daughter held temporary visiting visas.

[8] On December 29, 1997, the petitioner and daughter flew to Thompson, Manitoba after the petitioner told the respondent he wanted to take B. to see his parents. The respondent was aware that the petitioner and B. had return airfare tickets to Nashville on January 13, 1998 and understood that they would return on that date.

[9] On January 12, 1998, the petitioner obtained from this court a "Without Notice" Order, granting him custody of the child and enjoining the respondent from removing the child from Manitoba without the father's consent or until further order of the court.

[10] The petitioner and the child did not return to Tennessee on January 13, 1998.

[11] The petitioner remains in Thompson, Manitoba with the child while the respondent remains in Nashville, Tennessee.

[12] The respondent has visited her daughter in Winnipeg pursuant to Consent Interim Orders of March 23, 1998 and August 28, 1998. The first order provided for access from March 23, 1998 until March 26, 1998 at 6:00 p.m. The second order provided for access from 7:00 p.m. on August 30, 1998 until September 5, 1998 at 7:00 p.m. She indicated in her material that she was not attorning to the jurisdiction of Manitoba to determine custody and reserved the right to argue jurisdiction.

[13] On September 21, 1998 the respondent wrote to the Department of Justice, Family Law Branch requesting that the Central Authority for the Province of Manitoba commence an application for the return of her daughter to Tennessee pursuant to the "Act" and the "Convention".

[14] Notice of Application was filed by the Department of Justice, Family Law Branch, on September 23, 1998, seeking inter alia, the return of the child to Tennessee and that "custody of the said child not be dealt with until such time as the application has been determined on a final basis".

EVIDENCE

[15] The respondent's evidence is that the petitioner told her he would return the child and that he knew it was the respondent's expectation that the child would be returned to Tennessee on January 13, 1998.

[16] The petitioner states: ". . . while I believe this was her expectation, I have never agreed that B. should live with her."

[17] Prior to December 29, 1997, B. had never lived in Manitoba. She lived in Saskatchewan for approximately the first 20 months of her life, then Texas for approximately 3 months, then Tennessee from February 1997 to December 29, 1997, approximately 10 months, at which time she travelled to Thompson with her father.

[18] The parties did not own a home in Tennessee, they lived in housing provided by the respondent's employer.

[19] When the petitioner and his daughter travelled to Thompson there was no custody order in place and there was no agreement between the parents granting the petitioner sole custody.

[20] There is no evidence that there is a grave risk that the return of the child to Tennessee would expose her to physical or psychological harm or otherwise place her in an intolerable situation.

JURISPRUDENCE

[21] The "Convention" became part of the law of Manitoba in December 1983, pursuant to ss. 17(2) of the "Act". The "Convention" forms a schedule to the "Act".

[22] In accordance with ss. 17(3) of the "Act", the Department of Justice is the Central Authority in Manitoba.

[23] The preamble to the "Convention". states in part:

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.

[24] In Thomson v. Thomson (1994), 6 R.F.L. (4th) 290, La Forest, J. of the Supreme Court of Canada said at p.315:

. . . the primary purpose of the Convention [is], namely, as Article 1(a) states, to secure the prompt return of children wrongfully removed to or detained in a Contracting State. The Commission started

from the assumption that the abduction of a child will generally be prejudicial to its welfare. It follows that, when a child has been abducted from one country to another, international mechanisms should be available to secure its return either voluntarily or through court proceedings.

[25] In *Medhurst v. Markle* (1995), 17 R.F.L. (4th) 428 (Ont.Ct. of Justice (Gen.Div.)), Jennings, J. had this to say at pp.431 - 432:

The provisions of Article 3 and 4 of The Hague Convention require an application to satisfy three conditions, as follows:

1. that the applicant has custody rights to the child;
2. that the child was wrongfully removed or retained;
3. that the child was habitually resident in a Contracting State immediately before any breach of custody or access right.

If those three conditions have been satisfied, Article 12 of the Hague Convention mandates an order for the return of the child to the place of its habitual residence.

[26] Article 3 4 of the "Convention" provides:

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 subparagraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

[27] Article 12 provides:

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

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.

[28] The only exception to an order mandating return of the child would be Article 13(b) which states as follows:

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 opposes its return establishes that

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.

[29] The discretion of the court in this case is limited to the return of the child to Tennessee if the three threshold conditions have been met and the court is satisfied that the child will not be harmed as set out in Article 13(b).

CUSTODY RIGHTS

[30] The child was living with the parties and custody rights were being exercised by them until the petitioner and the child departed for Thompson, Manitoba.

[31] Tennessee Code Authority

TCA 34-11-102

Parents as joint and equal natural guardians of minors - Custody of minors - Support of minors over eighteen (18) years of age in high school - Property of Minor - Incapacity of parents - Divorce - Commitment of guardianship to county - Guardianship instrument –

a. Parents are the joint natural guardians of their minor children and are equally and jointly charged with their care, nurture, welfare, education and support and also with the care, management and expenditure of their estates. Each parent has equal powers, rights and duties with respect to the custody of each of their minor children and the control of the services and earnings of each minor child; provided, that so much of the net income of each minor child as may be necessary may be expended by a parent (without the necessity of court authorization) for the child's care, maintenance and education. Funds of a minor held by a guardian shall not be expended to relieve or minimize the obligation of the parent(s) to support the minor.

[32] The parents were married at the time the child left Tennessee, no court orders had been made in relation to custody and there is no evidence of all agreement giving the father sole custody. By agreeing to the child accompanying her father to Thompson, the mother did not, in my view, waive her custody rights. The mother's position is that the parties have joint custody and the father does not deny this.

[33] I am satisfied that condition No.1 as set out by Jennings, J., in *Medhurst v. Markle*, supra, has been met and I find the mother has custody rights to the child.

WRONGFULLY REMOVED OR RETAINED

[34] The evidence satisfies me that the father wrongfully removed the child from Tennessee. He did so by deceiving the mother as to the child's return when he led her to believe the child would be returned and by showing her the return air fare ticket.

[35] The evidence satisfies me that the father made a unilateral decision to have the child remain in Manitoba without the mother's knowledge or consent:, which is a wrongful detention within the meaning of Article 3 of the "Convention".

[36] The removal or retention are wrongful in that they were a breach of the mother's rights of custody under Tennessee law.

HABITUAL RESIDENCE

[37] Article 4 of the "Convention" provides that the relevant time for determining the state of the child's habitual residence is immediately before the removal or retention.

[38] The parties lived together as a family in Tennessee from February 1997 C) December 1997. By December 29, 1997, the family had already lived in Tennessee for a significant period of their married cohabitation. There is no evidence of an intention by the parties to reside elsewhere. This child did not lose her place of habitual residence merely by moving to Thompson. The parties had the right to decide the child's place of residence and they did not agree to a change.

[39] It is not necessary that the family determined to settle in Tennessee indefinitely for that state to be the child's habitual residence, see *Medhurst v. Markle supra* .

[40] The expression "habitual residence" should be given a meaning based on evidence of a settled purpose continued for an appreciable time.

[41] I find that the habitual residence of B. is Tennessee where she normally and usually resided.

CONCLUSION

[42] The test under the "Convention" is not that of the best interests of the child but rather, that the child should be returned to the forum of its habitual residence to determine any custody issue provided the conditions as outlined in the "Convention" have been met.

[43] The respondent did not consent to the child's removal to Manitoba for other than a brief visit to the grandparents.

[44] The mother did not acquiesce in B. remaining in Manitoba and took steps as soon as she reasonably could to oppose the father.

[45] The mother did not attorn to the jurisdiction of the Manitoba Courts. She negotiated two Consent Interim Orders for access only and she clearly indicated in all her filed material that she was not attorning to the jurisdiction of Manitoba to determine custody and she always reserved the right to argue jurisdiction.

[46] She had not seen her daughter since December 29, 1997 and the fact that she negotiated consent orders with the petitioner does not in my view amount to an attornment to the Manitoba jurisdiction.

[47] In keeping with the spirit and intent of the "Convention", B. must be returned without delay to Tennessee. Tennessee, being the state of her habitual residence, is the forum to determine custody.

[48] The Interim Custody Order is set aside, it was granted until further order of the court and this is that further order.

[49] The child is to be returned to Tennessee at the father's expense.

[50] The parties may speak to costs if necessary.

COUNSEL: Patricia C. Lane, for the Petitioner; Shirley Van Schie, for the Respondent; Colette Chelack, for the Department of Justice as Central Authority for the Province of Manitoba

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