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[19/03/1992; Ontario Court of Justice (Provincial Division) (Canada); First Instance]
Wilson v. Challis, [1992] O.J. No. 563 (Q.L.)

I.W., Applicant and A.C. and D.C. Respondents

File No. 289/91

Ontario Court (Provincial Division)

March 19, 1992

HIS HONOUR JUDGE L.P. FORAN:

[1] This is an application. pursuant to Article 8 of the CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION which Convention is attached as a Schedule to section 47 of the Children's Law Reform Act , R.S.O. 1990 C.C.12. The applicant, I.W., is the father of the child L., born January 14, 1981 and for the purpose of the application and the hearing in respect thereto it is admitted that the applicant had the de jure and de facto custody of the child in the United Kingdom. The respondents, A.C. and D.C. are residents of the County of Renfrew and are maternal grandparents of the said child. The child's mother is deceased. It was conceded that the child is in the County of Renfrew, Province of Ontario, and is being retained in breach of the custody rights of the applicant. The applicant has not consented to or acquiesced in such retention. The United Kingdom and Ontario are Contracting States to the Convention.

[2] Article 11 of the Convention provides that the judicial or administrative authority must act expeditiously and a decision should be made within 6 weeks of the date of the commencement of the proceedings. The application in this matter was filed on behalf of the applicant on December the 19th, 1991 and the delay to date is hereafter explained.

[3] Where a child is being wrongfully retained and the retention has not continued for a period of one year, then the judicial or administrative authority dealing with the application "shall order the return of the child forthwith" in accordance with article 12. Article 131 however, provides that a mandatory order under in article 12 need not issue if the person opposing it establishes, inter alia, that there is a grave risk that the return would "expose the child to physical or psychological harm or otherwise place the child in an intolerable situation". Presumably this would have to be established in accordance with the civil burden which would be on the balance of probabilities or on a preponderance of the evidence. It is however, also provided in article 13 that:

"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."

[4] Accordingly, I believe that the problem facing the court is to initially ascertain if the child objects to being returned, and if so, whether the child has attained an age and a degree of maturity which would make it appropriate to take into account its views. The court then must make a decision as to whether it is exercising its discretion or not. If the discretion is not exercised, then the court can embark upon a determination as to the existence of a grave risk of physical or psychological harm. In my view, there is no point in embarking into a hearing concerning grave risk if the application is to be disposed of by a refusal to issue the order on the basis that the child objects to return and has obtained the age and degree of maturity that its views should be acted on.

[5] This application was commenced on behalf of the applicant father, on December the 19th, the child having come to Canada for a visit on October the 23rd, 1991. The matter was first before the court on December 24th when the application was adjourned to January 28th, 1992 and an interim order was issued at the behest of the applicant whereby it was ordered that the child was not to be removed from the Province of Ontario and that the child's passport was to be lodged with the court. An order was made requesting the official Guardian to do an assessment and prepare a report relevant to the issues to be litigated in Ontario and the official Guardian was further requested to appoint counsel for the child L. on January 28th, 1992 the matter was adjourned on consent to February 18th, 1992 at 9:30 a.m. to be spoken to. On February 18th the court became aware that the applicant had travelled from England to the County of Renfrew for the purpose of attending court on this date. Counsel had subpoenaed witnesses and had presumed that the matter would be proceeded with to trial notwithstanding that it is clearly recorded that the matter had been adjourned to be spoken to and notwithstanding that there would be little time, if any, available on that day for the trial. The child's counsel, as well as the counsel for the respondent grandparents objected to the matter proceeding on February 18th but counsel for the applicant insisted to the contrary. The applicant could not stay in Canada because of previous flight arrangements and he had limited financial resources to arrange alternative flights and accommodations in Canada. Accordingly, the court proceeded with a hearing, on the narrow issue of the child's objections, all other trial dates offered having been declined by the applicant's counsel.

[6] There had been a number of affidavits filed in this matter, including an affidavit of an investigating police constable; one of a 17 year old brother of L.'s namely, A. who resides in Canada with the same grandparents; an affidavit by L.'s teacher; two affidavits by the applicant; and two affidavits by the maternal grandmother. There is no indication within the Convention as to the protocol to be followed or as to the rules to be invoked and it is presumed that the ordinary rules used in the court would apply. The application seems to be an application in the usual form and accordingly, it was agreed that the matter was to be dealt with as a trial rather than as a motion and that viva voce evidence would be called.

[7] only two witnesses were called on the 18th of February. The first witness was Mr. B., the person appointed by the official Guardian's office to do the assessment and to prepare the report. His evidence is admissible pursuant to section 30(9) of the Children's Law Reform Act. The other evidence was given by L.'s teacher and would be admissible as her direct observation of L.'s attitude in the matter. In addition, L.'s counsel placed on record the results of her interview with L.

[8] At the end of the hearing, the matter was adjourned to February 19th to enable counsel for the applicant to decide whether reply evidence would be called. On February 19th, it was recorded that the applicant would not be giving reply evidence although he was in court. In addition, I believe it is important to record that the applicant was in court during the time that the evidence was given on the prior day. The matter was adjourned to March the 5th for argument at which time counsel made extensive arguments and filed several decisions from courts in Canada and in the United Kingdom.

[9] I have read all of the cases presented and I would point out that many of them deal with the grave risk issue and few address the issue of the child's objection. In the decision in Re M., a decision of the High Court of Justice, Family Division, Royal Courts of Justice, dated July 25th, 1990 case No. CA 609/90, it was acknowledged that the views of the children could not be determinative of the position but the court felt that effect should be given to their objections, in the light of the fact that they gave valid reasons for objecting to return to America because of the father's former conduct. This is the expressed reason why the court decided not to return the children and while there were comments concerning the grave risks issue the court specifically stated at page 12:

"I feel that I should give effect to their objection in this case in the light of the fact that they give valid reasons, in my judgment, for objecting to going back to America into the care of their father, because of his former conduct. I consider that he has materially admitted this. I do not therefore propose to order their return. That is the sole extent of the order that I make. I do not determine

custody rights custody rights or access rights or any other rights as between the parties. But in the light of the children's objections to being returned, I decline to order their return under the terms of the convention and the provisions of the Child Abduction and custody Act 1985. I make it clear again that I do not in any way endorse the mother's action or give any indication as to whether she should have the long-term custody and control of the children. Neither do I deal in any way with matters relating to access."

[10] The children were eleven, nine and eight years of age. Their views were recorded by a court welfare officer who interviewed them. The conduct complained of was found not to be of the nature which would constitute a grave risk. The decision is based entirely in the childrens' views and objections.

[11] The decision of the High court in M. is strikingly similar to the factual situation in the case before me.

[12] In the English case of Re R. 1992 1 F.L.R. Bracewell J. dealt with a similar issue to that which confronts me. He was cognizant of that fact that the Convention's purpose: "is to secure prompt return of children wrongfully remove to or retained in any Contracting State; and to ensure that rights of custody and access under the laws of the Contracting State are effectively respected in other Contracting State. The Convention is not concerned with establishing the person to whom custody of the child will be granted at some time in the future."

[13] Bracewell J. found in that case that he was not satisfied that there was a grave risk in returning a 13 year old child to Germany, and accordingly, was not within the provisions of article 13(b). He dealt then with the issue of the child's objections and he stated:

"The word "objects" imports a strength of feeling which goes far beyond the usual ascertainment of the wishes of the child in a custody dispute. Questions must also be addressed as to whether or not the views expressed by the child of appropriate age and maturity and understanding are expressed out of free will and choice, whether or not they are genuine views, or whether they have been influenced by some party or person in contact with the child".

[14] Having found that the 13 year old child was of an appropriate age and degree of maturity to be able to understand the circumstances and to be able to express strong views, he determined that the child was so strong in her objections that it was appropriate for him to exercise a discretion in favour of refusing to return the child. He felt that there was and must be more than a mere preference express by the child. I have read the head note only of the decision of Justice Waite in P. v. P. (Minors) 1992 1 P.L.R.. 155, (a decision of the English courts) and the English Court of Appeal decision Re S (A minor) dated the 18th day of May 1990. The P. v. P. case dealt with an entirely different situation as far as I can ascertain and the Re S case dealt with many aspects of custody not relevant to the issue here and in particular the question of whether there had been a settlement in the new environment as referred to in article 12. The case did involve an application in respect of a 12 1/2 year old child who's only objection to return was the possibility that a final order of custody would be made to her father. She did not object to visiting him. It was specifically found that there was no basis for refusing a return on the issue of grave risk. The court felt the child's views did not amount to an objection in the terms of Article 13.

[15] I have reviewed carefully all of the Ontario and Canadian cases referred to me by counsel including the decision of Mr. Justice Hogg in Hutchison vs. Hutchison decided in the supreme court of Ontario, filed No. 527-89 dated April 25th 1989 and I would observe that the only issue before the court at that time was whether there was evidence upon which one could conclude that there was grave risk of physical or psychological harm in the child being returned. The court declined to make such finding. In Parsons vs. Styger, 67 O.R (2d) 1, the court was dealing with a child of four years of age and the grave risks issue was resolved by providing that the child was to be returned and allowing the mother to accompany the child if she so wished.

[16] The case of Kelley vs. Williams 16 R.F.L, 3(d) 407 (a decision of the Alberta court of Appeal) involved 4 year old twins and in fact was not an application under the Hague Convention so that

this particular case is of no assistance to me in determining whether a discretionary order should be made relevant to the child's objections. In the decision of Judge Webster in Avala vs Avala (Oxford File No. D66190), the children were returned to California and the issue of the child's objections was of consequence in that the 13 year old child specifically requested that she be returned to California with the applicant father. In another decision of Judge Webster, Cozby vs. Cohoon, September 19th, 1991 (File No. 675/90 London) there was a specific finding by the court that the child had not attained an age and degree of maturity at which it would be appropriate to take into account her views, the child being some 4 years of age at the time of the hearing. The other Ontario case referred to was the decision of Mr. Justice Fedak dated July 6th 1990 of Moore vs. Moore made in the Supreme Court of Ontario File #6601-89. Again this case dealt largely with the issue of grave risks, the children at that time being x and 6 years of age. Judge Fedak was satisfied that the children were too young and too immature to decide on their own whether they wanted to return. I believe that I have reviewed all of the case law which has been referred to me.

[17] As I mentioned there are a number of affidavits filed which are not being considered by reason of the fact that they have not been made part of the evidence, the deponents have not been cross-examined on the contents thereof, many of the allegations relate only to the issue of grave risk or to circumstances existing in England and lastly, the deponents for the most part were present and could have been called to give evidence viva voce Counsel elected to proceed with this matter by viva voce evidence and I concluded that the contents of the filed affidavits should be disregarded notwithstanding applicant's counsel's submissions to the contrary.

[18] It is left then to determine:

[19] Firstly; has the child attained an age and degree of maturity at which it is appropriate to take account of its views;

[20] Secondly; does the child object to being returned;

[21] Thirdly; is the child expressing strength of feeling, in the words of Justice Bracewell in Re. R., "which goes beyond the usual ascertainment of the child's wishes in a custody dispute";

[22] Fourthly; are the views being expressed by the child of his own free will and choice, are they genuine views, or have they been influenced by some party or person in contact with the child.

[23] I would confirm my exchange with counsel during submissions when I indicated that it was my opinion that the child and his brother could well have been called in this proceeding and I would point out that there is special provision in Section 64 of the Children's Law Reform Act whereby the court may interview the child to determine its views and preferences. I think that this may have been an appropriate procedure in this matter or in matters of this kind. I do agree with counsel that there are times in custody or access disputes when the child should not be made to choose between parents but such is not the case here.

[24] Mr. B., a very experienced social worker testifies that L. is 11 years of age and 15 "a very bright boy" and he adds: "I was quite impressed with him. He is very articulate, very clear with what he had to say, very forthright and consistent and persistent in his comments about what was happening in the father's home."

[25] The question was put to Mr. B.,

Q. "And is it your opinion that he has attained sufficient age and degree of maturity to make his wishes known to the court?"

A." Yes "

[26] At another point in his evidence, Mr. B. mentioned: "I would probably see him as being slightly more than average maturity."

[27] His teacher Mrs. L. testified:

"I think he is an extremely mature child, and also very intelligent. I haven't had him in my class long enough to, you know, to give a [..] other than to observe, and from tests results that I have given him I would say that he is definitely above average intelligence, and above his age in maturity".

[28] At another point in her cross-examination, the teacher stated "He is an above average student". Accordingly, I would have to conclude that the child has attained an age and a degree of maturity at which it is appropriate to take account of his views.

[29] To deal then with the nature of his objections. His counsel at the end of the trial, did not call evidence but stated: "the child has consistently said to me he doesn't want to return" and again "I interviewed the child on the 22nd of January and he was very consistent at that point in time. He did not want to return home. I interviewed him this morning, with Mr. B. I was present during the interview, alone with L., and the child at that time I once again asked him if he wanted to return home. He asked the purpose of the court today, and he insisted that he did not want to return to England. He wanted to remain here."

[30] His counsel reiterated this stance at the time of the making of submissions.

[31] Mr. B. gave evidence that he met with L. and with his brother A. and with both of them and alone in private. He met the applicant father alone, and he met the applicant father with the two boys together. Since the time of giving his evidence, Mr. B. has had the opportunity of completing his written assessment and report. He states that L.'s wishes are that he remain in Canada with his grandparents and that was made quite clear in his interviews. The child's counsel in cross-examining Mr. B., questioned him as follows and received the following answers:

Q. Mr. B., once again back to these visits. You have seen L. on four occasions, twice on Saturday, in two separate interviews, once last night, a lengthy interview with the two boys and their father, and again this morning briefly. L.'s opinion – L.'s wishes –were addressed on each of those occasions? Is that right?

A. Yes.

Q. And L.'s' wishes on each of those occasions were consistent?

A. Yes.

Q. And what were they?

A. That he wanted to remain in Canada.

Q. You specifically requested this morning that you had an opportunity to interview L. after last night. Is that correct?

A. Yes.

Q. And did you expect a change?

A. I really didn't know what to expect this morning. I know he had seen his father and I wondered if there might be a change, and that is why I wanted to see him after he had had the night to sleep on it, I suppose.

Q. Was there any change?

A. No. He was very clear.

[32] Mrs. L. (L.'s present teacher) stated that he commenced to attend her classes in November and her evidence in part is as follows:

Q. Ms. L., in terms of - has L. ever expressed to you the wish of whether or not he wished to live with his father?

A. Yes.

Q. What has he said to you?

A. He does not wish to.

Q. Has he said that to you on more than one occasion?

A. Yes, he has.

Q. Has he ever told you, anything but that in regards to his wishes?

A. No.

Q. Getting back to the other point, how strongly has he expressed his wishes in terms of not going back to his father?

A. Very strongly.

Q. Do you recall particularly what he said in that regard?

A. Yes. "I do not want to go back".

Q. Has he ever indicated to you that he might be afraid of going back?

A. Yes.

Q. Has he indicated to you his wishes in regards to his grandparents?

A. Yes, he wants to stay with his grandparents.

[33] At the end of the teacher's evidence, the court had the following exchange with the teacher.

THE COURT: Ms. L., I am interested in your evidence today from the point of view of the child's wishes. You say that he said to you that be did not want to go back?

Ms. L.: Yes.

THE COURT: Has this been consistent? The reason I allowed them to call you today was to establish consistency. You have had this child since November,

Ms. L.: Yes.

THE COURT: And when was the first time that he told you that he didn't want to go back?

Ms L.: It would be the week after he started school.

THE COURT: When would be the next time that he told you he didn't want to go back?

Ms. L.: The following week.

THE COURT: And when would be the next time?

Ms. L.: Probably the following week.

THE COURT: And the next time?

Ms. L.: The following week.

THE COURT: This has been consistent?

Ms. L.: Yes, I have. May I say something?

THE COURT: Yes.

Ms. L.: I have developed a rapport with L. […] once he started school, and it didn't take more than a few days, a week, I don' t know exactly. He came to me; I did not go to him. He came to me and wanted to talk to me.

THE COURT: Okay. I don't think I want to hear this.

Ms. L.: Okay, I just ...

THE COURT: Okay, I want to find out again though, have you talked to L. since he knew that his father was in this country?

Ms. L.: Yes.

THE COURT: The last couple of days?

Ms. L.: Yes.

THE COURT: Has he expressed consistency in his wishes?

Ms. L.: Yes.

THE COURT: So that from the time you have known him since November until now, he has always consistently told you he does not want to leave the country?

Ms. L.: Yes.

THE COURT: That he wanted to stay with his grandfather or his grandmother?

Ms. L.: Grandmother and grandfather.

THE COURT: And that he objected being returned to England?

Ms. L.: Definitely.

[34] On the basis of the evidence that I have heard, I would have to conclude that L.'s wishes are more than a mere preference and in the words of Bracewell, J. his wishes import a strength of feeling which go far beyond the usual ascertainment of the child's wishes in a custody dispute. Mr. B.'s evidence indicates that L. gave him reasons for objecting to return to England and these reasons centred around his perception that:

[35] (a) his father traffics in and uses non-medically prescribed drugs;

[36] (b) he drinks alcohol to excess;

[37] (c) he has used physical discipline on one or two occasions;

[38] (d) he brings home female friends and that there were a number of them that he could hear them having sexual intercourse in another room.

[39] (e) he doesn't pay very much attention to him;

[40] Whether these facts are in fact true or not they are apparently perceived to be true by L. and they explain, somewhat, the objections that he is making to a return to his father's home. The father was in court when Mr. B. gave that evidence and elected not to dispute it by reply evidence.

[41] I have not had an opportunity of hearing the evidence of the respondent grandparents nor the evidence of the elder brother, A. To ascertain if L. is being influenced by someone in the formulating of his views I can only rely on the evidence given by Mr. B. in his written report that he found no evidence to support such conclusion. I can come to no other conclusion but that I must exercise the discretion provided for in article 13 and refuse to order the return of the child finding as I do that the child does object to being returned and finding as I do that the child has attained an age and a degree of maturity at which it is appropriate to take account of his views.

COUNSEL: Laurence J. Robinson counsel for the Applicant; Thomas J. Prince Counsel for the Respondents; B. Lynne Felhaber counsel for the child

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