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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Beatty v. Schatz,*
2009 BCCA 310

Date: 20090626

Docket: CA037140

Between:

Deirdre Mary Beatty

Petitioner

(Respondent)

And

Ernst Alexander Schatz

Respondent

(Appellant)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Bauman
The Honourable Madam Justice D. Smith

The text of this judgment was corrected at paragraph 1 where a change was made on August 10, 2009

On appeal: Supreme Court of British Columbia, March 31, 2009,

Beatty v. Schatz, 2009 BCSC 706, Vancouver Reg. E090060

Oral Reasons for Judgment

Counsel for the Appellant:	G.R. Vlug
Counsel for the Respondent:	W. Storey
Place and Date of Hearing:	Vancouver, British Columbia June 22, 2009
Place and Date of Judgment:	Vancouver, British Columbia June 26, 2009

[1] **NEWBURY J.A.**: This is one of the first cases, if not the first case, to reach this court involving the interpretation and application of Article 13 of the *Hague Convention on the Civil Aspects of Child Abduction*, which has the force of law in British Columbia by virtue of s. 55(2) of the *Family Relations Act*. In general terms, the *Hague Convention* requires a court in a contracting state to return any child who was habitually resident in another contracting state and who has been wrongfully removed or retained (as defined in Article 3) and prohibits a court in a contracting state from deciding on the "merits of rights of custody until it has been determined that the child is not to be returned" under the Convention. (In this case, it is not disputed that the child was habitually resident in Ireland and was wrongfully retained in Canada for purposes of Article 3.)

[2] Article 13 contains three main exceptions to the obligation to return – Paragraph (a) deals with a person having the care of a child who was not exercising his or her custody rights at the time of removal/retention or who consented to the removal or retention of the child; paragraph (b) applies where there is a grave risk of harm to the child or he or she would be placed in an intolerable situation if returned; and the third exemption permits a judicial or administrative authority in the contracting state to 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."

[3] This case involves the third prong, as applied to an intelligent, boy "A", who was ten years old when he was brought to Canada by his father, and is now 11 years old. On May 15, chambers judge below, Madam Justice Martinson, ordered his return to Ireland, where custody and access proceedings had been underway between his parents when Mr. Schatz brought the child to Canada. The father now appeals that order. He obtained a stay from a justice in chambers in this court pending the appeal, which was heard on an expedited basis.

[4] The facts are set out in Martinson J.'s reasons, which are indexed as 2009 BCSC 706, and I will not repeat them here. It will be sufficient to note that Mr. Schatz and Ms. Beatty lived together from 1996 and were married in July 2000. Their only child, A, was born on January 4, 1998. The parents separated in 2003 when living in Canada. Ms. Beatty took A and his half-siblings to Ireland for a vacation and did not return to Canada. Mr. Schatz began proceedings under the *Hague Convention* to bring A back to Canada, but then withdrew them when there was an attempt at reconciliation. The couple finally split in October 2004, and in 2007, after a custody and access report was prepared, an Irish court pronounced a consent order that custody of A would be shared by the parents jointly, with primary residence being with the mother.

[5] As Martinson J. noted, Mr. Schatz applied in February 2008 for sole custody of A and permission to return with A to Canada. The Irish court ordered another custody and access report and a Dr. Sheehan, a psychologist, prepared an interim report which is in evidence in this case. It was not completed because Mr. Schatz requested and received the Court's permission to bring A to Canada for a vacation for one month ending July 30, 2008. The Court granted this permission on the father's sworn undertaking to return the child at the end of July. Mr. Schatz brought A to

British Columbia and then asked Ms. Beatty for permission to keep him longer; she refused; and Mr. Schatz has since failed to honour his undertaking to return the child to Ireland.

[6] Ms. Beatty says she had to obtain legal aid and that caused some delay in seeking A's return; but ultimately, she commenced an action in the Supreme Court of British Columbia on January 12 of this year.

[7] For reasons dated March 31, 2009, Martinson J. decided that A "should have a chance to tell the court what he thinks and why", and ordered that a "Views of the Child Report" be prepared by a psychologist. She ordered that the author of the report speak to A and both parents, and that the author should also have the benefit of reading all the materials that would be before the Court. Dr. Elterman was ultimately retained but unfortunately, Mr. Storey, counsel for Ms. Beatty, decided to forward to the psychologist only Ms. Beatty's materials for his review, leaving it to Mr. Vlug, counsel for Mr. Schatz, to forward the father's materials. Mr. Vlug denies receiving Mr. Storey's letter to this effect. After the trial judge issued her reasons, Mr. Schatz retained Dr. Elterman to review his materials, which were provided to the psychologist in early June. By letter dated June 6, Dr. Elterman has confirmed that the additional materials did not change his opinion. I would admit his confirming letter as fresh evidence so that this court can be confident that his opinion is based on all the documents available. I would also grant Ms. Beatty's application to introduce a letter from the author of the initial Irish Custody and Access Report clarifying a matter under "Personal History".

[8] The chambers judge described Dr. Elterman's report at para. 15-21 of her reasons, and then quoted his summary, as follows:

… I think that [A] is fairly young but he seems quite self-aware and mature in terms of his expression and ability to reflect. On the issue of influence, I did not find any overt evidence that either parent has tried to influence [A] other than his knowledge of what they each wish. In the third area [A's preference] he was consistent on both occasions that I interviewed him that he wants to continue living with Mr. Schatz in British Columbia.

I hope that this report will assist the parents in coming to an agreement.

[9] There is no doubt that A certainly would prefer to stay here with his father and that he, A, feels he is "mature enough to see the consequences of it", as he told Dr. Elterman. As Mr. Vlug emphasized, A has expressed frustration at not having his views accepted or having his views attributed to the "influence" of one parent by the other. On this point, I note that Mr. Schatz stated in an affidavit sworn March 9:

... A is frustrated with the courts refusing to listen to him. A is frustrated with psychologists minimalizing [*sic*] what he has to say about wanting to stay with his dad. This is why A is now telling people the way things are going to be rather than asking or going along with decisions made about him. This is also one of the reasons I am fearful for his safety. I fear what will happen should he be forced to return. I am fearful that he will be frustrated and will take matters into his own hands.

[10] The father takes the position that the child's wishes should be acceded to and says that he, the father, has not influenced A in reaching those wishes. However, there was in evidence a note written by A in early 2009 in which he suggested that if he was "forced back" he was "never going to be able to see my dad until I am much older". (Evidently the father did not take any steps to disabuse the child of this fear.) As well, Ms. Beatty swore an affidavit of May 7, 2009 in which she described an access visit in April:

A was angry and expressed concerns that he had about the court case and the prospect of return to Ireland. He made a number of statements that I verily believe he has picked up directly from the respondent. He said that I was "unstable", that I was an "angry monster who made mountains out of molehills", and that I was only seeking to have him returned to Ireland "to make dad angry". He also said "I have committed no crime, the authorities cannot make me get on a plane". A has made this statement, or very similar statements, on a number of occasions since he was retained in Canada by the respondent last summer. I asked him how he knew what the "authorities" could do or could not do and he said "I just know". On this occasion he also said that nobody could force him to get on a plane, that he would hold onto something and I would have to drag him onto the plane. I listened to his concerns and then told him that I had to do what I thought was right for him even if he did not think it was the right thing for him.

[11] The father has also deposed that the "real issue is between the child and his mother", rather than between the parents; that "it is A who has negotiated a continued stay here in Canada with me"; and that in the summer of 2008, "... he told me how things were going be rather than ask, that he was making the decision."

[12] As I read the chambers judge's reasons, the same arguments were made below as were made in this court – Mr. Schatz taking the position that the child is mature enough to know what is in his own interests, and that his wishes should be determinative. If not, Mr. Vlug contends, Article 13 of the *Convention* is "meaningless".

[13] Mr. Storey, on the other hand, has submitted (and still does, notwithstanding Dr. Elterman's opinion) that the father has influenced the child's wishes and is putting all the responsibility of the decision on A because he wants to retain the child away from his mother. In this regard, Mr. Storey referred to the "interim" report prepared in Ireland by Dr. Sheehan and dated February 7, 2009. As Dr. Sheehan noted, this was a preliminary report because the child was removed from the jurisdiction of the Irish court by Mr. Schatz in the summer of 2008 before the report could be completed and filed. However, under the heading "Consultations with Ernie Schatz", the psychologist wrote:

One of the matters that impressed me most in the consultations with Ernie was his anger and his rage. My sense was that he was gripped by rage in relation to Deirdre. This pushed him to be quite controlling in relation to how I might conduct the assessment. He did not want me to see anyone else in the family except himself, Deirdre and A ... He was very keen that A should be heard by me and listened to and he underlined that he had "a very honest and open relationship with him". He described how the relationship he had with his son was "very loving. I listen to him;

he is saying to me he is not happy". ... He insisted that if allowed to take A to Canada he would not stand in his way if he wished to come back to Ireland. However, he himself would not return again to Ireland.

The latter line is echoed in A's statement to Dr. Elterman, who wrote that "A says that his father has said to him a number of times that if he finds that he made the wrong choice he is free to go back to Ireland".

[14] The chambers judge was satisfied from Dr. Elterman's report that A does object to being returned to Ireland, but she stated at para. 30 that that was not the end of the matter. She noted that different views have been expressed by courts as to how the discretion in Article 13 of the *Convention* is to be exercised. She was of the opinion that the decision of the House of Lords in *Re M* [2007] UKHL 55, [2008] 1 All ER 1157 reflected the appropriate approach. At para. 46 of *Re M*, Baroness Hale stated that although the views of children are considered increasingly these days, taking account of a child's views does not mean that they are determinative or even presumptively so. She continued:

… Once the discretion comes into play, the court may have to consider the nature and strength of the child's objections, the extent to which they are "authentically her own" or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations referred to earlier. The older the child, the greater the weight that her objections are likely to carry. But that is far from saying that the child's objections should only prevail in the most exceptional circumstances.

[15] Bearing this in mind, the chambers judge was critical of Mr. Schatz's conduct in discharging both his legal and parental responsibilities. She wrote:

[43] I am going to refer now to the legal and parental obligations Mr. Schatz had when A said he wanted to stay here.

[44] I emphasize the Mr. Schatz is the parent. A was only ten at the time.

[45] Mr. Schatz's legal responsibility was to tell A that he would take him back to Ireland as he undertook to do.

[46] He offers no satisfactory explanation for this blatant breach of his legal obligation to return A to Ireland so that the Irish court could decide whether he should live here.

[47] The existing legal custody order is the Irish order that they have joint custody of A with primary residence with Ms. Beatty. He has blatantly disregarded that order and, in doing so, has deprived A of the benefit of having both of his parents in his life.

[48] Mr. Schatz's parental responsibility, if he wanted A to live with him, was to explain to A that they had to go back to Ireland and that he would do all he could in Ireland to persuade the Irish court that A should live with him in Canada. Yet, he

continues to say that this is a matter between A and his mother. He, in my view, based on the evidence, is also giving A the message that it is acceptable to disobey the law if you do not like it by the actions he has taken.

The trial judge found that by his words and actions, Mr. Schatz had:

[49] ... at the very least, been subtly giving A the message that his father is not going to go back to Ireland to fight for custody if the Court says A has to go back. This feeds into A's biggest concern about going back, which is that he will not see his father as much.

[50] I am also satisfied that Mr. Schatz, at the very least, has been subtly giving A the message that he does not have to go back, even if the Court says he must.

[16] She concluded that although A is bright and can express his wishes, he is not mature enough to understand "the subtleties of what is happening and their long-term consequences on his well being." Finally, she said:

[56] This is a case where the policy considerations underlying the *Hague Convention* are particularly important. As the court said in *Re M*, the *Hague Convention* is there not only to secure the prompt return of abducted children, but also to deter abduction in the first place. The message should go out to potential abductors that there are no safe havens among the contracting States.

[57] Mr. Schatz decided that he, not the Irish court, would decide where A was going to live.

[58] Not returning A would send the wrong message that, when a case is before the courts in another jurisdiction, it is acceptable to wrongfully retain a child in another country, even in the face of an undertaking to the court to return the child, so long as the child says that he or she does not want to return.

[59] I therefore make an order that A be returned to Ireland.

[17] As I mentioned earlier, Dr. Elterman has, since the hearing below, written a letter stating that having reviewed all the materials that were sent to him, the views in his report are unchanged.

[18] The basic thrust of Mr. Vlug's argument in this Court was that it is in the interests of A to have his wishes respected and that "Article 13 is all about the wishes of the child." In this regard, he refers to the preamble to the *Hague Convention* in which the contracting states recite that they are "Firmly convinced that the interests of children are of paramount importance in matters relating to their custody." Mr. Vlug also referred us to a decision of the Supreme Court of British Columbia, *W.K.I. v. B.W.I.*, 2005 BCSC 771, in which Drost J. ruled that a 12-year old child who had expressed a "clear and strong desire" to remain with his mother and brother in British Columbia rather than be returned to North Carolina, should prevail and that the child's wishes were "sufficient reason to refuse to order his return" The Court in that case accepted an expert opinion to the effect that the child's views were not the result

of pressure from either parent. As well, Mr. Vlug referred to *Thorne v. Dryden-Hall* (1995), 18 R.F.L. (4th) 15, in which the Court declined to give effect to the wishes of a child aged ten whose refusal to return to England with her mother was found to be the product of her mother's influence. Mr. Vlug contrasts that situation with the case at bar, in which we have Dr. Elterman's opinion to the opposite effect.

[19] It is clear from a review of the authorities, including *Re M*, that all of these cases turn on their particular facts. In the case at bar, I cannot agree that the chambers judge erred in declining to give effect to the child's wishes. Mr. Schatz's position comes perilously close to the proposition the child's best interests are whatever the child wishes. As any parent knows, this is not the case, and in any event, Article 16 makes it clear that it is not the function of this court at this stage to determine where the child's bests interests lie in terms of custody and access. The British Columbia courts' role is to decide whether A should be returned to Ireland in accordance with Article 12 of the *Convention* or whether the exception in Article 13 should apply. If A is returned to Ireland, the court there will complete its assessment of the custody and access issues, which of course do turn on the child's best interests.

[20] The trial judge correctly interpreted Article 13 as giving her a discretion. She regarded A's wishes as one factor, certainly an important factor, to be considered amongst others, including the importance of ensuring that children are not wrongfully removed from their home jurisdictions or wrongfully retained elsewhere. Indeed, the objects of the Convention as stated in Article 2 are to secure the prompt return of such children and to ensure that rights of custody and access under the laws of contracting states are "effectively respected" in the others. These objectives were stressed by the Supreme Court of Canada in the seminal case of *Thomson v. Thomson*, [1994] 3 S.C.R. 551, where La Forest J for the majority stated:

The preamble ... states the underlying goal that document is intended to serve: "[T]he interests of children are of paramount importance in matters relating to their custody." In view of [the lower court's] remarks on this matter, however, I should immediately point out that this should not be interpreted as giving a court seized with the issue of whether a child should be returned to the jurisdiction to consider the best interests of the child in the manner the court would do at a custody hearing. This part of the preamble speaks of the "interests of children" generally, not the interest of the particular child before the court. This view gains support from Article 16, which states that the courts of the requested state shall not decide on the merits of custody until they have determined that a child is not to be sent back under the Convention. I would also draw attention to the fact that the preamble goes on to indicate the manner in which its goal is to be advanced under the Convention by saying:

> "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 to secure for rights of access."

The foregoing is entirely consistent with the objects of the Convention as set out in its first Article. Article 1 sets out two objects: (a) securing the return of children wrongfully removed to or retained in any contracting state; and (b) ensuring that the

rights of custody and access under the law of one contracting state are effectively respected in other contracting states. [at page 14]

[21] In this case there was evidence to support the chambers judge's findings and inferences. She gave serious consideration to A's expressed wishes, but concluded that those wishes had been influenced by A's father and that the onus on Mr. Schatz to justify the continued retention of A in this jurisdiction was not met. I agree with counsel for Ms. Beatty that Mr. Schatz in addition to breaching his undertaking to the Irish court has not recognized his responsibility as a parent to act in A's interests, or realized the effect his attitude is having on A. Of course A loves his father and has enjoyed his time in Canada, where (until recently) he has been largely shielded from the consuming conflict between his parents. It is obvious that it would be in A's interests for both parents to overcome their hostility towards each other and not to use A as a pawn in their conflict. If this lesson can be earned, perhaps some good will come of this unfortunate episode.

[22] In the circumstances, however, having concluded that the trial judge did not err, I would dismiss the appeal.

[23] **BAUMAN J.A.**: I agree.

[24] **SMITH J.A.**: I agree.

[25] **NEWBURY J.A.**: Counsel, we would like to adjourn briefly and give you a chance to discuss the arrangements that should be made so that we do not have to order police assistance. We propose to give you 15 minutes and then come back.

(matter stood down)

(discussion with counsel)

[26] **NEWBURY J.A.**: We are going to provide that it is to be a professional supervisor to be agreed upon to be present during telephone calls and visits. If you cannot agree then come back to the court for an order.

(submission by counsel)

[27] **NEWBURY J.A.**: Access and telephone contact will be supervised twice a week by a person to be agreed upon, who will be a professional. I hope you can agree on the days. I hope it is not necessary to come back for an order on that.

(discussion with counsel)

[28] **NEWBURY J.A.**: Ms. Beatty will have her costs.

"The Honourable Madam Justice Newbury"