COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-023320-138
(500-04-060222-131)

DATE: July 9, 2013.

CORAM: THE HONOURABLE YVES-MARIE MORISSETTE, J.A.
MANON SAVARD, J.A.
CLAUDE C. GAGNON, J.A. (AD HOC)

A. H.
APPELLANT – Respondent-petitioner
v.

M. S.
RESPONDENT – Petitioner-respondent

JUDGMENT

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[1] The appellant appeals from a judgment of the Superior Court, Registry of Montreal (the Honourable Michael Stober), rendered on February 1, 2013, and which ruled on two motions for safeguard orders filed by the appellant and by the respondent. The judgment dismissed the appellant's motion, granted the respondent's motion and, on an interim basis, awarded custody of the parties' two children to the respondent, ordered the appellant to make payments to the respondent for the support of their children and granted the appellant certain access rights.

[2] For the reasons of Justice Morissette, with which Justices Savard and Gagnon (ad hoc) concur;

[3] **THE COURT**:

[4] **DISMISSES** the appeal, without costs considering the circumstances;

[5] **DISMISSES** also, without costs, the appellant's motion to introduce in the record of the appeal, and as new evidence, the judgment of the 2nd Circuit Court of Appeals of May 14th, 2013, which confirmed the judgment of the District Court rendered on December 17th, 2012.

YVES-MARIE MORISSETTE, J.A.

MANON SAVARD, J.A.

CLAUDE C. GAGNON, J.A. (AD HOC)

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Date of hearing: June 14, 2013

REASONS OF MORISSETTE, J.A.

[6] The appellant seeks to set aside a judgment of the Superior Court[1], district of Montreal (the Honourable Michael Stober), rendered from the bench on February 1, 2013, and which ruled on two motions for safeguard orders filed by the appellant and by the respondent. The judgment dismissed the appellant's motion, granted the respondent's motion and, on an interim basis, awarded custody of the parties' two children to the respondent, ordered the appellant to make payments to the respondent for the support of their children and granted the appellant certain access rights.

I. Summary of the facts and proceedings

[7] The motions judge carefully reviewed the relevant facts in his reasons. A detailed account of the circumstances which gave rise to the litigation is therefore unnecessary at this stage.

[8] The proceedings of February 1 in Montreal came in the wake of a judgment of the United States District Court (Southern District of New York) ("the District Court") which, on December 17, 2012, granted the appellant's petition under the *Hague Convention on the civil aspects of international child abduction* ("the *Convention*") and ordered the return of the parties' children to Town A. On January 16th, 2013, the United States Court of Appeals for the Second Circuit ("the Second Circuit Court of Appeals") declined to stay the execution the District Court's judgment. Six days later, the respondent filed a motion for custody and relocation of the children in the Superior Court. It was met shortly thereafter by a similar motion from the appellant. Both motions were heard on February 1.

[9] In the main, the events leading to this appeal unfolded as follows:

- The appellant is a Canadian citizen, born and raised in Canada. The respondent is an American citizen, born and raised in the United States. The parties, who are both physicians, met in Town A during their studies at A University. They were married in 2008.

- The respondent gave birth to a first son, X, in [...] 2009, and to a second son, Y, in [...] 2011. Both children were born in Town A where the parties resided together until August 15, 2011.

[1] 2013 QCCS 941.

- On this last date, with the knowledge and consent of the appellant, the respondent and her two sons went to live in New York with her parents. The appellant visited them on a regular basis. Early in 2012, he and the respondent began to contemplate seriously a permanent relocation of the family to New York. They took various steps in furtherance of that end.

- It appears that one reason for the parties' desire to move to New York was a breakdown in relations between the parties on the one hand, and the appellant's parents (particularly his mother) on the other. Because of this situation, the appellant was estranged from his parents and his siblings until at least September 2012.

- At the same time, however, relations were deteriorating between the parties. In August 2012, the respondent moved to a different residence in New York and she did not inform the appellant of her new address. At the end of that month, she commenced divorce proceedings in the Supreme Court of the State of New York. On September 5, 2012, her action for a divorce was served on the appellant while he was arriving in New York to visit his family.

- On September 11, the appellant brought his petition in the District Court for the return of the children to Town A, pursuant to the *Convention*. A six-day hearing followed and on December 17 the petition was granted[2].

- What followed has already been described in paragraph [8], above.

[10] It bears mentioning that, in its judgment, the District Court gave a detailed description of its findings of fact, reached on the basis of the conflicting evidence it had heard. In the District Court's view, neither party was entirely credible, but "there was credible testimony from both parties on some of the key issues".

[11] The outline of the facts in the paragraph [9] coincides with the main findings of the District Court and of the Superior Court. Unlike the District Court, however, the Superior Court did not have the benefit of oral testimony extending over several days of hearing : instead, it was confronted with widely divergent affidavits, some containing several allegations of gross misrepresentation by the adverse party, which is less than helpful in a case of this kind. During the hearing in the Superior Court, the judge allowed each party to address the court briefly and to offer his or her version of the facts. This said, apart from some flat contradictions in the oral evidence, what really seems to have transpired from the hearing is how eminently desirable it was that the provisional custody applications be heard promptly. The judge therefore took steps, sensibly in my view, to have the case fixed for a hearing as early as possible. For reasons which need not be elaborated on here, the dates initially chosen, May 23 and 24, had to be

[2] It appears that this judgment was confirmed by the Second Circuit Court of Appeals on May 14, 2013. This development has no bearing on the proceedings in this court.

changed, but a new hearing is now scheduled and it will take place in the Superior Court from September 30 to October 3, 2013.

II. Issues raised by the appeal

[12] The appeal raises two issues: on the facts disclosed in paragraph [9] above, (i) what interaction is there, if any, between the *Convention* and the custodial dispute, and (ii) did the motions judge err in law or in fact when he issued an interim order allowing the respondent to return to New York with her two children?

III. The interaction between the *Convention* and the custodial dispute

[13] Leave to appeal from an interim order is rarely granted and would not normally be given when a four-day hearing on a provisional order is imminent. In the particular circumstances of this case, however, the judge of the Court who heard the motion for leave to appeal took the view that the situation of the parties is unusual and that it raises a legal issue in need of clarification by a panel. In her reasons for judgment, she wrote:

> [L]es questions que [soulève] la situation méritent d'être soumise à la Cour d'appel : par exemple, celle de l'interaction d'une décision rendue aux termes de la *Convention de la Haye* où le juge ordonne le retour des enfants au Québec et une demande d'ordonnance de sauvegarde subséquente, au Québec, comportant une conclusion voulant que, à ce stade (par opposition à une décision rendue sur le fond après audition), les enfants puissent quitter le Québec.

This question ought therefore to be addressed first.

[14] The appellant's petition in New York was brought pursuant to Article 3 of the *Convention*. It seems convenient to begin by quoting the relevant passages of the *Convention*[3]:

> 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

[3] Incidentally, these provisions are reproduced verbatim in sections 3 and 13 of the *Act respecting the civil aspects of international and interprovincial child abduction*, R.S.Q., c. A-23.01, the legislation which implements the *Convention* in Quebec.

> *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 sub-paragraph *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 8
>
> Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

[15] Only a few issues were outstanding between the parties in the District Court and, in point of fact, the task of the Court was therefore limited to determining what was the "habitual residence" of the children. Under the law then applicable in New York State, the governing precedent was *Mota* v. *Castillo*[4], a decision of the Second Circuit Court of Appeals. In accordance with this precedent, the District Court had to "inquire (i) into the shared intent of those entitled to fix the [children's] residence, and (ii) whether the evidence unequivocally point[ed] to the conclusion that the [children were] acclimatized to the new location and thus [had] acquired a new habitual residence notwithstanding any conflict with the parents latest shared intent"[5].

[16] Addressing the issue of the habitual residence as it is analysed in this governing precedent, Judge Kenneth M. Karas rendered a detailed and carefully reasoned judgment, the ratio of which is aptly summarized in the following excerpts from the transcript of the hearing[6]:

> … what the court concludes is that, until the summer of 2012, petitioner and respondent had a shared intent that the family would relocate to New York, there's no doubt in that, but that they would do so if they could remain an intact family unit. That shared intent did not change the children's habitual residence because the condition was not satisfied. Again, relying on *Mota*. And, as of the summer 2012, respondent adopted the unilateral intent that she and the children would reside permanently in New York without petitioner, but that unilateral intent did not change the children's habitual residence.

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4 629 F.3d 108 (2012); the origin of this two-prong analysis appears to be the case of *Gitter* v. *Gitter*, 396 F.3d 124 (2005), also decided by the Second Circuit Court of Appeals.

5 Paraphrasing page 21 of the judgment transcript.

6 Pages 25-6 and 28 of the judgment transcript.

> […]
>
> Now the court recognizes that the children have lived more or less continuously in the New York area since August of 2011. And, of course, X is now attending school, and by all accounts he has some friends at the school. But again relying on *Mota*, quote "This duration of time is not nearly so great that the court could presume that returning him to Canada[7] would expose him to the severe harm one associates with a child's deprivation of his acclimatized life."

[17] It should be immediately apparent that the issue under the *Convention*, framed in New York State by *Mota* v. *Castillo*, has very little in common with the issue the Superior Court had to resolve on February 1, 2013. At most, the reality of a child's habitual residence, as a factual matter, is one of several elements which a court will take into account when resolving a custodial dispute.

[18] Two additional considerations are apposite here.

[19] First, not all federal circuits in the United States adopt the same characterization of "habitual residence" as the Second Circuit Court of Appeals. In deciding what location qualifies as an habitual residence, some courts emphasize the perspective of the child, as opposed to the perspective of the parents. Thus, in *Friedrich* v. *Friedrich*, the United States Court of Appeals for the Sixth Circuit (which consist of Kentucky, Ohio, Michigan and Tennessee) observed[8]: "To determine the habitual residence, the court must focus on the child, not on the parents, and examine past experience, not future intentions." This shift in perspective, which occurs from one state to the next, has been commented on in recent scholarship[9]. No uniform solution from the Supreme Court of the States appears in sight for the time being.

[20] Second, the interpretation of "habitual residence" favoured by Quebec courts differs noticeably from that which must prevail under the *Mota* v. *Castillo* formula. The leading case in Quebec is *Droit de la famille – 2454*, where Justice Chamberland, writing for the Court, stated[10]:

> Premièrement, aux yeux de la communauté internationale, la «résidence habituelle» doit être comprise comme une notion de pur fait; madame le professeur Pérez-Vera écrit, au paragraphe 66 de son rapport:

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7 In fact, *Mota* v. *Castillo* involved Mexico, not Canada.

8 983 F. 2d 1396 (1993), p. 1401.

9 See Jeff ATKINSON, "The Meaning of "Habitual Residence" under the Hague Convention on the Civil Aspects of International Child Abduction and the Hague Convention on the Protection of Children" (2010-2011), 63 *Oklahoma Law Review* 647.

10 The case is reported at [1996] R.J.Q. 2509 (C.A.). This passage, which appears at p. 2523 of the law report, is taken here from the actual minute of the judgment.

> 66 La deuxième question à examiner se réfère au droit choisi pour évaluer la validité initiale du titre invoqué. Nous ne nous arrêterons pas ici sur le concept de la résidence habituelle : il s'agit en effet d'une notion familière à la Conférence de La Haye, où elle est comprise comme une notion de pur fait, qui diffère notamment de celle de domicile.
>
> […]
>
> La réalité des enfants doit seule être prise en compte pour déterminer le lieu de leur « résidence habituelle »; à cet égard, le tribunal doit s'en tenir à l'expérience des enfants, les désirs, souhaits ou intentions de leurs parents ne comptant pas lorsqu'il s'agit de décider du lieu de leur « résidence habituelle » au moment de leur déplacement. Dans ce contexte, tout le débat entourant les intentions de monsieur et de madame quant à la suite des événements est sans importance dans un contexte où, comme en l'espèce, les deux parents avaient la garde de leurs enfants. La situation pourrait être différente si un seul des parents avait la garde; ses intentions auraient alors plus d'importance (*Re J (A minor)*, 87 L. Soc'y Gazette, Oct. 3, 1990). Mais je n'ai pas à en décider puisque ce n'est pas le cas dont nous sommes saisis.
>
> […]
>
> La sagesse de l'approche axée sur la réalité des enfants plutôt que sur les intentions des parents saute aux yeux dans un cas comme celui-ci; madame n'a pas l'intention de demeurer plus longtemps en Californie, monsieur oui. L'intention duquel des deux parents devrait prévaloir pour déterminer le lieu de la « résidence habituelle » des enfants ? L'approche axée sur la réalité que vivent les enfants permet d'éviter d'avoir à sonder les reins et les cœurs de parents.

A more recent illustration is found in *Droit de la famille – 3713*, where the Court reiterated this interpretation with reference to the *Act respecting the civil aspects of international and interprovincial child abduction*, and did so in these terms[11] :

> [23] WHEREAS the *Act* does not contain a definition of "habitual residence";
>
> [24] WHEREAS the concept is to be understood according to the ordinary and natural meaning of the words;
>
> [25] WHEREAS the determination of a child's habitual residence is usually regarded simply as a question of fact to be decided by reference to all the circumstances of any particular case (*Droit de la famille - 2454*, [1996] R.J.Q. 2509);

[11] [2000] R.D.F. 585 (C.A.). See also *S.S.-C.* c. *G.C.*, [2003] R.D.F. 845 (C.S.), confirmed by *G.C.* c. *S.S.-C.*, [2003] R.D.F. 796 (C.A.), *Droit de la famille – 08638*, [2008] R.D.F. 399 (C.S.) and *Droit de la famille – 112106*, 2011 QCCS 3612.

> [26] WHEREAS the place of habitual residence of a child will be determined by focusing on the reality of the child, not that of the parents;
>
> [27] WHEREAS an appreciable period of time - one of a duration necessary for the child to develop ties and to show signs of integration into his new environment - should elapse before a new habitual residence might be acquired;
>
> [28] WHEREAS the child should have a real and active connection with the place of his residence;
>
> [29] WHEREAS to be habitual the residence must have achieved a certain degree of continuity;
>
> [30] WHEREAS there is no minimum period necessary in order to establish the acquisition of a new habitual residence;

[21] While the judgment of the District Court follows, and understandably so, the guiding precedent in the Second Circuit, the courts of other circuits appear to consider the issue of habitual residence strictly from the perspective of the child, an approach which evidently has more affinities with that adopted by the courts in Quebec. In other words, had the initial matter in this case been decided according to the law applied in Quebec or, say, in Michigan, the children would very likely have stayed where they had been since August 2011. And in any event, the purpose of the habitual residence rule in the *Convention* is to determine the forum in which the issue of custody, should it arises, ought to be debated and decided. Judge Karas was well aware of the distinction when he said in his reasons "what I'm not deciding is the custody in question"[12]. This remark is consistent with an explicit provision of the Convention:

> Article 19
>
> A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

In no way, therefore, can the ultimate determination made by the District Court in the instant case materially curtail a proper examination of the issue of custody, whether at the interim or at the provisional stage of the case.

IV. Did the motions judge err in awarding custody to the respondent on a provisional basis?

[22] The appellant also alleged in his motion for leave to appeal that the motions judge committed, in the words of our colleague who granted leave to appeal, "des erreurs manifestes et déterminantes, de fait et de droit, auxquelles le jugement final ne

[12] Page 4 of the judgment transcript.

pourra remédier". So far as alleged errors of fact are concerned, the Court cannot re-open such matters in the absence of an egregious and irreparable error, compellingly demonstrated by the appellant. It is inappropriate simply to second-guess on appeal the findings of fact made by a motions judge when he or she issues, essentially on the basis of conflicting affidavits, an interim order for custody or support. At such an early stage in the often fluid context of a family law case, when the record is perforce incomplete, such issues are better settled *temporarily* in the Superior Court and they will very seldom be reconsidered in the Court of Appeal. So far as alleged errors of law are concerned, the burden is on the appellant to circumscribe as explicitly and persuasively as possible the specific defect in the court's reasoning. Vague or generic allegations, amounting to no more than a wan invitation to revisit from A to Z all legal and factual issues raised and debated below, do not meet the standard for review on appeal. The appellant in this instance fails to show why the Court should depart from what is its usual practice in these matters, and why his grounds of appeal should not be assessed in accordance with the usual standard of review.

[23] On the subject of provisional measures and safeguard orders concerning the custody of children during a matrimonial dispute, a standard treatise on family law in Quebec states what follows[13]:

> Il est possible de statuer sur la garde au stade provisoire (ou de sauvegarde) si le tribunal dispose d'une preuve complète (art. 501 C.c.Q.) et même d'ordonner un changement de garde, si un jugement avait déjà été prononcé sur la question et si l'intérêt de l'enfant le commande clairement. Toutefois, la grande majorité des décisions confirment la tendance au *statu quo* en matière de garde; les tribunaux tentent d'éviter à l'enfant une période d'instabilité ou de perturber la routine qui a déjà été établie à cette étape des procédures.
>
> Par ailleurs, une modification au *statu quo* n'est pas nécessairement synonyme d'instabilité si la preuve l'appuie.

After quoting a judgment which involved issues of shared custody and which is therefore of little or no relevance here, the same author continues in these terms[14]:

> Par ailleurs, nous croyons que l'ordonnance de sauvegarde n'est pas le moment le plus approprié pour modifier les modalités de garde dont les parties ont pu convenir et qui existent dans les faits depuis un certain temps, sauf si l'intérêt de l'enfant le commande. Il y a lieu généralement de s'en rapporter au *statu quo* et au meilleur intérêt de l'enfant, bref la prudence est de rigueur. Il est en effet essentiel de permettre à la Cour de bénéficier du meilleur éclairage et de toute la latitude possible lors de l'audience « au fond » et de ne pas créer, au stade

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13 Michel TÉTRAULT, *Droit de la famille- La procédure, la preuve et la déontologie*, vol.4, 4th ed., Cowansville, Éditions Yvon Blais, 2010, p. 89 (footnotes omitted).

14 *Ibid.*, p. 91.

> intérimaire, un nouveau *statu quo* qui pourrait cristalliser une situation qui n'est pas conforme au meilleur intérêt de l'enfant.

These passages present an accurate account of the current state of the law. In short, the court will maintain the *status quo*, unless the best interest of the child or children demands a different outcome. As can be seen from the foregoing comments, at the stage of awarding custody on a provisional basis, it is emphatically the case that the issues canvassed by the court will differ from the second part of the two-pronged test formulated in *Mota* v. *Castillo* and which is above in paragraph [15].

[24] The judge of the Superior Court here was faced with lengthy, repetitive and conflicting affidavits, unnecessarily belligerent in tone. He invited both parties to offer their own version of the relevant facts, which versions diverged significantly[15]. There was before him evidence which, though not univocal in nature, pointed to serious discord between the respondent and the appellant's family; consequently, the inferences he drew in paragraphs [16], [17] and [18] of his reasons are entirely rational. He well understood, and underscored, that his "role [was] not to address claims as to which party was at fault or which party was deceitful". Instead, as the law required him to do, he turned to the central issue of the best interest of the children.

[25] Addressing this question, he said that the following considerations were relevant:

a) the young age of the children;

b) before the breakdown of the marriage, the parties were already taking steps to move permanently to New York;

c) the mother was in New York with the children, since August 15, 2011, with the knowledge and the consent of the father;

d) the father agreed and paid for his older son to be enrolled in a school program in New York City;

e) the principal of that school lives near the mother and drives their older son to and from school;

f) the mother's mother (maternal grandmother in New York) lives with the mother and assists her with both children;

g) the mother put her career on hold after the birth of the second child in order to be with the children;

h) the youngest child is presently being weaned.

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[15] The judge did not observe, as did Judge Karas in the District Court, that the testimonial evidence "was at times exaggerated, at times disingenuous, and sorry to say, at times, outright false on certain matters" (page 4 of the judgment transcript). The fact remains, however, that the two versions heard by the motions judge in the Superior Court cannot both be true in every respect.

All these factors are relevant in this case and it was appropriate for the judge to lay emphasis on them.

[26] He then expressed his conclusions, the essence of which is contained in the following paragraphs:

> [24] The Court concludes that the dominant parental figure, having lived with and taken care of the children on a daily basis, since their birth, has been the mother.
>
> [25] These young children require the continuity of the structure already in place. It is clear, in this Court's view, that they need to be with their mother.
>
> [26] The mother presents all of the necessary qualities to take care of the children and to support their physical, intellectual, emotional and social development. The father must certainly have access to his children. They need him as well. However, to remove the children from the mother's custody, at this stage, is not in the best interest of the children.

Not only is there nothing defective in these conclusions, but at the interim stage in a case which will be heard again in a few months, these conclusions were almost self-evident. They may not find favour with the appellant, who naturally would have preferred to have the custody of his sons, but it is obvious that that alone does not make these conclusions reversible on appeal.

[27] For these reasons, I would dismiss the appeal, without cost considering the circumstances.

[28] I would also dismiss the appellant's motion to introduce in the record of the appeal, and as new evidence, the judgment of the 2nd Circuit Court of Appeals of May 14th, 2013, which confirmed the judgment of the District Court rendered on December 17th, 2012. Such evidence has no relevance to the issues raised in the present appeal.

YVES-MARIE MORISSETTE, J.A.