Citation: Garcia Perez v. Polet, 2014 MBCA 82 Date: 20140910
Docket: AF 14-30-08222

IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

MARCO ANTONIO GARCIA PEREZ	***L. I. Z. Pinksy*** *and* ***K. M. Clarke*** *for the Appellant*
(Applicant) Respondent	***E. G. Rice*** *for the Respondent M. A. Garcia Perez*
- and -	
JEAN POLET and BERT POLET	***N. B. Fishman*** *for the Respondents J. Polet and B. Polet*
(Respondents) Respondents	***J. V. Sigurdson*** *for Central Authority for the Province of Manitoba*
- and -	*Chambers motion heard:* ***August 7, 2014***
MELINDA JOY POLET	*Decision pronounced:* ***August 11, 2014***
(Respondent) Appellant	*Written reasons:* ***September 10, 2014***

STEEL J.A.

[1] This is a motion for an order staying the enforcement of the decision of the motion judge pronounced July 17, 2014, ordering that the child of the marriage be returned to her habitual residence and to the

See 2014 MBQB 151

residence of her father pursuant to the provisions of the Hague Conference on Private International Law, *Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, 28, <http://www.hcch.net/> (Hague Convention).

[2] The motion for the stay is brought before this court on an urgent basis after it was refused by the motion judge. The mother asks that short leave be granted and that the time for service and filing be abridged.

[3] With respect to the substance of the appeal itself, the mother argues that the motion judge erred on two grounds. First, the motion judge did not allow the child's voice to be heard and second, she held that serious emotional or psychological harm or an intolerable situation would not be created for the child if she were sent back to Hawaii without her mother, her primary caregiver.

[4] The motion for a stay is dismissed for the reasons that follow.

Facts

[5] The mother and father were married in Canada in 2005. The parties separated in November 2006 when was five months old and the parents were living in Winnipeg. The father was a Mexican citizen and as a result of the divorce granted in 2008, he was required to leave Canada. The parents consented to a final order of joint custody where the mother had primary care of with the father having periods of care.

[6] lived with her mother in Winnipeg until she was approximately four years old, at which time she moved to Hawaii with her

mother. The father moved to Hawaii in October 2011, subsequently married, established a family and applied for a U.S. Green Card. Both mother and father have now remarried American citizens.

[7] [redacted] was taken back to Winnipeg by her maternal grandparents in March 2013. The mother returned to Winnipeg shortly thereafter in April 2013. The father commenced an application pursuant to the Hague Convention for the return of [redacted] to Hawaii on March 28, 2013, naming the maternal grandparents as respondents. The mother was subsequently added as a respondent pursuant to the order of the court in July 2014.

[8] On June 28, 2013, the court below ordered that [redacted] be returned to Hawaii on July 5, 2013. U.S. Department of Homeland Security denied both the mother and [redacted] entry into the United States because of their previously overstayed visitor visas.

[9] On July 10, 2014, the court confirmed its June 28, 2013 order by which it ordered that [redacted] be returned to Hawaii. The motion judge held that the child, at eight years of age, was too young to have her views considered in this matter and further held that it would not cause [redacted] serious emotional harm to be returned to her father, even though it was unknown whether the mother could accompany her or when the mother would obtain her own visa to return to her husband and family in Hawaii.

[10] During the year between the first order of the court in 2013 and the second order in 2014, both the mother's new husband and the father's new wife filed immigrant visa (Green Card) applications on behalf of [redacted] and on behalf of the mother and father, respectively. The father has now

received his Green Card. The mother has not. She is not permitted to return to the United States without this visa in place. She is working with an immigration lawyer in the United States to expedite the process. Her interview took place on August 4, 2014, but it is not known exactly when this visa will be granted. [redacted] interview took place at the Consulate General of the United States in Montreal, Quebec on July 31, 2014.

[11] In summary, a number of orders had to be made in this case because the immigration status of both of the parents and that of the child was in flux. An important fact to be considered is that when the child was removed from Hawaii, the mother was her primary caregiver, but the father was exercising periods of care and control. It is agreed by all parties that at the time of her removal, Hawaii was the child's habitual residence. The motion judge found as a fact that she was removed from that habitual residence by her maternal grandparents wrongfully because they wished to prevent the child from being interviewed by child protective services. She also found as a fact that as of July 2013, it would not cause the child grave harm to be returned to Hawaii and that nothing occurred in the year since that order to justify its rescission, suspension or variation.

[12] The question for me in this motion is whether the mother has a reasonably arguable case for a stay of the enforcement of that decision.

Criteria for a Stay of Proceedings

[13] The law with respect to a stay of proceedings pending appeal is not in dispute. The factors to be considered on a request for a stay are set out in the seminal cases of *RJR - MacDonald Inc. v. Canada (Attorney General)*,

[1994] 1 S.C.R. 311; and *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, and were confirmed in the Manitoba Court of Appeal decision of *Leis v. Leis*, 2011 MBCA 109, 275 Man.R. (2d) 55.

[14] A party seeking a stay of proceedings pending appeal must satisfy the court of three things:

1. that there is a serious question to be argued on appeal,
2. that the applicant would suffer irreparable harm if the stay is refused, and
3. that the balance of convenience favours the stay. In other words, who would suffer greater harm from the granting or refusal of the stay?

(See *Leis* at para. 3.)

[15] Within those criteria, when dealing with matters in which a child is central to the dispute, the question is not only whether the applicant would suffer irreparable harm if the stay was refused, but the question is widened to consider the best interests of the child involved in the dispute.

Is there a serious question to be tried?

[16] At this stage, the mother does not have to prove her case on a balance of probabilities. She merely has to show the court that she has a reasonable prospect of success. On this first criterion, the mother argues that the motion judge erred in the application of Art. 13 of the Hague Convention.

[17] In her reasons for decision in 2013, the motion judge found as a fact that the child was wrongfully removed from Hawaii and brought to Manitoba by her maternal grandparents in March 2013, in contravention of the father's rights. The mother came to Winnipeg some weeks later.

[18] The motion judge also noted that at the 2013 hearing, the grandparents conceded that Hawaii was the child's habitual residence, that the father was exercising rights of custody and the removal was wrongful. She then proceeded to analyze whether, pursuant to Art. 13*b)* of the Hague Convention, despite the facts conceded by the grandparents, the return of the child to Hawaii was not warranted because it would expose her to physical or psychological harm or otherwise place her in an intolerable situation.

[19] The motion judge carefully considered the law and the facts that existed at the time and held that such a grave risk did not exist. The order was not appealed and it stands. Therefore, I rely on those findings of fact where necessary.

[20] In the 2014 order, that argument was raised again in the context of what has transpired in the intervening year. The court acquiesced in the mother's request that the court review its decision to send [redacted] back to Hawaii and granted the mother's request to file material.

[21] The only reason to review the court's decision of 2013 would be to ask whether the events, which caused a delay in the execution of the 2013 order, created a situation which would mean a return of the child to Hawaii, now or in the near future, would create a grave risk that the return would expose her to physical or psychological harm or would otherwise place her

in an intolerable situation. The most significant new fact is that the mother's immigration status is not presently known and thus, the child may be separated from her primary caregiver until there is a custody determination in Hawaii.

[22] The mother argues that if [redacted] is sent back to Hawaii without her, the child faces the risk of permanent and irreparable emotional and psychological harm, or of being in a situation that would be intolerable to her because she is [redacted] primary caregiver. [redacted] and her mother share a close relationship and the mother has always been her primary caregiver. This, it is submitted, is corroborated by the report of Nicole Kraft, the child's psychologist.

[23] The mother argues further that it is not known when, if ever, the mother will be allowed by American immigration authorities to return to Hawaii, thus the severance of the child-parent bond might be permanent.

[24] The relevant portions of Art. 13 of the Hague Convention state:

> 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.
>
> 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.
> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

[25] The test contemplated in Art. 13*b)* of the Hague Convention is a stringent one. The onus of proof is on the mother. The harm contemplated must be more than an ordinary risk or something greater than would normally be expected on taking a child away from one parent and passing her to another. As Little J. pointed out in *Mahler v. Mahler* (1999), 143 Man.R. (2d) 56 (Q.B.), courts are frequently faced with the fact that a change in primary caregiving might occur as a result of an order returning a child to the former jurisdiction.

[26] La Forest J. pointed out in *Thomson v. Thomson*, [1994] 3 S.C.R. 551 (at p. 596):

> It has been generally accepted that the Convention mandates a more stringent test than that advanced by the appellant. In brief, although the word "grave" modifies "risk" and not "harm", this must be read in conjunction with the clause "or otherwise place the child in an intolerable situation". The use of the word "otherwise" points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of Article 13(b) is harm to a degree that also amounts to an intolerable situation. ….

[27] The court below considered the law in detail again in the 2014 hearing. Based on her review, the motion judge concluded that (at para. 41):

> … [E]ven where there may be a change in primary care which

> might result in some sort of ensuing psychological harm resulting from the severance of the bond with the primary caregiver, children, in a variety of cases, have been ordered returned to the place of their habitual residence.

She then applied the law to the facts and concluded again that while there may be some emotional upset, the grave risk of harm test had not been established. That finding of emotional upset is not similar to the level of terror, anguish and panic suffered by the four-year-old child in *A.R. v. S.K.* (1998), 58 O.T.C. 184 (Gen. Div.), as argued by the mother.

[28] The court did consider the report of the counsellor. I note counsel's argument that the court may have misinterpreted the fact that the child was not taken to see a counsellor specifically because these court proceedings were upcoming. She was seeing a different counsellor before. The counsellor who wrote the report based her opinion on three visits with [redacted] The court specifically considered the counsellor's comments, including her comments about the child's bond with her mother and the risk of psychological harm. Even if she did err in considering the counselling of recent origin, it is a minor error within all the other considerations, not a palpable and overriding error.

Child's Wishes

[29] Children should not be placed in the position of choosing between parents unless they have "attained an age and degree of maturity at which it is appropriate to take account of its views" (Art. 13*b)* of the Hague Convention). Indeed, to do so might be extremely unsettling or damaging to a young child. The child in this case is eight years old. The court canvassed

the issue of considering the views of the child and determined that neither Hague Convention case law, nor the protocols of Family Conciliation Services, nor Art. 12 of the United Nations Human Rights Office of the High Commissioner for Human Rights, *Convention on the Rights of the Child*, GA Res 44/25, UNCRC, 1990, required her to canvass the views of a child as young as eight. The cases and protocols relied on by the mother all deal with children over ten years of age. The case of *R.M. v. J.S.*, 2013 ABCA 441, 566 A.R. 230, dealt with a ten-year-old child. In finding that there was insufficient evidence of the child's maturity, the court comments (at para. 25):

> ….
>
> It would seem to me that, if one were to even consider the views of a child who was as young as age ten in the context of an Article 13 argument, the level of maturity would have to be quite extraordinary. ….

[30] This was a discretionary decision on the part of the motion judge. She considered the law carefully and explained her rationale for not interviewing the child and asking her wishes. She held that [redacted] was not of a sufficient age and maturity such that her wishes ought to be considered.

[31] In any event, taking account of a child's wishes does not mean that those views are always determinative. They do not represent an "*automatic veto on the question of the return to his or her home state*" (*R.M.* at para. 31).

[32] In the instant case, I have not been convinced that the mother has

met the first element of the stay test. The motion judge made firm findings of fact and assessed credibility. These findings call for deference. Her conclusion that "the mother has not met the onus of convincing me that separating [redacted] from her mother for an unknown, hopefully short, amount of time pending the mother's visa application carries with it such a grave risk of psychological harm or will place the child in such an intolerable situation that the removal order should be rescinded" (at para. 55), was a decision well supported by the law and facts, and does not raise an arguable case that has a reasonable chance of success.

Irreparable Harm

[33] The motion judge found that [redacted] and her father do have a relationship. The court accepted the father's evidence that when he moved to Hawaii, he saw the child frequently and, before her removal, had almost a full six-week period of care. Again, in the 2014 reasons, the court repeated that, "From the time he moved to Hawaii, he saw the child often and sometimes for extended periods of time. …. Despite the order fixing the father's time with the child, he saw her on a much more flexible arrangement with the mother" (at para. 6).

[34] The court further found that the father and child have maintained some contact throughout the period of their separation. Indeed, they recently have enjoyed close concentrated time together along with her stepmother and baby brother. [redacted] will be returning to a home with three stepsiblings, her half-brother, father and stepmother with whom she lived for some periods of time before her abduction.

[35] In contrast, the court made certain findings of fact with respect to the relationship between the mother and child. First, that the child spends weekdays with her grandparents and only the weekends with her mother; that the mother chose to get married in [redacted] absence and delayed following [redacted] to Manitoba for some six or seven weeks. As well, that the mother and child appear to have lived in at least six different places in the last year and the father was not always informed of their location. Most particularly, the court found as a fact that the mother has been inconsistent regarding her intent to return to Hawaii.

[36] Finally, [redacted] will be able to have the outstanding sexual abuse issues properly addressed by professionals in Hawaii without further delay. In the 2013 decision which has not been appealed, the court held:

> … I find as a fact, one, the father was not told or consulted by the mother, her parents, or her sister about the move. The child was removed from Hawaii March 7th, 2013, with the stated reason of mother, grandmother, grandfather, and aunt relating to their desire to remove her from child protection services or Parents Inc. purview or investigation. I find as a fact that father diligently pursued his Hague Convention remedies and I further find that the grandparents dissembled to the police who made some inquiries as to whether this was a visit or a permanent stay.
>
> .....
>
> All of grandmother, grandfather, and mother clearly admit their motivation for the move was to thwart an independent investigation into whether or not this little girl had had something untoward of a sexual nature happen to her. ….

[37] It is important to remember that this is not a custody determination. It will be up to the Hawaiian court to determine custody. The child is being

returned to her habitual residence (as conceded by her grandparents and mother at the return proceeding). It is also the place where most of the witnesses in an eventual custody trial presently reside.

Balance of Convenience

[38] The mother argues that the outcome of her visa application will be known in the next few weeks or months. Moreover, her appeal could be heard in the next few months. Given the amount of time that has already passed, the inconvenience to the father of staying the enforcement provisions of the order is minimal. On the other hand, if the order is not stayed, the child will be returned without her primary caregiver and the appeal will be rendered nugatory.

[39] The purpose of the Hague Convention is to ensure the prompt return of the child. The father filed an application pursuant to the Hague Convention shortly after the child was taken to Winnipeg by her grandparents. After the child was ordered returned, she and her mother were refused entry into the United States because of the mother's actions. The mother says that since that time she has been expeditiously pursuing rectification of her immigration status and her immigration lawyer confirms that. The court found as a fact that her sincerity and commitment to the process was to be questioned.

[40] Until April 30, 2014, the father was not legally able to travel to Canada. He has a wife and four children, in addition to [redacted] and is unable to afford to visit [redacted] in Canada. The mother and her family are well able to finance travel and communication to stay connected with

[redacted] if she moves to Hawaii before the mother. Given the finding that the child will not suffer grave harm if returned without her primary caregiver, the balance of convenience lies with the father.

A Couple of Other Points

Parens Patriae jurisdiction of the court

[41] In her notice of motion and brief, the mother relies on the *parens patriae* jurisdiction of the court for some of the relief requested. As indicated by this court in *Children's Advocate (Man.) v. Child and Family Services of Western Manitoba et al.*, 2005 MBCA 11, 192 Man.R. (2d) 23 (at para. 41):

> It is important to remember that the exercise of the parens patriae jurisdiction by the court is not the exercise of the power of judicial override. By judicial override, I mean the power to disregard legislation, if the need arises in matters involving children. Parens patriae is generally viewed as being part of the inherent power of the court. Therefore, just as inherent power cannot be exercised in contravention of any statutory provision … neither can parens patriae. In other words, parens patriae does not include a general reviewing power of the court. ….

[42] *Parens patriae* jurisdiction of the court is ousted when the legislation assumes this jurisdiction. The court only retains jurisdiction to intervene on behalf of children where the state has not legislated where there is a gap in the legislation. In this case, Canada is a signatory to the Hague Convention and Manitoba, adopting that the Hague Convention has agreed in an international forum that we will abide by its provisions. The court cannot intervene in contravention of legislation on point.

Affidavits

[43] Counsel for the Central Authority for the Province of Manitoba filed an affidavit from Wendy Post, Crown Counsel, employed by the Family Law Branch of the Manitoba Department of Justice. Ms Post is not counsel in this matter. Rather, Janet Sigurdson, counsel in the same department, is the contact person for the purposes of the Central Authority for the Province of Manitoba for the Permanent Bureau at The Hague. She is the counsel who has appeared in court on these matters. However, because Ms Sigurdson was out of the country, Ms Post made the arrangements for and attended at the reunification of [redacted] with her father in Winnipeg. She filed an affidavit as to the events that transpired at that meeting.

[44] Counsel for the mother argued that I should not consider the affidavit of Wendy Post, or those portions of the affidavit of the father, that describe the reunion of the child and the father in Winnipeg. Counsel argues that the filing of those affidavits was so late that the mother should be given an opportunity to respond and she has not had that opportunity.

[45] It should be remembered that the mother filed the affidavit of Evelyn Neufeld on August 1st and her brief on August 5th, for a hearing date of August 7th. The affidavit of the father was filed August 5th and the affidavit of Wendy Post was filed the next day on August 6th. In the mother's motion, she asks for relief on an urgent basis and asks that the time for filing and service be abridged. Given that request, which I have granted, I do not see how the mother can ask for an adjournment to allow the filing of

material in response. She has urged upon us the emergent nature of this motion and she cannot have it both ways. However, I do take counsel's point that the comments in the father's affidavit represent only one point of view and I have weighed those comments accordingly.

[46] Second, with respect to the affidavit of Wendy Post, it is submitted that she is counsel in this matter and the *Code of Professional Conduct* (the *Code*) provides that a lawyer who appears as advocate must not submit her own affidavit evidence before the court unless the matter is purely formal or uncontroverted. Many of the facts described in Ms Post's affidavit are in dispute. While the court is not bound by the *Code*, the court does have the inherent jurisdiction to remove a lawyer from the record because of a conflict of interest or where the advocate has a common interest with a witness. See *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 at 1245, and *Oliver, Derksen, Arkin v. Fulmyk* (1995), 126 D.L.R. (4th) 123 at 125-26.

[47] Ms Post has not appeared as counsel on this matter. Nonetheless, counsel for the mother argues that she is in the same office and should not consequently have filed an affidavit in the matter. While the cases do indicate that the prohibition can extend to members of the same firm, the situations in which that extension will occur are not clear. In the *Oliver* case, Twaddle J.A. opined that (at p. 125):

> …. This may occur where the witness is a partner or associate of the law firm to which the advocate belongs and the other lawyer's evidence concerns a matter arising from the law firm's practice. ….

[48] However, I do not find it necessary to decide this issue in order to reach a decision in this case. I have not considered the affidavit, but I make no decision on the point of law as argued by counsel for the mother.

[49] Next, the mother questioned whether this case should even have been brought pursuant to the Hague Convention in light of the fact that the final order in Manitoba, which provides the mother with primary care, was registered in Hawaii and no other motion to vary has been made by the father in Hawaii, Manitoba or elsewhere.

[50] The final consent order was made in 2008 when both parties were resident in Manitoba. Much has changed since then. Both the mother and father have claimed their habitual residences in Hawaii and have remarried American citizens. I do not fault the father for not bringing a myriad of legal applications, especially given his financial situation. What is important is that the father was exercising access to the child in Hawaii, which was the habitual residence of the child, and that he promptly brought a Hague Convention application. Courts at all times, but most especially in family matters, should focus on the substance and not the form.

[51] Lastly, the mother takes issue with para. 6.11 in the 2013 return order that provides cascading options for [redacted] return depending upon the occurrence of a number of events. These options range from the least coercive to more coercive. So, for example, if the grandparents do not return [redacted] or cause her to be returned to Hawaii voluntarily, she will be delivered to the father or his agent and returned to Hawaii. This approach is completely consistent with best practice under the Hague Conference on

Private International Law, *Guide to Good Practice under Hague Convention on the Civil Aspects of International Child Abduction, Part IV – Enforcement*, 25 October 1980, at 23-24 <http://www.hcch.net/>.

Conclusion

[52] In these cases, the underlying purpose of the Hague Convention must always be kept in mind. This is not a child custody case. Instead, the purpose is to protect children from the harmful effects of their wrongful removal or retention and to ensure their prompt return to the state of their habitual residence. It is that jurisdiction that will decide the issue of custody.

[53] The process is meant to be an expeditious one. I agree that, for a number of reasons, this process was not as expeditious as one would have hoped. Nonetheless, so long as the child is not harmed, any further delay in returning this child to her habitual residence undermines the whole spirit of the Hague Convention and encourages further non-compliance.

[54] The motion for a stay is refused. At the delivery of these reasons orally on August 11, 2014, it was agreed that if the father wished to make a written submission as to costs, he should do so within two weeks from August 11, 2014. Having received no submissions, this motion for a stay of proceeding is refused without costs.

_____ J.A.