REDACTED VERSION
QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2017 SKQB 179**

Date: **2017 06 20**
Docket: FLD 169 of 2017
Judicial Centre: Saskatoon

BETWEEN:

B.S.P.

PETITIONER

- and -

C.M.

RESPONDENT

Counsel:

Anna C. Singer	for the petitioner
Beau J. Atkins	for the respondent

FIAT — DUFOUR J.
June 20, 2017

NOTE: Real names will not be used throughout this judgment to protect the identity of the children.

Introduction

[1] Four children are the subject of this application:

Daryl, born December 19, 2002
Gwen, born October 17, 2009
Stephanie, born August 7, 2011
Gretchen, born March 5, 2014.

[2] On September 29, 2016, the mother, C.M. [Cecile], left the family home in North Dakota and brought the children to Saskatchewan. B.S.P. [Bill], the biological father of the three youngest children, has brought an application under the *Hague Convention on the Civil Aspects of International Child Abduction* (which was incorporated into the law of Saskatchewan by *The International Child Abduction Act, 1996*, SS 1996, c I-10.11) to have all four children returned to North Dakota. I will refer to the "*Hague Convention*" throughout this decision.

[3] My role here is limited. This is not a custody and access dispute to determine whether it is in the best interests of the children to be with one party or the other. Subject to a very few narrow exceptions, none of which are applicable here, my sole mandate is to determine whether the children were wrongfully removed from North Dakota. If I find that they were, I am required by the *Hague Convention* to order that they be returned to North Dakota and leave it for the courts there to determine that which is in the best interests of the children.

Saskatchewan Proceedings

[4] Bill filed a *Hague Convention* application and affidavit in support thereof on May 12, 2017 with a stipulated hearing date of May 26. Cecile appeared on that date and was granted an adjournment to June 9 to allow her further time to retain and instruct counsel and to file materials. The hearing was again adjourned on June 7, this time to June 14, again at Cecile's request for the same reason.

[5] Cecile had not filed affidavit material by June 14, but was present in the court and represented by counsel. Bill had travelled from North Dakota to Saskatoon and was present as well. As both parties were present and counsel represented that they were prepared to conduct a *viva voce* hearing, I allowed that both parties could testify and that is what they did.

[6] At the conclusion of the hearing, I indicated to the parties that I would order that the three youngest children be returned to North Dakota and that I would give fuller reasons later. These are those reasons.

Facts

[7] Until Cecile left for Saskatchewan with the children, the parties had lived together for 8 years. They are the biological parents of Gwen, Stephanie and Gretchen. Bill is not Daryl's biological father. He testified that he stood in the place of a parent for 8 years and, a few weeks before Cecile removed the children from North Dakota, he formally had the biological father's name removed from Daryl's birth certificate and replaced with his own name as father. The Indian name bestowed on Daryl by Bill is, "Changes the Wind."

[8] Until late September 2016, the parties and the four children lived together in a town on the Fort Berthold Reservation in North Dakota. Bill, Gwen, Stephanie and Gretchen are members of the Fort Berthold Reservation. Cecile and Daryl are not.

[9] Without warning, on September 29, 2016, Cecile left North Dakota with the children. She slipped away with the children while Bill was at work, leaving no note or any indication where they were going. Bill used the On-Star GPS in the

vehicle Cecile was driving to track her and the children to a small town in Saskatchewan.

[10] Cecile took the children to Punnichy, Saskatchewan and enrolled them in school there. She later moved to Saskatoon with the children and enrolled them in school.

Court Proceedings in North Dakota

[11] Bill brought applications in the "District Court, Three Affiliated Tribes, Fort Berthold District Court" (to which I will refer as "Tribal District Court") for orders that Cecile bring the children back and that he have custody of them. Following is a summary of that which transpired as a result of his applications:

October 28, 2016

[12] On an *ex parte* application brought by Bill, Judge Mary Seaworth, a Judge of the Tribal District Court, held:

> 1. That the Court has jurisdiction over the parties and subject matter of this action.
> 2. The Fort Berthold Reservation is the "Home Jurisdiction" of this action relating to the minor child [sic] pursuant to the Uniform Custody and Jurisdiction Act.
> 3. Custody determinations are made in the Best Interests of the Children.
> 4. A situation exists that warrants the courts [sic] intervention and issuance of an ex parte order to return the children to this jurisdiction.

[13] Judge Seaworth ordered that the "physical custody of the minor children … shall be with [Bill] pending further hearing."

November 3, 2016

[14] Judge Seaworth ordered that the children be "produced for the hearing to be held on November 15, 2016." Cecile was served with the order.

November 15, 2016

[15] Both Bill and Cecile were present with their lawyers. Cecile did not bring the children as previously ordered and was found to be in contempt of court. She was allowed by Judge Gunderson to purge the contempt by delivering the children into the custody of Bill by November 24, 2016. It does not appear from the decision as though there was any evidence adduced in respect of whether or not Bill should have custody – it appears as though the order (issued on November 18) was merely a confirmation of the October 28 *ex parte* order.

December 13, 2016

[16] Neither Cecile nor her lawyer attended. The children had not been delivered to Bill as ordered and were not at the hearing.

[17] Bill gave sworn testimony at the hearing and Judge Seaworth found the following as facts: (1) Bill is an enrolled member of the Three Affiliated Tribes; (2) Cecile is not an enrolled member of the Tribe and has lived with Bill for the last 8 years; (3) Bill and Cecile are the "legal and/or biological parents" of all four children; (4) the Fort Berthold Reservation is the only home that the minor children have known.

[18] Based on Bill's testimony, Judge Seaworth again found that the court had jurisdiction over the parties and the children and that it was in the children's best

interests to be in the custody of Bill. She ordered (on December 16) that Bill have "interim physical/primary residential responsibility" of the children and that this allows him to, "make legal, educational, medical, and residential decisions" concerning the children.

February 21, 2017

[19] Neither Cecile nor her lawyer were present and the children were not there. Bill gave sworn testimony. Judge Seaworth made the same findings of fact she had previously made and on February 27 ordered that Bill have "sole physical custody/primary residential responsibility" of the children.

The Issue

[20] The question before me is whether the removal of the children from North Dakota is wrongful within the meaning of Article 3 of the *Hague Convention*. None of the exceptions to the mandatory return of the children, if the removal was wrongful, are applicable and were not relied upon.

Discussion

[21] Article 3 of the *Hague Convention* provides that the removal or retention of a child is wrongful where:

> a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

> The rights of custody mentioned in 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.

[22] The determination as to whether the children were wrongfully removed from North Dakota involves a multi-step process to determine: (a) the children's place of habitual residence; (b) whether Bill had "rights of custody" that were breached when Cecile took the children to Canada; and (c) whether Bill was actually exercising "rights of custody" when the children were taken to Canada.

[23] The parties agree that the children's place of habitual residence is North Dakota. Further, Cecile's counsel concedes if Bill had custody rights in respect of each of the children, he was exercising them at the time the children were removed from North Dakota.

[24] Thus, the only issue to be resolved is whether Bill had rights of custody as defined in the *Hague Convention* at the time the children were taken to Canada.

Did Bill have custody rights in respect of the children?

[25] The *Hague Convention* defines "rights of custody" as, "... rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence" (Article 5). It is the law of the place of habitual residence that determines whether Bill is imbued with those incidents of custody.

[26] It might seem obvious that Bill would have custody rights because the children were living with the parties as a family unit at the time Cecile took them out of North Dakota. That which seems obvious, however, is not always accurate. Laws differ from state to state, especially when the parents of the children are not married.

In *J.M.H. v A.S.*, 2010 NBQB 235, 88 RFL (6th) 376, for example, the court sought to determine rights of custody in the face of a Florida law that states, "[t]he mother of a child born out of wedlock is the natural guardian of the child and is entitled to primary residential care and custody of the child unless a court of competent jurisdiction enters an order stating otherwise."

[27] It is never easy for a Canadian court to interpret the laws of another country or state but divining the incidents of Bill's rights of custody in respect of these children at the time they were removed from North Dakota is even more involved than usual:

- the children resided with the parties in North Dakota, which has laws in respect of custody of children: the *North Dakota Century Code* [*State Code*];
- within North Dakota, the children resided on the Fort Berthold Reservation which is a part of the Three Affiliated Tribes which has also promulgated laws dealing with child custody: the *Code of Laws of the Three Affiliated Tribes* [*Tribal Code*];
- Bill and the three children of which he is the biological father are members of the Fort Berthold Reservation. Cecile and Daryl are not members.

[28] Canadian courts have sought to divine the true nature of the "custody" rights in foreign jurisdictions in several ways: some, such as in *J.T. v S.L.T.*, 2016 ONCJ 83, 75 RFL (7th) 476 [*J.T.*], have engaged in something of a self-directed analysis of the applicable legislation and some have relied on the opinions of legal experts (see: *M.C.S. v H.V.L.*, 2011 SKQB 60, 369 Sask R 150. The decisions of courts in the home jurisdiction on the matter at bar are sometimes of assistance. I will

briefly set out my markedly unsuccessful attempts to find guidance through these sources.

(i) Decisions of the Fort Berthold District Court

[29] The decisions that I summarized earlier are "chasing orders" – made after the children were removed from North Dakota. As my mandate is to determine Bill's incidents of custody at the time the children were removed from North Dakota, as opposed to incidents of custody ordered after the removal, the chasing orders are of limited relevance. In *Thomson v Thomson*, [1994] 3 SCR 551 (QL) [*Thomson*], the Supreme Court held, at para 73, "[t]here is nothing in the Convention requiring the recognition of an *ex post facto* custody order of foreign jurisdictions." As such, the post-removal orders decisions awarding Bill "sole physical custody/primary residential responsibility" of the children are not binding (nor, in most respects, relevant).

(ii) Legal opinion

[30] Bill filed an affidavit of El Marie Conklin, an attorney licenced by both the Three Affiliated Tribes and the State of North Dakota. She deposed that she has knowledge of the laws and Codes of the Three Affiliated Tribes on the Fort Berthold Reservation and those of the State of North Dakota. She proffered the following opinion:

> 4. Regardless of whether the Hague Convention applies the Three Affiliated Tribes Tribal Code (*place where [Bill] is domiciled*) or North Dakota State Law (*resident of the state*) in order to determine whether [Bill] had "rights to the children" prior to removal, the language of both bodies of law are identical. Both section 5-25-18 of Chapter 25 of Title V of the Code of Laws of the Three Affiliated Tribes and section 14-09-05 of Chapter 9 of Title 14 of the North Dakota Century Code provide as follows:

> "When maternity and paternity of an illegitimate child are positively established, the custody rights must be equal as between mother and father and must serve the best interests of the child."
>
> 5. While it is true that [Bill] and the mother of the above-named children were not married at the time their children were born, paternity was positively established by the acknowledgement of the parents, years prior to removal, that [Bill] is the children's father and his name is on each child's birth certificate.
>
> 6. Since [Bill's] paternity was positively established through each of the … children's birth certificates, he therefore has established equal rights to his children "*prior*" to the time of their removal.

[31] With no disrespect to Ms. Conklin, I will not accord "expert opinion" status to her averments because she has represented Bill in his North Dakota custody proceedings. Even though Ms. Conklin is not appearing on this *Hague Convention* application, she is Bill's advocate in a similar proceeding. I am not suggesting for a moment that Ms. Conklin would tailor her opinion to her client's interests but the appearance of conflict must be avoided.

[32] I will treat Ms. Conklin's affidavit as a representation of counsel deserving of consideration but not deference.

(iii) The Legislation

The *State Code*

[33] Title 14, Chapter 9 (Parent and Child) of the *State Code* contains provisions that enable the court to make enforceable custody orders but, insofar as I can determine, does not attribute or define any rights that may exist *before* there is a

court order. Thus, the *State Code* does not assist me in determining the custody rights, if any, Bill had at the time the children were removed from North Dakota.

[34] Ms. Conklin represents that section 14-09-05 of Chapter 9 of Title 14 of the *State Code* provides that "custody rights must be equal as between mother and father" but my research indicates that section of the *State Code* was repealed in 2009 and I can find nothing similar that replaced it.

The *Tribal Code*

[35] That custody rights between a mother and father "must be equal" is contained section 5-25-18 of Chapter 25 of Title V of the *Tribal Code*. Although that provision is much more general than one would wish when faced with the mandate to determine whether the father had a right to determine the place of residency of the children, it provides at least some guidance.

Which Code Governs?

[36] The orders granting Bill custody of the children were issued by the Tribal District Court. I will not assume, however, that means the *Tribal Code* is paramount. The Tribal District Court orders reference a portion of the *State Code* as the source of its jurisdiction to make the custody orders it made.

[37] Neither counsel provided me with case authorities or statutory provisions that might guide me through this jurisdictional morass. It is quite beyond my reach to attempt to determine whether the *State Code* or the *Tribal Code* governs the rights of custody in the matter before me or the incidents of custody that may be vested in Bill.

[38] I am now no closer to determining the nature of Bill's rights of custody immediately before the children were removed from North Dakota.

Proceeding in the absence of the proved law

[39] The onus is on Bill to establish that his rights of custody were breached when the children were brought to Saskatchewan. My inability to identify those rights at this hearing cannot end my inquiry: four children were relocated from the United States to Canada and a decision as to whether they ought to be returned must be made.

[40] As I see it, I am left with only two options. The first is provided by Article 15 of the *Hague Convention*:

> The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

[41] Seeking an opinion from North Dakota authorities would be of assistance. It would also result in delay. That is a problem. Delay is anathema to the *Hague Convention*. Article 11 states that judicial authorities "shall act expeditiously in proceedings for the return of children" and allows that if this court has not rendered a decision within six weeks of the filing of the application, the North Dakota Central Authority has "the right to request a statement of the reasons for the delay".

[42] The hearing of this matter occurred nearly 5 weeks after Bill brought this *Hague Convention* Application. It is very nearly summer, a time in which counsel's and judges' schedules often do not mesh and court facilities are relatively

scarce. Butting up against the end of summer is the beginning of the fall school term – a decision must be made well before then. Time is of some essence.

[43] The second option is to apply the private international law rule that if foreign law is not proved, it is assumed to be the same as the *lex fori* unless proven otherwise (see: *Chan v Chow*, 2001 BCCA 276, 15 RFL (5th) 274 [*Chan*]; *Unger v Unger*, 2016 ONSC 4258, 88 RFL (7th) 64; *Innes v Innes*, 2005 BCSC 771; and *J.T.* In *Chan*, the court was faced with the same issue as here – determining whether the applicant had rights of custody as defined in Article 5 of the *Hague Convention*. The laws of the place of habitual residence, Hong Kong, were not before the chambers judge or the Court of Appeal. The Court of Appeal held at para. 50:

> 50 … The laws of Hong Kong were not proven to be different than the laws of British Columbia in this case. Hence, the court must interpret the question of whether Ms. Chan's "rights of custody" were breached under Hong Kong law by considering the meaning of "right of custody" in the Convention and by applying the law of British Columbia in the absence of Hong Kong law.

[44] Bill has not proved the applicable foreign law but neither has Cecile brought any law or argument to my attention that would indicate that the custody laws of North Dakota and/or the Three Affiliated Tribes are different from the laws of Saskatchewan. It is not necessary, in my view, to go so far as to place an onus on Cecile to prove that the custody laws in North Dakota and/or the Three Affiliated Tribes are different than Saskatchewan custody laws but it is not necessary in this case to determine that issue.

[45] Bill's counsel argued that the delay that would be occasioned by seeking and waiting for an opinion from an expert in North Dakota is contrary to the best interests of the children. Cecile's counsel acknowledged that delay is undesirable and

did not request an adjournment so that an expert report could be filed. Both counsel agreed that it was appropriate in these circumstances that the laws of Saskatchewan should govern the resolution of this application.

[46] The governing legislation in Saskatchewan is *The Children's Law Act, 1997*, SS 1997, c C-8.2, s 3 of which reads:

> **3**(1) Unless otherwise ordered by the court and subject to subsection (2) and an agreement pursuant to subsection (3), the parents of a child are joint legal custodians of the child with equal rights, powers and duties.

[47] Under the Saskatchewan common law, there is a presumption that one parent cannot move children to another jurisdiction without the agreement of the other parent or a court order (*Mantyka v Dueck*, 2012 SKCA 109, 399 Sask R 303).

[48] Based on Saskatchewan law I find that, at the time of the removal of the children from North Dakota, Bill had custody rights that included the ability to have a say in where the children reside – but only in respect of the parties' biological children.

[49] I cannot find that Bill had custody rights in respect of Daryl. Bill has not adopted Daryl and I cannot assume that the recent replacement of the biological father's name on Daryl's birth certificate with his own is determinative of custody rights. That would certainly not suffice under Saskatchewan law. Further, Daryl's biological father was not served with notice of this application and I will not distribute custodial rights between these two parties without hearing from him. On a practical note, and not at all surprisingly, Cecile testified that she will bring Daryl back to North Dakota with the other children regardless of whether or not I order her to do so.

Conclusion

[50] I find that Gwen, Stephanie and Gretchen were wrongfully removed from North Dakota and that they must be returned.

The appropriate order

[51] The *Hague Convention* directs that the return of the children be "forthwith". That does not mean that I will order that they be shipped back without regard to the consequences that might flow therefrom. Immediacy must in some cases bend to that which is in the children's best interests if that can be accomplished without doing violence to the spirit and intent of the *Hague Convention*. There are only two weeks left in the children's school term and I will not order them back to North Dakota before they finish.

[52] My order must also take into account the chasing orders because they complicate matters. There is an extant order in North Dakota authorizing the police to take the children from Cecile and place them with Bill. It is not in the best interests of these children for an order to issue from this court that could result in police officers wrenching them from Cecile as soon as they set foot on North Dakota soil. Rightly or not, Cecile has been the sole caregiver for these children for the last nine months. They have been through more than enough already – they have been uprooted from the only home they have known, taken to another country, enrolled in one school and then moved to another city and placed in school there. If at all possible, their tumultuous journey should not be capped off by police intervention. In a different vein, I note that the custody orders in North Dakota were issued without the benefit of testimony from Cecile.

[53] I do not have the jurisdiction to affect that which transpires after the children are outside of Saskatchewan but, at my urging, Bill agreed to provide an undertaking that will hopefully avoid the children being traumatized more than is necessary (see: *Thomson*, paras 84 – 92). He has agreed that he will not seek to enforce the post-removal custody orders until after July 14. This enables Cecile time to bring a custody application to a court in North Dakota if she is of such a mind.

[54] I order as follows:

1. Cecile shall ensure that Gwen, Stephanie and Gretchen are returned to North Dakota not later than July 1, 2017, provided that Bill files an undertaking with this court that he will not seek to enforce the custody orders previously issued by the District Court, Three Affiliated Tribes, Fort Berthold District Court until after July 14, 2017. The undertaking may be executed by Bill's Saskatchewan counsel.

2. In the event Cecile does not accompany the children to North Dakota, Bill is released from his undertaking and may seek to enforce the custody orders as though he had not given an undertaking.

3. If Bill wishes to address the matter of costs, he must indicate his intention to the Local Registrar within 20 days of today. The registrar shall thereafter consult with the parties or their counsel to arrange a suitable date for representations.

J.
G.D. DUFOUR