

In the Court of Appeal of Alberta

Citation: Pohl v Pohl, 2019 ABCA 71

Date: 20190221
Docket: 1801-0243-AC
Registry: Calgary

Between:

Kimberley Dawn Found aka Kimberley Dawn Pohl

Respondent
(Respondent/Plaintiff)

- and -

Kent Douglas Pohl

Appellant
(Applicant/Defendant)

- and -

The Central Authority

Intervenor

The Court:

**The Honourable Madam Justice Patricia Rowbotham
The Honourable Mr. Justice Brian O’Ferrall
The Honourable Madam Justice Barbara Lea Veldhuis**

**Memorandum of Judgment
Delivered from the Bench**

Appeal from the Order by
The Honourable Madam Justice C.L. Kenny
Dated the 4th day of July, 2018
Filed on the 4th day of July, 2018
(2018 ABQB 542, Docket: 4801 134025)

**Memorandum of Judgment
Delivered from the Bench**

Rowbotham J.A. (for the Court):

[1] A chambers judge dismissed the appellant father’s application pursuant to the *International Child Abduction Act*, RSA 2000, c I-4 enacted to enforce the *Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Can TS 1983 No 35 (the *Hague Convention*) to return the parties’ 13 year old son to Arizona. The child was born in Alberta. The parties divorced in 2007. The child lived with his mother in Alberta until 2011 when the mother, the child, and the maternal grandmother moved to Arizona where they lived for approximately six years. They returned to Alberta in 2017. The child attends school in Alberta. The father has no connection, nor has he ever had a connection, to Arizona. He has lived in the United Kingdom since 2008. There is no one in Arizona to care for the child.

[2] Articles 3 and 12 of the *Hague Convention* provide for the prompt return of a child where a child habitually resident in the jurisdiction has been wrongfully removed or retained. There are exceptions. The chambers judge relied upon the exception in Article 13(b) which provides that the child need not be returned where “there is a grave risk that [the child’s] return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” She found that returning the child to Arizona where neither parent resided was an intolerable situation. She also noted that the Arizona courts had thus far declined to take jurisdiction over the dispute.

[3] The father submits that the chambers judge erred by failing to first find the child’s habitual residence prior to considering the exception. He also challenges her conclusion that the exception applied. An ounce of common sense dictates the result of this appeal. Not only are there no reviewable errors, the appeal is utterly devoid of merit. If the child’s habitual residence is Alberta, there was no wrongful removal and if the child’s habitual residence is Arizona, the court then considers the exception. With respect to the application of the exception in Article 13(b), the evidence virtually compelled the finding that this was an intolerable situation.

[4] The father also seeks the return of filing fees of \$700 plus some additional fees from the Court of Queen’s Bench and the Court of Appeal. While Article 26 of the *Hague Convention* provides that contracting states shall not impose charges in relation to applications submitted under the *Hague Convention*, Article 42 authorizes states to opt-out of this provision. Alberta has done so pursuant to s. 3 of the *International Child Abduction Act*. We deny the father’s request for the return of his filing fees.

[5] The appeal is dismissed. As Ms. Pohl is the successful party, according to our default rules as to costs she is entitled to party and party costs in accordance with Column 1, Schedule C of the *Alberta Rules of Court*, Alta Reg 124/2010.

Appeal heard on February 11, 2019

Memorandum filed at Calgary, Alberta
this 21st day of February, 2019

Rowbotham J.A.

Appearances:

Respondent Kimberley Dawn Found aka Kimberley Dawn Pohl, in person

Appellant Kent Douglas Pohl, in person

K.M. Berlin
for the Intervenor Central Authority, Alberta Justice