CITATION: Wallace v. Williamson 2020 ONSC 1376
COURT FILE NO.: FS-19-8416
DATE: 20200303

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Tarika Wallace	)	
Applicant	)	William Abbott and Meghan Melito, for the Applicant
– and –	)	
Steven Williamson	)	Alexandra Grant, for the Respondent
Respondent	)	
	)	**HEARD: February 25, 2020**

SHORE, J.

[1] This is an Application brought by the Respondent Father, Steven Williamson, for the return of the parties' daughter, T.W.W., born in 2015 (age 4) to Arizona, pursuant to the *Convention on the Civil Aspects of International Child Abduction*, Can. T.S. 1983 No. 35 ("the *Hague Convention*"). The Respondent Mother is seeking a declaration that Ontario has jurisdiction over the issues of custody and access.

Brief Overview:

[2] The parties were married on May 17, 2014 in Toronto, Ontario. They moved to Phoenix, Arizona around November 2014 for the Father's work.

[3] The parties have one child of the marriage, T.W.W., age 4.

[4] The parties separated at the end of January 2019.

[5] On January 31, 2019, the Mother took the child to Toronto, Ontario, without the Father's consent. Neither the Mother nor the child have been back to Arizona since that date.

[6] The question before this court is whether the child should be sent back to Arizona pursuant to the terms of the *Hague Convention* to have the issues of custody and access determined by the courts in Arizona.

The Law under the *Hague Convention*:

[7] The purpose of the *Hague Convention*, as set out in Article 1, is to enforce custody rights and secure the prompt return of wrongfully removed or retained children to their country of habitual residence. A prompt return is aimed at speedy adjudication of the merits of custody or access dispute in the forum of a child's habitual residence. The question being asked in a Hague Application is not which parent should get custody, but in which jurisdiction should the question of custody be determined.

[8] Article 3 provides:

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

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.

[9] Therefore, the initial questions to be answered in this case under Article 3 of the *Hague Convention* are as follows:

a. Where did the child habitually reside immediately before her removal or retention?

b. Did the father have custody rights at the time of the child's removal or retention?

c. Were the custody rights being exercised at the time of the child's removal or retention?

d. Was the removal/retention wrongful or did the father consent to the removal?

e. If there was a removal or retention of the child from her habitual residence that was wrongful under the *Hague Convention*, do any of the exceptions apply (see Articles 12 and 13)?

Last place of Habitual Residence:

[10] Based on the facts before me, I find that T.W.W.'s habitual place of residence at the time of her wrongful removal was in Phoenix, Arizona. I do not think either party will be surprised by this finding.

[11] The parties were married on May 17, 2014 and moved to Arizona later that year. The Mother arrived in Arizona around November 2014. The parties lived in Arizona until the Mother left Arizona with T.W.W. on January 31, 2019.

[12] T.W.W. was born in Arizona and is a citizen of the United States. The child attended day care four days a week in Arizona.

[13] The parties own a family residence in Arizona, municipally known as 21619 North 43rd Place, Phoenix, Arizona. While the parties traveled to Ontario to visit family for extended periods of time, they maintained their home in Arizona. The parties did not maintain a residence in Ontario.

[14] Both parties worked in Arizona. The Father continued to work in Arizona following separation.

[15] In March 2017, they began the process of obtaining their green cards. Their green cards were approved in October 2018.

[16] On January 22, 2019, the Father advised the Mother that he wanted a divorce. The parties were living in Arizona at the time. The Mother left Arizona with T.W.W. on January 31, 2019. At the time, she was still employed in Arizona.

[17] Although the Mother provides details of the child's connection to Ontario, those connections do not change the fact that until removed from Arizona, the child's habitual residence was in Arizona.

[18] The Mother submits that it was always the parties' intention to return to Ontario. The law in this area is well established: see *Knight v. Gottesman*, 2019 ONSC 4341, 147 O.R. (3d) 121, at para. 40, *Gavriel v. Tal-Gavriel*, 2015 ONSC 4181, 65 R.F.L. (7th) 452, at paras. 52, 55, and *Kirby v. Thuns*, 2008 CarswellOnt 5407. While the intent of the move may be temporary, it does not detract from establishing the child's habitual place of residence. In *Kirby*, the family moved to Romania and had no intention of staying there. They only signed a two-year lease. The children's habitual place of residence was still determined to be Romania. What is required is that there be an intention to live in a particular place with "a sufficient degree of continuity that one may call settled": at para. 44. The facts in the case before me provide sufficient evidence to find that the child's habitual place of residence was in in Arizona. In other words, the focal point of the child's life immediately prior to her removal to Ontario was in Arizona.

Did the Father have custody rights at the time of the removal?

[19] The Mother acknowledges that at the time the child was removed from Arizona, the Father had custody rights.

Were the custody rights being exercised at the time of the child's removal or retention?

[20] The Mother acknowledges that at the time that the child was removed from Arizona the father was exercising his custody rights.

Was the removal/retention wrongful or did the father consent to the removal or acquiesce to the retention?

[21] The Mother acknowledges that she did not advise the father in advance of her taking the child out of Arizona. She also knew she did not have the father's consent to move with the child. In a text between the parties on January 23, 2019, the father states:

You mentioned your desire to move to Canada in a year or two, however I think it's clear that being close to [T.W.W.] is my number one priority and I currently have no plans to relocate.

[22] The Mother responds as follows:

I have no plans on staying so we'll let the courts decide.

[23] The Mother knew that she did not have the father's consent and knew that the matter had to be decided by the courts. Yet she knowingly and deliberately wrongfully removed the child.

[24] Within days of realizing that the child had been removed from Arizona, the Father commenced proceedings in Arizona seeking the return of the child. His Petition was issued on February 6, 2019.

[25] When the Mother started proceedings in Ontario in March 2019, the Father immediately advised that he did not attorn to the jurisdiction and that the child should be returned to Arizona.

[26] On September 26, 2019, the Father filed an Application under the *Hague Convention* with the Central Authority in Arizona seeking the immediate return of the child.

[27] I find that the Father did not consent to the removal nor acquiesce to her retention in Ontario.

[28] In light of the above, I find that the child was wrongfully removed from Arizona, in accordance with Article 3 of the *Hague Convention*.

[29] I therefore turn to Article 12 of the *Hague Convention*, which is where the real conflict arises between the parties.

Exceptions:

Article 12

[30] *Article 12 provides that:*

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

[31] Under Article 12, the court is not obligated to return a child when the proceedings pursuant to the *Hague Convention* are commenced a year or more after the alleged removal or retention but only if it is demonstrated that the child is settled in its new environment. The onus is on the parent who removed the child to prove that the child is settled in its new environment.

[32] The Mother submits that:

a. A period of more than one year elapsed from the date of the wrongful removal until the commencement of proceedings; and

b. The child is now settled in Ontario.

[33] There is a dispute as to how to define or determine the date of commencement of the proceedings. Depending on my finding for the first question, the question of whether the child is settled in Ontario may no longer be necessary.

Date of Commencement of Proceedings:

[34] The Mother submits that service of the Father's Notice of Motion on February 13, 2020, for this attendance constitutes the commencement of his *Hague Convention* proceedings in Ontario. Therefore, it is the Mother's position that the Father brought his Application more than one year after the date of wrongful removal, which removal was January 31, 2019 and the case falls under the exception set out in Article 12.

[35] The Mother relies on *Nowlan v. Nowlan*, 2019 ONSC 4754, 31 R.F.L. (8th) 170, submitting that the court found that the Mother's *Hague Convention* Application was not commenced until she served an Application seeking the return of the child, almost one year following the notice delivered by the central authority, indicating that the mother intended to commence a Hague Application. But in *Nowlan*, the parties conceded that the application was commenced after the expiration of the period of one year from the date of the wrongful removal: at para. 2. The issue was therefore not before the court. Further, the notice received by the court in *Nowlan* was that the mother intended to commence a Hague Application. The notice received by this court was that an Application has been commenced.

[36] The Mother also relies on *Kubera v. Kubera*, 2010 BCCA 118, 317 D.L.R. (4th) 307. In that case, four years passed from the unlawful retention and the hearing of the Hague Application and two years between commencement of proceedings and the hearing of the Application. The Court was focussed on what time frame to consider when looking at whether the child was settled in the new environment (at the date of the hearing or the date of the commencement of the proceedings). The parties in this case also consented to the date, of April 2004, as the commencement of the proceedings. The case is therefore

not helpful in this regard. Further, in *Kubera*, in December 2005, the Court refused to stay the proceeding before the court and specifically found that there was no notice before their court of an Application having been commenced (and no request from Poland to assist with the return). In the case before me, by October 30, 2019, this Court recognized that the Hague Application had been commenced, the other proceedings were stayed, and a date was set for the hearing of the Application.

[37] In *L.(J.) v. British Columbia (Director of the Child, Family and Community Service Act)*, 2010 BCSC 1234, 322 D.L.R. (4th) 385 ("*L.(J.)*"), the father issued his Application under the *Hague Convention* in April 2019. The proceedings were stayed upon the Court's receipt of the notice. However, the father's petition in British Columbia was not commenced until December 2009. The Court did admonish the father and threatened to lift the stay if the father did not start a petition in British Columbia. When considering whether the child was now settled in B.C., the court found that the "application for the return of David was made by the petitioners on April 3, 2019, approximately 16 months after David was wrongfully removed or retained.": at para. 55.

[38] Below is a summary of the relevant dates in the case before this Court:

a. As set out above, the Father commenced proceedings in Arizona on February 6, 2019, seeking the return of the child. His proceedings were commenced by way of a Petition for Dissolution of Marriage.

b. The Mother commenced proceedings in Ontario, on March 4, 2019, by way of an Application for Divorce.

c. On September 26, 2019, the Father filed an Application under Article 8 of the *Hague Convention* with the Central Authority in Arizona seeking the immediate return of the child.

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.

Article 8 provides:

> *The application shall contain -*
>
> > *a) information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;*
> > *b) where available, the date of birth of the child;*
> > *c) the grounds on which the applicant's claim for return of the child is based;*
> > *d) all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.*
>
> *The application may be accompanied or supplemented by -*

> *e) an authenticated copy of any relevant decision or agreement;*
> *f) a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;*
> *g) any other relevant document.*

d. The Mother was served with a copy of both the Notice of Filing and the Application. The Application was served on her lawyer in Arizona the same day it was filed.

e. On October 30, 3019, an Order was made staying the proceedings in Ontario because the Father had filed an Application with the Central Authority for the return of the child, pursuant to the *Hague Convention*.

f. On November 4, 2019, I made an order that "Hague Application has now been issued. Application to be heard on December 17, 2019.". A timetable for the exchange of material was included in my endorsement.

g. The hearing of the Application scheduled for December 17, 2019, was adjourned at the request of the mother, to February 25, 2020, on consent, with a new timeline for the service and filing of the material. The Mother's affidavit acknowledges that the return date was peremptory on her.

h. Some confusion arose with the lawyers in Arizona, as they too had set the Hague Application down for a hearing in Arizona. Following a conference call on February 21, 2020, it was agreed that the Hague proceedings in Arizona would be stayed and would only proceed in Ontario.

i. On January 29, 2020, the Mother served motion material, seeking an order dismissing the Respondent's motion pursuant to the *Hague Convention* and an order that Ontario has jurisdiction over the matters of custody and access.

j. On February 20, 2020, the Father served his motion material, seeking the return of the child to Arizona under the *Hague Convention*.

[39] The Mother received a copy of the Application in September 2019, well within the one-year time frame. The Application was scheduled to be heard in December 2019, also within the one-year time frame. The other proceedings were stayed based on the Application having been issued. The mother requested an adjournment to February 25, 2020, just outside of the one-year time frame. Based on the facts of this case, as set out above, I find the proceedings in Ontario were commenced within one year after the wrongful removal.

Settled in New Environment:

[40] Even if I am wrong with respect to the date of commencement of the proceedings my order would not change. Based on the facts in this case, I find that the child is not settled

sufficiently in her new environment to warrant an order dismissing the Hague Application.

[41] The Court of Appeal in *Kubera* adopted the guidance provided by the Nova Scotia Court of Appeal in *A. (J.E.) v. M. (C.L.)*, 2002 NSCA 127, 220 D.L.R. (4th) 577 (see also *Soucie v. Soucie* (1994), 1995 S.C. 134 (Scotland I.H.)):

> *61 The "settled" exception is particularly difficult to apply. It requires the court to weigh directly certain aspects of the child's best interests — particularly that of not being uprooted — even though the individual child's best interests are not generally the focus of the inquiry under the Convention. The difficulty is that refusal to return based on the assessment of the child's best interests tends to undermine the fundamental objectives of the Convention. Thus, if interpreted too broadly, the settled exception would undermine the effective operation of the Convention. On other hand, if interpreted too narrowly, the exception would be robbed of any practical effect.*
>
> . . . . .
>
> *67 I would conclude, therefore, that the settled exception ought to be approached not simply by examining the child's present circumstances in the new environment, although that is an important part of the inquiry. In addition, the child's present circumstances need to be assessed in light of the underlying objectives of the Convention and in particular how ordering return of the child is likely to further those objectives.*
>
> *68 It will be helpful, therefore, to consider how the key objectives of the Convention relate to the specific circumstances of the child whose return is sought. To repeat, the relevant objectives include first, general deterrence of international child abduction by parents; second, prompt return of the child facilitated by precluding a full inquiry into the "best interests" of the child in the state to which the abductor has fled with the child; third, restoration of the status quo; and, fourth, entrusting to the courts of the place of habitual residence the ultimate determination of what the best interests of the child require.*

[42] As set out in *Kubera*, there are four interrelated objectives of the Convention, directed at protecting the interests of children generally: at para. 31 and *A.(J.E.) v. M.(C.L.)*, at para. 31. These include:

a. Deterrence of international child abduction;

b. Rapid return of the child;

c. Restoration of the status quo; and

d. Deference with respect to the determination of a child's best interests to the courts of the place of habitual residence.

[43] The Courts have been clear that with the passage of time, the policies that require consideration of the welfare and interests of the particular child tend to strengthen while

those policies favouring mandatory return tend to weaken. I also keep in mind the words of Baroness Hale of Richmond, writing for the House of Lords, that one child "should not be made to suffer for the sake of general deterrence of the evil of child abduction world wide": at para. 54; see *Kubera*, at para. 66 and *Nowlan*, at para. 41. When applying an exception, the court must balance the actual circumstances of the particular case with the four objectives of the *Hague Convention*. The factual finding of whether the child has settled in her new environment at the time of the hearing must be weighed with the objectives of the Convention.

[44] But in the case before me, the hearing of the Application took place less than one month after the one-year automatic return date. The consideration favouring the return are marginally weakened, if at all. The cases relied on by the Mother all tend to be cases where years have passed from the unlawful removal/retention until the hearing of the Application: see e.g. *Kubera*, *Nowlan*, and *I.(A.M.R.) v. R. (K.E.)*, 2011 ONCA 417, 106 O.R. (3d) 1.

[45] What should the court consider when determining if a child is settled within its new environment? The review requires a highly child centric factual inquiry aimed at determining the actual circumstances of the child at the time of the hearing and "the likely effect of uprooting a child who has already been victim of one international relocation". The court is required to look at both the nature of the evidence and the degree of settlement, while keeping in mind that there is both a physical and emotional element to settlement: see *Kubera*, at para. 74 and *L.(J.)*, at paras. 68, 70-71, and 73.

[46] The Mother's affidavit offers evidence about the child's links to family, school, the community, and friends. However, with respect to a young child or infant, "the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of: *Balev*, at para. 44.

[47] As set out in *Knight v. Gottesman*:

> *[48] ...the Mother and Father moved as a family to Massachusetts ... The children's "family environment" was based in Massachusetts, albeit for a short period of time. But length of time is not a determinative factor. It is well established law that there is no requirement that a child should have been resident in the country for a particular period of time. At the time that the children were wrongfully retained in Ontario, there is no question that the family home and family environment was in Wellesley, Massachusetts ... At varying degrees, both parties were involved with the children's day-to-day activities and upbringing. The children are still so young that their environment is mostly dictated by their family environment, which was in Massachussets at the time of their retention in Ontario. ... In Malik, the child had also lived for considerable time in Ontario with consent. He was able to communicate, through a Voice of the Child report, his own connections to Ontario, including family, friends, school, etcetera. The children in the case before me are of such a young age that their lives still revolve around their parents and their family-centric lives.*

[48] While I appreciate that the child has been welcomed into the community in Ontario, children at a younger age will not have integrated with members of a community in the same manner an older child would through school and extra-curricular activities. As a child gets older the ties to the community take on more importance than it does with a younger child: see *Nowlan*, at paras. 48 and 49.

[49] When dealing with a younger child, there is a different focus to determine the degree of settlement. The court needs to look at the relationship the child has with immediate family: *Nowlan*, at para. 49 and *L.(J.)*, at para. 79. In *Nowlan*, the child had been living with the father for two years when the Hague Application was heard. The request was to return the child to Virginia to live with the mother. There was no option for the father to return with the child to Virginia. The "greatest factor" relevant in *Nowlan* was that for the last two years, the father offered the child security and stability that she did not have while living with the mother: see paras. 50 and 51. The mother in *Nowlan* struggled with mental health and substance abuse issues.

[50] In a case involving a young child, it is difficult to show that a child is settled in its environment, based solely on the physical elements. The emotional element of settlement is more significant. In the case of a young child, if the parent will return with the child upon an order for return, a court will have less concern about the impact on the child's emotional security and stability: see *L.(J.)*, at para. 76. In *L.(J.)* the child was not returned to Connecticut because the child's caregivers could not relocate and move back with the child: see para. 81. Many of the cases relied on by the Mother are distinguishable in that the age of the children in those cases are significantly older than the young child in the case before me.

[51] While the Mother expresses concerns about T.W.W. being able to adapt to living in Arizona, she also describes the wonderful trip to Jamaica over Christmas break. As stated by the Mother, T.W.W. is a healthy, well-adjusted child.

[52] In the case before me, the mother requested that if the child be ordered back to Arizona, that the child be left in the primary care of the mother. The primary caregiver for the child (at this time) will not change. The emotional stability and status quo will be maintained. The child's environment is still largely determined by the family environment, created by the parents. The child's playdates, school, and extra-curricular activities at this age still play a lesser role than the ties to primary caregivers.

[53] In *Nowlan*, the child was initially sent to live in Canada by the Children's Aid Society and with the mother's consent. The issue of deterrence was not a significant factor in that case: at para. 57. The mother did not have an ability to care for the child at the time that she asked for the child's return to Virginia. Further, there could be no return to the status quo because it would raise protection concerns: at para. 63.

[54] In considering the four objectives of the *Hague Convention*, there is a strong case for deterrence. While I appreciate that the Mother has a strong support system in Ontario and she very much wants to live in Ontario, she cannot make unilateral decisions about the parties' child. Knowing that the Father objected to the child moving to Ontario, the

mother used a "self help" method. The Mother removed the child from her habitual place of residence in Arizona, without the Father's consent (or knowledge) and took her to Ontario.

[55] With respect to the second consideration, the status quo for the child can be maintained pending hearing by the courts in Arizona.

[56] Third, the child was removed from Arizona one year and one month ago. The hearing of the application and release of these reasons would permit a fairly rapid return of the child.

[57] Fourth, I am concerned by the Mother's comments that "T.W.W. has no connection to Arizona, other than her Father residing there temporarily. She does not remember much about her time in Arizona", in that I do not find them to be accurate. T.W.W. had connections in Arizona, which the Mother ignores. T.W.W. was born in Arizona. She has a doctor and dentist there. She saw a speech therapist in Arizona. She attended day care four days a week at Scottsdale Learning Center (which also makes me question the Mother's evidence that "She did not develop relationships with peers or other caregivers in Arizona"). She lived in Arizona for all but the last year. However, I appreciate that given T.W.W.'s young age, the child may very well not remember much about Arizona, other than living with her parents but the passage of just one year does not change that significantly. Why would the argument not hold true for Ontario? Further, it does not change the fact that but for the unlawful removal, almost all the evidence related to the child was in Arizona.

[58] The child should be returned to Arizona and the issues of custody, access, and mobility should be determined by the court in Arizona, pursuant to the terms of the *Hague Convention*.

[59] I appreciate that the Mother has a strong support system in Ontario, and it is easier for her to live in Ontario and reside with her own mother. But that decision will be made by a court. That court will be in Arizona. The Mother may have a strong argument as to why she should be permitted to relocate with the child, but that determination is to be before the court in Arizona.

Article 13:

[60] I am going to mention Article 13 briefly. Although the Mother's materials make allegations of possible sexual abuse by the father on the child, she advised during her submissions that she would not be pursuing the argument that there is grave risk that the child's return to Arizona would expose the child to physical, psychological harm, or otherwise place the child in an intolerable situation under Article 13 of the *Hague Convention*.

[61] There were no other exceptions raised by the Mother in her submissions.

Order:

[62] This Court orders that:

a. The child, T.W.W. Audrey Wallace Williamson, born September 25, 2015, shall be returned to Phoenix, Arizona, within 48 hours of release of this order, in the care and control of the Applicant Mother, pending Court order in Arizona or agreement between the parties.

b. Police Officers in the City of Toronto, OPP, RCMP, and officers of any other law enforcement agency having jurisdiction are directed and authorized to enforce this order, if requested, and in doing so may enter any place, including a dwelling place, where they have reasonable and probable grounds to believe the child is located.

c. The Respondent shall buy the airline tickets for the wife and the child;

d. The parties are ordered not to remove the child from Arizona until the Arizona court determines the merits of a claim for custody or access under its law, by interim or final parenting orders, or as the parties otherwise agree in writing.

e. The Respondent Father shall vacate the home, municipally known as 21619 North 43rd Place, Phoenix, Arizona, USA, prior to the child's arrival in Arizona, so that the Applicant and child can return to the matrimonial home upon their arriving in Arizona.

f. If the parties are unable to reach an agreement with respect to costs, the Respondent shall serve and file written cost submissions, no long than 2 written pages, not including offers to settle and bill of costs, no later than 10 business days from the release of these reasons. The Applicant shall serve and file any responding material within ten business days of receipt of the Respondent's material, subject to the same length restrictions.

Shore, J.

Released: March 3, 2020

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– and –

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REASONS FOR JUDGMENT

Shore, J.

Released: March 3, 2020