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[22/09/2004; Newfoundland and Labrador Supreme Court - Court of Appeal (Canada); Appellate Court]
V.B.M. v. D.L.J. [2004] N.J. No. 321; 2004 NLCA 56

Between V.B.M., appellant, and D.L.J. and Attorney General for Newfoundland and Labrador, respondents

Docket: 04/93

Newfoundland and Labrador Supreme Court - Court of Appeal

Cameron, Welsh and Mercer, JJ.A.

September 22, 2004

[1] WELSH J.A.:-- A young girl, born in Canada, was living in the United States with her mother, a Canadian citizen, and her father, an American citizen of native ancestry. There was a break down in the relationship between the parents. Ultimately, the mother took the child, without the father's knowledge or consent, and returned to Canada. The father located the child after some months and sought her return under the international Convention dealing with child abduction.

[2] The trial judge ordered that the child be returned to the United States. However, rather than returning the child to the father's custody, he ordered that she be placed in the custody of child protection services in Washington State until all child protection issues had been determined by the State superior court. This Court granted a stay of that order pending determination of this appeal.

[3] While several issues were raised at the hearing of the appeal, the disposition turns on a narrow point: whether more than one year had elapsed from the date of removal of the child to commencement of the proceedings. I have also included some general comments regarding the nature of an order under the Convention.

BACKGROUND

[4] The facts are succinctly stated by the trial judge in his oral decision of July 30, 2004:

[The father] is a Native American Indian and an American citizen, having been born in Bellingham, Washington State. He now resides in Ferndale, Washington State, the United States of America. [The mother] is a Canadian citizen, having been born in Scarborough, Ontario, in September of 1962. [The mother] grew up in Nova Scotia and Ontario. She now resides in St. John's, the Goulds area, in the province of Newfoundland and Labrador.

[The father] and [the mother] met each other via the internet while [the mother] was living in Nova Scotia. She subsequently visited Washington State in July of 1996, where she and [the father] began a relationship resulting in their cohabitation later that same year. [The mother] and [the father] then moved to Ontario, Canada, where they lived for approximately two years.

As a result of their relationship, [the mother] became pregnant in January of 1997, and their child [name] was born on September 4th , 1997 in Ontario, Canada. In March of 1998, following the birth of their child, the parents moved to Washington State, in the United States, where they lived in [the father's] home on the Lummi reservation, and remained there for approximately five years, during which time the relationship broke down.

[The mother] removed the child [name] to Canada in December of 2002, and subsequently to the Province of Newfoundland and Labrador, the most eastern part of the country. [The father located the child in October 2003.] ... [The father] has not seen the child since November of 2002. [The father had access to the child while he was in this Province for the purpose of testifying at the hearing. He has also been granted telephone access.]

In 2002, while in Newfoundland, [the mother] met [P.R.] via the Internet. [P.R.] was a resident of the United Kingdom. [The mother] and [P.R.] were married in November of 2003 and reside in this Province. [The mother] is now self-employed and operates her own business in the St. John's area. Since moving to Newfoundland, [the child], who is now seven-years-old, has commenced school at [name], and is doing well there. She has made friends and is socially well adjusted to her community. [The child] is enrolled as well in a soccer program for children in her area and overall seems to be adjusting well to her Newfoundland environment.

[5] The mother has resisted the father's application to have the child returned to Washington State for a number of reasons. She testified about physical and emotional abuse against her by the father, witnessed by the child. As to living conditions, the trial judge said:

There was evidence of deplorable living conditions, described as third world standard, where rats and mice infested the house. The house itself is described as leaking and damp with insulation hanging from the walls. [The father] was not able to counter these concerns to my satisfaction.

[6] The mother also testified that neighbours, relatives and friends of the father were convicted child sex offenders. Further, she expressed concern that she would not have a fair hearing if the matter of custody is determined by the Lummi Tribal Court.

[7] The trial judge concluded:

As to the level of risk ... in returning the child [name] to Washington State, I do not find on the evidence that the level of risk is grave. There is some serious risk because of the allegations of [the mother]. However, these risks can be minimized by an appropriate court order.

[8] He then ordered that the child:

... be placed in the care and custody of such child protection agency in the State of Washington, United States of America, as arranged by the local authority in Newfoundland through the offices of the Child, Youth and Family Services in this Province. ... And until the arrangements are made for the child to be removed to Washington State, United States of America, I am declaring that [the child] is a child in need of protection, and is placed in the immediate care and custody of the Director of Child, Youth and Family Services, following which the child is to be transported to the State of Washington in the United States of America, with the clear understanding that she is not to be returned to her father's care and custody until all child protection issues and living conditions have been determined to be in the best interests of [the child] by the superior court of the State of Washington in the United States of America at a full hearing of these issues in that court.

ISSUES

[9] Counsel made submissions on two issues at the hearing of the appeal:

(1) Whether more than one year had expired from the date of wrongful removal of the child from Washington State to the date of commencement of the proceedings; and

(2) Whether fresh evidence in the form of an affidavit is admissible for purposes of the appeal.

Other issues, such as the application of Articles 12 and 13 of the Convention and the validity of the order made by the trial judge, were set over to September 27, 2004. However, the determination on the first issue disposes of the appeal because a new hearing is required. As a result, and particularly since applications under the Convention must be dealt with as expeditiously as possible, the sole issue determined in this appeal is the first one.

ANALYSIS

The Law

[10] The international Convention on the Civil Aspects of International Child Abduction ("the Convention") applies in this Province, having come into force on October 1, 1984 upon being incorporated into the Children's Law Act, RSNL 1990, c. 13, pursuant to section 54. Subsection 54(9), which operates to give paramountcy to the Convention, says:

Where there is a conflict between this section and another Act, this section prevails.

[11] The provisions of the Convention dealing with the return of a child wrongfully taken from one jurisdiction to another are Articles 12 and 13, which say:

[12] 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 wrongful removal or retention, the authority concerned shall order the return of the child immediately.

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.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

[13] 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 his or her views.

(emphasis added)

[12] In Thomson v. Thomson, [1994] 3 S.C.R. 551, the Supreme Court of Canada considered, in some detail, general principles under the Convention. Several of these are relevant to this appeal. First, and of fundamental importance, the objects of the Convention provide a framework within which it is to be construed. La Forest J., speaking for the majority said, at page 578:

I now turn to a closer examination of the purpose of the Convention. The preamble of the Convention thus states the underlying goal that document is intended to serve: "[T]he interests of children are of paramount importance in matters relating to their custody." In view of Helper J.A.'s remarks on this matter, however, I should immediately point out that this should not be interpreted as giving a court seized with the issue of whether a child should be returned to the jurisdiction to consider the best interests of the child in the manner the court would do at a custody hearing. This part of the preamble speaks of the "interests of children" generally, not the interest of the particular child before the court. This view gains support from Article 16 , which states that the courts of the requested state shall not decide on the merits of custody until they have determined that a child is not to be sent back under the Convention.

[13] La Forest J. also pointed out, at page 582:

Nothing in the nature of mens rea is required; the Convention is not aimed at attaching blame to the parties. It is simply intended to prevent the abduction of children from one country to another in the interests of children.

[14] Where a custody order is obtained ex parte by a party after the child has been removed from the jurisdiction, La Forest J. cautioned, at page 592:

There is nothing in the Convention requiring the recognition of an ex post facto custody order of foreign jurisdictions.

[15] With respect to the Article 13 exception to the requirement that a child wrongfully removed from a jurisdiction be immediately returned, La Forest J. said, at page 596:

... 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.

(emphasis in the original)

[16] Finally, in the context of potential remedies, La Forest J. discussed the use of undertakings to achieve a result consistent with the objects of the Convention. He said, at pages 598 to 599:

As discussed earlier, the "chasing order" issued by the Scottish court [ex parte after the child had been wrongfully removed, and replacing the order granting interim custody to the mother with an order granting custody to the father] complicates matters in the case at bar, for it makes one objective of the Convention, a return to the status quo as it existed before the wrongful removal, impossible to achieve without taking additional action. The Convention does not provide specifically for remedial flexibility because it is based on the primary assumption that the wrongful removal of a child necessarily has harmful effects (see the preamble; see also Anton, supra, at p. 543). In interpreting the Convention, courts have recognized that frequently an unqualified return order can be detrimental to the short term interests of the child in that it wrenches the child from its de facto primary caregiver. As Helper J.A. put it, at p. 215, "children must not be made to suffer twice over as a result of their parents' wrongdoing".

[17] In this Province, proceedings under the Convention must be taken in the Supreme Court (Trial Division), Unified Family Court or the Provincial Court. Given the location of the mother and child in this case, the appropriate court is the Unified Family Court. (Children's Law Act, supra, sections 54(5) and 2(1)(a).)

Application of the Law

Wrongfully Removed

[18] The mother is not contesting that the child was wrongfully removed from Washington State within the meaning of Article 3 of the Convention. Accordingly, Article 12 of the Convention is engaged.

Less Than One Year

[19] It is necessary to determine whether the proceedings under the Convention were commenced less than one year after the child was wrongfully removed because that factor will determine the test to be applied in deciding whether the child is to be returned.

[20] Under Article 12, if the proceedings were commenced less than one year after the wrongful removal of the child, the court is not bound to order the return of the child if the mother establishes that there is a grave risk that to return the child would expose her to physical or psychological harm or otherwise place her in an intolerable situation. However, if the period of less than one year from the date of the wrongful removal of the child to the date of commencement of the proceedings has expired, the court must consider the additional factor of whether "the child is now settled in [her] new environment".

[21] The trial judge concluded that the proceedings were commenced less than one year after the child was wrongfully removed. Counsel for the mother submitted that he erred in this conclusion because the proceedings were not commenced until March 2, 2004 when the application commencing the civil action was filed. This was more than one year after December 11, 2002, the date when the child was taken from the State of Washington into the Province of British Columbia.

[22] Counsel for the father stressed that the father had signed an Application for Assistance under the Convention on October 10, 2003, two days after he was informed that his daughter had been located. The Central Authority for the United States faxed the Application and supporting documents to the Central Authority for this Province ("the Central Authority") on November 3, 2003. The materials were reviewed by the Central Authority. Some delay occurred while the residence of the mother and child was located.

[23] On December 8, 2003, the Central Authority filed a Notice in the Unified Family Court. The purpose of the Notice was to notify the Court that an application under the Convention had been filed with the Central Authority. The Notice which, among other things, cautions the Court about the effect of the Notice, says:

Pursuant to Article 16 of the Convention, the judicial or administrative authorities of the Province of Newfoundland and Labrador "shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application is not lodged within a reasonable time following receipt of the notice".

[24] The next step taken was an Originating Application (inter partes) filed in Unified Family Court on March 2, 2004 by the father. The application set out the relevant background and sought an order:

... for the return of [the child] to the care of [the father] to be returned to the State of Washington, United States of America, so that the authorities therein may make a fair and equitable determination of the issues of custody and access to the child aforesaid and that [the father] and [the mother] may be heard by the presiding Court of competent jurisdiction.

[25] In order to decide whether the proceedings were commenced less than one year after the child was wrongfully removed from Washington State, it is necessary to determine which action constituted "the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is" (Article 12).

Submission to the Central Authorities

[26] Dealing first with the documents submitted to the Central Authorities, it is clear that these documents, whether submitted in Washington State or in this Province, would not qualify to establish the commencement date under Article 12. The Application for Assistance submitted by the father to the Central Authority in Washington State could not be characterized as commencing proceedings before the courts of this Province, the courts being the appropriate judicial authority (paragraph 17, above). Jurisdiction in this Province cannot be engaged until some action is taken here.

[27] Further, submission of the Application for Assistance to the Central Authority in this Province would not constitute commencement of proceedings before the appropriate judicial authority. The Attorney General, who has been designated as the Central Authority (subsection 54(4) of the Children's Law Act), acknowledged that the Central Authority and the judicial authority under Article 12 are separate entities. I agree.

[28] This conclusion follows from the language of the Convention, and indeed, from the fact that it is the Attorney General who is designated as the Central Authority, and not the courts. The fact that Article 12 refers to the judicial or administrative authority does not alter this result.

[29] The Central Authority has specified responsibilities under Article 7 of the Convention. These include:

(e) to provide information of a general character as to the law of their State in connection with the application of the Convention;

(f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access; ...

(emphasis added)

[30] It is clear that the reference to "administrative" in "administrative authority" (Article 12) or "administrative proceedings" (Article 7(f)) does not mean the Central Authority. Rather, the judicial or administrative authority under Article 12 means the entity charged with the responsibility of determining whether an order should be made to return the child. That entity is different in different Contracting States.

[31] In this Province, that entity is the courts. It is not the Central Authority. It follows that submission of an application to the Central Authority does not constitute "the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is".

Notice Filed by the Central Authority Pursuant to Article 16

[32] The purpose of the notice that the Central Authority filed in Unified Family Court on December 8, 2003, was to advise the Court regarding Article 16 of the Convention. Article 16 says:

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

[33] In assessing the effect of this provision, the distinction between giving notice and commencing a proceeding must be considered. Article 16 deals with two different circumstances. First, in the situation where custody proceedings have already been commenced or are subsequently commenced, the Article provides that the court shall not decide issues relating to the custody of the child until the court has first determined that the child is not to be returned under the Convention. Second, in the situation where proceedings have not been commenced, the purpose of Article 16 is to give notice to the court that Article 12 is to be applied "unless an application under this Convention is not lodged within a reasonable time following receipt of the notice". This language clearly contemplates something more than notice under Article 16 being given to the court. For Article 12 to apply, an application must first be lodged. Lodging an application would result in commencement of the proceedings.

[34] To interpret Article 16 in this way yields a result that is consistent with the

operation of Article 11 which deals with delay in proceedings. Article 11 says, in relevant parts:

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. ...

(emphasis added)

[35] If notice to the court with respect to Article 16 was sufficient to commence the proceedings, the six week period would be engaged, and potentially expire, as in this case, before an application was filed requesting that the

court make a determination under the Convention. Ordinary principles of interpretation dictate that such an anomalous result should be avoided.

[36] Further, this interpretation is consistent with subsection 54(5) of the Children's Law Act, which says:

An application may be made to a court in pursuance of a right or an obligation under the convention.

The Rules of the Supreme Court of Newfoundland and Labrador, SNL 1986, c. 42, Schedule D, provide for the mode of commencing a proceeding. Rule 5.01, which applies to proceedings in Unified Family Court (Rule 56B.01 (1)), says, in relevant parts:

5.01 (1) ... every proceeding shall be commenced by issuing an originating application or statement of claim and an originating application or statement of claim shall be deemed to be issued when it is filed in accordance with rules 5.02 or 5.03.

[37] In this case, the proceedings were commenced by an originating application (inter partes) filed on March 2, 2004. That application was clearly filed more than a year after the child was wrongfully removed from Washington State in December 2002. It follows that evidence as to whether the child "is now settled in [her] new environment" is a relevant consideration in determining whether she is to be returned to Washington State under the Convention.

[38] I would note that the conclusion that the proceedings were commenced more than a year after the child was removed from Washington State does not preclude the operation of the Convention. The effect is simply to require the Court to consider one additional relevant factor in determining whether the child should be returned. The result is completely consistent with the objectives of the Convention.

[39] In summary, the trial judge erred in concluding that the date of commencement of the proceedings was less than one year after the child was wrongfully removed from Washington State. The proceedings were commenced by means of the originating application filed by the father on March 2, 2004, more than a year after the child was wrongfully removed. In the result, the court must consider whether the child is now settled in her new environment as well as whether there is a grave risk that return of the child would expose her to physical or psychological harm or otherwise place her in an intolerable situation.

[40] For this purpose, the matter must be remitted to the Unified Family Court for a new hearing.

Nature of the Order

[41] Given my conclusion that a new hearing is necessary because the trial judge erred with respect to the time of commencement of the proceedings, it is unnecessary for me to deal with the remaining issues. However, the following comments are provided in the hope of assisting the judge who conducts the new hearing.

[42] An order made in accordance with the Convention requires careful consideration. The judge may refuse to order that the child be returned to Washington State. This would be the appropriate order if the evidence establishes that the child is now settled in her new environment or that there is a grave risk that return of the child would expose her to physical or psychological harm or otherwise place her in an intolerable situation.

[43] Alternatively, the judge may simply order the return of the child to Washington State to the custody of her father on the basis that the exceptions in Articles 12 and 13 do not apply.

[44] A third option is an order to return the child, with written undertakings. This was the approach taken in the Thomson case. An additional example of the use of undertakings is found in Finizio v. Scoppio-Finizio (1999), 46 O.R. (3d) 226 (ONCA), at paragraph 38. In Jabbaz v. Mouammar (2003), 226 D.L.R. (4th) 494 (ONCA), at paragraphs 45 to 47, the order was made conditional on the child being permitted entry into the United States. References to these cases are illustrative only. Undoubtedly, additional cases and other issues, submissions and evidence will be raised for consideration by the Court.

[45] Any other options put to the judge should be carefully considered to ensure that the order does not purport to have effect outside the territorial jurisdiction of this Province.

Fresh Evidence

[46] Given that a new hearing has been ordered, it is unnecessary to consider the question of the admissibility of fresh evidence. The new hearing, including the additional factor to be considered by the judge, will dictate the evidence that is admissible.

CONCLUSION

[47] The judge erred in concluding that the date of commencement of the proceedings was less than one year after the child was wrongfully removed from Washington State. The proceedings were commenced by means of the originating application filed by the father on March 2, 2004, more than a year after the child was wrongfully removed. In the result, in making a determination under Article 12 of the Convention, the court must consider whether the child is now settled in her new environment as well as whether there is a grave risk that return of the child would expose her to physical or psychological harm or otherwise place her in an intolerable situation.

[48] In the result, the matter must be remitted to the Unified Family Court for a new hearing. From a purely practical perspective, I would draw the Court's attention to the very poor quality of portions of the transcript, particularly the evidence of the father.

DISPOSITION

[49] The appeal is allowed. The matter is remitted to Unified Family Court for a new hearing. The parties have leave to apply with respect to costs, if necessary.

[50] The child shall remain in the custody of her mother unless the Order of this Court (2004 01 H0093, filed September 17, 2004) is varied by the Unified Family Court. The conditions imposed by the Order of this Court shall continue to apply unless varied by the Unified Family Court.

WELSH J.A.

CAMERON J.A.:-- I Concur.

MERCER J.A.:-- I Concur.

Counsel for the Appellant: Averill Baker; Counsel for the Respondent D.L.J.: Jacqueline Jenkins; Counsel for the Respondent the Attorney General: Brian Furey

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