CITATION: Ibrahim v. Girgis, 2008 ONCA 23
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COURT OF APPEAL FOR ONTARIO

MACPHERSON, ARMSTRONG and EPSTEIN JJ.A.

BETWEEN:

DIANA GEORGE IBRAHIM

Applicant (Respondent)

and

IMAD SHAKIR GIRGIS

Respondent (Appellant)

Darrell S. Waisberg for the appellant

Simonetta Lanzi for the respondent

Heard: January 9, 2008

On appeal from the order of Justice Jane Ferguson of the Superior Court of Justice dated July 18, 2007.

MACPHERSON J.A.:

A. INTRODUCTION

[1] This case deals with a child who, at a very young age, was wrongfully retained in Ontario and with the Hague Convention on international child abduction, which governs such retentions. The chief question is whether the father, who stayed in Florida while his wife took the child to Ontario, acquiesced in the retention and should therefore be denied his son's summary return under the Hague Convention.

[2] The motion judge concluded that the father had acquiesced, emphasizing his delay in filing his Hague Convention application for his son's summary return. During the eight-month period between the child's retention and the father's Hague Convention application, the father consented to a hearing in Ontario on whether Ontario or Florida was the proper jurisdiction to hear a custody application, and did not begin his Hague Convention application until the day before that hearing was scheduled to be held. Relying on the father's acquiescence, the motion judge declined to order the child's return under the Hague Convention.

[3] The father appeals, arguing that he did not acquiesce and seeking an order for his son's return. For the reasons that follow, I would allow his appeal.

B. FACTS

[4] The appellant (the father) and the respondent (the mother) were married in Florida on July 29, 2004. A year later, on July 20, 2005, in Pensacola, Florida, the mother gave birth to their first and only child, Andrew Girgis.

[5] Neither the father nor the mother is a citizen or a permanent resident of the United States. The father is a Jordanian citizen and has lived in the U.S. since 2001. During the time Andrew lived in Florida, the father resided in the U.S. on a temporary work permit. He has since been granted asylum status in the United States. The mother is a citizen of Canada, and lived in Ontario from 1991 until her marriage in 2004.

[6] Andrew is a U.S. citizen and holds a social security card. He lived in Florida continuously from his birth until just before his first birthday.

[7] The mother's grandmother, who was very dear to the mother, was terminally ill. The mother decided to visit her grandmother in Ontario, and to bring Andrew, who had never met his great-grandmother.

[8] The mother was uncertain whether she would be allowed back into the U.S. if she went to Canada. Accordingly, the mother wrote a letter dated February 2, 2006 to the member of Congress in the area where she resided asking permission to leave the country. In March 2006, she applied to U.S. immigration officials for a travel document granting her permission to re-enter the United States. By June, however, she still had received no response from either the congressman or U.S. immigration, and her

grandmother's health was deteriorating. On June 11, 2006, she boarded a plane for Ontario, still having received no permission from U.S. officials. Her ticket, purchased by the father, had a return date of September 29, 2006.

[9] The father wrote a letter granting the mother permission to travel with Andrew to Canada.[1]

[10] By late September, a dispute had arisen between the father and the mother. The mother said she wished to remain with Andrew in Ontario. The father and mother also seem to have disagreed over whether immigration officials would allow the mother to return to the United States. September 29, the date of the return ticket, came and went. Neither the mother nor Andrew boarded the plane.

[11] The parties offer different accounts about what occurred over the ensuing months. The father says he attempted to reconcile with the mother, guided by his Coptic Orthodox faith, which he says forbids divorce absent adultery. Father Youstos Ghaly, a Coptic priest, played a major role in this attempted reconciliation according to the father, reaching out to the father and the mother, who was of the same faith, to try to bring the two together. The father's hope was that his wife would eventually agree to return to Florida with Andrew.

[12] The mother says that the father made few attempts at reconciliation. She says she was firm beginning in late September that neither she nor Andrew would be returning to Florida. Although she concedes that she had contact with Father Ghaly – indeed she says she was the one who initiated it – she denies he played the conciliatory role her husband claims he did. She says she tried to persuade the father to relocate to Canada, whose social services she felt made it a better place for them to live.

[13] Although the mother did not use her return ticket, she did make one attempt to cross the U.S. border. On September 24, 2006, she and Andrew tried to cross the Fort Erie/Buffalo Peace Bridge on foot. Border officials turned her away. The mother explained this attempt by saying that an immigration lawyer had told her that crossing on foot would increase her chances of getting in.

[14] On January 25, 2007, the mother began custody proceedings in Ontario. She served the father with notice of her motion for custody on February 7, 2007.

[15] Six weeks later, on March 20, 2007, the father began custody proceedings in Florida. This motion was his first resort to the legal system to secure Andrew's return. The father served the mother with notice of his motion for custody on April 5, 2007. He also began divorce proceedings at that time.

[1] The only date the letter refers to is July 11, 2006. Presumably, the father meant June 11, 2006.

[16] Given the two parallel proceedings, on April 26, 2007, the Ontario judge, Justice Hatton, and the Florida judge, Judge Santurri, held a conference call with the parties' counsel to determine the proper venue for hearing a motion on custody jurisdiction. They concurred, and the parties agreed, that the Ontario Superior Court would hear the jurisdictional motion. During the conference call, no one made any mention of an application for Andrew's summary return under the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention" or "Convention").

[17] On May 23, 2007, the day before the jurisdictional motion was set to be heard, the father served the mother with notice that he would be commencing an application under the Hague Convention for Andrew's summary return to Florida.

[18] The Hague Convention motion was heard on June 7, 2007 before Ferguson J. of the Superior Court. The motion judge declined to order Andrew's return. Invoking Article 13(a) of the Hague Convention, she concluded that the father had acquiesced in Andrew's retention in Ontario. Her conclusion was based largely on the father's delay in initiating his Hague Convention application. Based on this acquiescence, she used the discretion granted to her under Article 13 of the Convention not to apply the summary return mechanism in Article 12.

[19] Andrew, now two and a half years old, continues to reside in Ontario with his mother. He has not seen his father in 19 months.

C. ISSUE

[20] The sole issue on appeal is whether the motion judge erred in concluding that the father acquiesced in his son's retention and declining on that basis to order Andrew's return to Florida under the Hague Convention.

D. ANALYSIS

[21] Any analysis of the Hague Convention requires bearing in mind that instrument's core objective: securing the prompt return of abducted children to their country of habitual residence. In *Thomson v. Thomson*, [1994] 3 S.C.R. 551, the Supreme Court of Canada's leading case on the Hague Convention, La Forest J. stated at p. 559: "The underlying purpose of the Convention, as set forth in its preamble, is to protect children from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the state of their habitual residence." The Convention thus establishes a presumption in favour of ordering the child's summary return under Article 12.

[22] The Convention creates certain exceptions to the mandatory return procedure for children wrongfully removed or retained. Those exceptions, contained in Articles 12, 13 and 20, were intended to be of limited scope. The Convention's drafters envisaged a "restrictive" interpretation of these exceptions: see Elisa Pérez-Vera, "Explanatory

Report" in Hague Conference on Private International Law, *Acts and Documents of the Fourteenth Session*, vol. 3 (The Hague: 1980) at para. 34. Similarly, Chamberland J.A. of the Quebec Court of Appeal in *M.G. v. R.F.*, [2002] J.Q. No. 3568 at para. 30, said:

> The Hague Convention is a very efficient tool conceived by the international community to dissuade parents from illegally removing their children from one country to another. However it is also, in my view, a fragile tool and any interpretation short of a rigorous one of the few exceptions inserted in the Convention would rapidly compromise its efficacy.

[23] The exception at issue in the case at bar is contained in Article 13(a), which reads:

> *Article 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 –
>
> a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to *or subsequently acquiesced in* the removal or retention. [Emphasis added.]

[24] I make two observations about this provision. First, it places the burden for establishing acquiescence on the person who opposes the child's return – in this case, the mother. Second, whereas return of the child under Article 12 is mandatory where the court finds wrongful removal or retention, a court's decision not to return a child because of the aggrieved parent's acquiescence is a discretionary decision: where Article 13(a) applies, the requested state "is not bound to order the return of the child".

[25] In *Katsigiannis v. Kottick-Katsigiannis* (2001), 55 O.R. (3d) 456 (C.A.), this court performed an in-depth analysis of Article 13(a) and decided to adopt the analysis of acquiescence set out in a House of Lords judgment by Lord Browne-Wilkinson: see *In re H and others (Minors) (Abduction: Acquiescence)* [1998] A.C. 72 (H.L.). This court's conclusion was that acquiescence is a question of the aggrieved parent's subjective intention, not one of the outside world's perceptions of that intention (para. 48). Subjective intention can be demonstrated through conduct, but such a demonstration requires the abducting parent to show "clear and cogent evidence" of "conduct . . . which is inconsistent with the summary return of the children to their habitual residence" (para.

49). Moreover, to override the mandatory return mechanism, the acquiescence must be "unequivocal" (para. 49).

[26] In her reasons, the motion judge referred to *Katsigiannis* and correctly summarized its holding. However, the motion judge went on to refer to the concept of "passive acquiescence," which she said "occurs when the aggrieved parent allows enough time to pass without insisting on summary return." She went on to conclude that "[w]aiting and permitting Andrew to become settled in Ontario and to establish roots with his mother and her extended family *can only be the result* of acquiescence on the part of the father." [Emphasis added.] The four factual findings at the end of her endorsement follow a similar path of reasoning:

> (i) there is clear and cogent evidence of unequivocal acquiescence;
>
> (ii) the father's conduct is inconsistent with the summary return of Andrew to Florida. He did not take immediate or even relatively immediate steps. He only brought the Hague motion in May of 2007;
>
> (iii) there has been passive acquiescence on the part of the father i.e. enough time has passed without insisting on summary return;
>
> (iv) acquiescence, in this case, can be inferred from the father's conduct.

[27] With respect, in my view the motion judge misapplied the concept of acquiescence set out in Article 13(a) and explained in *Katsigiannis*.

[28] The eight-month delay between the mother's failure to return Andrew on the September 29 return flight and the father's commencement of Hague Convention proceedings cannot, without more, constitute acquiescence. The Hague Convention, under Article 12, allows aggrieved parents one year following the date of the wrongful removal or retention to apply for their child's summary return, and to have the Convention's summary return mechanism apply with its full force. Even after a year has passed, an aggrieved parent's summary-return rights are not extinguished; the return mechanism is merely softened, with the abducting parent given the chance to override mandatory return upon proof that the child has "become settled in its new environment": see Article 12. To infer acquiescence solely on the basis of delay where the application was filed within eight months is inconsistent with Article 12. Given Article 12's one-year window, which is not even a strict limitation period, such delay cannot by itself constitute

"clear and cogent evidence" of "conduct . . . which is inconsistent with the summary return of the children to their habitual residence".

[29] There are good reasons not to deny the aggrieved parent the one-year window provided by Article 12. The parent may initially be unaware of the Hague Convention and of the rights and remedies flowing from it. The parent may, as the father claims here, attempt reconciliation, or to otherwise settle the dispute outside the courtroom. Most importantly, such a broad interpretation of acquiescence is inconsistent with the purpose of the Convention, which is to secure the prompt return of abducted children, and with the correspondingly limited scope of the Convention's exceptions.

[30] The motion judge committed a similar error in principle by referring to the fact that "Andrew [had] become settled in Ontario and . . . establish[ed] roots with his mother and her extended family". Pursuant to Article 12, the degree to which the child has become settled has no bearing on a Hague Convention application filed within one year. The familial bonds Andrew has forged in Ontario may well influence the issue of where and with whom this toddler should reside, but such custodial matters are not before us: see Hague Convention, Articles 16, 19; *Thomson, supra*, at 578.

[31] The motion judge noted that the father did not commence his Hague Convention application until after the jurisdiction motion was set to be argued in Ontario. Indeed, no mention of the Hague Convention was made during the conference call during which the Ontario and Florida judges set Ontario as the venue for the jurisdictional hearing. Further, the father filed notice of his application the day before the date for which the jurisdictional hearing was scheduled, and the day after he had filed his factum for that hearing.

[32] The father's procedural conduct is not inconsistent with summary return. Consenting to and preparing for a jurisdictional hearing in Ontario did not show a weakened will on the father's part to seek his son's return. Indeed, had the jurisdictional motion taken place, the father would almost certainly have argued something very similar to what he argued before Ferguson J. and before this court: that Andrew should be returned to Florida for a custody hearing in that state. The fact that that argument would have been based on *forum non conveniens* rather than Article 12 of the Hague Convention says nothing about the father's desire for the swift return of his son.

[33] I conclude that the trial judge erred in interpreting Article 13(a) and in finding that the father had acquiesced in Andrew's wrongful retention. In my view, the mother did not show conduct by the father inconsistent with summary return or in any other way establish unequivocal acquiescence.

[34] Because the exception contained in Article 13(a) does not apply, I would order that Andrew be returned forthwith to Florida. Given Andrew's young age and attachment

to his mother, it is appropriate that she travel with him. The father has agreed to make accommodations for the return of mother and child, and should do so by covering their airfare expenses, providing financial support for their basic needs (including food, clothing and medical treatment), arranging separate accommodation for the mother in Florida, and facilitating a workable shared custody regime while the Florida courts determine custody matters.

E. DISPOSITION

[35] I would allow the appeal and order Andrew's return forthwith, pursuant to Article 12 of the Hague Convention, to his home in Florida.

[36] I would set aside the motion judge's costs order and award the appellant his costs of the motion and the appeal fixed at $5,000 in total, inclusive of disbursements and GST.

RELEASED: January 16, 2008 ("JCM")

"J.C. MacPherson J.A."
"I agree Robert P. Armstrong J.A."
"I agree G. Epstein J.A."