IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Shortridge-Tsuchiya v. Tsuchiya***,
2009 BCSC 541

Date: 20090421
Docket: E54989
Registry: Nanaimo

Between:

Theresa Shortridge-Tsuchiya

Plaintiff

And

Sakae Tsuchiya

Defendant

Before: The Honourable Mr. Justice Shabbits

Oral Reasons for Judgment

Counsel for the plaintiff:	S.E. Gosh
Counsel for the defendant:	M. Thomas
Date and Place of Hearing:	April 07, and 21, 2009 Nanaimo, B.C.

[1] The application that is before the court concerns a child, Taiyo. Taiyo was born in Japan in August of 2001.

[2] Ms. Shortridge-Tsuchiya and Mr. Tsuchiya are Taiyo's parents.

[3] Ms. Shortridge-Tsuchiya is the plaintiff in this proceeding. She was born in Ottawa and is a Canadian citizen. She is 38 years of age. She is a teacher. She received a Bachelor of Education degree from the University of Alberta in 1994. She is licenced to teach in British Columbia and holds a professional certification of qualification from the B.C. College of Teachers.

[4] Mr. Tsuchiya is the defendant. He is a Japanese citizen. He has lived and worked his entire life in Japan. He is 50 years of age. He graduated from Chubu University with a major in electronic engineering. He is self-employed, having taken over his family's firm from his father in September of 2007.

[5] The plaintiff moved to Japan in 1995. She taught English in Japan. She met the defendant in the spring of 1996 when she was an instructor at an English conversational school in Kasugai, Aichi Prefecture. The defendant was taking English conversational classes at the school.

[6] The plaintiff and the defendant began dating in or around 1997. They married in March of 2000 in Hawaii. Their marriage was registered with the municipal authorities in Kasugai in May of 2008.

[7] After they married, the plaintiff and the defendant lived in Kasugai until the plaintiff returned to Canada with Taiyo in November of 2008.

[8] Taiyo is now seven years and eight months of age. He has both Japanese and Canadian citizenship. He is said to be fluent in both Japanese and in English.

[9] The plaintiff claims to have a good working knowledge of Japanese. The defendant claims to have a good working knowledge of English.

[10] After Taiyo's birth, the defendant resumed working as a teacher outside of the family home. She continued to be employed as an English teacher, but at various schools. She typically worked outside the home two or three days a week from about noon until eight or nine in the evening, and from about 10:00 a.m. to 1:00 p.m. on another day of the week. She had other occasional teaching assignments.

[11] When both of his parents were working, Taiyo was frequently cared for by his paternal grandparents. Taiyo and his paternal grandparents have a close relationship.

[12] In January of 2005, Taiyo and his parents moved into the home which had been built by the defendant. This is a three level residence. The defendant's parents live on the first floor, and the plaintiff and the defendant and Taiyo lived on the second and third floors. The defendant's office is on the second floor.

[13] Taiyo began kindergarten in April 2005.

[14] Taiyo has other extended family members in Kasugai. The defendant's sister and her husband and their three children live there. Those cousins are 12, 11, and 9 years of age.

[15] Taiyo has always enjoyed good health. He has had regular dental care.

[16] By the end of 2006, the parties' relationship became strained. An attempt at counselling was unsuccessful. In December 2007, the defendant told the plaintiff that he intended to seek a divorce.

[17] In June of 2008, the defendant hired a lawyer to obtain a divorce. He applied for Coordination and Mediation of Marriage at Nagoya Family Court on July 8, 2008. The defendant says that he was advised by his lawyer that that was a necessary first step towards obtaining a divorce and that if mediation was not successful the case could proceed to trial.

[18] The first mediation session was held on September 4, 2008. A second session was held on October 8, 2008. Mediation was not successful.

[19] On or about November 1, 2008, the plaintiff left with Taiyo for Canada. She did not tell the defendant that they were leaving.

[20] The plaintiff and Taiyo now reside with her parents in Nanaimo. I have no doubt but that Taiyo and his maternal grandparents are developing the same kind of close bond that Taiyo enjoyed with his paternal grandparents.

[21] Taiyo is in grade two at an elementary school which is situation not far from where he is now living. Taiyo is reported to be doing well in school.

[22] The plaintiff started this proceeding in British Columbia on November 20 of 2008. She seeks an order for Taiyo's custody, and an order that she have his care and control.

[23] The defendant started proceedings in Japan on November 21 of 2008. In that proceeding he seeks an order that he have custody of Taiyo.

[24] This application is brought in British Columbia by the defendant. With it, the defendant seeks a declaration that the court is without jurisdiction to make an order relating to Taiyo's care and custody, or, alternatively, for an order that the court decline to exercise its territorial competence.

[25] Japan is not a signatory to the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

[26] Part III of the *Family Relations Act* RSBC 1996 c. 128 (the "Act") is of application. It relates to Extra-provincial Custody and Access Orders

[27] Section 43(a) of the *Act* provides that a purpose of Part III is to ensure that applications to the courts in respect of custody of, access to and guardianship of children will be determined on the basis of the best interests of the children.

[28] Section 43(b) provides that a purpose of Part III is to recognize that the concurrent exercise of jurisdiction by judicial tribunals of more than one state in respect of the custody of or access to the same child ought to be avoided, and to make provision so that the courts of British Columbia will, unless there are exceptional circumstances, refrain from exercising or decline jurisdiction in cases

where it is more appropriate for the matter to be determined by a tribunal that has jurisdiction in another place with which the child has a closer connection.

[29] Section 43(c) provides that a purpose of Part III is to discourage the abduction of children as an alternative to the determination of custody rights by due process.

[30] In this case the father, who is the defendant, submits that the plaintiff abducted Taiyo from Japan as an alternative to the determination of custody rights in Japan by due process.

[31] The mother, who is the plaintiff, denies that. She points out that no court proceeding in Japan had yet been commenced relating to Taiyo's custody, access or guardianship, and that she has equal rights to Taiyo's custody and guardianship. She submits that she did no more than return with Taiyo to her parents' residence, (Taiyo's maternal grandparents), to escape from circumstances where the defendant was unfairly and unreasonably dominant over her and the family finances. She alleges that the defendant had been physically abusive. She claims that the defendant controlled the family finances and that although the family is of obvious means, the defendant was secretive and evasive about money matters,

[32] The defendant agrees that he would not have permitted the plaintiff to leave with Taiyo. The defendant has made no financial contributions for Taiyo's maintenance since October, 2008. He has left the financial cost of his care entirely to the plaintiff and her parents.

[33] I do not find that the plaintiff abducted Taiyo as an alternative to the determination of custody rights by due process. The defendant knew where the plaintiff and Taiyo had gone. The plaintiff has always been subject to court process. There was nothing illegal about the plaintiff leaving with Taiyo. The plaintiff was one of his legal custodians. There was no pending court process. There was no court order preventing her from leaving.

[34] Section 44(1)(a) of the *Act* provides that a court must exercise its jurisdiction to make an order for custody of or access to a child only if the child is habitually resident in British Columbia at the commencement of the application for the order, or although the child is not habitually resident in British Columbia, the court is satisfied that six criteria set out in s. 44(1)(b) are met.

[35] Habitual residence is defined in s.44(2) of the *Act*. It is the place where the child resided with both parents, or if the parents are living separate and apart, the place where the child resided with one parent under a separation agreement or with the implied consent of the other parent or under a court order, or the place where the child resided with a person other than a parent on a permanent basis for a significant period of time. A child's habitual residence is the place where the last of those events occurred.

[36] I find that Taiyo was habitually resident in Japan at the commencement of this application for an order relating to his custody or access. I find that that is so because the last s. 44(2) event is that Taiyo lived with both of his parents in Japan.

[37] An issue in this application is whether the court must exercise its jurisdiction to make an order relating to Taiyo's custody or access under s.44(1)(b).

[38] Madam Justice Mesbur of the Superior Court of Justice of Ontario concluded in ***Nordin v Nordin*** 2001 17 RFL (5^{th}) 119 that for the court to take jurisdiction under this enactment, all six of the criteria in this subsection must be met. The plaintiff and the defendant agree that that is so.

[39] The first criterion is that Taiyo be physically present in British Columbia at the commencement of the application for the order. This requirement is clearly met.

[40] The third criterion is that no application for custody of or access to Taiyo was pending before an extra-provincial tribunal in Japan.

[41] This criterion relates to the time that this proceeding was commenced. I am of the opinion that this criterion has been met. The defendant commenced legal proceedings for custody and divorce in Japan on November 21, 2008. That is after this proceeding was commenced. The defendant's earlier application for Coordination and Mediation of Marriage does not, in my opinion, constitute an application for custody that was pending. On November 5 of 2008, the court issued a Certificate of Failure of Mediation. That ended the mediation proceeding. There was therefore no legal proceeding pending in Japan when this proceeding was commenced on November 20, 2008. That is so even if the advice the defendant says he received that mediation was a condition precedent to an application for a divorce is correct.

[42] Criterion (iv) is that no extra-provincial order in respect of custody of or access to Taiyo has been recognized by a court in British Columbia. This requirement is met.

[43] There is a dispute between the parties as to whether criteria (ii), (v) and (vi) have been met.

[44] Criterion (ii) is that substantial evidence concerning the best interests of the child is available in British Columbia.

[45] There is evidence concerning Taiyo's best interests available in British Columbia. That is so because he has been here since November, and because he was brought here on earlier occasions to visit, although the evidence that arises from those earlier visits is likely limited. The dispute between the parties in respect of criterion (ii) relates to whether the evidence available in British Columbia as to Taiyo's best interest is substantial evidence, within the meaning of that criterion.

[46] Criterion (v) is that Taiyo has a real and substantial connection with British Columbia. Taiyo has a real connection with British Columbia. His maternal grandparents live here. He has lived here for the past several months. He is a Canadian Citizen. He visited British Columbia in times past. Taityo's mother is qualified to teach here, and she wishes to live and work here with Taiyo. The issue is whether Taiyo 's connection with British Columbia is substantial.

[47] The defendant submits that although Taiyo has a real connection with British Columbia, his real and substantial connection is with Japan.

[48] Criterion (vi) is that on the balance of convenience, it is appropriate for jurisdiction to be exercised in British Columbia.

[49] I am not satisfied that criteria (ii), (v) and (vi) have been met. This court is therefore not required to exercise its jurisdiction to make an order for custody of or access to Taiyo. It may do so in unusual circumsances but it is not mandated by s. 44.

[50] The plaintiff moved to Japan in 1995. She met the defendant not long after she moved there, but she did not marry until she had been in Japan for a number of years. Taiyo was born in Japan in August of 2001. The plaintiff decided to make her life with her family in Japan. The plaintiff and the defendant resided and worked in Japan until difficulties arose in their marriage.

[51] I am satisfied that until the plaintiff left with Taiyo on about November 1, 2008, both parties considered that Japan would be the forum for resolution of any issues relating to their marriage, including issues relating to Taiyo. The plaintiff had already taken part in formal family court mediation proceedings before she left.

[52] Section 46 of the *Act* provides that a court that has jurisdiction in respect of custody or access may decline to exercise its jurisdiction if the court is of the opinion that it is more appropriate for jurisdiction to be exercised outside British Columbia.

[53] The evidence of outside witnesses who have seen Taiyo relate to both of his parents is available only in Japan. The long term evidence relating to Taiyo's best interests is in Japan. Taiyo has been in British Columbia only since November. The

evidence that is available in British Columbia is short term evidence including evidence from his elementary school teacher and evidence from witnesses who have seen him relate to his mother over restricted periods of time. I am not satisfied that there is substantial evidence concerning Taiyo's best interests available in British Columbia. See ***Nordin*** and ***Gilbert v. Gilbert*** (2001), 17 R.F.L. 199. In my view, the substantial evidence concerning Taiyo's best interests is in Japan.

[54] I am also not satisfied that Taiyo has a substantial connection with British Columbia. He has a real connection here, but he has, until the recent separation, lived in Japan. He has a substantial connection with Japan.

[55] In my view, of overriding significance, is that I am not satisfied on the balance of convenience that it is appropriate for jurisdiction to be exercised in British Columbia. Japan is where Taiyo has spent most of his life. Japan is the place where his parents chose to make their lives until their recent separation, and Japan is the place where the best evidence concerning Taiyo's best interests is available.

[56] I would decline jurisdiction pursuant to s. 46 even if the court had jurisdiction under s. 44.

[57] The plaintiff submits that because Taiyo is of mixed race he will be discriminated again in Japan. She submits that he will not be the subject of discrimination in Canada.

[58] The application that I am considering is which forum should determine what orders should be made relating to Taiyo's custody and access and care. This submission, in my opinion, does not relate to that issue.

[59] The courts and tribunals in Japan are in a better position than am I to assess the extent of discrimination to which Taiyo may be exposed to in Japan and to decide what orders should be made that address that issue.

[60] There is at present no unusual reason for this court to assume jurisdiction.

[61] Section 47 of the *Act* provides that on application for custody of or access to a child, a court that may not exercise jurisdiction under s. 44 or that has declined jurisdiction under s. 46 may make an interim order.

[62] This court either does not have jurisdiction under s. 44 or it is declining jurisdiction under s. 46. I am therefore going to make an interim order for custody and access.

[63] The court may make the custody or access order that the court considers is in the best interests of a child and may stay the application subject to any conditions the court considers appropriate and may order a party to return the child to a place the court considers appropriate. The court, in its discretion, may order payment of the costs of the reasonable travel and other expenses of a child and any parties to or witnesses at the hearing of the application.

[64] Taiyo has been in the plaintiff's care and control. There is no issue that she has cared for him well. The evidence before me is that it is extremely unusual for a

mother in Japan not to be awarded custody of her child or children upon breakdown of a marriage.

[65] I order that the plaintiff have interim custody and interim care and control of Taiyo. The defendant shall have reasonable and generous access to him.

[66] It is of concern to me that the defendant appears to have unilaterally and secretly controlled this family's finances. It is of concern to me that the defendant has not been contributing to Taiyo's maintenance. Those concerns give credence to the plaintiff's assertion that the defendant uses financial control as a tool for manipulation.

[67] Although it will be the courts in Japan that decide the parties' financial claims against each other, Taiyo's best interests require that the plaintiff be in a position to meaningfully participate in its court process.

[68] It is not in Taiyo's best interests that the defendant's control of his family finances prevent or hinder the plaintiff from presenting evidence in Japan as to what is in Taiyo's best interests.

[69] The defendant has made it clear that he will be retaining possession of the former matrimonial residence to the exclusion of the plaintiff.

[70] I order that the plaintiff return with Taiyo to Japan so that the issues relating to Taiyo's custody, access and guardianship can be decided in Japan. This order is stayed until the defendant pays the plaintiff a sum of money that is adequate to cover Taiyo and the plaintiff's reasonable travel expenses to Japan and until the

defendant secures payment to the plaintiff of a sum of money that is sufficient to cover Taiyo's and the plaintiff's reasonable living expenses in Japan until those matters can be decided.

[71] The parties have leave to apply should they be unable to agree as to what payment is required of the defendant and as to the amount and manner of securing payment of living expenses.

[72] I can hear submissions as to that later today.

[73] If the plaintiff chooses not to return to Japan following payment of travel expenses or after the defendant secures payment to her of reasonable living expenses, then the defendant has leave to apply for an order for Taiyo's interim custody and care.

[74] If the defendant does not pay the travel expenses and secure payment of living expenses then the plaintiff has leave in those unusual circumstances to apply to have matters relating to Taiyo's custody and access determined in British Columbia in this proceeding.

[75] The parties have enjoyed mixed success. I decline to make any orders as to costs.

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Mr. Justice S.J. Shabbits