Ellis v. Wentzell-Ellis

Canadian Family Law Guide

Ontario Court of Appeal

Before: Goudge, MacFarland, and LaForme JJ.A.

Decision: May 13, 2010.

Docket No. C51392

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Ellis v. Wentzell-Ellis

Case Summary

Custody and access — Hague Convention — Mother took child from England to Ontario for vacation and refused to return — Application judge found that child was habitually resident in Ontario and alternatively that child would be at risk of harm under Article 13(b) if returned to England — Father appealed — Appeal allowed — Judge wrongfully determined habitual residence based on mother's intention to reside in England temporarily and on the child's habitual residence at the time of application rather than time of wrongful removal — Alternative conclusion of risk of harm was also in error — Father's disrespectful behaviour and drinking problem did not meet the high threshold — Child was ordered returned with custody to be determined by English courts.

Facts: The parties met in Toronto in 2006 and lived there for one month before relocating to England. The parties were married and had a child in England in 2007. In March 2009, the mother brought the child to Canada to visit her parents. She was scheduled to return in April, but delayed the return until June 5, 2009. Instead of returning on June 5, the mother e-mailed the father to say that she would not be returning, and filed an application for custody in the Ontario Superior Court of Justice. The father successfully obtained an *ex parte* order from the English courts making the child a temporary Ward of the Court and brought an application for the return of the child under the *Hague Convention on the Civil Aspects of International Child Abduction* ("Hague Convention"). The application judge concluded that the child was removed from England with permission but was wrongfully retained in Ontario. However, she refused to grant the father's application on the grounds, first, that the child was habitually resident in Ontario or in both Ontario and England such that the Hague Convention did not apply, and alternatively, that returning the child to England would place her in an intolerable situation under Article 13(b) of the Hague Convention. The father appealed.

HELD: The appeal was allowed.

The application judge erred in both her interpretation and application of the Hague Convention. She made three errors in principle in finding that the child was habitually resident in Ontario. First, she set too high a threshold in requiring that the father demonstrate that the mother intended to reside permanently in England. Her finding that the mother had not intended to leave Canada permanently was irrelevant based on the jurisprudence. Second, she erroneously determined the child's habitual residence based almost exclusively on the mother's habitual residence, ignoring the fact that both parties were custodial parents when the mother left England. Convention rights are not dependent on the applicant being the primary caregiver, nor do they favour the primary caregiver. Third, the judge determined habitual residence at the time of the hearing rather than at the time of the wrongful retention. The child was habitually resident in England, not Ontario, immediately before the mother retained her in Ontario. The judge's alternative conclusion that returning the child to England would create an intolerable situation was also based on

multiple errors. There was no "grave risk of physical or psychological harm" to the mother by the father. Evidence that the father was disrespectful and may have had a drinking problem was insufficient, and the judge's finding that the likelihood that the mother would have to live in government subsidized housing in England would cause psychological and physical harm to mother and child was unsupported by evidence. The child was ordered to be returned to England forthwith so that the English courts could assume jurisdiction.

Counsel

P.M. Epstein, Q.C., and L. Ng for the appellant; I.R. Mang for the respondent.

The judgment of the Court was delivered by

H.S. LaFORME J.A.

OVERVIEW

1 This case once again examines the application of the *Hague Convention on the Civil Aspects of International Child Abduction*, 1980, C.T.S. 1983/35; 19 I.L.M. 1501 (the *Convention*). The circumstances involve the appellant father, the respondent mother and their child, a 2 year old daughter.

2 At para. 36 of her reasons, this is how the application judge described this family's situation at the time of the hearing: "The daughter was born in England, is a citizen of both England and Canada, has doctors in each country, is in the process of obtaining an OHIP card in Ontario and has her mother's family resident here. Her father and his family are resident in England".

3 The mother together with the child left England for Canada in March 2009 for a vacation with her parents. They were originally scheduled to return to England on April 12, 2009 but the mother extended their stay in Toronto and changed their return date to June 5, 2009. However, on June 5, the mother emailed the father to inform him that she would not be returning. The father sought an order from the application judge that the child was being wrongfully retained in Ontario by the mother. His position was that the child's retention in Ontario constituted a "wrongful removal" or "retention" of her within the meaning of the *Convention*.

4 The application judge concluded that the child had been removed from England with the permission of the father, but that he had not consented to the child's being retained beyond June 5, 2009. However, she refused to grant the father's application on two grounds. First, that the child is habitually resident in Ontario, or that she was habitually resident in both Ontario and England, and therefore the *Convention* did not apply. In the alternative, she found that Article 13(b) of the *Convention* did apply and that the mother and child were to remain in Ontario.

5 Respectfully, and despite the application judge's comprehensive and thoughtful reasons, I find that in all the circumstances of this case, I must disagree with her conclusions. In my view, there were no grounds on which to dismiss the father's application. In doing so, the application judge erred in both her interpretation and application of the *Convention*.

FACTS

6 The father and mother met in Toronto in April 2006. In the fall of 2006, they spent one month in Gibraltar and Spain before moving to England in November 2006. The mother had originally entered England on a tourist visa. She then obtained a "fiancée visa" in order to allow her to stay there, and she eventually obtained a "spousal visa". They were married on August 7, 2007 in London and their child was born there on November 3, 2007.

7 In March 2009, the mother brought their child to her parents' home in Canada, ostensibly on vacation. She was scheduled to return on April 12, 2009, but delayed this until June 5, 2009. As I noted above, neither the mother nor the child returned to England; rather, on June 5, 2009, the mother filed an action in Toronto in the Superior Court for custody of their child.

8 On July 9, 2009, the father moved, *ex parte* before the Family Division of the High Court of Justice in London, England, for an order making his daughter a Ward of the Court during her minority. The High Court of Justice in England granted the order and the daughter was made a ward of the Crown in England until further order of the court.

9 On July 27, 2009, a representative of the Official Solicitor, International Child Abduction & Contact Unit, wrote to the Reciprocity Office of the Ministry of the Attorney General of Ontario to put that Office on notice that the father was going to bring on a *Convention* application for the return of the child to England.

10 As part of the mother's proceedings in Ontario, the father brought his *Convention* application, which was heard on September 14, 2009. The application judge dismissed the father's application on two grounds. First, she found that, pursuant to Article 3 of the *Convention*, the child was not habitually resident in England. Second, she found that, pursuant to Article 13(b), returning the child to England would place her in an intolerable situation. It is that decision that is the subject of this appeal.

11 I will refer to other background facts later in these reasons where they are relevant to my analysis.

ISSUES

12 The father raises numerous issues on this appeal; however, they condense into two questions:

(i) Did the application judge err in her interpretation of Article 3 of the *Convention*, namely, the habitual residence of the child?

(ii) Did the application judge err in her interpretation of Article 13(b) of the *Convention*? That is, would a return of the child to England place the child in an intolerable situation?

13 As I have already noted, and as I will demonstrate, I find that the application judge erred in her answers to both questions. Given this, I would allow the appeal and order that the child be returned to London, England.

ANALYSIS

Relevant Provisions

14 The *Convention* was incorporated into Ontario law pursuant to s. 46(2) of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12. The following provisions of the *Convention* are relevant to the present dispute:

Article 3

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.

Article 4

> The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.
>
> **Article 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 the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
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> **Article 13**
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> 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.

Interpretation of the *Convention*

15 As stated by the Supreme Court of Canada in *Thomson v. Thomson*, *[1994] 3 S.C.R. 551*, at para. 41, interpretation of the *Convention* should be grounded in the rules established by the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37., in particular, Article 31(1) which states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

16 I would note that at para. 38 of her reasons, the application judge describes the "underlying purposes of the Convention" as "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." Careful review of the application judge's reasons reveals that her analysis focussed on what she determined to be in the best interests of the child and the mother given that they were in Canada at the time of the application. In particular, she seems to have been of the view that there were no "harmful effects" from which the child required protection. In my view, this led the application judge to err in considering factors not strictly relevant to the analysis as defined in the *Convention*.

17 The objects of the *Convention* are listed in article 1. They are to secure the prompt return of children wrongfully removed or retained in any Contracting State, and to ensure respect for rights of access and custody. Implicit in the language of the *Convention* is that each contracting state acknowledges that it is the courts of the country in which the child was habitually resident before his or her wrongful removal or retention that are, in principal, the best place to decide questions of custody and access. Articles 1 and 2 of the *Convention* clearly reflect this. It bears repeating what Feldman J.A. made clear at para. 7 in *Korutowska-Wooff v. Wooff* *(2004), 242 D.L.R. (4th) 385*:

> The court of the contracting state to which the child was removed is not to enter into a determination of the custodial rights of the parties, but is to return the child to the state from which he or she was removed, in order that the custody and related issues be determined in that state.

18 The *Convention* achieves this by creating a uniform code of rules to be applied by Contracting States. The need for uniformity in the interpretation of the *Convention* among state parties was stressed by Lord Browne-Wilkinson in *Re H.* [1996] H.L.J. No. 43, [1998] A.C. 72 at 87: "An international Convention, expressed in different languages and intended to apply to a wide range of differing legal systems, cannot be construed differently in different jurisdictions. The Convention must have the same meaning and effect under the laws of all contracting states."

19 By incorporating the *Convention* into Ontario law, the legislature not only adopted the rules it sets out, but

endorsed the goal of the contracting states to have those rules interpreted and applied uniformly. As stated by the Supreme Court in *Thomson* at para. 42, "[i]t would be odd if in construing an international treaty to which the legislature has attempted to give effect, the treaty were not interpreted in the manner in which the state [sic] parties to the treaty must have intended."

20 I would note that in interpreting the *Convention*, the Supreme Court of Canada, has cited jurisprudence from several other states parties: See *Thomson* at para. 82. Canadian jurisprudence has in turn been cited by other Contracting States: Paul R. Beaumont and Peter E. McEleavy, *The Hague Convention on International Child Abduction* (Oxford: Oxford University Press, 1999) at 235-236; See *Nunez-Escudero v. Tice-Menley*, 58 F. 3d 374 (1995), citing *Thomson*. Although foreign case law is not binding, the court should nevertheless take care to ensure consistency with the interpretations adopted by the courts of other states parties, particularly where a consensus has emerged from among them. To do otherwise would, in my view, not only weaken the *Convention* but also run contrary to the will of the legislature which has chosen to enact it into domestic law.

21 As I noted briefly at the outset, the application judge rejected the father's application on two grounds. First, she found that the child was either habitually resident in Ontario or had two habitual residences - Ontario and England - and therefore the *Convention* did not apply to her. In the alternative, she found that returning the child to England would place her in an "intolerable" situation. In my view, these findings cannot be supported by the ordinary meaning of the terms of the *Convention* as interpreted by courts in Canada and in other contracting states. I will address each of the application judge's grounds in order.

Article 3 - Habitual Residence

22 As the application judge correctly notes at para. 39 of her reasons, this court held in *Korutowska-Wooff* that habitual residence involves an intention to stay in a place "whether temporarily or permanently for a particular purpose, such as employment, family, etc." The principles to be considered when deciding the issue of habitual residence are specified by Feldman J.A. at para. 8 in *Korutowska-Wooff* and have been repeatedly restated in the jurisprudence:

* the question of habitual residence is a question of fact to be decided based on all of the circumstances;
* the habitual residence is the place where the person resides for an appreciable period of time with a "settled intention";
* a "settled intention" or "purpose" is an intent to stay in a place whether temporarily or permanently for a particular purpose, such as employment, family, etc.;
* child's habitual residence is tied to that of the child's custodian(s).

23 With respect to the definition, I would make two comments. First, it is clear from both the wording of the provisions and the jurisprudence that an applicant need not establish *permanent* residence. Second, pursuant to Article 4, "[t]he Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights." It is thus clear that in determining the child's habitual residence, facts arising after they have been wrongfully removed are irrelevant to the analysis. I would note that such facts will be relevant under Article 12, which applies where an application is not brought within one year of the wrongful removal, but that issue does not arise in the present case.

Application Judge's Reasons

24 The application judge decided the child's habitual residence with reference to that of her parents. At para. 40 of her reasons, she finds that the mother's habitual residence is Canada:

> In the case before me, I find on the facts that the mother never intended to reside permanently in England. She saw herself staying there for a short time while the father worked there. I accept that the mother's plans were to return to Canada as soon as possible, especially after the daughter was born. She never had a settled intention to leave Canada. The mother's habitual residence is Canada.

25 Turning to the father's habitual residence, she found that the father was habitually resident in England. However, she noted that this could change if he were offered employment elsewhere, which she found would not be unusual.

26 Based on these findings, the application judge found that the child was habitually resident in Canada. She found that the mother was the child's primary caregiver and had "*de facto* custody of the daughter here in Canada." She discounted the father's habitual residence because it was liable to change. Crucially, at para. 48, the application judge states:

> I find that the daughter is habitually resident in Canada now, and the Hague Convention does not apply to send the daughter back to England. If I am wrong, I find the daughter has two habitual residences.

27 Although the determination of habitual residence is a question of fact, I find that the application judge made three errors in principle in making these findings. First, she set too high a threshold for habitual residence, appearing to require the father to prove that the mother intended to reside permanently in England. Second, she completely discounted the father's residence in determining that of the child. Third, she explicitly relied on facts arising after the wrongful removal of the child from England and based her decision on the child's current residence.

28 With respect to the first, although the mother lived in London from November 2006 to March 2009 - with two 4 month visits to Canada - the application judge found that the mother never intended to stay permanently in London and wished to move back to Canada when the appellant got a job in Toronto. I would note that, even if this were true, applying the jurisprudential principles referred to earlier, the mother would still be "habitually resident" in London at the time she left in March 2009. Regrettably, this misinterpretation also led the application judge to find that the father's habitual residence could not be determined because she found that he would likely move if offered a job abroad.

29 Second, the application judge noted that the child's residence should be determined with reference to that of both custodial parents. However, she then erroneously determined the child's habitual residence almost exclusively with reference to the mother's habitual residence and appears to have ignored the father's. Her reasons for doing so are found at para. 46 of her reasons:

> The mother has *de facto* custody of the daughter here in Canada. The mother has been the daughter's primary caregiver since birth. The child has spent far more daily time with her mother than her father since her birth. The mother is one of her custodial parents and her habitual residence is here in Canada. The father, however, while habitually resident in England at the moment, could work anywhere in the world where there are IT/gaming positions. His residence will continue to change as his work-pattern changes.

30 Unfortunately, this ignored the fact that, at the time the mother left England, there was no question that both the mother and the father were both custodial parents. The *Convention* does not make protection of custodial rights contingent on an applicant being the primary caregiver, nor does it give preference to the custody rights of the primary caregiver. It was an error on the part of the application judge to weigh the comparative custodial rights and caregiver roles of each parent as she appears to have done.

31 Third, the application judge framed her decision as being where the child is habitually resident *now*. At para. 48, she states: "On the facts before me in this case, I find that the daughter is habitually resident in Canada now, and the Hague Convention does not apply to send the daughter back to England."

32 In reaching this conclusion, the application judge relied on facts that took place after the mother retained the

child in Canada in June 2009. As cited above, the application judge noted that "[t]he mother has *de facto* custody of the daughter here in Canada." It was also noted that the mother was in the process of getting an OHIP card for the child and that the child had been living in Canada for the past seven months.

33 In my view, the evidence clearly establishes that in June 2009, the time at which her wrongful retention began, the child was habitually resident in England and had been visiting Canada since March 2009. As I noted, aside from two 4 month vacations to visit her grandparents in Canada, she had resided in England from her birth in November 2007 until she was brought to Canada in March 2009.

34 There is also ample evidence that although the mother may not have been happy in England, she was in fact residing there. For example, she had an apartment there where her mail and bills were delivered. The fact that she wished to return to Canada at some point in the future does not detract from the fact that she moved to England and resided there with the appellant and their daughter.

35 With respect to the conclusions of the application judge, the *Convention* does apply. The child was habitually resident in England immediately before the mother retained her in Canada. I find it unnecessary, given my just stated conclusions, to consider the application judge's alternative holding that the child has two residences.

Article 13(b) - Intolerable Situation

36 In the event she was in error in her findings on habitual residence, the application judge went on to consider Article 13(b) of the *Convention*. In doing so she found that returning the child to England would create an intolerable situation. Once again with respect, I find she committed several errors in doing so.

Intolerable Situation

37 Article 13(b) creates an exception to the general rule that a child wrongfully removed or retained in a Contracting State should be returned to his country of habitual residence. The provision sets a high threshold of a "grave risk" of physical or psychological harm or otherwise placing the child in an "intolerable situation."

38 This interpretation is only reinforced when examining the text in its context and in light of the treaty's object and purpose. As stated by Chamberland J.A. in *F. (R.) v. G. (M.)*, *[2002] J.Q. No. 3568* (Que. C.A.), at para. 30:

> 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 ... a fragile tool and any interpretation short of a rigorous one of the few exceptions inserted in the Convention would rapidly compromise its efficacy.

39 This court in *Jabbaz v. Mouammar* *(2003), 226 D.L.R. (4th) 494* agreed with those comments and went on to add further comment, which is of particular relevance to this appeal. At para. 33, Rosenberg J.A., writing for this court observed:

> Refusing to enforce the Convention because the child might have to move a short time later is not consistent with the rigorous interpretation required and is inconsistent with the stated objects of the Convention to secure the prompt return of children wrongfully removed or retained from the Contracting State and to ensure that custody rights are respected. Such an interpretation is, in my view, inconsistent with the thrust of the cases in this province such as this court's decisions in *Pollastro* and *Finizio*. Continuity in residence is desirable but some instability is not intolerable.

40 The threshold with respect to the exceptions set out in the *Convention* is thus a high one. The Supreme Court of Canada in *Thomson* held at para. 28 that the risk to the child must be one of substantial psychological harm to the child. In *Finizio v. Scoppio-Finizio*, *(1999), 46 O.R. (3d) 226* (C.A.), relying on *Thomson*, MacPherson J.A., writing for the court, found that the father had on one occasion struck the mother, but held that this was not a sufficient

reason to refuse his application to have the children returned to Italy. This conclusion was based in part on the assertion that it should be left to the police and courts of Italy to minimize any harmful effects of returning the children there: *Finizio* at paras. 33-35, citing *C. v. C.,* [1987] 1 W.L.R. 654 (England and Wales C.A.).

41 In contrast, in *Pollastro v. Pollastro*, *43 O.R. (3d) 485*, this court found that a continued pattern of escalating emotional and physical abuse, combined with threats against the mother and her family were sufficient to create an intolerable situation for the child. I would note that the court's conclusions in that case were based on evidence from the mother's doctor as well as transcripts of a taped phone message.

Application Judge's Reasons

42 As noted, the application judge found that returning the child to England would expose her to an intolerable situation. In so doing, she first found that returning to England would create an intolerable situation for the mother. Although the application judge reviewed evidence of threats by the father and one incident where he shook her stomach, her reasons base her Article 13(b) finding on the following findings of fact:

- The father has a drinking problem and, "stayed out in the pub with friends instead of going home to be with the mother and their child",
- The father treated the mother with "total disrespect",
- The mother would be forced to live in public/government tenement housing which would cause psychological and physical harm to the daughter and the mother,
- The father was "derogatory about [the mother's] family and friends, calling them unflattering names. He seemingly liked none of the wife's friends",
- The mother and child had to leave the apartment one evening because of the father's violent outbursts,
- The father's sister does not like the mother,
- The mother has few friends and no family in England.

43 Relying on this court's decision in *Pollastro*, the application judge concluded that these circumstances would create an intolerable situation for the child.

44 With respect, I find that the application judge committed several errors in reaching this conclusion. First, as a general point, the application judge appears to have set the standard of "intolerable situation" too low. The evidence accepted by the trial judge describes the father as irresponsible and disrespectful toward the mother, her family, and friends but records only one incident of physical violence, in which the father shook the mother's stomach. Based on the jurisprudence reviewed above, this is, in my view, not sufficient to ground a finding that the child would be placed in an "intolerable situation."

45 Second, the application judge's finding that the prospect of living in government subsidized housing would cause the child physical and psychological harm presents several problems. There does not appear to be any evidence on the record as to what kind of accommodations would be available and what risks they would entail. In addition, the application judge's finding in this regard seems to me to be contrary to the high threshold established in *Thomson* required to demonstrate an intolerable situation.

46 Furthermore, the application judge's finding is contrary to this court's decision in *Finizio* where, at para. 34, MacPherson J.A. held that it should be assumed that courts of the requesting country are able to deal with the issues arising from the divorce proceedings, including child and spousal support. This would apply equally to the application judge's reliance on the fact that the father was not paying child support while the mother was in Canada. In my view, absent strong evidence, it was not open to the application judge to find that the courts in England would not have granted and enforced support payments sufficient to allow the mother to acquire adequate housing.

47 The third error in respect of this issue is the application judge's reliance on facts that do not cause any direct harm to the child. For example, she noted at para. 55 that the father was disrespectful toward the mother and did not like any of her friends. At para. 56, she considered why returning to England would be intolerable for the mother; not why it would put the child in an intolerable position:

> Even though the father has family in England, his sister has said in so many words that she does not like the mother. The mother has few friends in England and no family to support her and the daughter.

48 The application judge, I believe, appears to have placed significant reliance on her finding that the father had a drinking problem and was prone to inappropriate and violent outbursts, which for the most part is contradicted by his evidence. This finding is not sufficient to meet the high threshold required. Nor, in my view, is it sufficient if this fact is combined with the others relied upon by the application judge.

49 In my opinion, the allegations of the mother are insufficient to find that the requirements of Article 13(b) of the *Convention* have been met. The evidence falls short of demonstrating that the child would suffer substantial psychological harm if she were returned to England.

50 I would conclude with this reminder. It must be appreciated that the court would not be forcing the mother or child to return to live with the father. Rather, an order that the child be returned to England simply recognizes that the mother was not entitled to take the child from England and that custody proceedings should be decided by English courts. Aside from recognizing that the English courts are the appropriate forum to determine the merits of the custody case, a return order also recognizes and trusts that those courts are capable of taking the necessary steps to both protect and provide for the mother and the child in the present case. This is what underlies Article 13(b) and why there is such a high threshold for parents wishing to justify removing their children from one contracting state to another.

DISPOSITION

51 For these reasons, I would allow the appeal. I would order that the child be returned to England forthwith so that the English courts can assume jurisdiction.

52 If the parties are unable to agree on the issue of costs, written submissions -- not to exceed five pages -- may be filed with the court. The father shall file his submissions within 14 days of the release of these reasons; the mother shall have seven days to reply.

H.S. LaFORME J.A.
S.T. GOUDGE J.A.:— I agree.
J.L. MacFARLAND J.A.:— I agree.

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