CITATION: Simpson-Campbell v. Stark-Campbell, 2013 ONSC 1328
COURT FILE NO.: FS – 13 - 384007
DATE: 20130304

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Audrey Violetta Simpson-Campbell	)	Ryan Aalto, for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
Michael Andrew Stark-Campbell	)	Phyllis Brodkin, for the Respondent
	)	
Respondent	)	
	)	
	)	
	)	
	)	**HEARD:** February 25, 2013

KITELEY J.

Background

1. The father has invoked the *Hague Convention* on the basis that his children had been wrongfully removed from Canada by the Applicant and should be returned to Scotland. For the reasons that follow, his application pursuant to the *Hague Convention* is dismissed.

2. The Applicant and Respondent have four children: Celeste (13.5 years old), Natasha, (12.5 years old); Christopher (4 years old) and Tabitha (2.5 years old). The parents disagree on many facts.

3. They do agree that their relationship began in Scotland approximately 15 years ago and that, following obtaining his engineering degree, the respondent worked in several countries while the Applicant resided with the children in Scotland. They also agree that they decided to emigrate to Canada and began the process of obtaining immigration approval. The Respondent qualified for the Skilled Permanent Resident Class visa and he sponsored the Applicant and their then three children. They all became Permanent Residents in February 2010. In September 2011, the Respondent moved to Toronto and worked here. The Applicant and Respondent married on January 2, 2012. The Applicant

said she and the children had arrived on March 12, 2012 while the Respondent said that they arrived on March 16. They agree that the family occupied the apartment on Finch Ave. that the Respondent had obtained before their arrival. The older girls were enrolled in school. The Applicant was a stay-at-home mother.

4. They agree that shortly after the arrival of the Applicant and the four children, the relationship between the Applicant and the Respondent deteriorated. They do not agree as to the date that the relationship ended. She said it was June 8, 2012 when they had a conversation about it and he said he stated to her that the relationship ended on March 18, 2012 – two days after he says they had arrived. Whether it was March 18th or June 8th, they do agree that they continued to live together in the apartment on Finch Avenue in Toronto. They agree that the Respondent left that apartment but they disagree as to when and why: he said it was when he was charged with assault on December 14, 2012. And she said it was November 8th or 9th when he left to live elsewhere. They do agree that as a result of his conditions of release following his arrest, he was prohibited from being in contact with the Applicant and the children who remained living in the apartment. He was specifically prohibited from attending at the apartment.

5. They agree that the Applicant and the children went to Scotland on December 18th. It is indisputable that the Applicant and the children returned to Toronto on January 16, 2013.

6. On December 28th, the Respondent obtained an amendment to his conditions of release as a result of which he was able to go back to the apartment on Finch Ave. They disagree whether he was truthful in seeking the amendment.

7. While in Scotland, Celeste and Natasha spoke with their father. From those conversations, the Applicant understood that the Respondent would not permit her and the children to return to the apartment on Finch Ave. When she left Scotland on January 16, she had no idea where she would stay when she arrived in Toronto. She had been given information about shelters and, from the airport, made some phone calls that led to a shelter in Mississauga. Since that was too far from the children's schools, she moved to another shelter in Scarborough. At the time of hearing the motion on February 25th, she was still living in the shelter with the children.

8. On January 23rd the Applicant launched this application, seeking a divorce, child support, spousal support, custody and exclusive possession of the apartment on Finch. Her application along with her financial statement, her rule 35.1 affidavit, and a notice of motion returnable January 24th were served on the Respondent on January 23rd. The Applicant sought immediate exclusive possession of the apartment on Finch Ave.

9. On January 21st, the Respondent initiated an Application pursuant to the *Hague Convention* in which he alleged that the Applicant had wrongfully removed the children from Scotland. He sought to have the children returned to Scotland. Such an application

takes priority over a domestic application. Consequently, on January 24th, Czutrin J. adjourned the Applicant's motion and established a timetable for the delivery of materials leading up to the motion on February 25th. He directed the Respondent to pay $2500 forthwith. The Respondent had offered to provide a hotel room for the Applicant and the children but the Applicant refused for a number of reasons not the least of which was it was far from the school the girls attended.

10. The Respondent filed an affidavit sworn February 7th. The Applicant filed an affidavit sworn February 19th. On February 22nd, the Respondent filed an affidavit in response.

11. In his January 21st application to the Official Solicitor in Scotland pursuant to the *Hague Convention* the Respondent provided no information about the family having lived in Toronto in 2012. His description of the circumstances of the alleged wrongful removal from Scotland began with having had conversation "throughout December" with his daughters in the UK. He said he had been told that they were would be attending school and had already gotten their uniforms. He said that while the children never gave him any indication that they were planning to leave the country, he was uneasy about the unpredictability of the Applicant's nature. He said that he called the local police who he described as being unhelpful. On the morning of January 16, 2013, the Respondent's brother went over to the Applicant's house to visit the children but they were not there. His brother when to the home of the Applicant's mother and was told that they had left for Canada. The Respondent called his daughters and the one that answered said they were on a plane but someone grabbed the phone and hung up. He said he awaited their arrival and secured a hotel room. He said that when he finally got through to the children, they told him they were not allowed to tell him where they were and were not allowed to talk to him or see him. He contacted police in several locations and the police would not tell him where the children were. In his ICACU application, he said he was in Canada and had arranged accommodation in Canada and that his extended family in the UK had made arrangements to receive the children and he would be willing to travel to anywhere to accompany his children back to the UK.

12. In his affidavit sworn February 7th, the Respondent listed at paragraph 21, over 20 factors that he said demonstrated that neither he nor the Applicant had made any attempts to establish a permanent home in Canada, or to change their recognized domicile from the UK. In her affidavit sworn February 19th, the Applicant responded to all of those allegations. He refuted her evidence in the February 22nd affidavit.

The Hague Convention

13. Article 12 of the *Hague Convention* is as follows:

> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of 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. . . .

14. In order to be wrongfully removed, the children must have been removed from their habitual residence. It is accepted that until the Applicant and the children arrived in Canada in March 2012, their habitual residence had been in Scotland. Ms. Brodkin conceded that at the time when the Applicant and the children left on December 18th, their habitual residence was Ontario. The narrow issue is whether, when the children left on December 18th, the habitual residence of the children reverted to Scotland such that on January 16th, 2013 they were wrongfully removed from Scotland.

Positions of the Parties

15. The Respondent takes the position that when the marriage ended on March 18, 2012, he and the Applicant agreed that she would return to Scotland with the children and that it was their shared intention that that would happen. He alleged that the Applicant had unilaterally changed her mind.

16. The Applicant takes the position that her intention when she left on December 18th was to return to Scotland for the Christmas holiday and to return in January and that the Respondent was well aware of those plans.

17. Ms. Brodkin relies on the reasons for decision in *Fasiang v. Fasiangova*[1] which applied the following definition[2] of habitual residence for *Hague Convention* cases:

    1. The question is a question of fact to be decided by reference to all the circumstances of the case;
    2. An "habitual residence" is established by residing in a place for an appreciable period of time, with a "settled" intention;
    3. A child's "habitual residence" is tied to the habitual residence of his or her custodian(s).

18. In *Fasiang*, the court referred to the earlier definition in *Blanchard v. Wuest*[3] in which the definition of habitual residence was as follows:

    1. An appreciable period of time and a settled intention;

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[1] 2008 CarswellBC 2096 BC SC
[2] Chan v. Chow (2001), 199 D.L.R. (4th) 478 (B.C.C.A.)
[3] 6 R.F.L. (5th) 66 (B.C.S.C.)

2. A residence adopted voluntarily and for a settled purpose;
3. A quality of residence as something midway between domicile and residence.

19. In that case, at paragraph 63, the court referred to the non-exhaustive list of factors in *Petnehazi v. Kresz*[4] namely:

    1. Both parties have relocated to the new state;
    2. The custodial parent is employed in the new state;
    3. The custodial parent had taken steps to satisfy the immigration requirements of the new state;
    4. The children were enrolled in school in the new state;
    5. The parents had purchased one-way tickets to the new state; and
    6. Accommodation has been arranged in the new state.

20. Mr. Aalto referred as well to the decision in *Christodoulou v. Christodoulou*[5] in which the court observed that the *Hague Convention* does not contain a definition of "habitual residence" because it is a question of fact to be decided by reference to all of the circumstances in a particular case. At paragraph 119, the court held as follows:

> If a person has lived in a particular place over a period of time, apart from temporary or occasional absences, a person will be deemed to be habitually resident there. . . When the period of residence does not clearly indicate that it is habitual, a court may have regard to the intentions of the person concerned or in the case of a child, to the intentions of his or her parents. The court must look for *hard evidence* that an individual intends to remain indefinitely or for a certain period of time in the jurisdiction in question. *(emphasis added)*

21. Mr. Aalto relied on paragraph 123 where the court noted that the enquiry with respect to habitual residence was twofold:

> First, the court should enquire into the *shared intention* of those entitled to fix the child's residence (usually the parents) at the latest time their intent was shared; actions as well as declarations may be taken into account. Second, the court should enquire whether the evidence *unequivocally* points to the conclusion that the child is acclimatized to the new location and thus acquired a new habitual residence notwithstanding any conflict in the parents' latest shared intent. *(emphasis added)*

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[4] [1999] B.C.J. No. 1238 (B.C.S.C.)
[5] 2009 CarswellOnt 6275 (Ont. S.C.)

Analysis

22. The evidence demonstrates that there is considerable animosity between the parties. There are many differences between them as to the nature of their relationship in Scotland and what happened after they arrived in Canada. It is not possible on this material to make findings of credibility on all of those many differences. However, it is not necessary to do so. I will focus on the evidence as it relates to intention.

23. There is some evidence to suggest that the Applicant intended to return to Scotland. For example, in her material, she attached copies of emails she had exchanged with a friend in Toronto beginning on August 13, 2012. That email began with an inquiry about paying U.S. tax and Canadian tax and she went on to say that she and the children were "going back for good". However in the same email, she also said:

> I say we are going back for good but the girls love it here, so I will be thinking of ways I can make my own way back, hence asking about the tax and stuff. (I think Michael is likely to withdraw his sponsorship of us.)

24. I accept that she was contemplating her alternatives, particularly in the context that, if the Respondent withdrew his sponsorship of the family, she would have no alternative.

25. The second example was in a letter dated October 1st, 2012 in which she told the Respondent that "in December we will leave and go back to Scotland." That appears at the end of a long letter tracing the history of the relationship. In her affidavit, the Applicant attached the letter that he wrote to her in response in October. The content of that letter can only be described as venomous. I infer that that letter demonstrates the way he was treating her at the time, again leading her in the direction of contemplating her return to Scotland.

26. There is corroboration for her evidence that when she left on December 18th she intended to return in January. To facilitate her move to Canada, the Respondent had purchased return airplane tickets for the Applicant and the children. Consequently when she arrived in March, she had a return ticket expecting to go to Scotland for Christmas. On December 16, 2003, before she left with the children, the Applicant purchased tickets for all of them to return on January 16, 2013. I accept her evidence (which is not contradicted) that she would have preferred to have come back the week earlier because of the return to school and her son's doctor's appointment but the later return meant it would be less costly.

27. On December 28th, the Applicant sent a letter to the school that the older girls attended in Toronto confirming that they would be returning to school on Monday January 21st.

28. There is evidence that contradicts the Respondent's evidence that he and the Applicant had agreed at the time of the separation in March, 2012 that the Applicant would return to

Scotland. For example, the Respondent sent to the Applicant an email dated August 27, 2012 in which he provided the undertaking that he had signed when they had become Permanent Residents on February 12, 2010 and he confirmed that he had just signed a new undertaking for the youngest child (who had not been part of the original sponsorship application). In that email he said the following:

> I'd like you [sic] see if you can find a new place to stay over the next week or so, or the best option is for me to sign you up as a tenant at the apartment. Then I can find somewhere else.

29. That email confirmed the immigration status of all of the family except the youngest child and confirmed that, weeks after he said they had separated and allegedly agreed that the Applicant would return with the children to Scotland, he had taken steps to include the youngest child as a Permanent Resident.[6]

30. In his letter to the Applicant in October, there is an indication that he knew the trip was just for Christmas:

> In all honesty I don't give a fuck, I'll move out as soon as possible, pay the rent till the end of the lease which is March. I have no intention of leaving and going to the UK for Christmas. . . .

31. When they arrived in Scotland, the Applicant and the children stayed in the home that the Respondent had purchased for her many years earlier. The Applicant had not sold the property because she knew she would return to Scotland regularly to visit her family including her mother who lived just minutes from that home. In other words, she did not acquire accommodation. The Respondent insisted that the older girls had been registered for school in Scotland but I accept the evidence of the Applicant (corroborated by an email from the school in question) that that had not occurred.

32. The only evidence that they agreed that the Applicant would return to Scotland with the children on a permanent basis is his evidence. While there is evidence (as indicated above) that she was contemplating moving back to Scotland, there is no evidence to corroborate his evidence that they *agreed* that she would do that.

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[6] In his affidavit sworn February 21, 2013, the Respondent attached as an exhibit a letter dated February 8, 2013 from Citizenship and Immigration Canada which confirmed that his application to withdraw sponsorship for his youngest child had been approved. The application cannot be withdrawn. At this point, the youngest child's legal status in Canada is not clear. I do not consider that to be relevant to the decision as to habitual residence.

33. While there is no reliable evidence to support his allegation that they agreed that she would return to Scotland with the children, there is considerable evidence that he *wanted her to return to Scotland* with the children, the most notable of which is the transcript of the telephone call he had with Celeste and Natasha on Christmas Eve. As indicated above, on his evidence he and the Applicant had never cohabited. However, he regularly kept in touch with the children by telephone. After she left on December 18th, he communicated with the older girls, although he was aware that, because of the conditions of his release, he had to do so without directly or indirectly contacting the Applicant. The evidence does not indicate whether he spoke with them on December 19, 20, 21 or 22. He did speak with the children on December 23rd and he recorded that conversation.

34. The Respondent spoke with Celeste and Natasha on Christmas Eve. It appears that after the conversation started, the Respondent told the girls he was going to record the phone call and he asked how that sounded. The girls said that was good. Several times he interrupted them and told them to start again or that he wanted to rewind. At page 35 he asked the girls if they were still taping the call and the younger girl said that they had turned it off. The conversation continued. The Applicant produced a transcript that consists of 100 pages double spaced. The girls both told him they wanted to come home. He told them that that was not going to happen. I will not quote from this transcript because his behaviour is demeaning, aggressive, and belligerent towards them and their mother. The only inference to draw is that he was bullying them into staying in Scotland.

35. In his reply affidavit sworn February 22, 2013, the Respondent took the position that the recording of that conversation by the Applicant was in violation of the UK privacy act. He explained his own recording of an earlier conversation on the basis that it was not illegal because he was in Canada at the time and he consented to his own recording of the conversation. He asserted that the transcript of the conversation of December 24th should be inadmissible but he would not take exception to its inclusion as it supported his own case. I make no comment about the legality of the earlier recording (which the Respondent did not produce) and the legality of the recording on December 24th. I do observe that this transcript does not support his case that the children were wrongfully removed from Scotland on January 16th. It makes it clear that the children expected and wanted to return to Toronto.

36. There is also evidence that immediately after she left, he took the position that she had returned to Scotland. On December 14th, he had agreed to an undertaking to stay away from the apartment. On December 28th he obtained an amendment on the basis that "the complainant has left for Scotland with the children and is no longer residing at the apartment". The Applicant takes the position that he misled the authorities because he knew she was coming back and he wanted to regain control of the apartment. Without making a finding that he misled the authorities, that evidence alone does not undermine the evidence of the Applicant's intention.

37. According to the Respondent, the Applicant and Respondent never cohabited until the Applicant arrived in Canada in March 2012. On his own evidence, the Applicant has been the primary caregiver for all of the children since each was born. She is clearly the primary parent and the de facto custodial parent. To the extent that the habitual residence of the children is associated with that of the primary parent, the evidence of the intention of the Applicant is paramount.

38. There is no "hard evidence" that the Applicant intended to remain indefinitely in Scotland. There is hard evidence that the Applicant intended to return to Canada on January 16, 2013. The evidence does not point "unequivocally" to the conclusion that the children had renewed their habitual residence in Scotland. Indeed, the evidence points unequivocally to the conclusion that the Applicant and Celeste and Natasha (the other children being too young to contribute to the analysis of intention) intended to return to Canada after their Christmas holiday in Scotland.

39. There is no evidence that the Applicant and Respondent agreed that when the children left Toronto on December 18th it was to move back to Scotland. There is evidence that the Applicant contemplated moving back to Scotland but under circumstances that suggest she had no choice. Even if she had contemplated moving back to Scotland, the evidence of her intention on December 18th was unequivocal: she intended that she and the children would return on January 16th.

40. This application is largely based on the Respondent's *desire* to keep the children in Scotland. There is no basis for finding that the habitual residence of the children had reverted to Scotland once they went for what was clearly a Christmas holiday. The Applicant did not wrongfully remove the children from Scotland. I agree with the position taken on behalf of the Applicant that the Respondent is using the *Hague Convention* to try to force her to move back to Scotland with the children.

41. The motion by the Respondent is dismissed in its entirety.

42. As indicated above, the motion by the Applicant for exclusive possession of the apartment and other relief was adjourned from January 24th. The status of the apartment on Finch is uncertain. There is evidence that the lease originally was to end on February 28, 2013. In his letter to the Applicant in October (referred to in paragraph 30 above), he said that the end of the lease was in March. In the material filed by the Respondent, he consistently indicated his address as the apartment on Finch Ave. However, in the affidavit sworn February 21, 2013, he showed his address as an apartment on Woodbine Avenue in Markham which is not the address on Bridletowne where he was required by his Undertaking to reside.

43. The Applicant is entitled to proceed with her motion immediately. She and the children have been living in a shelter since January 16th. An alternative must be found. The

motion by the Applicant will be returnable before me on Thursday March 7th at 10:00 a.m. I am optimistic that with the *Hague Convention* issue resolved, the parents will be able to agree to an arrangement that provides appropriate accommodation for the children as well as financial support and access.

44. By March 18th, counsel for the Applicant shall make written submissions as to costs not exceeding 4 pages (plus costs outline). By March 25th, counsel for the Respondent shall make written submissions not exceeding 4 pages.

Kiteley J.

Released: March 4, 2013

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– and –

Michael Andrew Stark-Campbell

Respondent

REASONS FOR JUDGMENT

Kiteley J.

Released: March 4, 2013