CITATION: *Husnik v. Barbero Salas*, 2018 ONSC 2627
COURT FILE NO.: FC-16-50145-00
DATE: 20180427

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Robert Husnik, Applicant

AND:

Sandra Cecilia Barbero Salas, Respondent

BEFORE: J. S. McLeod, J.

COUNSEL: A. Franks/K. Warren for Applicant

R. Aalto for Respondent

HEARD: December 6, 7 and 14, 2017
Written submissions received January 22, 2018

REASONS ON APPLICATION

Overview

[1] Cecilia Barbero Salas ("C.B.") has brought an Application under the *Convention* on the Civil Aspects of International Child Abduction (the "*Hague Convention*") for the return of the parties' son "R.B.". C.B. alleges that R.B. was wrongfully detained in Ontario by his father, Robert Husnik ("R.H.") in July 2015.

[2] R.H. denies the allegation of wrongful conduct and requests that the Application be dismissed. R.H. submits that R.B.'s move to Ontario in July 2015 was with C.B.'s consent. R.H. submits that R.B.'s habitual residence has been in Ontario since July 2015.

[3] The threshold considerations in this matter are whether C.B. has satisfied the conditions for the return of the child under Articles 3 and 4 of the Hague Convention. If these conditions are satisfied then Articles 12 and 13 of the Convention are relevant to this proceeding. All of those articles read as follows:

> **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.
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> **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.
>
> **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; or
> b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
>
> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Issues

[4] The issues raised are:

1) Was R.B. wrongfully removed or retained by R.H. at a time when he was habitually resident in Mexico?; and
2) If R.B.'s habitual residence was Mexico at the time he was wrongfully removed or retained, do any of the exceptions under Articles 12 or 13 under the Convention apply such that R.B.'s return to Mexico should not be ordered?

Background

[5] The parties were married in August of 2001 and lived in Mexico where they operated their business.

[6] The parties have two children together, R.B. (D.O.B. 21 June 2004) and M.B. (D.O.B. 6 May 2011). Both R.B. and M.B. were born in Mexico and have lived their entire life in Mexico, save and except for that timeframe described later in these reasons.

[7] R.B. and M.B. have dual citizenship for Mexico and Canada. Prior to being brought to Ontario in July of 2015, both R.B. and M.B. were habitually resident in Mexico.

[8] The family was very familiar with Ontario. For several years they visited Ontario, enrolling R.B. in summer hockey camps. Hockey was a passion of R.B. and something he excelled at. His parents encouraged this passion. Traditionally when summer camp ended the parties returned to Mexico in time for the approaching academic year.

[9] In 2014, the business the parties operated started to flounder. R.H. (who had Canadian citizenship) reached out to his former employer and was offered a job in Mississauga, Ontario.

[10] In January 2015, R.H. moved to Ontario and commenced his current employment. R.H's intentions were to relocate his family to Ontario permanently. He submits that this was a plan of both he and C.B.

[11] In 2015, R.B.'s hockey camp was scheduled from 6 July 2015 to 26 July 2015. R.B. arrived in Ontario on 1 July 2015 and has remained in R.H.'s primary care since that time with the exception of a period of time between 25 December 2015 and 1 January 2016.

[12] During that timeframe, R.B. was in C.B.s care at Disney World, Orlando.

[13] C.B. and M.B. arrived in Ontario after R.B. in July 2015. The family was together again.

[14] C.B. returned to Mexico alone, from 20 August 2015 to 9 October 2015 and 23 November 2015 to 2 December 2015. Her purpose in returning was to attend to the family business.

[15] On 25 December 2015, C.B. and the two children flew from Ontario to Disney World, Orlando. All three of them had return air tickets to Ontario and were scheduled to depart Mexico on 1 January 2016.

[16] This did not happen.

[17] R.B. was sent back to Ontario using his return ticket. R.B. was 11 years old and unaccompanied on the flight. C.B. and M.B. did not use their return tickets to Ontario but instead travelled to Mexico on 3 January 2016.

[18] R.H. and C.B. never discussed this change the change in itinerary. When it became clear that C.B. had no intention of returning to Ontario R.H. commenced his own *Hague* Application in Mexico wherein he sought the return of M.B. to Ontario. R.H.'s Application was commenced in January of 2016 and heard on 22 August 2016. R.H.'s Application was dismissed and M.B. continues to reside with C.B. in Mexico.

[19] At the same time that R.H. commenced his *Hague Convention* Application in Mexico, he also commenced proceedings in the Superior Court of Justice in Ontario. In that Application he sought custody, care and control of the parties' two children. The Ontario Application was issued on 2 February 2016 and served upon C.B., 3 March 2016.

[20] C.B. served an Answer to the Ontario proceedings upon R.H. on 31 January 2017. Almost 11 months after she was served with R.H.'s *Hague Convention* Application.

[21] In C.B.'s answer to the Ontario application, she requested a return of R.B. under the *Hague Convention*. The requested relief was made 18 months after the date upon which she alleges R.H. wrongfully retained R.B..

[22] R.H. acknowledges that at the time of removal C.B. had custodial rights to R.B.

[23] The facts as set out to this point in the **Background** are not in dispute.

[24] The court in Mexico determined that with respect to the child M.B., her habitual residence was Mexico and as a result dismissed R.H.'s Application wherein he sought the return of M.B. to Ontario. It would be tempting to adopt a similar finding as it pertains to R.B.. To do so, however, would be to ignore several important distinctions between the application involving M.B. in Mexico and the Application involving R.B. in Ontario.

[25] Firstly, the Application by R.H. in Mexico was commenced within 6 months of the alleged wrongful retention of the child M.B. The evidence presented at the Mexican hearing was entirely by way of Affidavit. By contrast, the Application in Canada was commenced by C.B. 18 months after the alleged wrongful retention of the child R.B. This court had the benefit of Affidavits, supplementary *viva voce* evidence, and of significance, *viva voce* evidence on cross-examination.

Analysis

[26] In determining habitual residence under the *Hague Convention*, the court is to have reference to the test for habitually resident as defined by s. 22(2) of the *Children's Law Reform Act*. That section provides that a child is "habitually resident in the place he has resided with… both parents".

[27] Habitual residence is not defined in the *Hague Convention*. In determining a child's habitual residence there are three possible approaches.

i) the parental intention approach;
ii) the child centred approach; and
iii) the hybrid approach.

In *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, the Supreme Court of Canada endorsed the use of the hybrid approach and held that the judge determining habitual

residence must look to all relevant considerations arising from the facts of the case. The judge is to consider all relevant links and circumstances: i) the child's link to and the circumstances in country A; ii) circumstances of the child's move from country A to country B; and iii) the child's links to and circumstances in country B.

[28] The court is to consider duration, regularity, conditions, and reasons for the child's stay in a member state and the child's nationality.

[29] The Supreme Court went further and indicated that no single factor dominates the analysis. The circumstances of the parents, including their intentions are important in cases of infants or young children. The court stated that the hybrid approach is fact-bound, practical, and unencumbered with "rigid rules, formulas, or presumptions".

Applying the Law to the Facts

Was R.B. Habitually Resident in Mexico at the Time of his Removal?

[30] The evidence elicited from C.B. by way of cross-examination left this court with the impression that she was playing "hide and seek" with the truth. C.B. initially denied many of the significant facts. She recanted and altered her evidence once cross-examined and faced with specific documentary evidence to the contrary.

[31] When cross-examined on many issues C.B. often responded that she did not remember important facts. In reviewing her evidence in its entirety, it lacked credibility.

[32] By contrast, R.H.'s responses to questions was, by enlarge, direct and unwaivering, albeit he did view the strength of his marriage to C.B. through "rose coloured glasses". On many of the key issues arising in this matter, R.H.'s evidence was more reliable.

[33] I find as a fact the following important details:

a) In June of 2015, C.B. told her colleagues in Mexico that she was moving to Canada.

b) C.B. was instrumental in selecting the location of the home the family moved into following their 2015 reunification in Ontario.

c) C.B. played a joint role in the selection of the neighbourhood school that the children were to be enrolled in for the academic year commencing September of 2015.
d) C.B. did request that R.H. ask St. Raphael's school many questions before the decision to enroll was finalized.
e) C.B. participated in the selection of the children's doctor in Ontario.
f) C.B. helped select the family automobile and the furnishings for the family's new home.
g) C.B. arranged for all of R.B.'s most important memorabilia relating to hockey to be delivered to Ontario. In addition, C.B. recognized the importance of R.B. playing hockey. She actively encouraged R.B. to play hockey following the commencement of the 2015 academic year.
h) C.B. encouraged R.H. to apply for the children's health cards, children's social insurance number cards, health coverage, and the child tax credit.

[34] I find that there was a common intention on the part of C.B. and R.H. to relocate to Ontario. The parties intended to live in Ontario as a family and to make Ontario home.

[35] At some point, either prior to or during the December 2015 trip to Orlando, C.B. came to the realization her marriage was not salvageable and made a unilateral decision to return to Mexico with her daughter.

[36] C.B.'s testified that she returned R.B. to Ontario because she knew R.H. would not consent to R.B. going back to Mexico. That explanation, however, cannot be accepted in light of the fact that this did not prevent her from returning to Mexico with M.B. C.B. was aware of the fact that R.B. had settled with his friends, was doing well in school and in hockey. She did not intend to interfere with this.

[37] C.B.'s allegations that R.H. wrongfully retained R.B. in Ontario is not supported on the evidence. At the conclusion of the Disney World vacation, C.B. intentionally put R.B. back on a plane and sent him home to Ontario while she and M.B. returned to Mexico.

[38] The intent of the parties need not be to reside permanently in the jurisdiction in question; a temporary move to that jurisdiction will do: see *Wentzell-Ellis* and *H.(A.) v. H.(F.S.)*, 2013 ONSC 1308 (CanLII) at para. 52 as aff'd by *Hammerschmidt v. Hammerschmidt*, 2013 ONCA 227 (CanLII). Krusack J. in *H.(A.)* also noted that "intention is examined through one's actions" and that is what I have to look to in this case in order to determine habitual residency.

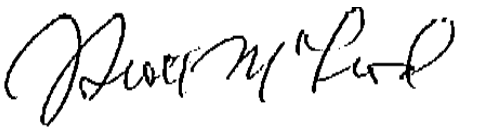
[39] This court finds that R.B.'s habitual residence at the time he was allegedly wrongfully retained was not Mexico but was, in fact, Ontario. The intentions of the parents, the relevant links, and the circumstances of R.B's move lead to the conclusion that Ontario was R.B.'s habitual residence.

Issue 2

If R.B.'s habitual residence was Mexico at the time he was wrongfully removed or retained, do any of the exceptions under Articles 12 or 13 under the Convention apply such that R.B.'s return to Mexico should not be ordered?

[40] If I am mistaken in the determination of "habitual residence" I would not otherwise order R.B.'s return for the following reasons:

i) I find on the evidence before me that the "now settled" exception under Article 12 applies.
ii) C.B. has brought her Application before this court 18 months from the date of the alleged wrongful retention.
iii) R.B. has settled in his new home in Ontario. He is participating actively in hockey. He has a strong circle of friends. He is doing extremely well in school. Article 13 of the Convention is applicable. The "Voice of the Child Report" sets out that R.B. has voiced his desire to remain in Ontario with his father. R.B. is almost 14 years of age. Given his age and degree of maturity, it would be appropriate to take into account his views.
iv) The Report does not specifically state that R.B. "objects" to a return to Mexico. It does, however, clearly set out that R.B. wishes to remain his father, that he misses his sister and that he is extremely hurt and upset by his mother's conduct.
v) I would further find in the alternative, that Article 13(a) applies. C.B.'s conduct in placing her child on an airplane and returning him to his father's care in Ontario demonstrates consent; and
vi) There is clear evidence of acquiescence on the part of C.B. C.B. waited almost 18 months following the date she alleges wrongful retention before she commenced her application.



J. S. McLeod, J.

Date: April 27, 2018