CITATION: Ireland v. Ireland, 2011 ONCA 623
DATE: 20111003
DOCKET: M40112, M40133 (C53656)

COURT OF APPEAL FOR ONTARIO

Juriansz J.A. (In Chambers)

BETWEEN

Laticia Savannah Ireland

Applicant (Appellant in Appeal)

and

Gavin Paul Ireland

Respondent (Respondent in Appeal)

Robert Shawyer, for the applicant

Arnold Schwartz and Rachel Eynon, for the respondent

M. Pilch, for the Children's Aid Society of Toronto and the Children's Aid Society of Durham

N. Leeque, for the Attorney General of Ontario

Heard: September 8, 2011

On motions for the production of documents and for security of costs in an appeal from the order of Justice Jane Ferguson of the Superior Court of Justice dated April 7, 2011.

Juriansz J.A. (In Chambers):

[1] This case involves resistance to the enforcement of a foreign custody order. By judgment dated January 13, 2011, the Superior Court of Fulton County in the State of

Georgia, USA (the "Georgia court") granted sole legal and physical custody of the parties' children to the respondent father. By order dated April 7, 2011, Ferguson J. of the Ontario Superior Court of Justice recognized and enforced the judgment of the Georgia court and the children, who were here in Ontario with the mother, have been returned to the father's custody in Georgia. The applicant mother has appealed the decision of Ferguson J., seeking an order setting it aside and requiring that the respondent father return the children to the custody of the mother in Ontario.

[2] The mother has brought a motion seeking an order compelling a number of third-party organizations in Ontario and Georgia to produce documents in their possession for the purpose of the appeal. The father opposes that motion and has brought a cross motion seeking security for costs. Counsel for the Children's Aid Society of Toronto and the Children's Aid Society of Durham and for the Attorney General of Ontario appeared on the mother's motion but took no position, other than to explain their clients would not produce the documents unless ordered to by the court. I would dismiss the mother's motion for production of documents and grant the father's motion for security for costs of the appeal.

Background

[3] The parties met in Ontario and married on May 26, 2001. They had two sons born in Ontario on July 29, 1999 and July 17, 2001. In July 2007, the family moved to Georgia. The parties separated sometime between June and August 2009. The mother

alleged that the father had physically abused her and the children, and that the paternal grandmother had sexually abused the children.

[4] The Georgia court granted the mother an *ex parte* protective order, and then on September 11, 2009, the court issued a consent 12 month family violence protective order. The court found that acts of family violence did occur. The Georgia court awarded the mother temporary custody of the children, temporary child and spousal support, and restrained the father from any contact with the mother except as specified by the order. The consent order provided for supervised visitation by the father. The court noted that the parties had consented to the order by affixing their signatures to it.

[5] After the mother's protective proceeding was consolidated with her petition for divorce, the Georgia court, on February 17, 2010, awarded temporary joint legal custody to the parties and physical custody to the mother. In its reasons, the Georgia court found that the minor children had witnessed domestic violence by the father while the parties were together, but found the mother's allegations of improper conduct toward the children by the paternal grandmother to be not credible. The Georgia court found there was no reason to deny the father access to his children and continued the father's supervised visitation. The Georgia court also ordered temporary child and spousal support and stipulated that neither party remove the children from their school or from the jurisdiction of the Georgia court. At the same time, the court denied the mother's emergency motion to terminate the father's visitation. The court found the mother "in

wilful contempt of the Court's Order in failing to make the children available to Father for his visitation", and added that the mother's "manner of litigating the case has not resolved any issues but has unnecessarily expanded the proceedings such that the Court's ruling as to attorney's fees is reserved."

[6] Claiming immigration problems, the mother left Georgia and returned with the children to Ontario in October 2010. She enrolled the children in school in Durham. She filed a complaint against the father with the Durham police regarding assaults alleged to have occurred between January 1999 and August 2009. The police laid charges against the father.

[7] Upon arriving in Ontario, the mother commenced proceedings in the Family Branch of the Superior Court of Justice in Oshawa, Ontario seeking custody of the children. In the affidavit supporting her application, she alleged that the father abused her verbally and physically, and that much of it was witnessed by the children. The mother withdrew her application after Scott J. issued an endorsement on October 21, 2010 that states, "I have reviewed these pleadings. I do not see that the children are habitually resident here. A court action exists and is ongoing in the State of Georgia; in my view that is the Court with jurisdiction to deal with this matter. No order made here."

Custody Order in the State of Georgia

[8] The mother's petition for divorce was heard in a final trial in the Georgia court on December 3, 2010. The mother did not attend but her counsel in Georgia did. In her

decision issued January 13, 2011, Tuscan J. indicated that the Georgia court had made "considerable effort…to accommodate [the mother's] unexcused absence" and although the court arranged to allow her to participate via Skype, she "failed to locate a computer anywhere in the Toronto, Canada suburbs to access Skype." Tuscan J. issued a Final Judgment and Decree after stating that the mother had "failed to present any evidence to establish that awarding her sole legal and physical custody of the children is in the best interest of the children." Tuscan J. went on to award sole custody to the father saying:

> Regrettably Petitioner's actions have deprived the Court of the opportunity to assess her contributions to the marriage and child rearing by opting out of the process and secreting away with the children. Hiding behind allegations of abuse and destitution, she left her counsel to advocate on behalf of an absentee client. Her actions leave the Court no option but to award sole custody of the children to the Respondent.

[9] Tuscan J. added, "Hopefully, at some point in the future, Petitioner will be prepared to appear before the Court to address a custodial arrangement that permits both parents to be involved in the lives of their children."

[10] The mother has not appealed the order of Tuscan J. and has not participated further in the Georgia proceedings.

[11] By separate order, also dated January 13, 2011, Tuscan J. found the mother in wilful contempt for removing the children from the jurisdiction, ordered that the mother return to the jurisdiction of the Georgia court with the children, and granted the father the

court's authorization to utilize any legal means to have the children return to his custody in Georgia where he has sole physical and legal custody of the children.

Ferguson J.'s Decision to Enforce the Extra-Provincial Custody Order

[12] On February 24, 2011, the mother filed an application in the Ontario Superior Court of Justice for custody of the children, child support, and a restraining order against the father. The mother, relying on ss. 22 and 23 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12, took the position that the children would suffer serious harm if returned to the custody of the father because they had allegedly been subject to physical and emotional abuse at his hands throughout the parties' relationship.

[13] The father moved to have the order of Tuscan J. of the Georgia court recognized and enforced in Ontario pursuant to s. 41 of the *Children's Law Reform Act*.

[14] The two motions came before Gilmore J. on March 10, 2011. The mother requested an adjournment and applied for a change of venue from Oshawa to Toronto. The mother had not filed any supporting material, and her counsel got off the record that morning due to a difference of opinion between him and his client. Gilmore J. "reluctantly" adjourned the matter to March 24, 2011 on "strict terms". The mother was to serve and file materials by March 18, 2011. Gilmore J. noted that the mother "confirm[ed] that the Court having jurisdiction to hear this matter is the Superior Court of Justice, Family Branch at Oshawa", and ordered that the mother not bring any further motion to change venue. Gilmore J. stipulated that the matter was peremptory on the

mother on the next return date. Finally, Gilmore J. observed that the mother "has not dealt with this matter expeditiously and her motivation is in question given the outstanding Georgia Orders."

[15] On March 24, 2011, the mother had failed to retain counsel and Ferguson J. of the Ontario Superior Court granted the mother a further adjournment until April 7, 2011. Ferguson J. emphasized that the matter would proceed on April 7.

[16] On March 29, 2011, the mother re-filed her motion to change the venue of the hearing from Oshawa to Toronto. On April 3, the father responded by moving for an order finding the mother in contempt of Gilmore J.'s March 10 order.

[17] The mother retained counsel who, on March 31, wrote to the father's lawyer seeking consent to an adjournment to mid May 2011. The father's lawyer refused to consent.

[18] All motions came on before Ferguson J. on April 7, 2011. Counsel for the mother requested an adjournment to mid May so she could properly prepare for the motion. Ferguson J. refused to adjourn the main motions, but adjourned the father's contempt motion.

[19] Counsel for the mother then applied to have her client give *viva voce* evidence. Ferguson J. adjourned until after the lunch hour so that the parties could consider their positions and make submissions on that application. Upon recommencing, counsel for the

mother, "without a proper affidavit and notice, again asked for an adjournment on the basis of newly learned information that the Durham Children's Aid Society (DCAS) and Toronto Children's Aid Society (TCAS) were involved in the matter." Ferguson J., querying how this could be last minute information, refused this second adjournment request. Ferguson J. also refused the application to provide *viva voce* evidence.

[20] The motions proceeded and Ferguson J. recognized and enforced the Georgia court's orders. She ordered the mother to surrender the children to the father. The mother did not immediately comply.

[21] On April 13, 2011, the children were reunited with their father. They are now registered and attending school in Georgia.

[22] The mother appeals Ferguson J.'s enforcement of the Georgia order and, among other things, her decisions not to grant the adjournments and not to allow the mother to present *viva voce* evidence.

The Mother's Motion

[23] Before me, the mother, who is now represented by different counsel, seeks an order compelling the following organizations to provide her with copies of all documents relating to her, the father, or the children:

- The Children's Aid Society of Toronto
- Durham Children's Aid Society
- Owen Public School in Toronto

- Durham Regional Police
- Sandtown Middle School, Atlanta, Georgia, U.S.A.
- Philip Randolph Elementary School, Atlanta, Georgia, U.S.A.
- Georgia Division of Family and Children Services.

[24] Counsel for the mother submits that I have jurisdiction to make the order under Rule 20(5) of the *Family Law Rules*, O. Reg. 114/99. That Rule provides:

> The court may, on motion, order that a person (whether a party or not) be questioned by a party or disclose information by affidavit or by another method about any issue in the case, if the following conditions are met:
>
> 1. It would be unfair to the party who wants the questioning or disclosure to carry on with the case without it.
>
> 2. The information is not easily available by any other method.
>
> 3. The questioning or disclosure will not cause unacceptable delay or undue expense.

[25] The *Family Law Rules* do not directly apply to this court. Rule 1(2) provides that the Rules apply to family law cases in the Family Court of the Superior Court of Justice, the Superior Court of Justice, and the Ontario Court of Justice. However, s. 134(1) of the *Courts of Justice Act*, R.S.O., c. C.43, provides:

> Unless otherwise provided, a court to which an appeal is taken may,
>
> (a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;
>
> (b) order a new trial;
>
> (c) make any other order or decision that is considered just.

[26] By virtue of this section, I conclude that this court has jurisdiction to grant the requested order under Rule 20(5).

[27] The mother bears the onus of establishing all three conditions of Rule 20(5) are met. I am satisfied that the documents are not available by any other method, and I put aside the question of whether making the order would cause unacceptable delay or expense. The motion turns on the condition in Rule 20(5)1: whether it would be unfair to require the mother to carry on with the appeal without the documents.

[28] The starting point for the analysis is to consider the context in which, and the purpose for which, the Rule is invoked. Whether it would be unfair to require the mother to carry on without the documents must be assessed in light of how she submits it would assist her in the appeal.

[29] In her appeal, the mother relies on Article 13(b) of the *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Hague XXVIII (the "*Hague Convention*") and s. 43 of the *Children's Law Reform Act* to argue that Ferguson J. should not have enforced the Georgia order. In this motion, she submits that the requested documents will assist her in establishing that the children's return to Georgia exposes them to the degree of harm from the father that makes those provisions applicable.

[30] I conclude that it would not be unfair to require the mother to proceed without the documents for several of reasons.

[31] First, the documents were not before Ferguson J. and the mother never requested Ferguson J. to make an order under Rule 20(5). The mother had ample opportunity to make the request before the motions came before Ferguson J. on a peremptory basis. Ferguson J. quite properly queried "how this could be last minute knowledge, as surely [the mother] must have been instrumental in their involvement." This late motion for an order under Rule 20(5) is part of a pattern of the mother's conduct of the litigation. That pattern includes serving material late, seeking changes of venue, raising new issues suddenly without notice, requesting to give *viva voce* evidence after indicating in her motion material that the motion was to be decided on the basis of written material, requesting adjournments of peremptory dates, and failing to comply with court orders. As Gilmore J. observed on March 10, 2011, the mother "has not dealt with this matter expeditiously and her motivation is in question". This echoed the remark made earlier by the Georgia court that the mother's manner of litigating did not help resolve issues, but rather unnecessarily expanded the proceedings. The mother's pattern of conducting the litigation has slowed and expanded the proceeding. As her failure to request the documents at the proper stage was very much part of her pattern of hampering the scheduled progress of the proceeding, I am satisfied that it would not be unfair to require her to carry on without them.

[32] Second, if the documents were ordered produced now, the mother would have to make a fresh evidence application to have them admitted on the appeal. If the fresh evidence application is bound to fail, it would not be unfair to deny the mother's request for their production. Ordering production would simply delay and add expense to the processing of the appeal.

[33] I am satisfied that the documents would not meet the test for the introduction of fresh evidence on appeal set out in *R. v. Palmer*, [1980] 1 S.C.R. 759. They would not meet the first requirement of *Palmer*, because the mother could have requested them in a timely way by the exercise of due diligence and adduced them before the motion judge.

[34] In addition, the documents would not meet the requirement of *Palmer* that the fresh evidence be reasonably capable of affecting the result. I am satisfied that this criterion is not met in this case. The mother is the source of the allegations put before the various organizations and her allegations about the father's conduct relate to events that occurred before the parties' separation. The mother's supporting material gives no reason to believe that any of the organizations have documents relating to the father's conduct after the parties separated, and after the Georgia court made a protective order and supervised the father's access to the children. I note that the Georgia court ordered that the supervisor of access make reports directly to the court. Counsel for the mother conceded that the only new allegations of conduct expected to be dealt with in the requested documents relate to the paternal grandparents who live in Canada. Obviously,

the father did not have any access to the children after the mother removed them from Georgia.

[35] In addition to its staleness, the requested documents would not affect the result for a more substantial reason. The documents do not assist the mother in establishing the degree of harm necessary to preclude an order returning the children to the jurisdiction where they were habitually resident at the time of the parties' separation. The requested documents, taken together with the material in the record, do not address the presumption that the court in Georgia is able to protect the children from harm. Without establishing that the Georgia court is not able to protect the children, the mother's appeal of Ferguson's J.'s order enforcing the Georgia court's order cannot succeed. I discuss why that is so in determining the father's motion for security for costs. The father's motion requires me to consider more directly the merits of the mother's appeal. For the reasons given in that discussion, I am satisfied that the mother's fresh evidence application would fail because the documents, if admitted, are not reasonably capable of changing the result.

[36] I conclude that the fresh evidence application will fail because the documents could have been requested at the motion by the exercise of due diligence, and moreover, the documents, when taken with the other material in the record, are not reasonably capable of affecting the result. Therefore, in applying Rule 20(5), it would not be unfair to require the mother proceed to the appeal without documents that are not going be admitted on the appeal.

[37] I have ignored additional difficulties with the mother's application. For example, counsel did not explain how this court's order that organizations outside Ontario produce documents would be enforced, or whether the Georgia court would enforce an order for the children's return given that the Georgia court has jurisdiction to determine the custody of the children.

[38] The mother's motion for an order requiring production of documents is dismissed.

The Father's Motion

[39] The father seeks security for costs. Rule 38(26) of the *Family Law Rules* applies:

> On a motion by the respondent for security for costs, the court may make an order for security for costs that is just, if it is satisfied that,
>
> (a) there is good reason to believe that the appeal is a waste of time, a nuisance, or an abuse of the court process and that the appellant has insufficient assets in Ontario to pay the costs of the appeal;
>
> (b) an order for security for costs could be made against the appellant under subrule 24 (13); or
>
> (c) for other good reason, security for costs should be ordered.

[40] The mother has insufficient assets in Ontario to satisfy a costs order. The only question in this case is whether the appeal is a "waste of time, a nuisance or an abuse of the court process." The mother argues that security for costs should be ordered in a custody case only in exceptional circumstances. Whether that is so, this is not a custody

case. The mother is resisting the enforcement of a foreign custody order. If she wishes to contest the custody order, she should do so in the court that has jurisdiction to determine custody. In any event, allowing an appeal that is truly devoid of merit to proceed does not serve the best interests of the children.

[41] The mother raises a number of procedural grounds of appeal. She submits that Ferguson J. erred by refusing her requests for adjournments and refusing to allow the mother to call *viva voce* evidence. These discretionary decisions were made on a second peremptory appearance and in a case where there were already earlier judicial pronouncements that the mother was hindering the proceedings. I am satisfied that the appeal, insofar as it attacks the procedural decisions of Ferguson J., will not be successful.

[42] The mother's substantive ground of appeal is that Ferguson J. should have given effect to Article 13(b) of the *Hague Convention* and refused to enforce the Georgia court's order.

[43] Article 13(b) of the *Hague Convention*, upon which the mother relies, does not directly apply to the proceedings. Article 13(b) provides:

> 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.

[44] As can be seen, Article 13(b) constitutes an exception to the obligation of a requested state to order the return of the abducted child. In this case, there was no request for the return of the child under the *Hague Convention*. The father's motion was to enforce the order of the Georgia court under s. 41 of the *Children's Law Reform Act*. He did not invoke the *Hague Convention*. The Supreme Court of Canada in *Thomson v. Thomson*, [1994] S.C.J. No. 6 at para. 93 made it clear that domestic legislation and the *Hague Convention* operate independently of one another.

[45] In any event, the mother can rely on s. 43 of the *Children's Law Reform Act*. Section 43 provides:

> 43. Upon application, a court by order may supersede an extra-provincial order in respect of custody of or access to a child if the court is satisfied that the child would, on the balance of probability, suffer serious harm if,
>
> (a) the child remains in the custody of the person legally entitled to custody of the child;
>
> (b) the child is returned to the custody of the person entitled to custody of the child; or
>
> (c) the child is removed from Ontario.

[46] Decisions of the lower courts are conflicting as to whether the *Children's Law Reform Act* applies when the states involved are signatories to the *Hague Convention*. In my view, the rationale of the *Thomson* case – that the two regimes operate independently

– leads to the conclusion that the mother can invoke s. 43. In any event, as the court stated in *Thomson* at para. 93, in cases involving domestic legislation "it may not be improper to look at the Convention in determining the attitude that should be taken by the courts" and at para. 79, that "the inconsistencies between the Convention and the [Manitoba] Act are not so great as to mandate the application of a significantly different test of harm." The Manitoba provision before the court in *Thompson* is in substance much the same as Ontario's s. 43.

[47] Using this approach, the level of harm required under s. 43 of the *Children's Law Reform Act* in an international custody dispute is not different in substance from the test under Article 13(b) of the Convention. Under Article 13(b), the harm must be of a degree that would amount to an intolerable situation: see *Thomson*, at para. 80; see also *Jabbaz v. Mouammar* (2003), 226 D.L.R. (4th) 494 (Ont. C.A.); *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1996); *Re A. (A Minor) (Abduction)*, [1988] 1 F.L.R. 365 (Eng. C.A.).

[48] In assessing whether a situation is intolerable, it must be presumed that the court with jurisdiction to determine what is in the best interests of the children is equipped to make, and will make, suitable arrangements for the children's welfare: see *Finizio v. Scoppio-Finizio* (2000), 46 O.R. (3d) 226 (C.A.) at para. 34, citing with approval *Medhurst v. Markle (*1995), 17 R.F.L. (4th) 428 at 432 (Ont. Gen. Div.). MacPherson J.A. writing for this court in *Finizio* quoted from the decision of the English Court of

Appeal in *C. v. C. (Abduction: Rights of Custody),* [1987] 1 W.L.R. 654 (C.A.) at p. 664, in which Lord Donaldson of Lymington M.R. said:

> It will be the concern of the court of the State to which the child is to be returned to minimize or eliminate this harm and, in the absence of compelling evidence to the contrary or evidence that it is beyond the powers of those courts in the circumstances of the case, the courts of this country should assume that this will be done. Save in an exceptional case, our concern, i.e., the concern of these courts, should be limited to giving the child the maximum possible protection until the courts of the other country -- Australia in this case -- can resume their normal role in relation to the child.

[49] The threshold for the application of s. 43 of the *Children's Law Reform Act* is a high hurdle. The mother's record in this appeal contains no evidence that even attempts to address the presumption that the Georgia court is well able to assess any and all information regarding the best interests of the children and protect them from harm. I am satisfied that without such evidence, the mother's appeal is doomed to fail.

[50] If anything, the record indicates that the Georgia court's ability to consider the best interests of the children is hampered only by the mother's failure to participate in the proceedings before the Georgia court. I note that Tuscan J. of the Georgia court has left the door open for the mother to participate in the custodial arrangements for the children. She said, "Hopefully, at some point in the future, Petitioner will be prepared to appear before the Court to address a custodial arrangement that permits both parents to be involved in the lives of their children."

[51] I regard the mother's appeal to be meritless and, consequently, "a waste of time" within the meaning of Rule 38(26) of the *Family Law Rules*. The mother has exhibited a pattern of delaying and expanding litigation. That pattern will add to the expense that must be borne by the father in responding to this meritless appeal. The mother's motion for the production of documents dealt with above is an apt example of how the mother's manner of litigating increases the expense of the process. In my view, this is one of those cases in which an order for security for costs is appropriate. I order that the mother provide security for costs in the amount of $10,000.00 within 30 days, failing which the father may move for dismissal of the appeal.

Conclusion

[52] For these reasons, the mother's motion is dismissed and the father's motion is granted. The parties may make submissions in writing as to costs. The submissions are not to exceed 5 pages. The mother's submissions are to be served and filed by October 10, and the father's by October 17.

RELEASED: October 3, 2011 "R.G. Juriansz J.A."