
CANADA / JUDGMENT

A.G. v. K.W.

2003 BCSC 1514

COURT

Supreme Court of British Columbia

DECIDED

9 September 2003

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2003BCSC1514

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: A.G. v. K.W.

2003 BCSC 1514

Date: 20030909

Docket: E4050

Registry: Chilliwack

Between:

A.G.

PETITIONER

And

K.W., FORMERLY KNOWN AS K.G.

RESPONDENT

Before: The Honourable Mr. Justice Groberman

Oral Reasons for Judgment

September 9, 2003

Counsel for the Petitioner

D. R. Klassen

Counsel for the Respondent

W. R. Storey

- [1] THE COURT: I have before me competing applications dealing with what should occur with respect to B.R.G., who is currently eight years old.
- [2] Ms. K.W. and Mr. A.G. were married May 2, 1985. There is one child of that relationship: B.R.G., born [], 1994. In the spring of 1997, when B.R.G. was about two-and-a-half years old, the parties separated. The parties lived in New Jersey at that time.
- [3] They reached an agreement which was made part of a New Jersey consent order on June 30, 1997. Under the agreement, Ms. K.W. was given full permanent custody of B.R.G., but if the parties lived more than 100 miles apart, the child was to reside with Mr. A.G. when school was in session, and with Ms. K.W. during summer holidays. There were also provisions for alternating Christmases, and spring break access to B.R.G..
- [4] A clause in the agreement which was embodied in the order is as follows:

This shall be in effect until B.R.G. is at least eight years of age and able to make an informed decision as to which parent he wishes to live with for the forthcoming school year.

- [5] The agreement recognized that Ms. K.W. might take up residence outside of New Jersey, and allows that she may live in Canada or the United States. Shortly after the agreement was entered into, in July or August of 1997, Ms. K.W. moved to the Lower Mainland.
- [6] For the most part, the provisions of the agreement have been adhered to. Access and living arrangements have varied over the years, primarily either by agreement, or due to financial difficulties in having the child move back and forth. As I understand it, there have not been any serious breaches of the agreement up until this year. It seems that there is considerable goodwill between the parents, and both clearly have the best interests of the child at heart.
- [7] This summer, B.R.G. came to reside in Abbotsford with Ms. K.W., in accordance with the agreement. At the end of the summer, however, Ms. K.W. indicated to Mr. A.G. that B.R.G., who is now eight years old, had expressed a preference to live with her for the coming school year. Accordingly, she indicated that she would not be returning B.R.G. to live in New Jersey. He has remained with her in the Lower Mainland.
- [8] Mr. A.G. took proceedings in New Jersey to seek to compel Ms. K.W. to return the child to him. He has obtained two ex parte orders. The first requires Ms. K.W. to return the child to him. The second grants him sole custody of the child. There is a provision of that order, as I understand it, that makes custody joint once the child is returned to New Jersey.
- [9] At this stage I have two applications before me. The first is the application by Ms. K.W. under Section 48 of the Family Relations Act, R.S.B.C. 1996, c. 128 seeking to enforce the June 30, 1997 New Jersey Order embodying the agreement between the parties.

- [10] It is the Ms. K.W.' position that if the New Jersey order is made enforceable in British Columbia, this court will have jurisdiction to interpret what I have called the "eight year-old clause." This court could then make a determination as to whether B.R.G. has made an informed decision to reside with his mother for the next school year.
- [11] Ms. K.W. contends that the June 30, 1997 order comes within Section 48 of the Family Relations Act, but that subsequent orders of the New Jersey courts do not, as they were made on an ex parte basis.
- [12] The second application before me is by Mr. A.G.. He seeks an order of this court that the child be returned to New Jersey pursuant to the more recent New Jersey court orders, and pursuant to the inherent powers of this court and its powers under the Family Relations Act. I have indicated that I will approach this application primarily under Section 47 of the Family Relations Act, which deals with the power of this court to make an interim order with respect to a child who is in the jurisdiction.
- [13] I have considerable doubt as to whether this court can or must enforce the June 1997 New Jersey order. Section 48 is not a discretionary provision. It provides that the court must recognize an extraprovincial order where it is satisfied of a number of matters. I have two concerns with respect to Section 48 and the 1997 Order.
- [14] The first arises under Section 48(1)(d). I must consider whether the order of the extraprovincial tribunal is contrary to public policy in British Columbia. I have considerable doubt as to whether a clause effectively giving an eight year old the choice of which parent to live with is in accordance with the public policy. I acknowledge that the order we are dealing with makes the age of eight a minimum age and requires that the child be "able to make an informed decision." I am concerned, however, that the pressures that this kind of an order might put on an eight year-old may be contrary to public policy.
- [15] My second concern in dealing with section 48 is the question of whether I am entitled, as things stand today, to enforce the June 1997 order and to ignore the subsequent orders of the New Jersey court.
- [16] There is no doubt in my mind that (subject to my concerns about Section 48(1)(d)) the original order complies with the requirements of Section 48, and the subsequent orders do not because they were made on an ex parte basis. The subsequent orders, however, purport to vary the June 1997 order. It seems to me that it would be wrong for me to deal with this matter as if the June 1997 order of the New Jersey courts continues in force without modification. I cannot ignore the subsequent orders, and in my view it would be an incorrect interpretation of Section 48 to enforce a New Jersey order that is no longer in force in New Jersey itself.
- [17] I conclude that I do not have authority under Section 48 to treat the New Jersey order of June 1997 as if it were subsequently unmodified.

- [18] It is rightly conceded on behalf of Ms. K.W. that this court does not have jurisdiction under Section 44 of the Family Relations Act over custody and access to this child. The child, while physically present in British Columbia, has not been habitually resident in British Columbia. Further, there are applications for custody and access pending in the place where the child is habitually resident, which I find to be New Jersey. Finally, on the balance of convenience, I find that New Jersey is the appropriate jurisdiction to deal with custody and access to the child.
- [19] I turn to the powers of the court under Section 47 of the Family Relations Act. In my view, the child is wrongfully retained in British Columbia at present because there has been no determination that the child has made an informed decision to live with his mother for the next year.
- [20] I am not satisfied that this court ought to determine whether B.R.G. has made an informed decision to reside with his mother. I am of the view that that ought to be a matter dealt with by the courts in New Jersey. I am also not satisfied on the material before me that the mere fact that the child has expressed a desire to live with his mother for the upcoming school year is conclusive of the matter of an informed decision. It will be very rare for an eight year-old to be in a position to make such an informed decision. This is particularly true of the current situation, where B.R.G. has been primarily attending school when resident with his father, and primarily on vacation when resident with his mother.
- [21] In my view it would take very substantial evidence to overcome what I would call a presumption that a child of eight is not in a position to make an informed decision as to which parent he should live with. It may be that such evidence can be provided, but that ought to be determined in the jurisdiction with the closest connection to custody and access to this child, and I find that jurisdiction to be New Jersey.
- [22] But for the recent ex parte order in New Jersey, I would have no hesitation in making an order that the child be returned to there pending any further order of the New Jersey courts. I say that for a number of reasons: the first is the rather technical basis that in my view under the Family Relations Act I do not have jurisdiction to enter into a consideration of custody and access.
- [23] I am also concerned about public policy in this kind of a case. This is not a situation, in my view, where the child has been abducted per se. But it is a situation in which the child was sent to Ms. K.W. for access over the summer months, on the understanding that he would be returned to New Jersey at the end of the summer. Ms. K.W. then unilaterally took steps (under the purported authority of the agreement) refusing to return the child. If the court were to countenance such actions, it would put in jeopardy the innumerable custody and access arrangements that must work in a cross-border arrangement. This court should be very, very slow to take a step which would put the confidence of parents acting under such arrangements in jeopardy.

- [24] As I have indicated, but for the ex parte orders in New Jersey, I would have no hesitation in making an order under Section 47 of the Family Relations Act that B.R.G. be returned there. I am concerned, however, that the New Jersey courts have granted Mr. A.G. sole custody of B.R.G. on an ex parte basis. Even if he is returned to New Jersey, those courts have made a change to the sole custody ordered by consent in 1997. In my view, it is not appropriate, and it is contrary to public policy, to have these matters permanently determined on an ex parte basis.
- [25] Mr. A.G. has explained the ex parte application by indicating that, on legal advice, he believed that a permanent custody order was necessary before the Hague Convention could be applied for return of the child. That may or may not be correct. But this court, acting under domestic legislation - the Family Relations Act - does have authority to order the return of the child, quite apart from the Hague Convention.
- [26] The underlying reasons for seeking the New Jersey ex parte order, then, have been shown to be misguided. I have indicated to Mr. A.G., through counsel, that I would be prepared to make an order under Section 47 for the return of the child to New Jersey if Mr. A.G. moves to set aside the New Jersey ex parte order. Mr. A.G. has indicated that he is prepared to do so.
- [27] I am therefore ordering that upon the courts of New Jersey vacating the ex parte order of August 27, 2003 which varied custody with respect to the child, Ms. K.W. must forthwith return B.R.G. to Mr. A.G. in New Jersey.
- [28] So, if Mr. A.G. moves before the New Jersey court to vacate that order and if it is vacated, Ms. K.W. will immediately take steps to return B.R.G. to Mr. A.G.. Thereafter, any party will be at liberty to take whatever proceedings he or she deems appropriate in New Jersey, which I conceive to be the appropriate jurisdiction to deal with this matter.
- [29] In the event that Mr. A.G. either does not move to vacate the order, or the courts of New Jersey elect not to vacate the order, either party is at liberty to re-apply, and I will be seized of the matter.

[Discussion between the Court and Counsel]

THE COURT: She must return him to Mr. A.G. with the intent that he be returned to New Jersey. If the change-over can occur most conveniently in the Lower Mainland, that is fine. The parties can make that arrangement. The key is that the New Jersey order ought to be vacated before the child is transferred.

[Discussion between the Court and Counsel]

THE COURT: Yes, I will make a declaration that this court does not have jurisdiction under Section 44 of the Family Relations Act, and I will further make an order staying the application under Section 48. That is not a permanent stay. The parties are at liberty to apply to have that stay removed.

[Discussion between the Court and Counsel]

THE COURT: There's no reason why Ms. K.W. should not be allowed ultimately to enforce the New Jersey order in British Columbia, but we have to take care of the current crisis before that happens. I am not at present going to make an order enforcing the New Jersey order because of the difficulties in interpretation of the eight year-old clause, and because of concerns that I have indicated as to whether I can enforce one New Jersey order without enforcing the other New Jersey order.

Once B.R.G. is returned to New Jersey, and once any proceedings that are going to be taken are taken there are taken, there is no reason why British Columbia courts should not enforce the extra-provincial order. This court ought to be able to ensure that the provisions of the New Jersey order are followed when B.R.G. is in British Columbia

[Discussion between the Court and Counsel]

THE COURT: These are volatile situations, but I have no evidence before me on which I could conclude that Ms. K.W. will not follow a court order. As I understand it, she is employed in British Columbia as a resident manager of an apartment building. She seems to have a substantial connection with the jurisdiction.

Ms. K.W., I expect you to comply with this court order, and this court would take a very dim view of the situation if you did not. This court does have powers to punish for contempt, and they can be extreme. I don't think there's anything more I need do at this stage.

I'm not minded to grant a police clause unless there is evidence that a violation of the order is likely. Such a clause can certainly be added quickly in the event that there is not compliance with the order.

Although I expect that both parties are going to be somewhat disappointed with the order of this court, and particularly Ms. K.W., the history of this matter shows them both to be very concerned parents who are worried about the best interests of the child. I expect those concerns will triumph over any personal feelings of injustice having occurred.

Further, there are likely to be further proceedings in New Jersey, and it certainly wouldn't be in either parent's best interest to be in violation of a British Columbia court order for the purposes of approaching this matter in New Jersey.

(SUBMISSIONS ON COSTS)

THE COURT: There obviously have been considerable costs on both sides in bringing this matter to this court. While I agree with Mr. Storey that his client has been largely successful, I do have concerns about the manner in which Mr. A.G. has handled this matter, particularly the obtaining of an ex parte order. That has been a sledge-hammer approach to this matter. In my view, the bulk of costs in resolving in this matter are likely to be costs involving litigation in New Jersey, and that is a matter for New Jersey courts acting under the laws of that State.

It is appropriate that each party bear his or her own costs for the proceedings in this court to date.

"H. Groberman, J."

The Honourable Mr. Justice H. Groberman

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