

CANADA / JUDGMENT

C.C. v. D.R.

2018 BCSC 291

COURT

Supreme Court of British Columbia

DECIDED

28 February 2018

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2018 BCSC 291 C.C. v. D.R. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: C.C. v. D.R., 2018 BCSC 291 Date: 20180228 Docket: E172902 Registry: Vancouver Between: C.C. Petitioner And D.R. Respondent Before: The Honourable Mr. Justice Butler Reasons for Judgment Counsel for the Petitioner: W.M. DeWolf Counsel for the Respondent: N.W. Lott Written Submissions of the Petitioner filed: January 30, 2018 Written Submissions of the Respondent filed: January 19, 2018 Place and Date of Judgment: Vancouver, B.C. February 28, 2018

- [1] The petitioner, C.C., applied pursuant to s. 80 of the Family Law Act, S.B.C. 2011, c. 25, the Convention on the Civil Aspects of International Child Abduction, 25 October 1980, Can. T.S. 1983, No. 35 (the "Hague Convention"), for an order that the respondent, D.R., return their daughter A.B. to Connecticut.
- [2] On January 16, 2018, in a ruling delivered orally, I dismissed the petitioner's application. In doing so, I found that the retention of A.B. in British Columbia was wrongful, but exercised my discretion under Article 13 of the Hague Convention to consider the views of the child. I found that A.B. objected to being returned to Connecticut and was of an age and degree of maturity where it was appropriate for the Court to take account of her views. Having done so, I found that her views were very much her own. I also found that her reasons for objecting to a return to Connecticut were substantial in nature, rational and serious.
- [3] At the conclusion of the oral ruling, I invited submissions on costs. The parties exchanged written submissions. This is my ruling on costs. Position of the Parties
- [4] The respondent says that he was the successful party and is entitled to costs. He says he should be awarded special costs because the petitioner breached an undertaking given to this Court as part of a consent order made at a Judicial Management Conference on December 18, 2017. The petitioner undertook to return A.B. to British Columbia following Christmas parenting time in Connecticut. However, when A.B. was in Connecticut, the petitioner cancelled the daughter's return ticket and tried to prevent her from leaving. The respondent says the petitioner's actions amount to the kind of reprehensible conduct in the course of litigation that is deserving of rebuke by an award of special costs. In the alternative, if the Court does not order special costs, the respondent says he should be awarded costs at ordinary difficulty.

- [5] The petitioner says this is an appropriate case for the Court to exercise its discretion to deny costs to the respondent even though he was the successful party. She says the respondent's conduct in wrongfully retaining A.B. in British Columbia in breach of the Connecticut court order is conduct worthy of rebuke and is a sufficient basis on which to deny costs to the respondent. His failure to live up to the Connecticut court order means that he did not come to court with clean hands in this proceeding. In addition, she says that her conduct does not amount to an exceptional circumstance sufficient to justify an order for special costs. The daughter was able to return to British Columbia in spite of the petitioner's actions and the respondent suffered no real prejudice. The petitioner says that in these circumstances each party should bear their own costs. Analysis and Ruling
- [6] The general principles governing costs in civil and family proceedings apply in applications brought under the Hague Convention. However, those costs are now assessed under the Supreme Court Family Rules: *Ho-Farris v. Nyirabu*, 2016 BCSC 184. Costs should be awarded to the successful party unless the court otherwise orders: *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 (C.A.). In deciding whether to order otherwise, the court may take into account factors such as hardship, the earning capacity of each spouse and the conduct of the parties in the litigation. The unsuccessful party has the onus of persuading the court to exercise its discretion to depart from the usual rule. Special costs may be ordered in proceedings brought under the Hague Convention: *J.H.F. v. S.H.F.N.*, 2015 BCSC 654.
- [7] Applying those principles to the circumstances of this case and taking into consideration Supreme Court Family Rule 16-1, I order that the petitioner pay costs to the respondent at ordinary difficulty, not as special costs.
- [8] Absent the petitioner's breach of the undertaking given to this Court, her argument that the respondent's conduct should be a factor in the costs ruling would carry more weight. Absent the breach of undertaking, I would have had to consider the circumstances of the wrongful retention of A.B. in British Columbia and balance those against the conclusions I arrived at about A.B.'s views. The litigation would not have been required if the respondent had commenced proceedings in Connecticut, a jurisdiction to which he had attorned and which was A.B.'s habitual residence. On the other hand, A.B. was 15 years old at the time of the wrongful retention and her reasons for objecting to return to Connecticut were mature and rational. The petitioner's pursuit of the return application in the face of A.B.'s views could be characterized as unreasonable.
- [9] However, the petitioner's breach of her undertaking to this Court must be taken into account in my exercise of discretion on costs. The petitioner has offered no explanation for her failure to follow the formal commitment she made to this Court in the course of these proceedings. Her conduct in breaching the undertaking can be described as reprehensible. The question is whether it should result in an award of special costs.

- [10] The principles for awarding special costs were summarized by Madam Justice Gropper in *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 73. These include the oft-stated proposition that a court should exercise restraint in awarding special costs and that a party must demonstrate exceptional circumstances to justify such an order.
- [11] As I have indicated, the conduct of the petitioner can be characterized as reprehensible because she misled the Court by consenting to an order designed to preserve the status quo. The order facilitated A.B.'s desire to visit her family in Connecticut at Christmas and the petitioner was anxious for that visit to occur. Her breach of the undertaking was intentional and was an attempt to improperly take advantage of the consent order. Fortunately, the consequences of her deliberate breach of the order were not serious. The cost to the respondent can be remedied by ordering that the petitioner reimburse him for the cost of A.B.'s flight back to British Columbia.
- [12] In these circumstances, I conclude that this is an appropriate case to exercise restraint against an award of special costs. The litigation has been contentious and has the potential to impair ongoing relationships between A.B. and her parents. An award of special costs could further impair those relationships.
- [13] When I weigh the relevant factors, I conclude that there is no reason that costs should not follow the event. I also conclude that it is not an appropriate case for an award of special costs. The respondent will receive costs of the petition at ordinary difficulty. The disbursements will include the cost of A.B.'s return flight to British Columbia. "Butler J."

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