

CANADA / JUDGMENT

Ding v. Law

2024 BCSC 1686

COURT

Supreme Court of British Columbia

DECIDED

11 September 2024

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2024 BCSC 1686 Ding v. Law

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ding v. Law,

2024 BCSC 1686

Date: 20240911

Docket: E240414

Registry: Vancouver

Between:

Cheng Ding

Petitioner

And

On Lan Law

Respondent

Before: The Honourable Justice E. McDonald

Reasons for Judgment on Costs

Counsel for the Petitioner:

M. Lokshin

Counsel for the Respondent:

C.P. Amundson

Respondent's Written Costs Submissions:

May 23, 2024

Petitioner's Written Costs Submissions:

May 24, 2024

Place and Date of Judgment:

Vancouver, B.C.

September 11, 2024

- [1] Following the hearing of a petition brought pursuant to Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980, 1343 U.N.T.S. 22514 [Hague Convention], I issued reasons for judgment on May 2, 2024 indexed as 2024 BCSC 976.
- [2] At the outset of the petition hearing, the respondent indicated she would voluntarily return the child to Washington State. The petitioner was concerned that the dismissal of the petition would disadvantage him in future proceedings. For the reasons that I explained, I dismissed the petition and I granted the parties an opportunity to make written submissions regarding costs, which they have now provided. Specifically, on May 23, 2024, the respondent provided written costs submissions and on May 24, 2024, the petitioner provided responding costs submissions.

Issue of Costs

- [3] Article 26 of the Hague Convention addresses the issue of costs. It provides, among other things, that in the event the return of the child is ordered, the court may hold the taking parent responsible for payment of the necessary expenses incurred by or on behalf of the applicant such as the costs of legal representation of the applicant:

Article 26

Upon ordering the return of a child or issuing an order concerning rights of access under this Convention, the judicial or administrative authorities may, where appropriate, direct the person who removed or retained the child, or who prevented the exercise of rights of access, to pay necessary expenses incurred by or on behalf of the applicant, including travel expenses, any costs incurred or payments made for locating the child, the costs of legal representation of the applicant, and those of returning the child.

- [4] The respondent submits that the costs provisions in Rule 11-1 and 16-1 of the Supreme Court Family Rules, B.C. Reg. 169/2009 [SCFR] apply to the proceeding. The respondent also submits that because she made an offer to settle that was not accepted, the court should award her double costs. Alternatively, if she is not awarded double costs, she seeks costs at Schedule B as the substantially successful party.

- [5] The petitioner disagrees that SCFR 11-1 and 16-1 apply to the proceeding because the "family law case" as referred to in those rules is not defined to include a proceeding commenced pursuant to the Hague Convention.
- [6] The petitioner also disagrees with the respondent's assertion that she was substantially successful on the petition. The petitioner submits that if the respondent had been substantially successful, the child would not be returned, even voluntarily.
- [7] According to the petitioner, the Legal Services Society incurred considerable expense on his behalf and the petition and supporting materials were filed and served well before the respondent offered to voluntarily return the child. Since the work had to be undertaken and the court materials filed, the petitioner submits that the work was necessary to achieve the objectives of the Hague Convention.
- [8] The petitioner also submits that the court's reasons, while not finding that there was a wrongful retention of the child by the respondent, clearly does not make any findings regarding the merits of the petition. The petitioner states in his submissions that, "Unlike the respondent's offers, this wording makes clear that the respondent was not absolved of the allegation of wrongful retention, and it leaves it open to the petitioner to raise this significant and relevant point during custody proceedings in the appropriate US jurisdiction."
- [9] The petitioner refers me to the case of J.C.P. v. J.B., 2019 BCPC 357 at para. 12 [J.C.P.]. In J.C.P., Judge Merrick considers the matter of costs, namely solicitor-client costs, to be assessed against Ms. B. Ms. B was a respondent in a Hague Convention proceeding brought by Mr. P. in New Zealand, as well as a party to a British Columbia Provincial Court ("BCPC") family law proceeding. At the request of the New Zealand court, Judge Merrick had made an order pursuant to the Hague Convention "to try and clarify issues for the New Zealand court".
- [10] After some negotiation and just prior to the resumption of the hearing in the New Zealand court, Ms. B agreed to return the child to British Columbia. Ms. B did not oppose reimbursement of Mr. P.'s costs, but her counsel did provide the court with context and an explanation for the steps she took. Judge Merrick determines that Article 26 of the Hague Convention applies and in reaching that conclusion, Judge Merrick refers to the authority in Beatty v. Schatz, 2009 BCSC 769 [Beatty].
- [11] In Beatty, at paras. 20-22, Justice Martinson notes that Article 26 gives the court discretion to order legal costs beyond those normally provided by the SCFR including to meet the objective of restoring the applicant to the position they would have been in had there been no wrongful removal or retention. At para. 16, Justice Martinson describes the objectives of Article 26 as follows:

... has three objectives: to compensate the left behind parent for costs incurred in locating and recovering the abducted child; [2] to punish an abducting parent; and [3] to deter other parents from attempting to abduct their children. The objectives of the Hague Convention would be defeated if the left behind parent were required to fund the process of locating the abducted child and obtaining that child's return.

- [12] In *Mitchell v. Mitchell* (2009), 71 R.F.L. (6th) 185, [2009] CarswellOnt 1628 (Ont. S.C.J.), Justice Polowin dealt with the matter of costs where there was an application pursuant to the Hague Convention and a declaration that Ms. Mitchell had wrongfully removed the child from Florida and retained him in Canada. The left-behind parent, Mr. Mitchell, had made an offer to settle to Ms. Mitchell that was identical to the decision. Mr. Mitchell sought his costs on a complete indemnity basis.
- [13] In *Mitchell*, at para.12, Justice Polowin notes that Article 26 does not supplant Ontario's Family Law Rules and at para. 10, that costs are "clearly within the discretion of the court to be exercised judiciously" which involves a consideration of the factors set out in the Family Law Rules. *Mitchell* is cited in *Beatty* (at para. 19) as one of a number of authorities establishing the general legal principles applicable to determining costs for a Hague Convention proceeding.
- [14] After considering the authorities, I have no difficulty concluding that in the present circumstances, as part of the judicious exercise of the court's jurisdiction regarding costs related to a Hague Convention proceeding, the court may consider the factors in, and award costs pursuant to, SCFR 11-1 and 16-1.
- [15] In early April 2024, with assistance from the Legal Services Society, the petitioner commenced a proceeding pursuant to the Hague Convention seeking the child's return. It was only after the petitioner took the step of commencing the proceeding, that the respondent offered to return the child. The petitioner submits that while he did not obtain a declaration that the respondent had wrongfully retained the child in Canada, he did obtain clarity that the order was made without the court having considered the merits of his application, which may assist him in the U.S. family law proceedings.
- [16] When I consider the legal principles and the objectives of Article 26, I conclude that the particular circumstances of this case militate against awarding either party costs. I find that a judicious exercise of the court's jurisdiction in respect of costs, that balances both the particular circumstances and the objectives of Article 26, leads to a result where the parties shall bear their own costs.

"E. McDonald J."

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