
CANADA / JUDGMENT

G.S. v. L.S.

2013 BCSC 1725

COURT

Supreme Court of British Columbia

DECIDED

19 September 2013

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2013 BCSC 1725 G.S. v. L.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

G.S. v. L.S.,

2013 BCSC 1725

Date: 20130919

Docket: E100601

Registry: Vancouver

Between:

G.S.

Claimant

And

L.S.

Respondent

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

The Claimant:

In Person

Counsel for the Respondent:

B. Ingram

Place and Date of Trial/Hearing:

Vancouver, B.C.

July 11, 2013

Place and Date of Judgment:

Vancouver, B.C.

September 19, 2013

- [1] The claimant in this family proceeding seeks a declaration that his ex-wife, the respondent, was and remains in contempt of court.
- [2] The respondent moved to Israel with the couple's three children, as she was permitted to do by an order of this court. However, that order was reversed by the Court of Appeal, which ordered the return of the children to British Columbia. The claimant began proceedings in Israel to enforce the Court of Appeal order pursuant to the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention"). The respondent opposed his application and asked the Israeli courts to take jurisdiction over the children. The issue is whether the position she took before the Israeli courts amounts to contempt of the courts of this jurisdiction and, if so, what punishment if any is appropriate.
- [3] The claimant was ultimately successful in the Israeli proceedings and, in fact, returned the children to British Columbia while the matter was still before the Israeli courts. The Supreme Court of Israel has said he acted improperly in doing so, but that was not a bar to enforcement of the British Columbia order.

The British Columbia Orders

- [4] Both parties were born and raised in Israel, where they were married in 1995 and their first child was born in 1997. They moved to Canada in 2002, eventually becoming Canadian citizens. Twin children were born here in 2005. The parties separated in either 2005 or 2007 (they do not agree on the date) but continued to live under the same roof and share parenting.
- [5] A consent order by Cullen J. on March 5, 2010, included declarations that the children are habitually resident in British Columbia for purposes of both the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA], and the Hague Convention. It also ordered that neither party was to initiate legal proceedings in any jurisdiction outside British Columbia relating to the children, but either party was free to seek an order in this jurisdiction allowing him or her to move the children.

- [6] On August 5, 2011, following a 10-day trial, Gropper J. made an order giving the parties joint custody and joint guardianship of the children, but stating that their primary residence would be with the respondent, who was free to move with them to Israel. The respondent took the children to Israel shortly after the trial judgment and the claimant went there at the same time.
- [7] The claimant's appeal came before the Court of Appeal on March 5, 2012. In the course of that hearing, the respondent's counsel told the Court (see p. 12, lines 18-19, of transcript of the hearing at the B.C.C.A.):

I wouldn't be here today if I didn't have her commitment to abide by this court's decision on the appeal

- [8] On April 5, 2012, the Court of Appeal allowed the claimant's appeal and ordered that the primary residence of the children be with him in Vancouver (see *Stav v. Stav*, 2012 BCCA 154 ["Appeal Decision"]). The court ordered return of the children on June 30, 2012, or as soon thereafter as travel arrangements could be made.
- [9] On June 13, 2012, the respondent applied to the Court of Appeal for a stay of its order, pending her application for leave to Appeal to the Supreme Court of Canada (*Stav v. Stav*, 2012 BCCA 420 ["Stay Decision"]). In reasons dismissing that application, Low J.A. said at para. 18:
- [18] I do not have any knowledge of Israeli law and do not presume to interfere with legal process in that country, but I feel obliged to state, as a matter of caution at least, that there is a positive duty on the respondent to comply with both the letter and spirit of this court's order. If she fails to cooperate with the implementation of the order without lawful excuse, she will be in contempt of court in this jurisdiction and will be at risk of being fined or losing her liberty. An order of a court in this province is a law that must be complied with in accordance with its terms.
- [10] The respondent's application for leave to appeal to the Supreme Court of Canada was subsequently dismissed.

The Israeli Proceedings

- [11] Following the Court of Appeal judgment, the claimant began proceedings in the Israeli Family Court in Jerusalem to enforce the order. The respondent applied for summary dismissal of those proceedings. Her application was dismissed on June 20, 2012, but she obtained interim restraining orders prohibiting the children from leaving Israel. At a hearing on July 17, 2012, the respondent testified that she wanted to remain in Israel with the children and would return them to Canada only if the Israeli court said she had to.

- [12] Meanwhile, on June 24, 2012, the respondent began divorce proceedings in the Regional Rabbinical Court of Tel Aviv-Jaffa and obtained an interim order prohibiting the claimant from leaving Israel.
- [13] On September 12, 2012, the Israeli Family Court ordered the immediate return of the children to Canada, saying that said Canadian courts have exclusive jurisdiction on custody and other matters relating to them. The claimant applied for and obtained a stay of that order, along with new restraining orders, and filed an appeal with the Jerusalem District Appeal Court. That appeal was dismissed on October 21, 2012. The respondent applied for and obtained another stay, pending appeal to the Supreme Court of Israel. She filed an application for leave to appeal to that court on October, 28, 2012.
- [14] Relying on the absence of any new specific restraining orders, the claimant left Israel with the children on November 7, 2012. The Supreme Court of Israel has since found that to have been contrary to the stay of proceedings. The court described the claimant's conduct as taking "the law into his own hands" and "sneaking" the children from Israel "in the dead of night."
- [15] The respondent returned to Vancouver about a week after the claimant and the children, but not before asking the Ministry of Justice in Israel to commence proceedings under the Hague Convention, alleging that the claimant had abducted the children. That request was rejected.
- [16] The respondent's application for leave to appeal to the Supreme Court of Israel remained. On July 28, 2013, subsequent to the hearing of this application, that court granted leave but dismissed the appeal on its merits (see *John Doe v. Jane Doe*, (28 July 2013), Israel 7784/12 (Isr. S.C.)). It is in that judgment (which I have since had the opportunity to read in translation) that the court criticized the claimant for leaving Israel with the children when he did. However, the court stated:

an examination of the facts of the case, including the intention of the parties, shows that the minors' habitual residence was in Canada, while residence in Israel did not become a permanent state in the "continuous reality of life" of the minors, and that the transition was temporary, short, reversible and was perceived as such.

The rule is that upon fulfillment of the conditions for application of the Convention--at the center of which are the statements concerning unlawful removal or retention of a minor from his habitual residence--his return should be ordered

- [17] Although the claimant has so far been successful at all levels of the Israeli courts, he believes the respondent may have a further avenue of appeal to a larger panel of the Supreme Court. I do not know if that is correct.

Subsequent British Columbia Orders

- [18] Following the return of the parties and the children to this jurisdiction, Abrioux J. ordered, on November 21, 2012, that neither party remove the children from the jurisdiction without consent of the other or further order of this court. He also ordered that the two younger children alternate residence between the parties, spending two nights at a time with each. That shared parenting arrangement was varied to one of alternate weeks by order of Burnyeat J. on April 11, 2013. The older child is now living with the claimant, but Burnyeat J. ordered that he be available at certain times to take calls from his mother.

Analysis

- [19] A court order must be obeyed until and unless it is reversed: *Larkin v. Glase*, 2009 BCCA 321 [Larkin]. All that is necessary to establish contempt of court is proof of deliberate conduct that has the effect of contravening the order; an intent to bring the court into disrepute or to interfere with the due course of justice or with the lawful process of the court is not an essential element of civil contempt: *Larkin*; *Topgro Greenhouses v. Houweling*, 2003 BCCA 355.
- [20] The respondent argues that she was not in contempt because she was merely exercising her rights under Israeli law to defend against proceedings commenced by the claimant in the courts of that country. I cannot accept that submission.
- [21] The claimant initiated proceedings in Israel because he feared (with good reason) that the respondent would not obey the Court of Appeal's order to return the children to Vancouver. Throughout those proceedings, the respondent asked the Israeli courts to take jurisdiction and allow the children to remain in Israel. She now suggests, in effect, that she was entitled to disobey the order as long as she was seeking a contrary order from a foreign court.
- [22] The respondent was not required to defend the Israeli proceedings. She could have simply obeyed the order that was made in this jurisdiction. Her position seems to be that she respects and recognizes the jurisdiction of Canadian courts while she is in Canada, but reserves the right to seek a different result when she is in Israel. I find it particularly offensive that, when the claimant brought the children back to Canada, which is what the Court of Appeal ordered, the respondent tried to allege there had been an abduction, as defined by the Hague Convention.
- [23] Parties cannot disobey orders they believe to be wrong, nor can they disobey orders that are, in fact, wrong or irregular, until such orders are set aside on appeal: *Canadian Transport (U.K.) Limited v. Alsbury et al.*, [1953] 1 D.L.R. 385; *Cunningham v. Regina (City)* (1994), 30 C.P.C. (3d) 183 (S.K.C.A.). In *Fraser Health Authority v. Jongerden (c.o.b. Home on the Range)*, 2013 BCSC 986, Wong J., at para. 60, referred to the following passage in Sharpe, J. *Injunctions and Specific Performance* (Toronto: Canada Law Book Looseleaf Service), s. 6.200:

It is well established that a contempt application is not answered by the assertion that the injunction was erroneously granted or even that it was void. The proper course is to move against the injunction or to appeal and the court will not permit the original order to be attacked in contempt proceedings.

- [24] If outstanding appeal proceedings in this jurisdiction cannot be an excuse for failing to obey a court order, the existence of proceedings in a foreign court cannot offer any greater protection.
- [25] I have no hesitation in finding that the respondent was in contempt of court from June 30, 2012, when the Court of Appeal order said the children were to be returned to Vancouver, to November 7, 2012, when the children were in fact returned to Vancouver.
- [26] I also find the defendant to have been in contempt of the March 2010 consent order, which established British Columbia as the habitual residence of the children. In the Appeal Decision, the Court of Appeal said of that order at para. 50:
- [50] There is nothing in the Consent Order which designates either custody or access. Rather it was an order made pursuant to s. 44 of the FRA, which contemplated that any order made with respect to custody and access of the children would have to be made in British Columbia as the habitual place of residence of the children. It was also intended to trigger the application of the Hague Convention in the event that the children were removed from the jurisdiction without the other parent's consent, or court order. [emphasis added]
- [27] The consent order has never been set aside or varied. Even if the order of Gropper J. could be said to have qualified it, that qualification was removed by the decision of the Court of Appeal. The consent order therefore remains in force. The respondent continued her efforts before the Israeli courts to deny the validity or applicability of the consent order, to argue that Israel had become their habitual residence, and to have the Israeli courts take jurisdiction. I find that to have been a continuing contempt of the consent order.
- [28] The more difficult question in this case is an appropriate response to the respondent's contempt. The children are now in British Columbia where this Court can effectively exercise its jurisdiction, although their return was due to the action of the claimant and not to any effort by the respondent to comply with the order or purge her contempt.
- [29] In considering the consequences that should flow from contempt, the distinction between civil and criminal contempt is an important one. The distinction was discussed by the Supreme Court of Canada in *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, at paras. 50 and 51:

- [50] Both civil and criminal contempt of court rest on the power of the court to uphold its dignity and process. The rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect. To maintain their process and respect, courts since the 12th century have exercised the power to punish for contempt of court.
- [51] These same courts found it necessary to distinguish between civil and criminal contempt. A person who simply breaches a court order, for example by failing to abide by visiting hours stipulated in a child custody order, is viewed as having committed civil contempt. However, when the element of public defiance of the court's process in a way calculated to lessen societal respect for the courts is added to the breach, it becomes criminal.
- [30] In cases of civil contempt the focus of the court is on restoring the rights of the parties. In *Larkin*, the court said at paras. 50 to 52:
- [50] While concern for the administration of justice is not, per se, a factor in sentencing for civil contempt (*Interfor v. Simm*, 2000 BCCA 500, at para. 17; *Continuing Care Employers' Bargaining Association v. A.U.P.E.*, 2002 ABCA 148, at para. 113), deterrence and rehabilitation are factors relevant to securing compliance with court orders.
- [51] In my view, deterrence is of more importance than rehabilitation, although the latter must not be ignored
- [52] It is clear that generally incarceration is reserved for the more serious contempt of court, generally criminal contempt. Jeffrey Miller, in his text *The Law of Contempt in Canada* (Toronto: Carswell, 1997), discusses punishment for contempt as it relates to civil versus criminal contempt as follows (at p. 129):

As between criminal and civil contempts, the general principle is that criminal contempts are to be answered with penal sanctions, while sanctions for civil contempts should protect the rights as between private litigants and thus generally should be "coercive" (as opposed to punitive).

- [31] However, even in a case civil contempt the court retains "a penal or disciplinary jurisdiction" to be exercised in the public interest. *North Vancouver (District) v. Sorrenti*, 2004 BCCA 316, at para. 8. The court has jurisdiction to punish for civil contempt, even though the contemptuous behaviour is no longer outstanding: *Orphan v. Roulston et al.*, 2000 BCSC 1062, at para. 26.
- [32] For the purpose of deterrence and denunciation, I find that it is important to make clear to the respondent, as I hope I have done, that she was in contempt of court. However, there is no coercive purpose to be served by an order imposing a fine or imprisonment -- the children are back in this jurisdiction and there are orders in place under which both parties are enjoined from taking them anywhere else without consent of the other or further order of the court. The respondent still has responsibility for care of the younger children half of the time. It would not be in the best interests of the children to put their mother in jail or to

force her, on what appear to be limited resources, to pay any significant financial penalty, beyond an order for special costs.

- [33] In the unusual circumstances of this case, it is sufficient to order that the respondent may purge her contempt by filing with the court, within seven days, a written, signed undertaking that:
- a) she will not initiate any further appeals or new proceedings in Israel or any other jurisdiction outside British Columbia in which she asks the those courts to take jurisdiction over the children or to make orders relating to their residence, guardianship or parenting time;
 - b) there were no such proceedings extant as of the date of these reasons or, if there were, those proceedings have been discontinued or abandoned.
 - c) she has surrendered to the claimant any and all Canadian and Israeli passports in the names of the children and will not, without the consent of the claimant or further order of this court, apply on behalf of the children for new passports in Canada, Israel, or any other country in which she may be or become eligible to make such an application.
- [34] The claimant is entitled to special costs. It should go without saying, and the respondent must understand, that any failure to purge her contempt or any future contempt will likely result in significant penalties.

"N. Smith, J."

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