

CANADA / JUDGMENT

Gill v. Gill

2024 BCCA 140

COURT

British Columbia Court of Appeal

DECIDED

10 April 2024

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2024 BCCA 140 Gill v. Gill

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Gill v. Gill,

2024 BCCA 140

Date: 20240410

Docket: CA49708

Between:

Vikramjit Singh Gill

Appellant

(Petitioner)

And

Anjena Kaur Gill also known as Anjena Kaur Gandham

Respondent

(Respondent)

Before:

The Honourable Mr. Justice Harris

The Honourable Justice Griffin

The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated

January 31, 2024 (Gill v. Gill, 2024 BCSC 346, Vancouver Docket E233294).

Oral Reasons for Judgment

Counsel for the Appellant:

J. Chow

Counsel for the Respondent:

T.H. Hopman

A. Ngom

A.S. Allidina

Place and Date of Hearing:

Vancouver, British Columbia

April 10, 2024

Place and Date of Judgment:

Vancouver, British Columbia

April 10, 2024

Summary:

The appellant appeals the dismissal of his application under the Hague Convention for an order returning the parties' child to the United States. The chambers judge found that the child was habitually resident in Canada, and therefore the Hague Convention does not apply. On appeal, the appellant argues that the judge made a legal error in her application of the test for habitual residence, and based her decision on irrelevant considerations. Held: Appeal dismissed. The appellant has not demonstrated a basis for appellate intervention. The judge correctly stated and applied the law, and did not make any palpable and overriding factual errors.

[1] HORSMAN J.A.: The appellant appeals the dismissal of his application for an order that the parties' child ("K") be returned forthwith to the United States pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980, Can. T.S. 1983 No. 35 (entered into force 1 December 1983) [Hague Convention].

Background facts

[2] The background facts were thoroughly reviewed by the chambers judge in her reasons for judgment, cited at 2024 BCSC 346. For the purpose of the issues raised on appeal, a brief summary will suffice.

- [3] The appellant is an American citizen. He was born in California, where his parents, brothers, and other extended family members continue to reside. The appellant has lived in Las Vegas, Nevada since 2010. He is a senior healthcare executive.
- [4] The respondent is a Canadian citizen. She was born and raised in the Vancouver area, where her parents and two sisters continue to live. The respondent is a psychiatrist.
- [5] The parties met in 2018, and were married on June 15, 2020 in California. The respondent received her conditional permanent United States residence in February 2022. In October 2022, the parties purchased a house in Las Vegas.
- [6] K, the parties' only child, was born in Las Vegas in April 2023.
- [7] On May 21, 2023, the respondent left Las Vegas and travelled to Vancouver with K. There was conflicting evidence before the judge regarding the reasons for the trip, and the parties' agreement with respect to its duration.
- [8] The appellant maintained that he only allowed K to travel to Vancouver with the respondent because K was breastfeeding, and the appellant understood the reason for the travel was the unexpected death of the respondent's cousin. According to the appellant, it was the parties' intention that the respondent and K would return to Las Vegas within three months. The appellant deposed that he signed a notarized travel authorization for a "period not to exceed three months" based on a template sent to him by the respondent, and that the respondent had kept possession of the completed form.
- [9] The respondent's evidence was that before K was born, the parties had planned to have her mother come to Las Vegas for a few weeks to help with the baby, and then for the respondent and K to travel back to Vancouver with her mother so the mother could continue to provide support. The respondent stated that the trip was always intended to be indefinite, although not permanent. The respondent acknowledged that she sent the appellant the template form for him to complete. She did not address in her evidence the question of what happened to the completed form.
- [10] Since arriving in Vancouver, K has resided with the respondent, and her parents and sister, in the parents' house.
- [11] The appellant visited the respondent and K in Vancouver on a number of occasions after May 2023.
- [12] The appellant deposed that in or around the end of July or the beginning of August 2023, he began to ask the respondent when she would be coming home, in anticipation that she would return to Las Vegas in August, as the parties had agreed. He contended that the respondent had wrongfully retained K in Vancouver as of early August. The appellant also argued that the respondent engaged in deceit in removing K from Las Vegas in May 2023, by purporting to agree to limit the trip to three months maximum when, in fact, the respondent had no intention of returning. Thus, the appellant said, the initial removal was

wrongful.

- [13] The respondent's evidence was that there were ongoing issues in the parties' relationship, before and after the respondent travelled to Vancouver. The issues concerned the respondent's allegations, supported by the evidence of her family members, that the appellant had been emotionally and verbally abusive to her throughout the relationship. The respondent deposed that, despite the abuse, she was highly motivated to make the marriage work, and that she continued to hope that the appellant would get help and the abuse would stop. The respondent provided evidence about incidents that had occurred in late October and early November 2023 that led her to conclude the appellant's behaviour was not going to improve, and the marriage could not be saved. This led the respondent to decide, on November 6, 2023, to separate from the appellant.
- [14] The evidence relating to the appellant's allegedly abusive behaviour, including the incidents in October and November 2023, is set out extensively in the chambers judgment: at paras. 38-61, 104-105, 110-121. Once again, it is unnecessary to repeat the evidence in any detail. It is sufficient to simply note that, for reasons I will explain, the judge's findings regarding the respondent's allegations of abuse are central to one of the appellant's grounds of appeal.
- [15] On November 8, 2023, the respondent served the appellant with a notice of family claim. On the same day, the appellant submitted his application under the Hague Convention to the United States State Department.

The Hague Convention

- [16] The objects of the Hague Convention, as set out in Article 1, are "to secure the prompt return of children wrongfully removed to or retained in any Contracting State", and "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States".
- [17] Under Article 3, the removal or retention of a child is considered to be wrongful where: (a) it is in breach of rights of custody attributed to a person under the law of the State in which the child was "habitually resident" immediately before the removal or retention; and (b) at the time of the removal or retention those rights were actually exercised, or would have been exercised but for the removal or retention. Article 5 broadly defines rights of custody. They include rights relating to the care of the person of the child, and the right to determine the child's place of residence.
- [18] If the criteria in Article 3 are established, Article 12 provides that where an application for return of a child has been commenced within one year of the wrongful removal or retention, the judicial or administrative authority of the Contracting State where the child is "shall order the return of the child forthwith".

- [19] Article 13 sets out a list of exceptions in which the requested State is not bound to order the return of a child. This includes, in (b), where 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".
- [20] An order for the return of a child under the Hague Convention is not a custody determination. It is simply an order designed to restore the status quo that existed before the wrongful removal or retention, and to deprive the "wrongful" parent of any advantage that might otherwise be gained by the abduction: *Office of the Children's Lawyer v. Balev*, 2018 SCC 16 at para. 24 [Balev].
- [21] In determining whether there has been a wrongful removal or retention of a child under Article 3, the court must first determine where the child was "habitually resident" immediately before the removal or retention. Within the overall scheme of the Hague Convention, the purpose of the habitual residence requirement is to define the children to whom the Hague Convention applies. If the child's habitual residence is not in the state of the parent seeking return, then the Hague Convention does not apply: *Balev* at para. 36.
- [22] The term "habitually resident" is not defined in the Hague Convention. In *Balev*, the Supreme Court of Canada adopted a "hybrid approach" to determining habitual residence. This approach requires an application judge to determine the "focal point" of the child's life--that is, the family and social environment in which the child's life has developed--immediately prior to the removal or retention: *Balev* at para. 43. The entirety of the relevant circumstances should be considered, and no single factor dominates the analysis: *Balev* at para. 44. The circumstances of the parents, including their intentions, may be an important consideration, particularly in the case of young children. However, the role of parental intention in the determination of habitual residence "depends on the circumstances specific to each individual case": *Balev* at para. 45.

The chambers judgment

- [23] The judge defined the contested issues on the application as: (i) whether the respondent wrongfully removed K from the United States on May 21, 2023, based on the appellant's assertion that his consent to the removal was vitiated by her deceit; and (ii) if the removal was not wrongful, whether the respondent wrongfully retained K in Canada in early August 2023, when she refused to return K. These issues turned, to a significant extent, on the resolution of the dispute between the parties as to whether, as the appellant alleged, the parties agreed that K's visit to Canada would not exceed three months: at para. 129.
- [24] The judge noted that in light of the "numerous and material conflicts in the evidence", credibility was a significant issue: at para. 129. Therefore, she began her analysis by assessing the parties' credibility.

- [25] The judge explained that she had "significant concerns" about the appellant's credibility on disputed issues, and "limited concern" about the respondent's credibility. Generally speaking, she found the respondent's account of contested factual circumstances to be supported by objective evidence, contemporaneous communication, and the probabilities affecting the case: at para. 136. The judge specifically addressed the credibility of the disputed evidence of the appellant's abusive behaviour "given its importance to [the respondent's] intention in particular": at para. 138. She found that the respondent's evidence, on its own and in combination with the evidence of her family members, provided a "believable if not compelling account of non-physical intimate partner violence": at para. 138. Ultimately, the judge concluded that she preferred the evidence of the respondent where it conflicted with the evidence of the appellant, unless his evidence was supported by other objective evidence: at para. 142.
- [26] The judge rejected the appellant's submission that his consent to K's removal was vitiated by the respondent's deceit; that is, her alleged deceit in agreeing that she and K would return to the United States within three months when her actual intention was to permanently relocate with K to Canada. The judge stated:
- [150] As I have indicated [the appellant's] evidence that he would not have allowed [the respondent] and K to leave Las Vegas absent extreme circumstances such as the death of her cousin and the suggestion she deceived him into agreeing to [a] three month trip, does accord with [the respondent's] allegations about his abusive behaviour which I have accepted, but I also accept the weight of the other evidence regarding the reasons for the travel and length of stay is one of several reasons I found her evidence credible and [the appellant's] not. It is clear to me that the trip was planned as alleged by [the respondent], that is in advance of her cousin's death and not because of it. Again, for example, the parties discussed an upcoming trip to Vancouver and a flight on May 23 and the tickets were purchased all before her cousin died.
- ...
- [153] Based on my assessment of credibility and the whole of the evidence on this issue, I reject the allegation that [the respondent] deceived [the appellant] into agreeing to a maximum three month visit. I find instead that they agreed that she and K would stay in Canada for an indefinite period at her parents' home.
- [27] The missing travel authorization did give the judge "pause" because the respondent's evidence did not address it. However, the judge explained that her concerns with the appellant's credibility were such that even if he did set out a three-month period in the travel form, she was nevertheless satisfied that the parties did not actually agree to a fixed date of return. She noted, among other things, that despite the parties' frequent communication via text message, there was no communication in writing before or after the expiry of the three-month period to suggest that the parties had agreed to a firm return date: at para. 154.

- [28] On this basis, the judge found that K's removal was not wrongful.
- [29] Having found that the appellant consented to K remaining in Vancouver for an open-ended or indeterminate period, the judge fixed the retention date as either November 6, 2023, when the respondent decided to separate, or November 8, 2023, when the appellant submitted his Hague Convention application: at para. 166.
- [30] The judge then turned to the issue of where K was habitually resident immediately prior to the retention date.
- [31] The judge applied the hybrid approach mandated by *Balev*. She took additional guidance from the subsequent decision of the Ontario Court of Appeal in *Ludwig v. Ludwig*, 2019 ONCA 680. Applying those decisions, the judge stated that the focal point of K's life should be assessed by reference to three kinds of links and circumstances:
1. His links to and circumstances in the United States;
 2. The circumstance of his move to Canada; and
 3. His links to and circumstances in Canada.
- [32] The judge conducted a detailed review of the evidence relevant to each of these factors. This review included the circumstances of K's life in Las Vegas before his removal on May 21, 2023, his social and family connections both in Las Vegas and Vancouver, the living and employment circumstances of the parties, and the involvement of each of the parties, and their extended families, in K's daily care. There is no suggestion that the judge misstated or misapprehended the evidence of K's circumstances. She reasoned as follows:
- [183] I highlight all of these details because of K's very young age. While I recognize the fact that [the respondent] has been his primary caregiver on its own is not determinative, both *Balev* and *Bearistro*, which followed a number of international decisions regarding the habitual residence of infants and very young children, highlight that where the child is an infant, "the environment of a young child is essentially their family environment, determined by the people who care for and live with them, also described as the circle of people on whom the child is dependent.
- [184] By November 6, 2023, K was close to seven months old and had spent all but 37 days of his very young life here.
- [185] Considering all of this and applying the hybrid approach as discussed in *Balev* and *Ludwig*, I am satisfied the focal point of K's life by November 6, 2023 was Canada. I reach this conclusion giving some weight to the parties' ongoing intention to an open ended stay in Vancouver prior to November 6, 2023 and significant weight to K's family environment.
- [33] The judge therefore found that K was habitually resident in Canada immediately prior to November 6, 2023. As a result, the respondent's retention of him was not wrongful. The judge dismissed the appellant's application.

On appeal

[34] The appellant alleges that the judge erred in law in two respects:

- a) She misapplied the legal test for habitual residence by "ignoring or unduly minimizing" the importance of parental intention; and
- b) She considered and relied upon extraneous and irrelevant concerns, in particular allegations of family violence, despite the fact that the respondent did not plead the "grave risk of harm" exception under the Hague Convention, and in doing so basing her decision in whole or in part on the child's best interests.

Standard of review

[35] Whether habitual residence under the Hague Convention is viewed as a question of fact or a question of mixed fact and law, appellate courts must defer to the application judge's decision on this question, absent palpable and overriding error. The need for deference may be inferred from the intention of the original state parties and the decision not to define habitual residence in the body of the Hague Convention. The goal was to avoid legal technicalities and to adopt a fact-based determination: *Balev* at para. 38.

Discussion

The first ground of appeal: Did the judge err in ignoring or unduly minimizing parental intention?

- [36] The appellant emphasizes that although the Court in *Balev* rejected a test for habitual residence based on parental intention, this factor remains relevant, "particularly in the case of infants or young children": *Balev* at para. 45. The appellant contends that in placing "significant weight" on K's family environment (per para. 185 of the reasons for judgment), the judge failed to properly consider the parties' shared parental intentions. The appellant says it cannot be the case that a child's place of habitual residence is determined solely or primarily by the identity of the primary caregiver. This would, the appellant argues, create a "worrisome precedent", in that it would contravene the purposes of the Hague Convention.
- [37] I am not persuaded that the judge committed the legal error alleged by the appellant. As the appellant acknowledges, the judge cited the correct factors to be assessed in determining the "focal point of the child's life" immediately prior to the retention: *Balev* at para. 43. K is an infant, and therefore his environment is "essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of": *Balev* at para. 44. The judge did not, as the appellant asserts, determine habitual residence primarily or solely by the identity of the primary caregiver. While the judge found that the respondent had been K's primary caregiver since birth, she also recognized that this was not, on its own, determinative.

- [38] The judge also did not overlook parental intention; that is, the parties' shared intention at the time of removal that the respondent's trip to Vancouver with K would be indefinite but not permanent. The judge acknowledged that in assessing K's circumstances, the factors to consider included "his nationality, the duration, regularity, conditions and reasons for his stay in Canada and the parties' circumstances including their intention": at para. 169 (emphasis added). The judge noted that, as set out in *Balev and Ludwig*, parental intention is a tool to assess the child's connections to a given country: at para. 170. There is no suggestion that the judge erred in her summary of the legal framework that governed the question of habitual residence, or the role of parental intention within that framework.
- [39] In the circumstances of this case, the judge concluded that in determining the focal point of K's life prior to November 6, 2023, parental intention should be given "some weight", and K's family environment should be given "significant weight": at para. 185. The judge was not obliged to conclude that parental intention was the dominant consideration. As was made clear in *Balev*, there is no "rule" that the actions of one parent cannot unilaterally change the habitual residence of a child: *Balev* at para. 46. The role of parental intention in the determination of habitual residence "depends on the circumstances specific to each individual case": *Balev* at para. 45. The judge gave cogent reasons for the more limited weight she placed on parental intention in this case, as compared to K's family environment immediately prior to the retention.
- [40] The appellant's complaint on appeal, in essence, is that the judge should have placed different weight on the various factors, and prioritized the parties' intentions over K's family environment. However, the weight to be placed on the relevant factors was a matter for the judge. Absent palpable and overriding error, which the appellant has not demonstrated, the judge's finding that K was habitually resident in Canada immediately prior to his retention is owed deference on appeal.
- [41] Before concluding on this issue, I note that the appellant additionally argues that the judge erred in giving "little to no weight" to the appellant's claims that he only provided consent for the respondent to travel with K to Canada on a time-limited basis: Appellant's Factum at para. 54. In fact, the judge rejected the appellant's evidence that his agreement was time-limited. She found as a fact that the parties had agreed that the respondent would travel to Vancouver with K for an indefinite period of time: at para. 153. The appellant has not shown that the judge made a palpable and overriding error in relation to this factual finding.
- [42] For these reasons, I conclude there is no merit to the appellant's first ground of appeal.

The second ground of appeal: Did the judge rely on an extraneous and irrelevant concern about family violence?

- [43] As I understand the appellant's second ground of appeal, he argues that the judge erred in making findings with respect to the respondent's allegations of family violence--that is, the appellant's alleged emotional and verbal abuse--because this suggests that she relied on the best interests of the child when making her decision. This, the appellant says, reflects an

error of law because Article 16 of the Hague Convention prohibits the court from deciding on the merits of rights of custody on a return application. The appellant argues that the allegations of family violence could only be relevant to the "grave risk of harm" exception in Article 13 (b) of the Hague Convention, which was not pleaded.

- [44] I am not persuaded by this argument. It is clear from the judge's reasons that she did not commit the error alleged by the respondent. The family violence allegations were relevant to the question of when the respondent formed the intention to remain in Canada. This, in turn, was relevant to the appellant's allegations of deceit, and the date of K's retention. The allegations of family violence provided necessary context for the respondent's evidence that she was still hopeful of saving her marriage when she left Las Vegas in May 2023, and why she reached the decision to separate from the appellant in early November 2023. It is in this context that the judge addressed the evidence of family violence. For example, after reviewing the evidence about the events in October and early November 2023, the judge explained:
- [121] I refer to this evidence because [the respondent] relies on it to explain coming to the realization that not much was going to change.
- [45] In assessing the credibility of the disputed evidence, the judge noted its "importance to [the respondent's] intention in particular": at para. 138.
- [46] The judge did not purport to decide the merits of the parties' rights of custody, nor did she apply a "best interests of the child" test in determining K's habitual residence. As I have reviewed, the judge correctly stated the legal framework that governed the question of habitual residence, as set out in *Balev*, and she assessed K's links and circumstances to Canada and the United States as required under *Balev*. In analyzing K's habitual residence, the judge did not rely on, or even reference, the respondent's allegations of family violence.
- [47] I would also not accede to this ground of appeal.

Disposition

- [48] I would dismiss the appeal.
- [49] HARRIS J.A.: I agree.
- [50] GRIFFIN J.A.: I agree
- [51] HARRIS J.A.: The appeal is dismissed.
- "The Honourable Madam Justice Horsman"

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