

CANADA / JUDGMENT

Lloyd Blanchard v Ingrid A. Wuest

2000 BCSC 592

COURT

Supreme Court of British Columbia

DECIDED

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Citation: Lloyd Blanchard v Ingrid A. Wuest Date: 20000406

2000 BCSC 592 Docket No.:

E1448

Registry: Chilliwack

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

LLOYD BLANCHARD
PETITIONER

AND:

INGRID A. WUEST
RESPONDENT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE W.G. GRIST

Counsel for the Petitioner F. Jensen

Counsel for the Respondent L. Hamilton

Date and Place of Hearing/Trial: March 29 and 31, 2000

Chilliwack, BC

- [1] Lloyd Blanchard, the father of Taylor Blanchard, a six year old girl resident with her mother, Ingrid Wuest, in Hope, British Columbia, applies for an order setting aside the ex parte Provincial court order of Judge Young made the 4th of November, 1999. This order granted Ms. Wuest sole custody.

- [2] Mr. Blanchard is a resident of California and also applies for an order pursuant to the Hague Convention, Article 12, requiring the mother to return the child to the state of California. On November 2, 1999, Mr. Blanchard received an order for custody of Taylor from a judge of the Superior Court of California, Kern County. On return of the child he would assume custody.

HISTORY:

- [3] The parties were married in July 1991 at Bakersfield, California. Ms. Wuest was a resident of British Columbia prior to her marriage and the parties came to live in Vancouver in September 1991. They resided there until they separated in January 1992. The parties tried to reconcile for one week during December 1992. Taylor was conceived during this period. After the parties again separated Mr. Blanchard returned to California. Taylor was born September 20, 1993 in Vancouver. There was no further contact between the parties or between Mr. Blanchard and Taylor until September 1997 when Mr. Blanchard phoned from a penal institution in California. He had been convicted of one or more driving while under the influence charges. These charges apparently were associated with drug use.
- [4] Mr. Blanchard completed drug abuse programs in 1996 and 1997. After further contact with his wife the parties worked towards reconciliation.
- [5] In February 1998 Ms. Wuest and Taylor visited Mr. Blanchard in Bakersfield and on July 1, 1998 she moved herself, Taylor, and her fourteen year old son by a previous relationship to his home in California.
- [6] The parties remained together until September 1999. The fifteen month period of cohabitation was marked by frequent arguments that degenerated to physical altercations. Ms. Wuest complains of abusive and controlling behaviour by Mr. Blanchard, a lack of monetary support, and a lack of interest in parenting Taylor. Ms. Wuest was an illegal alien in California and complains that Mr. Blanchard did not take effective steps to change this status and to process citizenship applications for the two children.
- [7] Mr. Blanchard complains of alcohol abuse by his wife and emotional instability resulting from psychiatric disorder. He says that she failed to control her emotional instability through medication or treatment programs. His material suggests that she was the party precipitating violence, which extended to physical abuse of Taylor.
- [8] During altercations between the parties, Mr. Blanchard would remove himself from the home to stay with his brother and sister-in-law, leaving Ms. Wuest to care for Taylor. Ms. Wuest says that the parties contemplated separation early in the summer of 1999 and that they finally separated September 24, 1999. She made preparations to leave California and says she informed Mr. Blanchard of her intended move with the children on October 1, 1999. She says he did not try to prevent the move but that he wanted access. She was not opposed.

- [9] There was a last physical altercation between the parties on October 5, 1999, after Ms. Wuest either destroyed or threw out Mr. Blanchard's personal belongings. The police were called. Ms. Wuest and the children left soon after, arriving in Hope, British Columbia on October 7, 1999.
- [10] Ms. Wuest now resides in Hope with her sister, is on social assistance and is looking for employment. Taylor is in grade one and Ms. Wuest's teenage son attends high school. She has completed an alcohol abuse program in Hope and has received psychiatric treatment. Taylor is progressing well in school.
- [11] Mr. Blanchard applied for custody of Taylor on October 8, 1999. He had Ms. Wuest served with the California proceedings on October 24, 1999. Ms. Wuest sought Counsel and prepared to forward a document referred to as Responsive Declaration shortly before the hearing in California, on November 2, 1999. This document outlining Ms. Wuest's evidence did not come before the Judge who pronounced the California order. I am not aware of whether this was through some misadventure following receipt of the document or whether the procedure in presenting the document was inadequate.
- [12] On November 4, 1999 Judge Young considered Ms. Wuest's ex parte application, knowing of the California order. She applied Section 50 of the Family Relations Act which empowers the court to grant a superseding order of custody notwithstanding that there is an outstanding order of an extra Provincial court. Section 50 authorises the superseding order if the Judge is satisfied that the child would, on a balance of probability, suffer serious harm if returned to the custody of the person legally entitled to custody under the extra Provincial order.
- [13] It is clear from Judge Young's findings of fact that she was concerned that Mr. Blanchard had a limited role in the life of Taylor. No role in fact from the date of birth, September 20 1993, until July 1998. The child's mother has no significant ongoing ties to the state of California and could only legally be physically present in the state as a visitor. Hence, enforcement of the California order would effectively dislocate Taylor from the person who has been primarily responsible for her care, exclusively until July 1998, and her primary caregiver since.
- [14] Custody to Mr. Blanchard would also separate Taylor from her brother and it is unlikely that Ms. Wuest in her present financial circumstances could effectively participate in access or in the California custody proceedings.

PROCEDURE:

- [15] This application is in large part focused on reconsideration of Judge Young's order. The mother comes to this court by consent application of Section 8(1) of the Family Relations Act. The parties have attempted to have the matter heard in Provincial court, however, the limited hearings in Hope did not allow for sufficient time. The order in the Provincial court is ex parte and subject to rehearing on evidence received from the party not served with the prior application. An application was also filed by Mr. Blanchard under the Hague

Convention for enforcement of the California order.

APPLICABILITY OF PART 3 OF THE FAMILY RELATIONS ACT:

- [16] Judge Young's order was made on application of Section 50 of the Family Relations Act, a section within Part 3 of the statute. Part 3 applies to consideration of extraprovincial orders. In circumstances where there has been a wrongful removal, as defined under the Hague Convention, Section 55 (5) determines that the Convention will apply to a child who immediately before a breach of custody or access rights, was habitually resident in a contracting state. Section 55(2) gives the Convention the force of law in British Columbia in such circumstances.
- [17] In my view, determination of Taylor's place of habitual residence is primarily determined on consideration of whether her mother, in this case the primary caregiver, was habitually resident in California prior to her return to British Columbia. The status of 'habitual resident' is discussed in *Hoskins v. Boyd* [1996] B.C.J. No. 1863. In this case Sigurdson, J. cites from *Re J* [1990] 2 A.C. 562, (H.L.) and *Adderson v. Adderson* (1987), 36 D.L.R.(4th) 631 (Alta. C.A.). These decisions offer these definitions of habitual residence:
1. An appreciable period of time and a settled intention.
 2. A residence adopted voluntarily and for settled purposes.
 3. A quality of residence...(having) an animus less than that required for domicile; it is a mid point between domicile and residence, importing somewhat more durable ties than the latter term.
- [18] Although the matter is not without some doubt, I am satisfied that when the mother left British Columbia and took up residence in California, she became habitually resident there. The parties' intention was that they would reconcile their marriage and become a unified family living in Bakersfield, dependent on Mr. Blanchard's income. It is true that Ms. Wuest was an illegal resident of California and that the settled intention was contingent on a successful reconciliation. However, the resident status was to be the subject of a naturalization application and there was commitment by the wife to the reconciliation, made after a trial visit. Accordingly the convention applies to this case as law of this Province.
- [19] Article 3 of the Convention establishes that the removal of a child is to be considered wrongful where:
- (a) it is in breach of rights of custody attributed to a person ...either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal and
 - (b) at the time of the removal those rights were actually exercised, or would have been so exercised but for the removal.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

[20] Articles 5(a), 12 and 13 provide:

Article 5

- a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that-

- (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
- (b) 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.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

[21] Consideration of these Articles pose two questions for determination in this case:

1. Did Mr. Blanchard have "rights of custody" as defined under the Convention?
2. Notwithstanding what might have been a wrongful removal, is there a grave risk that return of Taylor would expose her to physical or psychological harm or otherwise place her in an intolerable situation?

[22] The first question focuses on Mr. Blanchard's legal position towards Taylor when she was removed from California on or about October 6, 1999. The second question is in essence the same question considered by Judge Young when she determined whether there was a probability of serious harm to the child, when she applied Section 50 of the Family Relations Act.

RIGHTS OF CUSTODY:

[23] It is clear from Article 3 that the law of the State of California applies in establishing Mr. Blanchard's rights of custody. I have been given division 8 through 10 of the California Family Code. Counsel has brought to my attention Section 3010 and 3040. To my untutored eyes these sections provide law to be applied on an application brought in respect of custody. I am not able to determine from these sections alone whether a parent who is separated from his or her spouse has custodial rights towards a child resident with the separated spouse, absent a court order.

[24] The affidavits filed on this application establish that the parties separated either on September 24, 1999 (from Ms. Wuest's affidavit) or September 29, 1999 (taken from Mr. Blanchard's Declaration to the California court). By both parties' evidence, however, Mr. Blanchard left the house after the parties separated and the parties remained apart until Ms. Wuest left with the children for British Columbia. Ms. Wuest says Mr. Blanchard acquiesced in her leaving to British Columbia. Mr. Blanchard says the removal was an abduction, which I take to mean that the move was without notice or acquiescence and that Mr. Blanchard first knew of the leaving on October 7th when he found the former matrimonial home empty.

[25] If foreign law is not established by evidence, B.C. law will apply. In a comparable situation in British Columbia, Section 27(2) of the Family Relations Act stipulates:

27(2) If the father and mother of a child are or have been married to each other and are living separate and apart,

- (b) the one of them who usually has care and control of the child is the sole guardian of the person of the child unless a tribunal of competent jurisdiction otherwise orders.

[26] This law would, in my view, determine the question of rights to custody under Article 3 on the removal of the child from the jurisdiction were such a thing to happen in like circumstances in this Province.

PHYSICAL OR PSYCHOLOGICAL HARM OR PLACING THE CHILD IN AN INTOLERABLE SITUATION

[27] The evidence filed by Mr. Blanchard on this hearing in large part presents Ms. Wuest as a parent who has difficulty with alcohol and psychological disorder. The material indicates Mr. Blanchard has adequate accommodation and family support. It does not go so far as to assure that he has the ability, essentially on his own, to see to the care of a six year old child, who has only known him for a little more than a year. The child's ability to cope with the change from an accustomed life with her mother and brother is also a question very difficult to resolve on the affidavit material.

[28] I am reluctant to determine this question on affidavit material alone. The duty to safeguard the best interests of the child dictates a more complete hearing in this regard.

CONCLUSION:

[29] I am not satisfied that the two ultimate questions arising on this application should be settled on the affidavit material filed. If this matter is to proceed further, Mr. Blanchard will be required to show that the law in the State of California granted him rights of custody following the separation of the parties prior to the removal of Taylor to British Columbia justifying application of the Hague Convention.

[30] Should this be established, the assessment of risk of harm to Taylor, should she be returned to California to the custody of her father requires a hearing of that issue. I would expect that there should be viva voce evidence from both parents and that a one day hearing would be required for this determination.

"W.G. Grist, J."

The Honourable Mr. Justice W.G. Grist

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