

CANADA / JUDGMENT

van Dijk v. van Dijk-DeVos

2019 BCSC 1968

COURT

Supreme Court of British Columbia

DECIDED

12 November 2019

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2019 BCSC 1968 van Dijk v. van Dijk-DeVos

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

van Dijk v. van Dijk-DeVos,

2019 BCSC 1968

Date: 20191112

Docket: E16706

Registry: Chilliwack

Between:

Alisa Theodora van Dijk

Petitioner

And

Hooman Mortazavi and Ina van Dijk-DeVos

Respondent

Before: The Honourable Justice Shergill

Oral Reasons for Judgment

Counsel for Petitioner:

K.H. Russ

Counsel for Respondent van Dijk-DeVos:

J.S. Steiner

Place and Date of Hearing:

New Westminster, B.C.

November 6 and 12, 2019

Place and Date of Judgment:

New Westminster, B.C.

November 12, 2019

Overview

- [1] This is an application by the petitioner Alisa Theodora van Dijk for the return of her son, David Alexander Omid van Dijk, pursuant to the Convention on the Civil Aspects of International Child Abduction signed at The Hague on October 25, 1980 (the "Hague Convention").
- [2] David is a Canadian and Dutch citizen. For the past three years, he has lived with the petitioner in the Kingdom of the Netherlands (the "Netherlands"). He is currently residing in Abbotsford, British Columbia, with his maternal grandmother, the respondent, Ina van Dijk-DeVos (the "respondent"). David wishes to continue residing in Canada with his grandmother.
- [3] Ms. van Dijk-DeVos does not contest that David's habitual residence is in the Netherlands. She argues that having regard to David's wishes, and his emotional and psychological well-being, this Court should exercise its discretion and not order his return to the Netherlands.
- [4] David's biological father, the respondent Hooman Mortazavi, lives in the Metro Vancouver region of British Columbia. He did not participate in this proceeding and has not been actively involved in David's life.

Issue

- [5] The sole issue for my determination is whether this Court should exercise its discretion pursuant to Article 13 of the Hague Convention and not order the return of David back to the Netherlands.

Background

- [6] David was born in Abbotsford on December 1, 2003 and is currently 15 years old. His biological parents were never married. The petitioner has had sole custody and sole guardianship of David by way of a written agreement dated August 9, 2005. The written agreement was filed with the Provincial Court of British Columbia on August 11, 2005.

- [7] For the first eight years of his life, David lived with his mother in Abbotsford in his maternal grandparents' home. While the petitioner was pursuing her studies, David was cared for by his grandparents.
- [8] When David was eight years old, his mother decided to travel to the Netherlands to pursue further violin studies. David remained in Abbotsford in his grandmother's care. Over the next four years, David's maternal grandparents provided full-time care for him. They were aided by David's maternal aunt.
- [9] Upon completing her education in 2016, David's mother expressed a desire for David to come live with her in the Netherlands. David moved to the Netherlands and lived with his mother from age 12 to 15.
- [10] Around July 20, 2019, David came to Abbotsford for summer vacation. Following the visit he was to be returned to his mother in the Netherlands. Despite repeated requests from the petitioner, the respondent refused to return David to the Netherlands. While the parties were sorting out where David would reside, the petitioner provided written consent for David to be enrolled in school in Abbotsford.
- [11] Ms. van Dijk-DeVos commenced action No. 18653 in Abbotsford Provincial Court on August 20, 2019 (*Ina van Dijk-DeVos v. Hooman Mortazavi and Alisa Theodora Van Dijk*). Pursuant to an order pronounced by Judge MacDonald on August 27, 2019, Ms. van Dijk-DeVos was appointed a guardian of David under s. 51(1)(a) of the Family Law Act, S.B.C. 2011, c. 25 [FLA] with all parental responsibilities under s. 41 of the FLA. An order was granted permitting David to attend school in Abbotsford for the 2019/2020 school year.
- [12] On October 29, 2019, the petitioner filed a response in the Provincial Court proceeding seeking to have the orders made by Judge MacDonald vacated.
- [13] This petition was commenced on November 1, 2019. In it, the petitioner seeks the following relief:
1. a declaration that the child has been wrongfully removed and/or retained in this jurisdiction;
 2. an order that the child be returned to the Netherlands forthwith;
 3. in the alternative, an order that the child be delivered to the petitioner or her agents for return to the Netherlands;
 4. an order that the respondent shall do all things and deliver all such documents as may be required to facilitate the return of the child to the Netherlands;
 5. an order that the respondent pay to the petitioner her costs of this proceeding, including travel expenses and costs of locating and returning the child; and
 6. such other relief that this court may deem to be just.

Legal Framework

- [14] Pursuant to s. 80(4) of the FLA, the provisions of the Hague Convention have the force of law in British Columbia. Section 80(6) stipulates that the Hague Convention applies to any child who was habitually resident in a contracting state immediately before a breach of custody or access rights.
- [15] It is common ground that David was habitually resident in the Netherlands, and that the Netherlands is a contracting state. As such, the Hague Convention has application in these proceedings.
- [16] Under Article 3 of the Hague Convention, the retention of a child is considered wrongful where 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 and at the time of retention those rights were actually exercised. There is no dispute that such is the case here.
- [17] The parties agree that pursuant to Article 4 of the Hague Convention, the convention shall cease to apply when David turns 16 in a few weeks.
- [18] Article 12 of the Hague Convention requires the judicial authority hearing proceedings under the Hague Convention to order the return of the child forthwith where the child has been wrongfully retained and the application has been commenced within one year of the retention.
- [19] However, Article 13 of the Hague Convention provides certain exceptions to Article 12, and grants discretion to the judicial authority to not order the return of the child where "it finds that the child objects to being returned and has obtained an age and degree of maturity at which it is appropriate to take account of its views". It is under this provision that the respondent opposes the return of David.
- [20] The parties agree that the leading authority for interpretation of Articles 12 and 13 of the Hague Convention is *Office of the Children's Lawyer v. Balev*, 2018 SCC 16 [Balev].
- [21] In *Balev* at para. 77, the Court held that the application judge's discretion to refuse to return the child to the country of habitual residence arises only if the party opposing return establishes the following:
- a) the child has reached an appropriate age and degree of maturity at which his or her views can be taken into account; and
 - b) the child objects to his or her return.
- [22] In determining whether these elements are established, the application judge should use a fact-based, common sense approach: *Balev* at para. 76.

- [23] If the elements of (1) age and maturity, and (2) objection are established, the application judge has the discretion to decide whether the child should be returned, having regard to the "nature and strength of the child's objections, the extent to which they are 'authentically her own' or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations which are relevant to her welfare, as well as the general Convention considerations": Balev at para. 81.
- [24] Determining sufficient age and maturity in most cases is simply a matter of inference from the child's demeanour, testimony, and circumstances: Balev at para. 79.
- [25] At a certain age, the need for expert evidence of a child's maturity diminishes or is eliminated. In *Thompson v. Thompson*, 2017 ABCA 299 at paras. 17, the Court found that, absent evidence to the contrary, it is reasonable to assume a 14 year old child is sufficiently mature to express a view on their return, even if their view is not determinative.

Evidence

- [26] This hearing proceeded by way of affidavit evidence. Affidavits were received from the petitioner, the respondent, the child, and the child's maternal uncle.
- [27] Diederik van Dijk is the petitioner's brother. He resides in the Netherlands, and supports David remaining in British Columbia. Exhibited to Mr. van Dijk's affidavit is a letter from him setting out concerns about David's declining health, declining grades, and unhappiness with living in the Netherlands. The petitioner did not object to the admissibility of the affidavit and attached letter. However, I have disregarded the portions of Mr. van Dijk's letter which contain hearsay, argument, and opinion.
- [28] I was also provided an affidavit from David objecting to his return to the Netherlands. David cites various reasons for wanting to remain in British Columbia. He refers to a poor relationship with his mother, missing his family and friends in Abbotsford, and his comfort with Canadian life.
- [29] In his affidavit, David describes a happy life in British Columbia for the first 12 years that he lived here. He says he was a straight-A student, had many friends, and was active in sports and music. After moving to the Netherlands, he says that he had difficulty making friends, and he struggled with school. He lost motivation. Though he managed to pass his classes for the first two years, David failed his last year of classes in the Netherlands. David says that his health also suffered after his move, and that he was frequently sick. Although he was treated by mental health professionals, this was of little benefit. His relationship with his mother also deteriorated. He asked to return to Canada, but the petitioner refused. On his most recent visit to Canada, David told his grandmother that he was refusing to return to the Netherlands. He wrote a letter to his mother explaining the reasons why he did not want to return. A copy of the letter as well as notes of his feelings and thoughts were exhibited to his affidavit.

- [30] There was no "views of the child" report provided, and David did not testify in the proceedings. I therefore determined that an interview of David was necessary in order for me to ascertain his true wishes, the nature and strength of his objections, and whether his objections were authentically his own or the product of the influence of his grandparents or any related parties.
- [31] By consent of the parties, the interview was conducted in camera. None of the parties or their counsel were present during my interview with David. The audio recording of the interview is subject to a sealing order.
- [32] David presented as a mature young man who was able to clearly and rationally articulate his views. It was evident that David's request to stay in British Columbia was an expression of his own wishes. David appeared quite distraught at having to return to the Netherlands, and cited many of the reasons noted in his affidavit. David exhibited a sound understanding of the implications of moving to British Columbia. He wished to convey to his mother that his refusal to return to the Netherlands was not made out of malice, but out of a genuine concern for his own welfare and a desire to continue living with his grandparents and aunt, with whom he has strong emotional bonds.

Analysis

- [33] David is only a few weeks shy of his 16th birthday, and as noted, the Hague Convention only applies to children under the age of 16. I find that David's age raises a presumption of maturity: Thompson at para. 17. Consistent with that is David's own presentation. David presents as a mature child who is fully cognizant of the implications of the decision to move to British Columbia.
- [34] I am thus of the view that David has reached an appropriate age and maturity such that his views should be taken into account.
- [35] There is no dispute that David objects to returning to the Netherlands. The objection is strong, such that David has expressed a refusal to return to the Netherlands even in the face of a court order. I am satisfied that David's objection to returning to the Netherlands is his own, and that he has not been influenced by the respondent or any other party in making his objection. This objection is consistent with the views he has expressed to his uncle, grandmother and his mother.
- [36] David's strong objection to returning to the Netherlands is also consistent with other relevant considerations regarding David's welfare. David's grades and health suffered while he was living in the Netherlands. He is happier since returning to British Columbia, and though he misses his friends in the Netherlands, he has settled well into school life in Abbotsford. He is showing physical and emotional improvement and feels loved and supported.

[37] After having regard to David's age and maturity, his objection to returning to the Netherlands, and his overall welfare, I find that it is appropriate to exercise my discretion to not order that David be returned to the petitioner in the Netherlands.

Orders Made

[38] The first order sought in the Petition is granted, such that I declare that David Alexander Omid van Dijk has been wrongfully retained in this jurisdiction.

[39] The relief sought at paragraphs 2 to 4 of the Petition relating to the return of David Alexander Omid van Dijk to the Kingdom of the Netherlands, is dismissed.

[40] As the result was split, the parties agree that each party should bear their own costs of this proceeding.

"Shergill, J."

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