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CV 05637

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the
International Child Abduction Act;

BETWEEN:

ROBERT B. MORRIS III

Applicant

- and -

STEPHANIE L. POOLE

Respondent

Application for an order for return of a child pursuant to the *International Child Abduction Act*, R.S.N.W.T. 1988, c. I-5, granted.

Heard at Yellowknife on March 17th and April 4th 1995.

Judgment filed: May 1st 1995.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT

Counsel for the Applicant: David K. Baker, Esq.

Counsel for the Respondent: Ms. Sheila M. MacPherson

Counsel for the Attorney General of the Northwest Territories: Ms. Cayley J. Thomas

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REASONS FOR JUDGMENT

The father of a four-year-old child born in the State of California, one of the United States of America, requests an order that the child be forthwith returned to him there from the *de facto* custody of the child's mother at Lutselk'e on the south shore of Great Slave Lake in the Northwest Territories, pursuant to the *International Child Abduction Act*, R.S.N.W.T. 1988, c. I-5.

2 The mother opposes this request.

I. The Issues

3 The issues for determination, on the materials before the Court, are as follows:

1. Was the child wrongfully removed from California, or is it being wrongfully retained in the Northwest Territories, in violation of the *International Child Abduction Act*?

2. If the answer to either alternative in this question is "yes", has the mother established that the father was not actually exercising his custody rights in relation to the child at the time of its removal from California or retention in the Northwest Territories?

3. Alternatively, if the answer to either alternative in the first question is "yes", has the mother established that the father had consented to or subsequently acquiesced in the removal or retention?

4. In the event that either (or both) of the second and third questions is (or are) answered "yes", should this Court in its judicial discretion decline to order the child's return as requested by the father?

4 No issue has been raised as to the status of Canada (or the Northwest Territories) or of the United States of America (or the State of California) as a Contracting State for the purposes of the Act. The parties are evidently content to accept that the Act applies in the circumstances of the case. Counsel for the Attorney General of the Northwest Territories has been in constant attendance throughout the hearings before this Court, with a watching brief, and has not sought to intervene.

II. The Facts

5 The child was born to the parties during the period of their cohabitation "as man and wife" in California between September 1990 and April 1992. The birth took place at San Bernardino in that State on July 15th 1991.

Following the separation of the parties in April 1992, the child remained with the mother in California, on a day-to-day basis, subject only to periods when the child was in the care of the child's maternal (adoptive) grandmother Victoria Lynn Jones at Highland, California, or that of the father or his parents at Redlands, California. After the separation, mother and child lived continuously in the maternal grandmother's home save for occasional weekends or longer when the child was with the father or his parents (but at all times in California).

7 Adopted shortly after the age of 3 years by the maternal grandmother and her then husband, the mother describes herself as a Dene woman born in 1971 at or near Lutselk'e in the Northwest Territories. She deposes that, until recently , she had experienced no exposure to the traditional culture of the Dene or to the extended family of her natural parents at Lutselk'e. In April 1994 she paid a visit of several weeks duration to Lutselk'e, leaving the child with the father and his family in California. And, when she returned to Lutselk'e in July 1994 with the child, it was apparently with the father's consent (given on his understanding then that they were going to spend only the summer there and then return to California).

8 An order had by then been made, on the father's application, by the Superior and Municipal Court of California, County of San Bernardino, on July 21st 1993, in which "joint physical and legal custody" of the child was granted to both parties, on consent, "to be shared equally" between them. The order specified that the mother was to have "physical custody from 6.00 p.m. Thursday to 6.00 p.m. Sunday" and that the father was to have such custody in the remainder of the week. It is the father's evidence

that he made application to that court on this occasion because he was experiencing repeated difficulties and consequent frustration in obtaining any access to the child from the mother. And the affidavit material which he has filed is indicative of his continued difficulties in that respect even after this order was made.

9 It is deposed by the mother that, while the father initially shared custody with her as ordered, this gradually changed so that over time the father came to exercise custody over the child, in the sense of direct care and control, only every second weekend, more or less. Furthermore, she deposes that she herself frequently asked him to let her have the child even on "his" weekends, so that she could take it with her to spiritual gatherings held then. Her evidence is to the effect that she and the father had come to a tacit agreement by July 1994 that they would make specific temporary mutual arrangements from time to time regarding which of them would exercise custody, care and control of the child for an agreed period without regard for the actual specifics of the California court order.

10 For the father's part, his affidavit sworn on February 7th 1995 states that he and the mother were exercising joint physical and legal custody of the child pursuant to the California court order until immediately before the mother departed for Canada with the child in July 1994. At the same time, in his affidavit sworn on March 15th 1995, he deposes that from the time of their separation in April 1992 he and the mother exercised shared custody of the child although, by the Spring of 1993, the mother began regularly to breach their agreement as to such shared custody; and he exhibits a letter which he says he sent to the mother, dated May 14th 1993, in support of this fact. He further

deposes that the continuation of that situation, notwithstanding his letter, led to the California court order made on July 21st 1993. Further court documentation exhibited to the father's affidavit of March 15th 1995 lends support to his complaint that the mother refused to co-operate by permitting him to fully share the custody of the child. It is the father's evidence that he at no time agreed to any departures from the requirements of the California court order and did not willingly surrender his times with the child under that order.

11 On the affidavit material before the Court it is therefore apparent that the parties disagree quite strongly as to the general factual situation between them in relation to their joint custody of the child under the California court order of July 21st 1993, and otherwise, in the period up to July 1994.

12 There is a particularly sharp disagreement as to whether the father actually exercised his custodial rights and responsibilities in respect of the child in the final weeks prior to the mother's departure from California with the child. According to the mother, the child may have seen her father on at most two weekends in May 1994 and only on Father's Day in June that year. On the other hand, the child's paternal grandfather, Dr. Robert B. Morris II of Redlands, California, deposes that his son (the father in this application) had the child with him every weekend during the year or so before July 1994, even though the mother made it difficult for the father to keep to that pattern of custody. Dr. Morris adds that even when the father was away in San Francisco (which it appears he was almost all of June 1994) the child spent considerable time with the father's family at Redlands. Moreover, the father himself deposes in his supplementary affidavit sworn

on March 25th 1995 that he in fact exercised his custody rights on every weekend in May 1994. His evidence is that he only went to San Francisco to look for work in June 1994.

13 Although the mother has deposed in her affidavit sworn on March 14th 1995 that she had arranged for a three-week visit to Lutselk'e in April 1994, she insisted under cross-examination that she in fact only spent two weeks there on that visit. Both Dr. Morris and the maternal grandmother depose, on the other hand, that the child was with the father for three full weeks in April 1994. The mother may have spent as much as a week travelling away from Lutselk'e and from her California residence. If so, that would explain the missing week and reconcile these otherwise conflicting versions of her visit to Lutselk'e in April 1994.

14 A major point in contention is as to what the parties agreed, or did not agree, in relation to the mother's removal to Lutselk'e in July 1994 and her decision to remain there since.

15 According to the maternal grandmother a conversation took place between the parties on the weekend before the mother left for Canada. In that conversation the grandmother deposes to having heard the mother tell the father that she was considering a visit with her natural parents and family in the Northwest Territories and wished to take the child with her. It is the grandmother's evidence that the father asked the mother directly how long she would be away and that the mother then informed him "clearly and unequivocally' that she would be returning home to California with the child by the end

of the summer "if in fact she went at all".

16 The grandmother deposes in addition that the mother left California abruptly on July 3rd 1994 without giving the father any notice of her departure. And her evidence is that the mother did not tell the father where she was or how she could be contacted; that information was given to the father by the grandmother, she deposes, when it became clear to her that the mother would not be returning from Canada.

17 The father's evidence is that he never consented to or acquiesced in the child's removal from the United States, or as to her retention in Canada. At the same time, he says that when the mother first mentioned to him that she might be taking the child to Canada, he specifically asked her how long she planned to be away and that she replied to the effect that she would return to California at the end of the summer at the latest, if she went at all. It was not until they did not return by mid-September that the father complained about the matter to police in California, alleging that the child had been abducted by the mother. The father deposes in his supplementary affidavit of March 25th 1995 that he then also caused an application to be made through the U.S. State Department at Washington, D.C. pursuant to the Hague Convention on International Child Abduction. However, a copy of that application (which is exhibited to the affidavit) shows that it was in fact the paternal grandfather who made that application. Police documentation, likewise exhibited, shows that the grandfather had contact with them but it is not clear whether this was done on his own initiative only or on behalf (and at the instance) of his son (the father in this application).

18 In the course of her cross-examination, the mother agreed that she could have discussed with the father the proposed trip to Canada with the child although she denied any memory of such a discussion. Asked if it was her impression that the father was in agreement about her taking the child out of the United States permanently, she answered that he was aware that she would probably do that. She then qualified this answer by adding "Or maybe", saying "Yeah, I was not sure myself". It was nevertheless her testimony, moments later, that she in fact told the father that she "would be leaving California for good". And she then added that they thereupon discussed how he would see the child "and stuff like that", in reference to which she testified that she "told him we would just have to work it out like we always do, but then he never contacted us, talked to us or wrote me letters or anything". She herself, she admitted, did not make any effort to contact him.

19 Asked by counsel for the father, in the course of her cross-examination, if it was not fair to say that "because you returned to California after your trip in April" the father "would have believed that when you left again in late June 1994 you would also be returning to the United States, is that not a fair assessment?", the mother answered, "He probably wished that I would". This, it seems to me, reveals the mother's evident awareness that any permanent removal of the child from California was contrary to the father's wishes. And it goes far to negate any inference of consent or acquiescence on his part to any such removal of the child.

20 This testimony given under cross-examination opens to question the mother's affidavit sworn on March 14th 1995, in which she deposed that the father was

in full agreement with her moving to Lutselk'e and, furthermore, that she would at a minimum spend the summer there and probably stay on permanently. While it is not for me to weigh affidavit evidence for credibility in the normal course of things, the clear contradiction on this point between the mother's affidavit and her testimony under cross-examination leads me to attribute no weight to this portion of the mother's affidavit, particularly since that portion conflicts also with the various depositions filed on behalf of the father.

III. The Legislation

21 The *International Child Abduction Act* is, as the name suggests, a statute intended to govern in situations where a child has been wrongfully removed from one sovereign state to another. And the states subject to the regime adopted by the Act are to reciprocate in giving effect to that regime, as described in the Convention subscribed to by them as set forth in the Schedule to the Act.

22 Section 7 of the Act enacts as follows;

> 7. An application may be made to a court in pursuance of a right or an obligation under the Convention.

23 The present application is evidently made pursuant to this section.

24 The preamble to the Convention is in the words following:

> The States signatory to the present Convention,

Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,

Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions:

25

There then follows:

CHAPTER I - SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are:

(a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

(b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, 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 removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in 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.

26

In addition, the language used in the foregoing provisions of the Convention is defined as follows:

Article 5

For the purposes of this convention:

(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;

(b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

7

The requirement of expeditious action in reference to applications such as this is made explicit in Articles 11 and 12 of the Convention, which are contained in Chapter III - RETURN OF CHILDREN and read as follows:

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

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.

28 By way of exception, notwithstanding Article 12, the Court is required also to notice Article 13:

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.

29

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.

Articles 14, 15 and 16 deserve to be also noticed. They state respectively:

Article 14

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice.

30 Chapter IV of the Convention deals with rights of access and provides for an application to be made for arrangements to organize or secure the effective exercise

of rights of access. I shall not quote this portion of the Convention since it is apparent that the father does not seek mere rights of access in the present application.

31 The present application has been brought pursuant to Article 29 of the Convention, which provides:

> *Article 29*
>
> This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention.

32 Furthermore, Article 30 would appear to have been complied with. It states:

> *Article 30*
>
> Any application submitted to the Central Authorities or directly to the judicial or administrative authorities of a Contracting State in accordance with the terms of this Convention, together with documents and any other information appended thereto or provided by a Central Authority, shall be admissible in the courts or administrative authorities of the Contracting States.

IV. Discussion

1.(a) Was the child wrongfully removed from California?

33 My answer to this question is to the effect that this has not been made out on the evidence.

34 The father's supplementary affidavit sworn on March 25th 1995 is at best

equivocal on the point. He deposes that he "never consented or acquiesced in" the child's removal from the United States. At the same time, he acknowledges that the mother had mentioned that she "might be taking" the child to Canada, whereupon he had "asked her how long she planned to be away", to which she had replied that she would return to California with the child "at the end of the summer at the latest, if she went at all". The grandfather, Dr. Morris, deposes that he was "surprised and upset to learn" that the mother had left for Canada over the long July weekend when he had expected the child to be with him; but that it was his understanding then, however, that the child "would be gone only for a short holiday and would be back by the end of the summer at the latest".

35 While the mother appears to have acted abruptly and without clearly informing either the father or his family (not to mention the child's grandmother) that she was in fact taking the child with her to Canada, it is apparent that she led them to believe that she and the child would only be away for the summer, after which they would return to California. On learning of the mother's sudden departure with the child, and relying upon her ostensible intention to return with the child after a short visit (of one or two months at most) to her natural parents and relatives in Canada, the father appears to have accepted the situation, but only on that basis.

36 Given that the mother and father were, at the time, joint custodians of the child under the California court order of July 21st 1993, it is apparent that the father on this occasion took no immediate action to assert his full rights pursuant to that order. As seems to have occurred on earlier occasions, the mother's unilateral action in denying him

those rights gave rise to no prompt attempt on his part to have the order enforced according to its express terms. While he does not appear to have given a prior or fully informed consent to the child's removal from California, it is also apparent that he knew, by then, of the mother's visit to Canada in April 1994 and knew also that she was then contemplating her return there with the child in the summer of that year.

37 In the circumstances, it remains unclear whether the mother removed the child only intending to be away for the summer, as she had led the father and his family to believe, or whether she intended a permanent removal. Most likely, as I read the material, she had both possibilities in mind but chose, at the time, to reveal only that possibility which would receive the least opposition from the child's father and his family. She had probably not reached a fully settled decision on the length of her stay in Canada, in any event. And, even if it truly was her intention initially to visit her natural kin in Canada only for the summer, it is not in any dispute that she took no step to later inform the father that she had changed her mind and that she then intended to stay on, keeping the child with her.

38 As far as the child's removal from California in late June or early July 1994 is concerned, I am therefore not satisfied, on a balance of the probabilities, that this was done wrongfully in law, on the evidence before me.

1.(b) Has the child been wrongfully retained in the Northwest Territories?

39 My answer to this question is "Yes".

The mother's continued retention of the child at Lutselk'e beyond the period of "the summer" of 1994, which is the most that the evidence shows that the father either consented to or acquiesced in, was clearly in breach of the California court order of July 21st 1994 since the father had not waived his rights as joint custodian of the child except for that limited period, and then only as to his physical access or exercise of day-to-day care and control in respect of the child.

2.(a) Has the mother established that the father was not actually exercising his custody rights in relation to the child at the time of its removal from California?

41 My answer to this question is "No".

42 The fact that the father saw the child only on Father's Day in June 1994, for which he travelled to Redlands from San Francisco (a day's drive by road), is clearly due to the exceptional circumstances in which he found himself at San Francisco looking for employment. The evidence is that the mother had considered visiting him there with the child, en route to Canada; but that she found the cost prohibitive and so did not do so. Considering the informal arrangements which had taken place between the parties with respect to the father's continuing access to the child after the court order of July 21st 1993, there is nothing in the evidence to support the mother's contentions under this head. If anything, the evidence indicates that the father frequently experienced difficulties in exercising that access due to the conduct of the mother in that connection.

2.(b) Has the mother established that the father was not actually exercising his custody rights in relation to the child at the time of its retention in the Northwest Territories?

43 If the period of wrongful retention of the child by the mother in the Northwest Territories is taken to have commenced only in September 1994, when she failed to return the child to California, it is nevertheless apparent that she thus made it virtually impossible for the father to engage in any further meaningful exercise of his custody rights in relation to the child.

44 The father's actions at that point, whether taken directly or through the agency of Dr. Morris, reflect his attempts then to make immediately possible the actual continued exercise of those custody rights.

45 Counsel for the Attorney General of the Northwest Territories, the Central Authority here under the Act, has explained the somewhat lengthy delay before the present application was brought on behalf of the father. The father cannot be held responsible, in my judgment, for that. And he has evidently endeavoured at all times to pursue the application expeditiously.

I conclude therefore that the answer to this question must also be "No".

3. Alternatively, has the mother established that the father had consented to or subsequently acquiesced in the removal or retention?

46 My answer to this question is "Yes" as to the removal for the summer of 1994, but "No" as to the retention from then on, as discussed above.

4. Should this Court in its judicial discretion decline to order the child's return as requested by the father?

Having answered Question 3 above "Yes" in part, I am obliged to consider the provisions of Article 13 of the Convention.

48 In particular, is there a grave risk that the return of the child to California would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation? My answer to this question is "No" regarding the likelihood of any harm resulting from the return itself. However, I have concerns as to the effect on the child if that return should take place in circumstances of psychological trauma for the child.

V. Conclusion

49 An order shall issue commanding the mother to return the child forthwith to California. Should she or the father anticipate any difficulty in giving effect to this order, leave is hereby granted to them, or either of them, to seek the directions of the Court.

M.M. de Weerdt
J.S.C.

Yellowknife, Northwest Territories
May 1st 1995

Counsel for the Applicant: David K. Baker, Esq.

Counsel for the Respondent: Ms. Sheila M. MacPherson

Counsel for the Attorney General of the Northwest Territories: Ms. Cayley J. Thomas

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