COURT OF APPEAL FOR ONTARIO

CITATION: Dieffenbacher v. Dieffenbacher IV, 2023 ONCA 189
DATE: 20230316
DOCKET: M54123 (COA-23-CV-0252)

Lauwers J.A. (Motion Judge)

BETWEEN

Alexandra D. Baril Dieffenbacher

Applicant (Appellant)

and

George W. Dieffenbacher IV

Respondent (Respondent)

Juliet Montes and Gloria Ichim, for the applicant

Katerina Svozilkova and Jennifer Cooper, for the respondent

Heard: March 15, 2023

ENDORSEMENT

A. OVERVIEW

[1] The application judge heard, virtually and by way of affidavit, an application brought by the respondent father under the *Convention on the Civil Aspects of International Child Abduction*, Can. T.S. 1983 No. 35 (the "*Hague Convention*") for an order directing the return of the parties' infant son to New York.

[2] The application judge allowed the father's application and issued the following order:

a. Pursuant to the Convention, the child shall be immediately returned to his place of habitual residence, New York, in the United States.

b. If the mother fails to return the child as required by this order, the Waterloo Regional Police, the Ontario Provincial Police, the Royal Canadian Mounted Police, and all other peace officers in Ontario where the child may be, shall, locate, apprehend and deliver the child to the father, at his request. In doing so, they may enter any place, including a dwelling place, if they have reasonable and probable grounds to believe the child is located there, and seize the child's passport, birth certificate and other identification or records pertaining to the child and deliver them to the father.

c. The following undertakings apply to the father:

    i. Vacate the family home at 7575 East Street, Newport, NY, USA and provide the keys to the mother, giving the mother temporary without prejudice exclusive possession of the home;

    ii. Ensure the mother is maintained on his medical insurance policy for as long as she qualifies for coverage under the policy;

    iii. Not be under the influence of alcohol or non-prescription drugs while in a caregiving role to the child.

[3] The mother has appealed this order and moves on an urgent basis for a stay of the order pending the disposition of the appeal. For the reasons that follow, I refuse the requested stay.

B. THE FACTUAL CONTEXT

[4] The parties are parents of a son born in March 2022 in New York State. The parties cohabited in New York from December 2020 until January 2023. In her affidavit, the mother states that she moved to New York on a trial basis with the understanding that the father would recover from drug and alcohol abuse. She contends this did not happen and that the father was abusive towards her and their child. The mother claims that in October 2022, the father consented to her moving back to Ontario with the child and stated he would not fight her for custody. The mother left New York and returned to Kitchener, Ontario with the child on January 6, 2023. The mother is currently pregnant with the parties' second child.

[5] The father commenced divorce and custody proceedings in New York on or about January 13, 2023. The mother issued a simultaneous custody application in Ontario on or about January 15, 2023. She also brought a motion to dismiss the father's petition in the Family Court of the State of New York County of Herkimer on January 18, 2023. On January 20, 2023, the New York court gave the father sole custody and primary physical residence of the child, and the mother supervised contact with the child.

[6] On or about January 23, 2023, the father commenced an application in Ontario under the *Hague Convention* for the return of the then ten-month old child. The mother filed an *ex parte* motion in the Ontario Superior Court of Justice on

January 26, 2023 seeking urgent relief in response to the father's application. The mother's *ex parte* motion was heard on February 2, 2023. The motion judge ordered the motion materials to be served on the father, set timelines for the father to serve responding materials, and adjourned the matter to February 6, 2023.

[7] At the *Hague Convention* hearing on February 6, 2023, the application judge found that the child's habitual residence was in New York and dismissed the mother's assertion that her residence in New York was temporary. She went on to find that the father was exercising custody rights at the time of removal. She further found that the father did not consent to the child's removal, stating that: "If the father was consenting to the mother and child relocating, then the mother would not have had to leave in the middle of the night without notifying the father". The application judge found no evidence to suggest that the father had harmed the child. The father admitted to drinking, and to having used cocaine and marijuana on occasion. He, however, denied any addiction issues or that he has cared for the child while impaired. The application judge considered all the evidence and found that while the evidence supported a finding that the father often drinks excessively, she could not determine from the evidence that he has an addiction or that his alcohol use puts the child or the mother at risk.

[8] As for the allegations of domestic violence, which the mother emphasized in her argument before me, the application judge did not find that the mother's evidence met the high threshold required to establish "a grave risk of physical or

psychological harm or intolerable situation": *Ellis v. Wentzell-Ellis*, 2010 ONCA 347, 102 O.R. (3d) 298, at para. 37.

[9] The application judge's order sets out undertakings for the father, including vacating the parties' family home in New York, and abstaining from drugs and alcohol while in a caregiving role. I make two points about the order. First, the undertakings in the order were advanced by the father, not by the mother. The father also submits, and the mother does not contest, that he was amenable to other undertakings, but the mother proposed none. Second, the mother's stay argument focused on domestic abuse and issues of alcohol and drug abuse, which makes the mother's failure to propose other undertakings perplexing.

C. THE GOVERNING PRINCIPLES

[10] The governing principles are well known. I adopt the words of Hourigan J.A. in *Zafar v. Saiyid*, 2017 ONCA 919, at paras. 17-18:

> The test for staying an order pending appeal under r. 63.02 of the *Rules of Civil Procedure*, requires the court to consider the following factors: (1) a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried; (2) it must be determined whether the applicant would suffer irreparable harm if the application were refused; and (3) an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits: *Circuit World Corp. v. Lesperance (1997)*, 33 O.R. (3d) 674 (C.A. [In Chambers]), at para. 8; *Warren Woods Land Corp. v. 1636891 Ontario Inc.*, 2012 ONCA 12 [In Chambers], at para. 1.

> These three factors are not watertight compartments; the strength of one may compensate for the weakness of another. The overarching consideration is whether the interests of justice call for a stay: *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1986), 21 C.P.C. (2d) 252 (Ont. C.A.); *Longley v. Canada (Attorney General)*, 2007 ONCA 149, 223 O.A.C. 102 [In Chambers], at paras. 14-15.

[11] This motion must also be considered through the lens of the *Hague Convention*. As Benotto J.A. stated in *J.P.B. v. C.B.*, 2016 ONCA 996, at para. 33:

> Applications pursuant to the Hague Convention are to be dealt with expeditiously. Continuing delays frustrate the purpose of the legislation, favour the non-complying parent, and postpone the determination of the children's best interests in the country where they are habitually resident.

[12] I agree with Hourigan J.A.'s comment in *Zafar*, at para. 26:

> I adopt the reasons of Roberts C.J. of the United States Supreme Court in *Chafin v. Chafin* (2012), 133 S.Ct. 1017, at p. 1027, as quoted in *Balev* in para. 35:
>
> > In cases in which a stay would not be granted but for the prospect of mootness, a child would lose precious months when she could have been readjusting to life in her country of habitual residence, even though the appeal has little chance of success. Such routine stays due to mootness would be likely but would conflict with the Convention's mandate of prompt return to a child's country of habitual residence. [Emphasis added.]

[13] To the same effect see *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398, at para. 33, where the Supreme Court states: "A clear purpose of multilateral treaties is to harmonize parties' domestic laws around

agreed-upon rules, practices, and principles. The *Hague Convention* was intended to establish procedures common to all the contracting states that would ensure the prompt return of children", as the *Hague Convention*'s preamble stipulates.

D. THE GOVERNING PRINCIPLES APPLIED

[14] The appellant mother's factum raises the following eight grounds of appeal:

i. Did the application judge err by misapplying the hybrid model from *Balev*?

ii. Did the application judge err in failing to consider the totality of the relevant factors as set out in *Balev*?

iii. Did the application judge err in determining the child's habitual residence?

iv. Did the application judge err in failing to admit the appellant's evidence?

v. Did the application judge err in failing to strike the respondent's reply affidavits and/or paragraphs of the reply?

vi. Did the application judge err in failing to make a finding of credibility of the parties and/or witnesses?

vii. Did the application judge err in failing to consider the mother's mental health?

viii. Did the application judge err in failing to assert jurisdiction in the mother's family law application which was not stayed prior to the *Hague Convention* hearing?

[15] The mother's counsel concedes that all these issues were squarely before the application judge. The application judge's reasons for decision also addressed them and drew reasonable conclusions based on the evidence before her.

[16] The first element of the test for a stay, set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, is whether there is a serious question to be tried. This is acknowledged to be a low threshold. Mother's counsel points to no legal errors made by the application judge. Instead, she disagrees with the application judge's factual findings, to which this court must defer absent palpable and overriding errors. No such errors were pointed out to me in argument. However, for the purpose of the requested stay, I will give the mother the benefit of meeting the low threshold of a non-frivolous appeal.

[17] The mother does not, however, meet her onus to demonstrate irreparable harm. As Benotto J.A noted in *J.P.B. v. C.B.*, at para. 33, in the context of an application under the *Hague Convention*: "There is no irreparable harm if the children are returned. There is greater harm being done to the children by delaying the determination of custody."

[18] That issue is to be determined by the New York court, which has already, and quite properly, taken jurisdiction. The status quo on which the mother relies does not set the child's habitual residence. She clearly absconded with the child. The court should not sanction this without good reason. The mother has not provided any in this case.

[19] As for the third element, the balance of convenience, I do not find that it favours the mother. The custody and access decisions (decision-making and parenting time determinations) will be made in accordance with the child's best interests in either New York or Ontario. The father submits that the mother has not participated in the most recent New York proceeding. The mother's continued insistence on avoiding lawful determinations is not to her or the child's benefit. The New York court will consider all the mother's evidence. In the meantime, the concerns raised by the mother are addressed in part by the father's undertakings. Further, the New York court and authorities are presumed able to address the mother's concerns.

[20] I dismiss the mother's application for a stay of the order under appeal.

[21] The application judge's order for the child's return to New York and for police enforcement of this order remains in full force and effect.

"P. Lauwers J.A."