

COURT OF APPEAL FOR ONTARIO

CITATION: McWhirter v. Lorza, 2023 ONCA 301

DATE: 20230428

DOCKET: COA-22-CV-0190

Pepall, Trotter and Nordheimer JJ.A.

BETWEEN

Richard McWhirter

Applicant (Respondent)

and

Arianna Lorza

Respondent (Appellant)

Stephen P. Kirby, for the respondent/moving party

Arianna Lorza, acting in person

Heard: in writing

On appeal from the order of Justice Mohan Sharma of the Superior Court of Justice, dated August 31, 2022.

REASONS FOR DECISION

[1] Arianna Lorza has filed an appeal from the order of the motion judge that determined that the parties' son should be enrolled at the Gow School near Buffalo, USA for the 2022/23 school year, provided that USA Border officials do not reject his entry into the USA to attend school. Counsel for the respondent sought a dismissal of the appeal pursuant to r. 2.1.01(1) of the *Rules of Civil Procedure*,

R.R.O. 1990, Reg. 194, by way of a letter to the Registrar of the Court of Appeal for Ontario dated March 20, 2023.

[2] The basis for the respondent's request arises out of the fact that, prior to the order of the motion judge regarding the Gow School, the motion judge ordered Ms. Lorza to return the parties' two children to Ontario. Ms. Lorza was then in Florida, USA and sought permission to register the children in a school in Florida, which was denied. On January 1, 2023, Ms. Lorza took the children to Colombia. Ms. Lorza told the respondent by text message that the children would be returning to Ontario on January 10, 2023, but that has not occurred. Indeed, Ms. Lorza subsequently advised the respondent that she had retained counsel in Colombia and was asking the courts of that country for a further custody and access order.

[3] The respondent then began proceedings under the *Hague Convention on the Civil Aspects of International Child Abduction*, Can. T.S. 1983 No. 35 and s. 40 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12. Those proceedings led to an order of Faïeta J. declaring that the children had been wrongfully retained in Colombia by Ms. Lorza and ordering their return to Toronto, Ontario forthwith. That has not happened.

[4] The moving party contends that the conduct of Ms. Lorza has rendered her appeal of the order regarding the Gow School for their son an abuse of process. We do not agree. Ms. Lorza was entitled to appeal the decision of the motion judge

regarding the school that her son was to attend. She has filed an appeal book and compendium and a factum with respect to that appeal. Ms. Lorza has not done anything with respect to the appeal itself that would constitute an abuse of process in this court.

[5] We do not countenance the conduct of Ms. Lorza as it relates to the matters in the Superior Court of Justice, but those are matters to be dealt with in that court. If Ms. Lorza should happen to require an indulgence from this court with respect to her appeal, then her conduct might become a relevant factor in the exercise of this court's discretion: *Ontario (Attorney General) v. Paul Magder Furs Ltd.* (1992), 10 O.R. (3d) 46 (C.A.), at pp. 53-56. Similarly, if Ms. Lorza were to be found in contempt of a court order, then an abuse of process argument could be raised as it relates to an appeal: *Ontario (Attorney General) v. Paul Magder Furs Ltd.* (1991), 6 O.R. (3d) 188 (C.A.), at p. 193, leave to appeal refused, [1992] S.C.C.A. No. 92.

[6] We are not dealing with either of those situations. It is not the purpose of r. 2.1 to deal with the type of issue for which the moving party is attempting to use it here.

[7] As already noted, the appellant has perfected her appeal. This appeal was listed for hearing on April 28, 2023. Unfortunately, after the r. 2.1 motion was filed, the court vacated this hearing date. The appeal should be re-listed for hearing at

the earliest opportunity. Any issues concerning the appellant's compliance with the order of Faieta J. may be addressed at that time.

[8] The request for dismissal of the appeal under r. 2.1 is dismissed.

"S.E. Pepall J.A."

"Gary Trotter J.A."

"I.V.B. Nordheimer J.A."