Case Name:
Cornfeld v. Cornfeld

Between
Cornfeld, and
Cornfeld

[2001] O.J. No. 5771

Court File No. 01-FA-10575

Ontario Superior Court of Justice

Ferrier J.

Heard: November 29, 2001.
Judgment: November 30, 2001.

(22 paras.)

Family law -- Custody and access -- Child abduction legislation -- Return order.

Application by the father under the Hague Convention for an order returning the parties' children to him in Israel. The children were being wrongfully retained in Ontario by the mother. The mother argued that there was a risk of harm to the children if they were returned to the father. The parties had lived there for 25 years and the children had lived there since their birth. The father argued that the children were accustomed to the conflict.

HELD: Application allowed. The parties and their children were always at risk of harm in Israel, but the parties did not see fit to remove the children from that environment before their separation. The mother had not demonstrated that there was a strong likelihood that harm would occur.

Statutes, Regulations and Rules Cited:

Hague Convention.

Counsel:

John T. Syrtash, for the applicant.
Andrew K. Dekany, for the respondent.

1 **FERRIER J.** (endorsement):-- The facts are fully developed in the affidavits filed and concisely summarized in the factums of the parties.

2 The respondent sought an adjournment of this motion and application but that request was denied. The reasons are as follows:

3 The applicant served a further motion record on November 28, 2001. In that motion record, the applicant challenged the validity of the respondent's experts on the subject of psychological harm to the children, by reason of the fact that the experts had not had contact with the children, in effect had not examined them and therefore the opinions were not sustainable. The applicant also filed further opinion evidence of an expert on Israeli law.

4 In reference to the first aspect, the respondent sought an adjournment to obtain a psychological assessment. The proposed assessor is available to start in the second week of December. He says he needs 60 hours. It is obvious that the assessment will take at least a few weeks (he does not say how soon it can be completed) and perhaps, in the court's experience as much as two to three months. If the assessment supports the respondent's position, no doubt the applicant may well want a further assessment.

5 Hague Convention applications ought to be dealt with on an expedited basis for obvious reasons. Adjournments for long periods should be avoided.

6 Also, I am not satisfied that even with an assessment, or two assessments, the court will be any better able to decide the application.

7 As to the request for further time to obtain legal opinion in response to that filed by the applicant, I note that the respondent has had since November 13, 2001 to obtain a legal opinion. The respondent knew or ought to have known that opinion evidence was required, even before the affidavit of the applicant of November 28, 2001. Further, counsel for the respondent does not appear to have even contacted an expert for such purposes. Counsel did not suggest in argument that the opinion evidence filed by the applicant was wrong.

8 For the above reasons, the adjournment was denied.

9 As to the merits of the application, the evidence is clear that the children are being wrongfully retained in Ontario by the respondent and such retention constitutes a wrongful retention or removal within the meaning of article 3 of the Hague Convention.

10 This leaves the major issue, whether the respondent has satisfied the onus upon her of establishing, under article 13(b) that there is a "grave risk that her return would expose the children to physical or psychological harm, or otherwise place the children in an intolerable situation".

11 The respondent has filed her own affidavit, and evidence of others, concerning the situation in Israel. The evidence is dramatic and extensive testimony to the impact of terrorist attacks on daily life in Israel. These attacks continued even as this application was being argued. She and her former husband have lived in Israel since 1976 and the children have lived there all of their lives. There has been great turmoil and violence in Israel during that entire period, at times escalating substantially during specific conflicts, referred to in the material. This, says the applicant, is nothing new for

these children and this family. In earlier heightened conflict periods, the respondent did not see fit to remove the children from Israel.

12 The respondent took no steps in Israel to have the Israeli courts determine whether a move out of Israel was appropriate.

13 Her response to the argument that violence in Israel has been present for many years, is that the recent escalation of violence, over the past several months, brings grave risk to the children of a kind not experienced in Israel previously - and that this explains why she has acted now.

14 In my view, in measuring the risk to determine whether or not it is "grave", it is important to consider the environment to which a parent or the parents voluntarily exposed the children previously. In my view it is fair to conclude on the evidence that living in Israel at any time over the past 25 years had risks of harm associated with it. The parents did not seek to remove their children from that environment.

15 The Shorter Oxford Dictionary defines "risk" as:

> Risk - (noun) - Hazard, danger; exposure to mischance or peril.

The verb definition is:

> Risk - To hazard, endanger; to expose to the chance of injury or loss.

"Grave" is defined as:

> Heavy, important ... highly serious.

16 In the context of article 13(b), the words in the article can be rephrased to read: "highly serious danger that the child would suffer physical or psychological injury".

17 I note that the article is not absolute. It is not necessary, to invoke the clause, to establish that harm will in fact occur.

18 One must not overlook the objects 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.

19 Taking into account the words of the article and the Oxford definition as above noted, it is my view that in order to successfully invoke article 13(b) the respondent must establish on a balance of probabilities that there is a very strong likelihood that harm will occur.

20 I am not satisfied that the respondent has met that onus.

21 I also refer to the recent decision of an Argentine court, ordering the return of children to Israel. (Altheim v. Altheim). Other courts have also ordered the return of children to Israel. (See Freier v. Freier and Watkins v. Watkins - applicant's casebook).

22 Application granted with costs.

FERRIER J.

cp/s/qlhcc