Orangeville Registry No. 154/09
DATE: 2009·XI·05
CITATION: *Mwanri v. Mwanri*, 2009 ONCJ 520

ONTARIO COURT OF JUSTICE

B E T W E E N :

IRENE MWANRI,
Applicant,

— AND —

ERNEST MWANRI,
Respondent.

Before Justice Bruce E. Pugsley
Heard on 4 November 2009
Reasons for Judgment released on 5 November 2009

CUSTODY OF CHILD — Interim custody — Grounds — Best interests of child — Risk of harm — Risk of abduction — Assessment of risk factors — Tanzanian parents who were now Canadian citizens had difficult separation during which mother obstructed father's contact with children (now 9 and 13 years old), even briefly taking children to Tanzania — During that time, father had obtained *ex parte* custody order of Tanzanian court against mother — Once back in Canada, mother had obtained interim *ex parte* custody order that limited father to supervised access at local access centre — At mandatory review of mother's *ex parte* order, motions judge isolated critical issue as nature and extent of any risk that father might forcibly remove children from Canada and take them to Tanzania — Judge now had benefit of father's affidavit evidence and, although existence of father's foreign order posed risk that he might abscond with children back to Tanzania (which was not signatory to the Hague *Convention on Civil Aspects of International Child Abduction*), judge concluded that risk of abduction did not exist here because:

1. **parents and children were all citizens of Canada where father was well employed and which he had no intention of leaving to live elsewhere;**
2. **Tanzanian order focussed on father's desire to determine where children would go to school rather than custody *per se*;**
3. **these children were not toddlers and were quite capable of expressing their desire to remain in Canada to any Canadian official whom they might meet before any attempt by father to leave country with them;**
4. **even though affidavit evidence had not yet been tested by cross-examination, motions judge accepted father's evidence that he had no**

intent to abduct children and there was no evidence to suggest otherwise;

5. **mother had not challenged father's evidence that, during marriage, mother had regularly left children in father's sole care and had trusted him to care for them properly while she worked outside home;**
6. **mother's latest affidavit conceded that father have unsupervised access (albeit with conditions).**

Moreover, father had voluntarily surrendered children's travel documents and had taken every appropriate legal step to put his case before court properly — Even in Tanzania, he had turned to local court and not to self-help and motions judge accepted that he would abide by orders of Ontario court now.

CUSTODY OF CHILD — Interim custody — Variation of interim custody — Reluctance to vary interim order — Ten months ago, father had suddenly told children (now 9 and 13 years old) that they were to go immediately to boarding school in Tanzania while separated parents would remain in Ontario — Then they learned that mother would be coming to Tanzania with them but, once there, mother blocked their communication with father until he appeared in Tanzania trying to convince children to live with him whereupon mother quietly returned to Ontario with children where she obtained interim *ex parte* custody order that allowed father supervised access at local access centre — At mandatory review of mother's *ex parte* order, motions judge recognized that access centres, no matter how well designed, are not designed with teenagers in mind — Office of Children's Lawyer stepped in to represent children only minutes before mandatory review began and thus, children's lawyer had no chance to meet with her clients and could take no position on this motion yet — In view of sweeping changes in children's lives over past few months, motions judge wanted to avoid any drastic changes in *status quo* and refused to jump from time-limited supervised access to open access that father wanted without input of children's lawyer — Pending further review, motions judge lifted supervision but limited father's access to daytime each Saturday and 2½ hours each Wednesday evening.

STATUTES AND REGULATIONS CITED

Convention on Civil Aspects of International Child Abduction, [1983] Can. T.S. No. 35, 1343 U.N.T.S. 89, 99 U.S.T. 11, 19 I.L.M. 1501.

Jennifer J. Holder ..... counsel for the applicant mother
Abby Vimal ..... counsel for the respondent father
Evelyn D. Huber counsel for the Office of the Children's Lawyer, legal representative for the children

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[1] JUSTICE B.E. PUGSLEY:— This matter comes before the court to review an order made without notice to the respondent (father) on 10 September 2009 and for determination of a motion brought by the respondent for expanded access to the children of the parties. At the conclusion of submissions, I reserved my decision so that I could review the material in detail with those submissions in mind.

[2] The background of this matter is somewhat unusual. The parties were married in

1996 in the United Republic of Tanzania in East Africa. The respondent (father) immigrated to Canada in 1998, and in 1999 the applicant (mother) and their eldest child (then only three) immigrated to Canada to join him here. Later, their second child was born in Canada. They are all Canadian citizens (and hold joint citizenship in Tanzania). The parties are the parents of two children: Anold (male) (born on 16 April 1996, now 13) and Alice (female) (born on 12 December 2000, now nearly 9). The parties shortly made a very successful life in Canada. In 2008, the parties began to have difficulties in their relationship. Much of the respondent's first affidavit details his views of his spouse's infidelities. The link between these views and the best interests of the children is unclear and some of the affidavit is improper comment on the conduct of the applicant (mother). The respondent asserts that the applicant's male friend at the time represented a risk of sexual abuse to his children, although he took no apparent steps to report these views to anyone in authority.

[3] The respondent states in his affidavit that he then decided that, for the safety of the children (particularly his daughter), they should be sent alone to a boarding school in Tanzania while he and the applicant remained in Canada and worked out their differences. To his surprise, the applicant then decided to go to Tanzania with the children. They left in January of 2009. The respondent hoped that his family members in Tanzania would be able to monitor the well-being of the children on his behalf but he alleges that his extended family was stopped from doing so by the applicant. By August of 2009, the respondent decided to return to Tanzania himself to see how the children were doing. He states that, when she learned that he was coming to Tanzania, the applicant told him that she did not want to see him. When he arrived, she prevented proper contact with the children and, as he states, tried to turn them against him. He states that the children wanted to come with him to live but were prevented by their mother from doing so. The respondent decided to seek a court order and, as a precondition to court, the applicant was asked to contact social services. She did not do so and the respondent alleges that she then hid herself and the children from him. He obtained a court order for substituted service upon the applicant from a Tanzanian court and the applicant was served by a newspaper advertisement requiring her to be in court three days later. When she did not appear, the court granted him custody of the children. He relies in part on that order (translated in the material) in this proceeding. In fact, the applicant and the children had returned to Canada the day before the first court appearance.

[4] The applicant's initial affidavit does not set out a version of the facts all that different from the respondent's assertions. She states that the respondent's plan was to leave the children in school in Tanzania by themselves for a year and she could not let that happen so she went with them. When the respondent came to Tanzania in August of 2009, he wanted to take the children with him to the airport. She did not know where they were going and the children did not want to go. She did not see the social workers and when she saw that the respondent was going to get the police to make her give him the children, she fled from Tanzania to Kenya with them and then returned home to Canada. Once here, she sought a temporary order without notice to the respondent. On 10 September 2009, within a week of her return from Tanzania, the applicant obtained an order for partial relief from Justice Roselyn Zisman of this court. The relief granted simply restricted either party from removing the children from Dufferin County, ordered service and an early case conference.

At the motion review held here on 30 September 2009, Justice Douglas B. Maund of this court adjourned the matter to 7 October 2009 for an early case conference. That conference was held on 7 October and the matter then adjourned for a motion and motion review to 4 November 2009. The parties agreed that, in the interim, the children would have supervised access at the local Family Visit Centre. Those visits have taken place.

[5] For the purpose of this motion, it is unnecessary that I decide what legal effect, if any, should be given to the Tanzanian *ex parte* order. The existence of the order does however bear upon the risk of the respondent's fleeing the jurisdiction with the children, a risk greatly feared by the applicant. The applicant fears that officials might treat the Tanzanian order as a sufficient legal basis to allow the respondent to spirit the children back to Africa. This is not a totally illusory fear. The United Republic of Tanzania is not a signatory to the (Hague) *Convention on Civil Aspects of International Child Abduction*, [1983] Can. T.S. No. 35, 1343 U.N.T.S. 89, 99 U.S.T. 11, 19 I.L.M. 1501. The translated reasons of the court granting the Tanzanian order suggest that the children are the "property" of the respondent (father) pursuant to the law of that country. Should the children return to Tanzania with the father, it is unclear whether they will ever be seen by the applicant again. If I order broadened access by the children to the respondent, then the applicant seeks that the respondent deposit his passports with the court and post a $10,000 bond.

[6] It is clear, however, that there is little actual risk of such an abduction.

[7] First, I accept that the parties and the children have well and truly decided to make their future lives in Canada, not Tanzania. They are all Canadian citizens. The respondent is well employed here and states in his material that he has no intention of leaving Canada to live elsewhere. Indeed, when the children and the applicant went to live in Tanzania, he stayed behind at his job. The oldest child came to Canada at age three and the youngest child was born here. They were fully engaged in the Canadian education system.

[8] Second, the Tanzanian order focussed on the respondent's desire to determine where the children would go to school. The respondent did not apparently seek custody for custody's sake.

[9] Third, the children are not infants or toddlers. Anold is a teenager and Alice nearly 9. Both want to live in Canada. Both are able to voice their situation to any officials they would necessarily meet before the respondent could ever leave the country with them. This moderates the risk of abduction greatly.

[10] Fourth, although noting that the evidence of the parties has not yet been tested by cross-examination, I accept the evidence of the respondent that he has no intention whatsoever in taking the children away from their new homeland in Canada. There is no evidence to suggest the contrary.

[11] Fifth, the unanswered evidence of the respondent was that, during the marriage of the parties and while living in Canada, the applicant regularly left the children in his sole care while she worked shift work. In short, she trusted him to care for them properly as their

father. This supports the view that the respondent will appropriately engage the best interests of the children in his care of them during visits.

[12] Sixth, the applicant's latest affidavit concedes unsupervised access, albeit day time only access. She seeks the terms of a bond and the deposit of the respondent's Tanzanian and Canadian passports to reassure her that the risk of abduction during such limited daytime access is ended.

[13] The respondent seeks a temporary order establishing what has been called in other cases "normal" access: every other weekend and Wednesday evening for dinner on the week when there is no weekend access. He submits that there is no need for any terms to govern access other than a term that he not remove the children from Ontario. He will advocate for custody should the matter not be settled.

[14] The applicant submits that there should be twice weekly evening access by the children to the respondent and daytime only access on the weekend. Again, she seeks the protection of terms as set out previously.

[15] The Office of the Children's Lawyer has agreed to become involved as advocate for the children. Ms. Huber's appointment as the children's counsel here was confirmed orally by telephone just minutes before the motion was argued. Ms. Huber has not met with her clients and could take no position on the motion.

[16] In assessing the merits of the parties' respective positions here, I make the following general observation. It is never possible for a court to predict the future with complete accuracy, nor to assess whether motives hidden from the court will cause mischief to the parties or their children away from the court's sight. When the parties engage the court process, necessarily they are giving up to the court a measure of their right as a parent to control the lives of their children. The court in return makes decisions in the best interests of the children as best the court can and based on the limits of the evidence before the court that day.

[17] In this case, the critical issue between the parties is the nature and extent of any risk that the respondent (father) will forcibly remove the children from Canada and take them to Tanzania. I do not find that any such risk exists here. In the event therefore, the issue becomes whether the best interests of the children are best served by the applicant's proposed access or by the access proposed by the respondent, or some middle place between these positions.

[18] The children will shortly make their views known to the court through Ms. Huber. In the interim, I pause to reflect on how the recent past must look through their eyes. In January, with little apparent warning, the children, then 12 and just turned 8, were told by the respondent that they were going to go immediately to a boarding school in Tanzania. Their parents would be thousands of kilometres away. They then learned that their mother would be coming to Tanzania with them. Once there, I accept that their communication with their father became more problematic. Then, suddenly, in August of 2009, the respondent

appeared and asked them whether they were going to live with him instead of their mother. The applicant then withdrew them from contact with the respondent and suddenly, they were back on a plane for Canada. Once here, they have only since October been able to see their father again and then under supervision at a local visit centre. I observe that visit centres, however well designed, are not intended to promote the interest of teens. It is little wonder therefore, that the children may be anxious, disoriented and unsure of what the future will bring. One of Ms. Huber's roles will be to assess whether these reflections are accurate.

[19] In my view, to go directly from time-limited supervised access to the access proposed by the respondent runs a risk that the children's lives will yet again be suddenly and forcibly yanked in an unwanted direction. The parents — both parents — have done this in the past. This court does not propose to do so now without the input of the Children's Lawyer.

[20] I see no basis for terms that require the respondent to deposit his own travel documents with the court, nor to post a bond to assure his obedience to the court's process and orders. He is not charged with any offence, has willingly turned over the children's travel documents in his possession and has taken every appropriate legal step to attempt to place his position before the court properly. In Tanzania, his actions were governed by the rule of law, not by self-help. I accept that the respondent will obey the laws of his adopted homeland and I accept that he will abide by the orders of this court.

[21] Neither party may be happy with this decision since neither party was fully successful here. I point out to them both that they are the adults here and that it is for them to swallow any temporary disappointments and move ahead as parents to their two children. The children are confused and anxious about the future. They need the reassurance of both parents that the adults will sort things out and that mom and dad will always be there for them. After the input of the Children's Lawyer, matters may well be reviewed further as this case makes its way through the court system. Eventually, the court action will be completed by a contested court order or by the consent of the parties. The judges and lawyers will go away and the parties will still be parents. They have decades lying ahead of them to parent their children together, but while living apart.

[22] Success being mixed there shall be no order for costs herein.

[23] The appropriate temporary access order here is as follows:

1. Commencing on Saturday, 7 November 2009, and on every Saturday thereafter, the children of the parties, Anold Mwanri (M) (born on 16 April 1996) and Alice Mwanri (F) (born on 12 December 2000) shall have access to the respondent (father) from 8:00 am to 8:00 pm.
2. Commencing on Wednesday, 11 November 2009, and on every Wednesday thereafter, the said children shall have access to the respondent (father) from 5:30 pm to 8:00 pm.
3. Commencing forthwith, the said children shall have reasonable and regular telephone contact with the respondent (father).

4. The respondent (father) shall pick up and return the children for access.
5. The respondent (father) shall not remove the children from the Province of Ontario.
6. The applicant (mother) shall not remove the children from the Province of Ontario.
7. The respondent (father) shall not apply for, obtain, or possess any travel documents for the children or either of them, including any Canadian or Tanzanian passport(s), nor visas, nor any copy of such travel documents.
8. The parties shall refrain from discussing this action with the children save and except as may be necessary to facilitate and explain the children's contact with their counsel.
9. The parties will not denigrate, disrespect or put down the other party to or in the presence of or hearing of the children, nor permit anyone else to do so.
10. The order of Justice Zisman dated 10 September 2009 is vacated.
11. There shall be no order of costs for this motion and motion review.
12. Adjourned as previously endorsed to 16 December 2009, at 10 a.m. to be spoken to only.