

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)**

CASE NO. 3207/2010

**DATE HEARD: 16/11/2010
DATE DELIVERED: 30/11/2010**

In the matter between

ELIZE LIN

APPLICANT

and

THE DIRECTOR: THE DEPARTMENT OF

INTERNATIONAL RELATIONS AND CO-OPERATION

RESPONDENT

JUDGMENT

ROBERSON J

[1] The applicant is married to one Wenkang Lin (Lin), a Chinese national. There is one child born of the marriage, W K L (W), a boy, born on 20 August 2005, in South Africa. W currently resides in the People's Republic of China (China). The applicant resides within the jurisdiction of this Court and Lin currently resides in Durban.

[2] The applicant has applied for an order in the following terms:

1. It is hereby declared that Elize Lin, with identification number, is the holder of full parental responsibilities and rights in respect of the minor child W K L, with identification number currently residing at

Room 301 and Room 906, Hengpai Street, Shunan Yanping District, Nanping City, Fujian Province, in the People's Republic of China and that the said Elize Lin has the right to have primary care of the said W K L in South Africa.

2. The Registrar of the Eastern Cape High Court, Port Elizabeth be requested to forward the order to the Department of Justice, Pretoria.

The Department of Justice, Pretoria is to request the Department of International Relations, Pretoria, to deliver the order to the relevant authorities of the People's Republic of China.

The Department of International Relations and Co-operation, Pretoria, is requested to assist the said applicant to seek the co-operation of the People's Republic of China for the return of the said child to South Africa and to place the child in the primary care of the Applicant.

[3] The application has been brought without notice to Lin. The respondent (the Department) abides the decision of the Court.

[4] In her founding affidavit, the applicant recounted the background leading up to the application. She met Lin during 2002, in South Africa, and they were married in South Africa on 20 September 2003. Not long after the marriage there was marital conflict which the applicant attributed to cultural differences between her and Lin.

[5] During February 2006 Lin the applicant discovered that Lin was involved in certain criminal activities. Lin warned the applicant that if she reported his criminal activities to the police, he would make sure she would never see W again.

[6] During February 2008 the applicant, Lin, and W traveled to China to meet Lin's family. Lin told the applicant that he intended to purchase a house in China and that it was his mother's wish that W should live in China. The applicant told Lin that she would not agree to such an arrangement and that she intended to raise W herself.

[7] The family returned to South Africa during March 2008. Lin continued to insist that W should move to China, because he was of the view that South Africa was dangerous and not conducive to William's wellbeing. He wanted W to live permanently in China and to be educated in China.

[8] During May 2009, the applicant, Lin, and William, again traveled to China to visit Lin's family. Lin only booked a one way ticket to China for William, claiming that he had insufficient funds for a return ticket. He promised that he would book a return flight for W to South Africa when he had the funds. He also told the applicant that she and W could return to South Africa if they were not happy in China.

[9] On 11 May 2009, the applicant accompanied Lin and his mother to an office where Lin told her to sign certain documents which would allow W to attend school in China. The applicant was not given an opportunity to read the documents and Lin threatened that if she refused to sign she would never see W again. The documents, together with William's passport, were given to Lin's mother and locked in a cupboard to which the applicant had no access. Lin eventually gave her copies of the documents, which turned out to be an agreement in terms of which the applicant and Lin agreed to Lin's mother being the "entrusted guardian to the fostered person before he is eighteen years old" (W was the fostered person named in the document). Lin's mother was given the responsibility of looking after William's "daily life and other matters" and the applicant and Lin could not terminate the agreement before W reached the age of eighteen years. The agreement was notarised by a notary. A document headed "Guarantee of Foster" was signed by Lin's mother, in which she accepted the responsibility to foster W and to be his guardian. She stated in the document "because my son and daughter-in-law are very busy in South Africa, they sent their son back to China and entrusted me to foster their son". When the applicant received the documents she noticed the word "foster" in the documents but because she was not fluent in English she did not understand what "foster" meant.

[10] On 2 June 2009 Lin returned to South Africa. The applicant remained in China with William, where W attended school. It became clear to the applicant that Lin's mother wanted to take control of W and they argued constantly about his upbringing.

[11] The applicant approached the South African Embassy and the Consulate in China for assistance, but to no avail because she could not communicate with them properly. As the date of her return to South Africa approached, it became clear to her that Lin had never intended that W return to South Africa.

[12] On 16 October 2009 Lin's mother left to visit her niece, taking W with her. She refused to allow the applicant to accompany them, despite the applicant's entreaties. That was the last time the applicant saw William.

[13] The applicant returned to South Africa on 23 October 2009 and lived with Lin in Durban. When she told Lin that she wanted W to return to South Africa, he said that as William's father he was able to decide what was best for W and that the applicant had no say in William's life. When the applicant communicated with

William, he would cry and tell her he wanted to return to South Africa to be with her. Since July 2010 she has not been allowed to have contact with William.

[14] On 2 April 2010 Lin traveled to China and told the applicant that if she wanted to go as well she would have to pay for her own ticket. She was not able to do so because she was unemployed. Lin told her that he was going to China to attend to William's visa and other matters.

[15] On 4 May 2010 she telephoned Lin (presumably he was still in China) wanting to know why he had not contacted her, and his response was to swear at her and tell her to leave his home, and that she would never see W again. She moved to live with her parents in Humansdorp and thereafter Lin refused to answer her calls.

[16] Presently W attends school in China, and is cared for by his paternal grandmother and his aunt. His visa expired on 13 May 2010 but the applicant believes that Lin had it illegally extended, because he has contacts in the Department of Home Affairs in South Africa and China.

[17] The applicant has requested help from the South African Police Service, Interpol, the respondent, and the Office of the Family Advocate, which office referred her to the Port Elizabeth Justice Centre, her attorneys of record in this application.

[18] The applicant fears that if Lin was given notice of this application he would instruct his family to send W into the Tibetan mountains, which he has previously threatened to do, or to arrange for William's disappearance. The applicant says that she cannot institute divorce proceedings at this stage as it would be apparent from her particulars of claim that she seeks an order that she be William's primary caregiver.

[19] The applicant maintains that W was born and raised in South Africa, that South Africa is his country of habitual residence, that he is being wrongfully retained in China and that it is in his best interests to be returned to South Africa.

[20] The Department became involved in this matter following an approach by the applicant's attorneys. A Deputy-Director of the Department indicated that if a South African Court granted interim custody of W to the applicant and requested the Chinese authorities to return the child to South Africa, such order and request would be conveyed to Chinese authorities through diplomatic channels.

[21] The Hague Convention on the Civil Aspects of International Child Abduction provides inter-country assistance for signatory countries, in instances where a child has been wrongfully removed from the country of his/her habitual residence, to another country. South Africa is a signatory to the Hague Convention but China is not, and this avenue of relief is therefore not open to the applicant.

Primary care

[22] By virtue of their marriage, the applicant and Lin both have full parental responsibilities in respect of William. (Ss 19 and 20 of the Children's Act 38 of 2005 (the Act).) In seeking an order that she be declared the primary caregiver of William, the applicant is effectively seeking an order in terms of s 28 (1)(b) of the Act, namely a circumscription of Lin's parental responsibilities. S 29 (1) of the Act provides that such an application must be brought in the court within whose jurisdiction the child is ordinarily resident, and s 29 (3) of the Act provides that the application may be granted only if it is in the best interests of the child. S 7 (1) of the Act sets out factors which must be considered in determining what is in the best interests of the child.

[23] W is not ordinarily resident in this Court's jurisdiction and on that ground alone the application cannot succeed. The applicant's other difficulty is that a final order for primary care cannot be obtained by way of an ex parte application. In order for the Court to consider the best interests of the child, the circumstances of both parents, and William, have to be fully investigated. There is no point in even beginning to consider what William's best interests are, in view of the fact that the only evidence available is that of the applicant. One does not even know what her circumstances are and whether or not she is a suitable primary caregiver. This is not, for example, a case where there is an existing order for primary care and the other parent has failed to comply with its terms.

Return of W to South Africa

[24] The real purpose of the application is to ensure W's return to South Africa. This is apparent from prayer 4 to the notice of motion and from the applicant's statement in her founding affidavit that:

"This is an application for the return of our minor child, W K L, a boy born of a marriage relationship between myself and Wenkang Lin, on 20 August 2005, from the People's Republic of China."

By involving the Department, the applicant seeks to try to enforce this Court's declaration that she is W's primary caregiver, in China.

[25] Even assuming that W was unlawfully removed by Lin to China, or is being unlawfully retained there, the fact is that he is not present within this Court's jurisdiction and this Court therefore does not have jurisdiction to order his return to the applicant in South Africa. (See *Boberg's Law of Persons and the Family* 2nd edition at 571, and *Di Bona v Di Bona* 1993(2) SA 682 (C) at 695E-F.) The applicant's remedy seems to be to seek an order in China for William's return to South Africa.

[26] There is no legal basis on which the applicant is entitled to any of the relief

prayed, in the manner in which she has brought this application. Perhaps the applicant should reconsider her decision not to institute divorce proceedings and seek legal advice in this regard.

[27] The application is dismissed and there is no order as to costs.

J.M. ROBERSON
JUDGE OF THE HIGH COURT

Appearances:

Adv. V Naidu, instructed by the Port Elizabeth Justice Centre.