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— Franks & Zalev - This Week in Family Law

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**Yes . . . But *Why* Do You Need the Disclosure???**

*Catholic Children's Aid Society of Toronto v. S.K.S.*, 2022 CarswellOnt 3590 (C.A.) — Huscroft, Sossin, and Favreau JJ.A.

Subsection 50(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "*IRPA*") provides that an Order authorizing the Minister of Public Safety and Emergency Preparedness (the "Minister") to remove an individual from Canada is stayed "if a decision that was made in a judicial proceeding — at which the Minister shall be given the opportunity to make submissions — would be directly contravened by the enforcement of the removal order". [emphasis added]

In *S.K.S.*, the Ontario Court of Appeal had to decide how to balance the Minister's right to make submissions under s. 50(a) of the *IRPA*, against the privacy rights afforded to parties and children in protection proceedings under the *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1 (the "*CYFSA*"), including the following provisions of the *CYFSA*:

87(4) A hearing shall be held in the absence of the public, subject to subsection (5), unless the court orders that the hearing be held in public after considering,

(a) the wishes and interests of the parties; and

(b) whether the presence of the public would cause emotional harm to a child who is a witness at or a participant in the hearing or is the subject of the proceeding.

.....

87(8) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family.

The mother in *S.K.S.* moved to Canada from St. Lucia in 2007 with her two children. After the mother arrived in Canada, she gave birth to a third child who, unlike the mother and siblings, was entitled to Canadian citizenship because she was born here.

The mother lost her immigration status in Canada in 2008, her claim for refugee status was rejected in 2011, and her requests to remain in Canada on humanitarian and compassionate grounds were refused (although a further application was still pending when the matter was heard by the Ontario Court of Appeal in 2022). As a result, the mother and two older children became subject to a removal order under the *IRPA*.

In the meantime, the Catholic Children's Aid Society of Toronto (the "CCAS") became involved with the mother and the children. In 2013, the two younger children were temporarily removed from the mother's care, but they were subsequently returned to her care under a series of at least eight supervision Orders.

In September 2019, the Minister advised the mother that her removal date had been set for October 20, 2019. In response, the CCAS brought a motion in the Ontario Court of Justice for a non-removal Order with respect to the younger two children (the eldest child was already over the age of majority by that point). The motion was made on notice to the Minister, and it was granted in December 2019 because the motion judge found that it "was a 'necessary incident of' the supervision order, as the terms of the supervision order could not be fulfilled if the family were deported to St. Lucia." As a result, s. 50(a) of the *IRPA* applied, and the removal order was stayed.

After the December 2019 non-removal Order was granted, however, the Minister advised the parties that it intended to bring a motion for disclosure so that it could make more informed submissions about the non-removal issue at the next status review hearing.

The Minister's disclosure motion was heard in March 2021, and the motion judge ultimately ordered the CCAS to provide the Minister with: (a) all status review applications and agreed statements of fact filed since 2015; and (b) all future status review applications and agreed statements of fact. However, the motion judge also prohibited the Minister from using the documents "for any purpose other than to decide if he intended to make submissions to the Court and to assist in preparing those submissions, and that the Minister was prohibited from copying or distributing or filing these documents in any other proceeding."

The CCAS and the Office of the Children's Lawyer (the "OCL"), appealed the motion judge's decision to the Superior Court of Justice. Their appeal was dismissed, but they then appealed to the Ontario Court of Appeal.

The Court of Appeal started its analysis by resoundingly rejecting the CCAS and OCL's argument that a judge of the Ontario Court of Justice did not even have jurisdiction to order the CCAS to disclose information about a child protection proceeding to the Minister:

[58] In my view, the appeal judge committed no error in this analysis. **Absent a provision of the *CYFSA* precluding a judge of the O CJ from making such a disclosure order, the broad discretion afforded to the judge under the *FLRs* confers jurisdiction on the O CJ to make disclosure orders including, where warranted, to the Minister exercising his mandate under s. 50(a) of the *IRPA*.**

[59] **The appellants point to no provision of the *CYFSA* that constitutes an express bar to disclosure. However, they argue that s. 87(8) of the *CYFSA* implicitly bars disclosure of the kind sought by the Minister.** This provision states, "No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding, or the child's parent or foster parent or a member of the child's family."

[60] **While this provision speaks to the constraints that must accompany disclosure orders in a child protection proceeding, it does not remove a judge's jurisdiction to make such an order.** [emphasis added]

The Court of Appeal then turned to the far more difficult question of how to "interpret the import of s. 50(a) of the *IRPA* harmoniously with the best interests of the child(ren) and the privacy constraints of the *CYFSA*." Ultimately, the Court of Appeal concluded at paragraph 91 of its decision that while the Minister can apply for disclosure with respect to family law matters that engage s. 50(a) of the *IRPA*, disclosure should only be ordered "where, and to the extent that the Minister's clearly defined need for disclosure is warranted, having regard to the competing interests and concerns of the affected parties." In reaching this conclusion, Court of Appeal also explained that:

- " . . . before a judge in a child protection proceeding can decide on the scope of a Minister's submissions or any accompanying question of disclosure, the Minister must provide a basis for the proposed scope of submissions. That basis

must be derived from the record before the Minister, or from the Minister's field of knowledge and expertise." [paragraph 88]

- "If, as in this case, disclosure is requested for the Minister's submission to be meaningful, the Minister must provide further justification for the specific, proposed disclosure. That justification must logically connect the proposed disclosure to the scope of submissions." [paragraph 89]

- "Once the Minister's position is set out, the judge can then consider the requested scope of submission/disclosure, together with the Minister's statutory obligation to pursue removal as soon as possible on the one hand, and the parties' duties under the *CYFSA* and the child's best interests on the other hand. This analysis will also inform the kind of restrictions that ought to be placed on disclosure, in terms of redacting documents, if necessary, protecting confidentiality to the extent possible, and restricting the use of the disclosure outside the specific purpose of making submissions." [paragraph 90]

As the motion judge in this case had not required the Minister to establish a *prima facie* basis for the proposed scope of its submissions, or assessed whether the disclosure was justified in the circumstances, the Court of Appeal set aside the motion judge's decision, and remitted the matter back to the Ontario Court of Justice to be decided based on the principles that are summarized above.

### **Come On — Let's Not Make Relocation Cases Even More Difficult to Resolve**

*A.J.L. v. J.G.L.*, 2022 CarswellBC 2166 (S.C.) — Hori J.

This case dealt with the question of whether or not a court retains jurisdiction over a child after it has granted an order allowing the child to relocate to another jurisdiction. The answer is concerning, and should influence how family lawyers advise their clients.

On December 14, 2021, the mother successfully obtained an order permitting her to relocate with the child, B., from British Columbia to Boolaroo, New South Wales, Australia. The father opposed the relocation. For those readers not familiar with the metropolis of Boolaroo (population 1,200) it is a few hundred kilometers north of Sydney, and in Boolaroo, you will find . . . well . . . not a whole lot.

The order granting the mother authorization to relocate to Australia included several provisions about the father's parenting time depending on whether or not he decided to also move to Boolaroo. If he did, the Court ordered that the parties were to have equal parenting time. Otherwise, his parenting time was to be as follows:

In the event that the [father] does not relocate to Australia, [B.]'s primary residence will be with the [mother] and the [father] will have:

- i. reasonable and generous in-person parenting time with [B.] in British Columbia and Australia as agreed upon by the parties or as further ordered by this Court;
- ii. video or telephone parenting time with [B.] at least three times per week on the days and times agreed upon by the parties or as further ordered by this Court;
- iii. video or telephone parenting time with [B.] on:
  - 1) Father's Day;
  - 2) B.'s birthday;
  - 3) the [father]'s birthday; and
  - 4) Christmas Day.

The mother moved to Australia with B. on December 21, 2021. The father did not, in the end, relocate with them. He did appeal the relocation order, however, and the appeal was still ongoing at the time of this decision.

As the parties continued to have parenting disputes after the relocation, the father sought a further parenting order from the British Columbia Supreme Court. He argued that the Court had preserved its jurisdiction by virtue of the line in the order that stated he would have generous in-person parenting time with B. as agreed upon by the parties "or as further ordered by this court."

The mother took no position on the issue of the Court's jurisdiction.

The Court *first* considered whether there were "exceptional circumstances" under s. 6.3 of the *Divorce Act*, and *then* went on to consider whether the child was habitually resident in Canada. Respectfully, this approach creates some confusion because the entire issue is then framed in the context of s. 6.3 of the *Divorce Act*. We believe the more clear approach (and the approach that most accords with the scheme of the *Act*) would have been *first* to consider whether the child was habitually resident in Canada, and *then*, if it found the child was not habitually resident in Canada, to consider whether the exception under s. 6.3 of the *Divorce Act* applied.

Section 6.3 of the Divorce Act states:

#### **Child habitually resident outside Canada**

6.3(1) If a child of the marriage is not habitually resident in Canada, a court in the province that would otherwise have jurisdiction under sections 3 to 5 to make a parenting order or contact order, or a variation order in respect of such an order has jurisdiction to do so only in exceptional circumstances **and if the child is present in the province.**

#### **Exceptional circumstances**

6.3(2) In determining whether there are exceptional circumstances, the court shall consider all relevant factors, including

- (a) whether there is a sufficient connection between the child and the province;
- (b) the urgency of the situation;
- (c) the importance of avoiding a multiplicity of proceedings and inconsistent decisions; and
- (d) the importance of discouraging child abduction.

Since the father had not alleged any "exceptional circumstances" under s. 6.3 of the *Divorce Act*, and the child was not present in British Columbia, s. 6.3 did not apply, and the Court had jurisdiction to make parenting orders with respect to B. only if B. was habitually resident in Canada.

To determine whether or not B. was habitually resident in Canada, the Court used the hybrid approach to habitual residence as described by the Supreme Court of Canada in *Office of the Children's Lawyer v. Balev* (2018), 5 R.F.L. (8th) 1 (S.C.C.). While *Balev* was decided in the context of the *Hague Convention*, the Court in this case determined that the hybrid approach was applicable to the *Divorce Act*.

However, it is not at all clear that this is the correct approach to determining the question of "habitual residence" under the *Divorce Act*. There are some cases that have applied the definition of "habitual residence" in *Hague* cases to non-*Hague* matters. See, for example, *Maldonado v. Feliciano* (2018), 15 R.F.L. (8th) 430 (Ont. C.J.); *Moussa v. Sundhu* (2018), 11 R.F.L. (8th) 497 (Ont. C.J.); *McKay v. Labelle*, 2019 CarswellOnt 4524 (C.J.); and *A.M. v. D.L.*, 2019 ONCJ 155 at paras. 44 and 45. However, the weight of authority seems to suggest that where a statute has a self-contained definition for "habitual residence", that definition (and arguably those specific considerations) should govern. See *Smith v. Smith*, 2019 CarswellSask 575 (Q.B.); *Kong v. Song*, 2019 CarswellBC 464 (C.A.); *Geliedan v. Rawdah* (2020), 38 R.F.L. (8th) 261 (Ont. C.A.); *M. v. K.* (2022), 73

R.F.L. (8th) 153 (Ont. S.C.J.); and *N. v. F.* (2021), 62 R.F.L. (8th) 7 (Ont. C.A.) (from which we still wait for a decision from the Supreme Court of Canada).

It does make sense that, where a statute specifically addresses the notion of "habitual residence", that definition ought to govern.

But in any case, the hybrid approach in *Balev* determines a child's habitual residence by considering all relevant factors to determine the "focal point" of a child's life. These considerations may include:

- A. The child's links and circumstances in country A;
- B. The circumstances of the child's move from country A to country B; and
- C. The child's links to and circumstances in country B.

In assessing the child's links and circumstances in country A and B, a court may consider the following factors:

- A. The child's nationality;
- B. The duration, regularity, conditions and reasons for the child's stay in the country that the child is presently in; and
- C. The circumstances and intentions of the child's parents.

The Court determined that once the mother and B. had moved to Australia with the Court's authorization, B.'s habitual residence changed from Canada to Australia. From that point on, the focal point of B.'s life was Australia.

The Court also noted that while it is possible for a child to have two habitual residences, that usually only occurs where both parents have joint parenting responsibilities, and the child spends equivalent time in both jurisdictions. In this case, there was no evidence that B. had spent a significant amount of time in Canada since the relocation.

As a result, the Court found it had no jurisdiction to make parenting orders about B.

This decision is of some concern, as it suggests that once a child moves with the court's authorization, there is an immediate change in habitual residence such that the court that authorized the move no longer has jurisdiction over the child — regardless of whether the Order says otherwise.

Not all relocation/mobility disputes are intractable or defy resolution. But one thing most (and probably all) parents who are prepared to consider *consenting* to a relocation want is to know that the province of original jurisdiction can (and will) retain jurisdiction for at least some period of time to make sure that everything goes "as planned."

Of some solace is the fact that there are opposing views. For example, in *Cosentino v. Cosentino* (2016), 84 R.F.L. (7th) 17 (Alta. C.A.), Alberta retained jurisdiction over a variation proceeding (where the father lived) even though mother and child had been in Ontario for five years.

While we are not suggesting courts retain jurisdiction in these situations for overly lengthy periods of time, we do prefer the safeguards provided in *Cosentino*. Relocation cases are challenging enough without taking away ways to resolve them.

### **Appealing an Arbitral Costs Award Without Leave to Appeal? Definitely Maybe.**

*Schickedanz v. Wagemas Holdings Ltd.*, 2022 CarswellOnt 13594 (S.C.J.) — Ramsay J.

In Ontario, we often assume that arbitration proceedings are automatically subject to the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and/or the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 and/or the *Family Law Rules*, O. Reg. 114/99.

And, therefore, it is generally assumed that leave is required to appeal an award of costs at an arbitration. But maybe that is not quite right as there are now two lines of cases about this very issue.

In contrast to *Flowers v. Eickmeier* (2017), 100 R.F.L. (7th) 175 (Ont. S.C.J.), and in contrast to an *order* for costs from a court, the Court concluded in *Schickedanz* that leave is *not* required to appeal an *award* of costs where the arbitration agreement includes broad rights of appeal.

The details of the underlying dispute are not particularly important for our purposes. There were siblings. There was a company. There was money involved. There was a fight. There was an arbitration.

In 2021, one side decided to discontinue the arbitration. The other side sought their costs of the arbitration. The arbitrator awarded costs. The party on the wrong end of that Award (the "Appellant") was not happy and served a Notice of Appeal to the Ontario Superior Court of Justice appealing the costs award.

Section 133 of the *Courts of Justice Act* states

**Leave to appeal required**

133 No appeal lies without leave of the court to which the appeal is to be taken,

(a) from an order made with the consent of the parties; or

(b) **where the appeal is only as to costs** that are in the discretion of the court that made the order for costs. [emphasis added]

The Respondent moved to quash the appeal because the Appellant had not sought leave to appeal the costs award (again, not an order). After all, it's right there in black and white.

Justice Ramsay, however, dismissed the Respondent's motion to quash the appeal, and held that leave to appeal was *not* required, and his reasoning was quite persuasive.

Justice Ramsay noted that arbitration is a process rooted in statute (the *Arbitration Act, 1991*, S.O. 1991, c. 17) and contract. And in *TELUS Communications Inc. v. Wellman*, 2019 CarswellOnt 4913 (S.C.C.), the folks in Ottawa were clear that parties to an arbitration are free to negotiate and design a bespoke arbitration process that meets their needs. Therefore, if the parties agree to broad rights of appeal without leave, the court should not just impose one. It is not for the court to re-write the parties' Arbitration Agreement.

Justice Ramsay then took the further step of suggesting that s. 133(b) of the *Courts of Justice Act* does *not* apply to arbitrations. (He actually said that the *Courts of Justice Act* does not apply to commercial arbitrations — but if it does not apply to commercial arbitrations it does not apply to family arbitrations either.)

If the Legislature intended for s. 133(b) to apply to arbitrations, it could easily have said so — as it did with respect to other sections of the *Courts of Justice Act*. For example, s. 134(1) of the *Courts of Justice Act*, which deals with the powers of an appellate court, is clear that it applies to a "court or tribunal." Justice Ramsay also noted that nothing in the *Arbitration Act, 1991* suggested that the *Courts of Justice Act* applied to private arbitrations. Therefore, he was of the view that the use only of the term "court" in s.133(b) meant that it did not apply to arbitration awards.

Therefore, leave to appeal costs may not be required *where the parties have negotiated broad rights of appeal that do not require leave*, in their arbitration agreement.

Who'da thunk it? Well, apparently Justice Grace also thunk it in *Pagliarioli v. Rite-Pak Produce Co.*, 2010 CarswellOnt 5175 (S.C.J.). It is going to take an appellate court to sort this out. But until then, go forth and appeal your costs award. Without leave. Maybe.

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