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Family Law Newsletters
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— Franks & Zalev - This Week in Family Law

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December isn't even half over, but its already been a very busy month for family law at the Supreme Court of Canada. In fact, as we have previously commented, it has been a busy year.

On December 1, 2022, the Supreme Court dismissed an application for leave to appeal from the Newfoundland Court of Appeal's decision in *K.F. v. J.F.*, which involved an Application by the father to have the parties' 7-year-old daughter returned to Massachusetts under the *Hague Convention on the Civil Aspects of International Child Abduction* (the "*Hague Convention*"). As discussed further below, in a 2-1 split decision, the Newfoundland Court of Appeal found that the trial judge erred in finding that the mother had wrongfully retained the parties' 7-year-old child in Newfoundland, and dismissed the father's Application under the *Hague Convention*.

Then, on December 2, 2022, the Court released its long awaited decision in *F. v. N.* under the *Children's Law Reform Act* (the "*CLRA*") about an abduction from Dubai. The decision, which is also discussed further below, must have been subject to very serious debate behind the scenes, as it took the Court almost eight months to release its decision (it was argued on April 12, 2022), and the result was a razor thin 5-4 split in favour of returning the parties' two young children to Dubai (the minority would have allowed the children to remain in Canada).

And finally, on December 5, 2022, the Court heard oral arguments in *Anderson v. Anderson*, a case from Saskatchewan about how to determine what weight, if any, should be given to a family law property agreement that did not meet the formal requirements of the applicable matrimonial property legislation. The Court reserved, and will presumably release its decision at some point in the first half of 2023. As we already discussed the Saskatchewan Court of Appeal's decision in *Anderson* in the 2022-14 (April 18, 2022) edition of *TWFL* (See *Miglin v. Miglin + Rick v. Brandsema = Anderson v. Anderson?*), we will wait to see what the Supreme Court of Canada decides before we comment on it further. We will just note that the Saskatchewan Court of Appeal suggested that, in *Rick v. Brandsema* (2009), 62 R.F.L. (6th) 239 (S.C.C.), the Supreme Court applied *Miglin v. Miglin* (2003), 34 R.F.L. (5th) 255 (S.C.C.), to a property agreement. While that is not factually accurate, the Saskatchewan Court of Appeal did so. However, in oral argument, the Supreme Court did not appear to be overly interested in that aspect of the case. We will see what they have to say in writing, as it is an important point.

F. v. N.

We already discussed the Ontario Court of Appeal's decision in *F. v. N.* in the 2021-38 (October 4, 2021) edition of *TWFL*. To recap, the parties were married in Pakistan in 2012, but lived in Dubai for their entire marriage. They had two children together, who were born in 2016 and 2019 respectively. The mother and both children were Canadian citizens. The father was not. With the father's consent, in June 2020, the mother left Dubai with the children to visit her family in Ontario. Although the mother purchased return plane tickets for herself and the children, once she got to Canada, she told the father that she would not be returning to Dubai, and would be staying in Ontario with the children indefinitely.

The father responded by starting court proceedings in both Dubai and Ontario, asking the Superior Court in Ontario for an Order requiring the children to be returned to Dubai under s. 40 of the *CLRA*, which provides as follows:

> 40. Upon application, **a court**,
>
> (a) **that is satisfied that a child has been wrongfully removed to or is being wrongfully retained in Ontario**; or
>
> (b) that may not exercise jurisdiction under section 22 or that has declined jurisdiction under section 25 or 42,
>
> may do any one or more of the following:
>
> 1. Make such interim parenting order or contact order as the court considers is in the best interests of the child.
>
> 2. Stay the application subject to,
>
> i. the condition that a party to the application promptly commence a similar proceeding before an extra-provincial tribunal, or
>
> ii. such other conditions as the court considers appropriate.
>
> 3. **Order a party to return the child to such place as the court considers appropriate** and, in the discretion of the court, order payment of the cost of the reasonable travel and other expenses of the child and any parties to or witnesses at the hearing of the application. R.S.O. 1990, c. C.12, s. 40; 2020, c. 25, Sched. 1, s. 17. [emphasis added]

If these provisions look familiar to those not in Ontario, it is because common law jurisdictions in Canada share similarly-worded provisions. As a result, this case is of import to all.

The mother responded to the father's Application in Ontario by asking the Ontario court to take jurisdiction over the children for a variety of reasons. However, the issue that is of greatest interest for our purposes was the mother's argument that the court in Ontario should assume jurisdiction pursuant to s. 23 of the *CLRA*, which allows a court in Ontario to decide what parenting arrangements would be in a child's best interests if the child is in Ontario, and if removing the child from Ontario would cause him or her to "suffer serious harm":

> 23 Despite sections 22 and 41, **a court may exercise its jurisdiction to make or vary a parenting order or contact order with respect to a child if**,
>
> (a) **the child is physically present in Ontario**; and
>
> (b) **the court is satisfied that the child would, on the balance of probabilities, suffer serious harm if**,
>
> (i) the child remains with a person legally entitled to decision-making responsibility with respect to the child,
>
> (ii) the child is returned to a person legally entitled to decision-making responsibility with respect to the child, or
>
> (iii) **the child is removed from Ontario**. 2020, c. 25, Sched. 1, s. 6. [emphasis added]

The mother argued that returning the children to Dubai would cause them to suffer serious harm because: (1) the children were very young and she had always been their primary caregiver, but she had no independent legal status in Dubai; (2) her ability to remain in Dubai was tenuous at best; (3) she would not be able to get a fair hearing there because the courts did not decide parenting cases based on a "best interests" test; and (4) if the children were returned to Dubai, she would not return with them.

In other words, the mother argued that if the children were required to return to Dubai, there was a very serious risk that they would never be able to see their mother/primary caregiver ever again.

The trial took place in November 2020, and finished on November 26th. The trial judge, Justice Conlan, recognized the urgency of the situation, and released his decision only two weeks later (on December 15th). He rejected the mother's arguments, and found that although young children can face adverse emotional and psychological impacts when separated from a primary caregiver, it was unknown whether the children in this case would suffer serious harm from such potential adverse impacts. He also found that the children's best interests would be served by their return to Dubai, with or without the mother, so that a court there could adjudicate the matters of custody, access, and guardianship.

The mother appealed to the Ontario Court of Appeal, and her appeal was argued in January 2021. She successfully argued for a stay pending the appeal.

The Court of Appeal presumably struggled with what to do in this case, because it took almost eight months to release its decision. Ultimately, however, in a 2-1 decision that was released in September 2021, Justice Hourigan and Justice Brown for the majority decided to uphold the trial judge's decision on the basis that the trial judge's findings were entitled to deference, and the mother had not established a palpable and overriding error.

In a vigorous dissent, Justice Lauwers explained that he would have allowed the appeal. In his view, the trial judge failed to take into account the mother's peculiar vulnerability as a foreign national, and as a woman undergoing a divorce process in Dubai under the laws of the UAE, with its effects on the children. Furthermore, he found that the trial judge had erred in finding that it was "unknown" whether sending the children back to Dubai without the mother would result in serious harm, as the risk of this harm was precisely what the trial judge had to assess in order to make determinations under ss. 23 and 40 of the *CLRA*. Finally, he was not satisfied that the father would take the necessary steps to ensure that the mother would be able to remain in Dubai if she returned with the children, and was concerned that the undertakings the father had said he would give would be unenforceable in Dubai if he subsequently decided to renege.

The mother successfully sought leave to appeal to the Supreme Court of Canada. It also stayed the Orders below pending the appeal.

The case was argued before the Supreme Court of Canada on April 12, 2022. As the children were very young, and had already been in Canada for almost two years by the time the second appeal was argued, we would have thought the Court would have released its decision very quickly (or even from the bench with reasons to follow) if it was going to Order their return to Dubai. However, like the Court of Appeal before it, we suspect that the Court really struggled with what to do here, because the case was under reserve for almost eight months (until December 2, 2022), and still resulted in a 5-4 split in favour of ordering the children's return to Dubai.

The Majority:

Writing for the 5-judge majority, Justice Kasirer agreed with the majority of the Court of Appeal that the trial judge's finding that the children would not "suffer serious harm" if they were returned to Dubai was entitled to significant deference, and the mother had not established "an error in law or a material error in the appreciation of the facts (*Van de Perre*, at para. 13)" that would permit the Court to intervene:

> [123] Assessing the application of the s. 23 regime in this case, **I am satisfied that the trial judge properly considered the relevant constellation of factors in this case, weighed them in light of the credibility of the witnesses, and based**

> **his conclusion on an individualized child-centered analysis**. As the trial judge recalled, both parents are capable, loving parents; he said, notwithstanding some of the Mother's allegations, that there is not a hint of evidence that she or the children would be subject to abuse if they return. But the trial judge went further, weighing the other relevant factors. For instance, the dissenting judge said the trial judge failed to assess the harm of an involuntary separation. I respectfully disagree: the trial judge considered the Mother's residency status in light of the undertakings; he considered the expert evidence on the options available to the Mother; and he decided that the best interests of the children would be the paramount consideration under UAE law. His conclusion was not based on a misplaced view that the Mother was certain or obliged to return; instead, he assessed the actual harm that would flow from the return of the children, whether or not the Mother went with them. **His finding that the serious harm threshold was not met is owed deference, and the Mother has not persuaded me that he erred.** ***Another judge might have decided serious harm differently, but that is no basis for disturbing the conclusion of the trial judge given the applicable standard of review.*** [emphasis added]

The majority also rejected the mother's argument that the father's proposed undertakings to try and alleviate her concerns about returning to Dubai, including helping her secure independent residency in Dubai, and agreeing that the children would reside primarily with her and that they would make major decisions jointly, would be unenforceable. According to the majority, the trial judge had already considered, and rejected those arguments, and his findings were entitled to deference:

> [134] Problems associated with the enforceability of undertakings by foreign courts are well known. But, **in this case, the trial judge unreservedly concluded, on the basis of the expert evidence, that the settlement offer proposed by the Father — if agreed to by the Mother — could be incorporated into a valid court order in Dubai, and would be enforceable** (para. 294(ii)). In deciding that the undertakings were a viable commitment from the Father, the trial judge plainly had no guarantee that the Father would not later resile from that commitment, as Lauwers J.A. emphasized in his dissenting reasons (paras. 301-2). **The trial judge did understand that the commitments were not guaranteed but I respectfully disagree that he put blind faith in the Father on the basis of his general finding of credibility.** The undertakings might have been made a condition for the return but, as commentators note, this is not always the practice (Schuz (2013), at pp. 291-92). In my view, what is required is that the judge who hears the parties is satisfied that the undertakings given are adequate (see Schuz (2013), at p. 290). **This assessment is discretionary and must be made in light of the parties' particular circumstances. I agree with Hourigan J.A. that nothing in the record indicated that the Father would not respect his undertakings** (paras. 71-72). [emphasis added]

That being said, to try to provide the mother with some additional protection, the majority expressly confirmed that the father was bound by his proposed undertakings, and listed the specific steps he was required to take in its reasons, including that he would have them incorporated into a consent Order/Judgment in Dubai. The issue of "undertakings" in the majority decision factor very prominently — perhaps too prominently given that their ultimate enforceability is not without issue.

The majority's decision also contains an excellent summary of the legal principles that apply when dealing with abductions from non-*Hague* countries that will be of enormous help to family law lawyers and judges across the country when dealing with these types of cases, including:

> • "The return order procedure in s. 40 of the *CLRA* thus starts from the premise that the best interests of the child are aligned with their prompt return to their habitual place of residence so as to minimize the harmful effects of child abduction. Returning the child to the jurisdiction with which they have the closest connection is also understood to be in the child's best interests." [paragraph 9]
>
> • " . . . the courts recognize that a parent should not be allowed to create a situation that is potentially harmful to the child and then rely upon it to establish a risk of harm to the child (see *Ojeikere v. Ojeikere* (2018), 8 R.F.L. (8th) 253 (Ont. C.A.), at para. 91)." [paragraph 10]
>
> • "A review of legislation in this area reveals that, in general, Canadian provinces treat child abductions in non-*Hague Convention* cases in a manner methodologically comparable to the Convention: first, by declining to decide parental disputes on the merits with respect to children who do not habitually reside in the province or territory, and second, by

favouring the return of children to the jurisdiction of their habitual residence. However, these similarities do not mean that an application brought under provincial legislation is treated the same way as one brought subject to the rules of the *Hague Convention* (*Geliedan*, at paras. 26-34)." [paragraph 52] [Keep this in mind as we discuss *K.F. v. J.F.* below.]

• "To account for the fact that, in the non-*Hague Convention* context, Ontario courts do not benefit from the *a priori* assumption that the best interests of the child principle will be applied to the merits of the custody dispute in the foreign country, judges assessing petitions for return to non-party jurisdictions must therefore consider the tenor of foreign law, generally through expert evidence adduced by the parties." [paragraph 53]

• "The premise that the children's best interests are favoured by their timely return to their home jurisdiction is sound. Child abductions harm children (*Balev*, at paras. 23-25; *Ojeikere*, at para. 16; A. Grammaticaki-Alexiou, "Best Interests of the Child in Private International Law", in *Collected Courses of the Hague Academy of International Law* (2020), vol. 412, 253, at p. 325). . . . Consequently, at the preliminary stage of deciding jurisdiction, it is not the role of the judge to conduct a broad-based best interests inquiry, as they would on the merits of a custody application." [paragraphs 64-65]

• "The onus to prove that the child would suffer serious harm rests on the abducting parent (*Onuoha v. Onuoha* (2021), 54 R.F.L. (8th) 1 (Ont. Div. Ct.), at para. 23, aff'g (2020), 49 R.F.L. (8th) 115 (Ont. S.C.J.). The burden is demanding." [paragraph 69] [We're not sure what a "demanding" burden — as opposed to an "ordinary" burden might be; there is only one standard of proof — a the balance of probabilities: *F.H. v. McDougall*, 2008 CarswellBC 2041 (S.C.C.); *McLean v. McLean*, 2013 CarswellOnt 17995 (Ont. C.A.).]

• "The measure of s. 23 is highly factual and, as the Court of Appeal pointed out, is discretionary, in the sense that it involves the weighing of various factors (para. 52; *Ojeikere*, at para. 63; E. (H.) , at para. 29; *Volgemut v. Decristoforo*, 2021 CarswellOnt 16070 (S.C.J.), at para. 99 (CanLII); *Ajayi v. Ajayi*, 2022 CarswellOnt 13314 (Div. Ct.), at para. 20). Serious harm may be established through a single consideration or may arise from a combination of factors, given the holistic nature of the assessment mandated by s. 23 (C.A. reasons, at para. 140, per Brown J.A.; see also *Ojeikere*, at para. 63)." [paragraph 71]

• "The analysis is also highly individualized. It should focus on the particular circumstances of the child, rather than on a general assessment of the society to which they are sent back." [paragraph 72]

• "Given the discretionary, individualized and fact-specific character of the serious harm analysis, a trial judge's findings are owed deference." [paragraph 75]

• "Separating an infant from their primary caregiver is a circumstance that most certainly can cause psychological harm to the child. . . . But I reject the argument that such a separation, in and of itself and without regard to the individualized circumstances, will always rise to the level required under s. 23." [paragraphs 77-78]

• " . . . if a child is separated from their primary caregiver, but is nevertheless returned to their capable left-behind parent and other known caregivers, in a safe and familiar environment, the high threshold of harm may not be met (for the *Hague Convention*, see Guide, at paras. 64-65). Conversely, if the evidence demonstrates that the child would be returned to an environment where they will be left without care or that they feel unsafe with their alternate caregiver, it is very possible that the serious harm threshold will be met (see, e.g., *Aldush*, at para. 158)." [paragraph 80]

• "When assessing the severity of the harm, judges should also consider whether undertakings made by the left-behind parent to the primary caregiver in the proceedings — also called 'protective measures' — could be joined to the return order made pursuant to s. 40 of the *CLRA* in order to lift the obstacles to the parent's return or to address any other aspect of the anticipated risk of harm to the child (for the *Hague Convention*, see Guide, at paras. 36-37 and 64-66; see also R. Schuz, T*he Hague Child Abduction Convention: A Critical Analysis* (2013), at pp. 291-92; P. R. Beaumont and P. E. McEleavy, *The Hague Convention on International Child Abduction* (1999), at pp. 156-57; for non-Hague Convention disputes in Ontario, see *Bolla*)." [paragraph 81]

• "As to the likelihood of separation, courts should consider all barriers to the return of the primary caregiver. In some cases, the risk of separation will be involuntary, namely when the primary caregiver faces definitive legal obstacles to their return. It may also be voluntary, in the sense that it flows from the parent's refusal to return. In general, a parent ought not to be able to create serious harm and then rely on it through their own refusal to return (*Ojeikere* , at para. 91; see also Schuz (2013), at pp. 280-81; Guide, at para. 72)." [paragraph 82]

• "This is not to say that a primary caregiver's refusal to return will always be taken to be unjustified. An abducting parent may have legitimate and reasonable reasons for not returning to the foreign country, such as significant obstacles to employment or risks to safety, including evidence showing that the left-behind parent is responsible for child abuse or intimate partner violence to the primary caregiver (see, e.g., *Ojeikere*, at para. 91; *Aldush*, at para. 149; B. Hale, "Taking Flight — Domestic Violence and Child Abduction" (2017), 70 Current Legal Problems 3; N. Bala and J. Chamberland, "Family Violence and Proving 'Grave Risk' for Cases Under the Hague Convention Article 13(b)", Queen's Law Research Paper No. 91 (2017), at p. 6)." [paragraph 83]

• "That said, as a general matter, an unreasonable refusal to return cannot be said to be in the child's best interests: the law requires that parents set aside their differences, and facilitate contact between the child and their estranged partner. The mere fact of undertaking the wrongful abduction suggests an abductor has lost sight of that idea; the subsequent refusal to return, where not reasonably justified, makes further contact between the child and the left-behind parent difficult." [paragraph 83]

• "As long as the ultimate question of custody is determined on the basis of the best interests of the child, the *CLRA* does not prevent children from being returned to jurisdictions where the law may differ in some respects from that of Ontario. I agree with Hourigan J.A. that it 'is not enough to point to differences in the law and suggest that a parent may have different rights in a foreign jurisdiction vis-à-vis Ontario' (para. 79)." [paragraph 87]

• "Nonetheless, there may be instances where foreign laws are so profoundly irreconcilable with Ontario law that remitting the matter to the foreign courts would constitute serious harm within the meaning of the *CLRA*. Drawing the line between what is acceptable and what is not is a delicate exercise." [paragraph 88]

• "The proper approach recognizes that inconsistencies between local and foreign legal regimes will usually not amount to serious harm if the best interests of the child principle remains the paramount consideration in all decisions concerning children. However, if the incompatible rule automatically applies in a manner that supersedes the best interests of the child, this will be a determinative factor in the serious harm analysis, when s. 23 is read in light of s. 19(a) of the *CLRA*." [paragraph 88]

The Dissent:

In a decision written by Justice Jamal, the four dissenting judges agreed with the majority's summary of the applicable legal principles. However, the dissent was of the view that the trial judge had "seriously misapprehended the evidence in evaluating both the likelihood and severity of the harm." And, after finding that the trial judge had made palpable and overriding errors, the dissent reweighed the evidence, and concluded that the mother had, in fact, established that the children were likely to suffer serious harm if they were returned to Dubai, as it would result in them being separated from their primary caregiver (the mother), who had legitimate reasons for refusing to return to Dubai (including her precarious residency status and concerns about living as a woman in that jurisdiction).

As a result, the dissent would have dismissed the father's Application to have the children returned to Dubai, and remitted the case to a different judge of Ontario's Superior Court of Justice to determine what parenting arrangements would be in the children's best interests based on the law of Ontario.

K.F. v. J.F.

K.F. is another abduction case, but unlike *F. v. N.*, it was decided under the *Hague Convention*. It provides yet another clear example of the substantial problems and confusion created by the Supreme Court of Canada's decision in *Office of the Children's Lawyer v. Balev* (2018), 5 R.F.L. (8th) 1 (S.C.C.) to adopt a "hybrid approach" to determining a child's habitual residence, which the majority described as a "fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions" that "requires the application judge to look to the entirety of the child's situation." Indeed — who wants "rigid rules" when it comes to returning children to their jurisdiction of habitual residence?

Immediately after *Balev* was released, the majority's decision was subject to significant criticism by a number of leading family law experts, including Philip Epstein, who had this to say about it in the 2018-19 (May 14, 2018) edition of *TWFL*:

> Readers can review Justice McLachlin's eloquently written judgment and determine why she and the majority favour the hybrid approach, but **in a rather stinging dissent, Justices Coté and Rowe, with Justice Moldaver concurring, I submit, correctly point out the flaws in the majority approach to the habitual residence interpretation**.
>
> The minority notes that if habitual residence is ascertained via the parental intention approach, most cases will turn on a straight forward question, i.e. "Where did the parents last mutually intend for the child to be habitually resident?" **The minority points out that the majority dilutes the importance of parental intent as the primary variable in favour of a multifactor test which the minority calls, "an unprincipled and open ended approach untethered from the text, structure and purpose of the *Hague Convention* — that creates a recipe for litigation".**
>
> The minority in an equally elegant dissent sets out the merits of the parental intention approach, points out the risks and weaknesses inherent in the hybrid approach and suggests the correct approach for the interpretation of the convention with respect to habitual residence.
>
> This is about as final a judgment on a family law issue as could exist. There is no chance whatever that the *Hague Convention* is going to be opened by the more than 100 countries who are signatories to insert a new definition or interpretation of habitual residence. And thus, parents, lawyers and judges are going to have to live with the hybrid approach for the interpretation of habitual residence for the foreseeable future. **This, I can safely predict, will lead to much more litigation in Hague Convention cases, lengthier hearings, a great deal more uncertainty and some very sophisticated forum shopping.** Clients will have to be warned that there is a danger in entering in any temporary parental agreements on relocation since an ill-motivated parent can use the temporary time to create an appearance of settled intention and open the door to consideration of a host of additional factors the courts will now have to consider in determining whether the child has become habitually resident in another jurisdiction. **What is more alarming is that under the hybrid test it is possible that one parent can unilaterally change the habitual residence of the children. That, very respectfully, is a significant step backward in resolving the Hague Convention cases and discouraging parental abductions.** [emphasis added]

K.F. shows that Phil's concerns were prescient and eminently well-founded.

The father in *K.F.* was born in America, and lived and worked in the United States for his entire life. The mother was born in St. John's Newfoundland, but moved to the United States in 1997.

The parties were married in 2011, and lived in Boston. Their daughter was born in Boston in 2014.

The family lived in Boston until July 2020, when the parties agreed that the mother and daughter would travel to St. John's to spend time with the mother's family. Because schools in Boston remained closed for in-person learning, the parties subsequently agreed that the mother and daughter would remain in St. John's until August 2021, at which point they would return to Boston so the child could start the new school year there. The father also spent significant time in St. John's after July 2020, including from November 2020 to March 2021. For those of you without a calendar at hand — the child lived in Boston for six years and was in Newfoundland for 13 months.

Despite the parties' agreement that the mother and child would return to Boston in August 2021, on July 30, 2021, the mother informed the father that she had decided not to return, and that she had filed an Application for divorce in Newfoundland for an Order allowing her to remain in St. John's with the child.

On August 24, 2021, the father brought an Application in Newfoundland under the *Hague Convention* for an Order requiring the child to be returned to Boston. The mother opposed the Application, and argued that the *Hague Convention* did not apply as the child was not habitually resident in Boston as of July 30, 2021, as by that point she had already become habitually resident in St. John's. She also raised the grave risk of harm defence under article 13(b) of the *Hague Convention*.

The trial started on September 27, 2021, and finished on October 20, 2021. The trial judge released her decision on November 8, 2021, found the child's habitual residence was in Boston, rejected the mother's grave risk of harm defence under article 13(b) of the *Hague Convention*, and ordered the mother to return the child to Boston by November 16, 2021.

As required by *Balev*, the trial judge reviewed the child's links to Boston, the circumstances of the move, and the child's links to St. John's, and ultimately concluded that although the child had spent "an appreciable period of time in Newfoundland", she was still habitually resident in Boston as of July 30, 2021 when the mother told the father that she intended to remain in St. John's.

The mother appealed to the Newfoundland Court of Appeal, and obtained a stay pending the appeal.

The appeal was argued in February 2022, and the Court of Appeal released its decision on May 26, 2022. In a 2-1 decision, the majority determined that the trial judge had misapplied *Balev* because she "failed to focus on the focal point of [the child's] life immediately before the date of her alleged wrongful retention", and placed too much emphasis "on parental intention and the circumstances of [the child's] parents in deciding that [her] habitual residence was Boston."

Ugh.

And, after reviewing the evidence, the majority concluded that the *Hague Convention* did not apply because the child's habitual residence had already changed from Boston to St. John's by the time the mother told the father that she had decided to stay in Newfoundland:

> [126] In the result, I am of the view that the focal point of [the child's] life immediately before July 30, 2021 was St. John's. She had been there for over a year at that time (an appreciable period of time, especially for a seven-year-old child), had completed her full grade one year at there, was integrated into the environment and social fabric of the St. John's, and settled into a secure and stable family life with her mother and her extended family. In short, [the child's] habitual residence had changed from Boston to St. John's by July 30, 2021, like the children in *Beairsto, J.M., Ludwig, and F against M*, whose habitual residences had changed as of the time immediately before the dates of their alleged wrongful retention. While the intentions of [the child's] parents were to return to Boston until [the child's] mother changed her mind, that does not alter the fact that [the child's] habitual residence had changed from Boston to St. John's immediately before July 30, 2021.

Ugh again.

The dissent, with which we strongly agree, was written by Justice Goodridge. He would have upheld the trial judge's decision, as she had "reviewed and applied the proper jurisprudence from *Balev*, and applied the hybrid test which arises from it. She considered all of the factors, assessed the facts properly and made the ultimate judgment call — a judgment call which was hers to make."

The father applied for leave to appeal the Court of Appeal's decision to the Supreme Court of Canada. Not surprisingly given that the Court just dealt with the issues raised by this case in *Balev* in 2018, the Court refused the father's request for leave. As a result, it will be up to the Newfoundland Superior Court, and not the court in Massachusetts, to decide what parenting arrangements will be in the child's best interests in this case.

Some Final Thoughts:

In its recent decision in *Leigh v. Rubio* (2022), 75 R.F.L. (8th) 251 (Ont. C.A.), an abduction case where it took 18 months for the trial court to decide the case at first instance, and another year to complete the appeal process, the Ontario Court of Appeal criticized the trial judge for allowing the trial to go on for 33 non-consecutive days from September 21, 2020 to February 2, 2021, and then taking four months to deliver her reasons.

While we certainly agree that the trial in *Leigh* took far too long, it is also important to note that while the trial judge in *F. v. N.* only took about two weeks from the end of the trial to deliver his decision, the Court of Appeal and the Supreme Court of Canada took almost eight months *each* from the time the appeals were argued to deliver their decisions. Given the very young ages of the children in *F. v. N.* (recall that they were born in 2016 and 2019, and had been in Canada since June 2020), and with the absolute greatest of respect, a total of 16 months under reserve between the two appellate courts is far too long.

Furthermore, although it only took the trial judge approximately six weeks to complete the trial and deliver her reasons in *K.F. v. J.F.*, it then took six months for the appeal to be heard and decided (including three months under reserve). While we realize that courts are busy and that it takes time to prepare, argue, and decide an appeal, six months is still far too long in these types of urgent cases.

Finally, while abduction cases are undoubtedly difficult, they are not made any easier by the fact that, despite repeated references in the case law about the importance of giving significant deference to trial judges in abduction cases, many appellate judges (five of the 12 appellate judges who heard *F. v. N.* between the Court of Appeal and Supreme Court, and two out of the three appellate judges who heard *K.F. v. J.F.*), appear to be more willing to essentially retry abduction cases on appeal than they are in other circumstances. This does not make decisions easy to predict, and only leads to uncertainty and litigation.

While unfortunate, it seems like we have reached the point where it is almost impossible to predict the outcome of an abduction case with any degree of certainty, and where appeals from trial decisions are now essentially a "coin flip". Advise your clients accordingly.

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