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— Franks & Zalev - This Week in Family Law

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Contents

She Came in Through the Bedroom Window . . . Seems She May Have Left that Way Too . . .

Osaloni v. Osaloni, 2023 CarswellAlta 834 (C.A.) — Khullar, C.J., Strekaf and Pentelechuk JJ.A.

We don't report on many cases about the *Convention on the Civil Aspects of International Child Abduction* (the "*Hague Convention*"), but *Osaloni* offers an excellent review of the basic *Hague Convention* provisions, and an opportunity to comment on the difference between a change in habitual residence *before* a *Hague Convention* application has been brought (such that there has been no wrongful retention or removal) and a party trying to claim a change in habitual residence to a new jurisdiction after a wrongful retention or removal.

The mother was appealing a decision ordering the return of the parties' two children to the United Kingdom pursuant to the *Hague Convention* (as implemented in the *International Child Abduction Act*, R.S.A. 2000, c. I-4).

The parties were living together in the UK when, on or around March 30, 2022, the mother removed the children (then aged six and three) from the family home through a bedroom window and took them to Calgary. The family had been living in the UK since June 2020 when the mother returned with them from Slovakia, where she had been studying medicine.

Both children had been born in the UK and had both British and Italian citizenship through the mother.

The father immediately invoked the provisions of the *Hague Convention*, and there was a hearing on December 9, 2022.

The court below, in well-structured reasons, ordered the children back to the UK based on the following findings:

> i. The children were "habitually resident" in the UK at the time of their removal — Articles 3(a) and 4;
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> ii. At the time of the removal, the father was exercising "rights of custody" over the children — Article 3(b) and 4;
>
> iii. The removal of the children was "wrongful", being in breach of those custody rights — Article 3;
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> iv. Less than one year had passed from the date of the wrongful removal — Article 12;
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> v. The father did not consent or acquiesce to the mother removing the children to Canada — Article 13(a); and
>
> vi. The children would not suffer a "grave risk" of "physical or psychological harm" if returned to the UK — Article 13(b).

Although the mother on the appeal largely focussed on events occurring *after* the order below was granted, the Court of Appeal rightly noted that what happened after that order was granted was mostly irrelevant.

The standard of review the court must apply is an onerous one. Absent an error of law, questions involving the application of the law to the facts — including the issue of consent, habitual residence and "grave risk of harm" — are reviewable only in the case of palpable and overriding error: *CB v. BM* (2021), 60 R.F.L. (8th) 1 (Alta. C.A.); *CCO v. JJV*, 2019 CarswellAlta 2017 (C.A.); and *RVW v. CLW* (2019), 26 R.F.L. (8th) 15 (Alta. C.A.).

With respect to the suggestion of the father's consent, as the parent *opposing* the children's return, the mother had the onus to establish *unequivocal consent or acquiescence* on *clear and cogent evidence*: *CB v. BM* (2021), 60 R.F.L. (8th) 1 (Alta. C.A.) at para. 43. This she failed to do. The mother relied on the fact that the parties had *contemplated* moving to Canada. But, *before* an actual move, to again borrow from Clint Eastwood, "intention's got nothin' to do with it." The mother also had the teeny tiny problem of alleging consent to a trip that started by climbing out the bedroom window.

The mother also argued that, at the time she left with the children to Calgary, the children were "habitually resident" in Italy, or perhaps Slovakia. Now, it is technically true that a child's habitual residence need not necessarily be their location immediately prior to their removal: *OM v. ED*, 2019 CarswellAlta 2718 (C.A.) at paras. 22-27. However, here, there was just no evidence on which the court below could have concluded habitual residence anywhere other than the UK. The children's only connection to Italy was their citizenship. Both children did spend some time in Slovakia, and they *may* have even been "habitually resident" there during the mother's studies. However — and here's the important part — to determine whether a removal is "wrongful", the court must consider where the children were "habitually resident *immediately before the removal or retention*": Article 3 — *Office of the Children's Lawyer v. Balev* (2018), 5 R.F.L. (8th) 1 (S.C.C.) at para. 43. In March 2022, this was the UK — where the parties had been living and working for nearly two years, and where the children were going to school, and nowhere else.

The mother also suggested that the children's "habitual residence" had switched to Canada in the interim, much as the mother successfully did in *K.F. v. J.F.* (2022), 76 R.F.L. (8th) 36 (N.L. C.A.) — a decision that drives us particularly crazy (and evidences the problem of jettisoning the former "parental intention" test with the "hybrid test" for habitual residence). However, be that as it may, in *K.F.*, the Newfoundland Court of Appeal determined that the child's habitual residence had changed from Boston, Massachusetts to St. John's, Newfoundland *before* the *Hague Convention* Application was commenced; that is, that at the time of the Application, the children's "habitual residence" had already changed to St. John's. But here, the mother was arguing that the "habitual residence" changed after the removal from the UK. Not possible. "Habitual residence" is to be determined by assessing the links to relevant jurisdictions that existed *prior* to the time of the removal; links created *subsequent* to the removal cannot be considered: *OM v. ED*, 2019 CarswellAlta 2718 (C.A.) at para. 25. Subsequent links are only relevant to the "settling in" exception in Article 12 of the *Hague Convention*, and this exception only possibly applies where the *Hague Convention* Application is brought more than a year after the wrongful removal or retention.

The mother was also unable to show that returning the children would expose them to a "grave risk" of "physical or psychological harm or otherwise place the child in an intolerable situation" under Article 13(1)(b). This requires a "weighty" risk of "substantial" psychological harm "to a degree that also amounts to an intolerable situation": *Thomson v. Thomson* (1994), 6 R.F.L. (4th) 290 (S.C.C.) at 596-597; *F. v. N.* (2022), 78 R.F.L. (8th) 253 (S.C.C.) at para. 73; *Wentzell-Ellis v. Ellis* (2010), 78 R.F.L. (6th) 245 (Ont. C.A.) at para. 37.

Much of the mother's evidence here focussed on her claim that the children would be "better off" with her. But that is not a factor. The *Hague Convention* is not meant to determine custody; it is meant to determine which jurisdiction gets to decide custody: *Office of the Children's Lawyer v. Balev* (2018), 5 R.F.L. (8th) 1 (S.C.C.) at para. 24; *Leigh v. Rubio* (2022), 75 R.F.L. (8th) 251 (Ont. C.A.) at para. 24. And a prompt return to the jurisdiction of habitual residence is in the best interests of children: *F. v. N.* (2022), 78 R.F.L. (8th) 253 (S.C.C.) at paras. 62-65.

Finally, given the decision of the Supreme Court of Canada in *F. v. N.* (2022), 78 R.F.L. (8th) 253 (S.C.C.), it was difficult for the mother to argue that being separated from her would subject the children to a grave risk of harm. Although not a *Hague*

Convention matter, in *F. v. N.*, the Supreme Court of Canada determined that a return order separating a child from their primary caregiver would generally not constitute "serious harm" under s. 23 of the Ontario *Children's Law Reform Act*, R.S.O. 1990, c. C.12 (where the other state is not a party to the *Hague Convention*). The Supreme Court was unanimous that separating a child from their primary caregiver does not, alone, meet the "serious harm" threshold. It is hard to argue that the same would not apply to the *Hague Convention*: *Ogunboye v. Faoye* (2023), 84 R.F.L. (8th) 99 (Ont. C.J.) at paras. 135-183; *P. v. F.*, 2022 CarswellOnt 11664 (S.C.J.) at paras. 60-65, aff'd (2022), 81 R.F.L. (8th) 299 (Ont. C.A.).

In *F. v. N.*, at paras. 10 and 82, the Supreme Court also made it clear that the mother (the children's primary caregiver) could not rely on self-engineered harm by refusing to return to the UAE if the children were returned. [See also *Ojeikere v. Ojeikere* (2018), 8 R.F.L. (8th) 253 (Ont. C.A.) at para. 91].

The appeal was dismissed and the children ordered returned to the UK.

When You Get More than You Give

Sidhu v. Sidhu, 2023 CarswellOnt 12275 (S.C.J.) — Mandhane J.

Parents have children. Children grow up. Children go to university. Children graduate. Children can't afford to buy a home or the astronomical rent in most urban centres. Children move back in with their parents. This story is becoming increasingly common given the ever-rising cost of real estate and now interest rates.

This case involves a multi-generational family living together in a home. The Mother, a widow, purchased a property in 2004 for $374,884. The majority of the purchase price — around $255,000 — came from the proceeds of sale of her previous matrimonial home, and she financed the remainder through a mortgage registered on title. She was the sole registered owner of the home.

The Mother's three unmarried adult sons lived with her. Just after the purchase, her eldest son married and moved his wife into the home (the "Son" and the "Daughter-In-Law"). The Son and the Daughter-in-Law later had kids, who also lived in the home, and they ran their real estate business out of the home.

In July 2008, the Mother wanted to take money out of the home to help pay for her other son's wedding. She could not qualify for another mortgage on her own. The Son had bad credit and was no help. The Daughter-in-Law agreed to co-sign the loan with the Mother. The borrowed funds were used to discharge the current mortgage, and the Mother received around $45,000 which she used to pay for her other son's wedding. A new mortgage was registered on title. At the same time, the Mother transferred the Daughter-in-Law a 1% interest in the home (probably because the bank required the Daughter-in-Law to be an owner of the property as a condition for the mortgage).

The family members pooled their resources and shared expenses. They all contributed to a family bank account managed by the Son. The contributions were used for communal expenses, such as the mortgage, insurance, repairs, maintenance, groceries, phone, internet etc. The Son also managed and rented the basement apartment for which he collected (and kept) $850/month.

The whole family — the Son, the Daughter-in-Law, the Mother and her other unmarried son — then all lived together happily ever after. The end.

Not so much . . .

Unfortunately, the family began arguing about the property. The unmarried son moved out. The Son and Daughter-in-Law threatened to move out and stop making payments towards the property. In response to this threat, the Son claimed the Mother agreed that she would only retain a $250,000 interest in the property. The Mother disputed ever making this promise.

The family also argued about renovations to the property and finances. Eventually, they were barely speaking with one another. Things came to a head in 2022, and the Mother asked the Son and Daughter-in-Law to leave. They refused, claiming they had a 50% interest in the property.

The Mother brought an application for partition and sale of the property. The Son and Daughter-in-Law brought a cross-application claiming a 50% interest in the home by way of unjust enrichment. The Son and Daughter-in-Law claimed that they were entitled to 50% of the proceeds based on their contributions to the mortgage payments and house maintenance costs. They argued that the parties were involved in a "joint family venture" such that they were entitled to a monetary remedy on a "valued survived" basis: *Kerr v. Baranow* (2011), 93 R.F.L. (6th) 1 (S.C.C.).

The Mother argued that she was entitled to 100% of the proceeds of sale, that any payments or contributions made by the Son and Daughter-in-Law were in the form of rent, and that the Daughter-in-Law held her 1% interest in trust for the Mother.

After the Application was commenced, the parties agreed to sell the home for $1,185,000. The net proceeds of sale totaled $753,233. Oddly, notwithstanding the Mother's claims that she was the sole owner of the home, each party received $100,000 from the proceeds of sale, with the remainder held in trust.

The matter proceeded to a 5-day hearing. In the end, Justice Mandhane dismissed the Son and Daughter-in-Law's claims and found that the Daughter-in-Law was holding her 1% interest in trust for the Mother.

Her Honour started by reciting the test for unjust enrichment established by the Supreme Court of Canada in several cases including *Moore v. Sweet*, 2018 CarswellOnt 19478 (S.C.C.), at paras. 35-59, 63 and 83 and *Kerr v. Baranow* (2011), 93 R.F.L. (6th) 1 (S.C.C.), at paras. 30-31:

1. Whether the Mother was enriched

2. Whether there was a corresponding deprivation to the Son and the Daughter-in-Law; and

3. Whether there was a juristic reason for the benefit and the corresponding detriment.

In order to succeed on the second part of the test, the Son and the Daughter-in-Law had to show a connection between their deprivation and the benefit conferred on the Mother. The benefit/deprivation are "essentially two sides of the same coin": *Moore v. Sweet*, at para. 41. If a party becomes richer in circumstances while the other poorer, the first two parts of the test will likely have been met: *Moore v. Sweet* at para. 44. Furthermore, the concept of "loss" captures a benefit that was never in the plaintiff's possession but that the court finds *would have* accrued for their benefit had it not been received by the defendant instead: *Citadel General Assurance Co. v. Lloyds Bank Canada*, 1997 CarswellAlta 823 (S.C.C.), at para. 30.

The Son and Daughter-in-Law argued that over the 18 years they had lived at the home, they contributed around $440,000 through contributions to the family account and "in-kind" labour (i.e. housekeeping, renovations and repairs). Justice Mandhane did not accept the value of their contributions. First, she concluded that there was no evidentiary basis for the value attributed to their "in-kind" labour for housekeeping and renovations to the home. She accepted the Mother's evidence that the repairs and renovations by the Son were shoddy and unfinished and, therefore, likely did not increase the value of the home.

Moreover, the Son and Daughter-in-Law did not have complete records for their financial contributions to the home. While they had contributed to the family account, it was impossible to trace the contributions to the account by each family member living in the home over the 18 years they lived together. In total, Justice Mandhane accepted that the Son and Daughter-in-Law had contributed $350,000 to the family account.

While Justice Mandhane acknowledged that there were benefits flowing to the Mother from the Son and Daughter-in-Law's contributions to the family account — she relied on the Son and Daughter-in-Law to maintain the property and to pay more of their combined living expenses when the Mother stopped working after she became ill — there was no corresponding deprivation:

> [34] On the facts before me, I find that [the Son] and [the Daughter-in-Law] did not suffer a *deprivation* equal to the amount that they deposited into the family account. This is because they benefited from the pooling of resources. They were able to keep their living costs low, run their business at minimal cost, claim valuable corporate tax credits, and likely

> save a significant amount of money in the process. I also draw the reasonable inference that their childcare costs were low or nonexistent on account of [the Mother's] in-kind care. This is not to say that [the Mother] didn't benefit from the arrangement, because she did as well. She was able to rely on [the Son] to maintain the Property, and continued living in the Property despite contributing minimally to the family account after she fell ill and stopped working. While not quantifiable, it was clear from her testimony that she derived pleasure from watching her grandchildren grow up in the Property.
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> [35] To accurately account for the benefits that [the Son] and [the Daughter-in-Law] received on account of their relationship with [the Mother], I would reduce the amount of [the Son] and [the Daughter-in-Law's] claim as follows. First, I would account for the rent that [the Son] collected for the basement apartment, which both parties agreed was $850 per month. Given that these funds were never transferred to [the Mother] or deposited in the family account, I assume they were retained by [the Son]. Between 2004 and 2022, I find that [the Son] would have collected rent equivalent to at least $183,600 ($10,200 per year for 18 years).
>
> [36] Second, since neither [the Son] nor [the Daughter-in-Law] paid occupation rent despite occupying the den, two bedrooms, and the common areas, I am prepared to impute a benefit from living rent free in the Property that was equal to at least $183,600 (and likely much more).
>
> [37] Third, [the Son] and [the Daughter-in-Law] were obviously claiming some of their contributions to the family account as business expenses for tax purposes. This is an obvious explanation for why the majority of their deposits into the family account originated from the AMG corporate account. Given [the Son] and [the Daughter-in-Law's] refusal to provide disclosure regarding the corporation, I am prepared to value the benefit that accrued to their corporation at $145,196, which is the total amount of money that flowed from AMG into the family account.
>
> [38] Therefore, while [the Son] and [the Daughter-in-Law] contributed $348,726 to the family account, I find that they were not deprived in any way. I arrive at this conclusion by taking their total contribution to the family account of $348,726, subtracting $183,600 for the basement rent, subtracting $183,600 for their personal rent, and subtracting $145,196 for benefits that accrued to their corporation.
>
> [39] Overall, I find that [the Son] and [the Daughter-in-Law] benefited from the multi-generational living arrangement such there was no unjust enrichment to [the Mother]. Having so found, I need not go on to consider the remaining prongs of the unjust enrichment test.

We do have a few comments questions about the analysis here.

First, while we agree with Justice Mandhane's conclusion that the Son and Daughter-in-Law benefitted from the arrangement, it is unclear to us on what basis she drew a "reasonable inference" that the Son and Daughter-in-Law's childcare costs were low or non-existent. There was evidence before the Court that the Mother had cancer and eventually had to stop working. Had the Mother provided childcare at no cost, presumably this is something that she could have given evidence about to show benefits she conferred upon the Son and Daughter-in-Law. But we are not sure this was an inference available to the trial judge.

Second, we're not sure the $145,196 in tax benefits that may have accrued to the Son's and the Daughter-in-Law's corporation is a valid consideration in the benefit/deprivation analysis. While the Son and Daughter-in-Law may have enjoyed a benefit here (by being able to reduce their taxes), the Mother certainly would not have suffered any deprivation on account of it. The fact that the Son and Daughter-in-Law were claiming some of their contributions to the family account as business expenses for tax purposes seem, to us, wholly irrelevant. There is also no basis offered for attributing a value of $145,196 to this benefit.

Third, the trial judge does engage in somewhat of a circular analysis with respect to occupation rent. The suggestion that the Son and Daughter-in-Law received a benefit because they did not pay occupation rent, presupposes that the Son and Daughter-in-Law did not, in fact, have a proprietary interest in the property. If the Son and Daughter-in-Law, in fact, *had* a proprietary interest in the home — they would not have owed occupation rent (or would have owed much less) for living in a property in which they had an ownership interest. However, Her Honour imputes to the Son and Daughter-in-Law a benefit of $183,600 (the calculation of which is not itself explained).

As Justice Mandhane did not consider the third part of the test (no juridical reason for the enrichment), we do not know if that hurdle would have been successfully overcome. The Mother would likely have argued that there was an implied agreement, or even a landlord-tenant relationship, between her and the Son and Daughter-in-Law: they contributed to the family's living expenses and in exchange, lived in the house with their family. Certainly, an agreement to share expenses can constitute a juristic reason: *Reiter v. Hollub* (2017), 96 R.F.L. (7th) 96 (Ont. C.A.); *Gallacher v. Friesen* (2014), 43 R.F.L. (7th) 1 (Ont. C.A.); *Peters v. Swayze*, 2017 CarswellOnt 5129 (S.C.J.), aff'd 2018 CarswellOnt 2847 (C.A.); *G.M.C. v. A.M.F.* (2018), 10 R.F.L. (8th) 366 (Ont. S.C.J.), aff'd 2019 CarswellOnt 1452 (C.A.) (*sub nom Christopher v. Freitas*); *Kiriakou v. Pentzos*, 2020 CarswellOnt 525 (S.C.J.).

Justice Mandhane's comments at the outset of the case suggest she viewed the living arrangement as a "quid pro quo" arrangement, and not one of unjust enrichment:

> [7] On the facts of the multi-generational family before me, I find that both parties' benefited from the joint living situation throughout the duration of their relationship. Both parties knowingly and intentionally organized their affairs to meet their own unique needs. ***In short, there was a meeting of the minds at to the essential bargain that lay at the heart of the parties' joint-living situation. That [the Son] and [the Daughter-in-Law] would provide consideration for their use of the Property pending a future inheritance.*** The parties never intended that the [Son] and [Daughter-in-Law] would *acquire* the Property during [the Mother's] lifetime. There was no unjust enrichment on the facts before me. [emphasis added]

The trial judge is absolutely correct that the court must consider the whole relationship to determine if the party claiming unjust enrichment ultimately "got more than they gave" — see, for example: *McCoy v. Hucker*, 1998 CarswellOnt 2919 (Gen. Div.); *Belvedere v. Brittain Estate* (2009), 60 R.F.L. (6th) 249 (Ont. C.A.); *Thomas v. Fenton* (2006), 29 R.F.L. (6th) 229 (B.C. C.A.); *Behiels v. McCarthy* (2010), 83 R.F.L. (6th) 19 (Alta. Q.B.); *Reiter v. Hollub* (2017), 96 R.F.L. (7th) 96 (Ont. C.A.); *Tsai v. Dugal*, 2022 CarswellOnt 950 (C.A.); *McGuire v. Bator* (2022), 74 R.F.L. (8th) 255 (Ont. C.A.); *Bikur Cholim Jewish Volunteer Services v. Langston* (2008), 51 R.F.L. (6th) 22 (Ont. C.A.); *Slade v. Feltham* (2013), 35 R.F.L. (7th) 137 (N.L. T.D.)]. However, according to the Supreme Court of Canada, the "offsetting of benefits" analysis is to occur at the defence/remedy stage of the analysis: *Kerr v. Baranow* (2011), 93 R.F.L. (6th) 1 (S.C.C.); *Ibbotson v. Fung* (2013), 27 R.F.L. (7th) 280 (B.C. C.A.).

This is to say that, on a properly sequenced analysis, it may be that the Son and Daughter-in-Law could have established enrichment and deprivation. We do not know if they would have succeeded on the lack of juristic reason analysis. And, subject to our comments above, her Honour was of the view that, at the remedy stage, the Son and Daughter-in-Law likely got more than they gave such that they could not show any unjust enrichment.

As for the resulting trust issue, Justice Mandhane correctly found that the Daughter-in-Law held her 1% interest in the home in trust for the Mother:

> [43] That all being said, based on the entirety of the evidence, I agree with [the Mother] that [the Daughter-in-Law] was holding her 1% interest in the Property as a resulting trust in favour of [the Mother]: *Patterson v Patrick Estate*, 2018 ONSC 6884 (CanLII), paras. 41-45. [The Daughter-in-Law] did not pay adequate consideration for her share of the Property and, even on her own evidence, only went on title to facilitate [the Mother] obtaining a second mortgage: *Pecore v. Pecore*, 2007 SCC 17 (CanLII) at para 20. Neither party intended for [the Daughter-in-Law] to have a beneficial interest in the property or to be legally responsible for the mortgage: *Andrade v. Andrade*, 2016 ONCA 368 (CanLII), para. 62. Throughout, [the Daughter-in-Law] held her 1% interest in the property for [the Mother's] benefit.

While this finding was certainly open to the trial judge on the evidence, there are cases where a pledging of credit has been found to be sufficient consideration to void the presumption of resulting trust: *Banihashemi v. Behshad*, 2021 CarswellOnt 1668 (S.C.J.) at para. 44.

This case is a helpful reminder of the challenges and common pitfalls associated with unjust enrichment claims. While, undoubtedly, the Mother benefitted from the arrangement of having her Son and Daughter-in-Law pay for most of her living expenses for several years after she stopped working, the Son and Daughter-in-Law's claim ultimately failed because they could

not show what deprivation they had suffered as a result of their contributions. As Justice Mandhane points out, proving this corresponding deprivation is the key to a successful unjust enrichment claim.

All too often, parties, particularly in family cases, advance these claims without having properly articulated and assessed the "disadvantage" they suffered. If a party gains something by their contributions, that needs to be considered. Simply paying for living expenses for a home a party lives in is not, in itself, a deprivation, particularly where the party would have incurred these living expenses if they had lived elsewhere: *Thomas v. Fenton* (2006), 29 R.F.L. (6th) 229 (B.C. C.A.); *Holloway v. Devinish*, 2009 CarswellOnt 7235 (S.C.J.); *Reiter v. Hollub* (2017), 96 R.F.L. (7th) 96 (Ont. C.A.); *Tsai v. Dugal*, 2022 CarswellOnt 950 (C.A.).

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