

FAMLNWS 2024-08
Family Law Newsletters
February 26, 2024

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

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Parenting Schedule Reviews — Use it or Lose it?

Giesbrecht v. Stettner, 2023 CarswellSask 212 (Sask. C.A.) — Caldwell, Barrington-Foote and Kalmakoff JJ.A.

This case is from the middle of 2023, but it raises an important point worth comment. If a party is entitled to review (not to vary — but to *review*) an order by a certain date or upon the occurrence of a specific event — is the right to a review lost if not requested by the specific date or before the specific event?

The parties were the parents of a child. The parties stopped living together in early 2016, and shortly after that, the father filed a claim seeking parenting relief under *The Children's Law Act, 1997*, S.S. 1997, c. C-8.2 (now replaced by *The Children's Law Act, 2020*, S.S. 2020, c. 2).

The parties reached an agreement (and consent order — the "2017 Order") at a pretrial conference with Justice Turcotte. Clause 11 of that Order stated that: "[t]he parenting arrangement shall be reviewed without the need for material change before [the child] begins attending Kindergarten."

The review did not happen at the anticipated time.

When the child was seven years old and in Grade 2, the father sought direction from the court as to whether he could then apply for the contemplated review.

The Chambers judge interpreted Clause 11 and directed that a review of the parenting arrangement could proceed (*i.e.* without the need to prove that a material change in circumstances had occurred):

Clause 1 of my order is clause 11 of the judgment of Justice Turcotte, dated January 6, 2017, provided for review of parenting arrangements respecting the child, [redacted], without the need for material change. It contemplated that such application would take place in or around the time the child . . . was attending Kindergarten.

Clause 2, notwithstanding the delay, the fact that the [father] now brings the application, does not change the essence of the agreement. Specifically, there is no need to prove material change to address a review of the parenting arrangements.

The mother appealed — the issue being whether the Chambers judge misinterpreted Clause 11 of the 2017 Order in ruling that the father could proceed to review the parenting arrangements (without having to show a material change in circumstances).

The Court of Appeal then usefully considered the principles involved when interpreting a court order:

[6] The interpretation of a court order is not governed by the subjective views of the parties. An issue on appeal as to whether a court decision or order has been properly interpreted by a judge gives rise to a question of law (*Hertz v Kille*, 2023 SKCA 3 at para 15). The rules for interpreting the meaning of a court order are set out in cases like *Pratt v Johnson*, [1959] SCR 102; *Hertz v. Kille*; *Onion Lake Cree Nation v Stick*, 2020 SKCA 101, [2021] 2 WWR 614; *Campbell v Campbell*, 2016 SKCA 39 at paras 15 — 17, [2016] 8 WWR 631; *Sutherland v Reeves*, 2014 BCCA 222, 61 BCLR (5th) 308; and *Yu v Jordan*, 2012 BCCA 367, 354 DLR (4th) 8. In summary, a judge who is interpreting a court order must not do so in a vacuum but instead must consider the language of the order in the context of the pleadings, the proceedings in the action that led to the order, the circumstances surrounding the making of the order, and the reasons given for making the order, if any.

As the 2017 Order was a consent order, there were no reasons.

The Court of Appeal then went on to review the pleadings:

[7] In this case, the pleadings include the petition and answer/counter-petition. For his part, [the father] sought joint custody and access, alleging that [the mother] had left the family home with the child and that he had not had access since then. [The mother] sought joint custody and primary residence but stated that she was "not agreeable to a shared parenting arrangement" given [the father's] work schedule and hours of work. She plead that she had allowed [the father] "graduated access" to the child and proposed a two-week custody rotation, wherein the child would have access to her father from Thursday at 7:00 p.m. to Saturday at 12:00 p.m. during the first week and from Friday at 10:00 a.m. to Sunday at 7:00 p.m. during the second. [The mother] said that such an arrangement was in the child's best interests because it accommodated both parents' work schedules and allowed the child to alternate her weekends with them. That arrangement is largely mirrored in the *2017 Order*.

[8] The child was one-and-a-half years old at the time of the *2017 Order*. The order is a consent order that addresses all the family property, parenting, spousal support and child support issues between the parties in a final way. In addition to clause 11, the *2017 Order* grants joint custody and decision-making, with the child primarily residing with [the mother]. It addresses the child's access to [the father], with reference to his work schedule, and determines with whom the child would spend holidays. Clause 7 provides that [the father] "shall request and [the mother] will not reasonably refuse additional parenting time on 'rainy days' or other days when he is not required to work" and, under clause 8, both parents "shall have the right to be caregivers of first resort to the other".

From this, the Court of Appeal determined that, in the context of the 2017 Order, the language in Clause 11 was clear: "the parenting arrangement shall be reviewed without the need for material change before [the child] begins attending Kindergarten." The Court of Appeal found no room for uncertainty.

According to the Court of Appeal, the 2017 Order "must" be taken to reflect an agreement between the parties that the mother would be the primary parent at least until the child was set to attend kindergarten and that the parenting arrangement would be reviewed at that time. That seems an entirely reasonable statement.

The Court of Appeal then noted that the review was "tied" to a milestone in the child's life:

[9] . . . That is, the review was tied to a milestone in the child's life when the coordination of her attendance at kindergarten with parenting and work schedules would be at issue in any event. Given that the child was years away from kindergarten at the time, there was also a greater likelihood that [the father's] work schedule, which was a factor addressed in the pleadings, might have changed in the meantime.

Ultimately, the Court of Appeal determined that the Chambers judge erred in interpreting the 2017 Order as contemplating that a review of the parenting arrangements "would take place *in or around* the time the child . . . was attending Kindergarten". The court noted that the 2017 Order clearly contemplated the review occurring *before* the child started Kindergarten, and nothing in the pleadings or the surrounding circumstances suggested a different interpretation.

As determined by the Court of Appeal, the correct interpretation of Clause 11 required the Chambers judge to consider that the purpose of the review was to allow the parties to assess the parenting arrangements in advance of the child starting kindergarten — and the "essence" of the agreement was not that the parties could review the parenting arrangement without establishing a material change.

[11] . . . As the child was in Grade 2 at the time of [the father's] application, the milestone of starting kindergarten had come to pass and any adjustments to the parenting arrangements necessary to address that major change in the child's life had been made. At that point, clause 11 of the *2017 Order* was spent by the effluxion of time. As a spent order, it was not within the Chambers judge's discretion to revive it or to enlarge the time fixed to bring a review. Moreover, it was not within his authority to relieve either party of the substantive requirement of establishing a material change in circumstances before the parenting arrangements could be revisited by the Court.

As a result, the Court of Appeal insisted that the father would have to proceed by way of an application to vary the 2017 Order.

Respectfully, we whole-heartedly disagree. Anytime parents agree to a *review* of a parenting schedule, the "essence" of that agreement is — almost invariably — that the schedule can be reviewed *without having to show a material change*. That is because of cases such as like *Wiegiers v. Gray* (2008), 47 R.F.L. (6th) 1 (Sask. C.A.); *Brown v. Lloyd*, 2015 CarswellOnt 790 (Ont. C.A.); *D. (H.) v. D. (L.M.)* (2016), 81 R.F.L. (7th) 357 (B.C. S.C.); and *Coppin v. Arboine*, 2018 CarswellOnt 19895 (S.C.J.) — all of which make it clear that the mere passage of time and increased maturity is not a material change.

We can guess what happened here. In 2017, the parties attended court and were encouraged to settle their parenting matters. They did. And they did so on the basis that the mother would have primary residence, but that the father could review the schedule when the child was to start kindergarten. The timing of the review was not the important piece — the importance lay in the fact that the father would not have to show a material change in exchange for his cooperation at the time. This sort of result makes it harder for lawyers to settle cases.

Oh 2 A-Torn in O-Man

Mehralian v. Dunmore (2023), 94 R.F.L. (8th) 255 (Ont. C.A.) — Trotter, Sossin, and Monahan JJ.A.

This case involved two appeals from two jurisdictional decisions in the same matter, the decision of Justice Myers recognizing the validity of an Omani divorce, and the decision of Justice Brownstone dismissing the Husband's motion seeking the return of their child to Oman.

The parties really got around. The Husband is Canadian; the Wife, Iranian. They met while working in Malaysia. They married in Japan in June 2015 and lived there for one year. They moved to the United Arab Emirates in 2016 after the Husband got a job there. They separated for a period in 2017 and reconciled in 2018. They moved to Oman in 2018 and lived there until March 2020.

The parties traveled to Ontario in March 2020 to visit with the Husband's family, intending to return to Oman in April. But COVID-19 forced them to stay in Ontario until January 2021, living with the Husband's family. During that time, the Wife became pregnant (as all family lawyers know, children always make it better), and in December 2020, she gave birth to their first and only child.

The family returned to Oman in January 2021. The Husband got a new job in Oman, but he was terminated just over one month after they returned. He then signed a fixed-term contract with an Ontario employer, and the parties returned to Ontario in April 2021.

The parties purchased a chalet in Quebec and were vacationing there in May 2021 when an "incident" occurred. The police were called. The Husband was charged. The marriage was over.

The Husband started an Application in the Ontario Court of Justice to deal with parenting issues. He brought a 14B Motion claiming the issue was urgent because he was leaving Ontario for work (he found a job in the UAE). A motion was scheduled, but the Husband later withdrew his claims in the OCJ and vacated the motion.

In June 2021, the Wife also brought an Application, but in the Ontario Superior Court of Justice, seeking a divorce, corollary relief, and equalization of net family properties. However, as the Wife had not lived in Ontario for the year preceding the Application, Ontario had no jurisdiction to do *anything* under the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.).

Although this point was not really addressed by the court below or the Court of Appeal, a quick reminder about *Divorce Act* jurisdiction can save us all some time, trouble and embarrassment — and no time like the present. Recall ss. 3 and 4 of the *Divorce Act*:

Jurisdiction in divorce proceedings

3 (1) A court in a province **has jurisdiction** to hear and determine a divorce proceeding **if either spouse has been habitually resident in the province for at least one year immediately preceding the commencement of the proceeding.**

Jurisdiction in corollary relief proceedings

4 (1) A court in a province **has jurisdiction** to hear and determine a corollary relief proceeding **if**

- (a) either former spouse is habitually resident in the province at the commencement of the proceeding; or
- (b) both former spouses accept the jurisdiction of the court.

[emphasis added]

That is, a spouse cannot claim a divorce until one of the spouses has been habitually resident in the province for a year — and a spouse cannot claim corollary relief under the *Divorce Act* without already having been divorced in Canada or without also claiming a divorce in Canada — remember that whole *Rothgiesser v. Rothgiesser* (2000), 2 R.F.L. (5th) 266 (Ont. C.A.) ("*Rothgiesser*") thing? Therefore, the Wife's divorce proceeding was a nullity: *Robar v. Robar*, 2010 CarswellNB 15 (N.B. Q.B.); *Enman v. McCafferty*, 2010 CarswellNB 167 (Q.B.); *Nafie v. Badawy* (2015), 56 R.F.L. (7th) 28 (Alta. C.A.); *Green v. Green* (2009), 72 R.F.L. (6th) 84 (B.C. S.C. [In Chambers]); *Zalizniak v. Zaliziak*, 2006 CarswellMan 449 (C.A. [In Chambers]); *M.E.F. v. S.L.*, 2007 CarswellNfld 69 (C.A.).

Now back to the main show.

The Husband took the position that Ontario was not the appropriate jurisdiction to deal with their family law claims, but he did not bring a motion to dismiss it. Instead, he moved back to the UAE, then to Oman, and commenced a proceeding in Oman in March 2022 seeking a divorce and joint custody of their child.

Although the Wife contested the Omani court's jurisdiction, the Omani Court of Appeal disagreed with her and found Oman had jurisdiction, sending the matter back to the lower court for a determination on the merits as to the validity of the divorce and custody under Omani law. The Wife participated in the Omani proceeding, taking the position that, under Omani law, her marriage was invalid, and seeking custody of their child. The Omani Court found that her marriage, and divorce, were valid, and granted her custody of their child.

The Husband then brought a motion in the Ontario proceeding for an Order recognizing the validity of the Omani divorce. He brought a second motion for an Order returning their child to Oman, where he claimed the child habitually resided. His motions were heard by two different judges on two separate dates.

At the divorce recognition motion before Justice Myers, the Wife argued that the Ontario Court should not recognize the Omani divorce for several reasons, including that it did not have subject-matter jurisdiction and on public policy grounds, claiming the

Husband only sought a divorce in Oman to avoid his support obligations to her in Canada. Again, recognition of the Omani divorce in Ontario would mean that the Wife had no standing to claim spousal support under the *Divorce Act* (there's that pesky *Rothgiesser* again). And she also could not seek spousal support in Ontario under the *Family Law Act*, R.S.O. 1990, c. F.3, which only allows "spouses", and not "former spouses" to claim spousal support.

Justice Myers disagreed with the Wife. His Honour found — properly in our view — that the Wife had attorned to the jurisdiction of the Omani Court when she actively participated in the proceeding there. His Honour briefly considered the issue of whether recognizing the Omani divorce would violate Canadian public policy because there is no provision for spousal support under Omani law, but noted that he was not provided with sufficient evidence so as to understand what Omani law might provide for separating spouses in general. It is also far from clear that Oman not providing for spousal support would suffice for the public policy defence to the recognition of the Omani divorce — see our comments on *V. v. S.*, 2022 CarswellOnt 19030 (S.C.J.), in the February 13, 2023 (2023-06) edition of *TWFL*. Justice Myers recognized the Omani divorce. Again — correct decision.

As for the Husband's motion for the return of the child to Oman, Justice Brownstone found that the child was habitually resident in Ontario at the time the Wife commenced her Application, and therefore, the Ontario court had jurisdiction under s. 22(1)(a) of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 (the "*CLRA*").

Section 22(1)(a) provides:

- 22(1) A court shall only exercise its jurisdiction to make a parenting order or contact order with respect to a child if,
- (a) the child is habitually resident in Ontario at the commencement of the application for the order . . .

Section 22(2) defines habitual residence as follows:

- (2) A child is habitually resident in the place where the child resided in whichever of the following circumstances last occurred:
1. With both parents.
 2. If the parents are living separate and apart, with one parent under a separation agreement or with the consent, implied consent or acquiescence of the other or under a court order.
 3. With a person other than a parent on a permanent basis for a significant period of time.

Justice Brownstone dismissed the Husband's motion.

Not to be deterred, the Wife appealed Justice Myers' Order and the Husband appealed Justice Brownstone's Order. The appeals were heard together.

The Court of Appeal dismissed the Wife's appeal. It rejected the Wife's argument that she only participated in the Omani proceeding to dispute jurisdiction. Justice Myers made no palpable or overriding error when he concluded, based on facts which the Wife did not contest, that she litigated the merits of the divorce in Oman, and sought and obtained relief from the Omani court — i.e. custody of their child. Her participation was determinative of the issue:

[30] Parties to an action are free to select or accept the jurisdiction in which their dispute is to be resolved: *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416, at para. 37. As the Divorce Recognition Judge noted, a party that has voluntarily attorned to the jurisdiction of a court has consented to having the issues in dispute determined by that court. **Where jurisdiction is established through such consent, as in this case, it is unnecessary to consider whether there are other grounds upon which a court's jurisdiction might be either recognized or challenged, such as whether the parties had a real and substantial connection with the jurisdiction in question:** *Wolfe v. Pickar*, 2011 ONCA 347, 332 D.L.R. (4th) 157, at paras. 43-44.

[31] For the same reason, the Divorce Recognition Judge did not err in his finding that the applicant could not relitigate issues that she had unsuccessfully raised before the Omani court. These issues included whether the applicant had received valid notice of the Omani divorce and whether the respondent had committed fraud in obtaining the divorce. [emphasis added]

For the same reason, the Wife could not resist enforcement of the Omani divorce on public policy grounds:

[32] Although the Divorce Recognition Judge did consider whether the Omani divorce should not be recognized in Ontario because the divorce laws of Oman are contrary to Canadian public policy, in my view it was unnecessary for him to do so. **This is because consent to the jurisdiction of the foreign court necessarily involves consent to the laws applicable in that jurisdiction.**

[33] The Divorce Recognition Judge found that although the applicant was not required to agree that the validity of the parties' divorce should be decided by the Omani courts, she voluntarily chose to do so. In so doing, she agreed to have the validity of the divorce determined in accordance with Omani law. **Having consented to the application of Omani law, the applicant cannot now argue that the decision of the Omani court should not be recognized in Ontario because the law on which it was based is contrary to Canadian public policy.** [emphasis added]

Three points are worth emphasizing about attornment:

1. Where jurisdiction is established through attornment — that is the end of it. After a party attorns to the jurisdiction of a Court, there is no need to consider other possible methods of securing jurisdiction, such as real and substantial connection.
2. Attorning to the jurisdiction of a foreign court *necessarily* means consenting to the laws applicable in that jurisdiction.
3. Attorning to the jurisdiction of a foreign court *necessarily* means surrendering the chance to argue that the foreign law is contrary to Canadian public policy.

Or, to put it more gastronomically — one can't have one's jurisdictional cake and eat it too. Maybe that doesn't work so well — but you get our point.

The Court of Appeal also dismissed the Husband's appeal. It rejected his argument that Justice Brownstone failed to consider the "settled intention" of the parties in determining whether the child was habitually resident at the time the Application was commenced. He claimed the parties did not intend to move to Ontario when they traveled here in April 2021, but that Ontario was merely a "way station" until they returned to the Middle East.

The Court of Appeal acknowledged that while Justice Brownstone did not specifically refer to "settled intention", she concluded based on her careful and detailed review of the evidence that the parties agreed to move to Ontario in April 2021 — and that residence in Ontario *at the time* was sufficient to establish habitual residence. Her Honour rejected the Husband's evidence that they were merely visiting, finding that he was not credible. These were factual findings that were entitled to deference, and the Husband had identified no palpable and overriding error that would justify setting her decision aside.

Of some interest is the following statement by the Court of Appeal:

[42] I see no reviewable error in the Parenting Jurisdiction Judge's factual finding that the parties were residing in Ontario at the relevant time, or in her conclusion that this was sufficient to establish habitual residence of M. **for purposes of s. 22(1)(a) of the CLRA.** [emphasis added]

Personally, we would have appreciated the Court of Appeal more directly addressing the appropriate test to apply when determining "habitual residence" under the *CLRA*, as the above statement suggests that the test is where the parties agreed to

and did reside. It is unclear whether Justice Brownstone was even required to decide the child's "habitual residence" based on (or solely on) whether the parties had a "settled intention" to live in Ontario. The *CLRA* says nothing about "settled intention". But the Court of Appeal gives no further guidance, that is, until a few weeks later when it released its decision in *Zafar v. Azeem*, 2024 CarswellOnt 183 (C.A.) ("*Zafar*").

In *Zafar*, the Court of Appeal suggests (in *obiter*) that 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.) ("*Balev*") dealing with habitual residence under the *Hague Convention* applies equally in non-*Hague Convention* cases. Recall that in *Balev*, the majority of the Supreme Court concluded (to the chagrin of many) that in deciding "habitual residence" under the *Hague Convention*, a "hybrid approach" should be adopted in Canada over the "parental intention" (or "settled intention") approach. The hybrid approach requires an analysis of "all relevant considerations arising from the facts of the case at hand". The parents' intentions are still important, but they are not the sole focus of the analysis. Under *Balev*, the court should also consider the age of the child, the focal point of his or her life, the child's links to and circumstances in Country A vs. Country B, and the child's nationality, among other things, in determining the child's habitual residence.

However, as noted above, *Balev* deals with the interpretation of "habitual residence" under the *Hague Convention*. It is not at all clear that the same analysis applies under the *CLRA* or other provincial acts, all of which have their own "baked in" definition of "habitual residence." There are conflicting decisions on the question:

- On one hand, there are cases that suggest the definition of "habitual residence" under the *Hague Convention* has no bearing on the definition of "habitual residence" under provincial statutes: *Chan v. Chow* (2001), 15 R.F.L. (5th) 274 (B.C. C.A.); *Korutowska-Wooff v. Wooff* (2004), 5 R.F.L. (6th) 104 (Ont. C.A.); *Smith v. Smith*, 2019 CarswellSask 575 (Q.B.); *Kong v. Song*, 2019 CarswellBC 464 (C.A.); *Logan v. Logan* (2022), 82 R.F.L. (8th) 193 (Ont. S.C.J.) at 26-28.
- On the other hand, there are cases that suggest that "habitual residence" has the same meaning under both: *Medhurst v. Markle* (1995), 17 R.F.L. (4th) 428 (Ont. Gen. Div.); *Rogala v. Rogala*, 2001 CarswellOnt 1513 (S.C.J.); *Solem v. Solem*, 2013 CarswellOnt 1699 (S.C.J.); *Sanders v. Aerts* (2014), 42 R.F.L. (7th) 477 (Ont. C.J.); *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.) at paras. 44 and 45.

And to make you wring *both* hands, *Zafar* appears to contradict another recent Court of Appeal decision, *Geliedan v. Rawdah* (2020), 38 R.F.L. (8th) 261 (Ont. C.A.), where the court was of the view that the determination of "habitual residence" is *not* the same under the *Hague Convention* and the provincial statutes.

To us, it makes sense that if the provincial statutes include a definition of "habitual residence" that is the definition that should apply in non-*Hague Convention* cases. They are entirely different regimes informed by different principles. The whole point of the *Convention* is to create consensus between signatory countries that parenting issues will be dealt with based on the best interests of the children. That same assumption does not apply in non-*Hague Convention* cases. Moreover, whereas the *CLRA* specifically states that a parent cannot unilaterally change a child's habitual residence, this is completely at odds with the Supreme Court of Canada's comment in *Balev* that "there is no 'rule' that the actions of one parent cannot unilaterally change the habitual residence of a child" — see para. 46. (There *should* be a rule in our opinion, but there is not.)

At least for now, remember the lessons of attornment and stop wringing your hands.