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— Franks & Zalev - This Week in Family Law

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Contents

How to Not Discourage Child Abduction

***Kalra v. Bhatia*, 2024 CarswellOnt 4551 (S.C.J.) — Agarwal J.**

Issues: Ontario — Child Abduction — Habitual Residence — Jurisdiction

In *Kalra*, the court had to consider whether it had jurisdiction under the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 (the "*CLRA*"), to determine the parenting issues regarding a child who was no longer in Ontario.

The parties moved to Canada from India with their daughter, SK (born December 2017), to start a new life. Unfortunately, that new life did not last long, and the couple separated within a few months of their arrival in Canada.

Things rapidly went downhill from there.

The Father left the rented matrimonial home on December 20, 2022. On December 25, 2022, the parties exchanged a few messages in both English and Hindi (more on that later) wherein it was suggested that SK might benefit from going to visit India for a few days. The tone of the text messages was very combative and ended with the Mother suggesting that if the Father thought the child would benefit from visiting India — then *he* ought to take her.

The Father did not see SK after he moved out of the matrimonial home. He stated that he was not "mentally stable", did not have housing, could not afford food, and had little money. When he tried to contact the Mother through a mutual friend, she told the Father that he was "dead" to her.

In February 2023, the Mother's then counsel e-mailed the Father a notarized declaration entitled "Reporting Letter of Separation." The declaration suggested that the Mother had obtained a restraining order against the Father, restraining him from contacting the Mother or the child.

When the Father requested a copy of the restraining order — there was no response — from the Mother or the Mother's lawyer.

In April of 2023 the Mother took SK to India for her brother's wedding; and SK has remained in India since then.

The Mother returned to Canada (without SK) on July 3, 2023, and remained in Canada (except for three weeks when she visited SK in India for her birthday).

The Father did not know that SK was in India. He was frightened by the restraining order and thought that if he contacted the Mother or tried to see SK, he would be arrested. He had no money for a lawyer and did not know that he could commence proceedings in Ontario for parenting time with SK.

Eventually, however, the Father saved enough money to have a consultation with counsel. His lawyer wrote to the Mother's lawyer to ask for a copy of the restraining order — no response. The Father again asked the Mother for a copy — no response. The Father's lawyer then searched the court file — and guess what — no restraining order.

Then, in or around August of 2023 the paternal grandfather saw the child in India. The Father put 2 and 2 and 2 (and maybe even another 2) together — and realized he had been duped. There had never been a restraining order.

In the meantime, the Wife had commenced several proceedings in India. A report was made to the police, and the Wife claimed that a warrant for the Father's arrest had been issued in India. The Mother had also started a claim for divorce under the *Hindu Marriage Act*, 1955. Finally, the Mother's parents sued the Father's parents in family court as well as seeking the equivalent of a restraining order against them. "Divorce — The Game the Whole Family Can Play."

On September 18, 2023, the Father commenced a family law case in Ontario seeking a divorce, parenting orders and Table child support. As he did not have his three most recent income tax returns (as he was not a Canadian taxpayer before 2022) he could not file his Application — a triumph of procedure over logic.

The Father brought an urgent motion to allow him to file his Application without the tax information and an order for substituted service, as he only had an e-mail address for the Mother, and an order that the child be returned to Ontario.

The judge reviewing that motion determined that it was not urgent. The Father was permitted to file his Application — but had to schedule a motion for substituted service "in the ordinary course." Another triumph. The issue of the child's return was not addressed, although the judge did make it clear in their endorsement that the issue of jurisdiction also had to be addressed.

The Mother was served with the materials and retained counsel. She did not file an Answer, but rather challenged jurisdiction.

The Father scheduled a motion for January 5, 2024, to return the child to Ontario.

The motion judge directed that the matter be adjourned to an Early Case Conference, as they were not persuaded that the motion should be heard before a case conference. Triumph number 3.

Then, in a sudden (and quite appropriate) burst of judicial efficiency and case management, on January 22, 2024, Justice Agarwal, directed by the Regional Senior Justice, set out a timetable to hear the matter promptly. Cross-examinations were scheduled to take place on the Affidavits the parties had filed.

The parties' Affidavits were replete with irrelevant and inadmissible evidence. Justice Agrawal provides a succinct description of what evidence should be received by a court:

> The parties' affidavits included inadmissible evidence. For evidence to be receivable, it must be "relevant, material and admissible." Evidence is relevant if "as a matter of human experience and logic, the existence of a particular fact, directly or indirectly, makes the existence of a fact more probable than it would be otherwise." Evidence is material if what it is "offered to prove is in issue" in the proceedings or assists the trier of fact in assessing other evidence. Evidence is admissible if the trier of fact is legally permitted to consider it. If the evidence is relevant and material but inadmissible, it can't be considered by the trier of fact. [See *R v. Candir*, 2009 ONCA 915 at paras. 48-49]

Although included by both parties, allegations (and evidence) as to the cheating ways of the other party (complete with pictures) was not material to the issue of jurisdiction. The Mother also put forward "legal research" done by her lawyer as an exhibit to her Affidavit. This too was not evidence and was disallowed.

The Mother also tried to introduce evidence of a Facebook chat message between herself and the Father that was in Hindi, but not translated by a certified interpreter. This was also inadmissible.

Both parties also tried to attach affidavits from third parties as exhibits to their own Affidavits. These other witnesses were not available or presented for cross-examination and, as a result, their evidence was also inadmissible.

The only issue at hand was: what was SK's habitual residence.

Justice Agarwal also helpfully reminds us that "credibility" and "reliability" are not the same. *Credibility* has to do with a witnesses' veracity, while *reliability* is about the accuracy of the witnesses' testimony. *Reliability* engages consideration of the witness's ability to accurately observe, recall and recount events. A witness whose evidence on an issue is not *credible* cannot give *reliable* evidence on the same point. Credibility, however, is not a "proxy" for reliability. A person who is completely credible might give unreliable evidence. A person without credibility generally cannot give reliable evidence. [See *R. v. G.F.*, 2021 CarswellOnt 6892 (S.C.C.) at para. 82 and *R. v. HC*, 2009 CarswellOnt 202 (C.A.) at para. 41]

In the end, Justice Agarwal found the Mother's evidence to be neither reliable *nor* credible. She had deliberately lied to the Father about a restraining order to prevent him from having time with the child. Those with pants ablaze are generally not credible (and incredible people cannot give reliable evidence).

The Father, on the other hand, was found to be reliable and credible. Why? Because he seemed honest "including about events that [were] not favourable to him." An important lesson for all.

The court then considered the actual substantive issue. The Father was essentially asking for a "chasing order" requiring that the child be returned to Ontario. The idea of a "chasing order" comes from Article 12 of the *Hague Convention on the Civil Aspects of International Child Abduction*, where the "requesting state" issues an order for return believing that a removal or retention was wrongful.

India, however, is not a party to the *Hague Convention*. As a result, the Father had to rely on the provisions of the *CLRA*. The *CLRA* sets out that the court will only exercise its jurisdiction to make a parenting order with respect to a child that is habitually resident in Ontario at the start of the application for the order.

As the *CLRA* is based on a uniform code, all Canadian jurisdictions have similar (although not necessarily *exactly* identical) jurisdiction and habitual residence provisions:

> **Jurisdiction**
>
> 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; or
>
> (b) the child is not habitually resident in Ontario, but the court is satisfied that,
>
> (i) the child is physically present in Ontario at the commencement of the application for the order,
>
> (ii) substantial evidence concerning the best interests of the child is available in Ontario,
>
> (iii) no application respecting decision-making responsibility, parenting time or contact with respect to the child is pending before an extra-provincial tribunal in another place where the child is habitually resident,
>
> (iv) no extra-provincial order respecting decision-making responsibility, parenting time or contact with respect to the child has been recognized by a court in Ontario,
>
> (v) the child has a real and substantial connection with Ontario, and
>
> (vi) on the balance of convenience, it is appropriate for jurisdiction to be exercised in Ontario.

Habitual residence

(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.

Abduction

(3) The removal or withholding of a child without the consent of all persons having decision-making responsibility with respect to the child does not alter the habitual residence of the child unless there has been acquiescence or undue delay in commencing due process by the person from whom the child is removed or withheld. [**emphasis** added]

Then, under s. 25 of the *CLRA*, where the court finds it has jurisdiction, it may decline to exercise jurisdiction if it believes it is more appropriate for jurisdiction to be exercised outside — essentially a *forum non convienens* provision.

While both parties relied on s. 40 of the *CLRA* (which allows the court, *inter alia*, to make orders returning a child to another jurisdiction), the court noted the provision was not applicable in this situation, where a child was taken *from* Ontario.

The court then considered whether or not SK has been habitually resident in Ontario. When the parties separated on December 20, 2023, the child was unquestionably living in Ontario. However, the Mother argued that SK had been living with her in India with the Father's consent or acquiescence at the time the Father started his application.

As noted by Justice Agarwal, consent or acquiescence to a move must be unequivocal, clear and concise. It cannot be based on mere inferences. While there were text messages between the parties wherein the Father suggested it might be good for the child to *visit* India for a few days, that did not amount to consent to the Mother removing SK from Ontario permanently. The Mother's argument was also considerably undermined by her own suggestion that the *Father* should have taken the child to India for a visit.

The Mother also claimed that the Father had stated to her orally that she could move to India with the child. Of particular importance was the fact that the Mother had not adduced any evidence of these oral statements in any of her Affidavit evidence (to say nothing of the aforementioned reference to the Mother's pants being on fire). Furthermore, this argument was introduced, for the first time, in her cross-examination after the Father had testified. The court did not believe the Mother's evidence on that point. (This was also an impermissible splitting of the Mother's case and a likely violation of the Rule in *Browne v. Dunn*.)

The court then considered whether the Father had acquiesced. While the Father did not take any action for almost a year after separation, the Mother was the direct cause of that. The Father was in a precarious position in terms of his immigration status in Canada and he was understandably frightened by the Mother's claim that he had a restraining order against him. He did not have the funds to obtain legal advice, and he believed the Mother (and her lawyer) when they told him there was a restraining order. The Mother could not rely on the fact that the Father took no actions when she caused the very delay of which she was now trying to take advantage.

There was also no evidence that the Mother had told the Father that she had relocated SK to India. The Father could not have acquiesced to something he did not know. Once the Father found out on his own, he moved with alacrity.

While Justice Agarwal found that the Ontario Court had jurisdiction to deal with parenting under s. 22 of the *CLRA*, his Honour then had to consider whether or not the idea of "habitual residence" in s. 22(2) of the *CLRA* had to be considered in light of the

"new" habitual residence considerations as set out 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.) (that whole "parental intention" vs. "hybrid" thing). In the case of *Zafar v. Azeem* (2024), 97 R.F.L. (8th) 3 (Ont. C.A.), the Ontario Court of Appeal held that the test for determining a child's habitual residence under the *Hague Convention* applies equally to a determination of a child's habitual residence under the *CLRA*. (For a thorough discussion of this issue, see our discussion of *Mehralian v. Dunmore* (2023), 94 R.F.L. (8th) 255 (Ont. C.A.) in the February 26, 2024, (2024-08) edition of *TWFL*.)

Justice Agarwal acknowledged — and we agree — that *Zafar* contradicts both the plain words of the *CLRA*, which defines habitual residence in a "specific non-*Hague* context" — and also contradicts the Court of Appeal's earlier decision in *Geliedan v. Rawdah* (2020), 38 R.F.L. (8th) 261 (Ont. C.A.), wherein the Court of Appeal found it was an *error* for a motion judge to apply the definition of "habitual residence" in *Balev* to the specific definition of "habitual residence" in s. 22(2) of the *CLRA* (in *Geliedan*, with respect to a claim under s. 40 of the *CLRA* — an irrelevant distinction).

However, Justice Agarwal noted that, subsequently, in *Los v. Ross*, 2024 CarswellOnt 1842 (C.A.), at para. 31, a *different* panel of the Ontario Court of Appeal affirmed that the test for determining a child's habitual residence under the *CLRA* is the "hybrid approach" from *Balev*. Then, in *Aldahleh v. Zayed*, 2024 CarswellOnt 3299 (S.C.J.), the Ontario Superior Court of Justice held that while the concept of parental intention is captured by s. 22(2) of the *CLRA*, following *Zafar*, the court must also consider the "circumstances of the children."

Unfortunately (in our view), his Honour was seduced by the trappings (and, well, the binding authority of) the Court of Appeal:

> [66] In my view, this case shows why a hybrid approach must be used to analyze a child's habitual residence. Even though SK was physically present in Ontario when she was last with both parents, [the Mother's] position is that SK never "resided" in Ontario. Again, section 22(2) defines "habitual residence" as "the place where the child resided" not the place where the child was "physically present". Both sections 22(1)(b)(i) and 23(a) use the words "physically present", which must mean something different than "resided". Different words, different meanings. See *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, at para 81. Though "asking and answering where the child last lived during what period of time" is important, other factors are also important. See *Zafar*, at para 74.

As noted in our previous annotation on *Mehralian* — We. Could. Not. Disagree. More. At the risk of repetition:

> **Jurisdiction**
>
> 22 (1) A court shall only exercise its jurisdiction to make a parenting order or contact order with respect to a child if,
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> (a) the child is **habitually resident** in Ontario at the commencement of the application for the order; or . . .
>
> **Habitual residence**
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> (2) **A child is habitually resident in the place where** the child resided in whichever of the following circumstances last occurred:
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> 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.

Is it just us, or is this not a clear definition of "habitual residence" for *CLRA* purposes? While different words certainly have different meanings — what about clearly defined statutory terms? The Ontario Legislature could change the *CLRA* definition if it wanted to. To date, it has not.

Furthermore, the use of "resided" is s. 22(2) and "physically present" in ss. 22(1)(b)(i) and 23(a) are irrelevant to this discussion. The *CLRA* refers to "physical presence" in s. 22(1)(b)(i) and 23(a) specifically in the context of making orders with respect to children that are found to be *not* habitually resident in Ontario.

Now we're all hot and bothered. This dispute is going to have to be cleared up by someone somewhere.

In any case, in this case, there was a family decision to move to Canada. The Mother came first and then supported the Father in doing so. The court found that both parties intended to come to Canada and to become permanent residents or citizens. The Mother's decision to return to Canada after moving the child to India further demonstrated that intention. As a result, considering all the circumstances, at the time the Father started his Application, the child's habitual residence was Ontario.

The court also refused to decline jurisdiction in favour of India. After citing *Nawasreh v. Ahmad*, 2023 CarswellOnt 2782 (S.C.J.) and *Club Resorts Inc. v. Van Breda* (2012), 10 R.F.L. (7th) 1 (S.C.C.), the court set out that the party raising a claim of *forum non convienens* must establish "that the alternative forum is clearly more appropriate and that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to choose an alternative forum and to deny the plaintiff the benefits of [their] decision to select a forum."

The Supreme Court listed several non-exhaustive factors in *Van Breda*:

- the locations of parties and witnesses
- the cost of transferring the case to another jurisdiction or of declining the stay
- the effect of a transfer on the conduct of the litigation or on related or parallel proceedings
- the possibility of conflicting judgments
- problems related to the recognition and enforcement of judgments
- relative strengths of the connections of the two parties
- loss of juridical advantage

His Honour also cited several other cases wherein courts have applied a "balance of convenience" test (as opposed to *forum non conveniens*) when considering section 25 of the *CLRA*. In other cases, courts have stated that it is more appropriate for a matter to be determined by a court that both has jurisdiction and a closer connection with the child. [See *Bakarat v. Andraos* (2023), 85 R.F.L. (8th) 189 (Ont. S.C.J.) at paras. 69-71; *Malpani v. Malpani*, 2022 CarswellOnt 9815 (S.C.J.) at paras. 14-23; *Castillo v. Reynoso*, 2021 CarswellOnt 14357 (S.C.J.) at paras. 49-57; and *Cook v. Rosenthal*, 2021 CarswellOnt 2925 (S.C.J.) at paras. 93-119]. Ultimately, no matter what the test is called, it entails a consideration as to whether one jurisdiction is clearly more appropriate for any one (or several) of the reasons.

However, when considering this issue under the *CLRA*, particular attention must be placed on the fact that the *CLRA* mandates a "child-centered approach based on the best interests of the child in discouraging child abduction" — see *HE v. MM* (2015), 70 R.F.L. (7th) 350 (Ont. C.A.).

His Honour ultimately preferred the balance of convenience test, informed by factors that allow the court to conclude which forum is in a better position to address the parenting issues. These factors include, according to Justice Agarwal, consideration of the place where the child has a closer connection.

The Mother argued that India was the better forum. She argued that she had started family law proceedings in India and only in India could she obtain relief connected to the matrimonial dowry, Stridhan (women's property), harassment and coercion. In essence, she was making an argument that because she had a juridical advantage in India, it was the more appropriate forum.

However, there was no evidence before the court in terms of Indian law as it relates to parenting issues. The Mother's arguments on forum focused on the claims between her and the Father, not the parenting issues.

The Mother also argued that as SK had been in India since April of 2023, she was now more closely connected to India. The child was attending school in India and her grandparents lived there. The court rejected this argument, stating that those connections arose only because the Mother unlawfully abducted SK. If a parent is allowed to wrongfully remove a child from Ontario, settle the child in a new place and then successfully argue that the new place is the better forum to litigate the parenting issues, that would undermine the jurisdiction analysis and risk encouraging child abductions from Ontario.

As a result, the court refused to decline jurisdiction in favour of India.

Things then took an(other) unexpected turn.

While the court determined that Ontario was, indeed, the proper jurisdiction to determine parenting issues, Justice Agarwal found that he did not have jurisdiction to order that SK be returned to Ontario:

> [89] [The Father] urges me to make a chasing order. I'm not prepared to do so, in part because I'm not persuaded that I have jurisdiction to make such an order. As discussed above, section 40 of the *CLRA* doesn't apply because SK has been wrongfully removed *from* Ontario. The orders under section 37(3) can be used to "secure the prompt, safe return" of a child to Ontario but chasing orders aren't included as possible relief. Section 28(1)(c) allows me to make an order prohibiting a party from removing a child from Ontario without the consent of another party or an order of the court but that order is incidental to a parenting order.
>
> [90] I wasn't provided any statutory authority giving me express jurisdiction to order the return of SK to Ontario.
>
> [91] I acknowledge that our court has, in other cases, made chasing orders. See, e.g., *Malpani*. But I haven't been provided any caselaw in which the court's jurisdiction was expressly considered. Perhaps, in those cases, the respondent consented to a chasing order if the court found jurisdiction. [The Father] asks me to use the court's *parens patriae* jurisdiction because there's a gap in the legislation that would entitle the court to make such an order in SK's best interests.
>
> [92] Even if such a gap existed, I don't know if ordering [the Mother] to return SK to Ontario is in SK's best interests. Perhaps the court will authorize SK's relocation to India (and order that [the Father's] exercise of parenting time and decision-making responsibility should reflect SK's new place of residence). Again, the motion before me wasn't to determine SK's best interests on these issues. It would be premature to order [the Mother] to return SK to Ontario before the court has a hearing to determine SK's best interests.
>
> [93] As a result, the appropriate order is that [the Mother] should answer the case, and this application should proceed to trial quickly:
>
> (a) [the Mother] shall serve an answer and an affidavit in Form 35.1 on [the Father] on or before April 17, 2024; and
>
> (b) the parties shall attend a virtual case conference before me on April 23, 2024, at 9am.
>
> [94] The parties should operate on the basis that the trial of this application may be heard during the trial sittings starting May 12, 2024.

We respectfully disagree.

Ontario was found to be SK's habitual residence. And a court in Ontario must now make a determination as to what is in SK's best interests. How can a court in Ontario do so without the child being present in Ontario; and how can it be that Ontario does not have jurisdiction to order the Mother to return SK to Ontario, the jurisdiction determined to be her habitual residence?

Furthermore, s. 28 of the *CLRA* specifies the following possible relief where a parent has sought a parenting order:

Parenting orders and contact orders

28 (1) The court to which an application is made under section 21,

(a) may by order grant,

(i) decision-making responsibility with respect to a child to one or more persons, in the case of an application under clause 21(1)(a) or subsection 21(2),

(ii) parenting time with respect to a child to one or more parents of the child, in the case of an application under clause 21(1)(b), or

(iii) contact with respect to a child to one or more persons other than a parent of the child, in the case of an application under subsection 21(3);

(b) **may by order determine any aspect of the incidents of the right to decision-making responsibility, parenting time or contact, as the case may be, with respect to a child**; and

(c) **may make any additional order the court considers necessary and proper in the circumstances, including an order,**

. . .

(iii) **prohibiting a party from changing the child's residence**, school or day care facility without the consent of another party or an order of the court,

(iv) **prohibiting a party from removing the child from Ontario** without the consent of another party or an order of the court . . . [**emphasis** added]

Finally, s. 19(c) of the *CLRA* specifies that one of the purposes of the statute is to discourage child abduction. How, we ask, does this decision do that?

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