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— Franks & Zalev - This Week in Family Law

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Consent, Acquiescence & Smoked Brisket

Thomas v. Thomas, 2024 CarswellOnt 12987 (C.A.) — Nordheimer, Gomery and Wilson JJ.A.

The *Hague Convention on the Civil Aspects of International Child Abduction*. It used to be user friendly. It used to be so easy (relatively speaking) to determine habitual residence under Article 3 using the "parental intention" model. And a predictable interpretation of "habitual residence" acted as a strong deterrent to child abduction.

Then came *Office of the Children's Lawyer v. Balev* (2018), 5 R.F.L. (8th) 1 (S.C.C.) and the adoption of the "hybrid model" — and predictability went out the window. It now behooves litigants to "take their shot" — because, in the words of The Great One, "you miss 100% of the shots you don't take." Now we know that many will disagree with us, and we're willing to take the fight — but we're bringing Justices Moldaver, Côté, and Rowe to the rumble. As they noted in dissent:

> [152] The result of this approach [the hybrid model], we fear, is to grant judges unbridled discretion to consider or to disregard whatever they deem to be appropriate, leading to outcomes that may be as inconsistent as they are unpredictable. The effects will be felt most acutely by parents and potential litigants who will lack any discernable guidance as to how they should order their family affairs. This is particularly important in the context of educational exchanges, family visits, or other forms of international travel, where the majority's approach effectively vitiates the purpose of time-limited consents. If one parent can override such an agreement by presenting competing evidence based on "all relevant factors", then the certainty provided for by time-limited consent agreements is only ever illusory. . . .
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> [153] In summary, we view the majority's approach as embedding indeterminacy in a context that simply cannot tolerate it. Multi-factor balancing tests can play a helpful role in certain contexts. Unfortunately, this is not one of them: the *Convention* requires swift and predictable decisions, and the hybrid model provides neither. As we turn to below, this case convincingly illustrates the comparative advantages of the parental intention approach.

Don't believe us — or them? Just see what happened in *K.F. v. J.F.* (2022), 76 R.F.L. (8th) 36 (N.L. C.A.), as we reported in the December 12, 2022 (edition of *This Week in Family Law*.

At least the other provisions of the *Hague Convention* continued to be interpreted fairly strictly and restrictively, given the purpose of the *Convention*. In Article 13, the meaning of a "grave risk of physical or psychological harm" was reasonably clear. As was the notion of consent or acquiescence. And in *Thomas*, the Court of Appeal ensured that the meaning of "consent or acquiescence" *remained* clear.

The appellant/husband/father lived in Texas, where he was born and raised. The respondent/wife/mother lived in Ontario.

The parties met online in 2019 and were married in Toronto in February, 2020. After the marriage, the husband returned to Texas and the wife stayed in Ontario — an odd start to the marriage.

The wife visited the husband in Texas in July 2020. While there, a child was conceived. The wife then returned to Ontario.

The parties lived together in Ontario from September 2020 to November 2020. However, the call of the South was too strong — and the parties moved to Texas and built a life together. The husband returned to Texas in December 2020, and the wife moved to Texas in July 2021, after the birth of the child in March 2021.

The child had dual Canadian and American citizenship. The husband was employed in Texas, and the wife applied for her permanent residence status and employment authorization so she could work in Texas.

Then the marriage began to falter.

The wife's parents bought a plane ticket for the wife and the child to go to Ontario. The wife flew to Ontario with the child on June 5, 2023, but without notifying the husband of her intentions.

Upon arriving in Toronto, the wife texted the husband to advise him that she had returned to Ontario with the child and that she did not plan to return to Texas.

A variety of communications between the parties ensued; many were by text message (one of which said, "just come home"); others by telephone. But they all tended to show the discord between the parties and the husband's upset at what the wife had done.

The husband served his application on November 13, 2023. The application proceeded on the basis of affidavit evidence on which the parties were cross-examined before the application judge.

The judge in the court below had to make findings of credibility given what she called the "diametrically opposed evidence" and positions of the parties. The application judge also noted that she did not have the benefit of any affidavit evidence from any third parties to shed light on the matter. The court below felt that, "[n]either party was particularly compelling. They each had inconsistencies in their evidence, which were exposed in cross-examination."

But notwithstanding that finding, the application judge concluded that the mother had established — "on clear and cogent evidence" — that the husband had unequivocally acquiesced to the relocation of the child to Toronto.

It was clear to the Court of Appeal that the court below had failed to correctly *apply* the legal principles she had properly *cited*. In particular, she did not appreciate the degree of proof that is required for a proper determination of whether the husband had acquiesced to the child's removal from Texas such that Article 13(a) was in play.

Drawing on cases like *Katsigiannis v. Kottick-Katsigiannis* (2001), 18 R.F.L. (5th) 279 (Ont. C.A.) and *Ibrahim v. Girgis* (2008), 48 R.F.L. (6th) 1 (Ont. C.A.), Justice Nordheimer, for a unanimous Court of Appeal, helpfully set out principles that apply in *Hague Convention* cases as they relate to the issue of consent and acquiescence:

> (i) The object of the *Hague Convention* is to deter abductions of children and to secure the prompt return of children where abductions occur;
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> (ii) "consent" and "acquiescence" as used in Article 13(a) should be given their ordinary meaning;
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> (iii) Acquiescence is a **question of the actual subjective intention** of the wronged parent (not the outside world's perception of those intentions);
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> (iv) The onus rests on the abducting parent to establish acquiescence by the objecting parent;

(v) Acquiescence must be established on **clear and cogent evidence**;

(vi) To be established, it must be shown that the acquiescence was **unequivocal**; and

(vii) The **standard for finding acquiescence is high**.

There was no question in this case that the child's habitual residence was Texas. And there was no question that the wife had removed the child from his habitual residence without the knowledge or consent of the husband.

Here is where things went a bit wonky. The court below found that acquiescence had been established because, "nowhere in writing did [the husband] explicitly state that he did not consent to [the child's] removal. Nowhere in writing did he demand that the [wife] return [the child] to Texas."

Isolating those statements, the problems became clear: First, this statement directly contradicts what the application judge had said earlier in her decision — that it was "clear" that the husband "did not consent" to the relocation to Ontario. Second, in noting that the husband did not explicitly state he did not consent, the court below reversed the onus, suggesting the husband had to negate acquiescence rather than the wife prove it. The burden was on the wife to prove acquiescence. There was no burden on the husband to prove he did not acquiesce.

The court below also placed considerable weight on the "just come home" text message from the husband because that text did not explicitly demand that the child be returned. The Court Appeal found it an error to determine that this text message did not also refer to the child: "Common parlance would suggest that when the [husband] asked the [wife] to come home, it would carry the implicit assumption that the child, who was three years old, would accompany the [wife's] return."

The Court of Appeal also determined that the court below erred by not accepting the fact that the husband had commenced a custody application in Texas — but not served it — as evidence of him not having acquiesced. First, there was evidence that the husband did not serve the application as he was hoping to reconcile with the wife, and serving a claim rarely motivates reconciliation. More important, however, as acquiescence is determined based on the *subjective intention* of the objecting parent, the issued yet unserved application was clearly a relevant consideration.

Nor did the Court of Appeal accept, as did the court below, that the husband visiting the child in Ontario was evidence of acquiescence.

The Court of Appeal also took the court below to task for this statement at para. 95 of the decision below:

> [95] Applying the standard of **clear and cogent evidence**, I find on the **balance of probabilities** that the [husband] subsequently **unequivocally acquiesced** to the removal and retention of [the child] in Ontario. Through his subsequent actions and inactions, the [husband] subsequently **implicitly consented** to the removal and retention of [the child] once the [wife] notified him of this event on the same day the removal took place. [**emphasis** added]

If you have been paying attention, there are some problems with a finding that the husband had unequivocally but implicitly acquiesced on the balance of probabilities. The balance of probabilities standard is inconsistent with the idea that the "standard for finding acquiescence is high": *Jackson v. Graczyk* (2007), 45 R.F.L. (6th) 63 (Ont. C.A.). It is also inconsistent with the requirement that there be "clear and cogent evidence" of acquiescence. Clear and cogent evidence does not require a balancing act — it should be *clear* and *cogent*. A finding that the husband had "implicitly consented" runs afoul of all three parts of this test: the need for (1) clear and cogent evidence to meet the (2) high standard for a finding of (3) clear and unequivocal acquiescence.

Appeal allowed. At least there's good BBQ in Texas while the parties duke this one out.

Sometimes it is Better to Act Stupid

J.L. v. Nova Scotia (Minister of Community Services) (2024), 3 R.F.L. (9th) 311 (N.S. C.A.) — Bourgeois J.A.

The parents, J.L and R.S., were common-law partners with four children who first became the subject of a child welfare investigation when they lived in Newfoundland. The parents left Newfoundland and moved to Nova Scotia in the midst of that investigation. At the time of the hearing, there were four children: MA, born in 2016; MI, a four-year-old boy; and twins born in the fall of 2022.

The lengthy trial decision [*Nova Scotia (Minister of Community Services) v. R.S.*, 2023 CarswellNS 1025 (S.C.)] details the saga of the family. The findings by Newfoundland child protection authorities (later confirmed by child protection services in Nova Scotia) alleged family violence, substance abuse, emotional abuse and neglect, corporal punishment, behavioural issues at school, and a host of other "issues."

It appears from the reasons below that the Nova Scotia authorities took steps to assist the family with numerous interventions. Unfortunately, there were no discernable improvements, and with continued housing insecurity, the court ordered that all four children be placed in the Director's permanent care and custody with no parental contact — the "capital punishment" of child protection law.

The parents appealed and brought a motion to obtain state-funded counsel. This is that decision.

The seminal case about state-funded counsel is *New Brunswick (Minister of Health & Community Services) v. G. (J.)* (1999), 50 R.F.L. (4th) 63 (S.C.C.), where Justice Lamer opined that state intervention by means of child protection proceedings may give rise to an obligation to provide state-funded counsel to parents:

> [2] . . . When government action triggers a hearing in which the interests protected by s. 7 of the *Canadian Charter of Rights and Freedoms* are engaged, it is under an obligation to do whatever is required to ensure that the hearing be fair. **In some circumstances, depending on the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent, the government may be required to provide an indigent parent with state funded counsel.** Where the government fails to discharge its constitutional obligation, a judge has the power to order the government to provide a parent with state-funded counsel under s. 24(1) of the *Charter*through whatever means the government wishes, be it through the Attorney General's budget, the consolidated funds of the province, or the budget of the legal aid system, if one is in place.
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> . . . . .
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> [61] **I have little doubt that state removal of a child from parental custody pursuant to the state's *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of the parent.** The parental interest in raising and caring for a child is, as La Forest J. held in *B. (R.)* [citation omitted] at para. 83, "an individual interest of fundamental importance in our society". Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, **is a gross intrusion into a private and intimate sphere. Further, the parent is often stigmatized as "unfit" when relieved of custody. As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct.** [**emphasis**added]

While no one would dare argue with Justice Lamer, even where s. 7 *Charter*interests are engaged, the provision of state-funded counsel is by no means guaranteed — there are some "hoops." A parent must first establish (with evidence) that they do not have the financial means to retain counsel and that they have exhausted the possibility of obtaining representation through other sources — again, with evidence. Bare and unsupported statements will not, and should not, suffice.

Where parents have convinced the court as to the above-noted criteria, the next — and most important — question is whether the appointment of counsel is required to ensure a fair hearing. Again, we return to the words of Justice Lamer:

> [86] I would like to make it clear that the right to a fair hearing will not always require an individual to be represented by counsel when a decision is made affecting that individual's right to life, liberty, or security of the person. In particular, a parent need not always be represented by counsel in order to ensure a fair custody hearing. The seriousness and complexity of a hearing and the capacities of the parent will vary from case to case. **Whether it is necessary for the parent to be represented by counsel is directly proportional to the seriousness and complexity of the proceedings, and inversely proportional to the capacities of the parent.** [**emphasis** added]

Ah yes. The old "double proportionality test." But it certainly makes intuitive sense.

These principles apply both at trial and on appeal, however, for an appeal, the merits of the appeal must also be considered: *D.B. v. A.B.* (2016), 78 R.F.L. (7th) 253 (N.S. C.A.); *K.P. v. Newfoundland and Labrador (Child, Youth and Family Services)* (2017), 96 R.F.L. (7th) 84 (N.L. C.A.).

To summarize, then, when considering a motion for state-funded counsel on an appeal of an order issued under child protection legislation (here, the *Nova Scotia Children and Family Services Act*, S.N.S 1990, c. 5) the court should consider:

- Whether the state action in the matter under appeal engages the appellant's interests under s. 7 of the *Charter*. If not — "buh-bye" — the motion will be dismissed;

- The merit of the appeal. Specifically, based on the material available, can it be said the appeal is not frivolous? If the parent cannot demonstrate the merits of the appeal meet this low threshold — "buh-bye" — the motion will be dismissed;

- Is the appellant, due to their financial circumstances, unable to secure a lawyer and have they exhausted other avenues to obtaining legal representation? An appellant must provide evidence of their financial circumstances along with their efforts to obtain legal representation through Legal Aid and other sources. And, if the parent fails to meet this criterion, you guessed it — "buh-bye" — the motion will be dismissed;

- Can the appellant obtain a fair appeal without state-appointed counsel? In determining this question, it is necessary to examine the seriousness of the matter, the complexity of the issues and the capabilities of the appellant parent(s). Only where a parent would be precluded from advancing and obtaining a fair appeal, is the appointment of state-funded counsel to be awarded.

In this case, the Attorney General conceded that the parents' rights under s. 7 of the *Charter* were engaged. Reasonable concession.

With respect to the merits of the appeal, Justice Bourgeois did not have a ton to go on. She had the Notice of Appeal, the reasons below, two affidavits filed by J.L. and R.S., and submissions on the motion.

However, based on those materials, her Honour understood the submission that the trial judge had materially misapprehended the evidence before her and may have demonstrated bias. As these two grounds of appeal, if proven, would result in the appeal being allowed, they were not frivolous, even though the Attorney General raised valid arguments regarding the strength of these grounds.

The next consideration was the financial means of the appellants and their attempts to retain counsel. This is where the parents got into some trouble.

With respect to their financial means, the only documentation provided by the parents in support of their claim of impecuniosity were three months of bank statements. However, the Attorney General came to their rescue and conceded that the parents did not have the financial resources to retain private counsel.

However, her Honour found that the evidence before her did not establish that the parents had exhausted all avenues in obtaining legal counsel. As noted by her Honour:

• The parents had established that their application submitted to Nova Scotia Legal Aid for counsel on the appeal was declined — but, both acknowledge that they could have appealed that decision but chose to not do so;

• The parents provided an explanation for why they did not pursue the statutory appeal process. Simply, they were distrustful of the representation they would receive from any lawyer employed by Nova Scotia Legal Aid. They believed that the Nova Scotia Legal Aid Commission was aligned with the Minister and would not represent their interests or that of their children. J.L recounted his experience that Legal Aid lawyers were "incompetent." The parents said they would be willing to accept representation from a private lawyer who accepted a Certificate from Nova Scotia Legal Aid, but only if they could be assured of that lawyer's credibility; and

• The Attorney General noted that if the court ordered it to provide counsel, it would be the Nova Scotia Legal Aid Commission that would fulfill that obligation — the very same entity the parents did not want to represent them.

This was an inadequate evidentiary basis to conclude that all lawyers that work at Nova Scotia Legal Aid would be incapable of representing them competently and fairly. As held by her Honour:

> [21] **This Court regularly expects on a motion for state-funded counsel for the appellant to have applied to Nova Scotia Legal Aid and to have appealed to the Appeal Committee, if their application for representation is denied.** ***If an appellant has failed to take these steps, the motion is dismissed.*** Based on the material before me, I cannot conclude it would be appropriate to take a different approach in this matter. Accordingly, the motion for state-funded counsel will be dismissed on this basis. [***emphasis*** added]

Although *obiter*, her Honour then went on to consider the fairness of the appeal, noting that even had the parents satisfied the court that they had exhausted all avenues to retain counsel, the motion would still fail. This was because, even without counsel, the parents would be able to have a fair appeal.

There was no doubt to the seriousness of the appeal. What could be more serious than losing one's children. In fact, the Attorney General even acknowledged the seriousness of the matter before the court.

In considering the complexity of the appeal, her Honour noted that the focus of an appeal is typically much narrower than a trial; the Court of Appeal is asked to determine whether, based on a review of the record and relevant legal principles, an error or errors occurred which require appellate intervention.

All of the parents' grounds of appeal tended to be with respect to judicial bias and a misapprehension of evidence, areas of the law that are not terribly complex and that are well-defined in the case law. Therefore, her Honour was not convinced as to the complexity of the appeal.

As to the respective capacities of the parents, having had the benefit of reviewing the motion materials filed by the parents and hearing from them while being cross-examined and in presenting argument, Justice Bourgeois was impressed with both of their abilities to communicate clearly and their grasp on the issues they wish to advance on appeal. Neither party had any problem with self-expression and explaining the alleged errors. And their written submissions included detailed analysis, presented in a coherent and comprehensive manner. (Sounds like they may be better than us.)

Therefore, the appointment of state-funded counsel was also not necessary for the parents to have a fair appeal. The parents had a firm grasp on the issues they wished to advance and had the capabilities to do so.

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