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

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Breaking News—*Auer v. Auer*, 2024 CarswellAlta 2816, 2024 SCC 36 (S.C.C.)

In the May 6, 2024 (2024-17) edition of *TWFL*, we discussed the Supreme Court of Canada's hearing of Mr. Auer's appeal of the Alberta Court of Appeal's decision in *Auer v. Auer* (2022), 81 R.F.L. (8th) 338 (Alta. C.A.).

Mr. Auer argued before the Supreme Court that the *Federal Child Support Guidelines*, SOR/97-175 were *ultra vires*. Mr. Auer argued that the Governor in Council exceeded its authority under the *Divorce Act* when enacting the *Guidelines* because they require a payor parent to pay a greater share of the child-related costs than the recipient parent.

On November 8, 2024, the Supreme Court dismissed Mr. Auer's appeal. Justice Côté wrote as follows (at paras. 5-6):

> The *Child Support Guidelines* are *intra vires* the GIC. They fall within a reasonable interpretation of the scope of the GIC's authority under s. 26.1 of the *Divorce Act*, having regard to the relevant constraints. Section 26.1(1) of the *Divorce Act* grants the GIC extremely broad authority to establish guidelines respecting child support. This authority is constrained by s. 26.1(2) of the *Divorce Act*, which requires that the guidelines be based on the principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute. The *Child Support Guidelines* respect this constraint.
>
> Contrary to Mr. Auer's submissions, in selecting an approach to calculating child support, the GIC was authorized to: (1) not take into account the recipient parent's income; (2) assume that parents spend the same linear percentage of income on their children regardless of the parents' levels of income and the children's ages; (3) not take into account government child benefits paid to recipient parents; (4) not take into account direct spending on the child by the payer parent when that parent exercises less than 40 percent of annual parenting time; and (5) risk the double counting of certain special or extraordinary expenses. Each of these decisions falls squarely within the scope of the authority delegated to the GIC under the *Divorce Act*.

If you are interested in better understanding the mechanics of the *Child Support Guidelines*, we encourage you to read the Supreme Court's decision in full, as the above characterization of the *Guidelines* is somewhat misleading. For example, while the recipient parent's income is not required to calculate the table amount under the *Guidelines*, the recipient parent's income is not "ignored" (which is what Mr. Auer argued). As Justice Côté explains in her decision, the formula for calculating the table amounts takes into account the ways in which the recipient parent contributes to the financial needs of the child by assuming that, because the child resides with the recipient parent, that parent will support the child in a manner that is proportionate to their income.

While the outcome of the appeal is not surprising, it is a relief. The next time you have a client who is refusing to pay the table amount of child support when they do not fall within one of the exceptions set out in the *Guidelines*, you can hand them a copy of the Supreme Court's decision in *Auer* and perhaps a Notice of Change in Representation.

When Seeking Refuge is Just not Enough

A.A. v. Z.M., 2024 CarswellOnt 15849 (Ont. C.A.) — Nordheimer J.A.

Issues: Ontario — Return of a Child to a Non-*Hague Convention* Signatory

These were dueling motions before a single judge in the Ontario Court of Appeal about the return of a child to Bangladesh, a non-*Hague Convention* signatory — essentially an application of *F. v. N.* (2022), 78 R.F.L. (8th) 253 (S.C.C.) — but overlayed with a refugee application twist.

The mother was looking to stay (pending appeal) an Order that the child of the marriage (aged 13 months) be returned to Bangladesh. She was also seeking an order initializing the proceeding (I guess we know that she was successful on that one); and granting a limited publication ban. The father brought a cross-motion asking that the mother post security for costs for her appeal.

The case was about a Bangladeshi family who travelled on round-trip tickets to Canada for a three-week vacation on May 2, 2024. They travelled on visitor visas and were scheduled to return to Bangladesh on May 25, 2024.

Once in Canada, the mother expressed her strong wish for the family to remain in Canada permanently by seeking asylum here. The father opposed; their home was in Bangladesh, he had secure employment and stable financial circumstances there. The parties discussed extending their trip in Canada by a week, but the mother then unilaterally filed a refugee application. The parties argued. The mother called the police. She made allegations against the father. The father was arrested.

The father filed an urgent motion seeking that the child be returned to Bangladesh and for interim parenting time. He also started a proceeding in Bangladesh claiming the return of the child and custody.

The mother sought several adjournments, and the motion was eventually forced on by the court and heard on August 22, 2024.

The father was successful — he obtained an order requiring the child to be returned to Bangladesh.

The motion judge — Justice Sharma — gave detailed reasons for the return Order. Of particular importance was that the mother had not filed any material in response to the father's motion; not the most effective way to put your case forward. To remedy the situation, the motion judge allowed the mother to give *viva voce* evidence.

In her evidence, the mother acknowledged that the child was born in Bangladesh and has always lived in Bangladesh. She also acknowledged that she had family in Bangladesh who provided her with support. The motion judge also noted that the mother did not give any evidence that the child would suffer harm — to say nothing of "serious harm" — if she was returned to Bangladesh.

While the mother gave evidence that she started a refugee claim in Canada for her and the child, she did not say how she was able to do so without the father's consent. Her oral evidence also did not offer any information as to the factual foundation for the refugee claim.

At the time of the motion before Justice Nordheimer, the mother and child were living in a shelter. The mother had no support in Canada and no apparent source of income.

The court below recognized that Bangladesh is not a signatory to the *Convention on the Civil Aspects of International Child Abduction*, Can. T.S. 1983 No. 35 (the "*Hague Convention*"). Therefore, the governing law for the motion was the *Children's*

Law Reform Act, R.S.O. 1990, c. C.12 (the "*CLRA*") and *F. v. N.* (2022), 78 R.F.L. (8th) 253 (S.C.C.), where the Supreme Court of Canada stated:

> [59] In sum, parents whose children have been abducted from a non-party country can apply for their return pursuant to s. 40 of the *CLRA*. Unless the abducting parent demonstrates that Ontario courts should make parenting orders on any one of the four bases outlined above (ss. 22(1)(a) or (b) or 23, or *parens patriae* jurisdiction), the courts should decline to exercise jurisdiction with respect to a child.

The referenced provision of the *CLRA* is similar to other such provisions in provincial statutes across the country. Don't believe us? Have a look:

> **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.
>
> **Serious harm to child**
>
> 23 Despite sections 22 and 41, **a court may exercise its jurisdiction to make or vary a parenting order or contact order with respect to a child if**,

(a) the child is physically present in Ontario; and

(b) the court is satisfied that the child would, on the balance of probabilities, suffer serious harm if,

(i) the child remains with a person legally entitled to decision-making responsibility with respect to the child,

(ii) the child is returned to a person legally entitled to decision-making responsibility with respect to the child, or

(iii) the child is removed from Ontario. [**emphasis** added]

The court below held — properly — that neither ss. 22(1)(a) nor (b) were in play. He also concluded that s. 23 did not apply because there was no evidence that the child would suffer serious harm if returned to the father's care in Bangladesh.

These findings were, to Justice Nordheimer, unassailable.

Therefore, the mother's claim for a stay focussed almost exclusively on the decision of the Court of Appeal in *A.(M.A.) v. E.(D.E.M.)*, 2020 CarswellOnt 10620 (Ont. C.A.), leave to appeal refused, 2021 CarswellOnt 2398 (S.C.C.). The mother's argument was that, in the face of an unresolved refugee claim, no return order should *ever* be made pending the resolution of the refugee claim — even if the record showed no merit to the refugee claim. This was an aggressive argument to make, allegedly supported by a few specific statements made in *A.(M.A.)* including:

[63] Refugee protection is not limited to those granted refugee status but **applies equally to asylum seekers.**

. . . . .

[68] **Children are entitled to protection as they seek asylum. The application judge erred by ordering their return under s. 40(3) of the *CLRA* before the determination of the refugee claim.**

. . . . .

[72] **A return order must not be made under s. 40(3) in the face of a pending refugee claim.** [**emphasis** added]

While these select paragraphs did seem to offer support for the mother's position, Justice Nordheimer was of the view that the mother's argument required far too literal an interpretation of those paragraphs:

[13] That decision [*A. (M.A.)*] cannot be read separately from the factual foundation on which it was based. **In that case, there was evidence of serious harm to the mother and the children arising from an abusive relationship that caused them to leave their home country of Kuwait.** Indeed, there was evidence directly from one of the children (age 11) of the prospect of harm to him from his father if he was returned to Kuwait. **There was also evidence that the mother had taken the children from Kuwait, brought them to Canada, and immediately made an asylum claim.**

[14] This case is fundamentally different on its facts. The mother, father, and child came to Canada for a three-week holiday. There was no discussion of seeking asylum until some time after they arrived. In addition, it is unclear when the mother made her refugee claim. It was not made on May 2 when they arrived. In fact, it had not been made by July 4, when the matter was before Horkins J. because, in reference to the potential refugee claim, Horkins J. notes in her endorsement that "She has not commenced this process." [**emphasis** added]

In the case before Justice Nordheimer (and Justice Sharma below), there was simply no material foundation advanced for the refugee claim. It lacked supporting evidence and substance — could this be on account of the fact that the mother was in a foreign country and unrepresented? Of course. But it cannot be that the very fact of a refugee claim, no matter how unsubstantiated, is sufficient to prevent a child from being returned to their established habitual residence.

A.(M.A.) does not stand for the "blanket proposition" that — whenever a refugee claim is made — the court must delay exercising its *CLRA* jurisdiction. Were that the case, it would be an easy thing (little more than the completion of some paperwork) to delay the return of an abducted child to the jurisdiction of their habitual residence for months — if not *years*. As noted by Justice Nordheimer:

> [18] If the child in this case was required to stay in Canada while that process unfolds, she could well wind up spending more time in this foreign country than she has in her home country. If that were to occur, it would then add an additional level of complication as to the best interests of the child if a determination was subsequently made denying the refugee claim. The child would then be returned to her home country with less connection to it than to this country.

[See also *I. (A.M.R.) v. R. (K.E.)* (2011), 2 R.F.L. (7th) 251 (Ont. C.A.) which also (albeit in the context of a *Hague Convention* signatory) does not suggest that a refugee claim requires a "full stop" to the exercise of jurisdiction in Canada.]

And, then, should it turn out that the hybrid definition of "habitual residence" from *Office of the Children's Lawyer v. Balev* (2018), 5 R.F.L. (8th) 1 (S.C.C.) "infects" the "baked in" definition of "habitual residence" in the *CLRA* [which we will have to wait to learn when the Supreme Court of Canada hears and decides the appeal in *Mehralian v. Dunmore* (2023), 94 R.F.L. (8th) 255 (Ont. C.A.), application for leave to appeal to SCC allowed 2024 CarswellOnt 8709] — hang on, because all bets are off. See what happened in *K.F. v. J.F.* (2022), 76 R.F.L. (8th) 36 (N.L. C.A.); *Laranjeira e Silva v. Virco* (2024), 100 R.F.L. (8th) 257 (B.C. C.A.); *OM v. ED*, 2019 CarswellAlta 2718 (Alta. C.A.); and *J.M. v. I.L.* (2020), 39 R.F.L. (8th) 263 (N.B. C.A.).

Clearly, there must be a middle ground. On the one hand, a genuine refugee claimant is entitled to protection. On the other hand, an application for the return of a child cannot be thwarted solely on account of a refugee claim. Where does that middle ground lie? Hard to say; but it makes sense that the refugee claim being used to stay a return application must pass some minimal evidentiary threshold — perhaps a *prima facie* successful application for refugee status.

Here, the mother did not meet the test for a stay. While there was arguably a serious issue for appeal — the debate over the scope of the decision in *A.(M.A.)* — the mother could not show she would face irreparable harm without a stay. The alleged irreparable harm was that the mother and child would lose their refugee claim if they return to Bangladesh; but there was no requirement that the mother return to Bangladesh. Only the child was ordered to return. Therefore, the mother could have stayed in Canada and sought custody through the courts of Bangladesh if her refugee claim was ultimately successful.

Furthermore, without "a scintilla of evidence" to support her refugee claim, irreparable harm could not arise; irreparable harm cannot arise from the loss of a proceeding without any apparent merit.

Justice Nordheimer was also not persuaded that the mother would suffer irreparable harm if the child was returned to Bangladesh as there was no "guarantee" that the father would return the child to Ontario if the appeal was successful. However, the father had undertaken to return the child to Ontario if the appeal was successful. And while such an undertaking does not have the force of law or offer any guarantees — undertakings were certainly viewed as sufficient by the Supreme Court in *F. v. N.* where it was held that protective measures such as a party's undertaking can attenuate the risk of harm.

With regard to the mother's claim to initialize the proceeding, the father weakly opposed.

While the Open Courts Principle directs that all court proceedings be open to the public, in the words of Justice Nordheimer, there is "a recognized exception to that requirement and that is where the interests of children are involved." While we do not agree that there is, as of yet, a "recognized exception" in such circumstances (not to suggest that maybe there should be), we do recognize initialization does regularly occur in such cases and that no serious injury is done to the Open Courts Principle by initializing in a case like this.

The court also granted an order banning the publication of any information contained in the court record that might tend to identify the parties or the child.

In return, the father was asking for an Order that the mother post security for costs of $30,000.

In deciding motions for security for costs, judges are to consider the justness of the order sought in all the circumstances of the case, with the interests of justice at the forefront: *Yaiguaje v. Chevron Corporation*, 2017 CarswellOnt 16763 (Ont. C.A.) at para. 22.

No security was appropriate here. While the mother did not have significant assets in Ontario, the mother was entitled to pursue her appeal and requiring her to post security for costs would preclude her from doing so. That was not in the interests of justice.

The motion for security for costs was dismissed.

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