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

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Family Law News

In a bit of a surprise (well, it was a surprise to *us*, anyway), on Thursday, January 9, 2020, the Supreme Court of Canada granted leave to appeal from the decision of the Ontario Court of Appeal in *Colucci v. Colucci* (2019), 26 R.F.L. (8th) 259 (Ont. C.A.). *Colucci* concerned a delinquent payor who had his child support obligations retroactively reduced many years into the past on application under section 17 of the *Divorce Act*.

The Ontario Court of Appeal allowed the wife's appeal, finding that the motion judge erred in failing to apply the governing principles of *D.B.S. v. S.R.G.* (2006), 31 R.F.L. (6th) 1 (S.C.C.) and *Gray v. Rizzi* (2016), 74 R.F.L. (7th) 272 (Ont. C.A.). Specifically, the Court of Appeal held that the motions judge erred by: distinguishing *D.B.S.* (as not applying to claims to retroactively reduce child support); and not following *Gray*, where the Court of Appeal specifically modified the principles in *D.B.S.* to apply to claims to retroactively reduce support.

As not all provinces follow the same test when considering claims for retroactive reductions in child support (or the functional equivalent of expunging arrears), I suspect the Supreme Court granted leave so that it could unify the approach to such claims across Canada.

Notably, leave in *Colucci* was granted hot on the heels of the Supreme Court of Canada allowing the appeal in *Michel v. Graydon*, 2019 CarswellBC 3375 (S.C.C.) *from the bench* on November 14, 2019 (with reasons to follow on the issue of whether a court can retroactively vary a child support order *after* the child has ceased to be a child for support purposes) - a *highly* unusual occurrence.

And only 18 months earlier (April 20, 2018), the Supreme Court released its decision in *Office of the Children's Lawyer v. Balev* (2018), 5 R.F.L. (8th) 1 (S.C.C.).

That is three significant SCC family law "happenings" in under two years. Could a successful leave application in a mobility case be in our future? (Given the changes to the *Divorce Act* effective July 1, 2020, we suspect not.)

More Late-Breaking Family Law News

Last Thursday (January 16, 2020) the Supreme Court of Canada refused leave to appeal in *Petersoo v. Petersoo* (2019), 29 R.F.L. (8th) 309 (Ont. C.A.), a mobility case where the Arbitrator at first instance allowed a child to move from Toronto to Guelph, Ontario.

The father's appeal to the Superior Court of Justice was allowed on the basis that there was fundamental procedural unfairness in the process causing a denial of natural justice. The father claimed that he did not have adequate notice of the mother's intent to move. That result at the Superior Court of Justice was then reversed by the Ontario Court of Appeal.

. . . and so much for the possibility of a successful leave application to the Supreme Court on a mobility case.

Does *Balev* Now Define "Habitual Residence" in Non-Hague Cases? Yes!

Z.A. v. A.A., 2019 CarswellOnt 16442 (Ont. S.C.J.)

Ontario Superior Court of Justice - Price, J.

-and-

Does *Balev* now Define "Habitual Residence" in Non-Hague Cases? No!

Kong v. Song, 2019 CarswellBC 464 (B.C. C.A.)

British Columbia Court of Appeal - D. Smith, Fitch and Butler, JJ.A.

-and-

Does *Balev* now Define "Habitual Residence" in Non-Hague Cases? No Again!

Smith v. Smith, 2019 CarswellSask 575 (Sask. Q.B.)

Saskatchewan Court of Queen's Bench - Wilkinson, J.

To refresh your memory: In *Office of the Children's Lawyer v. Balev* (2018), 5 R.F.L. (8th) 1 (S.C.C.) (also known as *Balev v. Baggott*), the Supreme Court of Canada recast the test for "habitual residence" under Article III of the Hague Convention on the Civil Aspects of International Child Abduction.

Historically, the "parental intention approach" dominated Canadian jurisprudence and, as a result, the habitual residence of a child was determined based on the intention of the parent (or parents) with the right to determine where the child lives. But in *Balev*, a majority of the Supreme Court decided that a court determining habitual residence under the Hague Convention must, instead, use the "hybrid approach". That is, in determining habitual residence, the court must take into account all relevant links and circumstances, including the child's links to and circumstances in country A; the circumstances of the child's move from country A to country B; the child's links to and circumstances in country B; the duration, regularity, conditions and reasons for the child's stay in the jurisdiction etc. If it is relevant, it is to be considered. While the intentions of the parents are relevant, no single factor dominates the analysis. The import of this decision is that one parent can, in some circumstances, unilaterally change a child's habitual residence.

Notably, in making this decision, at para. 46 the majority said - *and remember this part*:

> It follows that there is no "rule" that the actions of one parent cannot unilaterally change the habitual residence of a child.
>
> ***Imposing such a legal construct onto the determination of habitual residence*** detracts from the task of the finder of fact, namely to evaluate all of the relevant circumstances in determining where the child was habitually resident at the date of wrongful retention or removal. [emphasis added]

The three cases that are discussed below (*Kong* from the British Columbia Court of Appeal, *Z.A.* from the Ontario Superior Court of Justice, and *Smith* from the Saskatchewan Court of Queen's Bench) consider whether the "hybrid approach" from *Balev* somehow modifies the test for "habitual residence" under provincial legislation. Unfortunately, there is dissention in the courts across the country.

Z.A. v. A.A.

Subsection 22(1)(a) of the *Children's Law Reform Act* allows a court in Ontario to make an order for custody of or access to a child who is "habitually resident" in Ontario at the time the proceeding is started. In *Z.A.*, Justice Price, a thoughtful and experienced judge, considered whether the test for habitual residence under s. 22(1)(a) has been impacted, or must now be informed, by the hybrid approach in *Balev*.

In *Z.A.*, the parties began their relationship when the father was 22 and the mother was 14. The mother had the child when she was 15, and married the father when she was 16. They lived in Ontario for their entire relationship, and the child was born in Toronto. The mother claimed that the relationship was abusive, and that the parties had separated in September 2018, when the father disappeared during a family vacation to the United Arab Emirates, Iraq and Iran. The mother also claimed that the father arranged for her illegal entry to Iran, where he had family, and then absconded with the child and the child's documents.

The mother tried to retrieve the child but was unsuccessful. She returned to Ontario and reported the father's alleged abuse to the police. She also commenced an application in Ontario for custody, the return of the child, a divorce, spousal support, child support and an Equalization Payment. The father responded by claiming spousal support, and requesting a declaration that Ontario could not make any orders regarding the child as she was living with him in Iraq.

The mother argued that the child had habitually resided in Ontario prior to being abducted by the father during their vacation in the Middle East. The father claimed that it was, in fact, the mother who had been abusive and that she had "abandoned" the child to his care while in Iran.

As Iraq is not a signatory to the Hague Convention, the mother claimed under the *Children's Law Reform Act*.

Most provincial legislation specifically defines what it is to be "habitually resident" somewhere. Ontario is no exception. Subsections 22(2) and 22(1) of the Ontario *Children's Law Reform Act* provide that:

> 22(2) **Habitual residence** - A child is **habitually resident** in the place where he or she resided,
>
> (a) with both parents;
>
> (b) where 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; or
>
> (c) with a person other than a parent on a permanent basis for a significant period of time,
>
> whichever last occurred.
>
> 22(3) **Abduction** - The removal or withholding of a child without the consent of the person having custody of 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]

Instead of referring to the statutory definition of habitual residence, Justice Price relied on some recent and previous cases from the Ontario Court of Justice [1] to hold that:

> [39] While [*Balev*] was decided pursuant to the Hague Convention, it applies to the present case as the definition of "habitual residence" has been held to be the same in Hague cases and in extra-provincial cases pursuant to Part II of the Act.

Therefore, His Honour did not rely of the specific definition of habitual residence under s. 22(2) of the *Children's Law Reform Act*. Instead, he relied on the definition of "habitual residence" from the Ontario Court of Appeal's decision in *Korutowska-Wooff v. Wooff* (2004), 5 R.F.L. (6th) 104 (Ont. C.A.), a Hague Convention case that was decided almost 15 years before *Balev* where the Court of Appeal determined that:

> • The question of habitual residence is a question of fact to be **based on all of the circumstances**;
>
> • The habitual residence is the place where the person resides for an appreciable period of time with a "settled intention;"
>
> • A "settled intention" or "purpose" is an intent to stay in a place whether temporarily or permanently for a particular purpose, such as employment, family, etc.;
>
> • A child's habitual residence is tied to that of the child's custodian(s). [emphasis added]

This sounds very similar to the hybrid test in *Balev*. It may be that Justice Price did not have fulsome submissions on the issue.

Ultimately, after considering all of the circumstances of the child (including the fact that the child had been in the Middle East for a year prior to the decision), His Honour found that:

> • the parties did not have a settled intention to be in Iran or Iraq for an appreciable period of time;
>
> • the parties intended to return to Ontario; and
>
> • the father could not establish a new habitual residence by surreptitiously removing the child to another country.

Therefore, Justice Price determined that the child's habitual residence was Ontario and that she had to be returned. Remaining in the Middle East, particularly due to the father's refusal to allow her to have time with her mother, would be harmful to the child.

This is unquestionably the correct result, but the path used to get there is of some concern.

The statutory definition of "habitual residence" and the hybrid-test-influenced definition of habitual residence from the Supreme Court in *Balev* will not always lead to the same result, especially in cases of unilateral action and the passage of a material amount of time. The statutory test is also arguably easier to apply and offers more predictable results. Fortunately, in this case, all roads led to Ontario.

With great respect, the use of *Balev* to determine "habitual residence" in a non-Hague case is concerning. The result in *Balev* is significantly driven by the fact that the Hague Convention does *not* contain a test or definition for habitual residence. The *Children's Law Reform Act* does. Section 22 of the *Children's Law Reform Act* appears to be a complete code [as discussed in *Hopkins v. Kay*, 2015 CarswellOnt 2232 (Ont. C.A.), but on another issue] as to the definition of "habitual residence" in claims under that Act, and the decision of the Supreme Court of Canada in *Balev* did not, and could not, change the statutory test for "habitual residence" under provincial legislation. Using the *Balev* hybrid approach to the definition of "habitual residence" in a non-Hague matter likely offends the principles of statutory interpretation.

Above, we asked that you remember the rationale (or the rationales) used by the Supreme Court in adopting the hybrid approach. Again, in reference to the notion of parent intention, the Supreme Court suggested that,

> Imposing such a legal construct onto the determination of habitual residence detracts from the task of the finder of fact, namely to evaluate all of the relevant circumstances in determining where the child was habitually resident at the date of wrongful retention or removal.

But in non-Hague cases, there is no legal construct to impose. We need only impose, and follow, the statutory definition.

Kong v. Song

Kong involves similar considerations as to the definition of "habitual residence" under provincial legislation - this time, under the B.C. *Family Law Act*. But the B.C. Court of Appeal comes to the opposite (and in my view correct) conclusion that *Balev* is irrelevant to the issue of habitual residence under B.C.'s provincial legislation.

In this case, both parents were citizens of China. Like Iraq, China is not a signatory to the Hague Convention. The father had permanent resident status in Canada, and the child was born in B.C. in a birth-tourism arrangement by the parties. The mother arrived in Canada just prior to the child's birth. The mother was the host of a Chinese television show, and the father was a businessman who owned numerous businesses in both China and Canada. The child spent the first six months of his life in Canada, then returned to China with the parents. The father then removed the child from China without the mother's consent and brought him back to Canada.

The mother brought an application in B.C. to return the child pursuant to the *Family Law Act*.[2] Similar to Ontario, the B.C. *Family Law Act* contains a statutory definition of "habitual residence":

> 72(2) For the purposes of this Division, a child is habitually resident in the place where the child most recently resided
>
> a) with his or her parents,
>
> b) if the parents are living separate and apart, with one parent
>
> i. under an agreement,
>
> ii. with the implied consent of the other parent, or
>
> iii. under an order of a court or tribunal.
>
> 72(3) The removal or withholding of a child without the consent of a guardian does not affect the child's habitual residence unless the guardian from whom the child is being removed or withheld acquiesces or delays in applying for an order of a court of an extraprovincial tribunal. [3]

The lower court applied the statutory test, determined that the father had removed the child from China without the mother's consent (explicit or implied), and ordered that the child be returned to China.

On appeal, the father argued that the trial judge had erred in not applying the hybrid approach to habitual residence as set out in *Balev*. The British Columbia Court of Appeal set out very clearly that the facts of this case did not engage the Hague Convention and, consequently, the hybrid approach to the definition of "habitual residence" did not apply. The *Family Law Act* set out a statutory test for habitual residence that focuses on the intentions of the parties. As such, the trial judge correctly applied the statutory test.

For the reasons noted above, it is hard to argue with this logic.

Smith v. Smith

In *Smith*, Justice Wilkinson of the Saskatchewan Court of Queen's Bench considered the cases that Justice Price relied on in *Z.A.*, and the B.C. Court of Appeal's decision in *Kong*, and ultimately sided with the British Columbia Court of Appeal.

So let the battle begin: "In this corner, four cases from the Ontario Court of Justice with a Superior Court of Justice kicker . . . in the other corner, the B.C. Court of Appeal and the Saskatchewan Court of Queen's Bench." Maybe another province wants to tie-break?

Costs (and Weak Claims)

Calver v. Calver, 2019 CarswellOnt 20462 (Ont. S.C.J.)

Ontario Superior Court of Justice - Pedlar, J.

When a decision begins with, "I opened and closed my reasons for judgement in this file expressing my deep concern about the way this action has been litigated," you know the court is going to have something significant to say about the conduct and consequences of litigation, and about the need for proportionality that is sometimes lost in family law.

According to Justice Pedlar, this is a trial that should have lasted 1-1/2 days at most. However, because of the applicant's numerous claims, the litigation took on a life of its own that was both unreasonable and unnecessarily complicated, and took a full nine days of trial time. The proceedings were made unreasonably complex by the number of unsuccessful claims advanced and pursued by the applicant.

Neither party obtained a result better than their respective Offers to Settle.

The applicant claimed relief totaling $450,000 and was ultimately awarded just under $84,000. Justice Pedlar noted this was only about 18 percent of her total claim. Most of the applicant's claims, including claims for unjust enrichment, constructive trust, proprietary estoppel, loss of future income, and compensation for emotional and physical damages, were dismissed. As a result, Justice Pedlar found the matter to have been entirely "over-litigated", and that the respondent had been required to address a range of claims and review an unreasonable amount of paper in order to properly defend himself.

The applicant was ultimately successful in her claim for an unequal division of Net Family Property, but Justice Pedlar found that this portion of the trial should have taken no more than 1-1/2 of the nine days of trial. Therefore, Justice Pedlar awarded the applicant costs only for that time, being approximately 16 percent of the trial time. As her total claim for costs was for $84,750, he awarded the applicant only $13,560 for costs.

Things then got even worse for the applicant.

The respondent was wholly successful in defending all the applicant's other claims such that he was entitled to 84 percent of his costs of $112,000 for a total of $95,000 in costs. Setting off those two claims, Justice Pedlar found that the "successful" applicant owed the respondent about $81,000 in costs. It is not common for courts to award costs by considering the percentage of successful and unsuccessful claims, but in appropriate cases (especially where the amount recovered is small compared to the amount claimed) this methodology may prove to be useful.

Justice Pedlar determined that, over the course of the litigation, the applicant should have re-evaluated the strength of her claims and narrowed them as appropriate. This should be a lesson for all: forcing a party to deal with claims that should not have been pursued may sound in significant costs. This is not the first time courts have forced a party to suffer the consequences of their unbridled claims. A party ought to continually assess the strength of their case and claims. If a litigant persists in a weak case and forces the other side to prepare and respond to it, then costs ought to reflect the work done by the other side to respond: *Kirshenblatt v. Kirshenblatt* (2008), 59 R.F.L. (6th) 120 (Ont. S.C.J.). If a party persists in an unreasonable claim, they cannot later complain about the amount of costs spent to defend those claims: *Fielding v. Fielding* (2019), 21 R.F.L. (8th) 187 (Ont. S.C.J.). All too frequently, parties do not re-evaluate their claims after discoveries and as trial approaches. Withdraw weak claims or persist in them and possibly face significant cost consequences.

As noted by Justice Pedlar at the end of the decision, "it will take time for both feelings and finances to heal." No doubt.

Assisted Human Reproduction and Birth Registration in British Columbia

Cabianca v. British Columbia (Registrar General of Vital Statistics), 2019 CarswellBC 3491 (B.C. S.C.)

British Columbia Supreme Court - MacDonald, J.

Unlike Saskatchewan (discussed last week in *C.P.B. v. L.M.B.*, 2019 CarswellSask 636 (Sask. Q.B.)) (sorry Saskatchewan) British Columbia is one of the jurisdictions that *has* amended their parenting legislation (in B.C., the *Family Law Act*, S.B.C. 2011, c. 25 - the "BC *FLA*") to deal with issues of intended parentage and assisted human reproduction. The Act codifies how parentage is to be decided for births resulting from reproductive technologies. But mistakes can happen, and this is a case about correcting such an error, dealing with whose names can appear on birth registrations when children are born with the assistance of reproductive technologies, in this case, in the context of two sperm donation agreements.

Part 3 of the BC *FLA* is a comprehensive statutory framework for determining parentage. However, the petitioners did not strictly follow the statutory scheme such that, contrary to their wishes, one of the intended fathers was not registered as a parent for one of the children. The problem was that, contrary to s. 30 of the BC *FLA*, the written Donor Agreement was not signed *prior* to conception as required. As a result, the petitioner has to seek relief from the court to direct the Registrar of Vital Statistics to correct the Birth Registration. The Registrar opposed the claimed relief because the petitioners had not strictly followed the statutory regime and was concerned that allowing the claim would discourage people from following it.

After concluding that the specific comprehensive statutory regime made reliance on *parens patriae* or inherent jurisdiction impossible, and emphasizing the importance of proper parentage and birth registration, Justice MacDonald decided that she was able to fix the problem with recourse to section 31 of the BC *FLA* which allows the court to make a declaration of parentage, "if there is a dispute or **any uncertainty** as to whether a person is or is not a parent under this Part." This was over the Registrar's objection based on the fact that there was no "uncertainty" here - but a failure to comply with the statutory regime.

Ultimately, Justice MacDonald emphasized that a birth registration should be inclusive and reflect the *intentions* of those involved with the child's birth, which intentions should be given liberal interpretation. The words "any uncertainty" are broad enough to include mistakes, and should take into account the best interest of the child and the right to have all their parents listed on their birth registration.

However, to address the Registrar's concerns, Justice MacDonald, quite properly, issues this caution:

> [49] . . . this decision should not be interpreted as a licence for parties to ignore the technical requirements of Part 3. Section 31 should not be used to circumvent the legislative scheme. This Court should not be expected to remedy every situation where an agreement regarding parentage is not executed prior to conception. While each case will be decided on its own facts, relief should not be presumed.

Footnotes

1 Specifically, *Maldonado v. Feliciano* (2018), 15 R.F.L. (8th) 430 (Ont. C.J.); *McKay v. Labelle*, 2019 CarswellOnt 4524 (Ont. C.J.). See also *Moussa v. Sundhu* (2018), 11 R.F.L. (8th) 497 (Ont. C.J.).

2 S.B.C. 2011, c. 25.

3 This is functionally the same as the definition of "habitual residence" under the Ontario *Children's Law Reform Act*, just with some simplified language.