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— Franks & Zalev - This Week in Family Law

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Zinati v. Spence, 2020 CarswellOnt 12519 (S.C.J.) - Akbarali J.

In *Zinati v. Spence* and *Nolet v. Nolet*, Justices Akbarali and Edwards dealt with two of the countless motions that are currently pending before courts across Canada about whether a child should attend school in person or online. In her well reasoned decision in *Zinati v. Spence*, Justice Akbarali agreed with Justice Himel's decision in *Chase v. Chase*, 2020 CarswellOnt 12173 (S.C.J.) that courts should generally not be delving into whether a legislature's decision about whether, and how, to reopen schools was correct, and should definitely not be doing so based on untested and unsworn reports and newspaper articles. Justice Akbarali also agreed that the question of whether a child should attend school in person or online requires the court to assess the potential risks and benefits for the *specific child* in each particular case, bearing in mind that it is not realistic to expect that it will be 100 percent safe for children to return to school in person for the foreseeable future. The standard to be met is not, and cannot be, one of 100 percent safety, as that was not available even pre-COVID-19; nor is there any guarantee of safety for children learning at home.

Justice Akbarali set out the following helpful list of factors to consider when deciding whether a child should attend school in person or online:

> [27] . . . a. **It is not the role of a court tasked with making determinations of education plans for individual families or children to determine whether, writ large, the government return to school plans are safe or effective**. The government has access to public health and educational expertise that is not available to the court. **The court is not in a position, especially without expert evidence, to second-guess the government's decision-making**. The situation and the science around the pandemic are constantly evolving. Government and public health authorities are responding as new information is discovered. **The court should proceed on the basis that the government's plan is reasonable in the circumstances for most people, and that it will be modified as circumstances require, or as new information becomes known**.
>
> > b. When determining what educational plan is in a child's best interest, **it is not realistic to expect or require a guarantee of safety for children who return to school during a pandemic**. There is no guarantee of safety for children who learn from home during a pandemic either. No one alive today is immune from at least some risk as a result of the pandemic. The pandemic is only over for those who did not survive it.

> c. **When deciding what educational plan is appropriate for a child, the court must ask the familiar question - what is in the best interest of this child?** Relevant factors to consider in determining the education plan in the best interests of the child include, but are not limited to:
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> i. **The risk of exposure to COVID-19** that the child will face if she or he is in school, or is not in school;
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> ii. **Whether the child, or a member of the child's family, is at increased risk from COVID-19** as a result of health conditions or other risk factors;
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> iii. **The risk the child faces to their mental health, social development, academic development or psychological well-being** from learning online;
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> iv. **Any proposed or planned measures to alleviate any of the risks** noted above;
>
> v. **The child's wishes**, if they can be reasonably ascertained; and
>
> vi. **The ability of the parent or parents with whom the child will be residing during school days to support online learning**, including competing demands of the parent or parents' work, or caregiving responsibilities, or other demands. [emphasis added]

To this list we might add: consideration of any factors suggesting that the argument for "at home" vs. "at school" learning is more about "parenting strategy" and less about "best interests." While we certainly hope that the drain on court resources for these cases is short-lived, this list of factors will undoubtedly be cited in cases to come.

After considering these factors, Justice Akbarali concluded that the parties' 6-year-old child should attend school in person as there was no evidence that anyone in her family had special risks or sensitivities to COVID-19 that could not be reasonably managed (including her 62-year-old paternal step-grandmother and 72-year-old maternal grandmother with whom she lived while she was with her mother and father, respectively), and she was satisfied that the social benefits of attending school outweighed the risks.

In *Nolet v. Nolet*, Justice Edwards determined that it was in the parties' 8-year-old son's best interests to attend school in person. The child had ADHD, and it would be difficult to provide him with consistency if he attended school online from home because both parties' jobs involved shift work. There was also "no evidence that [the child] himself would be subject to an unacceptable risk of harm" by attending school in person, or that anyone in the child's family would face an unacceptable risk of harm that could not be managed with proper safety measures.

Most importantly, however, Justice Edwards determined that there should actually be a **presumption** in favour of a child attending school in person:

> [25] In my opinion in the current circumstances in Ontario, the presumption is that it is in the best interest of a child to attend in-person schooling, absent compelling evidence to the contrary.

We will have to wait and see whether other courts agree with Justice Edwards that there should be a presumption in favour of children attending school in person. But we hope that they do. Such a presumption, when combined with the factors that Justice Akbarali set out in *Zinati v. Spence*, will make the outcome of these types of motions far more predictable which, in turn, should enable many more parties to resolve disputes about in person vs. online schooling without the need for litigation.

As Everyone Knows, We're Quite Anti-Suit Ourselves

Borschel v. Borschel, 2020 CarswellOnt 10658 (S.C.J.) - Sossin J.

The parties in *Borschel* separated in 2015. The husband started an application in Ontario for a divorce and for various other family law related relief. In 2016, the parties agreed to submit all of the issues arising out of the breakdown of their marriage to arbitration with a highly regarded family law arbitrator in Toronto.

The parties resolved the parenting and property issues on consent, and in 2017, the arbitrator signed two final consent Awards that incorporated the terms of the parties' agreements.

The consent Awards provided, among other things, that while the wife could move to Tennessee with the children, Ontario would retain jurisdiction to deal with disputes involving the children as long as the husband continued to reside there.

The wife and the children moved to Tennessee as contemplated by the Award. The parties also tried to schedule an arbitration to deal with the support issues, but for various reasons it was not able to be scheduled.

In May 2020, the husband started an application for a divorce in Tennessee, and he obtained an injunction prohibiting the wife from dissipating her property or removing the children from Tennessee. Although the reasons do not explain why the husband decided to start a divorce proceeding in Tennessee in 2020, he may have come to understand that the Ontario court would not have jurisdiction to order him to pay spousal support once a foreign divorce had been granted. For a detailed discussion of this issue, see "How Do You Solve a Problem Like *Rothgiesser*? (With apologies to the Sound of Music)" in the May 11, 2020 and May 18, 2020 editions of *TWFL*.

Following Newton's Third Law ("For every action, there is an equal and opposite reaction"), when the wife found out that the husband had started a proceeding in Tennessee, she brought a motion in Ontario to have the 2017 consent Arbitration Awards incorporated into a court order, and to enjoin the husband from proceeding with his application in Tennessee (i.e. an anti-suit injunction).

The husband responded to the wife's motion by raising a host of seemingly spurious arguments about why the 2017 consent Awards should not be enforced. After rejecting all of the husband's arguments, Justice Sossin concluded that the wife was entitled to have the Awards incorporated into a court order as they met the requirements of ss. 59.6(1) and 59.8(4) of the *Family Law Act*, which provide that:

> 59.6 (1) A family arbitration award is enforceable only if,
>
> > (a) the family arbitration agreement under which the award is made is made in writing and complies with any regulations made under the *Arbitration Act, 1991*;
> >
> > (b) each of the parties to the agreement receives independent legal advice before making the agreement;
> >
> > (c) the requirements of section 38 of the *Arbitration Act, 1991* are met (formal requirements, writing, reasons, delivery to parties); and
> >
> > (d) the arbitrator complies with any regulations made under the *Arbitration Act, 1991*.
>
> 59.8(4) If the family arbitration award satisfies the conditions set out in subsection 59.6 (1), the court shall make an order in the same terms as the award, unless,
>
> > (a) the period for commencing an appeal or an application to set the award aside has not yet elapsed;
> >
> > (b) there is a pending appeal, application to set the award aside or application for a declaration of invalidity; or
> >
> > (c) the award has been set aside or the arbitration is the subject of a declaration of invalidity. 2006, c. 1, s. 5 (10). [emphasis added]

After determining that the Awards should be incorporated into an order, Justice Sossin turned to the wife's request for an anti-suit injunction.

In *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, 1993 CarswellBC 1257 (S.C.C.), the Supreme Court of Canada adopted the House of Lords' test for an anti-suit injunction in *SNI Aérospatiale v. Lee Kui Jak*, [1987] 3 All E.R. 510 (Brunei P.C.). In that case, Lord Goff explained that an English court should only restrain a party from pursuing a proceeding in a foreign jurisdiction if the foreign proceeding was vexatious or oppressive:

> In the opinion of their Lordships, in a case such as the present where a remedy for a particular wrong is available both in **the English (or, as here, the Brunei) court and in a foreign court, the English (or Brunei) court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive**. This presupposes that, as general rule, **the English or Brunei court must conclude that it provides the natural forum for the trial** of the action, and further, since the court is concerned with the ends of justice, that **account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so**. So, as a general rule, the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him. [emphasis added]

In *Bell'O International LLC v. Flooring & Lumber Co.*, 2001 CarswellOnt 1701 (S.C.J.), Justice Nordheimer (as he then was) explained that the principles from *SNI* and *Amchem* could be broken down into five parts:

> [9] . . . (a) As a general rule, **the domestic court should not entertain an application for an injunction if there is no foreign proceeding** pending.
>
> (b) It is preferable that **the decision of the foreign court not be pre-empted until a proceeding has been launched in that court and the applicant for the injunction in the domestic court has sought from the foreign court a stay or other termination of the foreign proceedings and has failed**.
>
> (c) **If the applicant has so failed, then the domestic court must proceed to entertain the application for an injunction but only if it is alleged that the domestic court is the most appropriate forum** and the domestic court is in fact a potentially appropriate forum.
>
> (d) **In determining whether the domestic court is the appropriate forum, it must be determined whether the domestic forum is the natural forum**, that is the forum that on the basis of relevant factors has the closest connection with the action and the parties, and it must also be determined that there is no other forum that is clearly more appropriate.
>
> (e) **The domestic court must then consider any injustice to the defendant if the plaintiff is allowed to pursue the foreign proceeding and must also consider any injustice to the plaintiff if the plaintiff is not allowed to do so**. In general, the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign court of which it would be unjust to deprive him. [emphasis added]

In applying this test, Justice Sossin found that the wife's request for an anti-suit injunction should be granted for the following reasons:

> [95] First, there is clearly a Tennessee divorce proceeding pending.
>
> [96] Second, the Tennessee proceeding is not stayed, and it appears the [wife] has retained Tennessee counsel.
>
> [97] Third, Ontario remains an appropriate forum for this litigation. The existing Final Arbitration Awards provide for a resolution of the parenting and property issues and are themselves subject to oversight under Ontario law. The parties

> have agreed to a further case conference before this Court on the remaining financial and support issues in dispute on July 31, 2020.
>
> [98] Fourth, Ontario remains the jurisdiction with the closest connection to the divorce application. Not only does it remain the jurisdiction for oversight of the existing Final Arbitration Awards, it also remains the jurisdiction where the [husband] resides, is employed and where his income is derived.
>
> [99] Fifth and finally, there is no injustice to preventing the [husband] from continuing his action in Tennessee. Ontario Court awards may be enforced in Tennessee and the dispute resolution process in Ontario already is well-advanced. The [husband] has not alleged any significant difference in the substantive claims that would result in a loss of juridical advantage should the matter proceed in Ontario.

While we largely agree with Justice Sossin's analysis, we do wonder if his decision to grant an anti-suit injunction might have been premature given that the wife had not tried to obtain a stay of the Tennessee proceeding in Tennessee before she moved for an anti-suit injunction in Ontario. It seems that may have been an appropriate first step.

In *Amchem*, the Supreme Court of Canada was clear that, as a matter of comity, a Canadian court should not grant an anti-suit injunction unless and until the foreign court has been asked to stay the proceeding, but has declined to do so:

> [56] . . . In order to resort to this special remedy consonant with the principles of comity, **it is preferable that the decision of the foreign court not be pre-empted until** a proceeding has been launched in that court and **the applicant for an injunction in the domestic court has sought from the foreign court a stay or other termination of the foreign proceedings and failed**. [emphasis added]

Furthermore, as the B.C. Court of Appeal recently explained in *Li v. Rao* (2019), 27 R.F.L. (8th) 34 (B.C. C.A.), giving a foreign court an opportunity to consider whether to stay its own proceeding before granting an anti-suit injunction "strives to make anti-suit injunctions consonant with the principle of comity, and it allows for the possibility that the anti-suit application will not be needed if the foreign court stays or dismisses the foreign action." See also *Armoyan v. Armoyan* (2013), 37 R.F.L. (7th) 253 (N.S. C.A.), where the Nova Scotia Court of Appeal noted that, "*Amchem*'s principles of comity do not contemplate [a] pre-emptive strike against the foreign court's determination whether to accept jurisdiction."

The B.C. Court of Appeal stated the proposition even more forcefully in *R.P.C. Inc. v. Fournell*, 2003 CarswellBC 1444 (S.C.), aff'd 2004 CarswellBC 192 (C.A.): an anti-suit injunction may not be brought until the foreign court has had an opportunity to rule on an application for *forum non conveniens*.

On the facts of this case, it seems likely that the result would have been the same if the Tennessee court had been asked to stay its own proceeding before the wife moved for an anti-suit injunction in Ontario. Nevertheless, it would have been helpful had Justice Sossin explained why it was appropriate, in this particular case, to grant the wife's request for an anti-suit injunction before she had even *tried* to address the issue in Tennessee.

Is it *Better* to Ask for Forgiveness than Beg for Permission

OM v. ED, 2019 CarswellAlta 2718 (C.A.) - Paperny, Rowbotham, and Antonio JJ.A.

Until 2018, when the Supreme Court of Canada released its decision in Office of the *Office of the Children's Lawyer v. Balev* (2018), 5 R.F.L. (8th) 1 (S.C.C.) ("*Balev*"), most courts in Canada were of the view that a child's habitual residence under the *Hague Convention on the Civil Aspects of International Child Abduction* (the "*Hague Convention*") should be determined based on parental intention. In most cases, according to the Court in *Balev*, this meant that decisions about habitual residence would largely turn on the "the last mutually shared intent of the parents (or of the persons entitled to fix the child's residence) as to where the child was to be habitually resident." And, respectfully, that approach made a great deal of sense, allowing for predictability, avoiding uncertainty, and generally discouraging child abduction.

In the vast majority of cases, the parental intention approach allowed courts and parties to predictably determine whether a child had been wrongfully removed to or wrongfully retained in Canada for the purposes of the *Hague Convention*.

For better or for worse (and, again respectfully, we are in the "for worse" camp), the majority of the Supreme Court of Canada in *Balev* determined that instead of determining habitual residence based on parental intention, judges should apply what it called the "hybrid approach", which involves determining "the focal point of the child's life - 'the family and social environment in which its life has developed' - immediately prior to the removal or retention", and considering "all relevant links and circumstances - the child's links to and circumstances in country A; the circumstances of the child's move from country A to country B; and the child's links to and circumstances in country B."

In their vigorous dissent in *Balev*, Justices Côté, Rowe, and Moldaver expressed significant concerns about the implications of the majority's decision to reject the parental intention approach in favour of the hybrid approach:

> [152] **The result of this approach, 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**. Other courts have discussed this problem at length:
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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. [emphasis added]

OM v. ED offers an example of the application of the hybrid approach and some of the very significant problems with it, and animates the concerns of the dissent in *Balev*.

The parties in *OM* started living together in Calgary in 2009. They had a son together in 2015. The mother had Dutch and Canadian citizenship. The father had French and Canadian citizenship. The son had Canadian citizenship, and was eligible for Dutch and French citizenship, but had not yet obtained either.

In 2015, the father took a job that required him to spend every other month in Chad, and in 2018, the parties decided to move to Europe to be closer to the father's work. They shipped most of their belongings to Europe, sold their cars, and rented their condo in Calgary to the mother's sister for six months.

On November 1, 2018, the mother and child (along with the family dog) flew to Amsterdam on a return ticket that had a May 6, 2019 return date to Calgary. From Amsterdam, they drove to Normandy, and stayed at the father's house there. The parents registered the child in school in Normandy, opened a bank account, purchased two vehicles, and started the process of registering the mother as a French resident.

After only a few months in France, the family decided to move to Spain. The mother signed a one-year lease in Alicante, packed up all of the family's belongings, and advised the child's school in Normandy that "[w]e will officially be moving [to Spain]." The mother and child arrived in Spain on March 11, 2019, while the father travelled to Chad for work.

When the mother arrived in Spain, she registered as a Spanish resident, opened a bank account, and enrolled the child in school. The father came to Spain from Chad on April 2, 2019, and lived at the leased house with the mother and child until he had to return to Chad on April 30, 2019. They had no discussions about the mother returning to Canada during this time.

On May 5, 2019, without any notice or warning to the father, the mother surreptitiously removed the child from Spain and brought him back to Calgary on the return ticket that she had originally purchased before she left Canada back in November 2018. [In our view, a surreptitious removal speaks volumes. People that have consent to move their children need not do so secretly.]

When the father learned that the mother had left Spain and returned to Canada, he immediately started an application in Alberta under the *Hague Convention* to have the child returned to Spain. The father's application was heard almost immediately. The application judge rejected the mother's argument that she had only moved to Spain on a trial basis, found that Spain was the child's habitual residence, and ordered that the child be returned to Spain immediately:

> [29] **The mother's submission that the wording of Article 3 would allow me to consider that Calgary was the child's habitual residence, on the basis that "immediately" before the removal or retention" could refer back to the situation seven months before the move to Europe, does not withstand analysis**. This theory places undue focus on parental intention, requiring that I accept that there was an intention that the move was temporary or on a trial basis, and gives rise to the problems of a strict parental approach to habitual residence as outlined in *Balev*. . . .
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> [30] **The suggestion that an analysis of habitual residence can encompass a jurisdiction left by the family seven months before, on the basis of a contested and unproven allegation of an agreement on a time-limited stay, defeats the purpose of the hybrid approach**.
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> . . . . .
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> [33] While the test in Canada is now the hybrid test of both parental intention and the child-centered focus and not the previous tests, **the evidence in this case establishes an actual change in geography and time sufficient for acclimatization. Given the child's age, the fact that he moved to Spain with both parents and his dog, and that they set up a regular home and enrolled him in school, combined with the fact that he had all the things important to a four-year old, confirms that the period was long enough to establish habitual residence**. Other cases, including *Singh* which was decided post-*Balev*, have also found relatively short periods of time sufficient for this purpose. While the specific facts of these cases may be distinguishable, the principle that habitual residence requires evidence of the child's acclimatization in the jurisdiction remains valid. Despite the fact that the child had only lived in Spain for two months, there is sufficient evidence of that acclimatization. [emphasis added]

The mother appealed.

The objective evidence certainly supported the application judge's finding that the family intended to move to Spain, and she had referred to and considered the hybrid approach in her reasons. Nevertheless, the Alberta Court of Appeal concluded that the application judge had erred in rejecting any possibility that the child was habitually resident in Calgary solely because he had not lived in Calgary for seven months at the time of the removal from Spain. There was a significant amount of uncontroverted evidence in the record, including that the child was born in Alberta, had Canadian citizenship, and had spent almost all of his life in Calgary, which the Court of Appeal thought the application judge should have specifically considered when determining whether Calgary was still the focal point of the child's life:

> [27] In this case, the chambers judge's approach erroneously led her to disregard Alberta as a potential habitual residence for the child. Indeed, her analysis shows that she seriously considered only Spain as a potential habitual residence, notwithstanding several recent moves by the family. This elevated Spain to a presumed habitual residence, rather than merely the most recent. This was an erroneous application of the test. The links to Calgary were considerable, and should have been considered.

Having found that the application judge had erred, the Court of Appeal then considered the appropriate remedy. Given the urgent nature of the proceeding, the Court of Appeal chose to decide the case based on the record before it, instead of sending it back for a new hearing. And, notwithstanding the objective evidence of parental intent that the application judge had relied

on, the Court of Appeal concluded that the child had still been habitually resident in Calgary when he and the mother left Spain and returned to Canada on May 6, 2019, because Calgary had still been the focal point of the child's life at that point:

> [32] **When all of the relevant considerations and connections are taken into account, the child's connection to Alberta takes on greater import**. Many of those connections have already been discussed. The child is Canadian; he was born in Calgary in 2015 and lived there his whole life until the fall of 2018, when he moved to Europe with his family. While he lived in Calgary, his aunt and uncle also lived there, although his aunt has since moved to British Columbia. He lived away from Calgary, in Europe, for the seven months immediately preceding his removal back to Canada (in May 2019). Of those seven months, most of the time was spent in France, where the child briefly attended preschool. He spent less than two months in Spain, and the whole family was together in Spain for only one month. **The child's connection with Spain was of very short duration and, given the recent frequency of family moves, it is not likely that it had taken on the character of a consistent home for him in the brief time that he spent there**. The child has some paternal extended family in Spain, but at least as much maternal extended family in British Columbia and Alberta. **As with most young children, the child's environment is essentially a family environment and, in this case, that environment is very much tied to his mother, who has been his primary caregiver and who has no real connection to Spain. The connections that this child has known in his young life are primarily in Alberta**.
>
> [33] **Considering the entirety of the child's situation, and given the frequency of the family's recent moves, in our view the child is best characterized as being habitually resident in Alberta**. He was, therefore, not habitually resident in Spain at the time of the alleged wrongful removal, and there was no basis on which to order his return to Spain pursuant to the *Hague Convention*. [emphasis added]

While this outcome is somewhat surprising, it is nevertheless justifiable based on *Balev* and the evidence that was before the Court, particularly since the family had been in Spain for less than two months when the mother took the child back to Canada. This result also had the added benefit of avoiding the need for the mother and child to return to Spain and litigate the question of whether and when she should be able to return to Canada in circumstances where neither party had any real connection to Spain, and the father was only going to be physically present in Spain, at most, 50 percent of the time (with the rest of his time being spent in Chad).

That being said, it is ultimately hard to see this case as doing anything other than metaphysical violence to the objectives of the *Hague Convention*. *OM* also illustrates the significant problems with *Balev*. The *Hague Convention* worked well in Canada because lawyers and parties knew that there was a clear and strict test for determining a child's habitual residence, and in most cases there would only be one objectively correct answer to the question of where a particular child had been habitually resident at the time of the removal or retention. We are reminded of the concerns expressed by the Ontario Court of Appeal in *Balev v. Baggott* (2016), 84 R.F.L. (7th) 291 (Ont. C.A.) (a view that was arguably rejected by the Supreme Court of Canada): Although a given case may involve the interests and needs of specific children, it raises issues that transcend their interests and that affect the interests of countless other children and their parents.

The hybrid approach has sacrificed certainty at the alter of judicial discretion - something that is very dangerous when dealing with child abduction. Outcomes are going to become increasingly difficult to predict. And, unfortunately, the less certainty there is in *Hague Convention* cases, the more incentive there is for at least some parents to wrongfully retain or remove children to Canada, and roll the dice at trying to persuade a court to let them stay here. Some parents will think it more strategic to ask for forgiveness than to beg for permission.

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