COURT OF APPEAL FOR ONTARIO

CITATION: Balev v. Baggott, 2016 ONCA 680
DATE: 20160913
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Laskin, Sharpe and Miller JJ.A.

BETWEEN

John Paul Balev

Appellant

and

Catharine-Rose Baggott

Respondent

Steven M. Bookman and Chris Stankiewicz, for the appellant

Lauren Angle, for the respondent

Caterina E. Tempesta and James Stengel, for the Office of the Children's Lawyer

Heard: August 31, 2016

On appeal from the order of Associate Chief Justice Marrocco and Justices Sachs and Varpio of the Divisional Court, dated January 5, 2016, allowing an appeal from the order of Justice W.L. MacPherson dated August 27, 2015.

Sharpe J.A.:

[1] This appeal concerns the *Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, C.T.S. 1983/35; 19 I.L.M. 1501 (the "Hague Convention"). With the time-limited consent of the father, the mother came to

Ontario from Germany with two young children. When the consensual period expired, the mother unilaterally decided to remain in Ontario, and refused to return the children to Germany. The application judge followed a long line of authority and found that the habitual residence of the children in Germany did not change during the consensual period in Canada, and ordered their return to Germany. The Divisional Court reversed that decision. The central issue on this appeal is whether the Divisional Court erred in concluding that the habitual residence of the children had changed by the time the mother refused to return them to Germany.

FACTS

[2] Both parties are Canadian citizens. In 2000, they married in Toronto, Ontario. In 2001, they moved to Germany and attained permanent resident status. There are two children of the marriage, born in 2002 and 2005 respectively. Both children were born in Germany. The children are Canadian citizens but not German citizens.

[3] The father is employed in Germany and continues to live in the house the parties purchased in Dreieich in 2008, and in which they resided with the children.

[4] Prior to April 2013, the children had lived and attended school in Germany all of their lives, with the following two exceptions:

- In 2006, the mother and children were in Canada for an undisclosed period of time, during which the older child attended school in St. Catharines, Ontario.
- From October 2010 to January 2011, the mother and children came to Canada. Both children attended school in St. Catharines during this time.

[5] The parties encountered marital difficulties and separated in 2011. The father was awarded interim custody. The parties resumed cohabitation in 2012, in the same residence with the children.

[6] The children were having difficulty in school. In April 2013, the parties agreed that the mother would temporarily take the children to Canada to attend school. The application judge accepted the father's characterization of the trip as an "educational exchange" opportunity for the children.

[7] At the mother's request, the father signed a "Consent Letter for Children Travelling Abroad" confirming his consent for the children to visit Canada from July 5, 2013 to August 15, 2014, and later on April 2, 2013 signed a "notarized letter" transferring physical custody to the mother for the relevant period, commencing immediately. The father claimed that he agreed to the temporary change of custody only because the mother insisted that a transfer of custody was necessary in order to enroll the children in a Canadian school.

[8] On April 19, 2013 the mother and children arrived in Ontario, and they have remained here since that date. The mother and children travelled with limited baggage and left most of their belongings at their home in Germany. The children believed that they were coming to Canada for a limited time.

[9] Shortly after the departure of the mother and children from Germany, the father had a change of heart about their absence. In March 2014, he purported to revoke his consent. In June 2014, before his consent was set to expire in August 2014, he filed a Hague Convention application at the Superior Court of Justice, Family Court Branch in St. Catharines, asking for an order returning the children to Germany.

[10] There was a 10-month delay in the proceedings in St. Catharines while the father sought relief in Germany. He first brought a custody application. The first instance court made an interim order that the children should remain with their mother. The father's appeal was dismissed on the ground that the German courts lacked jurisdiction, as the children were not German citizens and the children were now resident in Canada. The parties accepted the court's invitation to withdraw the custody application.

[11] The father then commenced a Hague Convention application in Germany. While the German courts did not come to a final decision, both the first instance court and an appellate court indicated that as the children were no longer

habitually resident in Germany, the Hague Convention application could not succeed. The appellate court suggested to the father that he withdraw his application. The father accepted that suggestion, withdrew the German application, and proceeded with the application he had commenced in Ontario. The German appeal court subsequently ruled that the decision of the first instance court had been retracted.

[12] There was a further delay because the parties unsuccessfully attempted to have the application heard in Toronto.

[13] At the court's request, the Office of the Children's Lawyer ("OCL") became involved in the case to help determine the children's wishes and to represent their interests. The OCL supported the mother's position.

[14] The father has visited the children in Canada for two ten-day periods in November 2013 and March 2015. He has also maintained weekly contact thorough Skype and telephone calls.

STATUTORY PROVISIONS

[15] Articles 3 and 12 of the Hague Convention state the following:

> **Article 3**
>
> The removal or the retention of a child is to be considered wrongful where:
>
> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in

> which the child was habitually resident immediately before the removal or retention; and
>
> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.
>
> **Article 12**
>
> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

[16] The Hague Convention has been incorporated into Ontario law by the *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 46(2) (the "*CLRA*"). Section 22(2) of the *CLRA* provides some guidance on 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.

DECISIONS

1. Decision of the application judge – Superior Court of Justice

[17] The application judge concluded that the mother wrongfully retained the children in Canada within the meaning of Article 3 of the Hague Convention when she refused to return them to Germany after the father's consent expired on August 15, 2014. The application judge ordered that the children return to Germany pursuant to s. 46(5) of the *CLRA* and Article 12 of the Hague Convention.

[18] The application judge found that the children were habitually resident in Germany. That finding was based upon the following specific factual findings: the parents had acquired permanent resident status in Germany, had resided in Germany for 12 years, had been employed, and had owned property in Germany; the lives of the children were centered in Germany prior to their departure in April 2013; and the children were born in Germany where they attended school, engaged in extracurricular activities, and had friends.

[19] The application judge found that the parties' settled intention was that the children would reside in Canada on a temporary, not permanent, basis. The application judge stated, at para. 73:

> The case law is clear that the habitual residence of a child is in the state where both parties lived together with the child, and neither parent can unilaterally change the habitual residence, without the express or implied consent of the other parent. (*Cornaz v. Cornaz-Nikyuluw*, 2005 CarswellOnt 4714 (Ont. S.C.); *Thomson v. Thomson*, [1994] 3 S.C.R. 551 (S.C.C.))

[20] The application judge found that there had been a breach of the father's custody rights under Article 3 of the Hague Convention. The German Civil Code provides that where parents are married to one another, they have joint custody of any children born to them. The father continued to exercise his joint custody rights while the children lived in Ontario. The mother breached the father's custody rights by retaining the children in Ontario past the consensual travel period.

[21] Finally, the application judge determined that the "settled in" exception under Article 12 was not available in this case, as the father commenced his Hague Convention application well within the one-year period.

2. Appeal Judgment – Divisional Court

[22] The Divisional Court concluded that the application judge erred in finding that the habitual residence of the children was Germany. According to the

Divisional Court, their habitual residence changed from Germany to Ontario during the consensual, temporary travel period of April 19, 2013 to August 15, 2014 and it followed that the Hague Convention did not apply.

[23] The Divisional Court found that the application judge erred by relying on *Thomson v. Thomson* and *Cornaz v. Cornaz-Nikyuluw.* The Divisional Court held that, while those cases stood for the proposition that a parent cannot unilaterally change a child's habitual residence, that proposition did not resolve whether the children's habitual residence changed from Germany to Ontario during the consensual period. The Divisional Court stated, at para. 33:

> In this consensual period, the change in habitual residence, if one occurred, resulted from the circumstances created by the appellant and respondent's joint decision to move the children to Ontario for an extended period of time; it did not occur as a result of one parent's unilateral action.

[24] The Divisional Court also referred to s. 22(2)(b) of the *CLRA*, and stated the following at paras. 35-36:

> [Section] 22(2)(b) of the *Children's Law Reform Act* makes it clear that a child can be habitually resident in a place where he or she resides with one parent "with the consent, implied consent or acquiescence of the other." Since the children in question were residing in Ontario with their mother with the consent of their father their habitual residence could have changed to Ontario.
>
> Further, as the Court of Appeal made clear in *Korutowska-Wooff*, a person's habitual residence is the place where a person resides for an appreciable period

> of time with a settled intention to stay there either permanently or *temporarily* for a particular purpose. [Emphasis in original.]

[25] The Divisional Court stated at para. 40 that there was cogent evidence to support a conclusion that the children's habitual residence changed from Germany to Ontario:

> Specifically, on August 15, 2014, the last day of the consensual period of residence in Ontario, the children, who are Canadian citizens and speak English, had been living in St. Catharines for an appreciable period of time, namely approximately 16 months in close proximity to their mother and maternal grandparents. The children had attended school in Ontario during this period. In addition, based on the [application judge's] findings, I am satisfied that the appellant had the intention to remain in St. Catharines temporarily at the beginning of the consensual period. This intention was a "settled" one and was for two particular purposes – to obtain employment and to allow the children to attend school in Canada. Obviously the appellant's intention to remain in St. Catharines became permanent at a later point during the consensual period, because the appellant did not return to Germany with children after August 15, 2014. Finally, and significantly, at paragraph 70 [the application judge] concluded on the evidence that the children had "become integrated into their community" in Ontario.

[26] The Divisional Court also noted that its conclusion was consistent with the conclusions of the German courts who had considered the matter.

[27] The Divisional Court set aside the application judge's decision, and dismissed the father's Hague Convention application.

ISSUE

[28] The issue on this appeal is whether the Divisional Court erred in concluding that the habitual residence of the children had changed during the time-limited consent period of their stay in Ontario.

ANALYSIS

1. Purpose of the Hague Convention

[29] It is important to keep in mind that a judge deciding a Hague Convention application is not determining custody or deciding what would be in the best interests of the children. The judge is simply deciding whether a child has been abducted or wrongfully retained within the meaning of the Hague Convention. If the answer to that question is yes, and if no exception contemplated by the Hague Convention is present, the child must be returned to the place of the child's habitual residence.

[30] As this court explained in *Katsigiannis v. Kottick-Katsigiannis* (2001), 55 O.R. (3d) 456 (C.A.), at para. 32:

> [A] Hague Convention application does not engage the best interests of the child test - the test that is universally and consistently applied in custody and access cases. Hague Convention contracting states accept that the Courts of other contracting states will properly take the best interests of the children into account. … Thus, where there has been a wrongful removal or retention, and no affirmative defence is established within the meaning of the Hague

> Convention … the children must be returned to their habitual residence.

[31] The underlying purpose of the Hague Convention is to protect children from the harmful effects of wrongful removal or retention and to establish procedures to ensure their prompt return to the state of their habitual residence. The Hague Convention establishes a presumption in favour of ordering the child's summary return under Article 12: *Thomson v. Thomson*.

[32] This court confirmed in *Jackson v. Graczyk*, 2007 ONCA 388, 86 O.R. (3d) 183, at para. 23, that the Hague Convention's "underlying rationale is that disputes over custody of a child should be resolved by the courts in the jurisdiction where the child is habitually resident; child abduction is to be deterred."

[33] If an order for return is made, it is for the courts of the requesting jurisdiction, here Germany, to determine the issue of custody.

2. Habitual Residence

(a) *The Issue to be decided*

[34] Article 3 of the Hague Convention provides that retention of a child is wrongful if:

- the removal or retention is in breach of the custodial rights of the applicant under the law of the state where the child was habitually resident immediately before the retention; and
- at the time of the retention, the custodial rights were actually exercised or would have been so exercised but for the retention.

[35] In order to determine if the mother's retention breached the father's custody rights under Article 3, the court must identify the children's habitual residence immediately before the retention.

[36] The Hague Convention does not define habitual residence but in *Korutowska-Wooff v. Wooff* (2004), 5 R.F.L. (6th) 104 (Ont. C.A.), at para. 8, this court adopted the following test that the application judge applied:

- the question of habitual residence is a question of fact to be decided 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).

[37] There is no question that on that test, before the children came to Canada in April 2013, their habitual residence was Germany.

[38] The critical question in this appeal is this: where was the children's habitual residence immediately before the expiry of the father's time-limited consent in August 2014, following which the mother refused to return the children to Germany? At that point, had anything occurred that had changed the children's habitual residence from Germany to Ontario? If it had changed, the Hague Convention does not apply as there would be no wrongful retention and there would be no basis for ordering the return of the children.

(b) ***Unilateral change of habitual residence***

[39] There is a long and well-established line of authority to the effect that one parent cannot unilaterally change a child's habitual residence under the Hague Convention. The application judge correctly described this principle at para. 73: "the case law is clear that the habitual residence of a child is the state where both parties lived together with the child, and neither parent can unilaterally change the habitual residence without the express or implied consent of the other parent." As stated in *Maharaj v. Maharajh,* 2011 ONSC 525 (S.C.), at para. 18, "unless the mother can establish a shared parental intention to change the child's residence" at the time of the move to Ontario, the child's habitual residence

remains unchanged: see also *Korutowska-Wooff* and *Ellis v. Wentzell-Ellis*, 2010 ONCA 347, 102 O.R. (3d) 298, at paras. 27-33.

[40] The application judge correctly followed that principle. She found that the father remained a joint custodial parent while the children were in Ontario, despite the apparent transfer of custody in the time-limited agreement. Therefore, the mother could not unilaterally change their habitual residence during that period.

(c) *Time-limited consensual stays*

[41] The Divisional Court accepted that the mother could not unilaterally change the children's habitual residence, but found that it could change because of the parties' joint agreement that the children should spend a year in Canada. In my respectful view, that finding cannot be maintained in the face of the long line of cases dealing with consensual time-limited stays in another jurisdiction.

[42] The Ontario courts have uniformly held that a parent's consent to a time-limited stay does not shift the child's habitual residence: see *Ellis v. Wentzell-Ellis*; *Unger v. Unger*, 2016 ONSC 4258 (S.C.), at para. 57; *Webb v. Gaudaur*, 2015 ONSC 6956 (S.C.); *Fulmer v. Kaleo-Fulmer*, [2002] O.J. No. 3183 (S.C.), at para. 18; *Solem v. Solem*, 2013 ONSC 1097 (S.C.), at paras. 37-38; and *Snetzko v. Snetzko* (1996), 65 A.C.W.S. (3d) 56 (Ont. Ct. (Gen. Div.)), at para. 25.

[43] Time-limited consensual stays for educational purposes for periods of a year or more are now common. In *Cornaz v. Cornaz-Nikyuluw*, the mother brought the children to Canada from Switzerland to allow her to study for a year with the father's consent. The father agreed to extend that period by six months. The mother refused to return the children to Switzerland at the end of the consensual period. Glithero J. ordered the return of the children, holding at para. 57:

> One parent cannot change the habitual residence of a child without the agreement of the other parent having custody rights. … The consent to the children being abroad for a particular purpose for a particular time period, but not beyond, in my view does not operate so as to effect a change in the habitual residence of the children.

[44] *Re: Application of Mozes v. Mozes* (2001), 239 F.3d 1067, a decision of the United States Court of Appeals for the Ninth Circuit, dealt with a time-limited 15-month stay for education purposes. The court stated, at p. 1083:

> The academic year abroad has become a familiar phenomenon in which thousands of families across the globe participate every year….Children who spend time studying abroad in this manner are obviously expected to form close cultural and personal ties to the countries they visit – that's the whole point of sending them there for a year rather than simply for a brief tourist visit. Yet the ordinary expectation – shared by both parents and children – is that, upon completion of the year, the students will resume residence in their home countries. If this were not the expectation, one would find few parents willing to let their children have these valuable experiences.

[45] The Divisional Court refused to follow this long line of authority and referred to s. 22(2)(b) of the *CLRA* as authority for the proposition that a child can become habitually resident in a jurisdiction in which the child resides with the time-limited consent of the other parent.

[46] In my view, the Divisional Court erred in its application of s. 22(2)(b) which provides that where the parties are living separate and apart, the child is habitually resident in the place where he or she resides with one parent with the consent of the other. But I agree with the father that to apply s. 22(2)(b) to alter the child's habitual residence when the consent of the other parent is time-limited would effectively gut time-limited consent of any meaning. I also agree with the statement in *Fulmer v. Kaleo-Fulmer*, at para. 18, where Hambly J. refused to apply s. 22(2) to a time-limited consent: "There is an implication of permanency that needs to be read into the definition in s. 22(2)."

[47] The Divisional Court also referred to this court's decision in *Korutowska-Wooff* where reference was made, at para. 8, to a settled intention "to stay in a place whether *temporarily* or permanently for a particular purpose" (emphasis added). That dictum must be read in the context of the other principles expressed by the court in the passage I have set out at para. 36 of these reasons. In my view, this court did not have in mind a clearly defined, time-limited consensual stay where one parent takes the children to another jurisdiction with the other parent's consent, but then unilaterally decides to remain. This court explicitly

stated that “the child’s habitual residence is tied to that of the child’s custodian(s)” and could not have intended to lay down a definition of habitual residence that would allow one parent to displace the custodial rights of the other by contravening the terms of an agreement to take the child to another jurisdiction for a time-limited stay.

[48] Moreover, I do not accept the mother’s submission that because the father’s consent contemplated an extension, the time-limited consent cases do not apply. The father had the right to withhold his agreement for an extension. Even where an extension is agreed to, the extension does not defeat the time-limited nature of the consent: *Cornaz v. Cornaz-Nikyuluw*, at para. 57.

[49] I would not, however, wish to foreclose the possibility that there may be cases where a consensual time-limited stay is so long that it becomes time-limited in name only and the child’s habitual residence has changed.

[50] I add here that the question of habitual residence is essentially factual in nature. The application judge identified the correct legal principles and she did not make any overriding and palpable error when making her factual findings.

[51] The application judge rejected the mother’s assertion that she had moved to Canada on a permanent basis and that the parties had a settled intention to abandon their habitual residence in Germany. At para. 71, the application judge found:

> The undisputed evidence is that the mother came to Canada with two suitcases, leaving the bulk of her and the children's belongings in Germany. The evidence from the OCL confirms that it was the children's understanding that they were coming to Canada for "a vacation" and it was only after being in Canada for a period of time, that it became a permanent move and not a visit to Canada."

[52] At para. 72, she added:

> On the facts before me, the father consented to the children coming to Canada on a temporary basis for the purpose of an educational leave which expired on August 15, 2014. While there was provision in the consent for the period to be extended, it was never extended by the father.

[53] The application judge's finding is entitled to deference on appeal and there was no basis for reversing it.

(d) ***Settling in of the children***

[54] In finding that the children's habitual residence had changed, the Divisional Court placed considerable weight on evidence that the children had settled in to their new environment in Ontario.

[55] I recognize that there is a line of authority that supports the consideration of the child's acclimatization in determining habitual residence in some circumstances: see e.g. *Csoke v. Fustos*, 2013 ONSC 2417 (S.C.) at para 260; *Habib v. Amin*, 2014 ONSC 5330, 51 R.F.L. (7th) 432 (S.C.), at para. 42; *O'Brien*

v. O'Brien (2008), 59 R.F.L. (6th) 389 (Ont. S.C.), at paras. 35-36; *Matter of LC (Children)*, [2014] UKSC 1.

[56] However, decisions of this court and the Supreme Court of Canada hold that evidence of settling in is not relevant if the application is brought within one year of the wrongful detention or removal. Article 12 of the Hague Convention provides that if the application has been brought more than 12 months after the wrongful removal or retention, the court "shall…order the return of the child, unless it is demonstrated that the child is now settled in its new environment." In *Thomson v. Thomson*, the Supreme Court of Canada held, at para. 83: "By stating that before one year has elapsed the rule is that the child must be returned forthwith, art. 12 makes it clear that the ordinary effects of settling in, therefore, do not warrant refusal to surrender." This principle was applied in *Bazargani v. Mizael*, 2015 ONCA 517, 63 R.F.L. (7th) 58, at para. 22 and in *Ibrahim v. Girgis*, 2008 ONCA 23, 48 R.F.L. (6th) 1, where MacPherson J.A. held at para. 30:

> The motion judge committed a similar error in principle by referring to the fact that "Andrew [had] become settled in Ontario and … establish[ed] roots with his mother and her extended family". Pursuant to Article 12, the degree to which the child has become settled has no bearing on a Hague Convention application filed within one year. The familial bonds Andrew has forged in Ontario may well influence the issue of where and with whom this toddler should reside, but such custodial matters are not before us: see Hague Convention, Articles 16, 19; *Thomson*, *supra*, at 578.

[57] As the father's application was commenced well within the one-year period, the Divisional Court erred by considering the fact that the children had settled into Ontario when determining their habitual residence.

(e) ***Relevance of the German proceedings***

[58] The father submits that the Divisional Court erred by relying on the German court orders regarding the habitual residence of the children.

[59] I disagree with the father's characterization of the Divisional Court's reasons. The Divisional Court did not base its conclusion that the children habitually resided in Ontario on the German court decisions. The Divisional Court merely observed, at para. 42, that its conclusion was "consistent with the conclusions of the German courts that had had the opportunity to consider this matter."

[60] The mother submits that the application judge erred by failing to recognize the German court orders regarding the children's habitual residence. She contends that comity to the German courts and deterrence against forum shopping should prevent the father from succeeding on his Hague Convention application.

[61] The application judge was aware of the German proceedings, and took the precaution of obtaining through the offices of the International Hague Network Judge for Canada an opinion from a German judge on this matter. At para. 78,

the application judge summarized the advice from the German judge in the following manner:

> As set out in the response from Judge Erb-Kulnemann, there is no valid German court order dealing with habitual residence of the children. Further, it has been confirmed that, if the Ontario court were to determine that the habitual residence of the children is not in Canada, the German courts would receive an application for custody.

[62] I agree with the mother that the father's conduct borders on forum shopping. However, I am not persuaded that the application judge erred by holding that the orders of the German courts were not determinative of the issue of habitual residence. I say this for two reasons.

[63] First, it is clear on this record that the German courts never made a final determination of the issue of the children's habitual residence. That is demonstrated by the unchallenged opinion of the German judge who expressly so stated.

[64] Second, it has been held that, in this situation, the issue of habitual residence under the Hague Convention is one for the courts of the requested state.

[65] In *Caruso v. Caruso*, [2006] O.J. No. 5311 (S.C.), the father brought a Hague Convention application in Ontario, seeking an order from the Ontario court that the mother return the child from Italy. Herman J. dismissed the father's

application, stating that the father was required to first apply to the Central Authority in Canada or Italy so that the Italian authorities could address his Hague Convention application. In reaching this conclusion, Herman J. cited the Supreme Court of Canada in *Thomson v. Thomson*, at para. 72: "The provision [Article 15] it will be observed, contemplates that the initiative for obtaining a chasing order is with the requested state, and that the order is intended to determine whether the removal or retention was wrongful."

[66] In *Pitts v. De Silva*, 2008 ONCA 9, 47 R.F.L. (6th) 43, at para. 36, this court cited *Caruso* with approval as establishing that requested courts "have primary responsibility for adjudicating Hague Convention applications."

[67] In my opinion, the application judge correctly refused to be bound by the orders of the German courts. The German courts' orders were not final orders as established by the opinion of Judge Erb-Kulnemann, an International Hague Network Judge for Germany. Moreover, as the requested state, Ontario has primary responsibility for adjudicating the father's Hague Convention application.

3. Wrongful Retention

(a) ***Was there a breach of custodial rights?***

[68] Given that the children habitually resided in Germany immediately prior to the wrongful retention, the father's custody rights under the law of Germany apply, pursuant to Article 3 of the Hague Convention.

[69] The application judge found that under German law, the default provision of joint custody in the German Civil Code applied and accordingly, at the time of the children's departure from Germany, the mother and father had joint custody of them.

[70] The right of custody includes the ability to determine the child's habitual residence, and that right is protected by the Hague Convention. As the Supreme Court of Canada stated in *D.S. v. V.W.,* [1996] 2 S.C.R. 108, at para. 33:

> [R]ights of custody within the meaning of the [Hague Convention] cannot be interpreted in a way that systematically prevents the custodial parent from exercising all the attributes of custody, in particular that of choosing the child's place of residence but, on the contrary, must be interpreted in a way that protects their exercise.

[71] In *Thomson v. Thomson*, the Supreme Court of Canada held, at para. 76, that "a wrongful retention begins from the moment of the expiration of the period of access, where the original removal was with the consent of the rightful custodian of the child."

[72] There was ample evidence to support the application judge's finding that the mother's decision to refuse to return the children to Germany deprived the father of his custodial rights under Article 3(a) of the Hague Convention.

(b) ***Were the father's custodial rights exercised?***

[73] Under Article 3(b) of the Hague Convention, for the mother's retention to be wrongful, the father had to be exercising his custody rights at the time of the retention. The application judge found, at para. 94, that the consent to transfer custody for the period of the visit was done "for the sole purpose of enrolling the children in the Ontario school system and was not an abandonment of the father's custody rights." The application judge then found that the father exercised his custody rights when the mother refused to return the children, and there is no question that the father would have exercised custodial rights had the children not been retained by the mother in Ontario.

4. Views of the children

(a) ***Factual Findings***

[74] Article 13 of the Hague Convention provides that even if the retention is wrongful, the court may "refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." The mother places considerable weight in her submission on what she contends are the views of the children.

[75] In my view, this submission cannot succeed in the face of the explicit findings of the application judge which are entitled to deference on appeal.

[76] The children's objections included matters such as too much homework in Germany, loss of friends, loss of their dog, and that "Canada feels like home." After carefully considering the evidence led by the OCL as to the children's views, the application judge held, at para. 102, that the children's objection to being returned to Germany were neither "substantial" nor had "the 'strength of feeling' required that would take the objection beyond the level of expressing a preference for one place over another." The application judge quite properly observed at para. 105:

> To accede to such an objection would set the threshold much too low and certainly much lower than intended by the [Hague] Convention which provides that where there has been a wrongful retention, children shall be returned to their habitual residence unless the removing parent can establish that exceptional circumstances exist. Such circumstances do not exist in this case.

(b) ***The OCL's fresh evidence application***

[77] The OCL moves to introduce fresh evidence on this appeal as to the children's current views and circumstances. In my view, this evidence should not be admitted as it is not relevant to the legal issues this court is asked to determine.

[78] The OCL does not rely on Article 13 and, as I have explained, Article 12 excludes consideration of settling in as the application was brought within one year. This appeal essentially turns on the question of whether the children were habitually resident in Germany on August 15, 2014. If they were, the Hague

Convention application must be granted. If they were not, it must be refused. The proposed fresh evidence relates to facts arising long after that critical date, and I fail to see how it could assist the court in determining whether the application judge correctly determined the issue of habitual residence.

[79] Furthermore, to place any weight on such after-the-fact evidence would encourage protracted appeals and proceedings and reward delay.

[80] Accordingly, I would dismiss the motion for the admission of fresh evidence.

CONCLUSION

[81] The elements of Article 3 of the Hague Convention have been satisfied: the children habitually resided in Germany immediately prior to the wrongful retention on August 15, 2014; the retention breached the father's custody rights under German law; and the father was exercising his custody rights at the time of the retention. The mother wrongfully retained the children in Canada after August 15, 2014. None of the exceptions under the Hague Convention apply. Therefore, the children must be returned to their habitual residence.

[82] I have considerable sympathy for the mother, who obviously feels strongly that it is in her children's best interests to remain in Canada. I also recognize that the children have now been in Ontario for more than three years, and that moving them back to Germany is likely to be difficult. No doubt those

considerations were a significant factor influencing the Divisional Court to overturn the decision of the application judge.

[83] It is important to remember, however, that although this case involves the interests and needs of these two young children, it raises legal issues that transcend their interests and that affect the interests of countless other children and their parents. It is also important to remember that the mother's actions were in direct violation of the father's custodial rights.

[84] In my respectful opinion, the Divisional Court's decision would, if upheld, undermine the purpose and proper operation of the Hague Convention. To find that a child's habitual residence can be changed by the unilateral actions of one parent during the period of a time-limited consensual absence undermines the purpose and efficacy of a carefully crafted scheme to deal with child abduction and wrongful retention. It renders time-limited travel consents essentially meaningless, and would allow one parent to lay the foundation for child abduction by obtaining a defined, temporary consent of the other parent to travel with the child.

DISPOSITION

[85] Accordingly, I would allow the appeal, set aside the judgment of the Divisional Court and restore the order of the application judge. In paragraphs 6 and 7 of that order, I would substitute the date of October 15, 2016 for

September 30, 2016 as the date by which the children must be returned to Germany. I note that the application judge's order provides that the mother is permitted to travel to Germany with the children and reside with them there. It also requires the father to provide suitable housing for the mother and the children in Germany that approximates the accommodation they enjoyed prior to their departure for Canada.

[86] If the parties are unable to agree as to the costs of these proceedings, they may make brief written submissions to this panel.

Released: September 13, 2016

"Robert J. Sharpe J.A."
"I agree Laskin J.A."
"I agree B.W. Miller J.A."