CITATION: A.M. v. A.K. 2020 ONSC 3422
COURT FILE NO. FS-20-16188-00
DATE: 20200601

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
A.M.	Jennifer Ryan, for the Applicant
Applicant	
– and –	
A.K.	Oriana Pollitt, for the Respondent
Respondent	
	HEARD: May 21, 2020

SHORE, J.

[1] This is a case about four children, ages 11, 10, 8, and 2, who have been living in Ontario since February 2014, and whether they should be sent back to live in Australia to have the issue of custody and access determined by the Australian Courts. Specifically, the Applicant Father has brought an Application under the *Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, 1343 IL N. T. S. 89, Can. T.S. 1983 No. 35 (the "*Hague Convention*") asking this court to find that the children's habitual place of residence was in Australia as of August 2019, when the parties separated and the Respondent Mother refused to allow the children to move to Australia ("date of retention") with the Father.

Brief Overview:

[2] If the Court finds that the children were habitually resident in Ontario immediately prior to the date of retention, then there is no wrongful retention and the *Hague Convention* does not apply. If the Court finds the children's habitual place of residence immediately prior to the date of retention was in Australia, then subject to the exceptions set out in the *Hague Convention*, I am required to make an order for the return of the children to Australia.

[3] The primary thrust of the Father's argument is that the parties agreed and always intended to return to Australia and were only in Ontario for a limited time and purpose. He is asking the Court to make a finding that the children's habitual place of residence was in

Australia based on the intention of the parties. The case is interesting in that the Father concedes that the focal point of the children's lives was in Ontario immediately prior to the date of retention but submits that the intention of the parties should be given significant weight and should sway the court to find that the children were habitually resident in Australia.

[4] Both the Supreme Court of Canada and the Ontario Court of Appeal have addressed the issue of determining habitual place of residence where children were in a country with the consent of both parents on a time limited basis and specifically consider how "intention" should factor into the Court's analysis: see *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398, and *Ludwig v. Ludwig*, 2019 ONCA 680, 437 D.L.R. (4th) 517.

[5] For the reasons set out below, I am dismissing the Father's application. The Father, in his Application materials and during his lawyer's submissions, spent a lot of time going over the history in this file, the intention of the parties, and the ties that the children have to Australia. I am sympathetic to the Father who believed that he would eventually be bringing his family back to live in Australia and had those plans suddenly changed. However, the children have been living in Ontario, with his consent, for six years. The focal point of their lives (which can be different than the focal point of the Father's life) is clearly in Ontario. I find that the children's place of habitual residence is in Ontario and has been for quite some time. Although I have considered the issue of the parties' intention to return to Australia, it does not outweigh the children's significant ties to Ontario.

[6] To understand the Father's position, it is important to set out some of the history of this family.

Facts and History:

[7] The parties are parents to four children: Ab., age 11, D. age 10, C. age 8, and A. age 2. The Father is a citizen of Australia. The Mother is a citizen of Canada. The children were all born in Canada, with the exception of Ab. who was born in London, England.

[8] For the first several years of the parties' relationship, they moved back and forth between Australia and Ontario. In July 2010, the parties settled in Australia, although they continued to travel back and forth between Canada and Australia for a variety of different reasons.

[9] In 2012, the Mother travelled with the children to Canada and refused to return to Australia. At that time, the Father brought a successful Application under the *Hague Convention* and the Mother and children returned to Australia at the start of 2013. The parties reconciled.

[10] The Mother was in Australia on a visa. The mother outstayed her visa and despite all efforts made by the family, the Australian government would not extend her visa. In late 2013, she was required to leave the country. Because she had outstayed her visa, the government would not reconsider providing her with another visa for three years. The

Mother left with C. who was still breastfeeding. In the meantime, the Father continued to explore all avenues to obtain a new visa for the Mother.

[11] The Father remained in Australia with the older children, until February 2014, when they joined the Mother in Canada. The children started attending school in Toronto in 2014. The Father's position, which I accept, is that he always intended to return to Australia, and at that time, the Mother also intended to return to Australia.

[12] From 2014 and on, the Father continued to travel back to Australia approximately once ever six months so that he could renew his Canadian visa. The Mother and children continued living in Ontario. In each of 2015, 2016, and 2017, the Father took one of the children with him on an extended visit to Australia. If the Father and child were there for several weeks, arrangements were made for the child to attend school in Australia. The trips stopped in 2017.

[13] In October 2016, the Mother finally became eligible to obtain a visitor's visa for Australia. However, in and around that time, the Mother applied for a training program with the Toronto Paramedic Service. The parties agreed that if the Mother was successful in getting into the program they would stay in Ontario for her training.

[14] In February 2017, the Mother was accepted to the one-year program. The Father's position was the Mother would be well suited to get a job as a paramedic in Australia if she completed the program in Ontario and got one year of work experience before returning to Australia. The parties agreed that the family would remain in Ontario for another few years.

[15] The Father alleges that in early 2017, the parties signed an agreement that the family would return to Australia once the Mother completed her training and completed one year of work experience.

[16] In [Date Omitted] their youngest child was born in Canada. She has never been to Australia.

[17] The Mother completed the program in 2018, and in July 2018, the Mother got a job as a paramedic in Ontario.

[18] In the summer of 2019, the Father wanted to travel with Ab. to Australia. The Father said he wanted to return to start preparing for the family's return to Australia. The Mother did not consent to Ab.'s trip, and on August 9, 2019, she left the home with the children.

[19] The Father filed his *Hague* Application on September 16, 2019, alleging that Mother wrongfully retained the children in Ontario as the parents always intended to move back to Australia.

Law and Analysis:

[20] The Father brought his Application under the *Hague Convention*. The Ontario Legislature adopted the *Hague Convention* into Ontario law via s. 46(2) of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12. The relevant provisions are as follows:

Article 1

The objects of the present Convention are -

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

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 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

Date the children were allegedly retained:

[21] To begin the analysis under the *Hague Convention*, the Court must first determine the date of the retention. The date is important to the analysis because in order to determine if the retention was wrongful under Article 13, the court must assess which country the children were habitually resident immediately prior to the retention: see *Ludwig* at para. 24.

[22] The Father’s position is that he revoked his consent for the children to remain in Ontario on August 9, 2020, when the mother removed the children from the parties’ residence, and it was clear to both parties that their relationship was at an end. I accept his date for the purpose of determining this Application.

Habitual residence of the children immediately prior to August 9, 2019

[23] The next question to answer is: was the retention wrongful? This requires a finding with respect to where the children were habitually resident immediately prior to August 9, 2019. If the children's habitual residence was in Ontario immediately before the retention, then the retention was not wrongful, and no further order needs to be made under the *Hague Convention.* If the children's habitual residence was in Australia immediately before the retention, then the retention was wrongful, and subject to the exceptions set out in the *Hague Convention*, I would be required to order the children's return to Australia.

[24] I find the children were habitually resident in Ontario immediately prior to the date of retention and therefore the retention was not wrongful.

[25] There is no definition of "habitual residence" in the *Hague Convention*. It is a question of fact to be determined by the court: Balev para. 38 and Ludwig para. 33.

[26] The Supreme Court of Canada in *Balev* considered the two approaches that were being used by courts in Ontario to determine habitual residence: the dominant "parental intention approach" and the "child-centered approach", which focused on the child's connections with the state. The Supreme Court of Canada concluded that "habitual residence" should be determined by using a "hybrid approach" and stated at para. 43:

> On the hybrid approach to determining habitual residence, the application judge determines 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.
>
> The judge considers 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. [Citations omitted.]

[27] Under the hybrid approach, instead of focusing primarily on either parental intention or the child's actual acclimatization, the judge determining habitual residence must look at all relevant considerations arising from the facts of the case. When considering a child's habitual place of residence, a judge is required to look at a "multitude of factors which relate to the child's life": *J.M v. I.L.*, 2020 NBCA 14, 315 A.C.W.S. (3d) 515.

[28] No single factor dominates the analysis, rather the application judge should consider the entirety of the circumstances: *Balev*, at para. 44. The hybrid approach is "fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions": *Balev*, at para. 47. While courts allude to factors or considerations that tend to recur, there is no legal test for habitual residence and the list of potentially relevant factors is not closed: see *Balev* at para. 47.

[29] Following the decision in *Balev*, the Courts of Appeal in both New Brunswick and Ontario have supported the following analysis:

a. The court's task is to determine the focal point of the child's life, namely the family and social environment in which its life has developed, immediately prior to the removal or retention.

b. To determine the focal point of the child's life, the court must consider the following three kinds of links and circumstances:

    i. The child's links to and circumstances in country A;

    ii. The circumstances of the child's move from country A to country B; and

    iii. The child's links to and circumstances in country B.

c. In assessing these three kinds of links and circumstances, the court should consider the entirety of the circumstances, including, but not limited to, the following factors:

    i. The child's nationality;

    ii. The duration, regularity, conditions and reasons for the child's stay in the country the child is presently in; and

    iii. The circumstances of the child's parents, including parental intention: see *J.M*, at para. 11 and *Ludwig*, at para. 40.

The children's links and circumstances in Australia

[30] The Father submits that the children have been schooled in Australia and have family, social, and residential connections there such that "Australia is not a foreign environment to them". His evidence is as follows:

a. The three eldest children have both Canadian and Australian citizenship. The youngest child was born in Canada and can also obtain Australian citizenship.

b. The Father is Australian and currently has no status in Canada. He intends to live in Australia. The parties intended for the family to move back to Australia once the Mother finished school and obtained one year of work experience.

c. The children's paternal grandparents live in Australia and their paternal aunt lives in England. The grandparents maintain their relationship with the children by visiting the children in Canada and communication online.

d. The children lived in Australia until 2013/2014. Each of the three older children visited Australia once for an extended visit between 2015-2017, during which time they attended school in Australia (although it is unclear if each of the three children attended school during their respective trip).

e. The Father submits that he was the children's primary caregiver while the Mother was at school and working.

The circumstances of the children's move from Australia to Canada

[31] The details of the children's move from Australia to Ontario is set out in detail in the history section above. The children initially arrived in early 2014, with the parties' mutual consent. Both parties reconfirmed this consent in early 2017 when the Mother was accepted to the paramedic training program. At least initially, both parties intended to move back to Australia in the future.

The children's links to and circumstances in Canada

[32] The Father concedes that the children's 'focal point' is in Ontario but reiterates that his consent was time-limited. Even though he concedes this issue, it is important to provide details of the children's links to Ontario to understand the children's connection to this country when balancing their links in light of the entirety of the circumstances.

[33] The children's links to Ontario include the following:

a. The family has lived in Ontario for the last six years.

b. The children attended school in Ontario since 2014.

c. A. was born in Ontario and has never been to Australia.

d. The three eldest children left Australia and moved to Ontario when they were five, three, and one years old. They have each been back once for a visit between 2015 and 2017.

e. The parties are involved with the school community.

f. The children attend extracurricular activities both at school and the YMCA.

g. The children's doctor is in Toronto.

h. The children's dentist is in Toronto.

i. The children have extended family in Toronto, including their maternal grandmother, two uncles, and three cousins.

[34] It is clear the focal point of the children's lives has been in Ontario for the last six years.

Entirety of the circumstances:

[35] As set out in *Balev* and *Ludwig*, a finding that the focal point of the children's lives was in Ontario does not end the analysis under the *Hague Convention*.

[36] The Court is required to consider the entirety of the circumstances including but not limited to the following:

i) The child's nationality: The three eldest children have both Canadian and Australian passports. The youngest child has a Canadian passport but can obtain an Australian passport.

ii) The duration, regularity, conditions and reasons for the children's stay in the country the children are presently in: The children have lived in Ontario for six years. They moved to Ontario initially because the Mother had no status to remain in Australia and then remained in Ontario, with the consent of both parties, to allow the Mother to attend school and obtain some work experience. The only question is whether there was an intention to move back to Australia, which will be addressed more fully in (iii) below.

iii) The circumstances of the children's parents, including parental intention: see *J.M*, at para. 11 and *Ludwig,* at para. 40. As set out above, for the purpose of this analysis, I will accept the Father's position that the family was in Ontario for a limited time with the consent of both parties with the intention of moving back to Australia.

[37] Other factors I have considered:

a. The children have family in both countries and appear to have maintained connection with both families.

b. Neither parent has an unfettered right to live in the other's country.

c. Given the children's young ages when they left Australia, they really have known no home other than Ontario.

[38] Looking at the entirety of the circumstance, leaving out the issue of intent (which will be discussed below), it is clear the children are more closely connected to Ontario.

[39] The real issue in this case is intent. Do the parties' intent to move back to Australia (if I accept the Father's submission) outweigh the focal point of the children's lives so much that the Court should find that the children were habitually resident in Australia immediately prior to August 2019?

[40] The Father's position is that a significant weight should be given to the parties' intent to return to Australia. The Father is asking the Court to consider a handwritten agreement signed by the parties in 2017, wherein the parties agreed to return to Australia after the Mother completed her training. He acknowledges the agreement is not enforceable but that it provides strong evidence as to the parties' intention at that time. He submits that the court should give significant weight to this factor because the parties had already participated in a *Hague* Application in 2012 and therefore understood the importance of agreements and intentions. So, what weight should be given to the parties' intent and could this factor outweigh the significant link the children have to Ontario?

[41] The Supreme Court of Canada considered the role of parental intention in *Balev* and commented as follows at paras. 45-46:

> The circumstances of the parents, including their intentions, may be important, particularly in the case of infants or young children: see *Mercredi*, at paras. 55-56; *A. v. A. (Children: Habitual Residence)*, [2013] UKSC 60, [2014] A.C. 1, at para. 54; *L.K.*, at paras. 20 and 26-27. However, recent cases caution against over-reliance on parental intention. The Court of Justice of the European Union stated in *O.L.* that parental intention "can also be taken into account, where that intention is manifested by certain tangible steps such as the purchase or lease of a residence": para. 46. **It "cannot as a general rule by itself be crucial to the determination of the habitual residence of a child ... but constitutes an 'indicator' capable of complementing a body of other consistent evidence"**: para. 47. The role of parental intention in the determination of habitual residence "depends on the circumstances specific to each individual case": para. 48.
>
> 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: see *In re R. (Children)*, [2015] UKSC 35, [2016] A.C. 76, at para. 17; see also *A. v. A*., at paras. 39-40. [Emphasis added.]

[42] The hybrid approach requires the court to evaluate all the relevant circumstances of the case. If I were to give undue weight to the parents' intentions in the case before me, I would be ignoring the decisions in *Balev* and *Ludwig* by reverting back to the once dominant "parental intention approach". There may be some cases where intention outweighs the children's focal point but that is not so in the case before me. The children have lived in Ontario for six years. Their connection to Ontario is strong. In comparison the children have little connection to Australia and, after six years in Ontario, how can the intent to return to Australia outweigh the reality of these children's lives?

[43] To order the return of the children in these circumstances would be contrary to the objectives of the *Hague Convention*. The Supreme Court of Canada, in *Balev*, summarized the goals of a prompt return of children under the *Hague Convention* as:

a. deterring parents from abducting the child in an attempt to establish links with a country that may award them custody;

b. encouraging the speedy adjudication of custody or access disputes in the forum of the child's habitual residence; and

c. protecting the child from harmful effects of wrongful removal or retention. (at para. 59)

[44] The Mother did not abduct the children in an attempt to establish links in Ontario. The children have been living in Ontario with both parties' consent for six years. The best evidence for determining custody and access is in Ontario. There would be very little evidence available in Australia because the children have been absent for so many years. Finally, I am concerned about the harmful effects on the children if they are ordered to return to Australia. The children would be uprooted from the only home they know.

[45] Even if I would accept the entirety of the Father's evidence with respect to the parties' intent for the family to move back to Australia, I find that it would be insufficient to make any finding other than that the children were habitually resident in Ontario immediately prior to the retention.

Order:

[46] The Application is dismissed.

[47] If the parties are unable to resolve the issue of costs within ten business days of the release of this decision, they may each make brief written submissions, to my attention as follows:

a. The written submissions are limited to three pages, double spaced, using 12pt font. Anything over this page length will not be considered. The page limit does not include the parties' bill of costs or any offers to settle.

b. The parties do not need to provide a book of authorities but need only provide the name and citation of any cases they may want to rely on.

c. The Respondent shall file her costs submissions within fifteen business days of release of this decision.

d. In their submissions, the parties shall specifically refer to precedents regarding costs under the *Hague Convention* and assume that I am familiar with the law regarding costs under the *Family Law Rules*.

e. The Applicant shall file his costs submissions within five business days after being served with the Respondent's costs submissions.

[48] The written submissions can be served and filed by email. The material shall be emailed to Toronto.SCJ.FAMILYINTAKE@ontario.ca

S. Shore, J.

Released: June 1, 2020

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REASONS FOR JUDGMENT

S. Shore, J.

Released: June 1, 2020