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— Epstein's This Week in Family Law

Philip Epstein

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Hague Convention - Habitual Residence

Balev v. Baggott, 2016 CarswellOnt 14331 (Ont. C.A.) - Laskin J.A., Sharpe J.A. and Miller J.A. When I wrote about this case and the Ontario Divisional Court decision back in February, 2016, I ventured that there was very good reason to doubt the correctness of the decision. I pointed out that if in fact it was correct, it raised some serious questions about how parties should draft temporary agreements for custody that involve different jurisdictions.

The Court of Appeal for Ontario has weighed in and determined that the Divisional Court indeed erred in this decision. With the time-limited consent of the father, the mother had come to Ontario from Germany with two young children and when the consensual period expired, the mother decided to remain in Ontario and refused to return the children to Germany. The application judge found that the habitual residence of the children was Germany and did not change during the consensual period in Canada and ordered them returned to Germany. The Divisional Court reversed that decision and found that the habitual residence was, in fact, Ontario.

When this decision was issued and the mother was directed to return the children to Germany, the mother who was obviously upset at this result told a reporter that the *Hague Convention* was "legislative kidnapping".

I appreciate how upset the mother is since the children have now been in Ontario for three years, have been in regular school and established relationships. Nevertheless, the Divisional Court decision was contrary to the purpose of the *Hague Convention*. The Divisional Court went wrong in trying to analyze this case based on the best interests of the children. As the Court of Appeal said in *Katsigiannis v. Kottick-Katsigiannis*, 18 R.F.L. (5th) 279 (Ont. C.A.) at para. 32:

> 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.

Clearly in this case it was for the Courts of Germany to determine custody and the best interests of the children.

The Court of Appeal again reviews the principles of habitual residence and their cases of *Korutowska-Wooff v. Wooff*, 5 R.F.L. (6th) 104 (Ont. C.A.) and *Wentzell-Ellis v. Ellis*, 78 R.F.L. (6th) 245 (Ont. C.A.).

A parent cannot unilaterally change a child's habitual residence under the *Hague Convention*. The Divisional Court's finding that the habitual residence could change because of the parties' joint agreement that the children should spend a year in Canada does not change habitual residence, and the Divisional Court erred in that regard.

The Divisional Court placed considerable weight on the fact that the children had settled into their new environment in Ontario. There is authority that supports consideration of the children's association with a new jurisdiction. See, for example, *Csoke v. Fustos*, 2013 CarswellOnt 5137 (Ont. S.C.J.) at para. 260; *Habib v. Amin*, 51 R.F.L. (7th) 432 (Ont. S.C.J.), at para. 42 and *O'Brien v. O'Brien*, 59 R.F.L. (6th) 389 (Ont. S.C.J.), at paras. 35-36. However, the principle of "settling in" is not relevant if the application is brought within one year of the wrongful detention or removal. See Article 12 of the *Convention*. See, for example, *Bazargani v. Mizael*, 63 R.F.L. (7th) 58 (Ont. C.A.), at para. 22 and *Ibrahim v. Girgis*, 48 R.F.L. (6th) 1 (Ont. C.A.). Thus it was an error for the Divisional Court to consider the fact that the children had settled in Ontario when determining habitual residence.

The Court of Appeal was not unmindful of the distress this would cause the mother. However, they pointed out the following:

> 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.
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> 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.
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> 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 obtained a defined, temporary consent of the other parent to travel with the child.

I appreciate that this was an enormously difficult situation for the mother, particularly after the length of time the children have been in Ontario. Nevertheless, the Court of Appeal, respectfully got it absolutely correctly and this decision makes it clear that habitual residence cannot be interfered with on a temporary basis such as occurred here and that section 12 of the *Hague Convention* does not apply in the circumstances of such a case.

Custody - Views and Preferences of the Child - Judicial Interview of a 13-year-old

Eustace v. Eustace, 2016 CarswellOnt 12687 (Ont. S.C.J.) - Emery J. This was a custody trial with respect to a 13-year-old boy. The Children's Lawyer was appointed to represent the child and there was a comprehensive section 30 assessment done under the *Children's Law Reform Act*. The comprehensive assessment report was, as is usual in these kinds of cases, significantly out of date by the time of trial. The trial judge, an experienced family law judge, on his own motion, extended an invitation to the child to attend court and testify by way of a judicial interview. Justice Emery indicates that he conducted the interview under section 64 of the *Children's Law Reform Act* in order to ascertain the views and preferences of the child on the issues before the Court. The interview took place on the record. At Justice Emery's suggestion, the parents excused themselves so that the child could speak candidly. In a surprising move, the child also asked if all of the lawyers, including his own lawyer, would leave the courtroom and, thus, the judicial interview took place between the child and the trial judge with the court registrar and court reporter in attendance. A transcript was taken of the interview and the parents were provided with the transcript of the interview so that the views and preferences of the child should be well known. The child indicated that he wished to continue to live with his father and his grandparents and that he had significant issues with his mother.

The child's wishes and preferences are somewhat in conflict with the assessment report and, of course, Justice Emery recognized that judges do not delegate their decision making to assessors. The assessor's report is only one factor that a trial judge must consider. See *Tacit v. Drost*, 43 R.F.L. (4th) 242 (Ont. Gen. Div.) and *Woodhouse v. Woodhouse*, 20 R.F.L. (4th) 337 (Ont. C.A.).

While the assessment report favoured the mother, the trial judge found sufficient problems with the report that it did not overcome the child's parent wishes and preferences.

Justice Emery also noted the following:

> Although J.M. made his views and preferences known, it is equally important that he understand that those views and preferences must be taken into consideration along with a great many other factors that go into determining what is in his best interests. All facts must be considered to decide what custody and access terms would be best for him in defining his human relationship with both sides of his family. It is for this reason that I have taken his views and preferences into account and have given them significant weight. However, I have not considered those views and preferences to be conclusive.
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> What may be best for J.M. now and in the long run cannot be subject only to the wishes expressed by J.M. at this point in time in his life. Having interviewed him, I am confident that J.M. understands that at 13 years old he can't always get what he wants. Knowing he has been heard and his wishes have been taken into account, he must accept the court will order what he needs.

In the end, the father is awarded custody and the mother is given parenting time in accordance with a very extensive multidirectional order.

The important parts of that order include a requirement that the parents engage in counselling with a qualified therapist in a child reunification treatment program approved by the Office of the Children's Lawyer at least once a month and that the parents shall seek counselling from a qualified therapist for family sensitivity treatment at least once a month for a year in order to learn how to be respectful of the mother's role and to accept the importance of the child's relationship with both parents.

The multidirectional order also provided that the custody access and its terms are subject to review in two years.

It is unusual for a judicial interview to take place in the face of an assessment report, but given some of the problems that Justice Emery found with the report and given the fact that it was out of date, it was left to him to consider the best way of getting the current wishes and preferences of the child. For those judges who have not considered a judicial interview or how one should be conducted, they may find this an interesting template. It is important to note that the child in this case could not have been promised confidentiality by the Court and, in fact, the child knew that his remarks were being transcribed and given to the parents. The risk, of course, in this kind of interview is that a one-off interview, in what can only be a stressful setting, may not provide accurate information and may not be presented in a way that was absent parental influence. Perhaps that is why Justice Emery made it clear that the wishes of this particular child were only one factor in his decision. Clearly, as well, Justice Emery made it clear to the child that his wishes were not to be determinative of the issue.

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