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International Child Abduction: A 'Time-Limited Consent' Does not Change the Habitual Residence of a Child

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Case Commented On: *Balev v Baggott*, 2016 ONCA 680 (CanLII)

Introduction

The issues arising from international family disputes involving the non-consensual relocation of children abroad is perhaps one of the more difficult areas of private international law, in that the mechanical aspects of the conflict of laws (as set out in the *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, 19 ILM 1501) interact with the more personal aspects of international family life.

This post will examine the issue of international child abduction under the Hague Convention regime from the perspective of 'time-limited consent', namely whether the 'habitual residence' of a child can unilaterally be changed during a time-limited consent period when one parent wrongfully removes or retains a child in another contracting state.

Background

As the Ontario Court of Appeal in *Balev v Bagott*, 2016 ONCA 680 (CanLII) recalled, applications pursuant to the Hague Convention do not determine custody or decide on what would be in the best interest of the child. The Hague Convention mechanism solely involves an adjudication on whether a child has been 'wrongfully removed or retained' in a contracting state within the scope of Art. 3 and Art. 12 of the Convention. If the answer is yes, and no exception contemplated by the Convention is applicable, the child must be returned to the place of his or her habitual residence. The mechanism therefore hinges on a determination of the child's habitual residence immediately before the removal or retention.

The important term of 'habitual residence' is not defined in the Hague Convention. In 2004, the Ontario Court of Appeal set out a four-pronged test in *Korutowska-Wooff v Wooff*, 2004 CanLII 5548 (ON CA). The question of habitual residence is a question of fact, decided on all the circumstances; 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; and a child's habitual residence is tied to that of the child's custodian(s) (*Korutowska-Wooff,*at para 8).

The Convention establishes a presumption in favour of ordering the summary return of the child, designed to restore the *status quo ante* by way of a 'prompt return' of the child to the place of his or her habitual residence (see for example, *VW v DS*, [1996] 2 SCR 108 (CanLII), at para 36). The mechanism is subject to four discretionary exceptions: a time limitation; lack of custody rights or acquiescence in the removal or retention of a parent; grave risk of physical or

psychological harm to the child; and the 'voice, not a veto' right of a child to express its objection to a return order. This strict presumption is first and foremost designed to act as a powerful deterrent to parents against future international child abductions.

Issues Before the Ontario Court of Appeal

The appellant Mr. Balev and the respondent Ms. Bagott are Canadian citizens and the parents of two children, who were born in Germany but who are both Canadian citizens only. With the exception of two periods of time in Canada (one undisclosed and the other from October 2010 to January 2011) the children resided in Germany until April 19, 2013 when they arrived in Ontario with their mother. The parents had separated in 2011 but subsequently co-habited in 2012. The father had been awarded interim custody of the children in Germany. In April 2013, the parties agreed to take the children to Canada so that they could attend school, with the father signing a "Consent Letter for Children Travelling Abroad" for a period between July 2013 and August 2014. This consent is referred to as a 'time-limited consent' in international family law practice.

On the mother's insistence (so as to enroll the children in a Canadian school), the father also signed a letter transferring physical custody of the two children to the mother for the time-period in question. Upon expiration of the consent period, the mother continued to reside with the two children in Ontario.

The issue before the Ontario Court of Appeal was whether the habitual residence of the two children had changed from Germany to Ontario during the period of the father's time-limited consent so that the children were habitually resident in Ontario on the date that the consent expired. If so, the mother would not have wrongfully retained them in Ontario within the Hague Convention mechanism.

Case History and Decision

By way of background, the application judge had concluded that after the father's consent expired on August 15, 2014, the mother had wrongfully retained the children in Canada within the meaning of Art. 3 of the Hague Convention, after she had failed to return them to Germany. The application judge had found that the children remained habitually resident in Germany, based on factual findings that the parties' settled intention was that the children would reside in Canada on a temporary basis only. There had been a breach of the father's custody rights under Art. 3 and the children had not 'settled in' in Canada within the meaning of Art. 12 of the Hague Convention.

The Divisional Court judge disagreed with the initial findings and concluded that the habitual residence had changed from Germany to Ontario during the consensual, temporary travel period and that the Hague Convention did not apply (at para 22). It held that the change in habitual residence resulted from the joint decision of the parties to move the children to Ontario for an extended period of time. Since the children were residing in Ontario with their mother and with the consent of their father for an "appreciable period of time" (para. 24), their habitual residence had changed.

The Ontario Court of Appeal disagreed. In its view, the Divisional Court had erroneously concluded that the habitual residence of the children could unilaterally be changed by the mother. The determinative paragraph of the Ontario Court of Appeal, at para 42, quotes a long established line of Ontario decisions that confirm that "a parent's consent to a time-limited stay

does not shift the child's habitual residence". The time-limitation of a consent fails to establish an "implication of permanency" that is requisite in a change of habitual residence (at para 42). On the facts, the time-limited consent contemplated an extension of the stay, but even if an extension had been agreed to by the father, "the extension does not defeat the time-limited nature of the consent" (at para 48). Nevertheless, the Court left open the possibility that in a different factual scenario, a consensual time-limited stay may be "so long that it becomes time-limited in name only and the child's habitual residence has changed" (at para 49).

The Ontario Court of Appeal concluded that the components of Art. 3 of the Hague Convention were satisfied. The children habitually resided in Germany prior to their wrongful retention on August 15, 2014. That retention breached the father's custody rights which the father was exercising at the time of the wrongful retention. The mother therefore wrongfully retained the children in Canada after August 15, 2014 and none of the four discretionary exceptions to the Hague Convention mechanism applied. The children would have to be returned to their father in Germany.

Commentary

A consistent defence in international child abduction disputes is that the children have 'settled in' in their new environment. The Ontario Court of Appeal criticized the Divisional Court for taking this into consideration. As previously confirmed by the Supreme Court of Canada in *Thomson v Thomson*, [1994] 3 SCR 551 (CanLII), evidence of 'settling in' is not relevant under Art. 12 of the Hague Convention where an application to return a child is brought within one year of the wrongful detention or removal, as was the case on the facts here. Even where proceedings for a return application are commenced after the one-year period, a child is to be returned under the Hague Convention mechanism, 'unless' it can be established that the child is now 'settled in' in his or her new environment.

At the time of the decision of the Ontario Court of Appeal, the children had been in Ontario for more than three years. Despite this, the Court rightly concluded that a strict application of the Hague Convention was necessary. Firstly, the mother should not be given undue benefit for her actions in a "direct violation of the father's custodial rights" (at para 83). Secondly, the issues before the Ontario Court of Appeal "transcend" (at para 83) the direct interests of the children in the overall interest of "countless other children and their parents" (at para 83). Here, the Ontario Court of Appeal reiterated the Supreme Court of Canada's previous emphasis on deterring future international child abduction by favouring the restoration of the status quo as soon as possible (*VW*).

The objective and operation of the Hague Convention can only be achieved where there is a strict application of the Convention mechanism by all contracting states. Any decision to the contrary, as the mother in *Balev* had sought in her attempt to undermine the temporary aspect of a 'time-limited consent', would undermine the "purpose and efficacy of a carefully crafted scheme" (at para 84) as set out in the Hague Convention. Whilst the outcome for Ms. Bagott is clearly not satisfactory, the application judge's order permits her to travel with the children to Germany and to reside there. The order also imposes a requirement that the paternal custodian is to provide 'suitable housing' for the mother and the children in Germany that is approximate to their living conditions enjoyed in Canada. As the facts in the case set out, the father is employed and continues to reside in the house in which the parents had resided with the children prior to their wrongful retention in Canada.

Although I do not wish to pass judgment on a family situation that is clearly difficult, one cannot but wonder if Ms. Bagott's conclusion in the Canadian media that the Hague Convention has become a "means of legislative kidnapping" ("Court orders 2 Canadian children to move to Germany with father", CBC News, September 13, 2016) is somewhat far-fetched. As the Supreme Court of Canada has previously held, the threshold of harm to a child (both physical or psychological) is a high one, requiring that the harm would amount to an intolerable situation (*Thomson*, at 596). Nor were there any issues raised that the return to the children's custodian in Germany would invoke a Canadian public policy exemption as set out in Art. 20 of the Hague Convention on grounds of human rights and fundamental freedoms. The four discretionary exceptions to a 'prompt return' order were also not raised.

What is interesting from a conflict of laws perspective is that the Ontario Court of Appeal examined the father's actions through the concepts of 'parallel proceedings' and 'forum shopping', which are typically raised in private international law disputes. Before his temporal consent was due to expire, the father filed a Hague Convention application for the return of the children at a court in Ontario. After a delay of 10 months in the Ontario proceedings, the father commenced a Hague Convention application in Germany. When the German courts "indicated" (at para 11) that the children were no longer habitually resident in Germany, the father withdrew his application and proceeded with the Ontario application, an action which the Ontario Court of Appeal considered to border on forum shopping (at para 62). On the facts, however, the German courts had not actually issued an order on the habitual residence of the children, that is, they had not made a final determination (at para 62). Indeed, Art. 8 of the Hague Convention provides that a parent can seek assistance for the return of a child either in the country of the child's habitual residence or in another contracting state. The Ontario courts were correct to accept jurisdiction, with the Court of Appeal stressing that "the issue of habitual residence under the Hague Convention is one for the courts of the requested state" (at para 64). The jurisdiction of the Ontario courts to adjudicate the father's application cannot, therefore, be criticized.

Final Observations

There are indications that Ms. Bagott is considering an appeal to the Supreme Court of Canada. Given that the Supreme Court has previously stressed a strict application of the Hague Convention principles and has emphasized the deterrent aspect extensively in *VW*, it would be surprising if leave were granted.

I began this blog by acknowledging that international child abductions raise sensitive and difficult issues. But in order to deter unilateral actions by parents to wrongfully remove or retain a child, the Ontario Court of Appeal was correct to follow the Supreme Court of Canada's prior emphasis on deterrence, by applying the Hague Convention mechanism strictly.

On the subject of deterrence, between 2003 and 2008, the latest figures published by the Hague Conference on private international law (Nigel Lowe, *A Statistical Analysis of Applications Made in 2008 under the Hague Convention – Part III National Reports*, May 2011) show that Canada achieved a reduction of 13% in judicial return applications. Where there is arguable scope for improvement is the speed with which Hague Convention applications are determined.

To this effect, courts in Canada, such as the Court of Queen's Bench of Alberta, have reiterated the Convention's emphasis on expediency for determining applications on wrongful removal or retention pursuant to the Hague Convention mechanism (see, for example, Court of Queen's Bench of Alberta, Family Practice Note "6", Art. 6, effective March 1, 2011).

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