VOGEL

THE TOP 5 QUARTERLY FAMILY LAW REVIEW

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1. OM v ED, 2019 ABQB 503

B.E. Romaine J.C.Q.B.A.
Applicant - L. Sherry
Respondent - J. Wilkins / A. Peters

Residence, Hybrid Approach, Credibility

In *OM v ED*, the father of a 4-year-old child sought return of the child to Spain under the *Hague Convention* after the child's mother took him to Canada without the consent of the father. The father was also exercising a right of custody at the time of the child's removal. Seven months earlier, the mother, father and child had moved from Canada to Europe, eventually leasing a home in Spain in March 2019. Two months after the move to Spain the father, while away on a work rotation, learned that the mother and child had left to Canada.

Article 3 of the *International Child Abduction Act* (the "Act") provides that removal of a child is wrongful where it is in breach of the rights of custody of a person "under the law of the State in which the child was habitually resident immediately before the removal or retention". At issue in this matter was the determination of the child's habitual residence. The father's position was that it was Alicante, Spain, and the mother's position was that it was Calgary, Canada.

As the *Hague Convention* does not define "habitual residence", *Office of the Children's Lawyer v Balev*, 2018 SCC 16 is now the leading case in Canada on determining habitual residence. *Balev* provides that Canadian Courts should determine habitual residence using a "hybrid approach", rather than focusing primarily/exclusively on a parental intention analysis or on a child-centred focus. Relevant considerations under the hybrid approach include the duration, regularity, conditions and reasons for a child's stay in a jurisdiction, the child's nationality, as well as the circumstances of the parents (including their intentions). Habitual residence is determined at the point immediately prior to the wrongful removal of the child, absent exceptions set out in Article 12 of the Act.

Justice Romaine examined the circumstances of the child's residence in Spain and noted that he was there for just under two months prior to being removed to Canada. While in Spain he attended school, went to the beach and to the zoo, and was visited by extended family and friends. His clothes, books, toys, and his dog were with him in the home that his parents had set up. "Everything important to a four-year old was there for him in Spain. He was integrated into a social and family environment in Spain".

Despite the mother's assertion that she had agreed to move to Europe on a trial basis only and that she had some remaining ties to Canada, Justice Romaine found that the mother's covert conduct in the return to Canada as well as the overall conduct and email evidence of both parties indicated their intention to move to Europe permanently. The mother had posted about the move on social media, enrolled the child in school in Spain, and signed a lease for the parties' home. The father also asserted in his evidence that the move to Europe was permanent. Furthermore, Justice Romaine rejected the mother's submission that determining habitual residence "immediately" before the wrongful removal could refer to the period of time seven months earlier while the child was in Canada, as such an approach would require over-reliance on parental intention and defeat the purpose of the hybrid approach.

Addressing the fact that the child had spent a relatively short period of time in Spain prior to removal, Justice Romaine noted that habitual residence can be established in a short time frame if the evidence demonstrates a child's acclimatization to the jurisdiction. Given the child's age and the circumstances of his life in Spain with both parents, a dog, and a regular home and school, there was sufficient evidence in this case to demonstrate the child's acclimatization and established habitual residence in Spain.

The child's return to Alicante, Spain pursuant to Article 12 of the Act was ordered.

Practical Implications: For Hague applications, be sure to factor in the hybrid approach from Balev to determining habitual residence.

2. FJN v JK, 2019 ABCA 305

Jack Watson J.A., Frans Slatter J.A., Brian O'Ferrall J.A. (Dissenting)
Appeal from the Decision of A.B. Moen J.C.Q.B.A.
Appellant - A. Hayher / R.D. Bell
Respondent - E.G. Rice, Q.C.

Section 7 Expenses, High Income, Enhanced Costs

The Appellant and Respondent had met online and had a sexual encounter, resulting in the birth of a child with Down Syndrome. The parties had never lived together or formed any relationship. The Respondent raised the child with her husband from the child's birth alongside four other children of their own. The Appellant had no relationship with the child.

Lower Court Decision

The trial judge had ordered the Appellant to pay Section 3 / 4 guideline child support of $2,578 per month based on an annual income of $300,000. The trial judge had also found that the child's needs were greater due to her diagnosis of Down Syndrome and thus ordered extensive Section 7 expenses including an au pair until age 18; the au pair's flights; the cost of employment benefits; and a vehicle, along with all of the maintenance, fuel and driver training associated with the au pair learning how to operate the vehicle. The trial judge then ordered enhanced costs against the Appellant for misconduct, resulting in double costs at trial and additionally increasing all previous costs awards to double costs against him.

Appeal

The Court of Appeal dealt with the issue of which childcare expenses fell outside the base support amount and, if so, whether the expense was necessary and reasonable, therefore warranting a proportionate contribution.

In a 2 - 1 decision, the majority found the trial judge had erred in applying a wide net for Section 7 extraordinary expenses solely because the Appellant had a high income and that this amounted to a wealth redistribution between the families. The Court of Appeal highlighted that base child support amounts in Section 3 / 4 are based on a policy decision in regards to the proportion of income that parents are likely to spend on child rearing at various levels of income and Section 7 then adds on "special or extraordinary" items. The first question is thus to decide when an extracurricular expense is outside the base support calculations and the second question is whether the expense is reasonable. As noted, it is not correct for a Court to characterize any expense as an "extraordinary expense" under Section 7 merely because the payor spouse can afford it.

The Court of Appeal did not disagree with the trial judge's conclusion that, in light of the child's diagnosis of Down Syndrome, the base support amount would need to be supplemented by Section 7 support. However, the majority did find that the trial judge erred in expanding the scope of allowable Section 7 expenses. Ordering a Section 7 expense for a vehicle was not reasonable as other means of transportation fell within the scope of base child support. The cost of a full-time au pair was also found to be unreasonable as the child was in school full-time, though it was agreed that the child required an escort between home and school. The Court of Appeal sent these Section 7 expenses back to the Court of Queen's Bench for reconsideration but did further reject Section 7 expenses for summer camp and a recreation centre as it found these to be already included within base child support.

The Court of Appeal then rescinded the double costs award that the trial judge had ordered against the Appellant and substituted party and party costs in its place.

Dissent

Justice O'Ferrall found that the majority's views on what is necessary and reasonable for a child with Down Syndrome were irrelevant and that the majority had effectively substituted their views for the findings of the trial judge which were based on extensive evidence she had heard. He found that while there could be disagreement over what is necessary or reasonable, the trial judge's view was nonetheless entitled to deference particularly since her view was based on expert evidence as to what was necessary for the child. Justice O'Ferrall disagreed with the majority's view that $2,578 per month in base child support constituted a considerable sum of money that would go a long way towards funding any extraordinary expense reasonably required and stated that the majority was incorrect to characterize the trial judge's child support order as a wealth transfer.

The Appeal was allowed and the Respondent is currently seeking leave to appeal to the Supreme Court of Canada.

Practical Implications: Greater scrutiny needs to be given to Section 7 expenses, especially when Section 3 or Section 4 is significant.

3. SJB v RDBB, 2019 ABQB 624

D. A. Labrenz J.C.Q.B.A
Plaintiff - A. Hayher
Defendant - P. LeClair

Oppression Remedy, Lump Sum Support, Credibility

In *SJB v RDBB*, the parties were married and cohabitated for 19 years and had two children of the marriage aged 11 and 14 at time of trial. The trial here dealt with custody, parenting, property, and support.

Custody and Parenting

Since separation, the children lived with the mother in the matrimonial home. At trial, the judge found that the children felt neglected by the father while, in comparison, were close to and quite reliant on the mother. The father had made threats against the mother, made cruel statements to the children, and his actions amounted to those of a neglectful parent. Further, the father showed a pattern of failure to make parenting decisions with the mother. The trial judge granted the mother sole decision making of the children. The status quo on parenting was also preserved, whereby the father had parenting time every second weekend and on Thursday evenings; however, the trial judge noted that the children could choose to forgo time with their father if they wanted to.

Property

The father, along with his business partner, was a 50% shareholder in various corporations dealing with real estate properties in Calgary. Through the use of an expert valuator, the father's corporate interests were valued at $2,421,665. His income largely came from dividends and shareholder loans. At trial, the father's evidence was not found to be credible or reliable. The trial judge included the shareholder loans in his corporate valuation as assets and reduced the father's matrimonial property interest by the amount he had taken as shareholder loans.

The total equalization payment to the mother amounted to $917,816. The father had a history of defying Court Orders and failing to make support payments. To ensure the mother realized the benefit of this judgement, the trial judge held that the mother had an equitable interest in the father's corporate shares and ordered that she commence an oppression action to resolve her interest under Section 242 of the *Business Corporations Act*. The trial judge then seized himself of the forthcoming oppression action and issued a preservation order as against the corporations until the oppresive action was resolved.

Child Support

The father had been in arrears of $78,656 for child support despite enforcement actions conducted by the Maintenance Enforcement Program. The father's history of disregard to child support Orders and his failure to provide disclosure led the trial judge to order both prospective and retroactive Section 3 child support be paid as a total lump sum of $167,804 to the mother. The trial judge also awarded the mother combined retroactive and prospective Section 7 support as a total lump sum of $53,812, all secured against his corporate shares.

Spousal Support

The mother was the primary caregiver of the children during the marriage, largely working part-time as a real estate agent while the father worked unhindered by household responsibility. Clear entitlement to compensatory and non-compensatory spousal support was found. A lump sum of $198,000 was awarded for retroactive spousal support and $42,000 was awarded in prospective support for the next 6.5 years, secured against his shares.

Conclusion

After accounting for the value of the transfer of properties to the mother, the father owed the mother an equalization payment of $917,816 and $461,616 in total support. Following this judgment, the father has since filed a Notice of Appeal.

Practical Implications: This case illustrates the broad power of the MPA, in particular Section 9 and the interplay between the MPA and the BCA.

4. CCO v JJV, 2019 ABCA 356

Peter Martin J.A., Patricia Rowbotham J.A., Jo'Anne Strekaf J.A.
Appeal from the Decision of J.T. Neilson J.C.Q.B.A.
Appellant - A. Allen-Lloyd
Respondent - G.L. Yohannes

Habitual Residence, Grave Risk of Harm

Background

The Appellant Father and Respondent Mother were married in Quebec and later moved to Massachusetts shortly before the birth of their child. The parties then quickly separated within three or four months of the child's birth. The Mother remained in Massachusetts and the Father moved to Alberta. There were no Massachusetts Orders dealing with custody.

In January 2019, when the child was 9, the Father travelled to Massachusetts for the stated purpose of visiting the child; however, he took the child back to Alberta. The Father relied on a 2018 Alberta Desk Divorce Judgment, which awarded him sole custody, that he had obtained by default after the Mother had previously ignored service of the documents and failed to respond. The Father's affidavit filed in support of the Divorce Judgement made no mention of the child's residence since birth in Massachusetts with the Mother. The Mother had a prior criminal record for impaired driving.

The Mother made a successful application under the *Hague Convention* to have the child returned to her. The chambers judge used the hybrid approach from *Office of the Children's Lawyer v Balev*, 2018 SCC 16 and found that the child had been wrongfully removed from their habitual residence in Massachusetts. The chambers judge further held that the Father had not demonstrated that there was grave risk that the child's return to Massachusetts would expose the child to physical or psychological harm or otherwise place the child in an intolerable position.

The Massachusetts Trial Court then issued an Order directing that the Mother have temporary sole custody of the child and that the child reside primarily with the Mother. The chambers judge concluded that the Massachusetts Court was the appropriate jurisdiction regarding custody and access.

Appeal

Both parties applied to admit new evidence on appeal. The Court of Appeal found it appropriate to consider the new evidence as it went directly to the issue of grave risk of harm, an issue before the chambers judge. Citing *BRH v RPS*, 2017 ABCA 268 as the test for fresh evidence when children's best interests are involved, the Court of Appeal admitted Orders from the Massachusetts Court, affidavit evidence of the Father alleging a further criminal charge against the Mother, the Mother's response to this allegation, and a letter from the Department of Children and Families stating that they have no protective concerns with the Mother.

The Mother argued that the appeal was moot given the chambers judge's finding in regards to jurisdiction. The Court of Appeal disagreed and held that the appeal was not moot as the considerations under a *Hague Convention* application are different than what the Massachusetts Courts will determine in relation to parenting and a determination of moot here could have negative effects on future cases where a child is returned and submits to the jurisdiction of a foreign Court.

The Court of Appeal further held that the finding of the habitual residence in Massachusetts was well supported by the record. The Father argued that there were two habitual residences, Alberta and Massachusetts; however the chambers Justice considered this argument and rejected it. The child, age 8, had lived in Massachusetts since birth.

The Court of Appeal also noted no reviewable error in the chambers judge's conclusion that the removal of the child was in breach of the mother's rights of custody that were being exercised.

The Father's main focus was on the chambers judge's conclusion that the child would not be exposed to a grave risk of harm and the Court of Appeal found that this was also supported on the record. The Father had attempted to attack the Mother's character and questioned the Mother's fitness to parent the child in light of her criminal record. The Father pointed to newspaper clippings of crime in the area where the Mother lived. The chambers judge had considered the leading case, *Thomson v Thomson*, [1994] 3 S.C.R. 551 (SCC) which states that the physical or psychological harm under Article 13 of the *Hague Convention* must also amount to an intolerable situation and that the must be substantial and not trivial. The Court of Appeal thus agreed with the chambers judge's conclusion that there was no merit in the Father's claim of grave risk of harm.

The Court of Appeal found that it would be unreasonable, given the time sensitive nature of the proceedings, to set a standard for Applications under the *Hague Convention* where a chambers judge must address each piece

of evidence in his decision. The Court of Appeal was not persuaded that the chambers judge's reasons for his determination on the issue of grave risk of harm to the child was insufficient.

The Court of Appeal further found no merit to the Father's argument that the chambers judge erred when he declined to hear the views of the child. An earlier Order of the case management judge denied the Father's application for the appointment of counsel for the child and Counsel for the Father confirmed to the chambers judge that the Father was not seeking to have the Court consider the child's views in light of the prior application being denied.

Practical Implications: Detailed analysis of all evidence not required in *Hague Convention* decisions.

5. JKN v JPM, 2019 ABQB 509

M.J. Lema J.C.Q.B.A
Defendant - L. Balbi, Q.C.
Plaintiff - R. Fauser

Transfer, Divorce Act

In this case, the mother of a 13-year-old child applied to transfer a custody-variation proceeding from Alberta to British Columbia, notably under Section 6(3) of the *Divorce Act*.

The mother (JPM) and child were residing in BC and the father (JKN), residing in Alberta, opposed the application.

Section 6(3) states as follows:

Where an application for a variation Order in respect of a custody Order is made in a variation proceeding to a Court in a province and is opposed and the child of the marriage in respect of whom the variation Order is sought is most substantially connected with another province, the Court may, on application by a former spouse or on its own motion, transfer the variation proceeding to a Court in that other province.

The determinative issue from Section 6(3) is whether the child of the marriage is "most substantially connected with another province". This section was previously interpreted by the Alberta Court of Appeal in *Shields v Shields*, 2001 ABCA 140. The two-part *Shields* analysis tasks the Court with determining which province has the "higher, better, greater" connection with the child.

Under the first part of the analysis, Justice Lema noted that prior to moving to BC, the child's life was centered in Alberta: his parents lived there, he attended school, and he had numerous points of connection in Alberta. After the move and over time, the child's life then became more and more rooted in BC. Justice Lema determined that after three and half years of living in BC, the child's life was substantially rooted there. The child had connections in BC to his school, health-care generally, health-care providers, extra-curricular activities, his friends and social network. While the child did have extended family living in Alberta, he also had established relationships within a blended family in BC.

The second part of the *Shields* test provides that the Court still has discretion, regardless of the first part of the test's findings, to decide that custody and access should be determined one province over the other. Justice Lema examined whether there were compelling reasons in favour of Alberta continuing as the jurisdiction to determine custody.

While there was some "institutional connection" to Alberta given the background of litigation between the parties, the best evidence to determine custody was located in BC as the child had lived there for 3.5 years and had stronger bonds there than in Alberta. Finally, there was no evidence that determination of custody in BC would be delayed or less efficient than if it was determined in Alberta.

Given that the child was determined to be a "child of BC" at the time of the application and there were no substantial reasons for Alberta to continue as the jurisdiction to determine custody, Justice Lema granted the mother's application to shift the entire divorce proceeding to BC.

Practical Implications: Don't forget about Section 6.3 of the *Divorce Act*.