NOVA SCOTIA COURT OF APPEAL
Citation: Beairsto v. Cook, 2018 NSCA 90

Date: 20181121
Docket: CA 476904
Registry: Halifax

Between:

Macayla R. Beairsto

Appellant

v.

Jeremy B. Cook

Respondent

Judge:

(2) Are there grounds in the Notice of Contention to uphold W K H D S S O L F D W L R Q M X G J H ¶ V G H F
(3) If the application judge erred, what is the appropriate remedy?
(4) Is the fresh evidence admissible?

Result: The motion to introduce fresh evidence was dismissed. The Supreme Court of Canada, in a decision released on April 20 2018 determined that the parental intention approach reli L Q & D Q D G D W R G H W H U P L Q H 3 K D E keeping with the dominant thread of international Hague Convention jurisprudence in favour of the hybrid approach. Further, the hybrid approach best conforms to the text, structure and purpose of the Hague Convention. Although the application judge applied the law as it stood believed it to be on February 1, 2018, his focus on shared parental intention was legally wrong.

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v.

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Respondent

Judges:	Beveridge, Bourgeois and Van den Eynden, JJ.A.
Appeal Heard:	September 19, 2018, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Beveridge, J.A.; Bourgeois and Van den Eynden, JJ.A. concurring
Counsel:	Patrick J. Eagar, for the appellant Jeremy B. Cook, respondent in person

Reasons for judgment

INTRODUCTION

[1] The overarching issue in this case is whether Sahara, an 18-month-old girl, must be returned to the State of Washington. She has lived her whole life in Nova Scotia except for her first 42 days.

[2] The issue stems from Mr. Cook's application under the 1980 Hague Convention on the Civil Aspects of International Child Abduction, incorporated

[17] The parties agreed that Ms. Bearisto would go to Nova Scotia with Sahara.

4.

the problem of child abduction by a parent and was one of the first four signatories to the treaty.

[37] *Thomson* was a case about the wrongful removal of a child from Scotland to Canada. The mother had been granted interim custody of her young son by a Scottish court. The order prohibited the child from being taken out of Scotland. The mother took the child to Canada and refused to return. Forest J. stressed that the underlying purpose of the Convention is to protect children from the

> concept of habitual residence was used in a Hague Convention (on civil procedure) as long ago as 1896 and has since been frequently used in other Hague Conventions, none of those instruments has sought to define the term. Rather, as one author has put it, the expression has repeatedly been presented as a notion of fact rather than law, as something to which no technical legal definition is attached so that judges from any legal system can address themselves directly to the facts. Thus the Explanatory Report commenting on the Abduction Convention said that "the notion of habitual residence [is] a well-established concept in the Hague Conference, which regards it as a question of pure fact, differing in that respect from domicile" (emphasis added).
>
> (L.K. v. Director-General, Department of Community Services, [2009] HCA 9)

[42] While essentially a question of fact, there is no doubt that there must exist some criteria to guide. Canadian courts have long looked at case law from other Contracting States to strive for uniform interpretation of the Convention, including how to determine a child's habitual residence (see Ellis v. Wentzell-Ellis, 2010 ONCA 347 at paras. 18-20).

[43] One of the earlier decisions to consider how to determine habitual residence was from the House of Lords in re J. (A Minor) (Abduction: Custody Rights) [1990] 2 A.C. 562 Lord Brandon of Oakbrook, for the House wrote:

> In considering this issue it seems to me to be helpful to deal first with a number of preliminary points. The first point is that the expression "habitually resident", as used in article 3 of the Convention, is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains. The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. The third point is that there is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in Country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have come habitually resident in

54. Drawing the threads together, therefore:

i) All are agreed that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes the domicil of his parents.

ii) It was the purpose of the 1986 Act to adopt a concept which was the same as that adopted in the Hague and European Conventions. The Regulation must also be interpreted consistently with those Conventions.

iii) The test adopted by the European Court is 'the place which reflects some degree of integration by the child in a social and family environment' in the country concerned. This depends upon numerous factors, including the reasons for the family's stay in the country in question.

iv) It is now unlikely that that test would produce any different results from that hitherto adopted in the English courts under the 1986 Act and the Hague Child Abduction Convention.

[52] McLachlin C.J., writing for a plurality of seven, rejected the historical reliance in Canadian jurisprudence on the parental interest approach. The alternatives were the child-centered and the hybrid approach. The latter was fixed

> determining habitual residence under Article 3 must look to all relevant considerations arising from the facts of the case at hand. As noted above, in Canada, the hybrid approach has been adopted in Quebec: see *Droit de la famille — 17622*, at paras. 29-30.
>
> [Emphasis added]

[54] The Chief Justice elaborated on the nuances of the hybrid approach:

> [43] On the hybrid approach to 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: *Pérez-Vera*, at p. 428; see also *Jackson v. Graczyk*, 2006), 45 R.F.L. (6th) 43 (Ont. S.C.J.), at para. 33. 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.
>
> [44] Considerations include "the duration, regularity, conditions and reasons for the [child's] stay in the territory of [a] Member State and the child's nationality": *Mercredi v. Chaffe*, C-497/10, [2010] E.C.R. I-14358, at para. 56. No single factor dominates the analysis; rather, the application judge should consider the entirety of the circumstances: see *Droit de la famille — 17622*, at para. 30. Relevant considerations may vary according to the age of the child concerned; where the child is an infant, the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of: *O.L. v. P.Q.*, 2017) G-111/17, (C.J.E.U.), at paras. 44-45.
>
> [45] The circumstances of the parents, including their intentions, may be important, particularly in the case of infants or young children: *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 urge 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.
>
> [46] 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

> [33] There was consent to her going with the child. This is not a case of wrongful taking. The question is what does the law say with respect to wrongful retention?

[60] The application judge did not fix a date or time frame for when he should consider if the retention of the child in Canada was wrongful. The judge focussed on the subjective intention of the parties about their future in Washington prior to Ms. Beairsto's visit with Sarah on January 27, 2017. Specifically, he looked D W W K H S D U H Q W V ¶ V H W W O H G L Q W H Q W L R Q D V R I W

> [41]

> reasons talked about by the Supreme Court of Canada in Thomson v. Thomson, [1994] 3 S.C.R. 551. These parents both had custody rights, both had rights with respect to the child. There was consent for the child to be brought to Nova Scotia. This was not a case of wrongful taking.
>
> [67] I can only conclude, based on everything that I have found, that the habitual residence of this child for the purpose of the Hague Convention was the State of Washington. I think that is what the law demands.
>
> [68] I could list dozens of cases in these materials that I have here where Courts have said, and one Court said it really well, and I went to look for the quote and I cannot find it but the upshot of the quote was, Courts must guard against the desire to defeat the purposes of the Convention by taking the attitude "We have the child in front of us, and we want to act. We know what a child's best interest means, so let's apply it." Trial courts, like this one, have been repeatedly cautioned not to fall into that trap. It would be a mistake in law, I conclude, to find that the habitual residence is not in the State of Washington.
>
> [Emphasis added]

[62] Given the decision by the Supreme Court of Canada in Balev, the inescapable conclusion is that the application judge did not apply the correct test.

[63] The respondent has, from time to time, insisted that the application judge made no error because he applied the law as it existed on February 1, 2018.

[64] Where legislation changes the law and is silent about its temporal application, Courts must discern legislative intent on when and how it applies to previous transactions (see for example, Hayward v. Hayward, 2011 NSCA 118). However, where Courts deliver decisions that alter previously held views of the common law or statutory interpretation, those decisions operate retrospectively.

[65] That means any alterations to the law apply to past transactions as well as to present and future ones. As observed by Bayda C.J.S. in Edward v. Edward Estate (1987), 39 D.L.R. (4th) 654 at 661-662:

> In all of the cases cited above, there is no mention by the courts that they are giving retrospective application to the common law. It may be taken that in keeping with the attitude of the English and Canadian courts generally, the courts in these cases assumed that the retrospective principle is so basic and inherent in the law, that it may be applied without mention or acknowledgment.

[66] 72.024 96 Tm 0 g 0 G [([6)-4(6)-3(])] TJ ET Q q 0.00000912 0 0 6 sa [([6) 123.72

> [38] ...the interpretation the court gives an Act of Parliament is the meaning which, in legal concept, the statute has borne from the very day it went onto the statute book. So, it is said, when your Lordships' House rules that a previous decision on the interpretation of a statutory provision was wrong, there is no question of the House changing the law. The House is doing no more than correct an error of interpretation. Thus, there should be no question of the House overruling the previous decision with prospective effect only. If the House were to take that course it would be sanctioning the continuing misapplication of the statute so far as existing transactions or past events are concerned. The House, it is said, has no power to do this.

[67] One may easily sympathize with the application judge. He erred in law despite his application of the widely held view of the law prior to the Supreme Court of Canada's *Balev*. Nonetheless, correct principles guided his determination of habitual residence.

[68] What then is the appropriate remedy on appeal where the application judge committed legal error? Before that issue is examined, I will first address Mr. Cook's Notice of Contention.

NOTICE OF CONTENTION

[69] The respondent filed a Notice of Contention on June 20, 2018. It contains thirty paragraphs. Most allege that the application judge erred in fact. Two allege an error in "fact and law." I need not set them out.

[70] The respondent's August 9, 2018 factum is more focussed. Apart from arguments presented directly in response to the appeal issues, he targets three matters: so-called "false representations" to the respondent and the application judge on April 26, 2018; the Notice of Appeal was not served in accordance with the *Hague Service Convention*, and, the consent he gave to Ms. Bearisto to take Sahara to Nova Scotia was obtained by fraud, and hence Sahara's removal was wrongful.

[71] A Notice of Contention can be filed by a respondent pursuant to *CPR* 90.22 to ask that the decision under appeal be upheld for different reasons than those of the judge. The relevant portions of this rule are:

> 90.22 (1) A respondent who does not cross-appeal and wishes to contend that the judgment under appeal should be affirmed for reasons different than those expressed in the decision or the judgment under appeal must file a notice of contention.

«

(3) A notice of contention must be entitled "Notice of Contention", have the standard heading, be dated and signed by the respondent who wishes to contend on the appeal, and include a concise and complete summary of the alternative grounds put forward by the respondent for upholding the decision under appeal.

[72] The respondent's complaints about service and Ms. Beairsto's "fraudulent misrepresentations" on April 26, 2018 are factually and legally without merit.

[73] Ms. Beairsto was represented by counsel on that date. The appearance was to finalize the terms of the order. I have carefully reviewed the transcript of the appearance before the application judge on that date. I can find nothing that would constitute a misleading, let alone fraudulent, misrepresentation.

[74] Even if one were made, it would be irrelevant to any argument that the application judge's decision should be upheld on alternative grounds other than what is expressed in his reasons. Nor would it somehow invalidate the appeal proceedings.

[75] Mr. Cook's reference to inadequate service is puzzling. Mr. Cook acknowledged receipt in person of the Notice of Appeal on June 7, 2018 in Nova Scotia. That date was well within the 25 clear day window for filing and service of the Notice of Appeal.

[76] Thereafter, he participated fully in the appeal process. He filed a Notice of Contention; appeared at various chambers conferences (electronically); filed written argument; cross-examined the appellant on her affidavit, and made oral submissions.

[77] The whole point of proper service is to ensure that a party is aware of the proceedings, to know the case they must meet and have the opportunity to be

removal was wrongful. He never testified before the application judge to that

(d) direct a new trial by jury or otherwise, on terms the Court of Appeal considers is in the interest of justice, and for that purpose order that the judgment appealed from be set aside;

(e) make any order or give any judgment that the Court of Appeal considers necessary.

[84] In this case, I am satisfied that we should make the necessary determination rather than order a new hearing.

[85] I say this for two reasons. First, this appeal is heard as part of proceedings under the Hague Convention. The Convention directs that Contracting States use the most expeditious procedures available to implement the objects of the Convention. Speed is the goal, not protracted proceedings.

[86] If a child has been wrongfully removed or retained, prompt return is mandated. Moreover, if return is not warranted, the parties can proceed to make appropriate arrangements for custody and access or have them resolved by court process. Either way, uncertainty for the parties and the child is minimized.

[87] Provided the record is sufficient, and the proposed appellate determination causes no prejudice to a party's ability to prosecute or defend the Hague application, the appropriate course is to decide the case. I will comment later on the interplay between the standard of review and appellate determination.

[88] The second reason is that appellate courts in Contracting States have demonstrated little hesitation to resolve questions surrounding habitual residence or other questions of fact or of mixed law and fact.

[89] One of the few exceptions is *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001) where the United States District Court of Appeals remanded the application back to the District Court to make the necessary factual findings about the lives of children's family and social development in order to determine habitual residence. But the more usual course is for the United States District Court of Appeal to simply make the determination that should have been made by the application court while respecting all discrete factual findings (see *Silverman v. Silverman*, 338 F.3d 886 (8th Cir. 2003); *Redmond v. Redmond*, 724 F.3d 729 (7th Cir. 2013); *Martinez v. Cahue*, 826 F.3d 983 (7th Cir. 2016); *Yang v. Tsui*, 499 F.3d 259 (2007)).

[90] This tendency may be due to the less restrained standard of review in those courts that permit them to review questions of mixed fact and law de novo:

The standard of review is an issue of first impression in this circuit. Most of the circuits that have reached this issue have decided on a mixed standard, reviewing the district court's findings of fact for clear error and its legal determinations and application of the law to the facts de novo. See Silverman v. Silverman, 338 F.3d 886, 896-97 (8th Cir. 2003) (en banc); Miller v. Miller, 240 F.3d 392, 399 (4th Cir. 2001); Mozes v. Mozes, 239 F.3d 1067, 1073 (9th Cir. 2001); Blondin v. Dubois, 238 F.3d 153, 158 (2d Cir. 2001); England v. England, 234 F.3d 268, 270 (5th Cir. 2000); Friedrich v. Friedrich, 78 F.3d 1060, 1064 (6th Cir. 1996); Feder v. Evans-Feder, 63 F.3d 217, 222 n.9 (3d Cir. 1995). As explained by the court in Feder, this means that the court accepts the district [illegible]

[redacted]

[91] Other courts in Contracting States have simply made the determination without reference to this issue (see Punter v. Secretary for Justice, [2007] 1 N.Z.L.R. 40; L.K. v. Director-General, Department of Community Services, supra; In re R. Children, supra

APPLICATION OF THE HYBRID APPROACH

[95] To succeed, the Hague applicant must demonstrate on a balance of probabilities the Article 3 requirements. The key concept is a removal or retention that is wrongful. To be wrongful, the other requirements found in Article 3 must be established. A court must therefore answer these questions:

(1) When did the removal or retention at issue take place?

(2) Immediately prior to the removal or retention, in which state was the child habitually resident?

(3) Did the removal or retention breach the applicant's rights of custody under the law of the habitual residence?

(4) Was the petitioner exercising those rights at the time of the removal or retention?

[96] In cases of alleged wrongful removal, the first question will not usually be hard to answer. In cases that allege wrongful retention, it can be more difficult.

[97] Guidance can be found in Thomson, where La Forest J. relied on Hague Convention commentary to explain that the date of wrongful retention is not linked to the issuance of a chasing f 1.000009A ETs123T Q q 0e8792 re265.0112 792 re W*

> legal right of custody. [Describing "retention"] Naturally, we must assimilate to this situation the case of a refusal to return the child after a sojourn abroad, where the sojourn has been made with the consent of the rightful custodian of the child's person. In both cases, the outcome is the same: the child has been removed from the social and family background which shaped his life.
>
> Secondly, the person who removed the child . . . hopes to obtain the right of custody from the authorities of the country where the child has been taken . . . [in order to] legalize the factual situation he has created . . . [Emphasis added.]
>
> (Actes et documents, supra, at p. 172.)

To paraphrase, 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. This interpretation is repeated in the [3]

[99] In cases of open-ended or indeterminate consent, the date is usually fixed as when the left behind parent first formally asserted his rights (Balev v. Barzilay, 600 F.3d 912 (2010)) or demanded the child's return (Yang v. Tsui, supra).

[100] Bazargani v. Mizael, 2015 ONCA 517, like the case presently before this court, involved an open-ended consent agreement. One parent was permitted to leave Australia with their child for an indeterminate period. In the absence of a pre-determined return date, the court relied on the explicit revocation of consent by the wronged parent (paras. 9, 22).

State wrongful. Nor is such an order a prerequisite to fix a date of putative wrongful retention.

[106] I would fix the time to be June 2017. That is when Ms. Blair told clearly communicated her intention to stay in Nova Scotia with Sahara. It is also the time frame that Mr. Cook communicated he no longer consented to Sahara remaining in Canada. No more precise date is necessary because the evidence discloses no significant change in Sahara's circumstances in Nova Scotia from the end of May to the commencement of the respondent's Hague application and beyond.

[107] What then was Sahara's habitual residence immediately prior to June 2017? At that point, Sahara was not yet six months old. She had been and continued to be entirely dependent on her mother and her family in Nova Scotia.

[108] The Supreme Court of Canada in Balev directs that the court or judge hearing the application is best placed to weigh the factors that will achieve the objects of the Hague Convention in the particular case. This is to be achieved by following the international jurisprudence that supports a multi-factored hybrid approach (para. 70). McLachlin C.J. references many of the international authorities at paras

> young child is shared with those (whether parents or others) on whom she is dependent. Hence it is necessary, in such a case, to assess the integration of that person or persons in the social and family environment of the country concerned The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce. In particular, it follows from the principles adopted in A v A and the other cases that the Court of Appeal of England and Wales was right to conclude in re H (Children) (Reunite International Child Abduction Centre intervening) [2014] EWCA Civ 1101; [2015] 1 WLR 863 that there is no 'rule' that one parent cannot unilaterally change the habitual residence of a child.
>
> [Emphasis added]

[111] The essence of the nature and scope of relevant factors to determine habitual residence was more recently reiterated in D.L. v. P.Q. (2017) C-111/17, (C.J.E.U.)

> 42 According to that case-law, the habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment. Th

[112] McLachlin C.J. cautioned that there is no legal test for habitual residence. Hence, the list of potentially relevant factors is not closed (para. 47). It requires W K L V & R X U W W R O R R N W R W K H H Q W L U H W \ R I W K H habitual residence can change while she lives with one parent pursuant to a time limited consent of the other (paras. 71 + H U H 0 U & R R N ¶ V F R Q V H contain a determinate time, but the application judge found it was not forever.

[113] Mr. Cook's burden was to establish that it is more likely than not (a balance of probabilities) that immediately prior to the date of alleged wrongful retention, Washington State was Sahara's place of habitual residence. He has not done so. It is my view that, immediately prior to June 2017, it is more likely than not Nova Scotia was Sahara's place of habitual residence. I say this for the following reasons.

[114] Ms. Beairsto, despite filing joint tax returns with Mr. Cook and acquiring pets, had little real connection to Washington State. She had no family there, no support network, and was only there on a visitor's visa. Mr. Cook acknowledged the lack of support network in Washington, saying that it was up to Ms. Beairsto to create one.

[115] On the other hand, she had always maintained

[125] I would therefore dismiss the motion to adduce fresh evidence, allow the appeal and order the Hague application dismissed. No costs were requested. I would order none on the appeal.

Beveridge, J.A.

Concurred in:

Bourgeois, J.A.

Van den Eynden, J.A.