COURT OF APPEAL FOR ONTARIO

CITATION: Ludwig v. Ludwig, 2019 ONCA 680
DATE: 20190830
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Tulloch, Roberts and Miller JJ.A.

BETWEEN

Nils Christian Ludwig

Applicant/Appellant

and

Jennifer Dee Ludwig

Respondent/Respondent

Steven M. Bookman and Gillian Bookman, for the appellant

Ken J. Birchall, for the respondent

Patric Senson and Sheena Scott, for the Office of the Children's Lawyer

Heard: June 3, 2019

On appeal from the order of Justice Denise M. Korpan of the Superior Court of Justice, dated January 4, 2019, with reasons reported at 2019 ONSC 50.

Tulloch J.A.:

I. OVERVIEW

[1] This appeal concerns the *Convention on the Civil Aspects of International Child Abduction*, Can. T.S. 1983 No. 35 ("*Hague Convention*"). The appellant, Nils Christian Ludwig, and the respondent, Jennifer Dee Ludwig, are spouses who raised their four children in Germany. They then moved with their children to

Ontario. Following this move, the appellant and respondent separated. The appellant wanted to return to Germany with the children. The respondent wanted to remain in Ontario with the children. The appellant commenced an application under the *Hague Convention* seeking the children's return to Germany. The application judge concluded that the children were habitually resident in Ontario and dismissed the appellant's application. The appellant appeals from this decision.

[2] The central issue in this case is whether the children were habitually resident in Ontario or in Germany. Under the *Hague Convention*, where the court finds the children to be habitually resident determines whether or not the removal or retention of the children was wrongful and thus whether the court must order the children's return. If the children were habitually resident in Ontario, then there is no wrongful retention and the *Hague Convention* does not apply. If the children were habitually resident in Germany, then, subject to the exceptions that the *Hague Convention* provides, the court must order the return of the children to Germany.

[3] This appeal presents this court with an opportunity to consider and apply the new approach to habitual residence that the Supreme Court of Canada adopted in *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398. In *Balev*, the Supreme Court rejected the parental intention model that Ontario courts had previously used to determine habitual residence. In its

place, the Supreme Court adopted the hybrid model, which considers both parental intention and the circumstances of the children in determining where the children are habitually resident. Accordingly, I offer some comments in this judgment to set out and explain the proper approach to a *Hague Convention* application and how to apply the hybrid model.

[4] I would dismiss the appeal. I conclude that the application judge correctly stated and applied the hybrid model. She was entitled to make the factual findings that she did. She did not err in considering the children's wish to remain in Ontario as an indicator of the strength of their links to Ontario. Nor did she consider the evidence and submissions of counsel for the Office of the Children's Lawyer ("OCL") as opinion evidence.

II. FACTS

[5] The appellant and the respondent are the parents of four children: N. (15 years old), I. (13 years old), D. (12 years old), and P. (nine years old). The appellant is a German citizen and the respondent is a Canadian citizen. They and their children lived almost exclusively in Germany since the appellant and respondent married in 2001. The children are dual citizens but only had German passports.

[6] The parents and their children moved to Ontario on August 3, 2017. Prior to the move, the parents purchased an Ontario home and began negotiations to

buy a coffee shop business in Ontario. These negotiations were ongoing for several months following the move but ultimately proved unsuccessful. The parents left some belongings in Germany but brought most belongings and important possessions to Ontario. They also spent substantial sums renovating their Ontario home and purchasing home furnishings, cars, and landscaping equipment. The appellant entered Canada as a visitor and lacked a work permit. The children had obtained extended visas which were to expire on September 30, 2018.

[7] The parents exchanged numerous text messages both before and after the move. In the messages, both parents expressed uncertainty about the duration of the move to Ontario and whether and when they would return to Germany.

[8] The children soon developed ties to Ontario. They successfully completed the 2017-2018 school year in Ontario and did well in school. They made friends and enrolled in advanced classes, sports, and other activities. In particular, they developed close ties with their maternal extended family, which also resided in Ontario.

[9] The parents separated in March 2018. After the separation, the appellant made plans to return to Germany. On July 23, 2018, the respondent told the appellant that she intended to remain in Canada with the children. Four days

later, she issued a divorce application in Ontario that included a claim for custody of the children.

[10] In August 2018, the appellant commenced an application under the *Hague Convention* for the return of the children to Germany. Before the hearing of the application, Grace J. ordered the involvement of the OCL. His order gave the OCL "full power to act for the…child(ren)." Campbell J. subsequently ordered that OCL counsel could advise the court of the children's views and preferences from the counsel table, as the parties had agreed.

[11] Before the application hearing, OCL counsel (not Mr. Senson or Ms. Scott) met with and interviewed the children and provided a letter to both parties summarizing the children's views and preferences. The letter stated that N., I., and D. wished to remain in Ontario, while P. did not express any concrete views or preferences. OCL counsel stated that she included a discussion of the consistency, clarity, and independence of the children's views and preferences in the letter because she had an obligation to consider those factors in taking a position on behalf of the children. She stated that she had "no concerns" about both the clarity of all four children's views and the independence of the views of N. and I.

III. STATUTORY PROVISIONS

[12] 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. Articles 1, 3, 8, 12, 13, and 20 of the *Hague Convention* are most relevant to this case. These provisions read 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 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

…

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

…

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the

> person, institution or other body which opposes its return establishes that -
>
> a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.
>
> In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.
>
> …
>
> **Article 20**
>
> The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

IV. DECISION OF THE APPLICATION JUDGE

[13] The application judge ruled that the children were habitually resident in Ontario and dismissed the appellant's application. She articulated the hybrid

approach from *Balev* by quoting extensively from the majority decision. She then approached her analysis in two steps:

1) When did the retention at issue take place?

2) Immediately prior to the retention, in which state were the children habitually resident?

[14] In step one, the application judge found that the retention at issue took place immediately prior to September 2018. She based this finding on the appellant's allegation in his *Hague Convention* application that the children were to return to Germany by September 2018.

[15] In step two, the application judge first determined that she could not find a shared parental intention to return to Germany after a time-limited stay in Ontario with an expiry date. She emphasized the facts that the parents brought most of their belongings and important possessions to Ontario and spent significant sums on renovating their Ontario home. She relied on text messages tending to show the parents were undecided on whether or when to return to Germany. In addition, the application judge highlighted the appellant's signing of a form registering one of the children in an advanced class for the 2018-2019 Ontario school year, as well as the appellant's suggestion that the respondent should get the children covered under OHIP.

[16] The application judge next compared the circumstances of the children in Germany and Ontario and determined that their habitual residence was Ontario. She found that the children's family environment and social environment in Germany and Canada were similar. She accepted that the children's experiences in Germany were of longer duration. However, she emphasized that their experiences in Canada were more immediate and were for a significant period of time. The children were integrated into and doing well in their Ontario schools. The application judge found as a fact that the children have a closer relationship with their extended maternal family in Canada than with their extended paternal family in Germany. She also referred to the wish of the three elder children to remain in Canada. Balancing all these factors, the application judge concluded that the children's lives were centered in Canada immediately prior to September 2018. Accordingly, she dismissed the appellant's application.

V. ISSUES

[17] The following issues arise on this appeal:

1. Were the application judge's reasons inadequate?
2. Did the application judge misapply the hybrid model from *Balev*?
3. Did the application judge err in determining the children's habitual residence?

4. Did the application judge err by permitting OCL counsel to give evidence and advance legal argument from the counsel table?

5. Did the application judge err by permitting the respondent's counsel to give evidence that was not in the record?

VI. ANALYSIS

A. UNDERSTANDING THE *HAGUE CONVENTION* ANALYTICAL FRAMEWORK

[18] Before analyzing the appellant's specific grounds of appeal, it is appropriate for me to provide some general comments on the analytical framework that governs *Hague Convention* proceedings, especially the hybrid model for determining habitual residence that the Supreme Court adopted in *Balev*. I offer these comments as useful guidance to litigants, lawyers, and judges seeking to understand and apply the proper approach to *Hague Convention* proceedings.

(1) Objects of the *Hague Convention*

[19] The *Hague Convention* has two objects: to enforce custody rights and to secure the "prompt return" of children who have been wrongfully removed or retained: *Balev*, at para. 24; *Hague Convention*, Article 1. The object of prompt return serves three purposes: it protects against the harmful effects of wrongful removal or retention, it deters parents from abducting the child in the hope of

being able to establish links in a new country that might award them custody, and it aims at rapid resolution of the merits of a custody or access dispute in the forum of a child's habitual residence: *Balev*, at paras. 25-27. The *Hague Convention* is not concerned with determining rights of custody on the merits: *Balev*, at para. 24. In fact, Article 16 expressly prohibits a court charged with a *Hague Convention* proceeding from determining the merits of custody rights until the court has determined that a child is not to be returned.

[20] The *Hague Convention* aims to achieve its two objects by permitting any person, institution, or other body that claims that a child has been wrongfully removed or retained to apply for the return of the child to the country in which the child is habitually resident: Article 8. If the person alleged to have wrongfully removed or retained the child refuses to return the child, then it falls to the court to decide whether the child should be returned.

(2) Analytical Framework for *Hague Convention* Proceedings

[21] There are two stages to a *Hague Convention* application: determining the habitual residence of the child, and, if the child is found to be habitually resident in the state of the applicant, determining if one of the exceptions to ordering return applies. If the child is not found to be habitually resident in the state of the applicant, then the *Hague Convention* does not apply and there is no need to consider the exceptions: see *Balev*, at para. 36.

(a) Habitual Residence

[22] Habitual residence is central to the *Hague Convention* because it defines when a removal or retention of a child is wrongful. As Article 3(a) of the *Hague Convention* provides, the removal or retention of a child is only wrongful if it is in breach of custody rights under the law of the state in which the child was "habitually resident immediately before the removal or retention" (emphasis added). For example, in this case, the application judge's finding that the children were habitually resident in Ontario immediately prior to the date of the respondent's retention of the children in Ontario led her to conclude that this retention was not wrongful, as it did not breach custody rights under Ontario law. Conversely, if the application judge had found that the children were habitually resident in Germany immediately prior to the date the respondent retained the children in Ontario, the application judge would have had to find the retention was wrongful. It would have been in breach of the appellant's custody rights under German law for the respondent to retain the children in Ontario.

[23] I would endorse the two-step approach to habitual residence that the application judge took in this case. Under this approach, the first step is to determine when the alleged wrongful removal or retention took place, and the second step is to determine in which state the children were habitually resident immediately prior to that removal or retention.

(i) Step One: Date of Alleged Wrongful Removal or Retention

[24] The first step of analysis is for the court to determine the date of the alleged wrongful removal or retention. This date is central to the analysis because the court assesses in which country the child was habitually resident immediately prior to this date. A child's attachment to a country that is developed after the date of alleged wrongful removal or retention is only relevant to the Article 12 "settled in" exception: *Balev*, at para. 67. As I will later explain, this date also determines whether the Article 12 "settled in" exception can apply.

[25] Identifying the date of alleged wrongful removal or retention does not imply a finding that there has been a wrongful removal or retention. At this first step of the analysis, the wrongfulness of the removal or retention is merely an allegation. All that is required at this step is to fix a date to conduct the habitual residence analysis. Contrary to the appellant's arguments, it was perfectly consistent for an application judge to find a date of alleged wrongful retention at this first step, and then to ultimately find that there was no shared parental intention and that the respondent's retention of the children in Ontario was not wrongful.

(ii) Step Two: Determining Habitual Residence

[26] The second step of the habitual residence analysis requires the court to determine where the child was habitually resident immediately before the date of the alleged wrongful removal or retention. As I will explain, in *Balev* the Supreme

Court changed the approach that Ontario courts had previously employed to determine habitual residence.

[27] Prior to the Supreme Court's decision in *Balev*, Ontario courts applied a parental intention approach to habitual residence. As this court explained in *Korutowska-Wooff v. Wooff* (2004), 242 D.L.R. (4th) 385 (Ont. C.A.), at para. 8, leave to appeal refused, [2005] S.C.C.A. No. 132, a child's habitual residence was tied to that of the child's custodians and was determined by the custodians' "settled intention" to stay in a place for a particular purpose. Under this approach, neither parent could unilaterally change a child's habitual residence without the other's consent. Likewise, time-limited travel that both parents agreed to could not change the child's habitual residence: *Balev. v. Baggott*, 2016 ONCA 680, 133 O.R. (3d) 735, at paras. 39-40, 42, rev'd 2018 SCC 16, [2018] 1 S.C.R. 398.

[28] In *Balev*, the majority of the Supreme Court rejected both the parental intention approach and an alternative child-centred approach. The majority recharacterized parental intention as one relevant factor among many, instead of the controlling factor, and warned against "over-reliance" on this factor: at paras. 45 and 63. It specifically rejected the rules this court had adopted that one parent's unilateral actions are incapable of changing a child's habitual residence and that a child's habitual residence could not change in the case of time-limited travel that both parents agreed to: at paras. 46, 72-73. However, the court also rejected the child-centred approach that the OCL had proposed in its

submissions in *Balev*. Under this child-centred approach, parental intention would be irrelevant and the sole focus would be the child's acclimatization in a given country: *Balev*, at para. 41.

[29] Instead of the parental intention or child-centred approaches, the court adopted a hybrid model that combined parental intention and the circumstances of the children. The court stressed that under the hybrid approach, the application judge must look at "all relevant considerations," including both parental intention and the circumstances of the children: at paras. 4, 42. The court stated that the hybrid approach would best fulfill the object of prompt return that animates the *Hague Convention*: at para. 59. Unlike both the parental intention and child-centred approaches, the hybrid approach would allow the court to consider all relevant factors without relying on formulaic approaches: at para. 65.

[30] The aim of the hybrid approach is to determine 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": at para. 43. To determine the focal point of the child's life, the majority required judges to consider the following three kinds of links and circumstances:

1) The child's links to and circumstances in country A;

2) The circumstances of the child's move from country A to country B; and,

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

[31] The majority went on to outline a number of relevant factors courts may consider in assessing these three kinds of links and circumstances. Considerations include the child's nationality and "the duration, regularity, conditions and reasons for the [child's] stay," along with the circumstances of the parents and parental intention: at paras. 44-45. However, the list of relevant factors is not closed and the application judge must consider the "entirety of the child's situation": at para. 47. The child is the focus of the analysis and parental intention is only relevant as a tool to assess the child's connections to a given country: at para. 68.

[32] Certain factors may be more relevant where the child is an infant or is very young. Where a child is an infant, the child's environment 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": *Balev*, at para. 44. Accordingly, the circumstances of the parents, including parental intention, may be especially important in the cases of infants or young children: para. 45.

[33] *Balev* establishes that habitual residence is a question of fact or mixed fact and law and that an application judge's determination of habitual residence is

subject to deference. The court specifically stressed that the hybrid approach is "fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions": at para. 47. The application judge must consider the entirety of the child's situation and no one factor necessarily dominates the analysis: at paras. 44, 47.

(b) Application of Exceptions

[34] If the court determines that the child was habitually resident in the country of the applicant at the time of the alleged wrongful removal or retention, Article 12 of the *Hague Convention* provides that the court "shall order the return of the child." However, Articles 12, 13, and 20 also outline five exceptions to this obligation to return the child. These exceptions come into play only after habitual residence is determined: see *Balev*, at para. 66. In *Balev*, at para. 29, the Supreme Court summarized these exceptions as follows:

1) The parent seeking return was not exercising custody or consented to the removal or retention (Article 13(a));

2) There is grave risk that return would expose the child to physical or psychological harm or place the child in an intolerable situation (Article 13(b));

3) The child of sufficient age and maturity objects to being returned (Article 13(2));[1]

4) The return of the child would not be permitted by fundamental human rights and fundamental freedoms of the requested state (Article 20); and,

5) The application was brought one year or more from the date of wrongful removal or retention, and the judge determines the child is settled in the new environment (Article 12).

[35] Because the arguments in this case touched on the third and fifth exceptions, namely the child's objections and the "settled in" exception, I will provide further comment on these two exceptions.

(i) The "Settled In" Exception

[36] First, Article 12 provides the "settled in" exception. As the Supreme Court held in *Balev*, at para. 66, its function is to provide a "limited exception" to the court's obligation to return wrongfully removed or retained children to their habitual residences. The court's discretion to refuse return under the "settled in" exception under Article 12 becomes available if the following two conditions are met:

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[1] As the Supreme Court explained in *Balev*, at para. 5, fn. 1, "Although this provision is not numbered in the *Hague Convention* (unlike Article 13(a) and Article 13(b)), it is generally referred to as Article 13(2)."

1) The applicant has commenced return proceedings one year or more following the date of the wrongful removal or retention; and,

2) It is demonstrated that the child is now settled in its new environment.

[37] Under the "settled in" exception, the court must assess the children's connection to the country they are in at the time of the hearing of the application, not immediately before the date of wrongful removal or retention: *Balev*, at para. 67. This difference in timing can be significant. The "settled in" exception thus accounts for the possibility that a child will develop closer ties to the jurisdiction in which the child has been wrongfully removed or retained in the period of time that follows the date of the wrongful removal or retention: *Balev*, at para. 67. As the Supreme Court stated in *Balev*, at para. 66, "It may be that on the hybrid approach habitual residence favours return of the child, but that the one-year period and settling-in indicate that the child should not be uprooted and returned to his or her place of habitual residence."

(ii) The Objections Exception

[38] Second, Article 13(2) gives the court the discretion to refuse to order the return of a child of sufficient age and maturity who objects to that return. As the Supreme Court held in *Balev*, at para. 77, the party opposing return must meet a two-part test to be able to invoke the court's discretion to refuse return:

1) The child has reached an appropriate age and degree of maturity at which the child's views can be taken into account; and,

2) The child objects to return.

Both of these elements are questions of fact: *Balev*, at para. 78.

[39] Even if the party opposing return can prove both of these elements, the court is not required to refuse to order the child's return. Instead, the court has a discretion to do so. In *Balev*, at para. 81, the Supreme Court stated that the court should consider the following factors adopted from the House of Lords' decision *In re M (Abduction: Rights of Custody)*, [2007] UKHL 55, [2008] 1 A.C. 1288, at para. 46, when deciding whether to exercise its discretion:

1) The nature and strength of the child's objections;

2) The extent to which the objections are authentically the child's own or the product of the influence of the abducting parent;

3) The extent to which the objections coincide or are at odds with other considerations relevant to the child's welfare; and,

4) General *Hague Convention* considerations.

The general *Hague Convention* considerations include the overarching objectives of the *Hague Convention*, namely to secure the prompt return of wrongfully removed or retained children to their country of habitual residence and to ensure

that custody rights are respected, as well as the goal of deterring child abduction: *Balev*, at paras. 24, 26; *In re M*, at para. 42.

(c) Summary of the Governing Analytical Framework for *Hague Convention* Applications

[40] For ease of reference, I will summarize the governing analytical framework for *Hague Convention* applications below.

Stage One: Habitual Residence

1) On what date was the child allegedly wrongfully removed or retained?

2) Immediately before the date of the alleged wrongful removal or retention, in which jurisdiction was the child habitually resident? In determining habitual residence, the court should take the following approach:

   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 restricted 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.

<u>End of Stage One: Two Outcomes</u>

1) If the court finds that the child was habitually resident in the country in which the party opposing return resided immediately before the alleged wrongful removal or retention, then the *Hague Convention* does not apply and the court should dismiss the application.

2) If the court finds that the child was habitually resident in the country of the applicant immediately before the wrongful removal or

retention, then the *Hague Convention* applies and the court should proceed to stage two of the analysis.

Stage Two: Exceptions

At this stage, the court shall order the return of the children unless it determines that one of the following exceptions applies:

1) The parent seeking return was not exercising custody or consented to the removal or retention (Article 13(a));

2) There is grave risk that return would expose the child to physical or psychological harm or place the child in an intolerable situation (Article 13(b));

3) The child of sufficient age and maturity objects to being returned (Article 13(2));

   a) Has the party opposing return met the threshold to invoke the court's discretion to refuse return?

      i) Has the child reached an appropriate age and degree of maturity at which the child's views can be taken into account; and

      ii) Does the child object to return?

b) Should the court exercise its discretion to refuse to return the child? In considering whether to exercise its discretion to refuse return, the court should consider:

i) The nature and strength of the child's objections;

ii) The extent to which the objections are authentically the child's own or the product of the influence of the abducting parent;

iii) The extent to which the objections coincide or are at odds with other considerations relevant to the child's welfare; and

iv) General *Hague Convention* considerations.

4) The return of the child would not be permitted by fundamental human rights and fundamental freedoms of the requested state (Article 20); or

5) The application was brought one year or more from the date of wrongful removal or retention, and the judge determines the child is settled in the new environment (Article 12).

B. TREATMENT OF SPECIFIC GROUNDS OF APPEAL

(1) Were the application judge's reasons inadequate?

[41] The appellant submits that the application judge's reasons are inadequate because she reached bald conclusions without grounding them in the evidence. In particular, the appellant submits that the application judge failed to explain the evidence and legal principles she relied on to make her findings on both parental intention and habitual residence.

[42] I reject this argument. Reasons are adequate if they allow the parties, the general public, and the reviewing court to know whether the judge properly considered the applicable law and evidence: *Lawson v. Lawson* (2006), 81 O.R. (3d) 321 (C.A.), at para. 9. These reasons meet that standard.

[43] The application judge set out the law and the analytical framework from *Balev*. She surveyed and analyzed the relevant evidence before she made the findings on both parental intention and habitual residence that the appellant objects to. Read in context, her reasons explain why she made those findings and ground those findings in the evidence. For instance, she rooted her finding on parental intention in numerous pieces of evidence, such as the fact that the parties brought their most important possessions to Ontario. Likewise, she explained her finding on habitual residence by considering factors such as the children's integration into Ontario schools, their relationship with their extended

maternal family in Ontario, and the three elder children's preference to remain in Ontario.

(2) Did the application judge misapply the hybrid model from *Balev*?

[44] The appellant argues that the application judge applied the wrong legal test. He submits that while the application judge stated that she was applying the hybrid model from *Balev*, she actually applied the child-centred model that *Balev* rejected. He also submits that the application judge failed to address the children's links and circumstances in Germany and Ontario and the circumstances of the children's move from Germany to Ontario as *Balev* requires.

[45] I also reject this argument. As the appellant acknowledges, the application judge correctly set out the law and analytical framework from *Balev*. She then applied the hybrid model and considered the very factors that the appellant alleges she failed to consider. At paras. 91-92 of her reasons, the application judge specifically compared the children's life in Germany to their life in Ontario and found that their family and social environments were similar in both countries. She also considered the circumstances of the children's move from Germany to Ontario. Indeed, she analyzed the reasons for the move and concluded that she could not find a shared parental intention that the move would be for a time-limited stay with a return date.

(3) Did the application judge err in determining the children's habitual residence?

[46] The appellant's third argument is that the application judge made factual and legal errors in determining that the children were habitually resident in Ontario. He alleges the application judge made numerous factual errors. He also submits that the application judge made two legal errors in which she conflated the habitual residence stage of analysis and the application of the exceptions to return. According to the appellant, the application judge first improperly considered evidence that the children were settling-in to Ontario following the date of the alleged wrongful retention. Second, she erred by treating the children's views and preferences as objections to their return under Article 13(2) of the *Hague Convention*.

[47] I also reject this argument. The application judge did not commit the factual errors the appellant alleges. Nor did the application judge err in law by conflating the circumstances of the children with the settling-in of the children. Finally, she legitimately considered the children's views and preferences for purposes relevant to the test for habitual residence.

(a) Alleged Factual Errors

[48] The appellant alleges a variety of factual errors. These can be grouped under the following five categories:

1. The application judge erred in determining the date of the alleged wrongful retention;
2. The application judge erred in finding that there was no shared parental intention that the move to Ontario was time-limited and had an expiry date;
3. The application judge erred in analyzing the views and preferences of the children;
4. The application judge erred by failing to resolve the forum shopping issue; and
5. The application judge failed to appreciate the significance of the custody rights the appellant possessed over the children.

[49] I do not accept these arguments.

[50] First, the application judge's finding that the date of the alleged wrongful retention was immediately prior to September 2018 was reasonable. The appellant himself stated in his *Hague Convention* application that he consented to the children staying in Canada until the start of the 2018-2019 school year.

[51] Second, the application judge did not commit a palpable and overriding error in finding that there was no shared parental intention. There was abundant evidence that the application judge considered which supported her finding on this issue. For instance, the parents brought most of their belongings and

important possessions to Ontario and spent significant sums on home renovations in Ontario. The appellant suggests that the application judge should have placed more weight on other pieces of evidence, including pre-separation text messages and the immigration status of the children and the appellant. Yet it is not the role of this court to second-guess the weight the application judge gave to the pieces of the evidence which were before her: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 23.

[52] Third, the application judge did not make any palpable and overriding error in her analysis of the views and preferences of the children. The appellant submits that the application judge failed to consider the influence of the respondent and her family on the children as well as the reason for the changes in the children's views and preferences. However, it was open to the application judge to assign the weight she deemed appropriate to the views and preferences of the children despite the possibility that their views may have been influenced. I agree with the appellant that the views and preferences of the children are not determinative, but there is no indication that the application judge considered them as determinative. She also considered the children's family and social environment and their experiences in both Canada and Germany to draw a conclusion on habitual residence.

[53] Nor is there any merit to the fourth and fifth alleged factual errors. Both parties accused each other of forum shopping. This issue was peripheral to the

main issues before the application judge and she was not required to resolve it as it was not material to her ultimate determination: see *Wasinski v. Norampac Inc.*, 2016 ONCA 309, 31 C.C.E.L. (4th) 1, at para. 31. As for the appellant's custody rights over the children, the application judge and the parties accepted that the appellant and respondent had joint custody rights over the children. Nothing turned on this issue.

(b) Alleged Legal Errors

(i) Alleged Settling-In Error

[54] The appellant submits that the application judge erred in law by considering the settling-in of the children in order to determine their habitual residence. He submits that the court cannot consider the children's settled in environment in determining habitual residence when less than one year has passed from the date of the wrongful removal or retention.

[55] I do not accept this argument.

[56] As I have explained, the "settled in" exception applies if the applicant commences a return proceeding more than one year after the date of the wrongful removal or retention and it is demonstrated that the child is now settled in its new environment.

[57] In *Balev*, the dissent argued, at para. 121, that it would be improper to "consider evidence that speaks to the strength or quality of the child's

connections to each jurisdiction" when determining habitual residence if the evidence of shared parental intent was clear. In the dissent's view, considering the strength or quality of the child's connection to each jurisdiction was only permitted under the "settled in" exception, which follows a determination of habitual residence.

[58] The majority disagreed. As the majority explained at para. 66 of *Balev*, the majority saw "no conflict" between the hybrid approach and the "settled in" exception. For the majority, it was conceivable under the hybrid approach that evidence of settling-in could indicate that the child should not be returned even if habitual residence favoured the return of the child. Likewise, at para. 67, the majority emphasized that habitual residence and the "settled in" exception each addresses a different point in time. For habitual residence, the crucial moment is immediately prior to the date of the alleged wrongful removal or retention. In contrast, the "settled in" exception considers the links a child develops to a country following the date of the wrongful removal or retention.

[59] It follows that the appellant's argument must be rejected. In considering the strength and quality of the children's connections to Ontario, the application judge did not conflate habitual residence with the "settled in" exception. Instead, she did what *Balev* required her to do, namely to consider all of the children's relevant links to and circumstances in Ontario. The application judge also repeatedly made clear that she was analyzing the children's links to and

circumstances in Ontario immediately prior to the September 2018 date of alleged wrongful retention, and not subsequent to that date.

(ii) Alleged Error in Considering Views and Preferences of the Children

[60] The appellant also submits that the application judge erred in law by treating the children's views and preferences as objections to their return under Article 13(2) of the *Hague Convention*. The application judge thus conflated the determination of habitual residence with the Article 13(2) exception for "objections." Yet this exception is only engaged after the court determines habitual residence.

[61] Again, I reject this argument. The appellant is correct to stress the important distinction between the determination of habitual residence and the Article 13(2) exception. However, he has not shown that the application judge made the error he alleges. The application judge legitimately considered evidence of the children's views and preferences for purposes relevant to the test for habitual residence.

[62] It is proper for an application judge to consider the child's views and preferences as a relevant factor in determining habitual residence. *Balev* requires the application judge to analyze "all relevant links and circumstances" that connect a child to each country: at para. 43. A child's views and preferences may

be one such relevant link or circumstance. *Balev* teaches that the list of potentially relevant factors is not a closed list: at para. 47. Accordingly, the fact that the majority did not specifically enumerate a child's views and preferences as a relevant factor in *Balev* does not bar the application judge from considering those views and preferences.

[63] A child's views and preferences may be relevant to the concerns that animate the hybrid approach. As *Balev* teaches, at para. 43, the focus of the hybrid approach is the child's links to and circumstances in the two countries and the circumstances of the move between those two countries. A child's views and preferences may shed light on their links to a particular country or their circumstances in that country. For instance, if a child wishes to remain in country A because the child has made friends and social connections in country A, the child's preference to remain in that country provides evidence of the strength of the child's friendships and social connections, a relevant link to country A.

[64] However, courts should not consider views and preferences at the habitual residence stage in a manner that would stray into the Article 13(2) "objections" exception or assessing the best interests of the child. As stated previously, a return order is not a custody determination and the application judge does not have jurisdiction to consider the best interests of the child as a judge would at a custody hearing: *Thomson v. Thomson*, [1994] 3 S.C.R. 551, at p. 578. Likewise, the Article 13(2) "objections" exception, not the habitual residence stage, is

designed to allow the court to give the child “a say in where the child lives”: *Balev*, at para. 34.

[65] In this regard, I would note that children’s views and preferences may sometimes be motivated by factors that are not tied to the criteria for determining habitual residence but are more relevant to Article 13(2) objections or the ultimate determination of access and custody. A child’s views and preferences may have little to do with their links to and circumstances in a given country and may exclusively concern the child’s perceived interests. For instance, a child may wish to remain in a given country because it offers greater economic or educational opportunities when the child reaches the age of maturity. A court could take such a wish into account when considering a child’s objection to return under Article 13(2). Likewise, this wish would be relevant to a court charged with determining the best interests of the child to make a custody or access order. Yet a child’s belief that a given country offers greater economic or educational opportunities in the future offers little assistance to the court in determining whether that country is the “focal point of the child’s life” immediately before the date of the alleged wrongful removal or retention: *Balev*, at para. 43.

[66] In this case, it was open to the application judge to consider the children’s views and preferences as evidence of their circumstances in and links to Ontario. It is true that some of the reasons two of the children gave for wishing to remain in Ontario pertained more to best interests of the child or Article 13(2)

"objections" than to the concerns that animate the hybrid approach to habitual residence. For instance, N. and I. indicated that they were doing better in school in Ontario than in Germany, and N. expressed his view that he would have a better chance of attending university in Ontario than in Germany. Yet the three older children also gave reasons for wishing to stay in Ontario that were relevant to their links to Ontario. All three referred to their ties to their maternal extended family as a reason, and I. and D. referenced the friends they had made in Ontario as well.

[67] When the application judge's reasons are read in context, it is clear that she considered the children's views and preferences as evidence of their circumstances in and links to Ontario, not as Article 13(2) objections. The application judge specifically instructed herself that the issue before her was not the best interests of the children. Before referring to the children's views and preferences, the application judge emphasized their close relationship with their maternal extended family in Canada. This was one of the principal reasons the children gave for wishing to remain in Canada. The application judge did not highlight N.'s view that he would have a better chance of attending university in Ontario than in Germany. Accordingly, the most reasonable reading of the application judge's reasons is that she considered the children's views and preferences as evidence of the children's circumstances in Ontario and the strength of the links connecting them to Ontario.

(4) Did the application judge err by permitting OCL counsel to give evidence and advance legal argument from the counsel table?

[68] The appellant further argues that the application judge erred by permitting OCL counsel to exceed the parameters of her court-ordered role. The appellant points to two errors. First, he submits that the application judge erred by permitting OCL counsel to give evidence and advance legal argument on behalf of the children at the application hearing. Second, he maintains that the application judge erred by permitting OCL counsel to give evidence on the consistency, clarity, and independence of the children's views and preferences when she was not qualified as an expert.

(a) Role of OCL Counsel

[69] I reject the appellant's argument that the OCL counsel exceeded the parameters of her role. The appellant's submission misunderstands the role of OCL counsel. OCL counsel is not a mere cypher for the children's views or a passive participant in the proceedings. As this court recently confirmed in *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559, 141 O.R. (3d) 481 ("*OCL v. IPC*"), at paras. 69, 98-100, 114, leave to appeal refused, [2018] S.C.C.A. No. 360, OCL counsel acts as the legal representative of the OCL's child clients and owes them fiduciary duties of loyalty, good faith, and attention to their interests. It follows, as this court

established in *Strobridge v. Strobridge*, that OCL counsel may call evidence and make submissions on behalf of the children: (1994), 18 O.R. (3d) 753 (C.A.), at p. 764.

[70] That is what occurred in this case. Grace J.'s order gave OCL counsel "full power to act for the…child(ren)," including the rights to call evidence and make legal submissions. Campbell J.'s subsequent endorsement did not purport to rescind Grace J.'s order. Instead, Campbell J. merely specified the mode of presentation of the children's evidence, namely that OCL counsel would present this evidence from the counsel table on consent. This court approved of this mode of presentation of the evidence in *Strobridge v. Strobridge* at p. 764.

(b) OCL Counsel Did Not Give Opinion Evidence

[71] I also reject the second error the appellant alleges. While it would have been improper for OCL counsel to give opinion evidence, she did not do so, and the application judge did not treat her evidence or submissions as opinion evidence.

[72] I agree with the appellant that it would have been improper if OCL counsel had overstepped her role by giving opinion evidence. OCL counsel was a lawyer, not a clinician. She was not qualified as an expert. Nor did any expert clinician accompany her when she met with the children. In *RM v. JS*, 2013 ABCA 441, 369 D.L.R. (4th) 421, the issue was whether it was proper for counsel for the

child in a *Hague Convention* case to inform the court that the child's views seemed independent. The Alberta Court of Appeal held that this was improper. Counsel could not give opinion evidence about the independence of the child's views because counsel was not qualified as an expert, counsel lacked the relevant expertise, and counsel's non-expert opinion evidence would not be of use to the court: at para. 26. The same was true of OCL counsel in this case.

[73] The Alberta Court of Appeal's holding in *RM* that it is improper for counsel for the child to proffer opinion evidence is consistent with this court's decisions in *Strobridge* and *Ojeikere v. Ojeikere*, 2018 ONCA 372, 140 O.R. (3d) 561. In *Strobridge*, at p. 764, this court held that while OCL counsel can make submissions on the evidence, "counsel is not entitled to express his or her personal opinion on any issue, including the children's best interests." Likewise, in *Ojeikere*, at para. 50, this court discounted the opinion evidence of an OCL clinician in relation to children she had interviewed because the OCL clinician was not qualified as an expert. This court cited approvingly *Children's Aid Society of Toronto v. C.J.W.*, 2017 ONCJ 212, at paras. 21-22. In that case, the court emphasized that an individual retained to advise the court of the child's views and preferences, but not qualified as an expert, may only advise the court of both what the child said and the individual's direct observations of the child. This individual may not offer an interpretation of what the child's statements mean.

[74] However, I also agree with the OCL that OCL counsel had a duty to ascertain the consistency, clarity, and independence of the children's views and preferences. OCL counsel must ascertain the consistency, clarity, and independence of a child client's articulated views in order to determine whether to take a position that mirrors those views: see *Jewish Family and Child Services of Greater Toronto v. J.K.*, 2014 ONCJ 792, 74 R.F.L. (7th) 487, at para. 29. This court recognized the existence of this duty in *OCL v. IPC*: at paras. 69 and 80. At para. 80, Benotto J.A. adopted the following passage from the reasons of Mesbur J. in *Catholic Children's Aid Society of Toronto v. S.S.B.*, 2013 ONSC 4560, 35 R.F.L. (7th) 178, at para. 21:

> When [the Children's Lawyer] takes a position on behalf of a child, child's counsel will ascertain the child's views and preferences. In doing so, it will consider the independence, strength and consistency of the child's views and preferences; the circumstances surrounding those views and preferences, and all other relevant evidence about the child's interests.

[75] Furthermore, as I have already explained, OCL counsel has the right to make submissions on behalf of the children. This of course includes the right to make submissions that the children's views and preferences are clear, consistent, and independent.

[76] The question is thus whether OCL counsel stayed within the bounds of assessing the consistency, clarity, and independence of the children's views to determine what position to take and then make submissions to the court on those

factors, or whether she stepped into the realm of giving opinion evidence. As this court held in *Strobridge*, at p. 764, while OCL counsel "is entitled to…make submissions on all the evidence…counsel is not entitled to express his or her personal opinion on any issue."

[77] I reject the appellant's submission that OCL counsel purported to give opinion evidence in the letter she provided summarizing the children's views and preferences. At the application hearing, the appellant's counsel acknowledged that it was proper for OCL counsel to set out her assessment of the clarity, consistency, and independence of the children's views in the letter. That assessment was relevant to OCL counsel's ability to take a position on behalf of the children. As the appellant's counsel stated in relation to the letter:

> I'm not questioning the issue that [OCL counsel] found that the older three children had a level of maturity to, to be able to express their views and preferences. … [T]hat was her job…Whatever is in that, that letter is accepted by the [appellant].

[78] I agree. The letter from OCL counsel was not intended for use as opinion evidence. Instead, the letter clearly indicated that the purpose of the statements about the clarity, consistency, and independence of the children's views was to inform OCL counsel's own assessment of what position to take on behalf of the children.

[79] I also reject the appellant's argument that OCL counsel's use of the phrase "I found that…" in the letter indicated that OCL counsel was giving opinion

evidence. The use of “I found that…” at one place in the letter was perhaps an unfortunate choice of words. Yet it was clear from the context that OCL counsel was not purporting to offer opinion evidence but instead simply setting out the factors that informed her assessment of what position to take on behalf of the children.

[80] The appellant further submits that OCL counsel crossed the line and gave inadmissible opinion evidence in her submissions at the application hearing. He argues that OCL counsel framed her submissions as opinion evidence.

[81] I reject this submission. I have reviewed the transcript. OCL counsel did submit that the children’s views were clear, consistent, and independent. She was entitled to do so. However, she did not cross the line into giving opinion evidence. She prefaced her references to clarity, consistency, and independence with the phrase “I submit.” She was entitled to refer to the evidence of the children’s views and preferences in support of her submissions that the children expressed their views clearly, consistently, and independently. Furthermore, in her reply submissions, OCL counsel clearly indicated that her remarks on the clarity, consistency, and independence of the children’s views were intended as submissions.

[82] In any case, even if I had concluded that OCL counsel crossed the line into giving opinion evidence, I am not convinced that any prejudice to the appellant

would have flowed from this. The application judge did not analyze the clarity, consistency, and independence of the children's views in any detail, and there is no indication in her reasons that she improperly relied on the comments of OCL counsel as opinion evidence.

(5) Did the application judge err by permitting the respondent's counsel to give evidence that was not in the record?

[83] The appellant's final submission is that the application judge erred by permitting the respondent's counsel to advance statements of fact regarding the parties and their children that were not in the record. The appellant argues that this produced an injustice.

[84] I reject this argument. I agree with the OCL that this issue has no bearing on the application judge's decision. The application judge did not expressly rely on any of the evidence that the respondent's counsel allegedly tendered. The appellant is unable to point to any connection between such evidence and the application judge's decision. Accordingly, there is no prejudice to the appellant from any error.

VII. DISPOSITION

[85] Accordingly, I would dismiss the appeal. The parties agree that this is not a case for costs.

Released: "MT" AUG 30 2019

“M. Tulloch J.A.”
“I agree. L.B. Roberts J.A.”
“I agree. B.W. Miller J.A.”