

**CASE COMMENT ON THE SCC RULING UNDER THE HAGUE
CONVENTION**

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The long anticipated case from the SCC [*Office of the Children's Lawyer v. Balev*, [2018 SCC 16](#) (37250)] has arrived regarding the key issue of Habitual Residence and the defense under Article 13, where a child objects to returning to his or her habitual residence.

Up until the SCC's ruling today, the approach to determining habitual residence has varied not only within Canada, but in the US, UK, European Union, Australia, New Zealand and so on. Alberta up until the SCC ruling followed the last joint parental intention and degree of settled purpose test after making a factual inquiry: *Olson v. Olson* [2012] A.J. No. 1309; *Proia v. Proia* 2003 ABQB 576. Ontario followed a similar approach: *Ellis v. Wentzell-Ellis*, 2010 ONCA 347 [the SCC case below of *OCL v. Balev* originated in Ontario]. British Columbia case law has held that a child's habitual residence may only be altered when the child actually moves to a new residence, has resided in that new residence for an appreciable period of time, and is also tied to the habitual residence of his or her custodians: *Medina v. Pallett*, 2010 BCSC 259; *Chan v. Chow*, 2001 BCCA 276; *Fasiang v. Fasiangova*, 2008 BCSC 1339. In Quebec the Court of Appeal has applied the combined or hybrid approach which allows for the taking into account broader factors, such as the intentions of the parents and the reality of the children: *Droit de la famille-17622*, 2017 QCCA 529; *Droit de la famille-172423*, [2017] QJ No. 8429. Courts in the US have developed three primary but divergent approaches to determine the habitual residence of a child in a Hague case. The first approach focuses primarily on parental intention, with a subsidiary look at acclimatization. Six courts of appeals-the First, Second, Fourth, Seventh (to some extent), Ninth, and Eleventh Circuits-have adopted this approach, albeit with variations between the circuits. The 'last shared intent' regarding their child's habitual residence is presumed to be controlling, although the presumption can be rebutted if the child has acclimatized to its new surroundings. The second approach is the 'child centered approach.' It is followed in the Sixth Circuit. Parental intent is deemed irrelevant, and the courts look exclusively at the child's objective circumstances and past experiences. The third approach-which is followed by the Third and Eighth Circuits-requires a mixed inquiry into both the child's circumstances and the shared intentions of the child's parents. The weight to be given each factor is

unclear: *Jeremy D. Morley, The Hague Abduction Convention, 2nd Edition, 2017*. The 28 sovereign countries of the European Union apply a common set of rules, which includes the determination of habitual residence. The Court of Justice of the European Union (CJEU), ruled that habitual residence ‘must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment; e.g. reasons for moving to that state, school attendance, linguistic knowledge, family and social relationships of the child: *Lowe, Everall, Nicholls, International Movement of Children, Law, Practice and Procedure, 2nd Edition, Lexis Nexis*. The UK Supreme Court stated that habitual residence is a question of fact requiring an evaluation of all the circumstances. It is the stability of the residence that is important, not whether it is of a permanent character; that there is no requirement that the child should have been resident in the new country for a particular period of time or that one or both parents intended to reside there permanently or indefinitely; that the focus must be upon the situation of the child; that the intentions of the parents are merely one of the relevant factors; that there is no rule that one parent cannot unilaterally change the habitual residence of a child; and that it is necessary to assess the degree of the integration of the child into a social and family environment in the new country: *In Re R (Children) [2015] UKSC 35; Re: L.C. [2014] UKSC 1; A v A [2013] UKSC 60; Morley, supra; Lowe, Everall, Nicholl supra*. The modern law in Australia has been settled by the High Court in *LK v Director-General [2009] HCA 9*. The court stated that in determining a habitual residence of a child involves a broad factual inquiry, looking at the connection between the child and a particular state. The court must look at a wide variety of circumstances, such as where a person is said to reside and whether that residence can be described as ‘habitual,’ and past and present intentions often have a bearing on the weight to be attached to particular circumstances. As a general rule, neither parent can unilaterally change a child’s habitual residence, but the possibility of ambiguity or uncertainty on the part of one or both of them must be acknowledged. Where parental intentions are unclear, resolution will be determined by the ‘brute force of geography and duration:’ *Lowe, Everall, Nicholls, supra*. In New Zealand, the courts have given detailed consideration to US case law

on habitual residence. It can be described as taking the middle ground between parental intention and the child-centered approach. All relevant facts are weighed, with the settled purpose of the parents as one significant factor, but not as important as was seen to be by the Mozes court: *Mozes v Mozes*, 239 F.3d 1067 (9th Cir. 2001).

Our SCC has adopted the hybrid approach to determining habitual residence under Article 3 and a non-technical approach to considering a child's objection to removal under Article 13 (2). No longer will the shared parental test be decisive in Canada. I note from the strong dissent of Justices Moldaver, Cote and Rowe, that they advocated for the shared parental intent test, as they were of the opinion that the hybrid test would dilute the operation of the Hague Convention. The majority McLachlin C.J. Abella, Moldaver, Karakatsanis, Wagner, Gascon and Brown opted to harmonize Canada's jurisprudence with that of many other signatory countries internationally. Under the hybrid approach, a child's habitual residence can change while he or she is staying with one parent under the time limited consent of the other. The Court also ruled that there is no conflict between The *Hague Convention* and the *Convention on the Rights of the Child*, as they both seek to protect the best interest of children. The second issue the Court ruled upon, was that the *Canadian Charter of Rights and Freedoms* cannot be used to interpret the *Hague Convention*. In justifying the hybrid approach, the SCC referred to the EU, the UK, Australia, New Zealand and the US as all endorsing the hybrid approach. As I have stated above, the US cannot be used as an example, as the circuit courts differ as to the proper approach in determining habitual residence. In determining a child's objection, the SCC indicated that expert evidence (psychologist or social worker) may be required, but it is not necessary in all cases. In other words the court should approach the child's objection in a straight forward fashion. In most cases it will simply be a matter of inference from the child's demeanor, testimony, and circumstances. Calling an expert *should not be allowed to delay the proceedings*. The Court was also critical of the time it took for The Hague Convention hearing and appeals to resolve the matter. For many practitioners in this area, the hybrid approach will take some getting used to. The shared parental intent model, for the most part

was relatively decisive in reaching a decision. How the SCC's ruling plays out in the future, will be a matter of interpretation as future Hague Cases come before our courts.

Respectfully submitted this 15th day of May, 2018

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