# COURT OF APPEAL FOR ONTARIO

CITATION: Geliedan v. Rawdah, 2020 ONCA 254
DATE: 20200415
DOCKET: C67443

Lauwers, Paciocco and Fairburn JJ.A.

BETWEEN

Mazen Geliedan

Applicant (Respondent)

and

Abir Rawdah

Respondent (Appellant)

Kristy Maurina, Michael J. Stangarone and Edward C. Conway, for the appellant

Matthew Gourlay, Farrah Hudani and Jessica Luscombe, for the respondent

Estee L. Garfin and Hera Evans, for the intervenor the Attorney General of Ontario

Heard: November 27, 2019 and December 6, 2019

On appeal from the order of Justice E. Llana Nakonechny of the Superior Court of Justice, dated September 17, 2019.

**Fairburn J.A.:**

## A. OVERVIEW

[1] The parties have a six-year-old child. She is currently living with her mother in the Toronto area.

[2] The father brought an application under s. 40 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 ("*CLRA*") asking for a finding that the "child had been wrongfully removed to [and] was being wrongfully retained in Ontario". He asked the court to order that the child be returned to what he claims is her habitual residence in Dubai, United Arab Emirates, so that all matters relating to custody and access could be dealt with there.

[3] The mother did not bring a counter-application. Specifically, she did not ask the court to exercise jurisdiction to make a custody and access order in Ontario. Rather, the mother opposed the father's application on the basis that the child's habitual residence has been established, by an existing consent court order, as "England and Wales", United Kingdom, and that the father had wrongfully retained the child in Dubai. As I explain below, the mother claims that her decision to come to Ontario was one of necessity.

[4] The issue on appeal is whether the application judge erred in ordering that the child be returned to Dubai.

[5] In my view, the application judge erred in making that order. That error flows from her treating the father's s. 40 *CLRA* application ("the Application") as if it were governed by the *Convention on the Civil Aspects of International Child Abduction,* Can. T.S. 1983, No. 35 ("*Hague Convention*").

[6] For the reasons that follow, I would allow the appeal, stay the Application, and order that the father bring a similar proceeding in the court that issued the consent custody order.[1]

## B. THE BACKGROUND AND THE CONSENT CUSTODY ORDER

[7] The appellant mother is a Lebanese-born citizen of Lebanon and Canada. The respondent father is a Saudi Arabia-born citizen of Saudi Arabia and the United Kingdom. Their daughter was born in London, England and is a citizen of the United Kingdom. It does not appear to be in dispute that the child is also a Canadian citizen by birth.

[8] The parties were married in London in the fall of 2012. Their daughter was born in 2013. The parties separated shortly after her birth. Extensive family court proceedings took place within the U.K. A custody and access order was issued in respect of the child, on consent, on November 25, 2015. The parties agree it is the last custody and access order made ("the Consent Custody Order"). In the Consent Custody Order, among other things, His Honour Judge Cryan, a judge of The Family Court at Central Family Court, in London, U.K., ordered as follows:

a) "[t]he child is habitually resident in the jurisdiction of England and Wales"; and

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[1] The appellant raised numerous grounds of appeal, including a constitutional challenge to the operative statutory provisions for the first time on appeal. In light of how I would resolve the appeal, there is no need to address those other issues.

b) “neither party shall remove the child from the jurisdiction of England and Wales without the written consent of the other or order of the court”.

[9] Under the terms of the Consent Custody Order, the child is to live with the mother and the mother is to make the child available for parenting time with the father for two 24-hour periods and one eight-hour period each week.

[10] The father acknowledges that he started living “more substantially” in Dubai, around the time that the Consent Custody Order was made. Even so, he contends that he frequently travelled to London to retain contact with the child who was living with the mother. The mother says that the father was actually living more substantially in Saudi Arabia and that he did not come to London as often as he suggests. Regardless, on April 2, 2018, the mother travelled with the child to Dubai to meet the father. From that point forward, the parents’ narratives dramatically diverge.

[11] The mother maintains that she and the child went to Dubai for a two-week visit with the father. Although she and the child had return flights to London, Heathrow Airport booked for April 17, 2018, the mother contends that they never got on those flights because the father confiscated their passports.

[12] The mother maintains that she and the child were, for all intents and purposes, trapped in the U.A.E. for the next almost 14 months. The mother does not speak Arabic and says that her repeated attempts to obtain police assistance

were unsuccessful. On one occasion, she found the passports in the trunk of the father's car. She took the child to the airport and attempted to get passes to exit the country. There was a waiting period to obtain the exit passes and so she hid the passports behind a fire extinguisher outside of her apartment. The passports were found by the apartment's concierge who returned them to the father. The mother says that the father was furious and assaulted her as punishment for attempting to leave.

[13] About six months later, the mother maintains that she surreptitiously attended at the father's home when he was in Saudi Arabia for a funeral. She says that she regained control of both passports and obtained the assistance of an unidentified person in secretly leaving the country with the child. On May 29, 2019, the mother and child escaped to Beirut, Lebanon. The mother says that, having been absent from the U.K. for so long, and not being a citizen of the U.K., she was uncertain as to whether she could reenter that country with the child. Accordingly, as a Canadian citizen, on June 9, 2019, she and the child flew to Ontario where her mother (the maternal grandmother) and other family members live.

[14] The father completely denies the mother's narrative. He says that the mother and he agreed that she and the child would relocate to the U.A.E. so that he could be more actively involved in parenting the child. The father maintains that it was the parents' common intention to have the child set down roots in Dubai. The father contends that he never stole the passports. While he may have had them for a

while, it was for the purpose of obtaining legitimate documentation. He says that he never assaulted the mother. The father alleges that the mother simply became bitter after the child's paternal grandparents refused to purchase her an expensive home in which to live. The father says that it was only after that decision was made, that the mother decided to abduct the child and take her to Canada.

## C. THE DECISION UNDER APPEAL

[15] Pursuant to his Application, the father argued that the child should be returned to Dubai, which he claims had become her habitual residence. The mother opposed the Application, claiming that the father had wrongfully retained the child in Dubai and that the child's true habitual residence is the U.K., as legally recognized in the Consent Custody Order. The mother's position is that all custody and access matters should be resolved in the U.K.

[16] The parties filed extensive affidavits and the written record on the Application was substantial, detailed and conflicting in nature. The application judge considered whether the Application could be dealt with on a summary basis or required a hearing with oral evidence. Over the mother's objection, she decided the Application on the written record alone.

[17] The application judge determined that the child was habitually resident in Dubai immediately prior to the alleged wrongful removal to Ontario. She focused on the child's life in Dubai from April 2, 2018 to May 30, 2019. She observed that

the child first resided with both of her parents in rental accommodation and then primarily with her mother after her father moved to a separate apartment. Even so, the application judge found that the child was cared for by both of her parents. She attended private school during this time, participated in activities, piano lessons, and horseback riding, and had a nanny and a dog. Extended family, including aunts and cousins as well as family friends, visited the parties and the child while in Dubai.

[18] Based on these findings, and without resolving the parents' conflicting narratives about why the child was in Dubai for 14 months or the impact of the Consent Custody Order, the application judge concluded that Dubai was the child's habitual residence:

> I have considered the Respondent's argument that the child stayed in Dubai because the Respondent was "trapped" there by the Applicant. The Respondent sought to leave Dubai when her relationship with the Applicant did not proceed as she would have wished. This does not change the fact that the child's social and life connections including her community, school and activities were in Dubai for a fourteen-month period. The Respondent shipped her and [the child's] belongings from London to Dubai in August 2018. [The child] was acclimatized to this jurisdiction over an appreciable period of time. [Emphasis added.]

[19] Having concluded that the child's habitual residence was Dubai, the application judge went on to consider whether the child would suffer "serious harm" if returned to it. She stated that this level of harm must rise to a "high threshold".

Relying upon *Thomson v. Thomson,* [1994] 3 S.C.R. 551, at p. 596, she concluded that to exempt the child from being returned to her habitual residence because of harm, that harm must rise to the level of an "intolerable situation". Again, without resolving the conflict in the parties' narratives, the application judge concluded that the mother had failed to meet her burden to show that level of harm.

[20] Accordingly, the application judge ordered the child's return to Dubai. She also made several ancillary orders, including that the father pay for the mother's flight to the U.A.E. and rent an apartment for her for a period of time.[2]

## D. THE LEGAL FRAMEWORK

[21] I begin with this important observation: while Canada is a signatory to the *Hague Convention* and s. 46 of the *CLRA* makes its provisions the law of Ontario, the U.A.E. is not a signatory to the *Hague Convention*.

[22] The father brought the Application pursuant to s. 40 of the *CLRA*, which reads:

> Upon application, a court,
>
> > (a) that is satisfied that a child has been wrongfully removed to or is being wrongfully retained in Ontario; or
> >
> > (b) that may not exercise jurisdiction under section 22 or that has declined jurisdiction under section 25 or 42,

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[2] This order appears to have been predicated on the assumption that the mother would be permitted re-entry to the U.A.E. The mother has filed fresh evidence on appeal that she says demonstrates her highly precarious status in Dubai.

> may do any one or more of the following:
>
> > 1. Make such interim order in respect of the custody or access as the court considers is in the best interests of the child.
> >
> > 2. Stay the application subject to,
> >
> > > i. the condition that a party to the application promptly commence a similar proceeding before an extra-provincial tribunal, or
> > >
> > > ii. such other conditions as the court considers appropriate.
> >
> > 3. Order a party to return the child to such place as the court considers appropriate and, in the discretion of the court, order payment of the cost of the reasonable travel and other expenses of the child and any parties to or witnesses at the hearing of the application. [Emphasis added.]

[23] Where a return application is brought under the *Hague Convention,* the court first looks to the question of habitual residence under Article 3, which reads:

> 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 the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. [Emphasis added.]

[24] Once habitual residence is determined, Article 12 of the *Hague Convention* requires that the child be returned to the contracting state of the child's habitual

residence unless an exception applies: the authority concerned "shall order the return of the child forthwith". [Emphasis added.]

[25] In this case, the alleged exception was that the child would experience harm if returned to Dubai. To this end, Article 13 of the *Hague Convention* reads:

> Despite the provisions of the preceding Article [the mandatory return to the child's habitual residence provision], 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:
>
> …
>
> (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. [Emphasis added.]

## E. ANALYSIS: THIS WAS NOT A *HAGUE CONVENTION* CASE

### (i) Overview

[26] Although the U.A.E. is not a *Hague Convention* signatory, and the application judge recognized this fact, she still decided the case using the *Hague Convention's* legal framework.

[27] As if Article 3 of the *Hague Convention* applied, the application judge first asked where the child had been habitually resident just prior to her arrival in Ontario. Having resolved that the answer to that question was Dubai, she then asked whether the child would be subjected to serious harm, which she determined must rise to the level of an "intolerable situation", were the child to be returned to

Dubai. Answering that question in the negative, the application judge proceeded as if, pursuant to Article 12 of the *Hague Convention*, she was required to return the child to Dubai.

[28] It was an error for the application judge to apply a *Hague Convention* approach when determining this s. 40 *CLRA* Application.

### (ii) The Differences Between the *Hague Convention* and Section 40 of the *CLRA*

[29] The father contends that the application judge was right to apply the *Hague Convention* framework. He points to various lower court decisions in support of his argument that the principles governing applications under the *Hague Convention* and s. 40 of the *CLRA* are entirely interchangeable: See e.g. *Bolla v. Swart,* 2017 ONSC 1488, at para. 38; *Moussa v. Sundhu*, 2018 ONCJ 284, 11 R.F.L. (8th) 497, at para. 32.

[30] I do not accept the proposition that a s. 40 *CLRA* application is indistinguishable from a *Hague Convention* application.

[31] Recall the wording of s. 40 of the *CLRA* that is relevant to this appeal:

> Upon application, a court,
>
> > (a) that is satisfied that a child has been wrongfully removed to or is being wrongfully retained in Ontario; …
>
> may do any one or more of the following …. [Emphasis added.]

The available remedies are: (1) making interim custody or access orders in the best interests of the child; (2) staying the application on conditions, including that a similar proceeding be promptly commenced in another jurisdiction; and (3) ordering the return of the child "to such place as the court considers appropriate".

[32] Recall, also, that under the *Hague Convention,* the court must determine the child's habitual residence immediately before the alleged wrongful removal or retention and, then, unless a specified exception applies, order the child's return to the state of the habitual residence.

[33] Accordingly, a plain reading of s. 40 of the *CLRA* and of the relevant Articles under the *Hague Convention* reveal two fundamental differences between the two types of return applications:

> (1) The determination of wrongful removal or retention is not tied to the concept of "habitual residence" under s. 40 of the *CLRA*. In fact, s. 40 contains no reference at all to the term "habitual residence".
>
> (2) If the court is satisfied that a child "has been wrongfully removed to or is being wrongfully retained in Ontario" under s. 40 of the *CLRA*, unlike under the *Hague Convention,* the court is given broad powers to make orders, including staying the application on conditions. This is in direct contrast to the *Hague Convention* which provides that, once there has been a determination of wrongful removal, subject to specified exceptions, the child must be returned to the state in which he or she was habitually resident.

[34] While considerations taken into account under *Hague Convention* and s. 40 *CLRA* applications will often overlap, it is important not to lose sight of the

fundamental differences between the applications. The court's ability to exercise a broader range of powers under s. 40 is particularly important.

**(iii) The Rationale for the Differences Between the Schemes**

[35] There is good reason to distinguish between a return application under the *Hague Convention* and under s. 40 of the *CLRA*.

[36] In relation to *Hague Convention* matters, it is widely recognized that, between contracting states, the country of habitual residence is the most appropriate location to determine custody and access issues. Accordingly, the purpose of the *Hague Convention* is to ensure that, between signatories to the *Convention*, there is "the prompt return of wrongfully removed or retained children to their country of habitual residence": *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398, at para. 24. The return order is not a custody determination, but an order designed to "restore the *status quo*" existing before the wrongful removal or retention and "to deprive the 'wrongful' parent of any advantage that might otherwise be gained by the abduction": *Balev,* at para. 24.

[37] The fact that a state is a signatory to the *Hague Convention* provides comfort about how custody and access matters will be dealt with by that state. By becoming a signatory to the *Hague Convention,* states agree to follow the reciprocal obligations as set out in the *Convention*. By virtue of signing the *Hague Convention,* signatories warrant that they are:

> [f]irmly convinced that the interests of children are of paramount importance in matters relating to their custody. [Emphasis added.]

Given the paramountcy of the child's best interests in custody and access decisions under the *CLRA*, the warranty that *Hague Convention* signatories also treat the best interests of children as of supreme importance is critical.

[38] When considering whether to return a child to a non-signatory state, there is no basis to assume that the receiving state will determine custody and access issues based on the child's best interests. As noted by Laskin J.A. in *Ojeikere v. Ojeikere,* 2018 ONCA 372, 140 O.R. (3d) 561, at para. 61, "[s]ome non-signatory countries may do so; others may not." By way of example, in this very case, there is a significant dispute between the parents as to whether, in the U.A.E., considerations other than the child's best interests might prevail.

[39] Over the objections of the mother, the father was permitted to file expert affidavit evidence on the Application. The father's expert maintains that, among other things, the U.A.E. court will consider what is in the best interests of the child.

[40] The mother asks to file two expert reports as fresh evidence on appeal, both of which conflict with the father's expert evidence on the Application. The father opposes the admission of the evidence. I would admit it.

[41] I start with the observation that where a child's best interests are at issue, the test for the admission of fresh evidence is applied more flexibly: *Ojeikere,* at para. 47; *Salehi v. Tawoosi,* 2016 ONCA 986, at para. 21.

[42] From the time that the Application was scheduled to be heard, the mother found a lawyer, responded to a detailed and lengthy Application, and pulled together her own record which was largely based on evidence located within foreign countries. This was all done in circumstances where, if the mother is to be believed, the father had accessed her iCloud account and locked her out of it so that she did not have proper access to her historical electronic messages. In these circumstances, I accept that she acted diligently, but did not have enough time to obtain an expert report, particularly in the 11 days she had left after the father served and filed his expert's report.

[43] The mother's expert reports, addressing how custody and access issues will be dealt with in the U.A.E., are at least as reasonably capable of belief as the father's expert report. And, they could have affected the result and are necessary in so far as they are relevant to the child's best interests. Therefore, I would admit the mother's expert reports as fresh evidence on appeal.[3] I would also admit the father's responding affidavit.

[44] I will not go through the experts' reports in detail as it is not possible to reconcile their competing views, particularly on appeal. Suffice to say that the experts disagree on how custody and access issues would be dealt with if the child

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[3] While the mother also attempted to file other fresh evidence on appeal, I would dismiss the balance of her application as it is irrelevant to the disposition on appeal.

were to be returned to the U.A.E. While the father's expert suggests the child's best interests would be prioritized, the mother's experts suggest otherwise. The mother's expert reports suggest that, in any custody and access dispute, as a Christian, non-national, Canadian-Lebanese, non-Arabic speaking woman, the mother would be treated differently than the father who is a Muslim, non-national, Saudi Arabian-United Kingdom man. According to the mother's experts, under Sharia law, the parents could be treated very differently in terms of their suitability as a custodial parent and, indeed, the mother's suitability to even remain in the U.A.E.

[45] I note the conflict in the experts' reports to underscore that, when it comes to non-signatories of the *Hague Convention*, it cannot be presumed that the non-signatory state adheres to the fundamental precepts of the *Hague Convention.*

## F. THE APPLICATION JUDGE ASKED THE WRONG QUESTION

[46] In fairness to the application judge, and as pointed out by the father, I wish to emphasize that the application of *Hague Convention* principles to non-*Hague Convention* cases is not without precedent. Even so, it was wrong to proceed as if this case was governed by the principles under the *Hague Convention*. That error made a difference in this case.

[47] In *Hague Convention* cases, where the child's habitual residence must be resolved, a hybrid approach is applied, considering both the focal point of the

child's life prior to the alleged wrongful removal or retention, as well as parental intention: *Balev,* at paras. 43-46. That approach requires the court "look at the 'entirety' of [the child's] situation": *Farsi v. Da Rocha*, 2020 ONCA 92, at para. 41. Accordingly, even if this had been a *Hague Convention* case, the application judge would have had to grapple with the Consent Custody Order and the wildly different accounts of the parents in determining the location of the child's habitual residence.

[48] Yet, in concluding that Dubai was the child's habitual residence, the application judge did not consider the Consent Custody Order. Nor did she attempt to resolve the crux of the parental dispute in this case: how the child came to be in Dubai for over a year. Was the move from the U.K. to the U.A.E. a joint parental decision or was the stay in Dubai really an involuntary confinement?

[49] In support of her position that they were involuntarily confined, the mother emphasizes that she and the child travelled on return airline tickets, returning to London about two weeks after their arrival in Dubai. The mother kept her flat in London when she travelled. The child was not withdrawn from her school in London before they travelled. Immediately upon their arrival in the U.A.E., the mother communicated with her cousin in Beirut, asking that she join them in Dubai. The record of that communication reveals that when the cousin asked how long the mother would be in the U.A.E., the mother answered that she would only be there until April 17th, the date coinciding with the return airline tickets to Heathrow.

[50] The mother says that after the father took the passports, she lived in fear, and continues to fear, that the father would remove the child to Saudi Arabia. She presented documents she found stored on the father's phone that suggest he was actively seeking a passport and travel permit for the child to go into Saudi Arabia. The mother also produced evidence from her relatives, supporting her position. Among that evidence was her uncle's affidavit, suggesting that he spoke with the father's parents and they wanted the child to live in Saudi Arabia with their other grandchildren and, in fact, were prepared to give the mother a "large sum of money in exchange for abandoning her daughter and leaving to Canada."

[51] The father says that the mother's version of events is sheer fantasy. He likens it to a Hollywood movie that the mother has watched numerous times.

[52] In support of his position that the parents made a joint decision to change the child's habitual residence to Dubai, he relies on numerous factors.

[53] He maintains that there was never any intention for the mother and child to use the return airline tickets to Heathrow Airport two weeks after their arrival in the U.A.E. He says that he bought them return airline tickets only because they were cheaper than the one-way tickets he found.

[54] Also in support of his position, the father points to emails, said to be authored by the mother, exploring school options for the child in Dubai, more than a year in advance of moving there. He points to the fact that she also travelled there in

advance of April 2018 in order to assess the schools. He also points to communications between the mother and his father suggesting that she was planning on moving to Dubai. The mother says that the father has hijacked her private electronic communications and implies that he has falsified some of her communications.

[55] The father denies ever having been violent toward the mother. Indeed, he claims the opposite, that the mother is unstable and violent toward him. He claims that she cannot be trusted to parent the child and says she is mentally unstable. She claims it is he who is mentally unstable.

[56] The father also points to several documents in support of his version of events, including placing significant emphasis on an email that the mother sent to the British Embassy in July 2018 (over three months after her arrival in the U.A.E.). He highlights the fact that the mother told the Embassy that she moved to Dubai so that her daughter could be closer to her father.

[57] I note that other aspects of that email chain could be said to support the mother's version of events, including her reference to the father having "put a travel ban on our daughter" and having "taken her passport from me." The email also references the mother's fear that the father would have her "arrested at some point and take our daughter to Saudi." She asks the Embassy for assistance in obtaining a "new British citizen for my daughter as her father will not return the one I had.

Could I pay for an original copy of her birth certificate to come from London? And how soon can a new passport be made?"

[58] The father also emphasizes messages said to be sent by the mother to the paternal grandfather, suggesting that in July 2019 (after she had arrived in Canada), the mother wished to return to Dubai, acknowledging she had moved there for the child "to have a father".

[59] The mother's and father's accounts as to why the child was in Dubai for as long as she was could not be more different. Undoubtedly, it would have been difficult to resolve the parents' competing accounts on the written record before the application judge.

[60] While it is important that applications arising from alleged child abductions move with dispatch, this cannot be done at the expense of justice. Although it will be a rare case in which *viva voce* evidence will be required, had this been a *Hague Convention* case, where habitual residence needed to be resolved, this may well have been one of those rare situations where it was necessary to hear some *viva voce* evidence: *I. (A.M.R.) v. R. (K.E.)*, 2011 ONCA 417, 106 O.R. (3d) 1, at para. 125; *Dovigi v. Razi*, 2012 ONCA 361, 110 O.R. (3d) 593, at paras. 27-28, leave to appeal refused, [2012] S.C.C.A. No. 348*; Ierullo v. Ierullo* (2006), 216 O.A.C. 78, at para. 18.

[61] Importantly, this was not a *Hague Convention* case and, therefore, the application judge was not required to determine the question of habitual residence. She answered the wrong question. The "right" question did not require resolution of these facts.

## G. THE RIGHT QUESTION UNDER SECTION 40(A) OF THE *CLRA*

[62] The application judge should have asked whether the child had been "wrongfully removed to or [was] being wrongfully retained in Ontario": *CLRA* s. 40(a). A critical consideration in answering that question should have been the existence of the U.K. Consent Custody Order. That Order is not mentioned in the application judge's analysis.

[63] When taking that Order into account, both parents' versions lead to the inexorable conclusion that the child was wrongfully removed to Ontario.

[64] The father says that the mother abducted the child from Dubai and is now wrongfully retaining her in Ontario. Therefore, he says there is a wrongful removal from Dubai to Ontario and a wrongful retention in Ontario. His position meets the statutory prerequisite in s. 40(a) of the *CLRA*.

[65] In the somewhat rare circumstances of this case, the mother's position also amounts to an acknowledgement that there has been a wrongful removal to and retention in Ontario. The mother does not suggest that an Ontario court should take jurisdiction in relation to custody or access. Rather, the mother contends that

the November 25, 2015 U.K. Consent Custody Order remains a binding, valid court order. Recall that The Family Court at Central Family Court, in London, U.K., ordered as follows:

> (a)"[t]he child is habitually resident in the jurisdiction of England and Wales"; and
>
> (b)"neither party shall remove the child from the jurisdiction of England and Wales without the written consent of the other or order of the court". [Emphasis added.]

[66] The mother maintains that the father is in clear breach of that order, given that he, for all intents and purposes, confined the mother and child in Dubai by taking their passports and not letting them return to the U.K. at the end of their two-week vacation. The mother explains that she and the child are only in Ontario because, after the father breached the still-valid Consent Custody Order, and she was finally able to escape from Dubai, she did not know if she could return to the U.K. and stay there. While the child is a citizen of the U.K., the mother is only a citizen of Lebanon and Canada. Accordingly, the mother claims that, as a matter of necessity, and in the panic of the moment, she brought the child first to her family in Lebanon for a short time and then to her family in Ontario. She says that she deemed these to be the safest options.

[67] Accordingly, even though the mother provides an explanation for why she is in Ontario with the child, she accepts the binding nature of the Consent Custody Order. That order sets out the means by which the parents can remove the child from England and Wales: variation of the court order or written consent of the non-removing party. Neither of these prerequisites have been met. Therefore, even on the mother's own version, and despite her reason for coming to Ontario (if believed), her position amounts to an acknowledgement that the Consent Custody Order has not been complied with. Accordingly, even on her version, there is a wrongful removal to and retention in Ontario.

[68] Either way, whether on the father's or the mother's versions, the requirements of s. 40(a) of the *CLRA* are met.

## H. THE REMEDY THAT SHOULD HAVE FLOWED

[69] By incorrectly applying a *Hague Convention* framework, the application judge proceeded as if she had no option but to return the child to her habitual residence: Dubai. Leaving aside that habitual residence did not need to be decided in this Application, the question of remedy brings into sharp focus the second fundamental difference between the *Hague Convention* and s. 40 of the *CLRA.* The fact is that under s. 40, unlike under the *Hague Convention,* the court is given broad discretionary powers when determining what order will remedy a wrongful removal to or retention in Ontario.

[70] The mother says that the Consent Custody Order is still valid and that the father must return to the U.K. to vary it. The father contends that the Consent Custody Order is now "obsolete". Despite having never obtained a variation of the Consent Custody Order and despite neither parent having given written consent to the removal of the child from England and Wales, he argues that the parties consensually abandoned that order when they consensually moved the child to Dubai.

[71] The father also contends that the mother's failure to bring a s. 41(1) *CLRA* application is fatal to the suggestion that the U.K. Consent Custody Order governs. Section 41(1) reads:

> Upon application by any person in whose favour an order for the custody of or access to a child has been made by an extra-provincial tribunal, a court shall recognize the order unless the court is satisfied … [emphasis added.]

[72] While the mother did not advance an application under s. 41(1) in the court below, she says that her opposition to the father's s. 40 Application was consistent with s. 41(1), in the sense that the application judge should have recognized the U.K. Consent Custody Order as binding and the U.K. as the child's habitual residence.

[73] I find that the existence of the U.K. order was highly relevant to the s. 40 Application. While the mother could have brought a s. 41(1) application, seeking an order recognizing the U.K. order, the absence of that application does not

neutralize the relevance of the U.K. order for the purposes of s. 40. Indeed, recall that one of the illuminating principles under s. 19 of the *CLRA*, setting out the purposes of Part III, where s. 40 resides, is the "enforcement of custody and access orders made outside Ontario."

[74] I disagree that the Consent Custody Order is obsolete. To the contrary, it is a presumptively valid court order that contemplates and attempts to prevent precisely the type of dispute that is now before us. While I accept that the parties could change the child's habitual residence under the terms of that order, it specifically addressed the only manner in which the parties could accomplish that end, either by way of "order of the court" or "written consent" of the non-removing party. Neither method was pursued.

[75] In addition, while the child had not been in the U.K. for well over a year at the point that the Application was determined, until she left for Dubai, she had always lived in the U.K. Importantly, the Consent Custody Order was informed by an evidentiary backdrop that would still be available in the U.K., including parenting assessments that had been conducted by more than one professional.

[76] In all of the circumstances, the application judge should have given substantial weight to the Consent Custody Order when arriving at an appropriate disposition. Given the highly disparate accounts of the parties, and the clear need to resolve those accounts before ordering the child's return to Dubai, the matter

should have been returned to the Central Family Court in London, U.K. for determination.

[77] The U.K. is, of course, a *Hague Convention* signatory that subscribes to determining custody and access solely based on the child's best interests. As well, allowing the father to pursue the matter in the U.K. would show an appropriate respect for and enforcement of custody and access orders made outside of Ontario. It would also recognize the importance of avoiding the concurrent exercise of jurisdictions in relation to the custody of the same child. Finally, whatever the result in the U.K., it would act so as to discourage child abductions as an alternative to the proper determination of custody rights by due process. All of these goals are consistent with the purposes of Part III of the *CLRA,* which are captured in s. 19 of the *Act*.

## I. DISPOSITION

[78] For the above reasons, I have concluded that the order returning the child to Dubai cannot stand.

[79] I would allow the appeal, set aside the order under appeal, and order that:

> The father's Application be stayed pursuant to s. 40(a)(2) of the *CLRA* on the condition that the father promptly commence a similar proceeding in the court that issued the Consent Custody Order;
>
> In the event that court declines to take jurisdiction, I would order that the father may apply to the Ontario

> Superior Court of Justice to lift this stay and seek a rehearing of his s. 40 Application;
>
> In the event that the father brings a further proceeding within the Ontario Superior Court of Justice respecting the child, nothing in this order shall prevent the mother from bringing her own application(s) respecting the child;
>
> Pending further order of a United Kingdom or Ontario court, the child shall not be removed from the Greater Toronto Area; and
>
> Pending further court order, the mother shall facilitate access between the child and father by way of phone, email, and online chat.

[80] Unless the parties can agree on costs, I would order that the mother shall file and serve written costs submissions of a maximum of three pages in length, no later than 14 days from the date of release of this judgment. The father shall file and serve his responding written costs submissions no later than seven days following receipt of the mother's costs submissions. His cost submissions are also limited to three pages in length.

Released: RLL April 15, 2020

Tausendfreund J.A.

I agree Pepall J.A.

I agree - J.A.