Commentary: Foreign Court Cases

Office of the Children's Lawyer v. Balev, [2018] 1 S.C.R. 398 (Can.)

U.S. Cases Cited in Opinion

Karkkainen v. Kovalchuk,
445 F.3d 280 (3rd Cir. 2006)

Martinez v. Cahue,
826 F.3d 983 (7th Cir. 2016)

Redmond v. Redmond,
724 F.3d 729 (7th Cir. 2013)

Silverman v. Silverman,
338 F.3d 886 (8th Cir. 2003)

Tsai-Yi Yang v. Fu-Chiang Tsui,
499 F.3d 259 (3rd Cir. 2007)

This case comes from the Supreme Court of Canada. *Although not binding in the U.S. courts, the Canadian court's analysis considers U.S. precedent and may be of interest to U.S. courts.*

Habitual Residence | Unilateral Change of Residence

In this case, the Canadian Supreme Court explored whether one parent can unilaterally change a child's habitual residence when the consent of the other parent is time-limited. The Canadian court outlined a hybrid approach for how courts should determine the question of habitual residence, which it adopted in this case. The approach allowed for the consideration of any relevant factors and rejected formulaic approaches such as those based on parental intent or that focus on child-centered factors.

Facts

The mother and father in this case were married in Canada in 2000 but soon after moved to Germany, where they had two children. Although the parents later separated, they all continued to live in Germany, with two brief visits to Canada. In 2013, because the children were struggling in the German schools, the parents agreed that the children would temporarily move to Canada in the custody of their mother to attend Canadian schools. The father signed a letter of consent permitting the children to relocate with the mother until August 15, 2014. The father also signed a notarized letter temporarily transferring custody to the mother for the 2013–2014 school year. The father revoked his consent before the August 15 date set for the children's return and filed a Hague Convention petition with Ontario courts for return of the children. The Canadian trial and appellate courts ordered the children returned to Germany in October 2016.[1] After the children's return, a German court granted the mother sole custody of the children, and she moved back to Canada with the children. Although the case

1. *Trial Court Proceedings – Balev v. Baggott, 2015 CarswellOnt 13100 (Can. Ont. S.C.J.) (WL).* The trial court granted father's petition for return and found that the parents did not have a "settled intention" that the children remain in Canada, and father's consent was only for a temporary stay.

Divisional Court Proceedings – Balev v. Baggott, [2016] 344 O.A.C. 159 (Can. Ont. S.C.J. D.C.). The divisional court reviewed the case and reversed the trial court, finding that the parents had a settled intention that the children temporary live in Canada, and during this period the children became integrated into the community, thus changing their habitual residence.

Appellate Court Proceedings – Balev v. Baggott, [2016] 133 O.R. 3d 735 (Can. Ont. C.A.). The court of appeal reinstated the trial court's order of return to Germany. That court held that one parent cannot unilaterally change a child's habitual residence, and habitual residence does not change upon one parent consenting to a time-limited stay in another place. The appeal to the Canadian supreme court followed.

had become moot, the Canadian Supreme Court agreed to hear it to resolve the issue of how to determine habitual residence in Hague Convention proceedings.[2]

Discussion

Unilateral Change of Residence in Violation of Time-Limited Consent. The majority opinion found that there is no rule that prevents a parent from unilaterally changing the habitual residence of a child.[3] Although courts have held that habitual residence cannot change in cases where the child's removal was consented to for a limited period, and a parent may not unilaterally change that residence, a trial judge may consider other factors.

Time-limited agreements should not be deemed contracts to be enforced by the court. The Supreme Court reasoned that such agreements may be considered, but do not preclude the responsibility of the court to make factual determinations about habitual residence as of the time of the alleged wrongful retention or removal.

Habitual Residence. The court focused on three distinct approaches to determining habitual residence: (1) The parental-intent approach (citing *Mozes v. Mozes*[4]); (2) The child-centered approach (citing *Friedrich v. Friedrich*[5] and *Feder v. Evans-Feder*[6]); and (3) the "hybrid" approach:

> instead of focusing primarily on either parental intention or the child's acclimatization, the judge determining habitual residence under Article 3 must look to all relevant considerations arising from the facts of the case.[7]

Under this approach, the court considers the focal point of the child, looking at "all relevant links and circumstances" of the child in both countries and the circumstances surrounding the child's move.[8]

> Considerations include "the duration, regularity, conditions and reasons for the [child's] stay in the territory of [a] Member State" and the child's nationality. No single factor dominates the analysis; rather, the application judge should consider the entirety of the circumstances. Relevant considerations may vary according to the age of the child concerned; where the child is an infant, "the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of."[9]

The court noted that although parental intent may be important as an indicator, it cannot be crucial to determining habitual residence. The court rejected the notion that a parent cannot

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2. The children had already been returned to Germany, rendering the father's petition for return moot. The Canadian supreme court granted review, noting that "the issues raised in this appeal are important, and the law on how cases such as this fall to be decided requires clarification." Office of the Children's Lawyer v. Balev, [2018] 1 S.C.R. 398, 409, para. 3 (Can.).

3. The bulk of U.S. precedent is to the contrary. *See, e.g.*, Mozes v. Mozes, 239 F.3d 1067 1070, 1077–1081 (9th Cir. 2001); Calixto v. Lesmes, 909 F.3d 1079, 1084 (11th Cir. 2018); Darin v. Olivero-Huffman, 746 F.3d 1, 20 (1st Cir. 2014); Griffiths v. Weeks, No. 18-cv-60729-BLOOM/Valle, 2018 WL 7824477 (S.D. Fla. June 22, 2018); Blanc v. Morgan, 721 F. Supp. 2d 749, 761 (W.D. Tenn. 2010).

4. 239 F.3d 1067 (9th Cir. 2001).

5. 983 F.2d 1396 (6th Cir. 1993).

6. 63 F.3d 217 (3d Cir. 1995).

7. Office of the Children's Lawyer v. Balev, [2018] 1 S.C.R. 398, 400 (Can.).

8. *Id.*

9. *Id.* at 421, para. 44 (citations omitted).

unilaterally change a child's habitual residence, since such a rule would undermine the court's responsibility to evaluate all the relevant circumstances.

Borrowing language from the U.S. case *Redmond v. Redmond*,[10] the court described the hybrid approach as essentially "fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions."[11] Thus, the hybrid approach

> [R]equires the application judge to look to the entirety of the child's situation. While courts allude to factors or considerations that tend to recur, there is no legal test for habitual residence and the list of potentially relevant factors is not closed. The temptation "to overlay the factual concept of habitual residence with legal constructs" must be resisted.[12]

Recognizing that there is a circuit split on the issue of determining habitual residence in U.S. courts,[13] the court pointed to *Redmond* and other decisions from the Third, Seventh, and Eighth Circuits as "strong support" for the hybrid approach from U.S. circuit courts.[14]

The Canadian supreme court further reasoned that the hybrid approach was preferable for the following reasons:

- It harmonizes the trend in the international judicial community to reject the parental-intent approach and adopt a hybrid one.
- It best conforms to the text, structure, and purpose of the 1980 Hague Convention by deterring abductions, encouraging speedy resolutions, and protecting children from the harmful effects of wrongful conduct.
- It promotes prompt custody and access decisions in the appropriate forum.
- It protects children from the harm occasioned by wrongful removal or retention.

Dissent

Because the father's consent for removal was time-limited and there was no shared parental intent for Canada to become the children's habitual residence, the dissent argued that the appeal should be dismissed. Where parental intent is explicitly reflected in the terms of an agreement, absent exceptional circumstances, such an agreement should determine the issue of habitual residence.

The dissent further argued that the text, structure, purpose, and policy support the conclusion that the parental-intent test is appropriate. The hybrid approach is a broad, open-ended inquiry into the child's status and factors impacting that status, without any margins, and it blurs the lines between Hague Convention applications and custody determinations.

Criticizing the hybrid approach for contradicting the text of the Convention, the dissent argued,

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10. 724 F.3d 729 (7th Cir. 2013).
11. *Id.* at 422, para. 47 (quoting *Redmond*, 724 F.3d at 746).
12. *Id.* (citations omitted).
13. *See* James D. Garbolino, The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges 54 (Federal Judicial Center, 2d ed. 2015).
14. Martinez v. Cahue, 826 F.3d 983, 990 (7th Cir. 2016); Silverman v. Silverman, 338 F.3d 886, 898–99 (8th Cir. 2003); Tsai-Yi Yang v. Fu-Chiang Tsui, 499 F.3d 259, 271–72 (3rd Cir. 2007); Karkkainen v. Kovalchuk, 445 F.3d 280, 297 (3rd Cir. 2006).

> First, the hybrid approach is inconsistent with the text of the *Convention*. By inviting courts to consider an open list of unspecified factors that any individual judge deems to be relevant, the majority ignores the explicit distinction made by Article 12 of the *Convention*. As we have discussed, that provision clearly distinguishes the evidence that may be considered for applications brought within one year of the wrongful removal or retention, from that which may be considered for applications brought on or after that time. The hybrid approach renders this express textual distinction meaningless by encouraging courts in *all cases* to consider evidence of "settling in".[15]

Adoption of the hybrid approach undermines the deterrent effect of the Convention because allowing evidence to support a parent's unilateral decision to change the child's habitual residence motivates the parent to take measures to quickly establish connections to the new country and to argue that the child's acclimatization has overcome parental expectations and intent.

The dissent also argued that adoption of the hybrid model will result in a lack of promptness. Litigants are likelier to have the freedom to introduce any evidence that tends to establish acclimatization despite the strongest evidence of parental intent.

15. Office of the Children's Lawyer v. Balev, [2018] 1 S.C.R. 398, 451, para. 132 (Can.).