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**By Michael Ghert**

Most family law jurisprudence deals with local issues, within the province and Canada. But we live in a society that is global and mobile. People with different national origins and connections have children together. People relocate across international borders for personal and career reasons. Sometimes, a parent relocates with a child to another country (or stays with a child in another country) without the consent of the other parent.

Contemporary mobility facilitates many opportunities. But it also shapes situations where children may be abducted. The Hague Convention on the Civil Aspects of International Child Abduction is an international treaty through which its members have sought to manage this potential harm. The Convention creates a mechanism for the timely return of children who have been wrongfully removed from member states.

As the jurisprudence under the Convention demonstrates, it is not always easy to tell whether or not a child who has relocated with a parent has been wrongfully removed – if they have been abducted or if they have simply been moved by a parent within their rights to do so. In some cases, the point of contention is the question of the child's "habitual residence". To have been wrongfully removed, a child must have been "habitually resident" in the member state immediately before being removed.

Habitual residence is not defined in the Convention. Prior to the 2018 decision of the Supreme Court of Canada in Office of the Children's Lawyer v. Balev, 2018 SCC 16 the predominant approach in Canada was for courts to determine habitual residence based on "parental intention", essentially where the parents had decided the child would live. This approach stood in contrast to reliance on exclusively child centred factors, such as schooling or social connections. In Balev the Supreme Court mandated a hybrid approach: habitual residence is to be determined contextually and holistically, having regard to both parental intentions and the circumstances of the child.

In Balev the Supreme Court gave strong broad guidance respecting the question of a child's habitual residence. It was left to the Courts of Appeal and trial courts to fill in the details. In O.M. v. E.D., 2019 ABCA 509, the Alberta Court of Appeal put flesh on the bones of Balev in two important areas. In O.M. the parties moved with their four-year-old child from Calgary, where he had been born, to France in November 2018 and then to Spain in March 2019. In May 2019, the child's mother returned with him to Calgary. At that time, the father was in Chad, where he worked alternate months. The Queen's Bench justice found that the child was habitually resident in Spain and ordered the mother to return the child to that country. The Court of Appeal identified two key errors in the justice's analysis of the child's habitual residence.

The Court of Appeal noted the justice's rejection of the possibility that the child's habitual residence could be Calgary. She had considered only one possible habitual residence, Spain. The justice had effectively applied a presumption that the child's habitual residence was his most recent residence. The Court of Appeal found that this was not consistent with the contextual analysis required by Balev, and the Supreme Court's warning against presumptions. As a result, it is clear the analysis of habitual residence must go beyond reliance on the family's most recent choice of home. The child's connections to the place where the alleged abductor has taken them must also be weighed.

The Queen's Bench justice had refused to consider the fact that the mother was the child's primary caregiver in the analysis of his habitual residence. The Court of Appeal agreed that being the primary caregiver did not give the mother the unilateral right to decide the child's residence, but found that the justice had erred in excluding from her analysis any consideration of the fact that the mother was primary caregiver. The Court of Appeal concluded that "the identity and situation of a young child's primary caregiver can play a role in shaping the child's life, including connection to family, community and country".

In O.M. the mother had no real connection to Spain, and the father was not resident in Spain (as he worked in Chad 50% of the time). The Court of Appeal found that these considerations weighed against a finding that the young child was habitually resident in Spain, as opposed to Alberta. Going forward, the personal circumstances of a child's parents cannot be ignored in habitual residence determinations. The younger the child, the more weight will generally be given to the circumstances of the child's primary caregiver.

O.M. is a significant case not only because it adds substance to the hybrid test required by Balev. The case is also important because it tells us that there are situations where, after a family relocates away from Canada, one parent may properly return to Canada with the children without the consent of the other parent or a court order.

Counsel advising parents who have recently moved away from Canada and urgently need to leave a relationship should closely consider the Court's decision in O.M..