IS ONTARIO DROPPING THE BALL ON INTERNATIONAL ABDUCTION CASES?

Case studies of three recent Ontario Court decisions

By Phyllis Brodkin & Michael Stangarone
MacDonald & Partners LLP

INTRODUCTION

Overview

The Hague Convention on the Civil Aspects of International Child Abduction ("the Convention")[1] provides a uniform law that countries may adopt to compel the return of a child wrongfully removed from his or her habitual residence. It does not determine the merits of an underlying custody claim but rather provides a right of action for a party to seek the return of a child or children to a requesting state. The child must be under sixteen years of age and must have been wrongfully removed to, or is being wrongfully retained in a haven state. Both countries must be signatories to the Convention.[2]

Purpose of Convention

The *Convention* seeks to secure the prompt return of children wrongfully removed or retained in a Contracting state to the state of their habitual residence. It also attempts to ensure that rights of custody and access of one Contracting state are respected in the other Contracting states (Article 1). The Convention presumes that the interests of children who have been wrongfully removed are ordinarily better served by immediately repatriating them to their original jurisdiction where the merits of custody should and, but for the abduction, would have been determined.[3]

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[1] (November 1980) 19 I.L.M. 1501
[2] For a list of the signatories to the Convention, see: http://www.hcch.net/index_en.php?act=conventions.status&cid=24
[3] *Thomson v. Thomson* [1994] 3 S.C.R. 551 (S.C.C.), at paras. 39-49

Public Policy Considerations

The strong policy of the Convention in favour of ordering the immediate return of children is intended to deter the abduction of children by depriving fugitive parents of any possibility of having their custody of the children recognized in the country of refuge and thereby legitimizing the situation for which they are responsible. The foundation of the Convention is the rapidity of the mandatory return process and the principle that the merits of issues related to the custody of children who have been wrongfully removed or retained are to be determined by the courts of their habitual place of residence.[4]

Defences

There are several defences available under the Convention to a wrongful removal or retention. They are as follows:

1. More than a year has elapsed between the removal and the commencement of judicial proceedings and it can be demonstrated that the child is now settled into his new environment (Article 12);
2. 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 (Article 13(*a*));
3. The person ... having the care of the person of the child had acquiesced in the removal or retention (Article 13(*a*));
4. 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 (Article 13(*b*);
5. The child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take into account of its views (Article 13);

[4] *A. (J.E.) v. M.(C.L.)* 2002 CarswellNS 425 (N.S.C.A.), at para. 28

6. The return of the child would "not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms" (Article 20).

There is a limited scope for the operation of any of the exceptions in the Convention. Canada cannot be seen as a "haven" for abductors, and the effect of the Convention cannot be diluted. In *Garelli v. Rahman*[5], MacKinnon J., states that:

> …deterrence of abduction is enhanced by certainty that return will be ordered. Refusal to order return detracts from that certainty and therefore detracts from the deterrence intended by the Convention. This consideration supports, in general, a rather limited scope for the operation of any exceptions. Consistent with this view, the Supreme Court of Canada has stated that a "**narrow interpretation should be given to the exceptions to ordering return.**

In *F.(R.) v. G.(M.),* Justice Chamberland stated, "the Hague Convention is a very efficient tool conceived by the international community to dissuade parents from illegally removing their children from one country to another. However, it is also, in my view, a fragile tool and any interpretation short of a rigorous one of the few exceptions inserted in the Convention would rapidly compromise its efficacy."[6]

Based on a review of past jurisprudence regarding international abduction cases, the defences raised by abducting parents are routinely unsuccessful as the threshold test is very high and in fact is rarely met.

However, recent Ontario case law suggests a pendulum swing with respect to the success of the available defences. Defences that would not otherwise have been successful in the past are now being met with approval by the Ontario Courts. The effect of the Convention and the concept of habitual residence are being diluted in the

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[5] *Garelli v. Rahma*, 2006 CarswellOnt 2582 (S.C.J.) (WL) (obtained 25 November 2009), (2006), 28 R.F.L. (6th) 455 (Ont. S.C.J.), para. 76

[6] *F. (R.) v. G. (M.)*, 2002 CarswellQue 1738 (C.A.) (WL) (obtained 25 November 2009), [2002] R.D.F. 785 (Que. C.A.)., para 30

process and wrongful removals are being sanctioned by the Court contrary to the letter and the spirit of the Convention.

The focus of this paper is on three recent Ontario cases which dilute the effect of the Convention.

DILUTING THE GRAVE RISK OF HARM DEFENCE UNDER ARTICLE 13(b)

Achakzad v. Zemaryalai, 2009 CarswellOnt 5615 (Ont. S.C.J.)

The Supreme Court of Canada in *Thompson* enunciated the following with respect to 'grave risk':

> It has been generally accepted that the Convention mandates a more stringent test than that advanced by the appellant. In brief, although the word "grave" modifies "risk" and not "harm", this must be read in conjunction with the clause "*or otherwise* place the child in an intolerable situation". The use of the word "otherwise" points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of art. 13(*b*) is harm to a degree that also amounts to an intolerable situation. Examples of cases that have come to this conclusion are: *Gsponer v.* Johnstone (1998), 12 Fam. L.R. 755 (Aus. F.C.); (Aus. F.C.); *Re A. (A Minor) (Abduction)*, [1988] 1 F.L.R. 365 (C.A.); *Re A. and another (Minors) (Abduction: Acquiescence),* [1992] 1 All E.R. 929 (C.A.); *Re L. (Child Abduction) (Psychological Harm)*, [1993] 2 F.L.R. 401 (H.C.); *Re N. (Minors) (Abduction)*, [1991] 1 F.L.R. 413 (H.C.); *Director-General of Family & Community Services v. Davis* (1990), 14 Fam. L.R. 381 (Aus.); *C. v. C.*, supra. In *Re A. (A Minor) (Abduction)*, supra, Nourse L.J., in my view correctly, expressed the approach that should be taken, at p. 372:
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> ... the risk has to be more than an ordinary risk, or something greater than would normally be expected on taking a child away from one parent and passing him to another. I agree ... that not only must the risk be a weighty one, but that it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words "or otherwise place the child in an intolerable situation".
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> I hasten to add, however, that I do not accept Twaddle J.A.'s assessment that the risk contemplated by the Convention must come from a cause related to the return of the child to the other parent and not merely from the removal of the child from his present caregiver. As this Court stated in *Young v. Young,* [1993] 4 S.C.R. 3, [1993] 8 W.W.R. 513], from a child centred perspective, harm is harm. If the harm were severe enough to meet the stringent test of the Convention, it

> would be irrelevant from whence it came. I should observe, however, that it would only be in the rarest of cases that the effects of "settling in" to the abductor's environment would constitute the level of harm contemplated by the Convention. By stating that before one year has elapsed the rule is that the child must be returned forthwith, art. 12 makes it clear that the ordinary effects of settling in, therefore, do not warrant refusal to surrender. Even after the expiration of one year, return must be ordered unless, in the words of the Convention, "it is demonstrated that the child is now settled in its new environment".

The grave risk has to be something greater than would normally be expected from taking the child from one parent and placing him or her with the other. It must be one of substantial, not trivial, psychological harm. The risk contemplated has to be more than ordinary trivial risk and words are used such as obvious, substantial, severe and threatening to define the level of harm. The actual level of proof of the threat of harm was not made clear nor was the evidence required to raise a successful defence delineated or canvassed by the Court.

In the 1999 Ontario Court of Appeal decision of *Pollastro v. Pollastro*[7], the wife was allowed to remain in Ontario. The court found the domestic violence perpetuated against the mother had an impact on the child. Justice Abella, as she then was, came very close to actually stating that abuse to a mother is abuse to a child. In *Pollastro,* the Appellant alleged a history of significant spousal abuse. She stated that the Respondent had ongoing problem with drugs and alcohol abuse, anger management difficulties and a general lack of basic parenting skills. She also described incidents where the Respondent put the child directly in danger.

The sworn affidavit evidence confirmed and attested to the allegations of abuse. Various affidavits from independent witnesses corroborated the allegations of abuse, the bad character of the Respondent and the abusive situation attested to by the Appellant. Sworn statements of the deponents attested to the Respondent's attempt to burn the Appellant with a cigarette and his throwing coffee at the Appellant while the child was in her arms. Witnesses observed physical injuries to the Appellant and the drug use of the Respondent. There were numerous reports of his general instability. Additional

[7] Supra, 1

uncontroverted factual evidence gave credence to the allegations of the Appellant. The Metropolitan Toronto police observed the injuries of the Appellant and a police report was filed. The criminal record of the Respondent included a conviction. Medical evidence described injuries suffered by the Appellant.

The weightiest evidence in the *Pollastro* case was the tapes of the Respondent threatening the wife when she was in Canada and he was in California. Those tapes confirmed that the wife would be in danger if she returned with the child to California. The Court of Appeal found that returning the child to such a violent environment would place a child in an intolerable situation and would expose the child to a serious risk of psychological or physical harm. It was the threatening phone calls made by the father to the mother after she had removed the child from California that convinced the court that the father had an ongoing inability to control his temper. His propensity for violence was clear.

The evidence in *Pollastro* of grave risk was clear, unequivocal and, in parts, uncontroverted. The high evidentiary burden was met. That decision stands in stark contrast to Justice Weagant's decision to dismiss the Husband's Hague application in *Achakzad v. Zemaryalai*[8]. His decision was based on credibility issues and his concern that the California courts and law enforcement could not protect the Wife and the child because the Husband and his family resided there.

Justice Weagant found in *Achakzad v. Zemaryalai* that the child should not be returned to California because the child would be exposed to unreasonable risk of harm. Notwithstanding that Justice Weagant recognized the ability of California to properly administer its own custody laws, his Honour was of the view that the Husband and his family were such 'liars' that the California justice system could not protect the wife and the child. He began his decision by stating that it was clear that he had been 'lied to' during the course of the hearing. On appeal, Justice Czutrin found that the onus was on the wife to establish defence under the *Hague Convention* and that the trial judge erred

[8] *Achakzad v. Zemaryalai* 2009 CarswellOnt 3548 (O.C.J.) reversed, 2009 CarswellOnt 5615 (Ont. S.C.J.)

by placing that onus on the father and requiring him to lead his evidence first. Justice Czutrin found that the violations resulted in an unfair hearing.

His Honour further found that Justice Weagant did not fairly consider the ability of California to enforce its laws and the danger to the interpretation of the Convention if one could escape the consequences of a Convention by alleging that the Husband and his family could not be trusted. California is a modern state with law enforcement processes in place, which could have easily dealt with this matter. Further, the Husband gave a series of undertakings that would have protected the Wife. Notwithstanding those undertakings, Justice Weagant found that the Wife could not be protected given his very specific findings of credibility and belief that the Husband and his family were liars.

Justice Czutrin held that the hearing was flawed after considering the objectives of the Convention, and accordingly ordered a new and expedited hearing. An oral hearing was ordered given the credibility issues. At the expedited re-hearing[9], Justice Murray of the Ontario Court of Justice again dismissed the Husband's Hague application. Her Honour refused the return order finding that the past violence was so severe that it was probable that it would continue in the future if the Wife returned to California with the child.

DILUTING THE ARTICLE 13 OBJECTION EXCEPTION

Christodoulou v. Christodoulou 2009 CarswellOnt 6275 (Ont.S.C.J.)

Article 13 of the Convention provides that the judicial authority may 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. It does not require a judge to automatically accede to the child's stated wishes even if he or she finds the child has attained a degree of maturity. In this way, the Convention recognizes that the objecting child, should have a voice, but not a veto in the process of deciding whether he or she will be returned. The party who removed the

[9] 2010 CarswellOnt 5562 (O.C.J.)

child must establish this defence in accordance with the civil burden on the balance of probabilities. A child's objection is important but not presumptive or determinative. A child's objection may be heard but first there must be "gateway findings" prior to the court taking the objections into account. The weight to be given, if any, to the objection then must be determined. [10]

In *Christodoulou v. Christodoulou*[11], Justice Gilmore of the Ontario Superior Court held that the parties' son, George, who was 9 years old at the time, had reached an age and degree of maturity such that his objections to returning to Cypress were sufficiently articulated to form a defence under Article 13. Her Honour allowed the child to have veto power, rather than a voice, in contravention of the policy considerations of the Convention pursuant to Article 13 of the Convention.

In *Christodoulou*, the parties were married in Canada on July 6, 1997 and resided here until August 2007 when they relocated to Cyprus. The parties separated on January 16, 2009. At the time of the Wife's removal of the children, the children were enrolled in school and extracurricular activities in Cyprus. The Husband testified at trial that the children had close extended family in Cyprus. They fit in very well at the Greek schools, spoke Greek fluently, and had lots of friends. Emails sent by the Wife and the parties' son, George confirmed this fact.

The parties had sold their home in Ontario and in 2009 were residing in their newly built jointly owned matrimonial home in Cyprus at the time of the removal. Both were employed in Cyprus.

On or about January 16, 2009, the Wife left matrimonial home with the children, allegedly to take them to soccer. She did not return home. On January 18, 2009, the

[10] *Mitchell v. Mitchell*, 2009 CarswellOnt 911 (S.C.J.) (WL) (obtained 25 October 2009), (2009), 66 R.F.L. (6th) 189 (S.C.J.), para. 72
A.(J.E.) v. M.(C.L.) supra, para . 53*Thomson v. Thomson*, supra, para. 326
[11] 2009 CarswellOnt 6275 (Ont.S.C.J.)

Wife's brother advised the Husband that the Wife and the children were in Ontario and that she had no intention of returning to Cyprus.

The evidence of the OCL social worker at trial with respect to George was that he had a lot of adult information and he was 'to some extent manipulated by both sides.' The social worker testified that, *'…I think emotionally he's probably equivalent to his own age, and he seems very hurt by the separation'.* Under cross-examination, the social worker confirmed that George was manipulated more by his maternal side about custody issues. He saw the court papers and even knew about the court date. She admitted that since the child was in Canada, the Husband had had only had two telephone calls with George, both of which were monitored by the Wife, and two visits with him.

The emails from George marshaled as evidence before the trial illustrate that the child was settled and doing well in Cyprus and no independent evidence indicated otherwise at the trial. There was no such suggestion of misconduct on the party of the Husband at trial.

The fact that George did not like his paternal grandmother's food or Greek school are not the type of objections that should have been given weight by the Court. George's views on whether a Canadian or Cyprian lifestyle are better were not relevant. In her direct examination, the OCL social worker testified that George had used the words 'not civilized' to mean that people in Cyprus were rude, "*people yelled at each other for no reason, cars honked at red lights all the time, people double parked in parking lots, the grocery stores ripped you off, you had to check your receipts…"* The Wife's third party affidavits describe George's objections in adult language and relate mostly to one incident in which George and his father had a disagreement. George's alleged objections about the food and living conditions in Cyprus mirrored the Wife's own objections in her affidavit sworn April 6, 2009.

Notwithstanding the evidence and the type of objections made by George, Justice Gilmore held that the objections raised by the 9 year old were such that a defence under Article 13 were met.

With respect, the decision in *Christodoulou* sets a dangerous precedent and should be met with caution. Her Honour's decision effectively permitted a 9 year old child to determine the outstanding issues, and misapprehended the definition of 'objection' under the Convention. Within the context of the Convention, the objection must be to returning to the country of habitual residence, and not an expression of a preference to the custodial parent.[12]

The trial judge in *Christodoulou* also failed to consider the June 2009 British Columbia Court of Appeal in *Beatty v. Schatz*[13]. In that case, a 10 year old child was brought to Canada by his father. After his vacation, he was to be returned to his mother, in Ireland, pursuant to a sworn undertaking. The child was not returned. He was objecting and wanted to stay in Canada with his father. The father was concerned that the child would be frustrated and could try to take matters into his own hands. There was evidence that the child had said, "I have committed no crime, the authorities cannot make me get on a plane".

In *Beatty*, the trial judge found that the child had been given a message, albeit subtly, that the father did not want him to return to Ireland. The trial judge in *Beatty* concluded that although the child could express his wishes, she did not find him mature enough to understand the subtleties of what was occurring and the long term consequences on his well being. The trial judge ordered the child to return. The father appealed.

The appeal judge found that this was a case where the policy considerations underlying the Convention were particularly important. She emphasized the deterrence aspect of the Convention and the importance that a message must go out to potential

[12] *Garelli v. Rahma,* *Garelli v Rahma* at paras. 35-36

[13] *Beatty v. Schatz*, 2009 CarswellBC 2016 (C.A.) (WL) (obtained 25 October 2009), [2009] B.C.W.L.D. 6227 (C.A.)

abductors that there are no safe havens among contracting states. She confirmed that the Irish Court was to decide where the child was going to live and that not returning the child would send the message that it would be acceptable to wrongfully retain a child, if the child says that he or she does not want to return. The Court of Appeal agreed with the trial judge and found that she did consider the child's objections, but concluded that the child's wishes, as far as they impacted on the best interests of the child should be left to the court in Ireland.

The recent Canadian appellate decision in *Beatty,* which was before the trial judge in *Christodoulou*, was powerful authority that the defence should not have succeeded in that case. In *Beatty,* the judge referred to a House of Lords decision which states that once the discretion to consider the child's objection comes into play, the court may consider the nature and strength of the objections, the extent to which they are "authentically" the child's, or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations relevant to the child's welfare, as well as Convention considerations. It was made clear that the older the child, the greater the weight to the objections.

In *Christodoulou*, George was only 9 when he left Cyprus. The issue was whether he had the maturity to weigh competing advantages and disadvantages of his position. The OCL social worker indicated that while George was mature, articulate and could think things through carefully, he was emotionally only 9 or 10 years old. She indicated that he was greatly affected by the parties' separation. Given his emotional age, it would be difficult to conclude that he would be able to assess the impact of his objection being determinative on a long term basis nor its affect on his ability to have a relationship with both of his parents or on his life.

The Court must take a careful look at the background leading up to the expression of a child's objection. Often the child is stating an expression more of what is expected of her and indeed, consciously or unconsciously, demanded of her by the abducting parent. A child's objection often should not be given great weight because of

concern that the objection had been influenced by the abducting parent, and by the circumstances arising from the abduction itself and may not be the expression of the child's own free will. A judge must assess how independent the objection is and the degree to which it appears to be influenced by the abducting parent or others. In deciding how much weight to give the objection, the judge must consider the entire context in which the objection came to be expressed. The decision in *Christodoulou* provides the child's objection far too much evidentiary weight and fails to consider that the child was manipulated by both sides in the words of the OCL social worker.[14]

It is questionable whether George, at 9 years old, would be able to separate his objection to a return from his feelings about the conflict between his parents and break up of their marriage. In *Toiber v. Toiber*[15], the court stated that a court should be cautious in assigning undue weight to a child's objection given the almost inescapable conclusion that the sentiments expressed mirror some of the abducting parents sentiments.

DILUTING THE DETERMINATION OF HABITUAL RESIDENCE

Jackson v. Graczyk 2007 CarswellOnt 3216 (Ont. C.A.)

The term "habitually resident" is not defined in the Convention, but the case law makes clear that the habitual residence of a child will be the state where both parents lived together with the child, and cannot be changed unilaterally, without the express or implied consent of the other parent.[16] The Ontario Court of Appeal in *Korutowska-Wooff v. Wooff*[17] set out the following principles:

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[14] *Riedel v. Thompoulos-Danilov,* supra, para 29

[15] *Toiber v. Toiber*, 2005 CarswellOnt 8366 (S.C.J.) (WL) (obtained 25 November 2009), (2005), 25 R.F.L. (6th) 28 (Ont. S.C.J.), at para. 36

[16] *Korutowska-Wooff v. Wooff*, 2004 CarswellOnt 3203 (C.A.) (WL) (obtained 19 November 2009), (2004), 242 D.L.R. (4th) 385 (Ont. C.A.), para. 13
Cornaz v. Cornaz-Nikyuluw, 2005 CarswellOnt 4714 (S.C.J.) (WL) (obtained 19 November 2009), (2005) 20 R.F.L. (6th) 99 (Ont. S.C.J.), para. 50

[17] *Korutowska-Wooff v. Wooff* supra, para. 8

a. the question of habitual residence is a question of fact to be decided based on all of the circumstances;
b. the habitual residence is the place where the person resides for an appreciable period of time with a “settled intention”;
c. a “settled intention” or “purpose” is an intent to stay in a place whether temporarily or permanently for a particular purpose, such as employment, family, etc.;
d. a child’s habitual residence is tied to that of the child’s custodian(s).

In *Jackson v. Graczyk,* however, the Ontario Court of Appeal upheld the lower court’s decision that the child had *no* habitual residence at the time the mother brought him to Ontario. The decision considerably dilutes the concept of habitual residence but is distinguishable on its facts.

In *Jackson v. Graczyk*, the application judge not only held that Florida was not the child's habitual residence but that his habitual residence was Ontario by default. The father appealed and sought a declaration that the child had been wrongfully removed from Florida. In upholding the application judge's ruling that Florida was not the child's habitual residence, the court applied the principles enunciated by Feldman J.A. in *Korutowska-Woolf v. Woolf*, above. Laskin J.A. stated that the application judge had expressly and correctly found that the child's habitual residence was tied to that of his mother and had expressly considered the two key principles for determining habitual residence: appreciable period of time and settled intention. The Court of Appeal held that there was ample evidence to support the judge's finding that the evidence did not establish an "appreciable" period that the child resided in the U.S. and there was no settled intention to stay in Florida.

When the mother moved to Ontario, she had lived in Florida for less than one year and the child had lived there for less than three months. The mother was subject to

a deportation order, which did not expire until October 2006, and which required her to leave the U.S. The mother could not legally work in Florida or any other state in the United States, had no means of support and had been evicted from her apartment. Further, the mother no longer wanted to stay in Florida after the child was born.

The Court of Appeal held that the application judge made no palpable and overriding error when he found that Florida was not the child's habitual residence. The conclusion that Ontario was child's habitual residence was consistent with mother's settled intention. In a further dilution of the Convention, the court then went on to note (at para. 37) that *"the Convention does not say that a child must always have a habitual residence. Indeed, the child may have no connection, no readily perceptible link, to any jurisdiction. If that is the case, the Convention will not apply."*

While cases where a child has no habitual residence would be rare, in the court's view, this was one of those rare cases. Accordingly, the child had no habitual residence immediately before he moved to Ontario with his mother. Ordering his return to Florida would produce a result that would be both unjust and at odds with the aim of the Convention. The purpose of the habitual residence requirement under *Hague Convention* was to ensure that children have some connection to jurisdiction to which they were being returned. Even accepting the father's argument that the application judge erred in deciding the child's habitual residence by default, the Court of Appeal stated that it would simply hold that the Convention did not apply because the child was not habitually resident in a "Contracting State" under Article 4 and dismiss the appeal on that ground alone.

In *Christodoulou v. Christodoulou*[18], Justice Gilmore of the Ontario Superior Court held that habitual residence of the children at the time of the removal was Canada, rather than Cyprus, notwithstanding that the parties had purchased a jointly owned matrimonial home in Cyprus and had settled there. The decision erroneously interprets the idea of ‘acclimatization’. That idea is with respect to time and degree of settlement,

[18] 2009 CarswellOnt 6275 (Ont.S.C.J.)

and not how “well” the child or family has adjusted to the new environment, nor whether the child prefers it or not. That type of inquiry would be inconsistent with the summary nature of the Convention[19]. Evidence tendered from the Wife’s family and friends as to how happy she was is irrelevant and should not have been given any weight by the trial judge.

[19] *Feder v. Evans-Feder* (1995), 63 F.3d 217 (3rd Cir.) (WL) (obtained November 2009), (1995), 64 USLW 2106 (3rd Cir.), paras. 4-5