NOVA SCOTIA COURT OF APPEAL
Citation: *Beairsto v. Cook*, 2018 NSCA 90

Date: 20181121
Docket: CA 476904
Registry: Halifax

Between:

Macayla R. Beairsto

Appellant

v.

Jeremy B. Cook

Respondent

Judge:	The Honourable Justice Duncan R. Beveridge
Appeal Heard:	September 19, 2018, in Halifax, Nova Scotia
Subject:	"Habitual Residence" under *The Hague Convention on the Civil Aspects of International Child Abduction*.
Summary:	The appellant, was a young mother, living in Washington State on a visitor's visa. Following an incident of domestic violence, she flew to her home in Nova Scotia with her 6-week-old daughter. The respondent father consented to the international travel. He expected the appellant to return to Washington within six months. But within four months, it became evident she would not be returning. Various family law proceedings and orders were issued in Washington State and Nova Scotia. Eventually, the respondent applied under the *Hague Convention* for an order for the return of the child to Washington State. On February 1, 2018, the application judge found Washington State to be the child's "habitual residence" and ordered her return. The appellant moved to introduce fresh evidence. The respondent relied on a Notice of Contention.
Issues:	(1) Did the application judge err in law in his determination of "habitual residence" under the *Hague Convention*?

(2) Are there grounds in the Notice of Contention to uphold the application judge's decision?
(3) If the application judge erred, what is the appropriate remedy?
(4) Is the fresh evidence admissible?

Result: The motion to introduce fresh evidence was dismissed. The Supreme Court of Canada, in a decision released on April 20, 2018 determined that the parental intention approach relied on in Canada to determine "habitual residence" was not in keeping with the dominant thread of international *Hague Convention* jurisprudence in favour of the hybrid approach. Further, the hybrid approach best conforms to the text, structure and purpose of the Hague Convention.
Although the application judge applied the law as he rightly believed it to be on February 1, 2018, his focus on shared parental intention was legally wrong.
The respondent's Notice of Contention was without merit and was dismissed. The appropriate remedy, where an application judge errs in law, is to make the determination that was marred by legal error, while respecting the judge's untainted findings, so long as the record is sufficient, and the proposed appellate determination causes no prejudice to a party's ability to prosecute or defend the *Hague* application. Here the parties requested this Court make the determination of the child's habitual residence rather than order a new hearing. Balancing all relevant factors under the hybrid approach, the child's state of habitual residence immediately prior to the date of alleged wrongful retention was Nova Scotia.

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Respondent

Judges:	Beveridge, Bourgeois and Van den Eynden, JJ.A.
Appeal Heard:	September 19, 2018, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Beveridge, J.A.; Bourgeois and Van den Eynden, JJ.A. concurring
Counsel:	Patrick J. Eagan, for the appellant Jeremy B. Cook, respondent in person

Reasons for judgment:

INTRODUCTION

[1] The overarching issue in this case is whether Sahara, an 18-month-old girl, must be returned to the State of Washington. She has lived her whole life in Nova Scotia except for her first 42 days.

[2] The issue stems from Mr. Cook's application under the 1980 *Hague Convention on the Civil Aspects of International Child Abduction*, incorporated into the law of Nova Scotia by the *Child Abduction Act*, S.N.S. 1982, c. 4 (now R.S.N.S. 1989, c. 67).

[3] The objects of the *Hague Convention* are easy to recite. They are found in its preamble and opening Articles. The *Convention* states that it seeks to protect children from the harmful effects of wrongful removal or retention by establishing procedures to ensure their prompt return to the State of their habitual residence. But, as I will explore later, the *Convention* provides no guidance as to what is meant by "habitual residence".

[4] In this case, Mr. Cook asserted that the State of Washington was their child's habitual residence, while Ms. Beairsto claimed it was Nova Scotia.

[5] The Honourable Justice Jeffrey Hunt of the Nova Scotia Supreme Court heard Mr. Cook's application. He ordered the young child returned to Washington because that was her place of habitual residence. Ms. Beairsto appeals.

[6] She argues that Hunt J. used the wrong test to determine "habitual residence" and asks this Court to apply the correct test and reverse. Mr. Cook says that the record is complete, and if Justice Hunt erred, we should review the record and make the determination rather than remit the application for a new hearing.

[7] For reasons that I will set out, I agree that Justice Hunt used the wrong test. It affected the result and cannot be allowed to stand. At the relevant time, Sahara was not habitually resident in the State of Washington. Hence, her retention in Nova Scotia was not wrongful. I would allow the appeal and dismiss the *Hague* application.

[8] I will set out a general overview of the facts and procedural history, then turn to the legal principles that govern, and finally to an application of those principles.

GENERAL OVERVIEW & PROCEDURAL HISTORY

[9] While just 15 years old, Macayla Beairsto met an older man, Jeremy Cook, then 31, on an online dating site. She lived in Nova Scotia; he in Texas. She was in high school. He worked in the IT field.

[10] They eventually married on August 23, 2014 in Tatamagouche, Nova Scotia. He worked in the United States, while she lived in Nova Scotia.

[11] Mr. Cook is a U.S. citizen. He moved to Washington State in January 2015 to pursue his career. Ms. Beairsto moved to British Columbia in April 2015 to be closer to Mr. Cook. They visited on weekends. It was not until October 2015 that Ms. Beairsto began cohabiting with Mr. Cook in Washington on a visitor's visa. They acquired pets. They filed joint U.S. tax returns in 2015 and 2016.

[12] In March 2016, Ms. Beairsto learned she was pregnant. Apparently, Mr. Cook was not entirely supportive. He denied paternity. He suggested abortion or adoption as alternatives.

[13] Ms. Beairsto visited Nova Scotia from the end of April 2016 until the first of August 2016. She returned to Washington where she gave birth to Sahara on December 16, 2016.

[14] Tensions between the couple elevated. There is no need to detail the various incriminations. But on January 21, 2017, an incident of domestic violence was reported to the authorities by Ms. Beairsto. After the incident, Mr. Cook left the matrimonial home.

[15] There are frequently two sides or more to a story. Justice Hunt, who examined the various affidavits and heard the parties cross-examined, found that Mr. Cook had indeed pushed Ms. Beairsto while she held the baby.

[16] This incident created a risk of charges against Mr. Cook which could impact his security clearance for his employment as a civilian member of the military. Ms. Beairsto called her father, who travelled to Washington to assist.

[17] The parties agreed that Ms. Beairsto would go to Nova Scotia with Sahara. There was no set return date. Mr. Cook signed a U.S. State Department consent form. It granted unconditional permission for Ms. Beairsto to obtain a U.S. passport for Sahara's travel. For her part, Ms. Beairsto did not pursue a criminal complaint.

[18] Ms. Beairsto obtained a U.S. passport for Sahara and travelled with her father and Sahara to her home in Tatamagouche, Nova Scotia. She did not return to Washington with Sahara.

[19] For the next few months, there was little or no contact between the couple. The record discloses a plan for Ms. Beairsto and Sahara to go to Alberta to visit with Mr. Cook's relations in the summer of 2017. Mr. Cook would attend. But Ms. Beairsto refused to agree to take Sahara.

[20] This refusal prompted Mr. Cook to start family law proceedings in Washington. He filed for divorce in Washington on May 26, 2017.

[21] Ms. Beairsto did not respond directly to the Washington proceedings. Instead, she petitioned the Nova Scotia Supreme Court for divorce and sought interim sole custody, along with spousal and child support. An interim order for custody and access issued.

[22] Mr. Cook engaged Nova Scotia counsel to contest the Canadian divorce process. Then on December 7, 2017, he filed his *Hague* application asserting that Washington is Sahara's habitual residence and she had been wrongfully retained in Canada.

[23] Justice Hunt heard the *Hague* application on January 31, 2018. The parties filed briefs and extensive affidavit evidence. Further details emerged through cross-examination.

[24] Justice Hunt delivered oral reasons for judgment on February 1, 2018, subsequently reduced to writing (2018 NSSC 145). I will discuss the reasons in more detail later. For now, it suffices to say that he focussed on the last settled shared intentions of Ms. Beairsto and Mr. Cook to determine Sahara's habitual residence.

[25] Based on the submissions of counsel on the governing principles to determine habitual residence, Hunt J. said he felt bound to conclude that for the purpose of the *Hague Convention*, Sahara's habitual residence was the State of Washington. He found that the Article 13 exceptions to an order for return were not made out.

[26] The order that directed Sahara's return was not formalized until May 16, 2018. Ms. Beairsto filed a Notice of Appeal with this Court on June 1, 2018 with a motion to stay the order pending the outcome of the appeal. Mr. Cook personally appeared at the hearing of the stay motion on June 7, 2018.

[27] On June 7, 2018, I granted a stay pending the appeal (2018 NSCA 50) on the conditions the appeal be heard on an expedited basis and Mr. Cook be allowed reasonable access visits with Sahara, to be agreed upon by the parties.

[28] Mr. Cook filed with this Court what he said was a Notice of Contention on June 20, 2018. He filed a factum in support of that Notice and one in response to the appeal.

[29] Ms. Beairsto agreed to an unsupervised access visit for Mr. Cook to see his daughter in Nova Scotia on July 4, 2018. Unfortunately, Mr. Cook refused to return Sahara to Ms. Beairsto. Instead, he took her to the United States. He sent correspondence to the Nova Scotia Supreme Court and to the Deputy Registrar of this Court that he had abandoned his *Hague* application.

[30] The original Notice of Appeal set out four grounds of appeal asserting error by Justice Hunt in his determination of habitual residence, wrongful retention, and that Article 13 operated to preclude a return order. The grounds were as follows:

> 1. the learned Trial Justice erred in determining that the habitual residence of the child at issue was the State of Washington, United States of America, and erred in determining that it was necessary for the child to have any habitual residence;
> 2. the learned Trial Justice erred in determining the child to have been wrongfully retained in the Province of Nova Scotia, pursuant to Article 3 of the *Hague Convention*;
> 3. the Appellant states that the learned Trial Justice erred in determining that the Appellant had not established, pursuant to Article 13(a) of the *Hague Convention* that the Respondent was not actually exercising custody rights at the time of the removal or retention of the child, or had consented to or subsequently acquiesced in the removal or retention of the child;

> 4. the Appellant states that the learned Trial Justice erred in determining that the Appellant had not established, pursuant to Article 13(b) of the *Hague Convention*, that there is a grave risk that the return of the child to the State of Washington would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

[31] Ms. Beairsto filed an Amended Notice of Appeal on July 10, 2018. It re-numbered the grounds of appeal and added one additional ground: that Justice Hunt's analysis was inconsistent with the Supreme Court of Canada's decision in *Office of the Children's Lawyer v. Balev*, 2018 SCC 16. The new ground reads:

> 2. the Appellant cites the decision of the Supreme Court of Canada in *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, which decision had not been released at the time of the hearing below, and which requires an analysis with respect to, *inter alia*, the determination of the child's habitual residence under the *Hague Convention* which is inconsistent with the legal analysis employed by the learned Trial Justice. The learned Trial Justice's reasoning, therefore, has now become wrong in law by virtue of *Office of the Children's Lawyer, supra*.

[32] The appellant's submissions in her factum and at the appeal hearing focussed solely on this ground.

[33] Following Mr. Cook's transportation of Sahara to the United States, Ms. Beairsto filed a motion to adduce fresh evidence that detailed Mr. Cook's taking of Sahara and her subsequent return to Ms. Beairsto on July 22, 2018. All matters were heard on September 19, 2018, with Mr. Cook appearing via videoconference.

[34] With this background, I turn to the legal principles that guided the application judge and how they have changed.

LEGAL PRINCIPLES

[35] The Supreme Court of Canada has considered the *Hague Convention* in three cases: *Thomson v. Thomson*, [1994] 3 S.C.R. 551; *V.W. v. D.S.*, [1996] 2 S.C.R. 108; and, *Office of the Children's Lawyer v. Balev*, *supra*. Only the last is central to the issues that we are asked to decide.

[36] That is not to say that *Thomson* and *V.W.* do not contain important information about the genesis of the *Hague Convention* and its interpretation. Justice La Forest in *Thomson* reminds us that it was Canada that proposed the *Hague* Conference undertake the preparation of an international treaty to address

the problem of child abduction by a parent and was one of the first four signatories to the treaty.

[37] *Thomson* was a case about the wrongful removal of a child from Scotland to Canada. The mother had been granted interim custody of her young son by a Scottish court. The order prohibited the child from being taken out of Scotland. The mother took the child to Canada and refused to return. La Forest J. stressed that the underlying purpose of the *Convention* is to protect children from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence. Hence, the *Hague Convention* and any application brought under it is not concerned with the best interests of the particular child.

[38] The relevant provisions of the *Convention* are:

> The States signatory to the present Convention,
>
> Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,
>
> Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,
>
> Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions:
>
> Article 1
>
> The objects of the present Convention are:
>
> (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.
>
> [. . .]
>
> Article 3
>
> 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 removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

[39] The *Convention* charges the Contracting States to act expeditiously in proceedings for the return of children. If a child has been wrongfully removed or retained as set out in Article 3, and if the proceedings were started less than a year from the date of the wrongful removal or retention, the authority of the Contracting State shall order the return of the child forthwith. The only exceptions to mandatory return are found in Articles 13 and 20. In this case, Article 20 is not germane.

[40] Article 13 provides that the requested State is not required to order the return if: custody rights were not being exercised at the time of the removal or retention; the applicant had consented or acquiesced in the removal or retention; return would expose the child to harm or place the child in an intolerable situation; or, if a child of sufficient age and maturity objects to return. The relevant portions are:

> Article 13
>
> Notwithstanding the provisions of the preceding Article, 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:
>
> (a) 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, or had consented to or subsequently acquiesced in the removal or retention; or
>
> (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.
>
> The judicial or administrative authority may also 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.

[41] The key term "habitual residence" is not defined in the *Convention*. As explained by the High Court of Australia, the term has a long history in other *Hague Conventions* without any attempt to define the term:

> [21] The expression "habitual residence", and its cognate forms, have long been used in international conventions, particularly conventions associated with the work of the Hague Conference on Private International Law. Although the

> concept of habitual residence was used in a Hague Convention (on civil procedure) as long ago as 1896, and has since been frequently used in other Hague Conventions, none of those instruments has sought to define the term. Rather, as one author has put it, the expression has "repeatedly been presented as a notion of fact rather than law, as something to which no technical legal definition is attached so that judges from any legal system can address themselves directly to the facts". Thus the Explanatory Report commenting on the Abduction Convention said that "the notion of habitual residence [is] a well-established concept in the Hague Conference, which regards it as a question of pure fact, *differing in that respect from domicile*" (emphasis added).
>
> (*L.K. v. Director-General, Department of Community Services*, [2009] HCA 9)

[42] While essentially a question of fact, there is no doubt that there must exist some criteria to guide. Canadian courts have long looked at case law from other Contracting States to strive for uniform interpretation of the *Convention*, including how to determine a child's habitual residence (see: *Ellis v. Wentzell-Ellis*, 2010 ONCA 347 at paras.18-20).

[43] One of the earlier decisions to consider how to determine "habitual residence" was from the House of Lords in *In re J. (A Minor) (Abduction: Custody Rights)*, [1990] 2 A.C. 562. Lord Brandon of Oakbrook, for the House wrote:

> In considering this issue it seems to me to be helpful to deal first with a number of preliminary points. The first point is that the expression "habitually resident," as used in article 3 of the Convention, is nowhere defined. It follows, I think, that the expression is not to be treated as a term of art with some special meaning, but is rather to be understood according to the ordinary and natural meaning of the two words which it contains. The second point is that the question whether a person is or is not habitually resident in a specified country is a question of fact to be decided by reference to all the circumstances of any particular case. The third point is that there is a significant difference between a person ceasing to be habitually resident in country A, and his subsequently becoming habitually resident in country B. A person may cease to be habitually resident in Country A in a single day if he or she leaves it with a settled intention not to return to it but to take up long-term residence in country B instead. Such a person cannot, however, become habitually resident in country B in a single day. An appreciable period of time and a settled intention will be necessary to enable him or her to become so. During that appreciable period of time the person will have ceased to be habitually resident in country A but not yet have come habitually resident in country B. The fourth point is that, where a child of J.'s age is in the sole lawful custody of the mother, his situation with regard to habitual residence will necessarily be the same as hers.
>
> (pp. 578-579)

[44] This approach to the question of habitual residence was adopted in Canada. For example, Feldman J.A., for the Court in *Korutowska-Wooff v. Wooff* (2004), 188 O.A.C. 376, (leave ref'd [2005] S.C.C.A. No. 132), explained:

> [8] The term "habitually resident" is not defined in the Convention. However, the English courts have provided Canadian courts with guidance on the interpretation and application of this term in the cases of *Re J. (A Minor) (Abduction: Custody Rights)*, [1990] 2 A.C. 562 (H.L.), and *R. v. Barnet London Borough Council*, [1983] 2 A.C. 309 (H.L.). See *Chan v. Chow* (2001), 199 D.L.R. (4th) 478 at paras. 30-34 (B.C.C.A.); *Kinnersley-Turner v. Kinnersley-Turner* (1996), 94 O.A.C. 376 at paras. 19-20. The principles that emerge are:
>
> - the question of habitual residence is a question of fact to be decided based on all of the circumstances;
> - the habitual residence is the place where the person resides for an appreciable period of time with a "settled intention";
> - 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.;
> - a child's habitual residence is tied to that of the child's custodian(s).

[45] The application judge, in the case at bar, expressly relied on this test (para. 55). It was the same test that governed the outcome of the *Hague* application for the Ontario Court of Appeal in *Balev v. Baggott*, 2016 ONCA 680. In that case, the parents were Canadian citizens, but had lived in Germany for 12 years where they had acquired permanent resident status. Their children were born in Germany, where they went to school and engaged in extracurricular activities.

[46] The application judge's finding of habitual residence in *Balev* was summarized by Sharpe J.A.:

> [18] The application judge found that the children were habitually resident in Germany. That finding was based upon the following specific factual findings: the parents had acquired permanent resident status in Germany, had resided in Germany for 12 years, had been employed, and had owned property in Germany; the lives of the children were centered in Germany prior to their departure in April 2013; and the children were born in Germany where they attended school, engaged in extracurricular activities, and had friends.

> [19] The application judge found that the parties' settled intention was that the children would reside in Canada on a temporary, not permanent, basis. The application judge stated, at para. 73:
>
> > The case law is clear that the habitual residence of a child is in the state where both parties lived together with the child, and neither parent can unilaterally change the habitual residence, without the express or implied consent of the other parent. [authorities omitted]

[47] The Divisional Court reversed. On further appeal to the Ontario Court of Appeal, the application judge's decision was re-instated. Sharpe J.A reasoned:

> [39] There is a long and well-established line of authority to the effect that one parent cannot unilaterally change a child's habitual residence under the *Hague Convention*. The application judge correctly described this principle at para. 73: "the case law is clear that the habitual residence of a child is the state where both parties lived together with the child, and neither parent can unilaterally change the habitual residence without the express or implied consent of the other parent." As stated in *Maharaj v. Maharajh*, 2011 ONSC 525 (S.C.), at para. 18, **"unless the mother can establish a shared parental intention to change the child's residence**" at the time of the move to Ontario, the child's habitual residence remains unchanged: see also *Korutowska-Wooff and Ellis v. Wentzell-Ellis*, 2010 ONCA 347, 102 O.R. (3d) 298, at paras. 27-33.
>
> [Emphasis added]

[48] But the law evolved in many signatory states. In a series of cases, the United Kingdom Supreme Court rejected the use of rigid legal constructs to dictate the determination of a child's habitual residence. (see: *A. v. A. (Children: Habitual Residence)*, [2013] UKSC 60; *In the matter of K.L. (A Child)*, [2013] UKSC 75; *In re L.* and *In re L.C. (Children) (Reunite International Child Abduction Centre intervening)*, [2014] UKSC 1, [2014] AC 1038; *In re R. (Children)*, [2015] UKSC 35).

[49] The Court rejected the "rule" that where two parents have parental responsibility for a child, one cannot unilaterally change the child's habitual residence. In doing so, it relied on European Court of Justice jurisprudence. I will discuss some of these cases later.

[50] For now, it is sufficient to set out the unanimously adopted views of Lady Hale in *A. v. A.*, *supra*:

54. Drawing the threads together, therefore:

> i) All are agreed that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes the domicile of his parents.
>
> ii) It was the purpose of the 1986 Act to adopt a concept which was the same as that adopted in the Hague and European Conventions. The Regulation must also be interpreted consistently with those Conventions.
>
> iii) The test adopted by the European Court is "the place which reflects some degree of integration by the child in a social and family environment" in the country concerned. This depends upon numerous factors, including the reasons for the family's stay in the country in question.
>
> iv) It is now unlikely that that test would produce any different results from that hitherto adopted in the English courts under the 1986 Act and the Hague Child Abduction Convention.
>
> v) In my view, the test adopted by the European Court is preferable to that earlier adopted by the English courts, being focussed on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors. The test derived from *R v Barnet London Borough Council, ex p Shah* should be abandoned when deciding the habitual residence of a child.
>
> vi) The social and family environment of an infant or young child is shared with those (whether parents or others) upon whom he is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned.
>
> vii) The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce.
>
> viii) As the Advocate General pointed out in para AG45 and the court confirmed in para 43 of *Proceedings brought by A,* it is possible that a child may have no country of habitual residence at a particular point in time.

[51] By the time *Balev* reached the Supreme Court of Canada, the *Hague* application and the question of the habitual residence of the children had been rendered moot. The children had returned to Germany, but the German court granted the mother sole custody and the children were back in Canada. Nonetheless, because of the importance of the issues and to clarify the law, the Court heard the case.

[52] McLachlin C.J., writing for a plurality of seven, rejected the historical reliance in Canadian jurisprudence on the parental intention approach. The alternatives were the child-centered and the hybrid approach. The latter was fixed as law in Canada.

[53] McLachlin C.J. described the choices as follows:

> [40] The parental intention approach determines the habitual residence of a child by the intention of the parents with the right to determine where the child lives: see *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001), at pp. 1076-79; *Gitter v. Gitter*, 396 F.3d 124 (2nd Cir. 2005), at pp. 131-33; *R. v. Barnet London Borough Council, Ex parte Nilish Shah*, [1983] 2 A.C. 309, at p. 343.3 Under this approach, time-limited travel to which the parents agree does not change the child's habitual residence. "Where the children are sent abroad to live with relatives or for educational purposes, their habitual residence will not change where the parents intend for them to return, but may change after a period of time where there is no such intention": Schuz, at p. 187, fn. 87. Where the parents have agreed that the child will stay outside the country of habitual residence for a limited time, that intent governs throughout the agreed period, and allows the parent in the original country to mount a claim for the child's return under the Hague Convention at the end of the agreed period. **This approach currently dominates Canadian jurisprudence, where courts in a number of jurisdictions consider parental intent to be the primary consideration in determining a child's habitual residence:** see, for example, *Chan v. Chow*, 2001 BCCA 276, 90 B.C.L.R. (3d) 222, at paras. 30-34; *Korutowska-Wooff v. Wooff* (2004), 242 D.L.R. (4th) 385 (Ont. C.A.), at para. 8; *A.E.S. v. A.M.W.*, 2013 ABCA 133, 544 A.R. 246, at para. 20; *Rifkin v. Peled-Rifkin*, 2017 NBCA 3, 89 R.F.L. (7th) 194, at para. 2; *S.K. v. J.Z.*, 2017 SKQB 136, at paras. 44-47 (CanLII); *Monteiro v. Locke* (2014), 354 Nfld. & P.E.I.R. 132 (Prov. Ct.), at paras. 13-22.
>
> [41] The child-centred approach determines a child's habitual residence under Article 3 by the child's acclimatization in a given country, rendering the intentions of the parents largely irrelevant. It is backward-focused, looking to the child's connections with the state, rather than the more forward-looking parental intention model: see *Friedrich v. Friedrich*, 983 F.2d 1396 (6th Cir. 1993), at p. 1401; *Feder v. Evans-Feder*, 63 F.3d 217 (3rd Cir. 1995), at p. 224. No Canadian jurisdiction currently follows the child-centred approach, although courts in Quebec followed this approach (see *Droit de la famille – 2454*, [1996] R.J.Q. 2509 (C.A.)) until 2017, when it was abandoned in favour of the hybrid approach (see *Droit de la famille – 17622*, 2017 QCCA 529, at paras. 20, 27 and 29-30 (CanLII)).
>
> [42] Finally, the hybrid approach holds that instead of focusing primarily or exclusively 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 at hand. As noted above, in Canada, the hybrid approach has been adopted in Quebec: see *Droit de la famille – 17622*, at paras. 29-30.

[Emphasis added]

[54] The Chief Justice elaborated on the nuances of the hybrid approach:

> [43] On the hybrid approach to habitual residence, **the application judge determines the focal point of the child's life -- "the family and social environment in which its life has developed" -- immediately prior to the removal or retention**: Pérez-Vera, at p. 428; see also *Jackson v. Graczyk* (2006), 45 R.F.L. (6th) 43 (Ont. S.C.J.), at para. 33. **The judge considers all relevant links and circumstances -- the child's links to and circumstances in country A; the circumstances of the child's move from country A to country B; and the child's links to and circumstances in country B.**
>
> [44] 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: *Mercredi v. Chaffe*, C-497/10, [2010] E.C.R. I-14358, at para. 56**. No single factor dominates the analysis; rather, the application judge should consider the entirety of the circumstances**: see *Droit de la famille – 17622*, at para. 30. **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"**: *O.L. v. P.Q.* (2017) C-111/17, (C.J.E.U.), at paras. 43-45.
>
> [45] The circumstances of the parents, including their intentions, may be important, particularly in the case of infants or young children: see *Mercredi*, at paras. 55-56; *A. v. A. (Children: Habitual Residence)*, [2013] UKSC 60, [2014] A.C. 1, at para. 54; *L.K.*, at paras. 20 and 26-27. However, recent cases caution against over-reliance on parental intention. The Court of Justice of the European Union stated in *O.L.* that parental intention "can also be taken into account, where that intention is manifested by certain tangible steps such as the purchase or lease of a residence": para. 46. It "cannot as a general rule by itself be crucial to the determination of the habitual residence of a child ... but constitutes an 'indicator' capable of complementing a body of other consistent evidence": para. 47. The role of parental intention in the determination of habitual residence "depends on the circumstances specific to each individual case": para. 48.
>
> [46] **It follows that there is no "rule" that the actions of one parent cannot unilaterally change the habitual residence of a child. Imposing such a legal construct onto the determination of habitual residence detracts from the task of the finder of fact, namely to evaluate all of the relevant circumstances in determining where the child was habitually resident at the date of wrongful**

> **retention or removal**: see *In re R. Children*, [2015] UKSC 35, [2016] A.C. 76, at para. 17; see also *A. v. A.*, at paras. 39-40.
>
> [47] **The hybrid approach is "fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions": *Redmond v. Redmond*, 724 F.3d 729 (7th Cir. 2013), at p. 746. It requires 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: *A. v. A.*, at paras. 37-39.
>
> [Emphasis added]

APPLICATION OF THE PRINCIPLES

[55] In general, judges decide what they are asked to decide. That is a function of the pleadings that frame the issues, the evidence adduced and submissions made. In this case, with the assistance of counsel, Mr. Cook's *Hague* application of December 7, 2017 did not allege that Ms. Beairsto had wrongfully removed Sahara, but wrongfully retained her in Canada.

[56] This was the specific claim set out in Mr. Cook's affidavit sworn January 30, 2018. That was the position repeatedly made by Mr. Cook's counsel before Justice Hunt:

> The Court today is first to – to make a determination as to whether we have proved on the balance of probabilities that there has been the retention of Sahara that is wrongful.

[57] Counsel for Mr. Cook emphasized the direction from the Ontario Court of Appeal in *Balev v. Baggott*, *supra* that the habitual residence of a child is in the State where both parties lived together with the child and a parent cannot unilaterally change the habitual residence without the express or implied consent of the other parent.

[58] Ms. Beairsto took the position that Mr. Cook had expressly or impliedly consented to the child moving to Canada.

[59] The application judge had no difficulty in agreeing that this was not a case of wrongful taking in light of the specific agreement by Mr. Cook for Ms. Beairsto to leave Washington:

> [33] There was consent to her going with the child. This is not a case of wrongful taking. The question is what does the law say with respect to wrongful retention?

[60] The application judge did not fix a date or time frame for when he should consider if the retention of the child in Canada was wrongful. The judge focussed on the subjective intention of the parties about their future in Washington prior to Ms. Beairsto's departure with Sahara on January 27, 2017. Specifically, he looked at the parents' settled intention as of that time period:

> [41] This was a child who had been born in Washington and the parties intention, I find, would have been that they would have continued to live and raise the child in Washington State. That is where his work was. It is relatively well paid work. But for this blow-up, I think a visit back to Nova Scotia would have happened in the normal course to see the other side of the family. She would have returned with the child to Washington State. That is a relevant factor because it appears in some of the case law that touches on these issues.
>
> [42] What was the settled intention? I conclude that the settled intention would have been that they continued to reside and raise the child in Washington State. I fully accept that the upsetting events of January 21st and the behaviour and the concerns that arose brought home to Ms. Beairsto a concern that maybe this isn't going to work. If you look at all the evidence that is in, there seemed to be a willingness on her part to work on the issues. She wanted to see if they could be resolved but she wanted to do that from a place of being with her family, a place of comfort, a place of safety as it were.
>
> [43] I conclude when she left Washington State she wasn't sure in her own mind whether she would be back or not. The possibility was that they could bring things back together and go forward. She would obviously want the issues to have been worked on and resolved but couples do that all the time. It is real life.

[61] Rather than consider the relevant circumstances at a putative date of wrongful retention, the application judge went no further than to examine the last shared parental intention as of January 2017 to conclude Washington State was Sahara's habitual residence. He reasoned:

> [65] The Ontario Court of Appeal in a case called *Wedig v. Gaukel*, 2007 ONCA 521, found that one parent's unilateral intention to leave a jurisdiction with the child does not defeat a finding that the jurisdiction is the child's habitual residence.
>
> [66] I will add one further comment. A finding of habitual residence in this case is not based on the Orders that were obtained in the Washington Courts. This is not what this decision turns on. That was a really unhelpful step for the

> reasons talked about by the Supreme Court of Canada in *Thomson v. Thomson*, [1994] 3 S.C.R. 551. These parents both had custody rights, both had rights with respect to the child. There was consent for the child to be brought to Nova Scotia. This was not a case of wrongful taking.
>
> [67] **I can only conclude, based on everything that I have found, that the habitual residence of this child for the purpose of the Hague Convention was the State of Washington. I think that is what the law demands**.
>
> [68] I could list dozens of cases in these materials that I have here where Courts have said, and one Court said it really well, and I went to look for the quote and I cannot find it but the upshot of the quote was, Courts must guard against the desire to defeat the purposes of the Convention by taking the attitude "We have the child in front of us, and we want to act. We know what a child's best interest means, so let's apply it." Trial courts, like this one, have been repeatedly cautioned not to fall into that trap. **It would be a mistake in law, I conclude, to find that the habitual residence is not in the State of Washington**.
>
> [Emphasis added]

[62] Given the decision by the Supreme Court of Canada in *Balev*, the inescapable conclusion is that the application judge did not apply the correct test.

[63] The respondent has, from time to time, insisted that the application judge made no error because he applied the law as it existed on February 1, 2018.

[64] Where legislation changes the law and is silent about its temporal application, Courts must discern legislative intent on when and how it applies to previous transactions (see for example, *Hayward v. Hayward*, 2011 NSCA 118). However, where Courts deliver decisions that alter previously held views about the common law or statutory interpretation, those decisions operate retrospectively.

[65] That means any alterations to the law apply to past transactions as well as to present and future ones. As observed by Bayda C.J. S. in *Edward v. Edward Estate* (1987), 39 D.L.R. (4th) 654 at 661-662:

> In all of the cases cited above, there is no mention by the courts that they are giving retrospective application to the common law. It may be taken that in keeping with the attitude of the English and Canadian courts generally, the courts in these cases assumed that the retrospective principle is so basic and inherent in the law, that it may be applied without mention or acknowledgment.

[66] With respect to changes to a Court's interpretation of legislative provisions, Lord Nicholls in *In re Spectrum Plus Ltd*., [2005] UKHL 41, explained:

> [38] ...the interpretation the court gives an Act of Parliament is the meaning which, in legal concept, the statute has borne from the very day it went onto the statute book. So, it is said, when your Lordships' House rules that a previous decision on the interpretation of a statutory provision was wrong, there is no question of the House changing the law. The House is doing no more than correct an error of interpretation. Thus, there should be no question of the House overruling the previous decision with prospective effect only. If the House were to take that course it would be sanctioning the continuing misapplication of the statute so far as existing transactions or past events are concerned. The House, it is said, has no power to do this.

[67] One may easily sympathize with the application judge. He erred in law despite his application of the widely held view of the law prior to the Supreme Court of Canada's decision in *Balev*. Nonetheless, incorrect principles guided his determination of habitual residence.

[68] What then is the appropriate remedy on appeal where the application judge committed legal error? Before that issue is examined, I will first address Mr. Cook's Notice of Contention.

NOTICE OF CONTENTION

[69] The respondent filed a Notice of Contention on June 20, 2018. It contains thirty paragraphs. Most allege that the application judge erred in fact. Two allege an error in 'fact and law'. I need not set them out.

[70] The respondent's August 9, 2018 factum is more focussed. Apart from arguments presented directly in response to the appeal issues, he targets three matters: so-called "false representations" to the respondent and the application judge on April 26, 2018; the Notice of Appeal was not served in accordance with the *Hague Service Convention*; and, the consent he gave to Ms. Beairsto to take Sahara to Nova Scotia was obtained by fraud, and hence Sahara's removal was wrongful.

[71] A Notice of Contention can be filed by a respondent pursuant to *CPR* 90.22 to ask that the decision under appeal be upheld for different reasons than those of the judge. The relevant portions of this rule are:

> 90.22 (1) A respondent who does not cross-appeal and wishes to contend that the judgment under appeal should be affirmed for reasons different than those expressed in the decision or the judgment under appeal must file a notice of contention.

…

(3)A notice of contention must be entitled "Notice of Contention", have the standard heading, be dated and signed by each respondent who wishes to contend on the appeal, and include a concise and complete summary of the alternative grounds put forward by the respondent for upholding the decision under appeal.

[72] The respondent's complaints about service and Ms. Beairsto's "fraudulent misrepresentations" on April 26, 2018 are factually and legally without merit.

[73] Ms. Beairsto was represented by counsel on that date. The appearance was to finalize the terms of the order. I have carefully reviewed the transcript of the appearance before the application judge on that date. I can find nothing that would constitute a misleading, let alone fraudulent, misrepresentation.

[74] Even if one were made, it would be irrelevant to any argument that the application judge's decision should be upheld on alternative grounds other than what is expressed in his reasons. Nor would it somehow invalidate the appeal proceedings.

[75] Mr. Cook's reference to inadequate service is puzzling. Mr. Cook acknowledged receipt in person of the Notice of Appeal on June 7, 2018 in Nova Scotia. That date was well within the 25 clear day window for filing and service of the Notice of Appeal.

[76] Thereafter, he participated fully in the appeal process. He filed a Notice of Contention; appeared at various chambers conferences (electronically); filed written argument; cross-examined the appellant on her affidavit, and made oral submissions.

[77] The whole point of proper service is to ensure that a party is aware of the proceedings, to know the case they must meet and have the opportunity to be heard, if they choose to participate. For Mr. Cook, those things obviously happened.

[78] The only point raised by Mr. Cook which has the facial appearance of a legitimate alternative ground is his contention it was Sahara's removal from the State of Washington that was wrongful—not her retention in Nova Scotia—and therefore the order for return should be upheld.

[79] With respect, I am unable to see any merit in this contention. First, as I detailed earlier, Mr. Cook never advanced a claim in his application that Sahara's

removal was wrongful. He never testified before the application judge to that effect. Mr. Cook's counsel, after cross-examination and completion of the evidence before the application judge, confirmed that the case for the applicant was solely that of wrongful retention, not wrongful removal. This, of course, led the application judge to confirm that it was not a case of wrongful removal.

[80] Appellate courts are loathe to permit a party to advance a new argument on appeal. An argument of wrongful removal, if Mr. Cook wanted to make it, would have required an amendment to his pleadings, thereby giving notice to Ms. Beairsto of the case she had to meet in the first instance. Mr. Cook filed no motion to adduce fresh evidence to support a claim of wrongful removal. Instead, he simply re-argues the inferences that an application judge might have drawn about Ms. Beairsto's true state of mind as of January 2017 when she left for Nova Scotia.

[81] I would therefore dismiss his Notice of Contention and turn to consider what remedy I would grant.

THE REMEDY

[82] The choices are to quash the order made by the application judge and order a new hearing, or make our own determination as to habitual residence. The appellant asks us to adopt the latter. The respondent agrees that if the decision of the application judge cannot be allowed to stand, we should make the determination and not send the matter back.

[83] Generally, where an application or trial judge has erred in law, a new hearing is ordered. That is not to suggest this Court cannot provide a broad range of relief on appeal. The current *Civil Procedure Rules* provide:

> Powers of the Court of Appeal
>
> 90.48 (1) Without restricting the generality of the jurisdiction, powers and authority conferred on the Court of Appeal by the Judicature Act or any other legislation the Court of Appeal may do all of the following:
>
> (a) amend, set aside, or discharge a judgment appealed from;
>
> (b) draw inferences of fact and give any judgment, allow any amendment, or make any order that might have been made by the court appealed from or that the appeal may require;
>
> (c) make such order as to costs of the trial, hearing, or appeal as the Court of Appeal considers is in the interest of justice;

> (d) direct a new trial by jury or otherwise, on terms the Court of Appeal considers is in the interest of justice, and for that purpose order that the judgment appealed from beset aside;
>
> (e) make any order or give any judgment that the Court of Appeal considers necessary.

[84] In this case, I am satisfied that we should make the necessary determination rather than order a new hearing.

[85] I say this for two reasons. First, this appeal is heard as part of proceedings under the *Hague Convention*. The *Convention* directs that Contracting States use the most expeditious procedures available to implement the objects of the *Convention*. Speed is the goal, not protracted proceedings.

[86] If a child has been wrongfully removed or retained, prompt return is mandated. Moreover, if return is not warranted, the parties can proceed to make appropriate arrangements for custody and access or have them resolved by court process. Either way, uncertainty for the parties and the child is minimized.

[87] Provided the record is sufficient, and the proposed appellate determination causes no prejudice to a party's ability to prosecute or defend the *Hague* application, the appropriate course is to decide the case. I will comment later on the interplay between the standard of review and appellate determination.

[88] The second reason is that appellate courts in Contracting States have demonstrated little hesitation to resolve questions surrounding habitual residence or other questions of fact or of mixed law and fact.

[89] One of the few exceptions is *Mozes v. Mozes*, 239 F.3d 1067 (9th Cir. 2001) where the United States District Court of Appeals remanded the application back to the District Court to make the necessary factual findings about the locus of the children's family and social development in order to determine habitual residence. But the more usual course is for the United States District Courts of Appeal to simply make the determination that should have been made by the application court while respecting all discrete factual findings (see: *Silverman v. Silverman*, 338 F.3d 886 (8th Cir. 2003); *Redmond v. Redmond*, 724 F.3d 729 (7th Cir. 2013); *Martinez v. Cahue*, 826 F.3d 983 (7th Cir. 2016); *Yang v. Tsui*, 499 F.3d 259 (2007)).

[90] This tendency may be due to the less restrained standard of review in those courts that permit them to review questions of mixed fact and law *de novo:*

> The standard of review is an issue of first impression in this circuit. Most of the circuits that have reached this issue have decided on a mixed standard, reviewing the district court's findings of fact for clear error and its legal determinations and application of the law to the facts de novo. *Silverman v. Silverman*, 338 F.3d 886, 896-97 (8th Cir. 2003)(en banc); *Miller v. Miller*, 240 F.3d 392, 399 (4th Cir. 2001); *Mozes v. Mozes*, 239 F.3d 1067, 1073 (9th Cir. 2001); *Blondin v. Dubois*, 238 F.3d 153, 158 (2d Cir. 2001); *England v. England*, 234 F.3d 268, 270 (5th Cir. 2000); *Friedrich v. Friedrich*, 78 F.3d 1060, 1064 (6th Cir. 1996); *Feder v. Evans-Feder*, 63 F.3d 217, 222 n.9 (3d Cir. 1995). As explained by the court in *Feder*, this means that the court "accepts the district court's historical or narrative facts unless they are clearly erroneous, but exercises plenary review of the court's choice of and interpretation of legal precepts and its application of those precepts to the facts." 63 F.3d at 222 n.9.
>
> *Ruiz v. Tenorio*, 392 F.3d 1247 (11th Cir. 2004), at p. 1251

(See also *Martinez v. Cahue*, *supra* at p.989)

[91] Other courts in Contracting States have simply made the determination without reference to the issue (see: *Punter v. Secretary for Justice*, [2007] 1 N.Z.L.R. 40; *L.K. v. Director-General, Department of Community Services*, *supra*; *In re R. Children*, *supra*, at para. 9).

[92] The prevalent approach in Canada also appears to favour the appeal court to make the determination that was marred by legal error—whether it is about habitual residence or other issues of mixed fact and law—and decide the *Hague* application rather than order a new hearing (see *Ellis v. Wentzell-Ellis*, *supra* at paras. 16, 27; *Balev v. Baggott*, 2016 ONSC 55 at para. 38, overturned on different grounds by *Balev v. Baggott*, 2016 ONCA 680; *Pollastro v. Pollastro*, 118 O.A.C. 169 at para. 29; *Bačic v. Ivakić*, 2017 SKCA 23).

[93] However, appeal courts must still respect the applicable standard of review. This means that despite the application judge's legal error, the appeal does not morph into a hearing *de novo* or a re-hearing of the *Hague* application. An appeal court must defer to the factual findings and determinations of mixed fact and law that are untainted by error in law or principle (see *Office of the Children's Lawyer v. Balev*, *supra* at para. 38; *Hammerschmidt v. Hammerschmidt*, 2013 ONCA 227 at para. 5).

[94] With these principles in mind, I will apply the hybrid approach to determine the child's habitual residence immediately prior to her retention.

APPLICATION OF THE HYBRID APPROACH

[95] To succeed, the *Hague* applicant must demonstrate on a balance of probabilities the Article 3 requirements. The key concept is a removal or retention that is wrongful. To be wrongful, the other requirements found in Article 3 must be established. A court must therefore answer these questions:

(1) When did the removal or retention at issue take place?

(2) Immediately prior to the removal or retention, in which state was the child habitually resident?

(3) Did the removal or retention breach the applicant's rights of custody under the law of the habitual residence?

(4) Was the petitioner exercising those rights at the time of the removal or retention?

[96] In cases of alleged wrongful removal, the first question will not usually be hard to answer. In cases that allege wrongful retention, it can be more difficult.

[97] Guidance can be found in *Thomson*, where La Forest J. relied on *Hague Convention* commentary to explain that the date of wrongful retention is not linked to the issuance of a "chasing order", but simply to the date the child should have returned to the country of the left behind parent. He explained at pp. 592-3:

> There is nothing in the Convention requiring the recognition of an *ex post facto* custody order of foreign jurisdictions. And there are several statements in the supplementary material to support the view that "wrongful retention" under the Hague Convention does not contemplate a retention becoming wrongful only after the issuance of a "chasing order". According to the report of Professor Pérez-Vera on the Preliminary draft Convention (Preliminary Document No. 6 "Report of the Special Commission") the situations to which "wrongful retention" under the Hague Convention was intended to refer are quite straightforward and conform to common sense. She states:
>
> > As a result, an analytical approach seems to be the most appropriate for getting into the gist of the matter in an area where legal terminology could become either too complex or too simple. As a basis for this approach, we shall consider just two elements which coexist in all the situations we have to face and which, in such a way, may be deemed to constitute the unalterable nucleus of the problem.
> >
> > [Describing "removal"] In the first place, and in all cases, we have the removal of a child away from the normal social environment in which he lived in the care of a custodian (or institution) who exercised over him a

> legal right of custody. [Describing "retention"] **Naturally, we must assimilate to this situation the case of a refusal to return the child after a sojourn abroad, where the sojourn has been made with the consent of the rightful custodian of the child's person.** In both cases, the outcome is the same: the child has been removed from the social and family background which shaped his life.
>
> Secondly, the person who removed the child . . . hopes to obtain the right of custody from the authorities of the country where the child has been taken . . . [in order to] legalize the factual situation he has created . . . [Emphasis added.]
>
> (*Actes et documents, supra*, at p. 172.)

To paraphrase, a wrongful retention begins from the moment of the expiration of the period of access, where the original removal was with the consent of the rightful custodian of the child. This interpretation is repeated in the "Commentary on the Draft" in the Report of the Special Commission, which states:

> In the first place, the reference to wrongfully 'retained' children tends to cover the case of a child who is in a different place from that of his habitual residence, with the consent of the rightful custodian, and who has not been returned by the non-custodial parent.
>
> (*Actes et documents, supra*, at p. 187.)

Similarly, the Explanatory Report on the Convention states:

> The fixing of the decisive date in cases of wrongful retention should be understood as that on which the child ought to have been returned to its custodians or on which the holder of the right of custody refused to agree to an extension of the child's stay in a place other than that of its habitual residence.
>
> (*Actes et documents, supra*, at pp. 458-59.)
>
> [Emphasis added]

[98] Where the consent is for a determinate time period, the point of wrongful retention would ordinarily begin only at the expiration of that period despite the left behind parent's attempt to earlier terminate his consent (*Balev v. Baggott*, 2015 ONSC 5383 at para. 72; aff'd on this point 2016 ONCA 680 at para. 38). But there is support for the concept that where a parent announces his or her intent not to return the children to the former state before the completion of the agreed upon sojourn, this is the date to assess the allegation of wrongful retention (*Mozes v. Mozes*, *supra*; *Re S.*, [1994] 1 All E.R. 237). I need not dwell on this issue because Mr. Cook's consent was open-ended or indeterminate.

[99] In cases of open-ended or indeterminate consent, the date is usually fixed as when the left behind parent first formally asserted his right (*Barzilay v. Barzilay*, 600 F.3d 912 (2010) or demanded the child's return (*Yang v. Tsui*, *supra*).

[100] *Bazargani v. Mizael*, 2015 ONCA 517, like the case presently before this court, involved an open-ended consent agreement. One parent was permitted to leave Australia with their child for an indeterminate period. In the absence of a pre-determined return date, the court relied on the explicit revocation of consent by the wronged parent (paras. 9, 22).

[101] In this case, Mr. Cook's consent was open-ended. He discussed with Ms. Beairsto her ability to seek government child support in Canada, and apparently had concerns about what might happen once Sahara was in Canada since he tried to insert into the agreement a clause that the presence of both parents would be required should there be an application for Sahara's Canadian citizenship.

[102] Mr. Cook's affidavit acknowledged the indeterminate nature of the visit to Canada. He spoke of his uncertainty about when Ms. Beairsto would be able to return to the United States, but also suggested that he anticipated that Sahara would be on a six-month visitor's visa, which he thought would expire no later than July 28, 2017.

[103] However, prior to that date, Mr. Cook commenced divorce proceedings in Washington State. The Petition and related documents do not specifically assert a custody claim, but shortly thereafter Mr. Cook applied on June 16, 2017 (*ex parte*) for a Writ of Habeas Corpus for Children's Protective Services to take custody of Sahara pending a Superior Court hearing.

[104] The record is not clear whether these latter documents were served on Ms. Beairsto. What is not contested is that she did receive Mr. Cook's originating Petition and related documents on or about May 30, 2017. Ms. Beairsto in turn Petitioned the Nova Scotia Supreme Court for divorce on June 13, 2017, seeking custody and support. An interim order (*ex parte*) of June 21, 2017 granted her sole custody with supervised access for the respondent.

[105] It is irrelevant to the analysis that on August 29, 2017 the Washington Superior Court issued a final divorce order with a parenting plan that granted custody to Mr. Cook. As made clear in *Thomson*, the existence of a "chasing order" from one State does not make the removal or retention of a child in another

State wrongful. Nor is such an order a prerequisite to fix a date of putative wrongful retention.

[106] I would fix the time to be June 2017. That is when Ms. Beairsto clearly communicated her intention to stay in Nova Scotia with Sahara. It is also the time frame that Mr. Cook communicated he no longer consented to Sahara remaining in Canada. No more precise date is necessary because the evidence discloses no significant change in Sahara's circumstances in Nova Scotia from the end of May to the commencement of the respondent's *Hague* application and beyond.

[107] What then was Sahara's habitual residence immediately prior to June 2017? At that point, Sahara was not yet six months old. She had been and continued to be entirely dependent on her mother and her family in Nova Scotia.

[108] The Supreme Court of Canada in *Balev* directs that the court or judge hearing the application is best placed to weigh the factors that will achieve the objects of the *Hague* Convention in the particular case. This is to be achieved by following the international jurisprudence that supports a multi-factored hybrid approach (para. 70). McLachlin C.J. references many of the international authorities at paras. 43-47.

[109] One of these is *Mercredi v. Chaffe*, C-497/10, [2010] E.C.R. I-14358. Ms. Mercredi left England with her two-month-old daughter for French territory. Competing litigation followed in France and the United Kingdom over custody and access. The English Court of Appeal sought clarification from the European Court of Justice on determination of habitual residence. That Court made a number of observations, particularly on the importance of the age of the child and the degree of integration by the child in a social and family environment:

> 52 **In the main proceedings, the child's age, it may be added, is liable to be of particular importance**.
>
> 53 **The social and family environment of the child, which is fundamental in determining the place where the child is habitually resident, comprises various factors which vary according to the age of the child**. The factors to be taken into account in the case of a child of school age are thus not the same as those to be considered in the case of a child who has left school and are again not the same as those relevant to an infant.
>
> 54 As a general rule, 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.

> 55 **That is even more true where the child concerned is an infant. An infant necessarily shares the social and family environment of the circle of people on whom he or she is dependent. Consequently, where, as in the main proceedings, the infant is in fact looked after by her mother, it is necessary to assess the mother's integration in her social and family environment.** In that regard, the tests stated in the Court's case-law, such as the reasons for the move by the child's mother to another Member State, the languages known to the mother or again her geographic and family origins may become relevant.
>
> 56 It follows from all of the foregoing that the answer to the first question is that **the concept of 'habitual residence', for the purposes of Articles 8 and 10 of the Regulation, must be interpreted as meaning that such residence corresponds to the place which reflects some degree of integration by the child in a social and family environment. To that end, where the situation concerned is that of an infant who has been staying with her mother only a few days in a Member State – other than that of her habitual residence – to which she has been removed, the factors which must be taken into consideration include, first, the duration, regularity, conditions and reasons for the stay in the territory of that Member State and for the mother's move to that State and, second, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State**. It is for the national court to establish the habitual residence of the child, taking account of all the circumstances of fact specific to each individual case.
>
> [Emphasis added]

[110] This approach was approved by the UKSC in *In re R. Children*, *supra* with the caveat that it is the stability of the residence that is important, not its length or permanency:

> 16. …It is therefore the stability of the residence that is important, not whether it is of a permanent character. **There is no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely.**
>
> 17. As Lady Hale observed at para 54 of *A v A*, **habitual residence is therefore a question of fact. It requires an evaluation of all relevant circumstances. It focuses upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. It is necessary to assess the degree of integration of the child into a social and family environment in the country in question. The social and family environment of an infant or**

> **young child is shared with those (whether parents or others) on whom she is dependent. Hence it is necessary, in such a case, to assess the integration of that person or persons in the social and family environment of the country concerned**. The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce. In particular, it follows from the principles adopted in *A v A* and the other cases that the Court of Appeal of England and Wales was right to conclude in *In re H (Children) (Reunite International Child Abduction Centre intervening)* [2014] EWCA Civ 1101; [2015] 1 WLR 863 that there is no "rule" that one parent cannot unilaterally change the habitual residence of a child.
>
> [Emphasis added]

[111] The essence of the nature and scope of relevant factors to determine habitual residence was more recently reiterated in *O.L. v. P.Q.* (2017) C-111/17, (C.J.E.U.):

> 42 According to that case-law, the 'habitual residence' of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment. That place must be established by the national courts, taking account of all the circumstances of fact specific to each individual case (judgments of 2 April 2009, A, C-523/07, EU:C:2009:225, paragraphs 42 and 44, and of 22 December 2010, *Mercredi*, C-497/10 PPU, EU:C:2010:829, paragraph 47).
>
> …
>
> 45 **Where the child in question is an infant, the Court has stated that 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, and that an infant necessarily shares the social and family environment of that person or those persons. Consequently, where, as in the main proceedings, an infant is in fact taken care of by her mother, in a Member State other than that where the father habitually resides, the factors to be taken into consideration include, first, the duration, regularity, conditions and reasons for the mother's stay in the territory of the former Member State and, second, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State** (see judgment of 22 December 2010, *Mercredi*, C-497/10 PPU, EU:C:2010:829, paragraphs 54 to 56).
>
> [Emphasis added]

[112] McLachlin C.J. cautioned that there is no legal test for habitual residence. Hence, the list of potentially relevant factors is not closed (para. 47). It requires this Court to look to the entirety of the child's situation. Furthermore, a child's habitual residence can change while she lives with one parent pursuant to a time-limited consent of the other (paras. 71-73). Here, Mr. Cook's consent did not contain a determinate time, but the application judge found it was not forever.

[113] Mr. Cook's burden was to establish that it is more likely than not (a balance of probabilities) that immediately prior to the date of alleged wrongful retention, Washington State was Sahara's place of habitual residence. He has not done so. It is my view that, immediately prior to June 2017, it is more likely than not, Nova Scotia was Sahara's place of habitual residence. I say this for the following reasons.

[114] Ms. Beairsto, despite filing joint tax returns with Mr. Cook and acquiring pets, had little real connection to Washington State. She had no family there, no support network, and was only there on a visitor's visa. Mr. Cook acknowledged the lack of support network in Washington, saying that it was up to Ms. Beairsto to create one.

[115] On the other hand, she had always maintained a close connection with her family in Nova Scotia. Although she moved to British Columbia to be closer to Mr. Cook, she often returned to Nova Scotia for months at a time. This pattern continued even after her move to Washington in October of 2015. In April 2016 she was in Nova Scotia, staying until August 2016.

[116] Sahara was born on December 16, 2016. The evidence is that she was cared for by Ms. Beairsto with little help or support. Ms. Beairsto and Mr. Cook separated after the incident of domestic violence on January 21, 2017. As a result of that incident, Ms. Beairsto left Washington to return home with Sahara on January 27, 2017.

[117] Parental intentions are not determinative of habitual residence, but can be a relevant factor. Here, the application judge found that, but for the incident of January 21, 2017, the parents had a shared intention to live and raise Sahara in Washington State. With respect to intent after January 21, the judge found that Ms. Beairsto was uncertain whether she would return to Washington or not:

> [43] I conclude when she left Washington State she wasn't sure in her own mind whether she would be back or not. The possibility was that they could bring things back together and go forward. She would obviously want the issues to have been worked on and resolved but couples do that all the time. It is real life.

[118] Given the electronic messages exchanged and subsequent events, it is obvious that issues between the parents did not resolve. Ms. Beairsto's affidavit evidence establishes that she secured employment in Nova Scotia. She continued to be completely responsible for all of Sahara's needs, with Ms. Beairsto's mother and other members of her family assisting in Sahara's care.

[119] Sahara is, by reason of her birth in Washington, a citizen of the United States, but she has only spent the first 42 days of her life there.

[120] While it would have been beneficial to have additional direct evidence, what evidence there is demonstrates that immediately prior to June 2017, Sahara had become integrated into the family and social environment in Nova Scotia. It was where Ms. Beairsto's family is from, where she grew up, and continually returned. It was where Ms. Beairsto secured employment and where Sahara became integrated with Ms. Beairsto's extended family.

[121] Balancing all relevant factors, I am satisfied that Nova Scotia was her place of habitual residence immediately prior to June 2017.

[122] Therefore, Sahara's retention in Nova Scotia was not wrongful within the meaning of Article 3 of the *Hague Convention*. In light of this conclusion, there is no need to comment on the grounds of appeal that focussed on the possible exceptions to return found in Article 13.

[123] I add one final comment. The appellant's motion to adduce fresh evidence was, with respect, misguided. The proposed fresh evidence focussed on events in the summer of 2018. Mr. Eagan argued that Mr. Cook's conduct was a "relevant circumstance and consideration to the determination of habitual residence" under the hybrid approach.

[124] While the list of relevant factors is not a closed one, they must relate to the situation immediately prior to the alleged date of wrongful removal or retention. That is what the *Hague Convention* directs. To do otherwise would be an error in principle (see: *Ellis v. Wentzell-Ellis, supra* at paras. 31-33).

[125] I would therefore dismiss the motion to adduce fresh evidence, allow the appeal and order the *Hague* application dismissed. No costs were requested. I would order none on the appeal.

Beveridge, J.A.

Concurred in:

Bourgeois, J.A.

Van den Eynden, J.A.