

Office of the Children’s Lawyer v Balev, 2018 SCC 16:
Determining a child’s “habitual residence” in Hague Convention cases

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The *Convention on the Civil Aspects of International Child Abduction* (“*Hague Convention*”) was developed in response to the problem of international parental child abduction. It provides a process for the enforcement of custody rights by allowing a court in one country to order the return of a child to another country where the court finds that the child was wrongfully removed or retained from his or her country of habitual residence.

In *OCL v Balev*, the Supreme Court of Canada has directed that judges should adopt a “hybrid” approach to determining a child’s “habitual residence” with greater consideration for the best interests of the child. The court must factor in both the circumstances of the children (“child-centred” approach) as well as the intention of the parents (“parental intention” approach) in order to achieve a fair outcome.

Prior to this decision, Canadian courts focussed on parental intent in determining a child’s habitual residence. The “hybrid” approach holds that instead of focusing primarily on either parental intention or the child’s acclimatization in a particular country, the judge determining habitual residence should assess all relevant considerations arising from the facts of the case. Under this approach, a child’s habitual residence can change while he or she is staying with one parent under the time-limited consent of the other parent. The SCC instructed that the application judge should consider “the intention that the move would be temporary, the reasons for that agreement, as well as all other evidence relevant to the child’s habitual residence”.

According to the majority of the SCC, the “hybrid” approach best fulfills the goals of the *Hague Convention* as: (1) it protects the child from the harmful effects of wrongful removal or

retention; (2) it deters parents from abducting the child in an attempt to establish links with a country that may award them custody; and (3) it encourages the speedy adjudication of custody or access disputes in the forum of the child's habitual residence.

The "hybrid" approach deters parents from attempting to manipulate the *Hague Convention* by discouraging parents from attempting to alter a child's habitual residence by strengthening connections with a particular state. It also discourages parents from exercising intention in ways that artificially maintain the child's habitual residence in the initial state. By focusing on the circumstances of the child, the "hybrid" approach protects children from both the harmful effects of the wrongful removal or retention as well as the harmful effects of their return to the initial state. This decision recognizes that the child is the focus of the analysis, but acknowledges that it may be necessary to consider parental intention in order to properly assess the child's connections to a country.

While this decision is heralded as a step forward in advancing children's rights, it may also create more difficulties for a parent living abroad seeking the return of their child(ren) from Canada, if the "abducting" parent has established ties the children have with this country. As the dissenting judges have noted, adopting the "hybrid" approach offers parents an invitation to litigate, as even in cases involving unambiguous and binding agreements, evidence of other factors might outweigh the intention of the parents stated in the agreement. Hence, the "hybrid" approach may lead to increased and prolonged litigation, as the outcome of a case will be more unpredictable given the broad scope of the court's inquiry under the "hybrid" test.

Initiating or defending a *Hague* application can be a complicated matter. If you need help or have questions about this process, or if you wish to set aside or vary a foreign court order regarding custody, access or child support, please contact Julia Tremain at julia@waddellphillips.ca or (416) 745-4974.