IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *K.F. v. J.F.*, 2022 NLCA 33
Date: May 26, 2022
Docket Number: 202101H0071
and 202101H0072

BETWEEN:

K.F. — APPELLANT/RESPONDENT BY CROSS-APPEAL

AND:

J.F. — RESPONDENT/APPELLANT BY CROSS-APPEAL

Coram: Hoegg, Goodridge and Knickle JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Family Division 202102F0464
(2021 NLSC 148)

Appeal Heard: February 10, 11 and 17, 2022
Judgment Filed: May 26, 2022

Reasons for Judgment by: Hoegg J.A.
Concurred in by: Knickle J.A.
Dissenting reasons by: Goodridge J.A.

Counsel for the Appellant/Respondent by Cross-Appeal: Jean V. Dawe Q.C.

Counsel for the Respondent/Appellant by Cross-Appeal: Andrew A. Fitzgerald Q.C. and Sarah M. Learmonth

Authorities Cited:

CASES CITED:

Hoegg J.A. (Knickle J.A. concurring):
Thomson v. Thomson, [1994] 3 S.C.R. 551; *J.M. v. I.L.*, 2020 NBCA 14; *Singh v. Kaur*, 2022 MBQB 46; *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398; *A. v. A. (Children: Habitual Residence)*, [2013] UKSC 60; *O.L. v. P.Q.* (2017), C-111/17 (C.J.E.U.); *Monasky v. Taglieri*, 589 U.S. ___ (2020) (USSC); *Beairsto v. Cook*, 2018 NSCA 90; *The Petition of F against M*, [2021] CSOH 90 (Scot. Ct. Sess.); *Ludwig v. Ludwig*, 2019 ONCA 680; *A.M. v. A.K.*, 2020 ONSC 3422; *Allibhoy v. Tabalujan*, 2015 BCSC 37; *Whitting v. Krasser*, 391 F. (3d) 540 (3rd Cir. 2004); *Gadea v. Rath*, 2022 MBQB 5; *Batten v. Batten*, 2021 BCSC 2507; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention)*, [2020] EWCA Civ 1105; *In re B (A Child) (Reunite International Child Abduction Centre and Others Intervening)*, [2016] UKSC 4; *Ludwig v. Ludwig*, 2019 ONSC 50; *Gosse v. Sorensen-Gosse*, 2011 NLCA 58, 311 Nfld. & P.E.I.R. 76; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Knight v. Gottsman*, 2019 ONSC 4341; *Korutowska-Wooff v. Wooff*, 2004 ONCA 5548; *Chan v. Chow*, 2001 BCCA 276; *Bačić v. Ivakić*, 2017 SKCA 23; *Salvatore v. Medeiros*, 2021 ONSC 1488; *Gavriel v. Tal-Gavriel*, 2015 ONSC 4181; *D.R. v. A.A.K.*, 2006 ABQB 286; *C.B. v. B.M.*, 2021 ABCA 266; *Finizio v. Scoppio-Finizio*, [1999] O.J. No. 3579, 179 D.L.R. (4th) 15 (Ont. C.A.); *Ares v. Venner*, [1970] S.C.R. 608; *R. v. C.B.*, 2019 ONCA 380; *Zafar v Saiyid*, 2018 ONCA 352; *Graat v. The Queen*, [1982] 2 S.C.R. 819; *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250; *A.H. v. R.B.*, 2022 NLCA 9; *Madsen Estate v. Saylor*, 2007 SCC 18, [2007] 1 S.C.R. 838; *John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's*, 2020 NLCA 27; *Matchim v. BGI Atlantic Inc. et al.*, 2010 NLCA 9, 294 Nfld. & P.E.I.R. 46; *Medic v. Medic*, 2020 ONSC 6447.

Goodridge J.A. (dissenting):
Office of the Children's Lawyer v. Balev, 2018 SCC 16, [2018] 1 S.C.R. 398; *R. v. Gerrard*, 2022 SCC 13; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Courtney v. Cleary*, 2010 NLCA 46, 299 Nfld. & P.E.I.R. 85; *H.L. v.*

Canada (Attorney General), 2005 SCC 25, [2005] 1 S.C.R. 401; *Monasky v. Taglieri*, 589 U.S. ___ (2020) (USSC); *O.M. v. E.D.*, 2019 ABCA 509; *Nova Scotia (Community Services) v. N.N.M.*, 2008 NSCA 69; *Beson v. Director of Child Welfare (Nfld.)*, [1982] 2 S.C.R. 716; *R. v. Samaniego*, 2022 SCC 9; *Cooper v. Cooper*, 2001 NFCA 4, 198 Nfld. & P.E.I.R. 1; *R. v. Sullivan*, 2020 NLCA 5; *A.H. v. R.B.*, 2022 NLCA 9; *Thomson v. Thomson*, [1994] 3 S.C.R. 551; *Re A. (A Minor) (Abduction)*, [1988] 1 F.L.R. 365 (Eng. C.A.); *Batten v. Batten*, 2021 BCSC 2507; *Silva v. da Silva*, 2018 BCSC 788; *Ares v. Venner*, [1970] S.C.R. 608; *Wright v. Sun Life Assurance Company of Canada*, 2019 BCCA 18; *Graat v. The Queen*, [1982] 2 S.C.R. 819; *Compton v. Toyota Canada Inc.*, 2019 NLCA 79; *R. v. Krawchuk*, [1941] 2 D.L.R. 353, 75 C.C.C. 219, (S.C.C.); *Ambrose v. The Queen*, [1977] 2 S.C.R. 717; *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *F.F.R. v. K.F.*, 2013 NLCA 8, 332 Nfld. & P.E.I.R. 262; *Finizio v. Scoppio-Finizio*, [1999] O.J. No. 3579, 179 D.L.R. (4th) 15 (Ont. C.A.).

STATUTES CONSIDERED:

Hoegg J.A. (Knickle J.A. concurring):
Children's Law Act, RSNL 1990, c. C-13, section 54.

Goodridge J.A. (dissenting):
Children's Law Act, RSNL 1990, c. C-13, section 54(2).

RULES CONSIDERED:

Hoegg J.A. (Knickle J.A. concurring):
Supreme Court Family Rules, rules F38.03, F38.10, F37.01, F1.05, being Part IV of the *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D.

OTHER:

Hoegg J.A. (Knickle J.A. concurring):
Convention on the Civil Aspects of International Child Abduction, Can T.S. 1983 No. 35, articles 1, 3, 4, 25, 12, 13, 16, 9, 11.

Goodridge J.A. (dissenting):
Convention on the Civil Aspects of International Child Abduction, Can T.S. 1983 No. 35, articles 13, 3, 26, 12.

Hoegg J.A.:

INTRODUCTION

[1] This appeal concerns whether a seven-year-old girl is habitually resident in Boston, Massachusetts or St. John's, Newfoundland and Labrador.

[2] This question is governed by the *Convention on the Civil Aspects of International Child Abduction*, Can T.S. 1983 No. 35 ("*Convention*"), which is incorporated into Newfoundland and Labrador law by virtue of section 54 of the *Children's Law Act*, RSNL 1990, c. C-13. The *Convention*, often referred to as the *Hague Convention*, is an international multilateral treaty to which Canada and the United States are signatories and between whom the *Convention* is in effect. Article 1 of the *Convention* describes its objects as being: "(a) to secure the prompt return of children wrongfully removed to or retained in a 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".

[3] The term "habitually resident" is found in articles 3, 4, and 25 of the *Convention*. The term is not defined in the *Convention*, although its determination is critical to the resolution of a *Convention* application.

[4] When an application is filed under the *Convention* for the return of a child to a particular jurisdiction, the court must determine whether the child was wrongfully removed from the return jurisdiction or wrongfully retained in the present jurisdiction (*Convention*, at arts. 3, 12). If there is no wrongful removal or retention, there can be no return order. The determination is two-fold; it depends on (1) whether the applicant was exercising custodial rights at the time of the alleged wrongful retention or removal of the child, and (2) the location of the child's habitual residence *immediately before* the alleged wrongful removal or retention (*Convention*, at arts. 3, 4; Emphasis added.). If a court determines that the applicant was not exercising custodial rights or that the child's habitual residence is not the return jurisdiction, then no return order is granted (*Convention*, at arts. 3, 13(a)). However, if a court determines that an applicant was exercising custodial rights over the child and that the return jurisdiction is

the child's habitual residence, the removal from the return jurisdiction or retention in the present jurisdiction is wrongful, and an order that the child be returned to the jurisdiction of the child's habitual residence is granted. Even when it is determined that the applicant was exercising custodial rights and the return jurisdiction is the child's habitual residence, there are exceptions that could preclude the granting of a return order (*Convention*, at arts. 12-13). The *Convention* ceases to apply when a child reaches 16 years of age (art. 4).

[5] A defining feature of *Convention* proceedings is that they are not custody proceedings (*Convention*, at art. 16). A narrow and time-limited exception to this appears to exist in Canadian jurisprudence respecting temporary transitional measures that may involve parenting (custody and access). Such measures can be put in place by a court exercising its *parens patriae* jurisdiction while ordering a child to be returned to the jurisdiction of their habitual residence (*Thomson v. Thomson*, [1994] 3 S.C.R. 551; *J.M. v. I.L.*, 2020 NBCA 14, at para. 40; and *Singh v. Kaur*, 2022 MBQB 46).

BACKGROUND

[6] J.F. (the father) and K.F. (the mother) met in Boston a couple of years before marrying in St. John's in 2011. They returned to Boston, where they lived in a condominium owned by the mother and her sister. The father is a self-employed sales agent of supplies to professional sports teams and the mother is an occupational therapist. She was employed in the Boston public school system at the time of trial but was no longer so employed at the time of the appeal hearing.

[7] V was born in 2014 and is the only child of the marriage. When she was two years old, her mother was diagnosed with aggressive bladder cancer. She underwent surgeries and chemotherapy, and continues to manage her condition. The mother characterized her marriage as emotionally abusive, and the evidence establishes that she has availed of intimate partner abuse counselling from November 2017 until the time of trial in 2021 (Decision, at paras. 104-105).

[8] In the spring of 2020, both the mother and the father were working remotely from home due to the Covid-19 pandemic. As well, V was attending school remotely from home. Although the pandemic precluded V and her mother's usual summer trip to visit the mother's family in St. John's, the mother obtained special permission for V and her to come to St. John's due to her father's health crisis. They arrived on July 25, 2020. Later that summer, the Boston Public School System declared it would remain closed to in-person

learning. V's parents had concerns about V continuing to attend school remotely in Boston, so they decided that V and her mother would stay in St. John's until the Boston schools reopened to in-person learning. That way, V could attend school in-person and her mother could work remotely from St. John's.

[9] V's father joined his wife and daughter in St. John's in November 2020, driving from Boston so as to bring the mother her car. Because his work is more amenable to virtual contact in the winter than at other times of the year, he was also able to work remotely from St. John's. The family was together in St. John's until the end of March 2021, when the father returned to Boston. He drove back to St. John's for the month of June 2021 to be there for V's birthday.

[10] While V was in St. John's from July 25, 2020 until the time of trial, she lived together with her mother, her maternal grandparents, and her father when he was there. Although registered for school in Boston, V began grade one in person at an elementary school in St. John's in September 2020. In April 2021, when the Boston schools opened to in-person learning, V's parents decided it would be better for her to finish her school year in St. John's rather than return to Boston. When the school year finished, V and her mother stayed in St. John's for their usual summer visit. The father's understanding was that his wife and child would return to Boston in late August because the Boston schools were open to in-person learning, and that V would be able to visit her paternal grandparents in Florida before school started.

[11] V adapted well to life in St. John's. She integrated and performed very well at her school according to her report cards, and made friends. She also participated in several in-person extra-curricular and community activities including dance, music, swimming and tennis lessons, went to Sunday school, and enjoyed contact with her cousins and other extended family members. In short, she had a stable daily life with the benefit of much family and social contact.

[12] During V's time in St. John's, her social connections with Boston were minimal. According to the submissions, she had a single remote playdate in the fall of 2020 with her Boston school friend A. She took music lessons through the Brookline School of Music which operates out of Boston, although V's music teacher was teaching remotely from California.

[13] On July 30, 2021, V's mother told her husband in a telephone call that she would not be returning to Boston to live. She advised him that she had filed for

divorce in the Family Division of the Supreme Court of Newfoundland and Labrador, and that she was seeking joint parenting of V with her primary residence to be with her mother in St. John's, and significant parenting time for the father (previously known as liberal access).

[14] On August 24, 2021, the father filed a *Convention* application seeking V's return to Boston. He alleged that V was wrongfully retained in St. John's on the basis that he was exercising his custodial rights over her and that her habitual residence was Boston. V's mother opposed the application, arguing that V's habitual residence had changed from Boston to St. John's in the preceding year. The mother also argued that ordering V to return to Boston would subject her to a grave risk of harm or an otherwise intolerable situation, and claimed the exception set out in article 13(b) of the *Convention*.

[15] Upon receipt of the father's application, the Family Division of the Supreme Court set the matter for trial forthwith. The trial began on September 27, 2021, and was heard over 12 days between then and October 20, 2021. On November 8, 2021, the Judge rendered her decision. She ruled that V's habitual residence was Boston, and dismissed the mother's article 13(b) claim. The Judge ordered V's return to Boston on or before November 16, 2021.

[16] V's mother appealed the Judge's return order and applied for a stay, which I granted on December 14, 2021. The appeal was heard on February 10, 11, and 17, 2022.

The Judge's Decision

[17] The Judge concluded that Boston was V's habitual residence on the basis that V's parents had "maintained their connections and the child's to Boston and exhibited a settled intention to remain habitual residents of Boston", and ruled that V had been wrongfully retained in St. John's as of July 30, 2021 (Decision, at paras. 89-91).

[18] The Judge dismissed the mother's article 13(b) claim, ruling that V was not at grave risk of psychological harm nor would she be put into an intolerable situation by being ordered to return to Boston, and that the mother had not met the stringent threshold for an article 13(b) exception as described in *Thomson* (Decision, at para. 145).

The Appeal

[19] V's mother argues several grounds of appeal. Principal among them is that the Judge erred by failing to apply the correct law in deciding V's habitual residence. The mother argues that the Judge treated "parental intention" as the paramount and determining factor in her analysis respecting V's habitual residence and that in so doing she failed to consider all of the circumstances in play immediately before the date of V's alleged wrongful retention. The mother maintains that the Judge's failure to focus on V's family and social environment immediately prior to July 30, 2021 caused her to fail to recognize that V's habitual residence had changed. The mother also argues that the Judge erred in dismissing her article 13(b) claim that V would be subject to a "grave risk of harm" or an "intolerable situation" if she were ordered to return to Boston for a determination of custody.

[20] Further, the mother maintains that the Judge misapprehended, ignored, and/or rejected relevant evidence pertaining to the article 13(b) claim, and argues that the Judge erred by failing to admit into evidence the mother's records from the Massachusetts General Hospital and by unduly restricting Dr. David Philpott's evidence.

[21] V's mother also argues that the Judge's incorrect evidentiary rulings and unreasonable credibility findings, in addition to her conduct of the trial generally, were manifestly unfair to her. She submits that the Judge's conduct of the trial raises issues of trial fairness and pre-judgment leading to a reasonable apprehension of bias. She maintains that the Judge's errors should cause this Court to vacate the return order and dismiss the father's *Convention* application.

[22] For the reasons that follow, I agree that the Judge erred in law in determining that V's habitual residence was in Boston and thereby concluding that V was wrongfully retained in St. John's. Simply put, the Judge failed to focus on the focal point of V's life immediately before the date of her alleged wrongful retention, as directed by *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398. Instead the Judge focused on parental intention and the circumstances of V's parents in deciding that V's habitual residence was Boston. Accordingly, the Judge's order returning V to Boston must be vacated.

THE LAW

[23] The Supreme Court of Canada established the law governing the determination of a child's habitual residence in *Balev*. Prior to *Balev*, the determination of a child's habitual residence was made on the basis of parental intention (*Balev*, at para. 40). In *Balev*, the Supreme Court of Canada charted a new course. In *Balev*, McLachlin C.J.C. explained that the focus of Canadian courts on parental intention as the primary consideration in deciding a child's habitual residence was problematic and should be abandoned in favour of a hybrid approach (*Balev*, at paras. 45-48). She stated that other signatory countries with which Canada has close ties, such as the United Kingdom, Australia, and New Zealand, as well as the European Union, had abandoned or moved away from the parental intention approach in favour of the hybrid approach (*Balev*, at para. 50). Chief Justice McLachlin explained that the domestic law of signatory states should reflect agreed-upon rules, practices, and principles for interpretation and application of the provisions of the *Convention* that harmonize the signatories' domestic laws (*Balev*, at para. 33), and that the hybrid approach supports the principle of harmonization respecting international treaties (*Balev*, at para. 48). She went on to say that the hybrid approach "best conforms to the text, structure, and purpose of the *Hague Convention*" (*Balev*, at para. 71), and best fulfills the goals of prompt return to the appropriate jurisdiction to determine custody (*Balev*, at para. 59). She also noted that the hybrid approach often accords with the law respecting "*forum conveniens*" (*Balev*, at para. 64).

[24] The Chief Justice concluded that the hybrid approach represents a principled advance on the parental intention and child-centered approaches, in that it recognizes that the child is the focus of the analysis, while acknowledging that many factors, including but not limited to parental intention, inform the child's habitual residence (*Balev*, at para. 68).

The Hybrid Approach

[25] The Court in *Balev* stated that in deciding a child's habitual residence, the Judge must determine the focal point of the child's life immediately prior to the alleged removal or retention. This is done by focusing on the factual connections between the child and the jurisdictions in question, including how the child came to be in the present jurisdiction (*Balev*, at para. 43). The judge must consider all relevant links and circumstances (*Balev*, at para. 43), which include, but are not limited to, "the duration, regularity, conditions and reasons" for the child's stay in the present jurisdiction (*Balev*, at para. 44). The Court

stated that no single factor dominates the analysis (*Balev*, at para. 44), and that the focus is on the "entirety of the child's situation" (para. 47), and that "all relevant factors" (para. 65) are to be considered.

The Role of Parental Intention in the Balev Framework

[26] Under the hybrid approach, parental intention alone does not determine a child's habitual residence. Rather, it is one factor among the several to be considered. In *Balev*, Chief Justice McLachlin acknowledged that the circumstances of the parents and their intentions may be important, but at the same time cautioned against over-reliance on them in determining a child's habitual residence:

> [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.

[27] As noted in the above quote, Chief Justice McLachlin referenced *A. v. A. (Children: Habitual Residence)*, [2013] UKSC 60, at para. 54, and *O.L. v. P.Q.* (2017), C-111/17 (C.J.E.U.). It bears repeating that the United Kingdom Supreme Court and the Court of the European Union have both rejected parental intention as the controlling factor in the determination of a child's habitual residence. In *A. v. A.*, Lady Hale stated that determination of a child's habitual residence focuses on the situation of the child, with the purposes and intentions of the parents "being merely one of the relevant factors" (para. 54). Likewise in *O.L.*, the Court stated that "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" established by "taking account of all the circumstances of fact specific to each individual case" (para. 42). The Supreme Court of the United States is of similar mind, ruling in *Monasky v. Taglieri*, 589 U.S. ___ (2020)(USSC), that a child's habitual residence is where she is "at home" and "depends on the totality of the circumstances specific to the case" (Syllabus 1(a)).

[28] In *Beairsto v. Cook*, 2018 NSCA 90, the Nova Scotia Court of Appeal overturned a trial court decision to return a child to Washington State (from Nova Scotia). The trial court had determined the child's habitual residence on the basis of the parents' former intention to raise their child in Washington State. Although the case had been decided just before *Balev* was released, the appellate court overturned the trial decision, applied the law as set out in *Balev*, and ruled that the child's habitual residence was Nova Scotia on the basis that the child "had become integrated into the family and social environment in Nova Scotia" (para. 120).

[29] In *J.M.*, the New Brunswick Court of Appeal upheld a trial judge's decision that the child's habitual residence was New Brunswick, where she had been living with her mother for a year, despite the parents' previous intention to live together as a family and raise their child in Texas (*J.M.*, at para. 16). The appellate court ruled that the trial judge had correctly applied the law as stated in *Balev*, and dismissed the father's application to return the child to Texas.

[30] This was also the conclusion of Lady Wise in *The Petition of F against M*, [2021] CSOH 90 (Scot. Ct. Sess.), which involved two young children who had lived in Scotland with their parents for a year before the father decided that he wanted to move back to New Zealand as the parents had previously agreed to do. The Court concluded that the habitual residence of the children had changed to Scotland during the year they spent there.

[31] The above cases illustrate that, notwithstanding one or both parents' intentions that their child's habitual residence was the return jurisdiction, the overriding concern is the focal point of the child's life immediately before the alleged wrongful retention – not parental intention. In summary, it cannot be overstated that in adopting the hybrid approach, the Supreme Court of Canada directs that parental intention is no longer the lens through which the habitual residence of a child is determined. It is one among all of the factors to be considered, depending on the particular circumstances at issue.

Time-limited Consents

[32] *Balev* also addresses the thorny aspect of parental intention that arises when a child is in the present jurisdiction for a time-limited stay with the applicant's consent. *Balev* stipulates that while time-limited agreements setting out how long a child can stay in the present jurisdiction may be relevant, they do not usurp a court's duty to determine a child's habitual residence and whether the child's retention is wrongful (paras. 72-73). In other words, *Balev* explicitly

rejects the notion that parents can directly or by virtue of their previous intentions contract out of a court's duty to determine a *Convention* application; the child's habitual residence is for the court to decide. *Balev* also rejects the notion that one parent cannot unilaterally change a child's habitual residence (para. 46). The Chief Justice explained that legal constructs that strictly dictate the impact of time-limited consents and unilateral moves detract from the court's duty to consider where a child's habitual residence is immediately before the alleged wrongful retention on the basis of *all* of the relevant circumstances.

[33] The Supreme Court of the United States in *Monasky* also addressed agreements made by parents respecting where their children would be raised, holding that a "child's habitual residence depends on the totality of the circumstances specific to the case, not on categorical requirements such as an actual agreement between the parents. Pp. 7-14" (Syllabus, 1). See also *A. v. A.*, at para. 39; and *F against M*, at para. 23.

[34] Consents to time-limited stays were considered by the Ontario Court of Appeal in *Ludwig v. Ludwig*, 2019 ONCA 680. In *Ludwig*, the Court explicitly stated that *Balev* represents a rejection of legal constructs such as "one parent's unilateral actions are incapable of changing a child's habitual residence" and "a child's habitual residence could not change in the case of time-limited travel that both parents agreed to" (*Ludwig*, at para. 28). The appellate Court upheld the trial Court's decision that the habitual residence of the Ludwig children was Ontario, despite the parents' prior agreement that they would return to Germany after a specific time.

[35] In following the law respecting parental agreements established in *Balev* and *Ludwig*, the Ontario Superior Court in *A.M. v. A.K.*, 2020 ONSC 3422, put it this way:

> [40] The Father's position is that a significant weight should be given to the parties' intent to return to Australia. The Father is asking the Court to consider a handwritten agreement signed by the parties in 2017, wherein the parties agreed to return to Australia after the Mother completed her training. He acknowledges the agreement is not enforceable but that it provides strong evidence as to the parties' intention at that time. He submits that the court should give significant weight to this factor because the parties had already participated in a *Hague* Application in 2012 and therefore understood the importance of agreements and intentions. So, what weight should be given to the parties' intent and could this factor outweigh the significant link the children have to Ontario?

In concluding that the children's habitual residence was Ontario, and not Australia as the parents had previously agreed, the Judge stated:

> [42] The hybrid approach requires the court to evaluate all the relevant circumstances of the case. If I were to give undue weight to the parents' intentions in the case before me, I would be ignoring the decisions in *Balev* and *Ludwig* by reverting back to the once dominant "parental intention approach"…

See also *F against M*, at paras. 16-23, for a full discussion on how time-limited stays and parental agreements inform the analysis of habitual residence.

The Significance of the Age of the Child in the Balev Framework

[36] In *Balev*, the Court also recognized that the age of a child informs the analysis, saying:

> [44] … 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 para. 45.

and at the same time noting that the *Convention* provides for the views of a sufficiently mature child to be considered (*Convention*, at art. 13(2)). These provisions recognize that as children mature, they develop their own connections to a jurisdiction, independent of those of their parents. In other words, the older a child is, the more their own connections matter and the less their parents' intentions matter. That a child can develop their own connections to a jurisdiction is also recognized in the *Convention* in circumstances where article 12 applies.

[37] The British Columbia Supreme Court case *Allibhoy v. Tabalujan*, 2015 BCSC 37, at para. 48, quoting from the American case *Whiting v. Krassner*, 391 F. (3d) 540 (3rd Cir. 2004), recognized the significance of age in relation to four year-old Evan and roughly one and a half year-old Christina:

> … In recognizing acclimatization as an element of habitual residency in *Feder*, we were attempting to develop a definition of habitual residence which would comport with one of the main objectives of The Hague Convention — i.e., restoring the child to the status quo before the abduction. We recognize that this goal is crucial when the child involved is not only cognizant of his or her surroundings, but also of an age at which it is able to develop a certain routine and acquire a sense of environmental normalcy. A four-year-old child, such as Evan Feder, certainly has this ability. A child of such age is not only aware of those around him, but is able to form meaningful

> connections with the people and places he encounters each day. A very young child, such as Christina, does not have such capability. Therefore, her degree of acclimatization in Canada is not nearly as important to our determination of habitual residence as are her parents' shared intentions as to where she would live during her formative years. …

[38] In *Gadea v. Rath*, 2022 MBQB 5, the Manitoba Superior Court recognized the ability of a young child to form meaningful connections to an environment in the context of a child being "settled in" to its new environment within the meaning of article 12 of the *Convention*. In *Gadea*, the Court rejected a mother's *Convention* application and accepted the father's position that their three-year-old child had formed her own connections to her present jurisdiction in the 21 months she had spent there immediately before the date of her alleged wrongful retention:

> 75 Further, I accept the father's evidence that the child has "settled in" to her life in Manitoba. The child, a citizen of Canada, has resided in Manitoba for 21 months, more than half of her life. She has been seeing a doctor in Manitoba since August 17, 2020, she has had a Social Insurance Number since May 26, 2021, she has attended pre-school since November 9, 2021, and she has formed close bonds with her paternal relatives, which include her grandparents, aunts, uncles and cousins, as well as friends in the neighborhood and classmates. She is an active three-year-old involved in a number of age-appropriate activities. She has settled into her life in Canada.

[39] Although these statements are made in the context of article 12 of the *Convention*, they are relevant in that article 12 recognizes that a child may become integrated in a jurisdiction as time passes. This was recognized by Chief Justice McLachlin in *Balev*, and explains in part the move away from parental intention as determining a child's habitual residence.

[40] In *Batten v. Batten*, 2021 BCSC 2507, the British Columbia Supreme Court recognized that the length of time spent in a present jurisdiction can matter, but was not convinced that the five year-old child had formed substantial links to her present jurisdiction in the five weeks before the date of her alleged wrongful retention:

> [27] Although S.B. remained in Canada for approximately five weeks prior to September 1, 2020 — the date I have found she was wrongfully retained in Canada — I agree with the submission of Mr. Batten that, during this time, she did not develop substantial links to BC. There is evidence suggesting that, over time, S.B. began to develop connections in Canada by starting school, playing soccer, swimming, tap dancing, and visiting regularly with her maternal grandparents. However, I am not satisfied that these connections had formed prior to September 1, 2020.

[41] See also *Monasky*, at 8-9.

[42] It is clear from the cases that there is no rigid line to be crossed in order for even a very young child's connections to a place to weigh in an analysis of habitual residence.

The Significance of the Words "immediately before" in Articles 3 and 4

[43] Something must be said about the words "immediately before" found in articles 3 and 4 of the *Convention*. The words refer to the time of the alleged wrongful abduction or retention, and thereby pertain to the point in time when all of the circumstances relating to the child's situation for the purpose of determining the child's habitual residence must be considered.

[44] Language in governing legislation, which in this case is an international treaty, is presumed to be used deliberately, and for a specific purpose. As was recently confirmed in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, "the words of a statute must be read in their entire context, and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (para. 117). This type of analysis was carried out by Chief Justice McLachlin in *Balev*, and informed her ruling that a child's habitual residence is what it was immediately before the date of the alleged wrongful removal or retention, as determined by a judge (*Balev*, at paras. 36, 43). In short, what matters are the child's connections to the respective jurisdictions immediately before the alleged wrongful removal or retention. While historical connections may be relevant, it is neither reasonable nor appropriate to interpret immediately before as applying to an historical time, or to make light of or ignore these words.

[45] Lord Justice Moylan's reasoning in *M (Children) (Habitual Residence*: *1980 Hague Child Abduction Convention)*, [2020] EWCA Civ 1105, illustrates the need to be careful to avoid simply pitting one jurisdiction against the other on the basis of time spent. In referencing Lord Wilson's "see-saw analogy" from *In re B (A Child) (Reunite International Child Abduction Centre and Others Intervening)*, [2016] UKSC 4, at para. 45, Lord Moylan said:

> [62] Further, the analogy needs to be used with caution because if it is applied as though it is the test for habitual residence it can, as in my view is demonstrated by the present case, result in the court's focus being disproportionately on the extent of a child's continuing roots or connections with and/or on an historical analysis of their previous roots or connections rather than focusing, as is required, on the child's *current* situation (at the relevant date). This is not to say continuing or historical

> connections are not relevant but they are part of, not the primary focus of, the court's analysis when deciding the critical question which is *where* is the child habitually resident and not, simply, *when* was a previous habitual residence lost.
>
> (Emphasis in Original)

[46] The significance of a child's historical roots in a jurisdiction to the determination of habitual residence was also addressed in *Ludwig*. Despite the *Ludwig* children having lived in Germany for many years before moving to Canada 13 months prior to their father's *Convention* application, the Court at trial found their habitual residence to be Ontario, because their experiences in Canada were "more current and immediate and over an appreciable period of time" (*Ludwig v. Ludwig*, 2019 ONSC 50, at para. 93 [*Ludwig, (ONSC)*]). As noted above, the trial decision was upheld on appeal.

The Role of Timeliness in Determining a Convention Application

[47] The importance of timeliness in court proceedings determining a *Convention* application must be noted, as Chief Justice McLachlin did in *Balev* at paras. 82-89. Articles 9 and 11 of the *Convention*, and rules F38.03 and F38.10 of the *Supreme Court Family Rules*, being Part IV of the *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, clearly direct that *Convention* applications are to be decided expeditiously. However, expeditiousness should not come at the expense of fairness, as rule F37.01 provides. Further, even timeliness is contextual. Cases of abduction, or a parent absconding with a child to a far flung jurisdiction, are arguably more urgent than a case where a child has been in a present jurisdiction for an extended period of time with the consent of the applying parent.

STANDARD OF REVIEW

[48] The standard of review in family law cases is well established. In summary, questions of law are reviewed on a standard of correctness, and questions of fact, or mixed fact and law, are reviewable on the standard of palpable and overriding error, unless there is an extricable principle of law involved, in which case the standard respecting that issue is correctness. Deference must be shown to a judge's discretionary decisions, unless the judge exceeded jurisdiction, has failed to apply or misapplied an applicable principle, or made a palpable and overriding error in appreciating the facts, or the Court's failure to intervene would cause a manifest injustice (*Gosse v. Sorensen-Gosse*, 2011 NLCA 58, 311 Nfld. & P.E.I.R. 76, at paras. 17-19).

ANALYSIS

Did the Judge err by applying the wrong law to her determination of V's habitual residence?

[49] In my view, the determination of a child's habitual residence is a question of mixed fact and law, as legal principles apply to such a determination. Whether it is a question of fact or mixed fact and law (*Balev*, at para. 38), the application of wrong law to a set of facts is an error of law (*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 39); and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 32-33).

[50] For the reasons that follow, it is my view that the Judge erred in law by misapprehending the legal principles as stated in *Balev* law and failing to apply those legal principles to her determination of V's habitual residence. This misapprehension and consequent misapplication of the law caused her to erroneously conclude that V was wrongfully retained in St. John's.

[51] There is no dispute that the Judge cited *Balev*. However, she made several statements indicating her misapprehension of *Balev*, and decisions that show her misapplication of *Balev*.

[52] For example, the Judge stated:

> [16] Removal of a child is considered "wrongful" even if consent is granted by the other parent holding custody rights for the child to travel temporarily away from their home jurisdiction. It becomes wrongful when the child is then retained beyond what was originally contemplated (*Thomson v. Thomson*, [1994] 3 S.C.R. 551).

With respect, this statement of the law is incorrect. As noted above, *Balev* laid to rest the notion that time-limited parental agreements determine whether a retention is wrongful, saying that such legal constructs cannot determine a *Convention* application (*Balev*, at para. 73). Time-limited parental agreements are simply an aspect of parental intention, which itself is only one factor in the determination of a child's habitual residence, and a factor *Balev* specifically directs is not to be overly relied upon.

[53] The Judge stated that "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 …" (para. 74). This is correct, however, she went on to say in response to the mother's request that

the Judge consider "the focus of the child's life" as being in St. John's over the previous year, that:

> [79] Under the hybrid approach to habitual residence, the focus of the child's life is a relevant consideration, but not to the exclusion of other factors.

Again with respect, this statement shows the Judge's misapprehension of the analytical framework for determining habitual residence. *Balev* instructs that it is the focal point of the child's life that must be determined (para. 43) — that the child is the *focus* of the analysis in determining the child's habitual residence (para. 68). The focus of the child's life is not just a relevant consideration; it is the object of the inquiry. The circumstances of the case, including the child's connections to each jurisdiction, the circumstances of the move to the present jurisdiction, and all other relevant facts including parental intention, are relevant considerations which inform a court's determination of the focus of the child's life for the purpose of determining the child's habitual residence.

[54] The Judge's discussion of the circumstances in play in *Knight v. Gottesman*, 2019 ONSC 4341, is also telling. The Judge likened the Court's reasoning in *Knight* to this case, saying that there was no intention on the part of either of V's parents to establish Newfoundland and Labrador as their habitual residence (paras. 76-77).

[55] The Judge also said:

> [88] The fact that the child spent an appreciable period of time in Newfoundland does not displace Massachusetts as the habitual residence. As noted in *Chan* at para. 31," 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 become habitually resident in country B". (Emphasis added).

Again with respect, this statement of the law is incorrect: "[a]n appreciable period of time and a settled intention" (on the part of a child's parents to relocate to a present jurisdiction) is not the test for determining whether the child's habitual residence has changed.

[56] The Judge went on to apply the above-noted incorrect law to the evidence, and concluded: "Throughout V's stay in Newfoundland, her parents maintained their connections and the child's to Boston and exhibited a settled intention to remain habitual residents of Boston" (para. 89). In other words, the Judge relied on the settled intention of the parents to return to Boston to find that V's habitual residence was Boston.

[57] The Judge's use of the term "settled intention" was based on the term as found in *Thomson, Korutowska-Wooff v. Wooff*, 2004 ONCA 5548, and *Chan v. Chow*, 2001 BCCA 276 (Decision, at paras. 70-71, 78, 88-89) on which the Judge relied. In those and other cases, the term was used to describe a finding of where the parents had once intended to live together with their children. These cases are pre-*Balev* cases. The predominance of parental intention as it is described therein has been expressly overruled by *Balev*.

[58] As discussed in *Balev*, Chief Justice MacLachlin identified the problem with Courts overrelying on parental intention (paras. 45, 69). By way of further explanation, I add that permitting the determination of a child's habitual residence to rest on parental intention as it has been described and applied in pre-*Balev* jurisprudence fails to recognize that parents' intentions and lives change. Parents, together or separately, are people who often change their minds about where they want to live and whether they want to stay together as a unit. Failing to appreciate this reality, and binding both parents to a joint intention formed at a previous time and in different circumstances, binds both parents to the preference of one parent over the other, and effectively treats the child as a possession of the parent whose intention has not changed. That approach is folly, in that it diverts the inquiry away from determining the child's own connections to the jurisdictions in question, as *Balev* directs. The inquiry into habitual residence must concentrate on the focal point of the child's life immediately before the time of the alleged wrongful removal or retention, and not on past parental intentions that do not reflect the *current* circumstances of either the parents or the child.

[59] The Judge, at para. 11, quoted the following from para. 24 of *Balev*:

> … The return order [to the jurisdiction of habitual residence] is not a custody determination: Article 19. It is simply an order designed to restore the status quo which existed before the wrongful removal or retention, and to deprive the "wrongful" parent of any advantage that might otherwise be gained by the abduction. …

and added that a *Convention* application does not determine custody or consider the child's best interests. Rather, its purpose is to return the child to their habitual residence where those best interests will be considered (Decision, at para. 13).

[60] This statement of the law, while correct, requires explanation. For example, while a court deciding a *Convention* application does not consider the "best interests of a child" for the purposes of determining custody and access,

there is nothing in the *Convention* that precludes a court from considering a child's general interests when focusing on the focal point of the child's life. Such general interests are at the heart of the test for habitual residence. *Balev* instructs that the determination of a child's habitual residence must consider how connected the child is to the jurisdictions involved. This implicitly involves the child's general interests, insofar as the child's connections to their environment is concerned, as opposed to the best interests of the child for the purposes of parenting. In this regard, see *Balev*, at para. 89, and *Bačić v. Ivakić*, 2017 SKCA 23, at para. 25.

The Links

[61] The Judge correctly stated that in determining habitual residence the Court considers the child's links to the competing jurisdictions as well as the reasons for the move. At paragraph 68 of her decision, she listed what she considered to be the relevant links. Upon review, it is clear that parental intention dominated her list.

V's Move to St. John's

[62] The Judge's description of the circumstances of V's move to St. John's understandably consisted entirely of factors that relate to the circumstances of her parents. These circumstances are relevant, as they explain how V came to be living in St. John's, but they are not determinative of her habitual residence as of the date of alleged wrongful retention.

V's Links to Boston

[63] Of the 25 links referred to by the Judge as V's connections to Boston, over half do not relate to V but to her parents' circumstances and intentions. Further, it is not clear how certain of those links are relevant to parental intention. For example, the judge noted that the mother voted in the 2020 American election and that she filed income taxes in the United States that year. Of the links that refer directly to V's circumstances, they are connections V had to Boston prior to going to St. John's, and are either tenuous or no longer current. For example, the online piano lessons V took through the Brookline School of Music is a tenuous connection to Boston, given that the lessons were delivered remotely by a teacher in California. Also, the Judge stated that "V has friends in Boston" with whom "she maintained FaceTime contact" (para. 68). It appears that V had one FaceTime contact with her single school friend from Boston shortly after she moved to St. John's, and by the time of trial, the friend

had left the school she and V had attended together. The only *current* social link the Judge listed that V had to Boston was that V was close to her aunt L who lived in Boston. While the evidence was that V's aunt L no longer lived in close proximity to where V had lived in Boston and that she had less free time to spend with V given her new demanding job, there was no evidence that the significance of this relationship had diminished since V had been living in St. John's.

V's Links to St. John's

[64] By contrast, all the links V had to St. John's were current, and indicative of V's actual circumstances immediately before the alleged wrongful retention. The single link that was not, was the fact that the family did not purchase or rent accommodations in St. John's, which in any event speaks to parental intention. Importantly, although the Judge listed links V had to St. John's, the Judge did not discuss the significance of them to V, in particular the significance of school to V, or if they had weight in her consideration of whether V's habitual residence had changed. Neither did the Judge consider V's age, and that she may have had her own connections to St. John's aside from those of her father and mother.

[65] The Judge's analysis of the links also illustrates her emphasis on V's historical connections to Boston. The Judge stated in her decision that V had spent all of her life in Boston (para. 40). Given that V had spent a full year in St. John's before the date of the alleged wrongful retention, this is not quite so. Even if the Judge meant that V had spent most of her life in Boston, her emphasis on the links that (1) V was born in Boston and had lived there her entire life prior to the trip to Newfoundland on July 25, 2020, (2) V had attended Daycare, Pre-Kindergarten and Kindergarten in the Boston Public School System, and (3) V had been enrolled in extra-curricular activities in Boston, suggests that the Judge considered the historical time that V spent in Boston was more significant than the time she spent in St. John's immediately before the date of the alleged wrongful retention.

[66] Historical links to a former jurisdiction as well as "[t]he length of time the children spent in each jurisdiction" (Decision, at para. 20), are relevant, but they must be considered in context. The purpose of considering duration is not to compare the lengths of time spent by the child in each jurisdiction with a view to giving more weight to the jurisdiction in which the child spent more time. A child's historical connections are relevant to the determination, but they are not to be weighed the same as the child's connections to the present jurisdiction

existing *immediately before* the time of the alleged wrongful removal or retention. Historical connections generally do not reflect the connections the child has established with the present jurisdiction (*Ludwig, (ONSC)*, at para. 93; and *Convention*, at arts. 3, 4).

[67] It is instructive to refer again to Lord Moylan's decision in *M (Children) (Habitual Residence: 1980 Hague Child Abduction Convention)*, wherein he cautioned against placing a disproportionate focus on the extent of a child's roots in or historical connections with a previous jurisdiction, rather than focusing on the child's current situation immediately before the alleged date of wrongful abduction or retention as the *Convention* directs (para. 62). In this regard, it is well recognized in the jurisprudence that a child's habitual residence can change to a present jurisdiction within a short period of time despite the child having spent a much longer period of time in a former jurisdiction, and in some cases, even in a single day (see *Salvatore v. Medeiros*, 2021 ONSC 1488, at para. 28; and *Gavriel v. Tal-Gavriel,* 2015 ONSC 4181, at paras. 51, 55). If the words "immediately before" are to have any meaning, currency with the date of the alleged wrongful removal or retention is a controlling factor (see *Ludwig, (ONSC)*, at para. 93; *Beairsto*, at para. 124; and *J.M.*, at paras. 16, 17, 40).

Conclusion

[68] The Judge incorrectly instructed herself that the circumstances of V's parents and their previous intention to live together in Boston, along with V's historical connection to Boston, were the controlling factors in determining V's habitual residence. The Judge's focus on parental intention and her failure to consider V's connections to St. John's immediately before July 30, 2021, caused her to focus almost entirely on the prior intentions of V's parents and not on V's life or current connections. The Judge's only comment respecting the focus of V's life was to say that it was a relevant factor, but not to the exclusion of other factors. The Judge's approach led her to erroneously conclude that despite the appreciable period of time V spent in Newfoundland, her parents' (former) settled intention to remain habitual residents of Boston made V's habitual residence Boston. In short, the Judge failed to apply the principles set out in *Balev*, and instead applied wrong and outdated law in her determination of V's habitual residence. Accordingly, her conclusion that V was wrongfully retained in St. John's must be set aside.

The Mother's Article 13(b) Claim

[69] Article 13(b) of the *Convention* provides an exception to the issuance of a return order when return would expose the child to a grave risk of physical or psychological harm or place the child in an intolerable situation. In this case, the mother argued that the emotional abuse of her by V's father would subject V to a risk of grave harm and place her in an intolerable situation by being returned to Boston without her.

[70] The Judge decided that the mother's allegations respecting her husband's emotional abuse did not establish that V would be subject to a grave risk of harm or placed in an intolerable situation by being returned to Boston. Accordingly, the Judge dismissed the mother's claim to the article 13(b) exception. I agree with the Judge's decision. While it is not necessary to address the mother's arguments respecting her article 13(b) claim and other matters, some require comment.

A Return Jurisdiction's Ability to Protect a Child

[71] In the course of her analysis respecting the mother's article 13(b) claim, the Judge noted that there was no evidence that police or child protective services had ever been called to assist the family (para. 110), and that the mother had failed to lead any evidence that the local child protective authorities in Boston would not be able to intervene to protect V from abuse (para. 144). These statements suggest that a party resisting a *Convention* return order on the basis of article 13(b) must show that the return jurisdiction is either unwilling or unable to protect a potentially returning child from harm. This is not so.

[72] The notion seems to have grown out of a misinterpretation of *D.R. v. A.A.K.*, 2006 ABQB 286, at paras. 13, 249-253, which the Judge cited in this case. In *D.R.*, there was evidence, which the Court accepted, that the proposed return jurisdiction had in fact failed to act to protect the subject child who was being sexually abused while the child lived there. The reasoning in *D.R.* does not translate into a positive responsibility on a respondent to adduce evidence that a contracting state would fail to protect a returned child. If such evidence happens to be available, like it was in *D.R.*, then it can be adduced to strengthen an article 13(b) claim. However, there is no requirement to call such evidence in order to establish an article 13(b) claim.

[73] Whether a return jurisdiction is able to protect a child from abuse was considered by the Saskatchewan Court of Appeal in *Ivakić* and also by the

Alberta Court of Appeal in *C.B. v. B.M.*, 2021 ABCA 266. In *Ivakić*, the mother, who was resisting an order that her child be returned to Croatia, argued that Croatian courts do not take domestic violence seriously, and she claimed that this was shown by a Croatian child protection tribunal which had permitted the child's father unrestricted but limited access to the child. The appellate Court did not accept the mother's claim that the Croatian courts would not protect the child on the basis of the mother's arguments. Neither did the Court accept the mother's article 13(b) claim. However, the Court dismissed the father's *Convention* application because the child had become a permanent resident of Canada and had become "settled into" Saskatchewan within the meaning of article 12 of the *Convention*.

[74] In *C.B.*, the mother, who was resisting the father's *Convention* application, argued that her children could be in danger if returned to France, saying that the French legal system had shown itself incapable of protecting her children's welfare. The appellate Court did not accept that this was so on the basis of the evidence and arguments the mother submitted, and ultimately returned the children to France because they had been wrongfully removed from France and they had not settled into Canada within the meaning of article 12.

[75] In *D.R.*, *Ivakić* and *C.B.*, the respective Courts were dealing with specific allegations and evidence respecting the ability or willingness of local authorities in the respective return jurisdictions to protect the subject children. These cases do not stand for the proposition that there is a positive or inferential obligation on a party resisting a return order to adduce evidence that the return jurisdiction cannot or will not protect a child. Aside from the obvious difficulties of proving such a negative in the absence of specific evidence, it is uncontroversial that the state is not the arbiter of all cases of domestic abuse, especially those involving emotional or psychological abuse in which police and child protection services are not normally involved.

[76] In any event, contracting states to the *Convention* can be presumed to have police and child protection services available to those residing within their jurisdictions, unless there is evidence to the contrary, as there was in *D.R.* (see also *Finizio v. Scoppio-Finizio*, [1999] O.J. No. 3579, 179 D.L.R. (4th) 15, at para. 34 (Ont. C.A.)). Despite this presumption, it remains the duty of the courts to assess whether there is grave risk of harm to a child being returned or if the child will be placed into an intolerable situation.

[77] In summary, there is no duty on a party relying on an article 13(b) claim to prove that the return jurisdiction is not able to protect a child. To the extent

that the Judge placed an onus on V's mother to prove that the Boston authorities would not protect V, she was in error.

The Evidentiary Rulings

[78] The Judge's handling of the mother's article 13(b) argument also raises issues respecting evidentiary rulings on the admissibility of the mother's medical chart from the Massachusetts General Hospital and Dr. Philpott's evidence.

The Massachusetts General Hospital Records

[79] The Judge refused to admit the mother's records from the Massachusetts General Hospital, which were proffered to support the mother's evidence relating to her husband's attitude towards her illness which in turn informed her article 13(b) claim based on spousal abuse. It appears from the transcript that the father contested the admissibility of the hospital records on the basis that they were not authenticated by a hospital official and that they contained expert opinion. The mother argued that her hospital records were business records admissible for the truth of their contents pursuant to the law as stated in *Ares v. Venner*, [1970] S.C.R. 608.

[80] The Judge did not admit them into evidence on the bases that (1) they contained opinions from experts who were not available for cross-examination, and (2) there was no benefit to admitting them because the mother could testify to the contents. The Judge also reasoned that the hospital records were not relevant because they could not assist in evaluating the risk of harm to V should she be returned to Boston (Transcript, Oct. 6, at pages 5-6).

[81] There is no dispute that the law requires some evidence capable of authenticating that the records are what they are professed to be. But authentication does not mean that every word stated in a tendered record is accurate. The mother could have provided evidence capable of authenticating her hospital records for the purpose of their admissibility, similar to how a records custodian could. The mother also could have authenticated the records by testifying that she was tendering them as received by her in accordance with the reply letter doctrine, as explained in *R. v. C.B.*, 2019 ONCA 380, at para. 69.

[82] As to whether the medical records contained expert opinion, the record does not show that the Judge reviewed them to ascertain whether in fact they included such expert opinion. If expert opinion were contained therein, it could easily have been excised before the records were admitted, or the records could

have been admitted and the expert opinion excised or ignored if and when it became an issue. Trial judges are expected to be able to restrict their consideration of evidence to relevant and admissible evidence when deciding issues.

[83] Further, there was no suggestion that the records had been tampered with or that they were fraudulent, and if such an issue arose, it could be dealt with in due course. The actual use the Judge could make of the contents of the records could be determined as appropriate in accordance with the principles set out in *Ares* respecting the business documents exception to the hearsay rule. Additionally, and importantly, rule F1.05 of the *Supreme Court Family Rules* provides for relief from strict compliance with the rules of evidence in family proceedings.

[84] As for relevance, the fact that some evidence respecting an issue has already been adduced does not make other like evidence irrelevant. Corroboration is a valuable evidentiary tool, especially when credibility is involved, as it was on the issue of spousal abuse. The records could have provided corroboration of the mother's abuse claim or refuted some of the evidence the father had given respecting his view of his wife's medical condition. Further, it is well established that abuse of a child's custodial parent can establish a risk of harm to the child (see *Zafar v. Saiyid*, 2018 ONCA 352, at paras. 16-18). See also *Monasky*, at Syllabus 1(b).

[85] The Judge's refusal to admit the hospital records might have made sense if the mother's abuse allegation had not been contested. However, the abuse allegation was contested by the father, making the credibility of both the mother and father respecting whether or to what degree the abuse occurred relevant. Given this situation, the hospital records documenting her condition and treatment made in the normal course were relevant for the purpose of corroborating the mother's evidence of her illness and alleged abuse. Moreover, failing to admit them is hard to reconcile with the Judge's decision to admit, consider, and adjudicate on 1239 pages of text messages (communicated over a period of two years) tendered by the father to refute his wife's allegation of abuse.

[86] The admissibility of evidence is a question of law. For the above reasons, it is my view that the Judge erred in refusing to admit the mother's hospital records. That said, whether the admission of the records would have made a material difference to the Judge's rejection of the mother's article 13(b) claim is

impossible to say. In any event, it does not matter given my conclusion on V's habitual residence.

Dr. Philpott's Evidence

[87] The mother also argued that the Judge inappropriately constrained the evidence of Dr. Philpott. The father objected to Dr. Philpott testifying on the basis that he was an expert who was providing expert opinion evidence under the pretense of being a lay witness.

[88] Dr. Philpott was a friend of the mother and her family. He was also a retired clinical psychologist. His evidence comprised his factual observations of V and her parents respecting their interactions with each other. After much argument respecting the father's objection, the Judge permitted Dr. Philpott to testify

> …as a fact witness and [if he] refrains from expressing opinions unless they are clearly those within the sphere of day-to-day experience knowledge base, okay?
>
> (Transcript, Oct. 4, at page 34).

I essentially agree with the Judge's ruling. It is supported by the long-established law set out in *Graat v. The Queen*, [1982] 2 S.C.R. 819. However, something more must be said.

[89] Expert evidence is opinion evidence, often scientific, which is drawn by an expert from facts and observations which non-experts like judges do not have the necessary skill, knowledge and education to appreciate. Expert opinion, if accepted, provides a ready-made inference for a court. Courts must be alive to the differences between fact and opinion evidence, as the Judge was, and take care to separate factual evidence from expert opinion. However, there is no evidentiary principle which prevents a person with special knowledge and talent, and who could be qualified as an expert in the instant case or another case, from testifying as a fact witness. Further, witnesses are not all of equal intelligence and ability, and some, by virtue of their experience and training, may have more acute powers of observation and may notice things that others do not. I note this because I would not want the impression to be left that the Judge's ruling restricting Dr. Philpott's testimony to "the sphere of day-to-day experience knowledge base" means that a witness must adjust his or her evidence to that of a person with lesser or different knowledge and experience. The law does not require fact witnesses to tailor their evidence to that of such a person, whoever that may be. In this regard, see *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R.

250, at paras. 53-66, for a discussion of the issue in the context of the experience and training of police officers.

Misapprehension of Evidence

The Credibility Comments

[90] Much ado was made at trial about exactly when V and her mother would be returning to Boston. The father testified repeatedly that he and the mother had agreed that V and her mother had intended to return to Boston on August 16, 2020. The mother denied that she had agreed to return to Boston with V on August 16, 2020. However, she did not deny that that she had agreed to return to Boston in late August 2020, after the father's mid-August golf tournament (see Transcript, Oct. 7, at pages 29-36, and Oct. 8, at pages 80-86).

[91] To refute the father's adamant and repeated evidence (numerous times) that a specific date for their return had been agreed upon, the mother tendered a recording of a telephone conversation she had with the father to show that while she had agreed to return to Boston after the golf tournament, there was no agreement respecting August 16 or another specific date.

[92] The Judge accepted the father's evidence that there was an agreed return date of August 16, 2021, and stated that the recording confirmed the father's evidence and contradicted that of the mother (Decision, at para. 65).

[93] The recording was provided to the appeal panel. The recording confirms the mother's evidence that she agreed to return after the father's golf tournament in mid-August, and there was no mention of her returning to Boston with V on August 16. Yet the Judge stated that the recording contradicted the mother's evidence. The adverse credibility finding against the mother resulted from the Judge's misapprehension of the evidence.

[94] Another adverse comment in respect of the mother's credibility may also have resulted from a misapprehension of evidence. In her affidavit of response to the *Convention* application, the mother stated, "I am concerned that he encourages V to sleep with him while he is sleeping nude." In her testimony, the mother stated that she raised the issue in her response because she was concerned about the appropriateness of some of the father's parenting of V. The father was upset by this statement in the mother's response, although he acknowledged that his sleeping nude had been a source of ongoing conflict between him and his wife. In fact it was referenced in the text messages the father tendered.

[95] The mother made clear in her testimony on direct that she was not alleging any sexual impropriety, and she was not cross-examined on this point. On appeal, her counsel stated the obvious, saying that if the mother thought that there had been anything untoward between her husband and child, she would not be proposing V's liberal access to her father as part of the parenting arrangements. Nevertheless, the Judge saw the mother's comment in her response as a "weak attempt" to establish an article 13(b) claim (para. 125). While credibility is a trial judge's call, the Judge's adverse comment shows that she may have misapprehended the mother's evidence.

Timeliness

[96] The hearing of this matter was set immediately upon the father's *Convention* application being filed, and the trial began within a month. It is clear from the Transcript that the Judge was concerned that the matter had to move along quickly. This is understandable, given that the *Convention*, *Balev*, and the *Supreme Court Family Rules* direct expeditiousness in handling *Convention* applications. However, these directions should not operate in a way that prejudices or pressures a party, especially when normal requirements and practice respecting notice for tendering expert reports cannot be realistically met. A *Convention* application, by its nature, could involve expert evidence as well as evidence coming from outside of the trial court's jurisdiction, as this case did.

Apprehension of Bias

[97] The mother also argues that the cumulative effect of the Judge's interventions and rulings and general trial conduct gives rise to an apprehension of bias.

[98] The bar to establish apprehension of bias on the part of a judge is high. The issue was considered by this Court recently in *A.H. v. R.B.*, 2022 NLCA 9. In *A.H.*, Chief Justice Fry set out the principles governing apprehension of bias and stated the question to be determined as:

> [48] …what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude.

My colleague Goodridge J.A. has addressed this issue at paragraphs 212-221 of his dissenting opinion. While I differ from him respecting whether the Judge made reviewable errors in her handling of this matter — I say yes, he says no —

I agree with him that apprehension of bias has not been made out in this case. I would also make another comment.

[99] I agree with my colleague that the Judge's interventions in the mother's counsel's cross-examination of the father were because the questioning related to parenting, which was not, in the sense of custody and access, the issue before the Court. It was, however, relevant to whether the mother was the primary parent, which was an issue before the Court. Further, the father testified at great length respecting his view of the marriage and his parenting of V, and submitted 1239 pages of text messages on these issues for the Court's consideration. Accordingly, it is understandable why the mother's counsel would raise the issue in her factum.

SHOULD THIS COURT DECIDE THE FATHER'S CONVENTION APPLICATION?

[100] Given that the Judge's decision respecting V's habitual residence must be set aside, it falls to this Court to decide whether a new trial should be ordered or whether this Court can properly determine V's habitual residence on the basis of the record and relevant law and thereby decide the father's *Convention* application.

[101] In *Madsen Estate v. Saylor*, 2007 SCC 18, [2007] 1 S.C.R. 838, the Supreme Court of Canada considered the circumstances in which an appellate court can finally decide a civil case after finding error. In *Madsen Estate*, the Court ruled that it was both practical and fair to decide the case on the basis of the evidentiary record rather than sending the case back to trial. This Court came to the same conclusion in *John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's*, 2020 NLCA 27, on the basis that it was a matter of applying the correct law to an uncontroversial evidentiary record, which this Court was well positioned to do. As well, the advanced age of both the litigation and the claimants made it practical to do so (*John Doe*, at paras. 119-124). See also *Matchim v. BGI Atlantic Inc. et al.*, 2010 NLCA 9, 294 Nfld. & P.E.I.R. 46, at para. 99, wherein this Court made another similar decision.

[102] I note that the Nova Scotia Court of Appeal took this approach in *Beairsto*, after setting aside the trial judge's reasoning which was based on dated, pre-*Balev* law. The appellate Court reasoned that sending the matter back for a new trial would visit continuing uncertainty on the parties, and the record was sufficient for the appellate Court to make a fair determination of the child's habitual residence. The Court also reasoned that appellate courts in Canada and

other contracting states have demonstrated little hesitation in finally determining questions surrounding habitual residence (*Beairsto,* at paras. 85-92).

[103] Likewise in this case, the evidentiary record respecting the question of V's habitual residence is clear and not controversial. The necessary information respecting the circumstances of V's move to St. John's, and the focus of her life immediately before July 30, 2021, including her connections to both St. John's and Boston, along with the evolving intentions of her parents and other relevant circumstances, are before the Court as a matter of record. As a practical matter, timing is an important consideration, so that the matters of custody and access respecting V and her parents can be resolved sooner rather than later.

[104] It is my view that it is both practical and just that this Court determine whether V was wrongfully retained in St. John's by applying the correct law to the evidentiary record.

WAS V WRONGFULLY RETAINED IN ST. JOHN'S AS OF JULY 30, 2021?

[105] The Judge determined that the date of V's wrongful retention was July 30, 2021, which was the date the mother told the father she would not be returning to Boston. Given the father's evidence, it could be said that August 16, 2021 was the date of the alleged wrongful retention, but nothing turns on this difference of two weeks. The Judge found that the father was exercising custody rights respecting V at the time of the alleged wrongful retention, and that if V were being wrongfully retained in St. John's, his custody rights would be breached. I agree with this finding. Accordingly, the question for the Court is where was V's habitual residence immediately before July 30, 2021.

The Parents' Circumstances

[106] I begin with consideration of the parents' circumstances in July 30, 2021. V's father was under the impression that V and her mother would be returning to Boston in late August 2021. The mother did not dispute that this was the ostensible plan, or that she had agreed to it as recently as July 29, 2021 in the recorded telephone call. However, despite not being forthcoming to the father on July 29, 2021, the mother had changed her mind after the father returned to Boston at the end of June. She advised her husband on July 30, 2021, that she would not be returning to Boston to live and that she had filed proceedings in Newfoundland and Labrador respecting divorce and the custody and access of V. Despite being aware of problems within the marriage and having previously

threatened divorce himself, the father was understandably shocked and upset by the mother's news that she was ending the marriage.

[107] The mother's news that she was ending the marriage has the hallmark of a unilateral decision. Even though the unilateral decision of a parent does not determine the habitual residence of a child, the circumstances of the mother's decision to leave the marriage must be seen in context. The uncontroverted evidence established that the mother had been counselled for domestic abuse since 2017, and that she was on domestic violence leave from work at the time of the trial (Transcript, Oct. 8, at page 92). There was also evidence from other witnesses respecting her husband's emotional abuse of her. Given that she had coped with her troubled marriage for several years, her decision to leave the marriage appears abrupt.

[108] The Judge acknowledged that the parties' marriage was "troubled, if not dysfunctional" (para. 103). The Judge accepted that they had a difficult relationship, and stated "the evidence demonstrated that J.F. clearly loves his daughter and was devastated by the abrupt end of his marriage. J.F. acknowledged that there were difficulties in their marriage but stated he thought his wife loved him" (para. 142). Regardless, the state of the parents' marriage break-up does not make V's habitual residence Boston, or support an order to return V to Boston. Neither do these circumstances usurp the Court's responsibility to determine V's habitual residence by applying the correct law to the evidence. It bears repeating that there is no "rule" regarding unilateral decisions, as *Balev* instructs, and post *Balev* jurisprudence supports.

Parental Intention

[109] In Boston the parents lived in a condominium owned by V's mother and her sister L. Throughout the year or so before July 30, 2021, it is clear that the family's actions were geared to V and her mother returning to Boston to live with V's father. Renovations to the condo, the father's transport of winter clothing back to Boston in late June, and V's registration at the Gardner Pilot Academy (GPA) school for the fall of 2020 show that this was the intention of the parents, until one parent's intentions changed. But again, parental intention does not determine V's habitual residence or support an order to return V to Boston.

[110] The determination of V's habitual residence immediately before July 30, 2021 is the question for the Court. The focus of this inquiry is V, and where she was habitually resident immediately before July 30, 2021. The inquiry is

answered by considering the circumstances of V's move to St. John's, and the connections she had to each of St. John's and Boston immediately before July 30, 2021.

The Circumstances of V's Move to St. John's

[111] The circumstances of V's move to St. John's are not controversial. Simply put, V and her mother obtained special permission (due to Covid-19 travel restrictions) to enter the province on July 25, 2020 so V's mother could support her mother through her father's health crisis. V travelled with her mother to St. John's, with V's father's knowledge and consent. Their trip was in keeping with their annual summer visit to St. John's. V's father stayed in Boston. During the summer of 2020, V lived with her extended family and friends and engaged in tennis and swimming lessons and other summer activities in which she usually partook during her summer visits to St. John's.

[112] In the fall of 2020 when V's parents learned that schools in St. John's would be open to in-person learning and that schools in Boston would not be, V's parents thought it would be better for V to stay in St. John's to attend school in person. Consequently, V was registered to attend grade one at an elementary school in St. John's. As well, V's mother was able to work remotely from St. John's in her job as an occupational therapist with the Boston schools.

V's Links to St. John's and Boston

[113] V adapted well to school in St. John's, and made school friends. V's father came to St. John's in November 2020, and the family lived together with V's mother's parents between their summer and winter residences until V's father returned to Boston at the end of March 2021. While in St. John's, the father was actively involved with V, driving her to school and other activities, and was part of the mother's extended family.

[114] When Boston schools opened to in-person learning in April 2021, V's parents decided that V should stay in St. John's and finish the school year with her class.

[115] School is an important part of a school-age child's life. A school-age child spends almost as much waking time at school on school days as the child would spend at home with family, especially when time spent on extra-curricular activities and play with friends are considered.

[116] The significance of school to a child has been considered in *Convention* jurisprudence. In *Medic v. Medic*, 2020 ONSC 6447, the Court considered school to be a significant part of a child's life, saying "[a]part from the child's home or homes with his parents one of the most important indicators of the focal point of a child's life is where he attends school" (para. 75). In *F against M*, the importance of school and pre-school to the lives of the children in that case was considered by the Judge to be a significant factor in her determination that the children's habitual residence had changed from New Zealand to Scotland during the preceding year which the children had spent in Scotland. The Court in *Gadea* also considered attendance at pre-school as a significant factor in determining the very young child's habitual residence.

[117] In contrast, by July 2021, V's link to her former school in Boston was no longer. Her parents had maintained her registration for grade one (2020-2021) at GPA on the expectation that she would return to Boston, but as discussed, V attended grade one in St. John's. Her connection with GPA in the 2020-2021 school year was one school day in the early fall of 2020, when she attended GPA virtually because she was home sick from her school in St. John's. Further, V's single school friend from Boston, A, was no longer at GPA, having transferred to another school. While the father testified that there was a spot for V at GPA for the 20201-2022 year (he did not say when that was arranged), the mother had no knowledge of that arrangement. Nevertheless, as far as V's schooling was concerned, the focal point of her life was St. John's.

[118] While in St. John's, V participated in several extra-curricular activities. In the summer (between July 25, 2020 and July 30, 2021), she took tennis and swimming lessons and went to theatre and horseback riding camps. During the school year, she took dance and music lessons, and attended Sunday school. I digress at this point to comment on information the mother sought to introduce into evidence respecting V's music lessons. The mother tendered two letters respecting V's music lessons – one from the Brookline School of Music which operates out of Boston (although V was being remotely taught by a teacher in California), and one from Ms. B, V's piano teacher in St. John's. The father objected to the admission of the letter from Ms. B, but not to the letter from the Brookline School of Music. Arguments ensued, and ultimately the Brookline letter was admitted into evidence and the St. John's letter was not. It appears from the record that the mother's counsel gave up trying to have the St. John's letter admitted. Where a party submits two exhibits very similar in form and the one to a party's benefit is admitted by consent and the other is objected to, judicial discretion could be exercised to avoid a party, who is providing

evidence in good faith, from being unduly disadvantaged. That said, the judge accepted that V had taken piano lessons from Ms. B in St. John's.

[119] V's father came back to St. John's on May 31, 2021. He took V's bicycle with him so she could have it there for the summer, and stayed to be with V on her birthday, returning to Boston at the end of June. V finished the school year in St. John's with her classmates, after which she resumed her usual summer lessons and activities in St. John's.

[120] Socially, the evidence was that V loves and is loved by both of her parents, although she is very attached to her mother. The evidence also supports that V enjoyed the comfort and stability of living in her grandparents' home with her mother, and her father when he was there, and that she also enjoyed much social contact with her mother's extended family. In particular, she played and socialized frequently with cousins who were of similar age.

[121] V was seven years old when her father applied to have her returned to Boston. She was neither an infant whose environment is determined by the persons with whom she lives, nor sufficiently mature to relay to a court her views respecting where she should reside. Yet, she was old enough to live large parts of her day-to-day life in her own environment, in which she formed her own connections with St. John's. As stated above, she attended all-day school, various lessons at which she was taught by adults other than her parents and caregivers, and socialized with friends and peers from the community. Although her parents were very much central to her life, her life was in many ways disconnected from their circumstances, and disconnected from Boston.

[122] V holds both Canadian and American passports. She was enjoined to the Newfoundland and Labrador medical care plan, and has had professional consultations with both a family doctor and a specialist, as well as a dentist and an eye doctor, in St. John's during the year before July 30, 2021. V has had no connections with physicians or other health care professionals in Boston since 2019, although there is no evidence that these connections are severed.

[123] When matters came to a head on July 30, 2021, V had been living in St. John's for over a year. For over five months of that time, V's father had been there with V and her mother, living as a family. The rest of the year V was in St. John's with her father's full consent and support.

[124] The evidence supports that in July 2021, immediately before her alleged wrongful retention, V was "at home" in St. John's, having integrated into a

family life and social environment there. Her connections with Boston at this time were minimal, and almost entirely historical.

[125] Given that historical connections with a jurisdiction have some relevance, I note that V also had historical connections with St. John's as of July 2021, by virtue of her regular yearly visits. While V's historical connections to Boston were greater, her historical connections to St. John's were strong. She was there twice a year — in the summer for a period of at least three weeks — during which time she partook in swimming and tennis lessons and camps with her cousins and friends.

[126] In the result, I am of the view that the focal point of V's life immediately before July 30, 2021 was St. John's. She had been there for over a year at that time (an appreciable period of time, especially for a seven-year-old child), had completed her full grade one year at there, was integrated into the environment and social fabric of the St. John's, and settled into a secure and stable family life with her mother and her extended family. In short, V's habitual residence had changed from Boston to St. John's by July 30, 2021, like the children in *Beairsto, J.M., Ludwig,* and *F against M,* whose habitual residences had changed as of the time immediately before the dates of their alleged wrongful retention. While the intentions of V's parents were to return to Boston until V's mother changed her mind, that does not alter the fact that V's habitual residence had changed from Boston to St. John's immediately before July 30, 2021.

DISPOSITION

[127] I therefore conclude that V was not wrongfully retained in St. John's on July 30, 2021. There being no wrongful retention, the father's *Convention* application is dismissed.

COSTS

[128] I see no reason to deviate from the usual practice to award costs to the successful party. Accordingly, I would reverse the Judge's costs award at trial, and award party and party costs on Column 3 to the mother, K.F., for the trial and the appeal.

CROSS-APPEAL

[129] Given that I would allow the appeal, and award party to party costs to K.F., I would dismiss J.F.'s cross-appeal on costs.

_____

L. R. Hoegg, J.A.

I concur:_____

F. J. Knickle J.A.

Dissenting Reasons of Goodridge J.A.:

[130] I have read the reasons of my colleague. I do not agree that the applications judge misapprehended the evidence, misapprehended *Balev* analytical framework, or made any palpable and overriding error. *Balev* states that under Canadian law "appellate courts must defer to the application judge's decision on a child's habitual residence, absent palpable and overriding error" (para. 38). My colleague has referenced this same paragraph from *Balev* in her majority reasons (at para. 49 above) but omitted the main point — deference is owed to the application judge's decision on habitual residence, absent palpable and overriding error. The 'errors' identified by my colleague in her discussion of article 13(b) had no impact on the outcome because my colleague accepts that the applications judge was correct is dismissing the article 13(b) claim. The 'errors' identified by my colleague on credibility assessments had no impact on the determination of habitual residence because the factors relied upon in that determination were not dependent on credibility. In my view, the applications judge made no palpable and overriding error, and no other reviewable error, and she provided the parties with a fair opportunity to present their respective positions in what was a difficult and lengthy hearing. I would dismiss the appeal.

[131] The applications judge reviewed and applied the proper jurisprudence from *Balev*, and applied the hybrid test which arises from it. She considered all of the factors, assessed the facts properly and made the ultimate judgment call — a judgment call which was hers to make.

[132] As indicated by my colleague in her introduction, this appeal concerns the habitual residence – Canada or USA – of the parties' only child, seven-year-old V. This is an issue because the parties' home was in the USA; the mother initiated court proceeding in Canada while on a visit with V; the father subsequently initiated parallel court proceeding in the USA; the court proceedings each seek orders on the parenting issues of access and custody of V. The determination of habitual residence will decide in which jurisdiction – Canada or USA – the parenting issues for V will be decided.

[133] The appeal challenges the court order declaring V's habitual residence (under the *Hague Convention*[1]) as the USA, and the court order compelling V's return to the USA. The hearing from which these orders were made occupied 12 days, with considerable documentary and *viva voce* evidence.

[134] The *Convention* ensures that the parenting issues of access and custody are determined in the country of habitual residence. In allowing the application, the judge found that V's habitual residence was in the USA, and that the USA was the jurisdiction to address the parenting issues.

[135] The mother says that the judge made several errors in allowing the application and asks this Court to allow her appeal and vacate the return order. I reproduce all of the alleged errors in the order as set out in the mother's factum:

- Erred in assessment of witness credibility;
- Erred in determination of V's habitual residence under the *Convention*;
- Erred in interpretation of article 13(b) of *Convention* (providing an exception to a return order) by finding that the mother had not established grave risk that V's return would expose V to physical or psychological harm or otherwise place V in an intolerable situation;
- Erred in failing to exercise *parens patriae* jurisdiction;
- Erred in failing to obtain views and preferences of V;
- Erred in denying the admission of mother's medical records into evidence;
- Erred in limiting testimony of David Philpott;
- Erred in misapprehending or ignoring relevant evidence in making findings of fact; and
- Conducted the hearing in a manner that gave rise to a reasonable apprehension of bias.

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[1] *Convention on the Civil Aspects of International Child Abduction*, as adopted by section 54(2) of the *Children's Law Act*, RSNL 1990, c. C-13.

BACKGROUND

[136] The mother has a dual American and Canadian citizenship. She was born in Canada in 1979, moved to the USA in 1997, and remained in the USA, uninterrupted, until 2020. From 1997 to 2001, the mother pursued university studies in the USA. Following completion of her studies, the mother eventually secured employment with the Boston Public Schools as an occupational therapist. In 2008, while still living and working in Boston, the mother began a relationship with the father. They married in 2011 and, from the time of their marriage until July 25, 2020, they resided together in a Boston condominium (referred to hereafter as the marital home) owned by the mother and her sister. The parties' only child, V, was born in Boston in June 2014.

[137] On July 25, 2020, the mother travelled to Canada, with V, to visit her parents in St. John's, NL. Throughout the marriage, there had been similar visits to St. John's by the mother and V, including every summer for at least three weeks, and Christmas, often with the father joining for part of the time. The summer 2020 visit extended beyond the usual three weeks due to COVID-19; the parties wanted V to attend in-person schooling in St. John's because in-person schooling was not available in Boston during the pandemic. The parties' joint intention, at that time, was that the mother and V would remain in St. John's until the schools in Boston reopened, or until the mother was required to report to her employer in Boston for in-person work. The father made two visits, totaling about six months, to St. John's to be with his family during the 2020/21 school year, including November 2020 to March 2021, and June 2021.

[138] While in Canada, the mother continued working remotely for Boston Public Schools until late summer 2021 when she took a leave of absence.

[139] On July 30, 2021, the mother advised the father that she would not be returning to Boston with V, that she would be remaining in St. John's with V, and that she had filed for divorce. At the time of the application, the mother and V were residing with the mother's parents at their St. John's home.

[140] The father was born in the USA in 1978, is an American citizen, and has always resided and worked in the USA. He is a businessperson operating his own company, which company sells medical equipment to professional sports teams. At the time of the application, the father was residing at the marital home in Boston.

[141] On August 24, 2021, the father filed his application under the *Convention* alleging that the mother's decision of July 30, 2021 to remain in St. John's with V, amounted to a wrongful retention of V, contrary to article 3 of the *Convention*. He sought a court order for V's return to Boston.

[142] Article 3 of the *Convention* provides that the removal or retention of a child is wrongful (a) where it is in breach of custody rights under the law of the state in which the child was habitually resident immediately before the removal or retention and (b) where those rights were actually being exercised or would have been exercised but for the wrongful removal or retention.

STANDARD OF REVIEW

[143] The standard of review to allow appellate intervention will vary, depending on the alleged error under consideration.

[144] The threshold for interfering with the applications judge's credibility findings is stringent. Credibility findings are owed significant deference on appeal (*R. v. Gerrard*, 2022 SCC 13). Appellate intervention is not justified because of a difference of opinion with the judge or because of an error *simpliciter* by the judge. Rather, this Court must defer to the application judge's decision on credibility unless there is a palpable (plainly seen) and overriding (shown to have affected the result) error (*Housen*, at para. 20, and *Courtney v. Cleary*, 2010 NLCA 46, 299 Nfld. & P.E.I.R. 85, at para. 15, citing *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at para. 74).

[145] Whether habitual residence is viewed as a question of fact or a question of mixed fact and law, this Court must defer to the application judge's decision on a child's habitual residence, absent palpable and overriding error (*Balev*, at para. 38). Ginsburg J., delivering the opinion for the United States Supreme Court in *Monasky*, indicated, at 730, a more deferential standard of review to the question of a child's habitual residence, "The habitual-residence determination [under the *Convention*] thus presents a task for fact-finding courts, not appellate courts, and should be judged on appeal by a clear-error review standard deferential to the fact-finding court".

[146] Interpretation of the *Convention* is a question of law reviewed for correctness (*O.M. v. E.D.*, 2019 ABCA 509, at para. 15).

[147] Determining whether there was a duty to exercise *parens patriae* jurisdiction is a question of law reviewed for correctness (*Nova Scotia*

(Community Services) v. N.N.M., 2008 NSCA 69, at para. 37, citing *Beson v. Director of Child Welfare (Nfld.)*, [1982] 2 S.C.R. 716, at 724).

[148] The issues of admissibility of the medical chart and limitation on testimony from David Philpott are questions of law reviewed for correctness (*R. v. Samaniego*, 2022 SCC 9, at para. 25).

[149] Misapprehending the evidence, or ignoring relevant evidence engages findings of fact and factual inferences, to which the standard of palpable and overriding error applies (*Cooper v. Cooper*, 2001 NFCA 4, 198 Nfld. & P.E.I.R. 1, at paras. 9 -10, and *R. v. Sullivan*, 2020 NLCA 5, at para. 11).

[150] Apprehension of bias must be established on a balance of probabilities (*A.H. v. R.B.*, at paras. 47-59).

ANALYSIS

Erred in assessment of witness credibility

[151] The mother alleges that the applications judge failed to apply proper legal principles in her assessment of credibility, and instead, wholeheartedly accepted the father's testimony. The mother makes a general allegation that the applications judge ignored her testimony:

> [T]he trial judge … was as deaf to the Respondent's falseness as she was to the Appellant's truthfulness and sincerity. The trial judge was aided in her deafness by her rulings excluding much of the evidence the Appellant proffered …
>
> (Appellant's Factum, at paras. 47 - 48)

[152] In the examples provided by the mother in support of her argument, the reasons of the applications judge (mid-trial and final) reveal that the judge carefully considered and weighed the testimony of both parties. The examples included four circumstances where the judge excluded or limited evidence and five circumstances where the judge made factual findings.

[153] In three of the four circumstances that involved exclusion or limitation of evidence, the applications judge heard submissions from both sides and then provided reasons to explain her ruling. Each ruling was based on application of proper legal principles; credibility was not a factor. The fourth circumstance (letter regarding V's extra-curricular activities in St. John's) was not the subject of a court ruling. There was discussion, mostly among counsel, about admission of various letters dealing with these extra-curricular activities (Transcript

October 4, 2021, at 130 to 136) but the applications judge was not asked to make any ruling on admissibility. My colleague, in her majority reasons, points out that a letter from V's St. John's piano teacher was not admitted into evidence. That is one of the letters included in the discussion among counsel, and for which no ruling on admissibility was sought from, or made by, the applications judge. In any case, the mother's testimony that V attended piano lessons in St. John's was accepted by the applications judge (para. 68(nn)).

[154] In the five fact-finding circumstances that the mother gives (reproduced below), the written reasons of the applications judge do not support the mother's claim that there was an error in the credibility assessment:

- V's primary caregiver – the applications judge made no adverse credibility ruling against the mother regarding primary caregiver and accepted that the mother spent more time with V than the father (paras. 85 and 87);

- Victim of emotional and psychological abuse – the applications judge's statement that "the emotional abuse which [the mother] described was not directed at V" (para. 143) implicitly indicates that she considered the mother's testimony of abuse but felt that it was not directly relevant to the issues before the court;

- Legitimacy of mother's concern for V if exposed to the father's sole care for a substantial length of time – the applications judge discussed this concern in her reasons, and ultimately rejected argument that "V would be at grave risk of psychological harm or be placed in an intolerable situation if she were to be returned to Boston in her father's care" (para. 144);

- Legitimacy of the mother's fear of returning to Boston – the applications judge made no adverse credibility ruling on this testimony from the mother; and

- The mother's concern about the father's habit of sleeping in the nude, considering that V would occasionally come into their bed at night for comfort – the applications judge accepted the mother's testimony that the father generally slept in the nude, but rejected the mother's affidavit evidence to the extent that it may have implied some impropriety, "In my view, this [use of word 'encouraged'] was a weak attempt [by the mother] to establish a grave risk of harm" (para. 125).

[155] I acknowledge that the applications judge made credibility assessments against the mother in other parts of her decision; however, there was no misapplication of legal principles and there was adequate evidence supporting the conclusions made.

[156] The judge rejected the mother's testimony that she had not agreed to return to Boston with V on August 16, 2021. That assessment was based on an audio recording of a phone call in which the mother confirmed to the father, "Yeah, we agreed that after your golf tournament [I will return to Boston with V] … your golf tournament is, I don't know, August 13th" (Appeal Book, at 173). The golf tournament began Friday August 13 and ended Sunday August 15. The mother was not disputing that she had agreed to return to Boston sometime after the golf tournament, but she was disputing that she had agreed to return on the exact date of August 16. The judge inferred from the audio-recorded statements of the mother that she had agreed to that exact date. This was not an unreasonable inference.

[157] The judge rejected the mother's testimony that the father was abusive in his text messages to her. The judge reviewed these text messages (1239 pages) and had a different impression, "I did not find any evidence that [the father] expressed himself in a threatening or abusive manner to [the mother] in their text communications covering the period from April 27, 2019 to September 6, 2021" (para. 126). This is a reasonable conclusion based on the evidence.

[158] The judge rejected the mother's testimony that the father was angry and yelling during a July 29, 2021 telephone call. The judge listened to the audio recording of the call and found, "[the mother's] perception of the … tone of the recorded phone call is inconsistent with the objective evidence" (para. 130). This is a reasonable conclusion based on the evidence.

[159] The judge observed, without specifically rejecting the evidence, that there were internal inconsistencies in some testimony from the mother:

- "… [the mother's description of] V in the year prior to departing for St. John's … is in contrast to the picture she painted in trying to establish the risk of emotional harm should V be required to return to Boston" (paras. 133-134).

- "I find it significant that V would seek out the comfort of her father during the night. It contrasts with the narrative [the mother] advanced in her evidence regarding V's relationship with [the father]" (para. 140).

[160] The credibility assessments of the applications judge were supported by evidence. Some of the evidence is open to debate, but the applications judge was in the best position to assess credibility and reach the conclusions she did, looking at all the circumstance. There was no palpable and overriding error and, accordingly, the credibility findings of the applications judge are entitled to deference from this Court.

[161] I add that the credibility assessments did not have a significant impact on the determination of habitual residence. As the judge noted, “While there were some discrepancies in both of their evidence, the majority of the factors which were relevant for my consideration in determining habitual residence were not dependent on either party's credibility” (para. 132).

Erred in determination of V’s habitual residence under the *Convention*

[162] The test for determination of the habitual residence under the *Convention*, known as the hybrid test, was established by the Supreme Court of Canada in *Balev*. In simple terms, the test examines the entirety of the child's situation in the two competing jurisdictions, and considers all relevant factors. Parental intention is only one of the many relevant factors to consider. Prior to *Balev*, the test for determination of habitual residence focused on parental intention.

[163] The mother argued that the applications judge erred by focusing on parental intention and failing to properly apply the hybrid test. In addition, the mother says that the judge erred by failing to compare V’s links to the USA “immediately before” the alleged wrongful retention of V in Canada. Article 3 of the *Convention* references the state in which the child was habitually resident “immediately before” the removal or retention.

[164] The applications judge correctly stated the hybrid test, and acknowledged in her reasons that parental intention was only one of the many relevant factors to consider. She stated:

> [18] Determination of habitual residence is guided by *Balev*. The Supreme Court of Canada adopted a "hybrid approach" to determining habitual residence, which seeks to balance the previously dominant "parental intention" approach against a "child-centered" approach. The hybrid approach considers parental intention as one factor among others relevant to questions of habitual residence. *Balev* states that "all relevant links and circumstances" are to be considered, which includes the child's links to Country A, the circumstances of the move from Country A to B, and the child's links to Country B.

[165] The applications judge recognized that the hybrid test included an examination of the focal point of V’s life “immediately before” the alleged wrongful retention in Canada:

> [17] In order to determine whether the retention is wrongful under the *Hague Convention*, the Court must first determine the child's habitual residence immediately before the removal or retention.

…

[74] Referring to the hybrid approach in *Balev*, the court at paragraph 27 noted that 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 along with consideration of all of the relevant links and circumstances of the child's move from one country to the other, and the child's links and circumstances in each country.

[166] The judge discussed the factors to consider when applying the hybrid test, as set out in *Balev* and subsequent cases, when determining habitual residence:

[19] *Balev* at paras. 44-45 instructs the court, when determining habitual residence, to consider:

- The duration, regularity, conditions and reasons for the child's stay in a country;
- The child's nationality;
- The age of the child and the relationship to primary caregivers; and,
- The circumstances of the child's parents including parental intentions.

[20] Subsequent cases have, when applying the *Balev* test for habitual residence, cited the following factors:

- Whether a stay in a foreign jurisdiction was intended to be temporary;
- Whether parents moved their belongings to the foreign jurisdiction;
- Whether the parents had real property in the foreign jurisdiction;
- Whether the children were enrolled in school in the foreign jurisdiction;
- Whether the children were receiving social services, like health care coverage;
- The nature of the children's extended family and social environments in each jurisdiction;
- The length of time the children spent in each jurisdiction;
- The preferences of the children;
- The citizenship of the parents and children;
- Whether one of the parents are the primary caregiver;
- Whether the child had doctors, therapists, medical or dental care professionals in each jurisdiction; and,
- Whether the parents were employed in their respective jurisdictions.

[21] *Balev* indicates that no one factor is determinative and that each must be analyzed in the totality of the circumstances. If the court finds that the child's habitual residence is a foreign jurisdiction, it must order the child's return unless one of the *Hague Convention* exceptions applies.

…

> [67] *Balev* at para. 43 states that "all relevant links and circumstances" are to be considered, which includes the child's links to Country A, the circumstances of the move from Country A to B, and the child's links to Country B.
>
> …
>
> [75] The court [in *Knight v. Gottesman*, 2019 ONSC 4341] noted further at paragraphs 28-30:
>
> > 28 Under the hybrid approach, instead of focusing primarily on either parental intention or the child's actual acclimatization, the judge determining habitual residence must look at all relevant considerations arising from the facts of the case.
> >
> > 29 Considerations include but, are not limited to, the duration, regularity, conditions, and reasons for the child's stay in a member state and the child's nationality. No single factor dominates the analysis, rather the application judge should consider the entirety of the circumstances: *Balev* at para. 44. The hybrid approach is "fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions": *Balev* at para. 47. 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.
> >
> > 30 Although the hybrid approach requires the court to consider all the circumstances, the court emphasizes that it is the habitual residence of the child at the time immediately prior to the wrongful removal or retention that is relevant.

[167] In applying the hybrid test, the applications judge reviewed relevant factors emanating from the evidence, corresponding to the factors identified in the *Balev* and post-*Balev* court decisions. The parental intention was among the factors reviewed by the judge, appropriately, considering that the activities of a seven-year-old child are substantially determined by the intentions of her parents. The parental intention, as of July 2020 when the mother and V travelled to St. John’s, was to raise V at the marital home in Boston. The trip to St. John’s in July 2020 was planned as a short-term family visit to the maternal grandparents. It was appropriate and necessary for the applications judge to acknowledge and give weight to parental intention and there was no error in the judge’s reliance on parental intention as a factor. The judge correctly pointed out that “no one factor is determinative and that each must be analyzed in the totality of the circumstances” (para. 21). The judge reviewed and weighed many other factors, besides parental intention, in determining V’s habitual residence. The weight assigned to these various factors was within the discretion of the applications judge.

[168] Other factors, or links, for the USA, that were referred to, among others, by the applications judge, included:

- V was born in Boston in 2014 (para. 30);
- V lived in Boston, residing in the marital home (a condominium), her entire life prior to the trip to Newfoundland on July 25, 2020 (paras. 30, 40 and 68);
- Most of V's personal belongings remain at the condominium in Boston (para. 68);
- V has a dual citizenship, American and Canadian (para. 68);
- V attended the Boston City Employees Daycare from 2014 to 2017 (para. 41);
- V attended pre-kindergarten in Boston from 2017 to 2019 (para. 41);
- V attended Gardner Pilot Academy in Boston for Kindergarten during the 2019/2020 school year (para. 41);
- V was enrolled in Grade One at Gardner Pilot Academy in Boston for the 2020/2021 school year, and participated in one virtual instruction, despite also attending an elementary school in St. John's (paras. 56, 57 and 68);
- V will have the same cohort of classmates at Gardner Pilot Academy in Boston until grade 8 (para. 42);
- V was enrolled in dance, piano, swimming, and tennis lessons in Boston until the pandemic was declared (para. 68);
- V is enrolled in piano lessons at the Brookline Music School in Boston, which she has attended remotely while in Newfoundland (para. 68);
- V has hip dysplasia and was followed by a pediatrician in Massachusetts (para. 43);
- V was seen regularly by a dentist and an optometrist in Boston (paras. 44 and 68);
- V's medical insurance is through the City of Boston, which runs Boston Public Schools, the mother's employer (para. 35);
- V has friends in Boston, some of whom she maintained FaceTime contact with while in Newfoundland (para. 68);
- V is very close to her aunt, the mother's sister, who lives in Boston (para. 68); and
- Each summer and Christmas V visits her paternal grandparents in Orlando, USA (para. 46).

[169] Factors, or links, for Canada, that were referred to, among others, by the applications judge, included:

- V resided with her maternal grandparents while in St. John's since July 25, 2020 (paras. 61 and 68);
- V has a dual citizenship, American and Canadian (para. 68);

- V attended grade one an elementary school in St. John's during the 2020/2021 school year (paras. 56 and 68);
- V was enrolled in golf, tennis, voice, piano and horseback riding in St. John's (para. 68);
- V has been seen by a dentist, an optometrist, and a family physician while in St. John's (para. 68);
- V has a close relationship with her maternal grandparents in St. John's (para. 68);
- V has a close relationship with her cousins in St. John's (para. 68);
- V was enrolled in the Newfoundland and Labrador Medical Insurance Plan for a period of one year (para. 68); and
- In years past, V visited with her maternal grandparents in St. John's each summer and Christmas (paras. 46 and 68).

[170] There were other factors considered by the applications judge, such as the amount of parenting by each party, and the circumstances of the move from Boston to St. John's.

[171] The judge found that the parties were jointly parenting, "… each of the parties were actively engaged in parenting V" (para. 86). The judge found that the mother spent more time parenting compared to the father and that would be one of the factors to consider in determining V's habitual residence (para. 87). The judge listed several circumstances surrounding the move from Boston to St. John's, noting that it was a visit to the grandparents that was extended due to the pandemic (para. 68).

[172] A few of the factors considered by the applications judge pre-dated the July 2020 visit to Canada, and, arguably, were outside the period "immediately before" the alleged wrongful retention of July 30, 2021. Article 3 of the *Convention* makes specific reference to this period, "immediately before", when determining habitual residence.

[173] The context of the current matter is unique in that V's presence in Canada until July 30, 2021 was intended as a temporary arrangement to allow in-person schooling during the pandemic. During that temporary arrangement, V maintained continuing links with the USA, which clearly fall within the period "immediately before". These links included frequent communications with her father by FaceTime while he remained at the marital home in Boston, most of V's personal belongings remained in the marital home, V's piano lessons with the Brookline Music School continued (albeit with the instructor participating remotely from California), V's registration at Gardner Pilot Academy in Boston for the 2020/2021 school year was maintained to hold her place, V maintained

contact with her friend in Boston by FaceTime, and V's aunt with whom she had a close relationship remained in Boston.

[174] In addition to these continuing links to the USA, the applications judge considered factors surrounding the family and social environment in which V's life has developed and the circumstances of V's move to Canada from the USA. These other factors may not all fall within a narrow interpretation of the period "immediately before" the alleged wrongful retention. However, these other factors were still required considerations under the hybrid test set out in *Balev*, "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" (para. 43). It is an examination of the entirety of the child's situation, and not a static snapshot view using the days or weeks immediately preceding the alleged wrongful retention. This scope of examination is consistent with *O.M. v. E.D.*, where a unanimous panel of the Alberta Court of Appeal found that the lower court had erred in failing to consider Canada as a habitual residence because the child had left Canada seven months earlier, and therefore the links to Canada may have been outside the period "immediately before". The Court found "this was an erroneous application of the Supreme Court's directions in *Balev*" (para. 22).

[175] I conclude that the applications judge correctly set out and applied the hybrid test from *Balev*, in her discretionary exercise of weighing the evidence. There was no palpable and overriding error and the application judge's determination of V's habitual residence is entitled to deference.

Erred in interpretation of article 13(b) of *Convention*

[176] Article 13(b) of the *Convention* provides an exception for a return order where there is a grave risk that return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. The mother was not alleging a risk of physical harm, but was alleging a risk of psychological harm. The applications judge rejected this argument and found that the mother had failed to establish that the article 13(b) exception was engaged.

[177] The mother submits that the applications judge erred by interpreting article 13(b) too narrowly. The mother says, "… it is so obvious [that] a strict interpretation of article 13 of the *Hague Convention* will result in a miscarriage of justice …" (Appellant's Factum, at para. 96).

[178] There is no merit in this argument that article 13(b) was misinterpreted.

[179] The wording of article 13(b) sets a high threshold – "grave risk" or "intolerable situation". In *Thomson*, at 597, LaForest J., writing for the majority, adopted words from Lord Justice Nourse in *Re A. (A Minor) (Abduction)*, [1988] 1 F.L.R. 365 (Eng. C.A.), interpreting article 13(b):

> ... 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 …

[180] The applications judge relied on that interpretation of article 13(b) from *Thomson* (paras. 24 and 97). *Balev* and post-*Balev* authorities have not altered that interpretation of article 13(b).

[181] The applications judge reviewed in detail the evidence presented by the mother (paras. 109 - 125) and concluded that the evidence did not establish that V would be at grave risk of psychological harm or be placed in an intolerable situation if she were returned to Boston:

> [143] Having considered all the evidence, I am not satisfied that [the mother] has met the stringent threshold described in *Thomson*, for a finding of a grave risk of harm or intolerable situation …

[182] In reviewing the evidence the applications judge noted several indications that contradicted the mother's arguments regarding the risk of psychological harm if V was returned to Boston:

- The mother's proposed parenting plan included significant unsupervised parenting time for the father;
- The mother had no issues in the past allowing V to travel with her father alone;
- A mental health professional who had provided counselling services to the mother over several years testified that she had never made a report to authorities concerning risk of harm to V, despite a legislated obligation to make such a report if any such risk was disclosed;
- The mother had never made a report to authorities concerning risk of harm to V; and
- The mother had never feared physical abuse at the hands of the father and never called police or child protection services regarding abuse of V.

[183] I agree that V could be exposed to risk of psychological harm if she were removed from the mother's care and thrust into that of the father, considering

that the mother alone has been parenting V since June 2021. That risk of harm would only arise if the mother refused to accompany V on return to Boston, and refused to continue parenting V once back in Boston. In her decision the applications judge addressed that risk indirectly, by providing the option for the mother to accompany V on return to Boston, for the father to vacate the marital home, and for V to reside in the marital home with the mother pending resolution of their parenting and other matrimonial issues (para. 149). That option was not imposed as an order of the court because the applications judge believed she did not have the jurisdiction to make such an order. In fact, there is jurisdiction to impose transitional measures by court order under the *Convention*, and that can be done in the disposition of this appeal.

[184] I conclude that there was no error in the interpretation or application of article 13(b). The applications judge applied the correct interpretation and made a finding of fact that the evidence did not establish grave risk that return would expose V to psychological harm or otherwise place her in an intolerable situation (para. 28).

Erred in failing to exercise *parens patriae* jurisdiction

[185] The mother argues that the applications judge erred in failing to exercise the *parens patriae* jurisdiction of superior courts to act in the best interests of V.

[186] This argument, in essence, suggests that the applications judge was obliged to ignore the *Convention*, and proceed as if this was a hearing to decide parenting, where incidents of custody of and access to V are determined on the basis of the best interests of the child. This was not a hearing to decide parenting; the hearing under the *Convention* determines in which jurisdiction parenting should be determined. As pointed out in *Balev*, the *Convention* still protects the best interests of the child, but does so by mandating return to the jurisdiction of habitual residence where the parenting determination can be made:

> [34] … The *Hague Convention* does this [protects the best interests of children] by mandating the return of a child to the place of his or her habitual residence (Article 3) so that a custody determination may be made in that place …

[187] In *Batten*, at para. 51, Mayer J. also recognized this distinction, " … in the context of a *Convention* application Canadian courts are not to consider the best interests of a child in the same manner as in a custody hearing …".

[188] I would conclude that the applications judge applied the correct analysis under the *Convention* and made no error in relation to the Court's *parens patriae* jurisdiction.

Erred in failing to obtain views and preferences of V

[189] Under article 13 of the *Convention* the court may refuse to order the return of a 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 his or her views. The possibility of applying article 13 and seeking V's views and preferences – whether or not she objects – was not raised at the hearing below. The mother made no request. That is understandable because V was only seven years old at the time, and had not attained an age or degree of maturity at which it is appropriate to take account of her views. Where a child has not attained an age and degree of maturity which makes it appropriate to take her views into account, then this 'child objection' exception in article 13 has no application, *Silva v. da Silva*, 2018 BCSC 788, at para. 39. Considering V's young age, and the absence of any request by the mother, the applications judge had no duty to obtain V's views and preferences.

[190] I would find that there was no obligation in this situation to obtain the views and preferences of V, and accordingly, no error in failing to obtain those views and preferences.

Erred in denying admission into evidence of mother's medical records

[191] The mother attempted to enter her medical records from Massachusetts General Hospital as evidence. The chart included records of social workers who provided domestic abuse counselling services to the mother, and records and opinions of health professionals. The mother argued these records were relevant to her credibility because they could corroborate testimony about her being the victim of emotional abuse, and, by extension, corroborate evidence that V was at grave risk that return to Boston would expose her to psychological harm. The applications judge ruled that the medical records were inadmissible due to lack or relevance, and hearsay content. The mother says this was an error.

[192] In denying admission of the medical records the applications judge focused on lack of relevance, concluding that there was no benefit to admitting medical records when they cannot speak to the truth of their contents, and cannot assist in assessing grave risk and intolerable situation *vis-à-vis* V. In her oral reasons, the judge stated:

> … [The mother] can testify as to what she stated to the social workers or what she observed while her husband attended her treatments and consultations with doctors. There is no benefit to admitting medical records when they cannot speak to the truth of its contents.
>
> The second issue relates to relevance. [The mother] submits that the records are necessary to establish her case that if [V] is to be returned to Boston that there is a grave risk that her return would expose the child to psychological harm or otherwise places the child in an intolerable situation.
>
> I fail to see how these records of [the mother's] treatment can establish that the child, not the mother, will be exposed to psychological harm or otherwise be placed in an intolerable situation. [The mother] can testify as to her relationship with her husband. She has not established that there can be anything of relevance to the child in the mother's medical records, which could assist in the evaluation of the grave risk and intolerable situation question.
>
> Therefore, the records do not meet the test of admissibility pursuant to the [*Ares*] exception of the hearsay rule. Nor do they meet the requirement of relevance so will not be admitted.
>
> (Transcript, October 6, 2021, at 5-6)

[193] These reasons illustrate that the applications judge saw no value to reviewing medical records documenting what the mother told social workers, counsellors, and doctors in deciding on the issue of V's habitual residence, or evaluating the grave risk and intolerable situation question under the article 13(b) exception of the *Convention*. That is a reasonable conclusion.

[194] I agree with the mother's submission that the medical records could meet the test of admissibility pursuant to *Ares*, if they were authenticated. The *Ares* exception to the hearsay rule permits a party to introduce medical records into evidence as *prima facie* proof of the truth of the facts recorded by the maker of the record. In order to introduce the record into evidence it is only necessary to call a witness to testify to the authenticity of the record, the manner in which it is made, and the duty to record the facts set out therein (*Wright v. Sun Life Assurance Company of Canada*, 2019 BCCA 18). The applications judge had concerns here about authenticity because the medical records had not been certified and no keeper of the record was available to testify, "The documents have not been proven as the medical records of [Massachusetts General Hospital]; they were sent to [the mother] and do not constitute a certified copy of the hospital records" (Transcript, October 6, 2021, at 2). However, even if the hospital chart had been certified or otherwise authenticated and entered under

the *Ares* exception to the hearsay rule, the medical records were still properly excluded based on the applications judge's conclusion on lack of relevance.

[195] Three factors noted by the applications judge support this lack of relevance. First, the mother testified about her counselling sessions with social workers regarding emotional abuse, and her interactions with doctors regarding cancer treatment. The admission of medical records would have added little to her testimony. Second, while the medical records would have been admissible for the truth of the facts recorded, they could not be used to prove the opinions recorded. Third, the medical records would not assist the court in the evaluation of the "grave risk" and "intolerable situation" if V was returned to Boston.

[196] I add that the testimony that the mother was seeking to corroborate through these medical reports, that she was the victim of some level of domestic emotional abuse, was not rejected. The applications judge reviewed, in much detail (paras. 103 - 125) the evidence of alleged abuse and observed that, while it may be that the father was emotionally abusive, it was not evident in the text messages that he sent to the mother. After her detailed review of that evidence the judge accepted "the parties had a difficult relationship" (para. 142), and concluded, "[t]he emotional abuse which [the mother] described was not directed at V" (para. 143).

[197] To the extent that there was an error in consideration of the *Ares* exception to the hearsay rule, I conclude that it had no impact on the outcome because the records were properly excluded for lack of relevance.

Erred in limiting testimony of David Philpott

[198] The mother argued that the applications judge erred by restricting Doctor David Philpott from offering observational opinions as a lay witness. I would reject that argument because the questions from the mother's counsel sought opinions that required the expertise of a trained psychologist. I find no error by the applications judge in limiting Dr. Philpott's testimony to his factual observations.

[199] Dr. Philpott has a Ph.D. in psychology; he is a child development specialist and offers consulting service for healthy child development. He was not called as an expert witness and was not qualified as an expert witness. He was called as a lay witness who had opportunities to observe the mother, the father, and V, during social occasions as a friend of the family.

[200] The father objected during the examination-in-chief of Dr. Philpott, on the basis that the questioning by mother's counsel engaged opinions based on Dr. Philpott's expertise in psychology and child behavior. The questions of concern involved recommended strategies in managing attention deficit disorder for children and inattentiveness at school, and opinions about V's emotional reaction when in the presence of the father. After hearing submissions on the objection the applications judge limited Dr. Philpott to his factual observations. The applications judge stated:

> … we proceed … on the *caveat* that we do not want Dr. Philpott going into anything other than factual observations and no opinions or trying to draw conclusions as to the basis for the observed behavior …
>
> (Transcript, October 8, 2021, at 109)

[201] There are limited areas where a lay witness is permitted to offer opinion evidence, such as for basic subjects like degrees of light, sound, weight, and distance, as well as a person's appearance, identity, or manner of conduct. These areas of permitted opinion from lay witnesses flow logically from *Graat*. In that decision Dickson J. (as he then was), writing for a unanimous Court, at 837, noted that a lay witness may provide opinion evidence in areas where specialized knowledge is not required to form the opinion, such as a person's apparent age or emotional state.

[202] The areas where the mother sought to question Dr. Philpott were outside these basic subject areas and involved opinions about matters coming within his specialized knowledge as a child psychologist. This parallels to the situation in *Compton v. Toyota Canada Inc.,* 2019 NLCA 79, where O'Brien J.A., writing for a unanimous panel, found, "the evidence related to matters outside 'common ordinary knowledge and experience', it was expert opinion evidence which was inadmissible [as lay opinion evidence]" (para. 98).

[203] I conclude that the applications judge made no error in limiting the testimony of Dr. Philpott to his factual observations.

Erred in misapprehending or ignoring relevant evidence in making findings of fact

[204] The mother says that the applications judge erred in misapprehending or ignoring relevant evidence in making findings of fact. The mother offered the following four examples:

- Judge ignored or gave little weight to calendars on which mother had recorded family activities and appointments;
- Judge ignored an audio recording of a November 5, 2016 conversation in which the father raised the possibility of divorce;
- Judge gave no weight to a photo of the father wearing headphones and looking at his iPhone during the mother's chemotherapy; and
- Judge ignored credit card statements tendered to refute the father's testimony that he did most of the grocery shopping.

[205] I address each example in order.

Calendars

[206] The mother's objective in tendering the calendars was to support argument that the father was often away for golf trips and business trips, leaving her in the role of primary parent. The judge referred to the calendars (para. 80) and accepted the mother's testimony that she spent more time with V than the father (para. 85). The Court did not ignore this evidence. It is possible, that the judge gave less weight to the calendars, compared to the *viva voce* evidence from the parties. That would be reasonable considering that the mother agreed that the calendars might have contained errors (Transcript, October 7, 2021, at 94).

Audio recording

[207] The mother tendered as evidence an audio recording from a November 5, 2016 conversation between her and the father to illustrate "the selfishness and anger of the [father], and the anxiety it produced in V" (Appellant's Factum, at para. 119). The conversation occurred less than two weeks after the mother had surgery for treatment of cancer. In the conversation, the father complains about the amount of time that the mother spends on the telephone and the lack of respect that she shows toward him. At one point the father says, "I'm ready to file for divorce". It was a tense conversation of about five minute's duration; it occurred in V's presence. The father admitted participating in the conversation because he recognized his voice, but he denied recall of the conversation. The applications judge in her reasons did not mention this conversation.

[208] The conversation was a small part of a complex picture, and occurred more than five years prior. The relevance was marginal. The failure by the applications judge to mention the conversation in her reasons does not open the door to a redetermination of the facts by this Court and does not support error through misapprehension of, or a failure to consider, evidence. A judge is not

required to refer to every piece of evidence when explaining his or her reasons (*R. v. Krawchuk*, [1941] 2 D.L.R. 353, 75 C.C.C. 219, at 376 (S.C.C.), *Ambrose v. The Queen*, [1977] 2 S.C.R. 717, at 723 - 724, and *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, at para. 10).

Photo of the father wearing headphones

[209] The mother tendered as evidence a photo that she took of the father while he was sitting with her during her first chemotherapy treatment. In the photo, the father is wearing headphones and looking at his iPhone. The relevance is marginal. As with the audio recording discussed above, the failure by the applications judge to mention the photo in her reasons does not support error through misapprehension of, or a failure to consider, evidence.

Credit card statements

[210] The mother tendered the credit card statements to show that she was spending around $1,000 per month on groceries, and to disprove the father's testimony that he was doing most of the grocery shopping. This was a relatively minor point of questioning during the hearing, with each party acknowledging doing a share of grocery shopping, but debating the exact percentage share. The father testified on direct that he did 85% of the grocery shopping but changed that on cross-examination to 50%. The relevance is marginal. As with the audio recording and photo discussed above, the failure by the applications judge to mention the credit card statements in her reasons does not support error through misapprehension of, or a failure to consider, evidence.

[211] I find no error based on misapprehension of evidence, or a failure to consider relevant evidence.

Apprehension of bias

[212] The mother maintains that the cumulative effect of the conduct and interventions by the applications judge during the hearing gave rise to an apprehension of bias.

[213] In *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 111, Cory J., adopting comments by de Grandpré J. from *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at 394, set out the test to be met to demonstrate that the conduct of a judge gives rise to a reasonable apprehension of bias:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. ... [The] test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude...."

[214] The test is an objective one. The record must be assessed in its totality and the judge's conduct and interventions complained of must be evaluated cumulatively rather than as isolated occurrences.

[215] The mother raised apprehension of bias at the hearing below when the applications judge intervened during her cross-examination of the father; the mother raised this example and others to support her argument on bias (Appellant's Factum, at para. 125).

[216] When the judge intervened during cross-examination of the father, it was to note the lack of relevance to the line of questioning. The mother's counsel was posing questions concerning the parenting issue, which was not the issue before the Court. Indeed the role of a judge in considering an application under the *Convention* is to disengage from the parenting issue *per se*, where a best interests of the child analysis would otherwise apply. The applications judge's comment to counsel, reminding her of this fact, did not create any apprehension of bias. As evident from the judge's intervention, she was not limiting the mother's right of cross-examination; she was reminding counsel that this was not a hearing to decide the parenting issues, and that questions addressing the merits of the parenting issue were not relevant:

> … I am not going to limit you. It is just that I do not want to be spending time dealing with the merits of the parenting and the roles of the couple unless it relates specifically to the question which I am to decide, which is [V's] habitual residence. And there are times that we are going off course … or you are going to an area that is not entirely clear to me that relates to the issues that are before the Court, that they may be extraneous. That is all I am pointing out. I have not prejudged this matter in no way.
>
> (Transcript, October 1, 2021 at 80)

[217] The other examples to support apprehension of bias that were raised in the mother's factum mostly related to adverse evidentiary rulings, such as excluding, or assigning a lower weight, to evidence.

[218] The evidentiary rulings were made after hearing submissions from both sides; there were no reviewable errors in those rulings. On its own, the fact that a higher number of evidentiary rulings went in favour of one party is irrelevant.

[219] The mother ends her submissions on bias with the bald accusation that the applications judge "on numerous occasions throughout the trial teamed with the [father's] counsel in arguing points against the [mother]" (Appellant's factum, at para. 125). There were no specific examples, or cross-references to examples, provided. The accusation has no merit.

[220] Assessing the record in its totality, and the applications judge's conduct and interventions cumulatively, there is no indication that the judge stepped over the line between her legitimate role of trial management and guidance and improper interference with normal hearing process. An informed person, viewing the matter realistically and practically — and having thought the matter through — would conclude that the conduct of the hearing reflected a fair process.

[221] I reject the allegation of apprehension of bias.

CROSS-APPEAL

[222] The father's cross-appeal challenges the costs award and seeks full indemnity of legal costs and expenses in the Court below. The applications judge had allowed only party and party costs based on column 3.

[223] An award of costs is discretionary and deference is owed, absent an error in principle, *F.F.R. v. K.F.*, 2013 NLCA 8, 332 Nfld. & P.E.I.R. 262, at para. 67. Article 26 of the *Convention*, in using the word "may", reinforces the discretionary nature of the costs award, "… the judicial … authorities may, where appropriate, direct the person who … retained the child … to pay necessary expenses incurred ...". The applications judge explained her reasoning to deny full indemnity of legal costs and expenses. There was no error in the costs award, and I would dismiss the cross-appeal.

SUMMARY

[224] I would dismiss the appeal, and the cross-appeal, on the basis that the applications judge made no reviewable errors, and there was no apprehension of bias.

[225] I would order the mother to effect V's return to Boston, Massachusetts, no later than 30 days following the father's confirmation of the undertakings set out below (para. 232) as transitional measures. Communication of this confirmation shall be by email or letter from the father to mother's counsel.

[226] I would award the father party and party costs for the appeal, based on column 3.

TRANSITIONAL MEASURES

[227] Arising from *Thomson* and the preamble of the *Convention* that "the interests of children are of paramount importance", the courts have jurisdiction to impose transitional measures to minimize the harmful effect of a possible abrupt change in a child's life. This is accomplished through imposition of undertakings, as discussed by LaForest J., writing for the majority in *Thomson*, at 599:

> … Through the use of undertakings, the requirement in Article 12 of the *Convention* that "the authority concerned shall order the return of the child forthwith" can be complied with, the wrongful actions of the removing party are not condoned, the long-term best interests of the child are left for a determination by the court of the child's habitual residence, and any short-term harm to the child is ameliorated.

[228] In *Finizio*, MacPherson J.A., writing for a unanimous panel of the Ontario Court of Appeal, imposed undertakings while ordering return of a child to Italy. He relied on *Thomson* as authority:

> [36] … the Supreme Court of Canada [in *Thomson*] indicated that Canadian courts can impose undertakings on parties to deal with the transition period between the time when a Canadian court makes a return order and the time at which the children are placed before the courts in the country of their habitual residence …

[229] Both parties acknowledged this Court's jurisdiction to impose undertakings for the transition period, but each had different proposals for the undertakings, should the appeal be dismissed.

[230] The mother's proposal for the transitional measures was that there be joint legal custody; that V remain in Canada with her until the USA court hearing on parenting; that there be open communications for V to contact the father by Zoom, FaceTime or telephone; and that the father have exclusive parenting of V alternating weekends plus one overnight during the week should he agree to remain in Canada. The mother agreed to provide an undertaking that she would accompany V on return travel to the USA for the parenting hearing.

[231] The father's proposal for the transitional measures was that there be joint legal custody; that he vacate the marital home in Boston to allow its exclusive use by the mother and V; that he have equal parenting time with V; and that the exchange of V shall occur at a public venue near the marital home.

[232] The mother's proposal that V remain in Canada is inconsistent with article 12 of the *Convention*, which directs the court to "order the return of the child immediately". I reject the mother's proposal and instead order that the father abide by the following undertakings:

1. Vacate the marital home in Boston to allow exclusive use by the mother and V;
2. Not remove V from Massachusetts without the mother's consent;
3. Exercise exclusive parenting of V on alternating weekends (Friday after school to Monday morning) plus one overnight during the week, with pickup and drop off at school; and
4. Reimburse the mother, upon demand, for 50% of V's travel cost from St. John's to Boston.

[233] These undertakings would remain until the parenting issue for V is addressed before the courts in the USA.

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W. H. Goodridge J.A.