COURT OF APPEAL OF
NEW BRUNSWICK

COUR D'APPEL DU
NOUVEAU-BRUNSWICK

90-19-CA

J.M.

APPELLANT

- and -

I.L.

RESPONDENT

J.M.

APPELANT

- et -

I.L.

INTIMÉE

J.M. v. I.L., 2020 NBCA 14

CORAM:
The Honourable Justice Quigg
The Honourable Justice Green
The Honourable Justice Baird

Appeal from a decision of the Court of Queen's Bench:
July 19, 2019

History of case:

Decision under appeal:
2019 NBQB 153

Preliminary or incidental proceedings:
None

Appeal heard:
January 29, 2020

Judgment rendered:
March 12, 2020

Reasons for judgment by:
The Honourable Justice Quigg

Concurred in by:
The Honourable Justice Green

Dissenting reasons by:
The Honourable Justice Baird

J.M. c. I.L., 2020 NBCA 14

CORAM :
l'honorable juge Quigg
l'honorable juge Green
l'honorable juge Baird

Appel d'une décision de la Cour du Banc de la Reine :
le 19 juillet 2019

Historique de la cause :

Décision frappée d'appel :
2019 NBBR 153

Procédures préliminaires ou accessoires :
aucune

Appel entendu :
le 29 janvier 2020

Jugement rendu :
le 12 mars 2020

Motifs de jugement :
l'honorable juge Quigg

Souscrit aux motifs :
l'honorable juge Green

Motifs dissidents :
l'honorable juge Baird

Counsel at hearing:

For the appellant:
Céline Robichaud Fournier and
Michael J. Stangarone

For the respondent:
Monique Veillette and Sara Scaletta

THE COURT

The appeal is dismissed with costs of $2,500.

The cross-appeal is dismissed without costs.

Baird J.A., dissenting, would have allowed the appeal with costs of $2,500.

Avocats à l'audience :

Pour l'appelant :
Céline Robichaud Fournier et
Michael J. Stangarone

Pour l'intimée :
Monique Veillette et Sara Scaletta

LA COUR

L'appel est rejeté avec dépens de 2 500 $.

L'appel reconventionnel est rejeté sans dépens.

La juge d'appel Baird, dissidente, aurait accueilli l'appel avec dépens de 2 500 $.

The judgment of the Court was delivered by

QUIGG, J.A.

I. Introduction

[1] I have had the benefit of reading my colleague's reasons for decision. I agree with her synopsis of the facts and adopt them as such. In fact, the parties themselves do not differ much in their separate views of the background. Unfortunately, I do not agree with my colleague's conclusion that the application judge erred.

[2] In my view, the application judge did not make any palpable and overriding errors that would justify appellate intervention. The judge reviewed and applied the proper jurisprudence, *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398, 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.

[3] My colleague has also identified the correct standard of review. We part ways with respect to her considerations and observations of the application judge's analysis.

II. Issues

[4] In the Notice of Appeal, the father listed seven grounds of appeal, with the first ground containing 14 particular errors. This list was reduced to six categories in the father's written submission. In my view, the grounds of appeal can be summarized as follows:

a. Did the application judge err in law by failing to apply the hybrid approach to determine the child's habitual residence as outlined by the Supreme Court in *Balev*?

b. Did the application judge commit a palpable and overriding error by misapprehending the relevant facts and evidence of this case?

c. Did the application judge err in law in applying international jurisprudence?

d. Did the application judge err in imposing transitory measures following the *Hague Convention* hearing?

e. Can appellate courts award costs and disbursements arising from lower court proceedings when such relief was not requested in the original Application?

III. Standard of Review

[5] The standard of review in family matters dictates that trial judges' decisions must be given considerable deference (see *P.R.H. v. M.E.L.*, 2009 NBCA 18, 343 N.B.R. (2d) 100, at para. 8; *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014).

[6] Similarly, in cases relating to the *Convention on the Civil Aspects of International Child Abduction*, Can. T.S. 1983 No. 35 ("*Hague Convention*"), and specifically cases reviewing the determination of a child's habitual residence, this Court must defer to the trial judge's findings of the facts, unless a palpable and overriding error exists. In *Balev*, the Supreme Court states:

> Under Canadian law, whether habitual residence is viewed as a question of fact or a question of mixed fact and law, appellate courts must defer to the application judge's decision on a child's habitual residence, absent palpable and overriding error: see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 10, 25 and 36. The need for deference may be inferred from the intention of the original states parties (see Pérez-Vera, at p. 445) and the

> decision not to define habitual residence in the body of the *Hague Convention*. The goal was to avoid legal technicalities and to adopt a fact-based determination: see Pérez-Vera, at p. 445. [para. 38]

See also *Rifkin v. Peled-Rifkin*, 2017 NBCA 3, [2017] N.B.J. No. 49 (QL), at para 3.

[7] Furthermore, appellate courts have the authority to decide the issues rather than order a new trial. In *Beairsto v. Cook*, 2018 NSCA 90, [2018] N.S.J. No. 489 (QL), the Nova Scotia Court of Appeal reviewed the test utilized by a trial judge to determine the "habitual residence" of a child pursuant to the *Hague Convention*. The court determined the test used was not correct pursuant to *Balev* and ordered the child be returned to Nova Scotia. Rather than ordering a new hearing, the Nova Scotia Court of Appeal exercised its authority and decided the merits of the Application. Beveridge J.A. stated:

> The prevalent approach in Canada also appears to favour the appeal court to make the determination that was marred by legal error — whether it is about habitual residence or other issues of mixed fact and law — and decide the *Hague* application rather than order a new hearing (see *Ellis v. Wentzell-Ellis*, […] at paras. 16, 27; *Balev v. Baggott*, 2016 ONSC 55 at para. 38, overturned on different grounds by *Balev v. Baggott*, 2016 ONCA 680; *Pollastro v. Pollastro*, 118 O.A.C. 169 at para. 29; *Bačic v. Ivakić*, 2017 SKCA 23).
>
> However, appeal courts must still respect the applicable standard of review. This means that despite the application judge's legal error, the appeal does not morph into a hearing *de novo* or a re-hearing of the *Hague* application. An appeal court must defer to the factual findings and determinations of mixed fact and law that are untainted by error in law or principle (see *Office of the Children's Lawyer v. Balev*, […] at para. 38; *Hammerschmidt v. Hammerschmidt*, 2013 ONCA 227 at para. 5). [paras. 92-93]

[8] In my view, the trial judge did apply the correct test to determine the child's "habitual residence." As stated by the Supreme Court, "[t]he hybrid approach is 'fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions'" (*Balev,* at para. 47). No single fact is determinative. The trial judge considered the

entirety of the circumstances in deciding the matter and, as such, she did not commit a palpable and overriding error.

IV. Analysis

A. *Habitually resident – the hybrid approach*

[9] The term "habitually resident", in relation to a child, is not defined in the *Hague Convention*. In *Balev*, the Supreme Court adopted the "hybrid approach" as the proper manner to determine habitual residence. In that decision, McLachlin C.J.C. delineated factors to assist judges in their deliberations. At paras. 40-47, she explained the different historical approaches to determining habitual residence. She elaborated upon the "hybrid approach" as follows:

> On the hybrid approach to habitual residence, the application judge determines the focal point of the child's life — "the family and social environment in which its life has developed" — immediately prior to the removal or retention: Pérez-Vera, at p. 428; see also *Jackson v. Graczyk* (2006), 45 R.F.L. (6th) 43 (Ont. S.C.J.), at para. 33. The judge considers all relevant links and circumstances — the child's links to and circumstances in country A; the circumstances of the child's move from country A to country B; and the child's links to and circumstances in country B.
>
> Considerations include "the duration, regularity, conditions and reasons for the [child's] stay in the territory of [a] Member State" and the child's nationality: *Mercredi v. Chaffe*, C-497/10, [2010] E.C.R. I-14358, at para. 56. No single factor dominates the analysis; rather, the application judge should consider the entirety of the circumstances: see *Droit de la famille — 17622*, at para. 30. Relevant considerations may vary according to the age of the child concerned; where the child is an infant, "the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of": *O.L. v. P.Q.* (2017) C-111/17, (C.J.E.U.), at para. 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.
>
> It follows that there is no "rule" that the actions of one parent cannot unilaterally change the habitual residence of a child. Imposing such a legal construct onto the determination of habitual residence detracts from the task of the finder of fact, namely to evaluate all of the relevant circumstances in determining where the child was habitually resident at the date of wrongful retention or removal: see *In re R. (Children)*, [2015] UKSC 35, [2016] A.C. 76, at para. 17; see also *A. v. A.*, at paras. 39-40.
>
> The hybrid approach is "fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions": *Redmond v. Redmond*, 724 F.3d 729 (7th Cir. 2013), at p. 746. It requires the application judge to look to the entirety of the child's situation. While courts allude to factors or considerations that tend to recur, there is no legal test for habitual residence and the list of potentially relevant factors is not closed. The temptation "to overlay the factual concept of habitual residence with legal constructs" must be resisted: *A. v. A.*, at paras. 37-39. [paras. 43-47]

[10] Therefore, no strict test to determine a child's habitual place of residence exists. The application judge, when faced with the question, is required to consider a multitude of factors which relate to the child's life. For example, the application judge may determine, as relevant factors, the following: the child's connection to each country, the environment in which the child lives and the circumstances surrounding the move of the child. Although the mutual intention of the parents is weighed as a factor, it is not

solely determinative. The Supreme Court was clear in its instructions that no single fact or rigid rule should motivate the analysis (*Balev*, at paras. 44 and 47). The Court also stated that "there is no 'rule' that the actions of one parent cannot unilaterally change the habitual residence of a child" (*Balev*, at para 46).

[11] Following *Balev*, there has been Canadian jurisprudence regarding the return of children under the *Hague Convention* as well the habitual residence of children. This has all been reviewed by my colleague. In *Ludwig v. Ludwig*, 2019 ONCA 680, [2019] O.J. No. 4437 (QL), the Ontario Court of Appeal described the analytical framework for *Hague Convention* applications such as the one before us:

> For ease of reference, I will summarize the governing analytical framework for *Hague Convention* applications below.
>
> Stage One: Habitual Residence
>
> 1) On what date was the child allegedly wrongfully removed or retained?
>
> 2) Immediately before the date of the alleged wrongful removal or retention, in which jurisdiction was the child habitually resident? In determining habitual residence, the court should take the following approach:
>
> a) The court's task is to determine the focal point of the child's life, namely the family and social environment in which its life has developed, immediately prior to the removal or retention.
>
> b) To determine the focal point of the child's life, the court must consider the following three kinds of links and circumstances:
>
> i) The child's links to and circumstances in country A;
>
> ii) The circumstances of the child's move from country A to country B; and
>
> iii) The child's links to and circumstances in country B.

c) In assessing these three kinds of links and circumstances, the court should consider the entirety of the circumstances, including, but not restricted to, the following factors:

i) The child's nationality;

ii) The duration, regularity, conditions and reasons for the child's stay in the country the child is presently in; and

iii) The circumstances of the child's parents, including parental intention.

End of Stage One: Two Outcomes

1) If the court finds that the child was habitually resident in the country in which the party opposing return resided immediately before the alleged wrongful removal or retention, then the *Hague Convention* does not apply and the court should dismiss the application.

2) If the court finds that the child was habitually resident in the country of the applicant immediately before the wrongful removal or retention, then the *Hague Convention* applies and the court should proceed to stage two of the analysis.

Stage Two: Exceptions

At this stage, the court shall order the return of the children unless it determines that one of the following exceptions applies:

1) The parent seeking return was not exercising custody or consented to the removal or retention (Article 13(a));

2) There is grave risk that return would expose the child to physical or psychological harm or place the child in an intolerable situation (Article 13(b));

3) The child of sufficient age and maturity objects to being returned (Article 13(2));

a) Has the party opposing return met the threshold to invoke the court's discretion to refuse return?

i) Has the child reached an appropriate age and degree of maturity at which the child's views can be taken into account; and

ii) Does the child object to return?

b) Should the court exercise its discretion to refuse to return the child? In considering whether to exercise its discretion to refuse return, the court should consider:

i) The nature and strength of the child's objections;

ii) The extent to which the objections are authentically the child's own or the product of the influence of the abducting parent;

iii) The extent to which the objections coincide or are at odds with other considerations relevant to the child's welfare; and

iv) General *Hague Convention* considerations.

4) The return of the child would not be permitted by fundamental human rights and fundamental freedoms of the requested state (Article 20); or

5) The application was brought one year or more from the date of wrongful removal or retention, and the judge determines the child is settled in the new environment (Article 12). [para. 40]

[Emphasis added.]

[12] *Beairsto* dealt with an appeal quite similar to the situation before us. In that case, the mother submitted the application judge erred in law in his determination of the child's "habitual residence" pursuant to the *Hague Convention*. In the decision, Beveridge J.A. referred to the hybrid approach and reiterated the factors enumerated in

Balev, as well as those found in *A. v. A. (Children: Habitual Residence)*, [2013] UKSC 60, a decision of the Supreme Court of the United Kingdom. In the end, the Nova Scotia Court of Appeal overturned the application judge by determining Nova Scotia was the child's habitual residence.

[13] In the case before us, the application judge relied on the proper jurisprudence and conducted a methodical analysis with respect to the evidence presented. The application judge wrote: "Relying on the above principle, I must apply the hybrid approach to determine the child's habitual residence immediately before the alleged wrongful retention, that is before February of 2019. I must consider the entirety of the child's situation" (para. 69).

[14] The application judge set out the facts of this case equitably. She provided an overview of the parents' separate ancestry and culture and described their life together. The application judge made references to historical facts, as well as facts in existence at the time of the hearing, thus indicating her awareness of the parties' current circumstances. She referred to the child's connection to both his paternal and maternal grandparents. In my view, the majority of the facts outlined describe the parties' situation prior to their separation and the date of the alleged wrongful retention, February 6, 2019.

[15] Interestingly, the factual situation delineated by the application judge was based, to a greater extent, on the testimony and recollections of the father. As indicated, the application judge stated in her decision, "[a]s I was writing the facts of this case, if there was a difference between [the father]'s testimony and that of [the mother], I have chosen to believe [the father]" (para. 55). In my view, this suggests the trial judge was extremely cognizant of the father's version of the facts, and his position.

[16] In her written submission, the mother sets out the factors the application judge took into consideration in arriving at her determination. I can do no better than to reproduce this portion of the brief:

> […]

Stage 1: Habitual residence

1) The application judge alludes to the fact that [the father] revoked his consent for the child to remain in Canada on the date of the parties' separation, being February 2019 […]. As well, the application judge found that the date of the alleged wrongful retention was in fact on February 6, 2019 […]. Following this determination, the application judge proceeded to the second step of the first stage to determine the child's habitual residence.

2) At the second step of this stage, the application judge considered all facts she deemed relevant, including, but not limited to:

The focal point of the child's life – family and social environment

a) the father's family and parties' friends are in Texas[;]
b) the child had a medical doctor in Brenham, Texas[;]
c) it was [the mother] who remained home and was present to look after the child's needs immediately following his birth[;]
d) [the father] also helped with the care of the child when he returned from work in the evenings[;]
e) [the mother] cared for all the needs of the child in Canada[;]

Links to each country and circumstances of the child's move

f) the child was born in Brenham, Texas[;]
g) the couple attended multiple prenatal appointments in Texas[;]
h) the couple attended multiple postnatal appointments in Texas[;]
i) visits with [the father's] family and parties' friends in Texas[;]
j) activities in Texas[;]
k) most of the child's belonging remain in Texas[;]
l) child's first trip to Canada (month of February 2018) [;]
m) from August 2018 to February 2019, the child's environment became the maternal grandparents' home[;]
n) the child attends daycare in Sackville, New Brunswick;
o) child's relationship with [the mother's] family[;]

> p) [the mother] and the child were beneficiaries of a medical and dental plan through [the mother's] employer[;]
>
> *Entirety of the circumstances*
>
> q) the child is both a Canadian and an American citizen[;]
> r) child lived in Texas between September 8, 2017 and August 2018[;]
> s) child lived in Canada between August 2018 and February 2019[;]
> t) the parties' intention was that the family would continue to live in Brenham, Texas[.]

[17] In my opinion, the application judge employed the correct test and applied it properly to the facts of this case in reaching her determination. I find no palpable or overriding error.

B. *The relevant facts and evidence*

[18] It is trite law that Courts of Appeal cannot retry a case: see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 3; *S.F.D. v. M.T.*, 2019 NBCA 62, [2019] N.B.J. No. 203 (QL), at para. 15; *A.D. v. A.D.*, 2018 NBCA 83, [2018] N.B.J. No. 298 (QL), at paras. 10 and 27; *Vaughan v. Vaughan*, 2014 NBCA 6, 415 N.B.R. (2d) 286, at para. 7; *B.P. v. A.T.*, 2014 NBCA 51, 423 N.B.R. (2d) 99, at para. 12; *Bartlett v. Murphy*, 2012 NBCA 44, 388 N.B.R. (2d) 388, at paras. 2-3.

[19] In *Van de Perre*, Bastarache J. referred to a judge's obligation to discuss evidence in a case:

> In preparing reasons in custody cases, a trial judge is expected to consider each of these factors in light of the evidence adduced at trial; however, this is not to say that he or she is obligated to discuss every piece of evidence in detail, or at all, when explaining his or her reasons for awarding custody to one person over another. This would indeed be an unreasonable requirement at the end of a 26-day trial. Because of this, trial judges might sometimes appear to stress one factor over another and, in fact, it may be said that this is inevitable in custody cases which are

> heavily dependant on the particular factual circumstances at issue. This situation does not open the door to a redetermination of the facts by the Court of Appeal.
>
> [para. 10]

[20] The father contends the application judge made 14 errors of law, fact or mixed law and fact. He claims the application judge failed to properly consider the parents' mutual intention, placed too much weight on the fact that the mother was the child's primary caregiver, and relied on facts which occurred after the alleged retention of the child. I do not agree. The application judge did not misapprehend the facts, nor did she commit an error in law. I would dismiss this ground of appeal.

(1) Mutual intention of the parties

[21] In her decision, the application judge specifically referenced the parties' intention to live as a family in the state of Texas on two occasions:

> According to [the father], the plan was that the family would continue to live in his home in Brenham, Texas. He never intended to sell his business, his home, nor move to Canada. The house was set up for the family to live in including the child's bedroom. At the time of this hearing, his plan had not changed. Even the family pet remained at the home.
>
> […]
>
> The couple's plan was that [the mother] would come to Canada and return to her permanent employment as a teacher. At the time, the child was still breastfed and [the father] agreed that the child should be with his mother. The family would get together as frequently as possible, either by [the father] coming to Canada or [the mother] and the child going to Texas. The time in Canada would be either six months or a full school year. In August of 2018, [the father] signed the first consent to allow the child to travel to Canada. According to the plan, this would be temporary, and [the mother] and the child would return to Texas.
>
> [paras. 27 and 32]

[22] In fact, the "intention of the parents" was the starting point of the application judge's hybrid analysis after she reviewed the legal principles. She said:

> Looking firstly at the intention of the parents prior to the date of the alleged wrongful retention in February of 2019, I am satisfied that the intention of both parties was that [the mother] and the child would be returning to Texas. When [the mother] left Texas for New Brunswick by the end of August 2018, the parents' intention was that it would be temporary and that the child, and [the mother], would return to [the father's] home in Brenham, Texas. They would return to the residence where the child's bedroom was on the last day of the hearing, fully furnished with some of his clothing and toys. The family pet remained at the home. The house was not sold, and [the father] still operates the cement business. During [the mother] and [the child's] stay in Canada, the plan was that there would be visits whereby the father would come to New Brunswick as much as possible and [the mother] and the child would go to Texas as much as possible. [para. 70]

[23] In *Balev*, the Supreme Court clearly stated application judges must examine all relevant facts. The Court also explained:

> The circumstances of the parents, including their intentions, may be important, particularly in the case of infants or young children […]. However, recent cases caution against over-reliance on parental intention. […] [para. 45]

[24] It is clear from the decision the application judge was alive to the parties' intention yet, applying the hybrid test, she determined the child's habitual residence prior to the wrongful retention was New Brunswick. I find no error.

(2) Child's primary caregiver

[25] The father also maintains the application judge erred by only examining the social and family environment of the child in the context of his dependency on the mother. I do not agree.

[26] In determining habitual residence under Article 3 of the *Hague Convention*, the application judge is not bound by strict "rules, formulas, or presumptions" (*Balev*, at para. 47). Rather, the application judge must review all relevant considerations emanating from the facts of the case.

[27] *Balev* instructs that relevant considerations may vary depending on the age of the child. Typically, an infant or a toddler's environment will be linked to the parent who looks after the child's every need:

> […] 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" […]. [para. 44]

[28] The application judge referred to each of the parties' roles in the child's life. She determined the mother had shouldered a greater portion of the responsibility of the child's care both while living in Texas and in New Brunswick.

(3) Facts following the date of the wrongful detention

[29] In her decision, the application judge did review facts which occurred prior to the alleged wrongful retention. Although she did refer to facts in existence at the time of the hearing, these were not substantial and were in existence during both periods. The mother was breastfeeding the child both prior to February 6, 2019, as well as at the time of the hearing. The child was a toddler prior to the wrongful retention and at the time of trial. The mother was the primary caregiver prior to February 6, 2019, and at the time of the hearing.

[30] Therefore, the application judge did not err in reviewing the environment of the child and determining it in light of the mother's circumstances. Furthermore, she did not err in stating facts which did exist at the time of the hearing – facts which were merely used for contextual purposes.

(4) Best interests of the child

[31] The father submits the application judge erroneously applied a "best interests of the child" analysis in her determination of the Application.

[32] The "best interests of the child," as defined in s. 1 of the *Family Services Act*, S.N.B. 1980, c. F-2.2, directs courts to review a myriad of considerations and facts. The application judge does not mention this definition in the decision, nor does she refer to any of the relevant circumstances arising from the definition. The application judge does not, at any time, apply the best interests of the child test, either expressly or implicitly to her analysis. I would therefore dismiss this ground of appeal.

C. *International jurisprudence*

[33] In his Notice of Appeal, the father contends the application judge "erred at law in relying on European jurisprudence grounded in the *Brussels II Regulation*", and the application judge "erred at law in relying on the decision of *A. v. A.* quoted by her in paragraph 50 of her decision." At the hearing of the appeal, counsel for the father withdrew this ground of appeal. Despite this, I would like to take the opportunity to address the contention in *obiter*.

[34] The application judge does not reference international jurisprudence directly. Rather, she discussed *Balev* and *Beairsto*, both of which cited international jurisprudence, including *Mercredi v. Chaffe*, C-497/10, [2010] E.C.R. I-14358 and *A. v. A.* (*Balev*, at para 44; *Beairsto*, at paras. 48-50 and 109, cited at para. 67 of the application judge's reasons).

[35] The Supreme Court has directed the following when courts are faced with cases involving international treaties: "this Court should prefer the interpretation that has gained the most support in other courts and will therefore best ensure uniformity of state practice across *Hague Convention* jurisdictions, unless there are strong reasons not to do so" (*Balev*, at para. 49). Although the application judge did not directly refer to

international jurisprudence, it is not an error in law to do so considering the international application of the *Hague Convention*.

D. *Jurisdiction to impose transitory measures*

[36] Once she determined the child's habitual residence, the application judge put in place transitory measures in anticipation of the pending hearing regarding custody and access. She was correct to do so, otherwise, the child's status would be uncertain until the application for custody and access is heard in New Brunswick.

[37] The application judge invoked her *parens patriae* jurisdiction to do so. In New Brunswick, s. 11(9) of the *Judicature Act*, R.S.N.B. 1973, c. J-2, grants this jurisdiction. As well, the preamble of the *Hague Convention* states:

> **Preamble**
>
> The States signatory to the present Convention,
>
> Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,
>
> Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access,
>
> Have resolved to conclude a Convention to this effect, and have agreed upon the following provisions –

[38] In *New Brunswick (Attorney General) v. Majeau-Prasad* (2000), 229 N.B.R. (2d) 296, [2000] N.B.J. No. 363 (Q.B.) (QL), Robichaud J. commented on the court's jurisdiction to impose transitory measures following a hearing under the *Hague Convention*. Referring to *Thomson v. Thomson*, [1994] 3 S.C.R. 551, [1994] S.C.J. No. 6 (QL), and the preamble of the *Hague Convention*, she found the court has jurisdiction to impose transitory measures to minimize the harmful effect of a possible abrupt change in the child's life:

> With respect for those who may hold a different view, I do not read the reasoning of L'Heureux-Dubé J. or of La Forest J. as limiting the court's power to impose transitory measures to only those provinces that have incorporated the Convention into a broader general statute dealing with custody and access such as was done in the Manitoba Act at issue in *Thomson*.
>
> The *Convention* speaks of the paramountcy of the interests of children and protecting them from the harmful effects of wrongful removal. I agree with Helper J.A. that in applying the *Convention* the Court can impose measures to protect the child from the effects that an abrupt change can produce. The realistic and reasonable way of lessening the impact on Inuk is through the imposition of transitory measures; provided however that such are within the spirit of the *Convention* and do not frustrate the prompt return scheme which its orders are intended to achieve.
>
> [paras. 70-71]

[39] As well, in *D.G. v. H.F.*, 2006 NBCA 36, 297 N.B.R. (2d) 329, this Court stated the following with regards to the *parens patriae* jurisdiction:

> The *parens patriae* jurisdiction is a residual jurisdiction of the court based on necessity which may be raised only in special circumstances when there is a material gap in the legislation that the court is required to apply. [para. 21]

[40] As it is not explicitly directed in the *Hague Convention*, the application judge was well within her jurisdiction to order, on an interim basis, that the mother have sole custody of the child "until this matter is dealt with by the Court in New Brunswick, Canada" in accordance with the Court's *parens patriae* jurisdiction (para. 85).

E. *Costs of the lower court proceeding*

[41] The father has requested this Court to award costs to him for the lower court proceedings. In the Notice of Application filed by the father on June 5, 2019, he did not request costs. The request for costs was not made at the hearing. Although this

question need not be addressed as the appeal is dismissed on other grounds, I would have declined awarding this relief.

F. *Cross-Appeal*

[42] The mother filed a cross-appeal composed of two grounds:

a. Did the application judge err in law and in principle in failing to render sufficient reasons for not awarding costs to the mother in accordance with Rules 59.01, 59.02 and 59.08 of the *Rules of Court of New Brunswick*?

b. Did the application judge err in law in failing to award costs and disbursements to the mother in accordance with rules 59.0l, 59.02 and 59.08 of the *Rules of Court of New Brunswick* when the mother was the successful party in this matter?

[43] In *D.G. v. M.G.*, 2019 NBCA 69, [2019] N.B.J. No. 281 (QL), this Court had the opportunity to discuss costs:

> This Court has confirmed that a cost award is in the discretion of the trial judge, and it will not intervene unless it is satisfied that the exercise of discretion was manifestly wrong. In *M.R. v. J.R.*, Baird J.A. wrote as follows:
>
> > I conclude the trial judge erred when she failed to order costs. Many of the delays were the result of J.R.'s failure to comply with his undertakings and disclosure obligations. In spite of M.R.'s repeated requests for interim costs, they were deferred to be determined at trial. Rule 59 enumerates the criteria a court should consider when making an award of costs. In *D.E. v. L.E.*, 2014 NBCA 67, [2014] N.B.J. No. 289 (QL), Larlee J.A. writes:
> >
> > > According to Rule 59 of the *Rules of Court*, the costs of a proceeding are in the discretion of the court, which may determine by whom and to what extent costs shall be paid. I reiterate the

> comments of Drapeau J.A. (as he then was) in *Acadia Marble, Tile & Terrazzo Ltd. v. Oromocto Property Developments Ltd.* (1998), 205 N.B.R. (2d) 358, [1998] N.B.J. No. 412 (C.A.) (QL) on the issue of the awarding of costs following an event:
>
> > It is undoubtedly true that, where the trial judge has exercised his or her discretion as to costs, this Court will not intervene unless it is satisfied that the exercise of discretion was manifestly wrong. See *Williams et al. v. Saint John, New Brunswick and Chubb Industries Ltd.* (1985), 66 N.B.R. (2d) 10 (C.A.). [...] [para. 34]
>
> The party who recovers judgment is normally entitled to costs, although a judge may exercise his or her discretion by refusing to make such an award: *Flieger v. Adams*, 2012 NBCA 39, 387 N.B.R. (2d) 322. [paras. 23-24]
>
> [para. 100]

> This Court has also stated that "[c]osts awards are indisputably squarely within the purview of the trial judge, and should not be lightly interfered with by the appellate court. That said, when circumstances warrant, appellate intervention is appropriate" (see *Knowles Estate v. Knowles*, 2016 NBCA 62, [2016] N.B.J. No. 235 (QL), at para. 28). This Court has also determined that "[t]he trial judge is vested with a very broad discretion in relation to the assessment of costs": *L.T.G. v. C.J.G.*, 2011 NBCA 12, 369 N.B.R. (2d) 202, at para. 14. [paras. 52-53]

[44] I would not interfere with the application judge's determination that each party should be responsible for their own costs.

V. Disposition

[45] I would dismiss the appeal with costs of $2,500. Considering this is a *Hague Convention* case, I would invoke s. 24(2) of the *Official Languages Act*, S.N.B.

2002, c. O-0.5, and direct that this decision be published in one official language and, thereafter, at the earliest possible time, in the other official language.

The dissenting reasons of

BAIRD, J.A.

I. Introduction

[46] This appeal engages Article 3 of the *Convention on the Civil Aspects of International Child Abduction*, Can. T.S. 1983 No. 35 ("*Hague Convention*"). It is an appeal from a decision of the Court of Queen's Bench in which a judge declared the Province of New Brunswick the habitual residence of a child. The father appeals, asserting the judge made several errors: notably, she misinterpreted the recent decision of the Supreme Court on point. In *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398, the majority adopted a hybrid approach to the determination of a child's habitual residence in child abduction and retention cases. To date, there have been seven appellate decisions in Canada where Article 3 has been discussed and interpreted in light of this new approach. This appeal gives the Court its first opportunity to consider the hybrid approach to the unlawful removal or retention of children in international child abduction cases. Canadian jurisprudence remains divided as to whether *Balev* applies in domestic cases (see *Kong v. Song*, 2019 BCCA 84, [2019] B.C.J. No. 337 (QL); *Smith v. Smith*, 2019 SKQB 280, [2019] S.J. No. 440 (QL); *Z.A. v. A.A.*, 2019 ONSC 5601, [2019] O.J. No. 5171 (QL)).

II. Background

[47] The father is an American citizen who lives in a small city in the State of Texas. The mother is a Canadian citizen who has historically lived in New Brunswick. In 2016, the mother took a one-year leave of absence from her job as a teacher and moved to the United States. She did not have a work visa when she crossed the United States border under the pretence of visiting family members in the State of Massachusetts. She obtained employment in Texas on a horse ranch and she met the father in November 2016. The father owns a small concrete business which he operates from a shop located on his property.

[48] In December 2016, the mother advised she was pregnant with their child, and, in May 2017, she moved into the father's home. The evidence established that the father attended all pre-natal classes except for one, which he missed due to work commitments. The second bedroom in the home was prepared for the birth of the child, and family and friends assisted the couple with baby showers. The child was born in Texas on September 8, 2017. The father attended the birth, and he attended most of the child's medical appointments following the birth, including a visit to a lactation consultant. Following the birth, the mother took maternity leave and was at home during the day with the child. Both parents were active and engaged caregivers for the child. There was no allegation of domestic abuse.

[49] The child has an American and a Canadian passport. By agreement, the father consulted legal counsel in the United States to arrange for a work visa for the mother. The evidence was that this couple had no plans to move to Canada. In fact, they had discussions about renovating another house owned by the father, to accommodate the family. The paternal grandparents live in the same community and the grandmother visited the home at least once a week. Affidavits filed by friends advised that both parents were loving and caring with a social network in the community that included them in various activities.

[50] In February 2018, the parents agreed that the mother could travel with the child to New Brunswick to visit her family. The father signed a Consent to Travel document granting her permission to travel with the child for this purpose. At this juncture in the reasons, I believe it useful to set out a time line which tracks the movement of the child between Canada and the United States prior to the alleged retention.

Trip #1: The mother left Texas on February 6, 2018, and travelled to New Brunswick with the child for a visit. She resided with her parents. The father joined them for the last week of the visit and they returned together to Texas on March 6, 2018;

Trip #2: By agreement, the mother returned to New Brunswick with the child on August 19, 2018, so that she could resume her employment for a period of the school year only, ostensibly to save money. The plan was that the parents would travel back and forth between Canada and the United States with the child as often as they could. The mother ensured the father had daily FaceTime conversations with the child. The mother lived with the child at her parents' home, and the child attended day care during her working hours. Both parents travelled back and forth between New Brunswick and Texas frequently;

Trip #3: The father visited New Brunswick in September 2018, for ten days;

Trip #4: The mother travelled to Texas with the child from November 8-12, 2018;

Trip #5: The father travelled to New Brunswick to visit from December 19-26, 2018;

Trip #6: The mother travelled to Texas with the child and stayed there from December 26, 2018 to January 5, 2019.

[51] On February 6, 2019, the parents terminated their relationship. The judge determined that this is the date when the "alleged" retention of the child occurred and when the father revoked his consent for the child to remain in Canada. At that time, the child had resided in Texas from his birth in September 2017 until August 2018. He had resided in New Brunswick from late August 2018 to February 6, 2019, with the exception of those weeks he travelled to Texas as noted.

A. *The proceedings*

[52] In September 2018, the father obtained an *ex parte* court order from a Texas court which declared the State of Texas as the official place of residence of the child and prohibited the removal of the child from Texas without consent or a court order. The mother received a copy of these documents in September 2018, when they were left by the father following one of his visits to New Brunswick; however, she was not formally served with the documents until March 2019. From the exchange of text messages that occurred following September 2018, it is clear the father wanted an assurance that she was sincere in her plans to return to Texas in June 2019.

[53] On February 6, 2019, the mother commenced an application for the sole custody of the child pursuant to the provisions of the *Family Services Act*, S.N.B. 1980, c. F-2.2 (the "*Act*"). The father was served with those documents on March 9, 2019. The mother cancelled a planned trip with the child to Texas that month, and she restricted access to the father. When he visited New Brunswick thereafter in March, the mother insisted his access be supervised, and he stayed at the residence of the mother's sister.

[54] On April 24, 2019, a Case Management Master of the Court of Queen's Bench granted an interim order, declaring the child's habitual residence to be the Province of New Brunswick on an interim basis and granting interim custody of the child to the mother pursuant to the *Act*. On April 30, 2019, the father filed an application under the *Hague Convention* for the return of the child to the State of Texas. Those documents were received by the Central Authority in New Brunswick on May 16, 2019.

[55] On June 5, 2019, the father filed an application pursuant to Article 12 of the *Hague Convention*, enacted in New Brunswick as the *International Child Abduction Act*, R.S.N.B. 2011, c. 175, requesting the return of the child to the State of Texas. It was this latter application that was heard by the judge on July 8 and 9, 2019, during which there was both *viva voce*, and affidavit evidence. The judge concluded the child was habitually resident in New Brunswick prior to February 2019, the retention was not

wrongful within the meaning of Article 3 of the *Hague Convention*, and she declined to conduct an analysis under Article 12 on that finding.

III. Grounds of Appeal

[56] The father appeals, asserting several errors both in fact, in law and in mixed fact and law. They are summarized as follows:

a) The judge failed to weigh the objectives of the *Hague Convention* as set out in the preamble when she considered the child's circumstances at the time of the hearing, rather than at the time of the retention of the child by the mother;

b) The judge failed to correctly apply the hybrid model set out by the Supreme Court in *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398;

c) The judge committed reversible error when she conducted a best interests of the child analysis, an analysis that occurs during a custody hearing following a determination of jurisdiction;

d) The judge erred at law when she relied on the interim custody order made by a Master as part of the mother's application for custody under the *Act*, given the *Hague Convention* directs that such orders are automatically stayed and have no effect pending the determination of a *Hague Convention* application;

e) The judge erred when she relied on European jurisprudence grounded in the *Brussels II Regulation* (this ground was not pursued before us);

f) The judge erred when she relied on the principle of "settled intention" set out in Article 12 of the *Hague Convention*, which applies only if an application is commenced after one year of the wrongful retention.

IV. Standard of Review

[57] The Court has reiterated many times that decisions of trial judges in family cases are entitled to deference, unless it is found the judge committed a palpable and overriding error in fact, or mixed fact and law, or made a reversible error in law by applying an incorrect standard to the facts of a particular case. On material error, *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, articulates the standard of review as follows:

> As indicated in both Gordon and Hickey, the approach to appellate review requires an indication of a material error. If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all of the factors. In such a case, an appellate court may review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence. […] [para. 15].

[58] In *Balev*, the Supreme Court writes that habitual residence of a child is a question of fact or mixed fact and law. The hybrid approach is fact-bound, practical and unencumbered by rigid rules or presumptions (para. 47). In *O.M. v. E.D.*, 2019 ABCA 509, [2019] A.J. No. 1716 (QL), the court writes:

> The proper interpretation of the *Hague Convention* is a question of law reviewed for correctness. The place of "habitual residence" of the child is a question of mixed fact and law reviewed on the standard of palpable and overriding error: *Balev* at paras 32 and 38. [para. 15]

[59] Therefore, a trial judge's decision concerning habitual residence is entitled to deference, unless it is found the judge committed a palpable and overriding error in fact, or misapplied the law (*Balev*, at para. 38). For the reasons that follow, I conclude such an error occurred in this case.

V. Analysis

A. *The hybrid approach to determining habitual residence under the Hague Convention*

[60] The analysis will begin with a summary of the hybrid approach set out in *Balev*, with a brief nod to recent judicial treatment of the approach by appellate courts in Canada. I will then review the application judge's decision in light of that approach.

[61] The *Hague Convention* is an International Treaty signed by Canada on October 25, 1980. In New Brunswick, it is given effect by the *International Child Abduction Act*, as noted. The legislation governs those cases where a child is unlawfully removed from its country of habitual residence or is being unlawfully retained by a parent in a country that is not its habitual residence. The *Hague Convention* has received more attention in recent years, largely as a result of the increasingly mobile world population.

[62] An application under the *Hague Convention* for the return of a child should be heard quickly. In *Balev*, McLachlin C.J.C. drew the comparison with the decision in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, that there should not be a protracted delay in the hearing of these cases. Professor Nicholas Bala, in an article entitled, "*O.C.L. v. Balev*: Not an 'Evisceration' of the *Hague Convention* and the International Custody Jurisdiction of the CLRA" (presented at the Family Law Summit of the Law Society of Ontario, March 19, 2019; revised and published in 38 C.F.L.Q. 301), observes that these applications should be heard by way of affidavit evidence, if at all possible (pp. 310-11; see also *Kong v. Song*, at para. 59). In Ontario, oral evidence is generally heard if a parent raises an exception under Article 13, that is, the child's return might pose a danger or risk to him or her, and there would be a need to hear oral evidence. It does not follow that a hearing will automatically take place in every application. This need for an expeditious resolution was front and centre in the Supreme Court's analysis in *Balev*. An expedited process is also consistent with the protection of the rights of the "left-behind parent" (*Balev* at paras. 23-27). The public policy objective behind a quick resolution is to deter child abduction.

[63] In *Balev*, McLachlin C.J.C. wrote:

> […] Judges seized of *Hague Convention* applications should not hesitate to use their authority to expedite proceedings in the interest of the children involved. Unlike much civil litigation in Canada, *Hague Convention* proceedings should be judge-led, not party-driven, to ensure they are determined expeditiously. [para. 89]

[64] I agree. The preamble to the *Hague Convention* recognizes the imperative to protect children internationally from the harmful effects of wrongful removal or retention and to ensure a prompt state response to their return to the state of their habitual residence, absent the narrow exceptions listed in Article 13. In fact, Article 11 of the *Hague Convention* states these applications should be resolved in six weeks unless there is an explanation otherwise.

[65] Under the *Hague Convention*, wrongful removal or retention of a child aged sixteen years or younger occurs in violation of custody rights under the law of the state in which the child was habitually resident immediately at or before the retention, provided those rights were being exercised either jointly or alone, or would have been so exercised, but for the removal or the retention of the child, as was the situation in this case. The focus of an application heard under Article 3 is to determine the jurisdictional question, not the custodial question.

[66] Professor Bala writes: "A child is presumptively to be returned to the jurisdiction of habitual residence if there has been a wrongful removal or retention" (p. 319). Further, determining whether there has been a wrongful removal or retention in violation of custody of the left-behind parent is to be decided under the law of the child's habitual residence. There has been considerable litigation on this question since *Balev*, largely because the term "habitual residence" is not defined in the *Hague Convention*. In *Balev*, the Supreme Court concluded a child's habitual residence is determined at the time immediately before the alleged wrongful retention (para. 36). Evidence about the child's adjustment, or events occurring thereafter, is not admissible to determine the issue of

habitual residence, although it could be relevant to the issue of acquiescence, or grave risk or intolerable situation, should the child be returned (Article 13).

[67] In this case, proceedings under the *Hague Convention* were initiated in March 2019; however, the hearing did not occur until July. In my view, this delay is inconsistent with the principle of expedited hearings set out in *Balev*, as noted.

[68] I refer to this to highlight the fact that, in this case, it is only the links the child had to New Brunswick between August 19, 2018, to February 6, 2019, that were relevant to the analysis under Article 3. Evidence of the child's links to New Brunswick from February 6, 2019, to the date of the hearing should have no bearing on the decision.

[69] Prior to *Balev*, international jurisprudence identified three approaches to determining habitual residence: the parental intention approach, the child-centred approach, and the hybrid approach, first identified by Rhona Schuz, *The Hague Child Abduction Convention: A Critical Analysis* (Oxford, UK: Hart Publishing, 2013). As a result of *Balev*, the first two approaches have been rendered redundant.

[70] In *Balev*, the parents were Canadian citizens who moved to Germany where their two children were born. The children spent their childhoods living in Germany. There were problems in the marriage, so the parents decided the mother would temporarily move to Canada with the children for a year and the children would attend school in Canada. The mother and the children arrived in Canada in April 2013. The plan was that the mother would return to Germany around August 15, 2014. The father visited the family twice. In March 2014, the father revoked his consent and commenced a *Hague Convention* application. He also applied for custody of the children in Germany. The father was unsuccessful in the court of first instance. The German Court of Appeal concluded that it lacked jurisdiction, the children were habitually resident in Canada and it had become their habitual residence over a period of eighteen months. The father continued his application in Canada. At that time, the children were twelve and nine years of age. The Ontario court found the children were still habitually resident in Germany and that prior to the retention of the children in Canada, the parents did not have a

"settled intention" the children would stay in Canada. This decision was upheld on appeal. By the time this case was before the Supreme Court, it was moot, as the mother had returned to Germany with the children, a custody hearing had been held, and she was granted custody of them.

[71] In her reasons, McLachlin C.J.C. writes that, under the hybrid approach, instead of focussing on parental intention and the child's acclimatization, a judge considers all relevant considerations, including the child's life, as well as the family and social environment in which his or her life has developed immediately prior to the retention. Those considerations include:

a) The duration, regularity, conditions and reason for the child's stay in the member state;
b) The child's nationality;
c) The age of the child;
d) The circumstances of the parents and their intentions, particularly in cases involving infants and younger children who have not formed strong community and social attachments; and
e) The family environment, which includes the person with whom the child lives and who is caring for the child.

[72] In *Balev*, the children were both interviewed by professionals to obtain their views concerning custody. The Supreme Court placed significant weight on those views, particularly given the ages of the children. They had settled into their schools, they had friends and they did not wish to return to Germany. The Supreme Court emphasizes, more than once in the decision, that evidence concerning a child's settlement into a new country is not relevant to determining habitual residence, although it may be considered within the context of Articles 12 or 13 (para. 66). This principle was also applied in *Ludwig v. Ludwig*, 2019 ONCA 680, [2019] O.J. No. 4437 (QL), where the court conducted the *Balev* analysis of the circumstances of the child immediately before the retention. In that case, there were four children between the ages of nine to fifteen. The mother's move to Canada was considered temporary. When the father commenced his

application for their return, the three older children expressed the desire to remain in Ontario. The youngest child did not express a preference. The application judge determined the focal point of the children's lives, their "family and social lives" were established in Ontario by August 2018, the date when the wrongful retention was determined to have started.

[73] At para. 59 of *Balev*, the Supreme Court concludes the hybrid approach fulfils the goals of the *Hague* Convention for the following reasons:

i) It deters parents from abducting a child in an attempt to establish links with a jurisdiction that may grant them custody;

ii) It facilitates an expedited adjudication of custody and access disputes in the habitual residence of the child;

iii) It protects children from the harmful effects of wrongful removal and retention.

[74] McLachlin C.J.C. emphasizes that this approach takes into consideration the factual connection between the child and the other jurisdiction, as well as the reason for the move. This allows, as she states, for custody cases to be determined in the most convenient forum which mirrors a *forum conveniens* analysis, with the best evidence available in the child's habitual residence. She observes that an application judge's decision should be based on the entirety of the child's situation and that no one factor dominates the analysis (paras. 44 and 47). Justices Moldaver and Rowe, in dissent, quare whether that the hybrid approach is consistent with the policy objectives of the *Hague Convention*.

[75] *Balev* also tackled the question whether, or not, one parent can unilaterally change a child's habitual residence. At paras. 46-47, the majority concludes that it is possible, in some cases, for one parent to change a child's habitual residence in spite of an agreement to the contrary. In *Beairsto v. Cook*, 2018 NSCA 90, [2018] N.S.J. No. 489

(QL), Beveridge J.A. concluded a child's habitual residence had changed to Nova Scotia and discussed *Balev* in this context. The mother was a Canadian citizen who gave birth to the parties' child in Washington State. The relationship was intermittent prior to the birth and after. The mother resided with the father for only 42 days following the birth of the child and then returned to Nova Scotia, following an incident of domestic violence. The father had consented to the stay in Canada with the child on a temporary basis; however, the plans for the couple, ongoing, were described as vague. There was evidence the relationship between the mother and the father was abusive. The father revoked his consent after five months, and then, six months later, he started a *Hague Convention* application. The Court of Appeal concluded that by the time the father revoked his consent, in June 2017, the child's habitual residence was in Nova Scotia. The judge, in the case before us, relied heavily on *Beairsto* when reaching her decision. In my view, the facts in *Beairsto* are distinguishable as I will explain.

[76] The facts in *O.M. v. E.D.*, are similar to the facts in this case. There, the application judge determined the child's habitual residence was Spain for the purposes of the custody hearing. The mother successfully appealed, and the child's habitual residence was determined to be in Alberta. The parents started cohabiting in 2009. The father was both a French and a Canadian citizen, while the mother had dual Dutch and Canadian citizenship. The child was born in Canada in 2018 and held a Canadian passport. The parents moved to France in the fall of 2018, so that the mother and child could be closer to the father, who was then working in Chad. The family lived in France for three months. In January 2019, they moved to Spain where they lived until May 2019. On May 5, 2019, the mother and the child, without notice to the father, left Spain, travelled to Alberta and took up residence in Calgary. The father started a *Hague Convention* application in Spain under Article 3 for the return of the child. The only issue on appeal was the application judge's decision concerning the habitual residence of the child.

[77] The Alberta Court of Appeal concluded the application judge fell into error for the following reasons:

a) The rejection by the application judge of the possibility that Calgary could be considered a potential habitual residence because it was not the place where the child had resided "immediately" before his removal (para. 22); and

b) There was a "contested and unproven allegation of an agreement on a time-limited stay" in Spain, and the judge placed too much weight on parental intention (para. 23).

[78] The Appeal Court writes that the possibility "Alberta was the child's habitual residence was a very serious issue on the uncontested facts" (para. 24). Similarly, as in the case before us, the court concludes, although the child had lived in Europe for the seven months immediately prior to his removal, it was an error to "fail to at least give consideration to Alberta as the child's habitual residence, merely because he had left seven months earlier" (para. 24).

[79] In *Droit de la famille – 19412*, 2019 QCCA 461, [2019] Q.J. No. 2022 (QL), the mother appealed a decision that determined the childrens' habitual residence was in country A. The mother alleged the judge failed to conduct a proper weighing exercise. The parents were married in country A in 2011. They separated in August 2018. The mother agreed to temporarily return to Canada with their two children who were aged seven and three to reside from August until Christmas 2018. The husband returned permanently to country A in November 2018. The court noted there was no mutual intent to permanently live in Canada.

[80] In November, the mother advised she would not be returning to country A. The hearing judge determined that country A was the childrens' habitual residence. The Quebec Court of Appeal agreed. It concluded the application judge correctly considered all the circumstances of the case, including the children's family situation and the parents' intent that Montreal was a temporary location and was transiting, being "entirely" dependent on the father's work contract.

[81] In *R.V.W. v. C.L.W.*, 2019 ABCA 273, [2019] A.J. No. 902 (QL), the mother appealed an order requiring the return of a child to Texas under the *Hague Convention*. The parents had started cohabiting in Calgary in 2015. The father was an American citizen who had overstayed his visitor's visa and he returned to the United States in 2017 with the mother. They married in 2017. Their child was born in Texas in September 2017. The marriage was described as dysfunctional. Divorce proceedings were commenced in Texas in December 2017. The mother moved with their four-month-old child to Calgary in mid-January 2018 without the father's consent. The chambers judge, applying the hybrid test, found the child was habitually resident in Texas.

[82] On the issue of habitual residence, the Court writes:

> The appellant argues the child was too young to form any connection with Texas, and that the chambers judge erred in finding the child was habitually resident there. The *Convention* does not contemplate a child with no habitual residence. The child was born in Texas and had never lived anywhere else. Prior to his abduction he had never been to Canada. An infant of his age could not be expected to have any greater involvement in Texan society than to live there with his parents: *Sampley v Sampley*, 2015 BCCA 113 at para. 17, 69 BCLR (5th) 286. The father could only lawfully reside in Texas, and the mother's decision to follow him there displayed a sufficient intent to make Texas the family residence for the indefinite future. The chambers judge was entitled to conclude that any indefinite long-term parental plans to relocate to Canada were not sufficient to displace the child's present habitual residence in Texas.
>
> The mother's argument would make the *Hague Convention* effectively inapplicable to very young children. That cannot have been the intention. The appellant has not shown any reviewable error on this finding. [paras. 13-14]

[83] In dismissing the mother's appeal, the Court states:

> The philosophy behind the *Hague Convention* is that a parent cannot unilaterally take a child and go forum shopping: *Balev* at para. 26. Parenting is to be decided by the court of habitual residence, here the court of Texas. The

> exception for "grave risk" must not be turned into an assessment of the "parenting arrangement that is in the best interests of the child". As observed in *Thomson* at p. 578, the primacy in family law of best interests of the children "… should not be interpreted as giving a court seized with the issue of whether a child should be returned to the jurisdiction to consider the best interests of the child in the manner the court would do at a custody hearing". The issue is not directly what is in the best interests of the child, but the jurisdiction or court in which that decision should be made: *Balev* at paras. 24, 34; *E (Children), Re* at para. 13. Parenting issues are left to the court of habitual residence, which must decide on primary residence, protection orders, spousal support, and related issues: *Sampley* at para. 41; *Cannock v Fleguel*, 2008 ONCA 758 at paras. 29-31, 65 RFL (6th) 39. [para. 19]

[84] In *C.C.O. v. J.J.V.*, 2019 ABCA 356, [2019] A.J. No. 1272 (QL), the father appealed the decision to order the return of an eight-year-old child to the State of Massachusetts. The father resided in Alberta. About two months before the birth of the child, the parents had moved to Boston. They separated within three or four months following the birth. The mother stayed in Boston, while the father moved to Quebec and later to Alberta. There were no orders in Massachusetts dealing with custody.

[85] The child lived in Massachusetts with his mother until he was removed by the father in 2018, following a Divorce Order granting him sole custody of the child, which was granted by default. The chambers judge determined the child's habitual residence was the State of Massachusetts. The father appealed on the grounds the judge ignored his allegations that the child would be at risk if returned to the mother. The judge rejected the father's argument on this point.

[86] On the habitual residence question, the Court observed that the relevant inquiry under the *Hague Convention* is whether the removal of the child was in breach of the mother's right of custody she was exercising. The Court correctly comments that under Massachusetts law, the parents share the custody of a minor child, until a judgment on the merits is rendered, absent abuse, neglect or emergencies.

[87] The above decisions are consistent with *Balev* where the Supreme Court states the analysis must weigh the child's links to country A, the move from country A to B, and the connections and links in country B (para. 64). As noted, the child's links are to be determined prior to the time of the removal. Links created subsequent to the removal/retention are irrelevant to the analysis. I add, it is the child's links, not the parents' links that are considered. To allow a consideration of the *status quo* following retention would defeat the intent of the *Hague Convention* and would convert wrongful retention cases into custody cases, one of the issues raised by the father in this appeal.

[88] There are two steps to the *Balev* analysis. The first step is for the court to determine the date when the wrongful retention of the child occurred. The second step requires the court to determine habitual residence at that time, without exclusive consideration of parental intention or agreement, nor of the alternative child centred approach which considers a child's acclimatization in the new jurisdiction (*Balev*, at paras. 41, 45 and 63; *Ludwig*, at para. 28).

[89] The historical perspective focussed on parental intention as the barometer to measure habitual residence. The hybrid approach, in reducing the weight of parental intention as a consideration, requires the trier of fact to perform the weighing exercise as follows:

1. Determine the child's link and circumstances in country A;
2. Consider the circumstances of the child's removal to or retention in country B;
3. Consider the child's links to and circumstances in country B to the date of retention, which, as stated in *Balev*, include the child's views and preferences.

[90] In this case, the father argues the judge erred when she placed too much emphasis on the mother as primary caregiver a relevant factor in her analysis. As *Balev* instructs, when a child is an infant, his or her family environment is determined by whom he or she is cared for (para. 44); however, in this case, there was evidence that prior to the

child's retention, the father was an active participant in the child's life, both in person, and, when not in person, through FaceTime conversations. The judge did not consider the fact that when both parents travelled to and from Texas between August 2018 and February 2019, the father too was an active caregiver.

[91] The requirement to take a holistic, fact-driven approach to the determination of habitual residence, as stated in *Balev*, is not to be confused with a best interests of the child analysis required in custody cases. Although the evidence in this case suggested the mother was the primary caregiver to this child in Texas, during those times when the father worked, there was also evidence that he was at home in the afternoons and evenings, often cared for the child to give the mother a break, and was an active and engaged parent both in Texas and in New Brunswick.

[92] In my view, the judge placed too much emphasis on the fact the mother was the primary caregiver, to the exclusion of evidence that showed this couple conducted themselves as average parents following the birth of the child – one working to support the family, and the other on maternity leave. This emphasis on the primary caregiving role of the mother, to the exclusion of other factors which mitigated in favour of Texas as the habitual residence of this child, constitutes an error in my view.

B. *Balev considerations*

[93] A return order restores the *status quo* which existed at the time the child was removed or retained from his or her habitual residence so as to deprive a parent of any advantage they might gain through removing and/or retaining the child in a member state (*Balev*, at para. 24).

[94] Under the hybrid approach, the following principles emerge:

a) Habitual residence is determined by examining the "focal point" of the child's life – "the family and social environment in which its life has developed", immediately before the retention (para. 43);

b) A judge should consider the "duration, regularity, conditions and reasons" for the child's stay in the member state (para. 44);

c) No single factor dominates the analysis (para. 44);

d) Considerations vary depending on the age of the child. Where the child is an infant, the environment is essentially a "family environment, determined by the reference person(s) with whom the child lives" and by whom he or she is cared for (para. 44);

e) The circumstances of the parents may be important, including their intentions, particularly in the case of a young child or an infant (para. 45);

f) Parental intention, such as the purchase or lease of a residence may be an indicator, but cannot, as a general rule by itself, be critical to the determination of habitual residence (para. 45);

g) "[T]here is no 'rule' that the actions of one parent cannot unilaterally change the habitual residence of a child" (para. 46);

h) The enquiry is fact driven, taking into consideration settled purpose, actual and intended length of stay, the purpose of the stay, the strength of the ties to the state, and the degree of assimilation into the state (para. 53);

i) The hybrid approach deters parents from attempting to manipulate the *Hague Convention* by strengthening ties with a particular state (para. 60);

j) The hybrid approach favours choice of the most appropriate forum, similar to the *forum conveniens* test (para. 64);

k) Under the hybrid approach, the judge considers the intention of the parents that the move would be temporary, and the reasons for that agreement (para. 73).

C. *The judge's analysis*

[95] In this case, the judge correctly observed she must apply the hybrid approach and that she had to determine the child's habitual residence immediately before the alleged retention of the child. On this issue, she made the following findings:

a) She was satisfied the intention of both parents was that the mother would be returning to Texas with the child when the father granted her permission to work in New Brunswick for one school year;
b) She was satisfied that when the mother left Texas at the end of August 2018, the parents intended it would be temporary and the child would return to Texas;
c) She was satisfied the mother and the child would return to the residence where the child had resided; all of his toys and most of his clothing were left there in his fully furnished bedroom;
d) She found the family pet was in that residence;
e) She observed that the home in Texas was not sold, nor was it for sale;
f) She noted the father continued to operate his business in Texas;
g) She found the parents had made the decision they would travel back and forth between Canada and Texas for visits while the mother temporarily worked in New Brunswick.

(para. 70)

[96] The judge acknowledged the child and his family lived in Texas following his birth in September 2017, and she found the mother was the child's primary caregiver there. The child was breast fed and continued to be so when the mother moved to New Brunswick. She observed the father was an active caregiver in the child's life. Although the judge did not refer to this evidence in her reasons, as noted, there were affidavits from

friends of this couple who had observed them together with the child at social events in Texas, and who noted they were both caring and loving to the child.

[97] At para. 55 of the reasons, the judge made a credibility finding, concluding that where the evidence between the mother and the father diverged, she preferred the evidence of the father, finding him to be more credible. The mother had portrayed the father as a busy self-employed man who left the house at 3:00 a.m., returning in the evenings. This finding was not borne out. In fact, the father was required on one or two days a month to leave the home early in the morning to pour concrete before the heat of the day, returning home in the afternoons to be with the mother and the child. His office/workshop was situated on the property, and he testified that he was in and out of the residence during those days he had to work, and that he was home with the mother and the child many afternoons.

[98] Having noted the above facts, the judge proceeded with her analysis. Starting at paras. 72 and 73, she observes:

a) From late August 2018 to February 2019, the child's environment became that of the maternal grandparents;
b) The child attended day care in New Brunswick from late summer 2018 to mid-winter 2019;
c) The mother, "throughout the young child's life", was primarily responsible for his needs;
d) The child's environment at his age was essentially a family environment determined by the parent with whom the child lives and who takes care of him;
e) The mother's roots are in New Brunswick;
f) The mother's employment before going to the United States was in New Brunswick;
g) The mother's social connections are in New Brunswick;
h) The child "has become" integrated into the social and family environment in New Brunswick.

[99] I part company with the above findings of fact in the following areas:

a) From late August 2018 to February 2019, the child's residence was not exclusively in New Brunswick. The child returned to Texas on two occasions: once in November and again on December 26, 2018;

b) The child attended day care in New Brunswick while the mother was working; however, the child did not attend day care when returned to Texas, as noted, nor did the child attend day care when the father visited New Brunswick in the months of September and December to January, when the father was the caregiver while the mother worked. The child did not attend day care until mid-winter, as concluded by the judge;

c) The mother was not primarily responsible for the child's needs during this child's short life. Both parents offered the family environment to the child from birth, other than the few months the child was exclusively in the care of the mother in New Brunswick;

d) The reference by the judge to the mother's roots being in New Brunswick was not relevant to the determination of habitual residence in this case;

e) The mother's employment in New Brunswick was not relevant to the determination of the child's habitual residence;

f) At the time of the retention, the child was approximately seventeen months old. The judge's finding the child had integrated into the social and family environment in New Brunswick was unsupported by the evidence. The same could have been said about the child's integration into a family and social environment in Texas, where the child had resided for most of his life.

[100] Simply put, there was an overemphasis on what the judge considered to be factors militating in favour of New Brunswick, to the exclusion of evidence which revealed a similar, if not stronger, connection to the State of Texas at the time of the child's retention. The analysis does not reflect a weighing of the child's links between two jurisdictions, country A and country B, effective February 6, 2019, in a contextual or holistic way, as mandated by *Balev.*

[101] As an example, the mother was living with her parents in New Brunswick between August 19, 2018, and February 2019. All of the child's toys and clothing, with the exception of those the mother took with her in late August, remained in Texas. The child's physicians were in Texas. The child's bank account was in Texas. The child had an American passport. The family pet was in Texas. The paternal grandparents lived in the same community and had a relationship with the child. We do not know how the judge weighed these links when she reviewed the child's environment on retention. There is no indication in the reasons as to how the judge discounted them, how the judge considered the time the child spent with the father both in the State of Texas and in New Brunswick following August 2018, and the fact the stay in New Brunswick was considered temporary, as discussed in *O.M. v. E.D.*

D. *Where is the error?*

[102] In *Beairsto*, Beveridge J.A. writes the following:

> To succeed, the *Hague* applicant must demonstrate on a balance of probabilities the Article 3 requirements. The key concept is a removal or retention that is wrongful. To be wrongful, the other requirements in Article 3 must be established. A court must therefore answer these questions:
>
> (1) When did the removal or retention at issue take place?
> (2) Immediately prior to the removal or retention, in which state was the child habitually resident?
> (3) Did the removal or retention breach the applicant's rights of custody under the law of the habitual residence?
> (4) Was the petitioner exercising those rights at the time of the removal or retention?
>
> In cases of alleged wrongful removal, the first question will not usually be hard to answer. In cases that allege wrongful retention, it can be more difficult. [paras. 95-96 and 98]
>
> [Emphasis added.]

See also *Thomson v. Thomson*, [1994] 3 S.C.R. 551, [1994] S.C.J. No. 6 (QL), per La Forest J. at pp. 592-93).

[103] As observed, the father obtained an *ex parte* order from the State of Texas in September 2018, which prohibited the "disruption" or removal of the "children," without prior written consent of all parties, or an order of the court. The judge noted that the father left the documents with the mother in September 2018, during his visit, but there was no discussion in the reasons as to what was happening in the relationship between the parents at that time, nor was there a reference to the effect, if any, the Texas order may have had on the question of the child's habitual residence. There was also a series of text messages exchanged between the parents around this time, which reflected the father's concerns in the fall of 2018, that the mother may not be returning to Texas and was shutting him out of the child's life.

[104] The above are relevant considerations in my view. The child had lived in New Brunswick for a month only by the time the order in the State of Texas issued. Thereafter, the child spent less than four months in the Province, alone with his mother. To not consider the time the child spent in Texas after August 2018, and the time the father spent in New Brunswick, in the analysis, constitutes palpable and overriding error, in my view.

[105] In my view, a child's habitual residence must be determined based on a time line that reflects the reality of the child's life. In this case, the child was not permanently established in the Province of New Brunswick at the time of the mother's declaration she would not return to the State of Texas. It is my opinion, the judge's analysis excluded cogent facts, as noted, which tainted the result.

[106] There is a natural inclination to try to settle the custody question, as these cases lend themselves to difficult decisions; however, the judge's role at the Article 3 stage of the enquiry is to disengage from the custody question *per se*. It is my view that, in this case, the analysis was made unreliable for the reasons stated. *Balev* can be distinguished from this case for a number of reasons. First, in this case, there was a

declaration from a Texas court in September 2018, the child was a toddler who had not lived in Canada for an extended period of time, the child could not express a view or preference and the mother had returned to Texas on several occasions over a six-month period.

VI. Conclusion

[107] If a decision has not been made on the real merits of the case, it is reviewable, and it cannot stand. In the case of *S.L.B. v. P.J.O.*, 2013 NBCA 52, 408 N.B.R. (2d) 235, Quigg, J.A., writing for the Court, stated:

> The standard of review for varying a motion judge's decision on custody is discussed in *P.R.H. v. M.E.L*, 2009 NBCA 18, 343 N.B.R. (2d) 100:
>
> > The appropriate standard of review to be applied in an appeal of this nature is discussed in *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, [2001] S.C.J. No. 60 (QL), 2001 SCC 60. The Supreme Court of Canada set out a standard of considerable deference for the decisions of trial courts in cases of family law. Intervention on appeal requires that there have been a material error, a serious misapprehension of the evidence, or an error of law. A material error is further explained:
> >
> > > As indicated in both *Gordon* and *Hickey*, [1999] 2 S.C.R. 518, the approach to appellate review requires an indication of a material error. If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all of the factors. In such a case, an appellate court may review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence. This being said, I repeat that omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. [para. 15]

> Speaking for the Court, Bastarache J. further clarified that "an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion" (para. 15). See this Court's decisions on the application of the deferential standard: *MacLean v. MacLean* (2004), 274 N.B.R. (2d) 90, [2004] N.B.J. No. 363 (QL), 2004 NBCA 75 at para. 18; *J.P. v. R.R.* (2004), 278 N.B.R. (2d) 351, [2004] N.B.J. No. 467 (QL), 2004 NBCA 98 at para. 27; *Scott v. Scott* (2004), 278 N.B.R. (2d) 61, [2004] N.B.J. No. 468 (QL), 2004 NBCA 99 at para. 32 and *Boudreau v. Brun* (2005), 293 N.B.R. (2d) 126, [2005] N.B.J. No. 501 (QL), 2005 NBCA 106 at para. 5. [paras. 8-9]
>
> [para. 8]
> [Emphasis added.]

[108] It is my opinion there was material information in this case that was not taken into consideration by the application judge and which tilts in favour of the State of Texas.

[109] I would allow the appeal and I would declare the State of Texas to be the habitual residence of this child at the time of the retention. I would make an order under Article 19 of the *Hague Convention*, requiring the child's immediate return to the State of Texas so that a custody hearing can be held in that jurisdiction.

VII. Costs

[110] I adopt the reasons of my colleague concerning the issues of costs in the lower court proceeding, and the cross-appeal (paras. 42-45).

VIII. Disposition

[111] I would allow the appeal with costs of $2,500.