Where do Children Reside? Where they are “at Home”

The Supreme Court of Canada has released its reasons for dismissing the appeal (which it did orally on December 9, 2024) in *Dunmore v Mehralian*, 2025 SCC 20. The narrow issue was the meaning of “habitual residence” for a child in the statutory context of the *Children’s Law Reform Act* (Ontario). The SCC had earlier explained that a hybrid approach to the meaning of habitual residence is to be used under the Hague Convention: *Office of the Children’s Lawyer v Balev*, 2018 SCC 16. In the convention, there is no definition of habitual residence. In contrast, the CLRA does provide elements of a definition of habitual residence (in s 22) though it leaves “resides” undefined. This generated the issue: under the statute, does the same hybrid approach apply or is the definition different because of the statute?

This mattered because under an approach that used only or mainly the shared intention of the parents to determine the child’s habitual residence, the child was resident in Oman. [170] In contrast, under the hybrid approach that gave greater weight to objective factual connections to a place and less weight to the parents’ joint intent, the child was resident in Ontario. [88] The father urged the court to apply the former approach; the mother the latter.

The court by 8-1 decision agreed with the mother. Key statements in the judgment written by Justice Martin include “residence is a contextual and factual concept that should not be encumbered by unnecessary rigidity”; the court should consider “all factors”; “the guiding principle is not whether the parents had a settled intention to reside in the place but whether the child was at home there”. [6] The court found that the statutory language defining aspects of habitual residence did not adopt or mandate the parental intention approach [54] but rather left open how to define “resides”. *Balev*, while not directly applicable, “serves to underline the inappropriateness of a shared intention approach”. [55] The court offered several observations about principles to be used in determining a child’s residence. [64]-[67]

Justice Cote dissented, as she had in *Balev*. It might be interesting to note that Justice Rowe also dissented in *Balev* but did not do so here. Both had preferred

the parental intention approach in the Hague Convention context. Here Justice Cote held that in the CLRA context, s 22 had expressly adopted a parental intention approach [99] and that the court accordingly could not read the provisions to use the more flexible hybrid approach instead. She also continued the argument, from the dissent in *Balev*, as to why that approach was superior for protecting children. [130]

My own sense is that the majority has the better of the argument, both on the statutory wording and on the ultimate choice of what test to use. On the latter, the tide seems strongly to support broader tests of residence, especially for children, rather than narrower ones. The court wants this concept to be flexible. So where there is latitude to choose a meaning, the court will choose the hybrid approach. On the former, I think that s 22 leaves this latitude open. It is true, as Justice Cote points out [118]-[119], that elements of parental intent feature prominently in parts of s 22 (see s 22(2)2 and s 22(3)). But that does not mean that s 22(2)1 – resides with both parents – requires using the parental intention approach to determine what that means. There is enough room, as a matter of statutory interpretation, for the majority to get to its result.

The decision is useful for its clarification of the approach to be used. But I am not clear as to how it actually matters in the specific context of this case. The mother had commenced proceedings in Ontario seeking a parenting order, under s 22. The father argued s 22 did not apply, in part because the child was not habitually resident in Ontario. The father also sought an order under s 40 for the child to be returned to Oman, which could only be made if the court lacked jurisdiction under s 22. So far so good. If the court lacks s 22 jurisdiction, the mother cannot get the parenting order she wants and risks an order of return.

But the father had also started a divorce proceeding in Oman and got a divorce from that court, and part of that order was an award of "primary custody" to the mother. [110] The Court of Appeal for Ontario recognized that order: 2023 ONCA 806. So even if s 22 does not apply to give the Ontario court jurisdiction to make a parenting order, is there any likelihood the court would make an order under s 40 for return? She was awarded primary custody by an Omani court and she lives in Ontario. And in the absence of an Ontario parenting order, she still has primary custody under the order of the Omani court.

The SCC does not offer any thoughts, in its decision, on the impact of the

recognition of the Omani custody order. And in fairness it did not need to do so to settle the legal question of how to interpret habitual residence in the context of s 22 of the CLRA. But at least I am left to wonder about this.

As a general point, the majority stresses the need for deference to first-instance determinations of a child's residence [82] and, relatedly, the need for these sort of proceedings to be resolved expeditiously, [75] something that did not happen in this case. [77] Justice Cote does not disagree and argues that the majority's hybrid approach will contribute to such drawn-out litigation. [158]-[159]