

SUPREME COURT OF CANADA



Case in Brief: *Office of the Children's Lawyer v. Balev*

2018 SCC 16 | Judgment of April 20, 2018 | On appeal from the Court of Appeal for Ontario

Courts should look at all relevant circumstances to determine a child's "habitual residence," the Supreme Court has ruled in a case about the meaning of those words in an international treaty.

In a 6-3 decision written by Chief Justice Beverley McLachlin (as she was when the case was heard), the Supreme Court provided guidance for courts to determine a child's habitual residence under the *Convention on the Civil Aspects of International Child Abduction*.

The parents in this case married in Ontario in 2000 and moved to Germany in 2001. They became permanent residents there and had two children, but later separated. The children were struggling in school, so the parents decided the mother would take them to Canada for 16 months to see if things improved. In August 2014, at the end of the 16 months, the mother did not return the children to Germany. The father asked the court to order the return of the children. Based on a court order, the children were eventually returned to Germany in October 2016. Soon after, the German courts gave the mother sole custody of the children. In April 2017, the children and the mother returned to Canada.

By the time this case was heard at the Supreme Court, the disagreement between the mother and father was resolved. However, the questions asked in the appeal were important, so the Court decided to provide guidance on how to determine a child's habitual residence in future cases.

This case involved the *Convention on the Civil Aspects of International Child Abduction*. Nearly 100 countries are members of the Convention, including Germany and Canada. The treaty seeks to protect children by enforcing custody rights and securing children's quick return to their country of habitual residence.

Under Article 3 of the treaty, the children in this case would have to be returned to Germany if that was their place of habitual residence. The words "habitual residence" are not defined, and the parents' main disagreement was about what those words actually meant. The judge who first heard the case found that the intentions of the parents were most important. The Divisional Court later found that the children's integration into the community was most important. The Court of Appeal agreed with the first judge. That decision was appealed to the Supreme Court.

The majority of the Supreme Court held that courts should look at all relevant considerations to determine a child's habitual residence. This includes the child's links to, and circumstances in, each country. The circumstances of the parents, including their intentions, may be considered. However, courts have no definitive list of factors that they must take into account; they must look at the child's complete situation. A court can, however, decline to return a child if an exception listed in the treaty applies. Determining habitual residence quickly allows children to be returned as soon as possible. This protects children, deters abduction by parents, and helps ensure that the proper courts (in the child's country of habitual residence) can decide custody and access issues more quickly.

Justices Suzanne Côté and Malcolm Rowe, writing in dissent, disagreed with the majority about how to determine the habitual residence of the children. They said that in situations where the parents' intentions were clear, courts should respect those intentions. They said this would lead to faster and more predictable decisions, which is one of the goals of the *Convention*. In this case, the parents had signed an agreement that said that the move to Canada would be temporary. For this reason, Justices Côté and Rowe would have upheld the rulings of the application judge and the Court of Appeal, which had found that Germany was the children's habitual residence.

This case led to changes in the way the Supreme Court deals with international custody cases. The majority noted that the legal procedures took too long, and said this was unacceptable because the first goal of the

Convention is to bring children home quickly. To prevent future delays, the Court is making sure that cases like this one will be identified and sped up. The Court encouraged lower courts to take similar measures.

For more information (case no. 37250):

- [Reasons for judgment](#)
- [Case information](#)
- [Webcast of hearing](#)

Breakdown of the decision:

- Majority: [McLachlin](#) C.J. ([Abella](#), [Karakatsanis](#), [Wagner](#), [Gascon](#) and [Brown](#) JJ. concurring)
- Dissenting: [Côté](#) and [Rowe](#) JJ. ([Moldaver](#) J. concurring)

Lower court rulings:

- Court of Appeal for Ontario ([appeal judgment](#))
- Divisional Court ([appeal judgment](#))
- Superior Court of Justice ([application judgment](#))

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