Court of Appeal affirms Mobility for Pregnant Women

If a pregnant woman moves to another jurisdiction before the birth of the child, is that analogous to child abduction? The Ontario Court of Appeal has rejected this argument in *Dovigi v. Razi (2012) ONCA 361.* This case concerned a custody dispute about a child born in California in early January of this year. The parents had neither married nor lived together. They were in a dating relationship and at one point engaged to be married but their relationship was broken off before their child was born. Both parents had lived in Ontario during the relationship and are Canadian citizens. Shortly before the child's birth, the pregnant mother travelled to California. The child was born in California. Within three days of the child's birth, the father started a court application in Ontario for joint custody. A few days later, the mother started a court application in California for custody of the child.

The primary question for the Ontario court was whether jurisdiction lies in this province over a child who was born in a foreign state and has never been present here. In Ontario the relevant legislation provides that the courts here have jurisdiction to determine the custody and access of a child if that child is habitually resident in Ontario or, in certain circumstances, if the child is physically present here. The judge concluded that the child did not fall into either category but decided to exercise her *parens patriae* authority to find jurisdiction in any case. A court's *parens patriae* authority is a residual power of the court to protect those who otherwise have no other recourse.

The mother initially argued that she has a right to mobility protected by the Canadian *Charter of Rights and Freedoms* which cannot be constricted by the fact that she is pregnant. The mother, however, withdrew her *Charter* challenge for tactical reasons because she did not want to be seen to be attorning to the Ontario court, meaning she did not wish to appear to be conceding the Ontario court's jurisdiction by invoking the *Charter*. The judge of first instance accepted that the mother could decide where she wishes to live but did not agree that should determine which court has jurisdiction over the child. Although the judge acknowledged that Canadian courts do not have jurisdiction over an action concerning a foetus before birth, the judge expressed concern over declining jurisdiction in this case. The judge held that to refuse to hear the case would encourage a pregnant mother to move to another jurisdiction in circumstances that are "arguably analogous to abduction".

The mother appealed this decision to the Ontario Court of Appeal. At the Court of Appeal, the father argued both that the lower court was correct in exercising the *parens patriae* power to take jurisdiction over the question of the child's custody and, in any case, that the child was habitually resident in Ontario despite never having been here as her parents, or at least one, were resident here. The Ontario Court of Appeal rejected both arguments. The Court of Appeal found that the legislation did not have a gap, in other words, the legislature had not overlooked this eventuality. Rather, the legislation quite precisely delineates when jurisdiction should be taken by an Ontario court. Under the legislation "habitually resident" means a place that a child resides with both parents together, or with one parent alone if that is with the consent of the other parent. The statute expressly provides that if a child lives with one parent outside of Ontario because she has been abducted that does not change the child's habitual residence from Ontario to the jurisdiction to which the child has been abducted. The Court of Appeal found clearly that this child does not fall into any of these categories. The child resides in

California with one parent and is, therefore, not habitually resident in Ontario. The Court of Appeal's decision has the necessary implication that if a pregnant woman leaves Ontario and gives birth elsewhere the law does not treat that as akin to kidnapping a child.

The Court of Appeal affirmed that *parens patriae* jurisdiction might possibly apply in an appropriate case but concluded that in this case there was no evidence of any valid protection concerns. California has custody and access laws similar to ours and the decision will be made based on the child's best interests. The Court allowed the appeal. The father sought leave to appeal the decision to the Supreme Court of Canada but was denied.

The Court of Appeal did leave the door just barely open to the exercise of *parens patriae* jurisdiction over a child born outside Ontario but it is difficult to know exactly what set of circumstances would invoke the need for an Ontario court to act to protect a child. It is encouraging that the Court of Appeal quite clearly drew a distinction between a pregnant woman moving her own person and a parent kidnapping a child. This decision protects the physical autonomy of pregnant women and also fosters a basic principle of family law – that children's custody and access disputes should be resolved where the child resides.