COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Sampley v. Sampley,*
2015 BCCA 113

Date: 20150318
Docket: CA042350

Between:

Michelle Denise Sampley

Appellant
Respondent in Cross-Appeal
(Respondent)

And

Matthew Jason Sampley

Respondent
Appellant in Cross-Appeal
(Claimant)

Before: The Honourable Mr. Justice Lowry
The Honourable Madam Justice D. Smith
The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia, dated December 23, 2014 (*Sampley v. Sampley*, 2014 BCSC 2434, Cranbrook Docket 24551).

Counsel for the Appellant:	G.A. Lang
Counsel for the Respondent:	J.M. Lalonde
Place and Date of Hearing:	Vancouver, British Columbia February 17, 2015
Place and Date of Judgment:	Vancouver, British Columbia March 18, 2015

Written Reasons by:
The Honourable Mr. Justice Harris

Concurred in by:
The Honourable Mr. Justice Lowry
The Honourable Madam Justice D. Smith

Summary:

The appellant travelled with her child to Canada from the United States and eventually decided to remain in Canada with the child. The respondent, who is the child's father, sought the child's return under the Hague Convention on the Civil Aspects of International Child Abduction. The mother opposed his return, arguing that he was not habitually resident in the U.S., that the

father had acquiesced to their remaining in Canada, that the B.C. courts should take jurisdiction of the matter because the Montana courts would not, and that the child should not be returned due to the domestic abuse of the father. The application judge ordered the child's return, contingent upon the satisfaction of numerous conditions, and made several other orders, including for support and custody. The mother appeals the return order and the father cross-appeals the conditional, custody, and support orders. Held: Appeal dismissed. The child was habitually resident in the United States, not Canada. The evidence supports that the father did not acquiesce to the child remaining in Canada. The allegations of domestic abuse are not sufficiently serious to refuse the child's return – the courts of the United States can properly address that issue. The fact that the Montana courts have, as of yet, not taken jurisdiction of the matter does not mean that no U.S. court will. The mother's residency status in the U.S. is irrelevant to these proceedings. Held: Cross-appeal allowed, except as it relates to the costs order. There was no basis for the judge to make any of the conditional, custody, or support orders.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

[1] This appeal arises from an order under the Hague *Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Can. T.S. 1983 No. 35 (the "*Hague Convention*" or "*Convention*") that a child be returned to the state of Montana in the United States. The child had been brought into Canada by his mother, the appellant on appeal. The father, who is the respondent on appeal, sought his return. The order made the mother's obligation to return to the United States with the child conditional on the father's satisfying financial and other obligations imposed under the order.

[2] The judge made additional orders not requested in the petition or response. He ordered child and spousal support payable by the father, payment by the father of certain costs associated with the return of the child to the United States, payment by the father for certain of the mother's rental accommodation in Billings, Montana, an order that the father provide a letter without an end date stating that the mother can return to Canada with the child, and an order that the child live with the mother in Billings, Montana, until an order made in the United States directs otherwise. The order also required the mother and child to "travel to Billings, Montana, within 3 weeks' time of today's date, at a cost to be paid by [the father], in order to find suitable accommodation and for [the father] to have generous access with [the child]." Finally, the Court ordered that each party bear their own costs.

[3] The mother appeals the order requiring her to return the child to the United States. The father cross-appeals those terms of the order making the return of the child conditional on his satisfying child and spousal support, and the various other conditions built into the order, including the order that each party bear their own costs.

[4] For the reasons that follow I would dismiss the appeal and allow the cross-appeal, except insofar as it relates to the costs order.

The Chambers Judgment

[5] The husband and wife were married January 23, 2010, in Calgary, Alberta. The father is a citizen of the United States, the mother of Canada. At first, the couple lived in Anchorage, Alaska, where their son was born on July 1, 2011. In October 2011, they moved to Washington State where they lived until late September 2013. The father's employer transferred him to Billings, Montana. The family moved together. When they arrived there, the house in which they intended to live was uninhabitable. The judge described the situation as follows:

> [3] The parties moved all their possessions including horses to Billings, where the claimant's parents had a home in which the parties planned to live. Unfortunately, the prior tenants of the property left the home in such a poor state of repair that the claimant and respondent's parents, along with the claimant and respondent were required to work on repairing the house, installing new floors, renovating a bathroom, painting, etc. The parties moved into a motel while the work on the home was being done. Prior to moving to Billings, the respondent purchased a new refrigerator for their Billings home, and when in Billings, the respondent selected a new stove, new flooring, carpeting, paint and new toilets for the Billings home.
>
> [4] After four or five days living in the motel, the claimant says that the respondent told him that she was going to take [the child] and stay at her parents' residence in Elko, British Columbia, while the flooring was being installed and the walls were being painted in their new home. He also says that he believed that she was only going for three weeks because she only took basic clothing and toys that would be needed for that length of time away.
>
> [5] The respondent describes the move from Billings slightly differently as follows:
>
> > We moved to Washington with a plan to move to Billings. We arrived in Billings to find our planned home not habitable. [The child] and I stayed with the petitioner in a motel for five days in Billings and left for British Columbia. That is the only connection that either I or [the child] had with Billings. Neither [the child] nor I have ever resided in Billings. When [the child] and I left Billings for British Columbia it was with the petitioner's blessing. He agreed that [the child] and I would go to British Columbia and stay with my parents.
>
> [6] The respondent also denies telling the claimant that she would be returning with [the child] to Billings.
>
> [7] The claimant travelled from Billings to British Columbia to visit with [the child] and the respondent on three occasions: in October 2013 for the Canadian Thanksgiving weekend, in November 2013 for the American Thanksgiving weekend, and for a week or so for Christmas of 2013.

[6] After generally outlining the background, the chambers judge turned to analyze the evidence in light of the objects of the *Hague Convention*, which are set out in Article 1:

> The objects of the present Convention are –
>
> a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

[7] The chambers judge then sought to determine whether the Court was obligated to return

the child to the United States. In so doing, he analyzed and applied the relevant provisions of the *Hague Convention*. It is helpful to set out his analysis:

> [18] In *Fasiang v. Fasiangova*, 2008 BCSC 1339, Madam Justice Martinson set out the criteria to determine habitual residence. This requires that the child has resided in a place for an appreciable period of time and with a settled intention to reside there (at para. 56, citing *Chan v. Chow*, 2001 BCCA 276).
>
> [19] There is a settled intention to reside in a place if the purpose of living in that place has a sufficient degree of continuity to be properly described as settled (*Fasiang* at para. 60). In *Fasiang,* the Court noted that when a family decides to permanently move and takes the required steps to do so, such as selling their property and beginning to move into a new house, that family has effectively changed the habitual residence of their children (at para. 66).
>
> [20] When describing the requirement that the parties reside there for an appreciable period of time, Madam Justice Martinson made the following comments:
>
> > [69] Whether residence has been for an appreciable period of time is a question of fact: *Nessa v. Chief Adjudication Officer*, [1999] 1 W.L.R. 1937 at 1942 (H.L.).
> >
> > [70] An appreciable period of time is not a fixed period: *Nessa* at 1943.
> >
> > [71] An appreciable period of time could be as short as one day: [Hon. James D. Garbolino, *International Child Abduction: Guide to Handling Hague Convention Cases in U.S. Courts* (Auburn, Cal.: Garbolino, 1997)] at para. 4.6, cited in *[deHaan v. Gracia, 2004 ABQB 74]* at para. 42.
> >
> > …
> >
> > [75] Habitual residence is determined immediately prior to the child's removal: *Chan* at para. 43.
>
> [21] I am satisfied based on all the evidence that in this case the habitual residence of the child was in Billings, Montana.
>
> [22] [The child] was born and raised in the United States. The father's place of employment was changed to Billings, Montana and this provided a motivating purpose for the relocation. Consequently, the parties packed all of their belongings and moved those belongings along with their horses to Billings, Montana. Prior to the move, the respondent had purchased a fridge for the Billings home and when in Billings she purchased a stove, flooring, carpets and paint. Both the claimant and the respondent and their respective parents worked for approximately four days attempting to put the Billings home into a proper state of repair. The evidence indicates that the parties were substantially committed to relocating to Billings and that they took substantial efforts to relocate.
>
> [23] It was only after it became apparent that the home would not be completed in a short period of time that the claimant and respondent agreed that the respondent would take [the child] and move to Elko, British Columbia until their home was repaired, which according to the claimant would be in approximately three weeks' time. The respondent took only her basic clothing for her and their son along with some of their son's toys. I am satisfied that neither the claimant nor the respondent had an intention to relocate to Elko, and that this move was only meant to be a temporary relocation in the middle of the more permanent relocation to Billings, Montana.
>
> [24] The evidence of Wendy Eckersley, the claimant and the respondent is all consistent with the parties' intention to return to Billings, Montana after Christmas. It was only because of the respondent's father requiring major surgery that it was agreed that the respondent and [the child] would stay in British Columbia until the respondent's father's recovery. On agreement with the respondent, the claimant took all of [the child]'s and the respondent's "Christmas loot" along with [the child]'s outside toys and outgrown

clothing and the respondent's summer clothing to Billings. This indicates that the parties still intended for the stay in Elko to be only temporary.

[25] I find that the respondent's evidence that the parties separated at the end of September 2013 is inconsistent with her own evidence and the evidence of the claimant and Wendy Eckersley.

[26] Article 3 of the *Hague Convention* provides:

> The removal or the retention of a child is to be considered wrongful where --
>
> a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

[27] Here the evidence is clear that prior to the removal of [the child] to British Columbia, the claimant and respondent lived together as a family exercising joint custody and control of [the child]. I am satisfied that the respondent's retention of [the child] is wrongful under the *Hague Convention*.

[28] Article 13 of the *Hague Convention* provides:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that --
>
> a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
>
> b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

[29] It is clear that the abducting parent has the onus to prove that the left-behind parent was not actually exercising his or her custody rights. Further, it is clear that the leading cases have established a very low threshold for the "actual exercise of custodial rights". See *J.L. v. British Columbia (Director of the Child, Family and Community Service Act)*, 2010 BCSC 1234 at para. 40.

[30] I am satisfied that the removal of [the child] to British Columbia was a temporary move and the respondent has not satisfied me that the claimant acquiesced in the retention of the child in British Columbia.

On Appeal and Cross-Appeal

[8] The mother advances several grounds of appeal, alleging multiple errors in the judgment. She contends that the judge erred in his analysis of the child's habitual residence, erred in concluding that the father had not acquiesced in the child's relocation to Canada, failed to respect an order of the Montana court that it had no jurisdiction over the child's custody, and failed to give effect to Article 13(b) of the *Hague Convention*, which allows a court to refuse to return a child where there is a grave risk that his or her return would expose the child to physical

or psychological harm or otherwise place the child in an intolerable situation.

[9] The father cross-appeals, contending that the judge erred in making orders that had not been applied for. The father submits that the judge ought not to have imposed those conditions in the context of an application to determine which jurisdiction should consider the merits of custody and access. He also contends that the court erred in not awarding him his costs.

[10] The order under appeal rests on a series of findings of fact. First, that immediately prior to the child's removal to Canada, his habitual residence was in the United States, specifically in Billings, Montana, because the family had moved there, intending it to become their home. Second, that immediately prior to the child's removal to Canada, both the mother and father were exercising custodial rights over their child. Third, that the stay in Canada was intended to be temporary. Fourth, that the mother's ultimate refusal to return with the child to the United States was wrongful. Finally, that the father had not consented or acquiesced to the retention of the child in Canada.

[11] Before this Court will interfere with those findings, it must be demonstrated that in making them, the judge committed a palpable and overriding error. Alternatively, the Court may interfere if it can be demonstrated that the judge proceeded on a wrong legal principle or applied the wrong legal test to the determination of the facts.

Relevant articles of the *Hague Convention*

[12] The following articles of the *Convention* are relevant to the issues before this Court. Article 3 provides:

> The removal or the retention of a child is to be considered wrongful where –
>
> a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

[13] Article 4 of the *Hague Convention* states:

> The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

[14] Article 13 provides:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial and administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

[15] Article 31 deals with the situation where there are territorial jurisdictions within the Contracting State, such as in the United States and Canada, and requires, in this case, the court to determine in which territorial unit of the State jurisdiction the child was habitually resident at the time of the wrongful removal.

Habitual residence

[16] The mother contends that the judge erred in the test he applied to determine habitual residence. His error, she argues, was to conclude that the child's habitual residence was in Billings, Montana, by relying on parental intention, rather than the child's, and failing to account properly for the short time the family spent in Montana before the move to Canada.

[17] With respect, I am not satisfied that the judge applied an incorrect test to determine habitual residence. As the judge noted, the correct test was set out by this Court in *Chan*. The judge was entitled to examine the parents' intentions in making the move. He found that they made the move intending to live in Billings and make it their family home, and accordingly, the habitual residence of their child. It must be remembered that at the time of the move, the child was so young that he could not have had any intentions independent of his parents about where he would live or the nature of any of his connections to a particular community. In the circumstances of this case, I can see no error in the judge's appreciation of the relevant facts, including the circumstances leading to the family's move to Billings, the short time the family actually spent there before the mother and child temporarily moved to Canada, and the circumstances surrounding the temporary move to Canada. The judge found as a fact that the parents were "substantially committed" to relocating to Billings. I infer that the judge found that the move there was voluntary and not coerced as far as the mother was concerned. This is consistent with the judge's conclusion that when the mother and child went to Canada, it was with the intention to return to Billings when the problems with their accommodation had been resolved. These findings were open to the judge on the evidence.

[18] So far as the other findings of fact are concerned, the judge's conclusions are supported by the evidence. The mother has not demonstrated any palpable or overriding error in them.

Indeed, she does not dispute that initially she came to Canada as a temporary move. Her most substantial criticism of the judge's reasons is that he ignored evidence that she says demonstrates that the husband consented to or acquiesced in their child remaining in Canada.

Acquiescence – Article 13(a)

[19] Pursuant to Article 13(a) of the *Hague Convention*, a court may refuse to order the return of the child where the parent seeking the child's return has acquiesced to the child's removal:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –
>
> a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; …

[20] The mother points to evidence that the father had suggested that she stay in British Columbia when he visited at Christmas, encouraged her to seek employment while here, organized tools and other materials for her to take to British Columbia when she returned to Billings for a visit, provided financial support to her and their child after closing a joint bank account, failed to complete the work to restore the house in Billings, arguably attorned to the jurisdiction by consenting to a child support order in Provincial Court, and initially sought only access to his child rather than his return when filing the *Hague Convention* application.

[21] I am unable to accede to this argument. It is evident that the chambers judge was aware of the evidence, referred to it, and weighed it in reaching his decision. The evidence is consistent with the father's continuing expectation that the mother and child would return to Montana. The stay in British Columbia was extended principally because of the poor health of the mother's father. It was open to the judge to conclude that the father was facilitating nothing more than an extended temporary stay, during which the mother could work and contribute to the family income. Moreover, it is by no means clear that the father attorned to the jurisdiction of the Provincial Court in consenting to a child support order. We were advised that the father consented to the order without prejudice to his position on his *Hague Convention* application. Finally, I do not consider that the father's initial position on this application can, in light of all of the evidence, be taken as consenting to the non−return of his son. In my opinion, the mother has not demonstrated that the judge made a palpable and overriding error in his finding of fact.

Domestic Abuse – Article 13(b)

[22] The more substantial question on this appeal involves Article 13(b) of the *Convention*, which to repeat provides:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –
>
> …

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. …

[23] The mother contends that the chambers judge erred by failing to consider her evidence that the father had been abusive and violent in his relationship with her and the child, as well as with a former partner in a previous relationship. She says that the father has not effectively denied her evidence and that her evidence is sufficient to demonstrate that there is a grave risk that returning the child would expose him to physical or psychological harm or would otherwise place him in an intolerable situation. Moreover, the judge erred in refusing to admit a Child Custody Assessment prepared in relation to a previous marriage that supported her contention about the father's violent and abusive proclivities.

[24] The mother's affidavit evidence included the following:

> 17. … Our relationship had been one filled with emotional, verbal and physical abuse. That is what brought an end to our relationship. That is why I needed to leave the United States. I need to protect [the child] from the Petitioner's abusive nature. … He physically assaulted me on repeated occasions, that is not a good relationship.
>
> …
>
> 22. … I am also concerned that if left alone to parent [the child], the Petitioner will turn his tendency of violence and anger towards [the child]. On several occasions I observed the Petitioner trying to physically restrain [the child] in a kind of straight jacket hold so that [the child] would tire and go to sleep: what I mean by this is that the Petitioner would hold [the child] extremely tightly ([the child]'s legs would be tucked up tightly next to his chest) while [the child] would be crying, screaming and complaining, refusing to allow [the child] to move his limbs whatsoever. He would hold [the child] like this for a long time, and he would refuse to listen to my objections. [The child] would be crying for me until he finally would fall asleep from exhaustion. I found it to be abusive and was very disturbed watching it; but the Petitioner refused to listen to me. …

[25] The mother described three incidents in 2010 (October, November, and December), three in 2011 (March, April, and October), two in 2012 (January and August), and two in 2013 (September) in support of her allegation that she was the victim of verbal, emotional, and physical spousal abuse. These incidents, she said, involved yelling and screaming, insults, throwing objects (on one occasion when the mother was holding the child), physical restraint, rages, and generally threatening behaviour. The mother also alleges that on one occasion, the father kicked her while holding the child, and that on another, following a fight where he confined her in the bathroom, she found that he had removed their handgun from the drawer in which it was stored. He told her that he had been cleaning it. These incidents were directed towards her, but four also occurred in front of their child. In addition, the mother sought to introduce into evidence a Child Custody Assessment report prepared in 2004 in relation to the father's first marriage, which also included references to physical force, shoving, throwing objects, threats of violence involving the mother and child, and in general, physical and emotional abuse.

[26] It is important to note that the father denied these allegations. He acknowledged only one physical altercation with the mother, which he claimed was precipitated by her attack on him. He deposed that that was the only time he had ever had any physical altercation with the mother. He also deposed that he had never been abusive to his son and would never consider being so.

[27] The chambers judge ruled that the Child Custody Assessment report was inadmissible. He must also be taken to have rejected the mother's claim that she left Montana with the child to protect the two of them from abuse. The judge found that the mother and child went to Canada temporarily, expecting to return. But the judge did not deal expressly with whether the allegations of emotional, verbal, and physical abuse engaged Article 13(b) of the *Convention* as an exemption to returning the child. At most, one might regard the various conditions put on the child's return as intended to mitigate any risks of physical or psychological harm faced by the child on his return to Montana.

[28] The mother contends that the chambers judge ought to have admitted the Child Custody Assessment report and accepted the facts alleged by the mother in her affidavit. She argues that the father's response failed to contradict properly the mother's allegations.

[29] I disagree. The father's evidence is that there was only one physical altercation between the couple, which he explained, and that he had never been abusive towards his son. In my opinion, this is sufficient to join issue with the mother's allegations. I would not interfere with the exercise of discretion by the chambers judge in excluding the Child Custody Assessment report.

[30] The mother's position was that the evidence of abuse was sufficiently established on the record for this Court to invoke and apply Article 13(b). Her alternative position was that if the record was not sufficiently established, the matter should be referred back to Supreme Court for cross-examination on the affidavits so that the judge could make the necessary credibility findings to determine the facts.

[31] In my view, remitting the matter would be unfortunate, given one of the objects of the *Convention* is to ensure the speedy return of children to the State from which they have been wrongfully removed so that issues concerning custody and access (including such issues as the best interests of the child in light of the parental relationship) can be determined in the proper jurisdiction. It is preferable, in my view, to consider whether the mother's evidence, standing alone, is sufficient to engage Article 13(b). If it is not, the appeal should be dismissed and the child's return ordered.

[32] The mother argues that in the first years after the *Convention* came into effect, courts narrowly construed the exemption in Article 13(b) in favour of ensuring the prompt return of children. She argues that more recently, courts have recognized that spousal abuse, including where witnessed by a child, may put the child at grave risk of being exposed to physical or psychological harm or otherwise being placed in an intolerable situation. This, coupled with the

increasing awareness that a significant proportion of cases involve women fleeing abusive relationships, has led courts to take a more expansive view of the risks of harm facing a child on return, and accordingly, to rely on the exemption in Article 13(b) more readily. For a helpful discussion of these and related issues see, for example, Noah L. Browne, “Relevance and Fairness: Protecting the Rights of Domestic-Violence Victims and Left-Behind Fathers Under The Hague Convention on International Child Abduction” (2011) 60 Duke L.J. 1193.

[33] In my view, in Canada, the test established in *Thomson v. Thomson,* [1994] 3 S.C.R. 551, provides the necessary flexibility to accommodate and give effect to risks of physical or psychological harm on return. As the Supreme Court of Canada observed in *Thomson* at 578−79:

> I now turn to a closer examination of the purpose of the Convention. The preamble of the Convention thus states the underlying goal that document is intended to serve: “[T]he interests of children are of paramount importance in matters relating to their custody.” In view of Helper J.A.’s remarks on this matter, however, I should immediately point out that this 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. This part of the preamble speaks of the “interests of children” generally, not the interest of the particular child before the court. This view gains support from Article 16, which states that the courts of the requested state shall not decide on the merits of custody until they have determined that a child is not to be sent back under the Convention. I would also draw attention to the fact that the preamble goes on to indicate the manner in which its goal is to be advanced under the Convention by saying: [Emphasis in original.]
>
> 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. . . .
>
> The foregoing is entirely consistent with the objects of the Convention as set out in its first Article. Article 1 sets out two objects: (a) securing the return of children wrongfully removed to or retained in any contracting state; and (b) ensuring that the rights of custody and access under the law of one contracting state are effectively respected in other contracting states. Anton, *supra*, at pp. 542−43, indicates that prompt return was intended to be predominant:
>
> > The Special Commission also considered ─ and, until recently, this would have been an equally novel proposition for judges in common law countries ─ that the courts of the State addressed should order the return of the child, subject to certain limited exceptions, despite the possibility that further inquiries might disclose that the child’s welfare would be better secured by its remaining in that State. . . . [T]he primary purpose of the Convention [is], namely, as Article 1(a) states, to secure the prompt return of children wrongfully removed to or retained in any Contracting State. The Commission started from the assumption that the abduction of a child will generally be prejudicial to its welfare. It followed that, when a child has been abducted from one country to another, international mechanisms should be available to secure its return either voluntarily or through court proceedings.

[34] The Supreme Court recognized that Article 13(b) provides an exemption to return at 596−97:

It has been generally accepted that the Convention mandates a more stringent test than that advanced by the appellant. In brief, although the word “grave” modifies “risk” and not “harm”, this must be read in conjunction with the clause “or otherwise place the child in an intolerable situation”. The use of the word “otherwise” points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of Article 13(b) is harm to a degree that also amounts to an intolerable situation. Examples of cases that have come to this conclusion are: *Gsponer v. Johnstone* (1988), 12 Fam. L.R. 755 (Fam. Ct. Aust. (Full Ct.)); *Re A. (A Minor) (Abduction)*, [1988] 1 F.L.R. 365 (Eng. C.A.); *Re A. and another (Minors) (Abduction: Acquiescence)*, [1992] 1 All E.R. 929 (C.A.); *Re L. (Child Abduction) (Psychological Harm)*, [1993] 2 F.L.R. 401 (Eng. H.C. (Fam. Div.)); *Re N. (Minors) (Abduction)*, [1991] 1 F.L.R. 413 (Eng. H.C. (Fam. Div.)); *Director-General of Family and Community Services v. Davis* (1990), 14 Fam. L.R. 381 (Fam. Ct. Aust. (Full Ct.)); and *C. v. C.*, *supra*. In *Re A. (A Minor) (Abduction)*, *supra*, Nourse L.J., in my view correctly, expressed the approach that should be taken, at p. 372: [Emphasis in original.]

> . . . the risk has to be more than an ordinary risk, or something greater than would normally be expected on taking a child away from one parent and passing him to another. I agree . . . that not only must the risk be a weighty one, but that it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words ‘or otherwise place the child in an intolerable situation’.

[35] The mother analogized her circumstances to those discussed in *Pollastro v. Pollastro* (1999), 171 D.L.R. (4th) 32, 43 O.R. (3d) 485 (C.A.). In that case, the Ontario Court of Appeal invoked the exemption in light of a catalogue of evidence of escalating violence and physical and emotional abuse, as well as evidence of serious unpredictability in the way in which the father conducted himself as a parent. The Court’s findings were supported by evidence from the mother’s doctor and transcripts of a phone conversation. The Court gave effect to its concern that returning the child would put him at grave risk of being exposed to physical or psychological harm or otherwise being placed in an intolerable situation.

[36] The facts in this case are different from those described in *Pollastro*. That case was marked by a degree, intensity, and frequency of physical violence not found here. The child, in particular, was exposed to violence and abuse to a far greater degree than is alleged here. There too the father had drug and alcohol problems, and a history of unpredictability and unreliability in the care of his child, as well as a palpable hostility towards his wife. The domestic environment was characterized by a degree of volatility well beyond this case. Moreover, it was accepted as a fact that the mother fled California to escape the violence and abuse. In this case, the judge found that the mother left temporarily, intending to return, continued to intend to return for some months, and only changed her mind when the marriage broke down six months or so after first leaving.

[37] It seems clear that what is contemplated within this family is that the mother and child will return together and live together, separate and apart from the father, until a court deals with the issues within the family, including any issues arising from past or potential future abuse. As a result, the child is not being delivered directly to the father. The opportunity for occasions of domestic abuse to arise, as they may have sporadically occurred in the past on the mother’s

evidence, is thereby reduced, if not eliminated. Proposed living arrangements, particularly whether the child will live with an allegedly abusive parent, is a factor to consider in assessing risk under Article 13(b): see, for example, *Cannock v. Fleguel*, 2008 ONCA 758 at paras. 26−28.

[38] As noted, the mother recounted a number of incidents to support her allegation that the couple's relationship was marked by abuse. Most of those incidents occurred before the birth of their son, but four are said to have occurred in front of their son between October 2011 and September 2013. She also described some examples of inappropriate parenting by the father. Taken collectively, I am not persuaded these allegations, assuming they were found to have occurred, rise to the level of a grave risk of the child being exposed to harm or otherwise being placed in an intolerable situation if he is returned and lives apart from his father until a court addresses the merits of custody and access. It would seem most likely that whichever court deals with the problems facing this family will be well-versed in addressing these kinds of problems and have the experience necessary to craft the orders required to protect the child from any potential risks he faces. I do not think that the kind of alleged abuse involved in this case lays a foundation for a court in this province, in effect, to usurp the role of a court in the United States taking responsibility for protecting the child.

[39] The *Hague Convention* contemplates, as observed by Madam Justice L'Heureux-Dubé in *W.(V.) v. S.(D.)*, [1996] 2 S.C.R. 108, that the responsibility for assessing the merits of custody and access issues resides with the jurisdiction of the child's habitual residence:

> [36] … The Act, like the Convention, presumes that the interests of children who have been wrongfully removed are ordinarily better served by immediately repatriating them to their original jurisdiction, where the merits of custody should have been determined before their removal. …

[40] More recently, in *Ellis v. Wentzell-Ellis*, 2010 ONCA 347, the Ontario Court of Appeal identified the relationship between the rationale underlying an order to return a child and the threshold under Article 13(b), stating:

> [50] … It must be appreciated that the court would not be forcing the mother or child to return to live with the father. Rather, an order that the child be returned to England simply recognizes that the mother was not entitled to take the child from England and that custody proceedings should be decided by English courts. Aside from recognizing that the English courts are the appropriate forum to determine the merits of the custody case, a return order also recognizes and trusts that those courts are capable of taking the necessary steps to both protect and provide for the mother and the child in the present case. This is what underlies Article 13(b) and why there is such a high threshold for parents wishing to justify removing their children from one contracting state to another.

[41] Thus, in the absence of reason to doubt otherwise, we should accept that the jurisdiction from which the child was removed has the capacity to adjudicate the merits of the custody and access issues, including the allegations of abuse, and make the necessary orders to protect the best interests of the child. The *Convention* does not, through Article 13(b), displace the

jurisdiction of the courts of the place of habitual residence to adjudicate those matters.

[42] The conclusion that the alleged incidents of abuse of this case are not sufficiently serious to meet the Article 13(b) threshold is consistent with several decisions of the Ontario Court of Appeal, including *Pollastro*, as discussed above, as well as *Cannock*, *Ellis*, and *Finizio v. Scoppio-Finizio* (1999), 179 D.L.R. (4th) 15, 46 O.R. (3d) 226. In the latter three cases, the Court found that the Article 13(b) threshold had not been satisfied. All three involved allegations of physical abuse towards the mother, and in *Ellis*, the father was found to have had an alcohol problem, which led him to neglect his family, to have treated the mother with "total disrespect", to have been insulting towards her family and friends, and to have had violent outbursts, which occurred at least once in the presence of the mother and child: *Ellis* at para. 42.

[43] Accordingly, considering the above, I am satisfied that the alleged incidents of abuse, assuming they occurred, of this case are not sufficiently serious to warrant applying the exemption in Article 13(b).

Jurisdiction in Montana and loss of residency status

[44] The mother also argued that two additional matters militated against the return of the child. The first is that the court in Montana had declined to exercise jurisdiction over the parenting dispute between the parties.

[45] It appears from the record that the only reason the court declined jurisdiction is because of a domestic rule that requires parties to have resided in the jurisdiction for a certain time. The order is under appeal. The ruling does not, it appears, foreclose other bases on which a Montana court might exercise jurisdiction. Nor does it reflect a decision premised on the proposition that a court in Canada has jurisdiction or is the preferred forum to resolve the issues. As counsel for the mother conceded, if Montana does not have jurisdiction, Washington State would have. The critical point is that a court in the United States has the jurisdiction to deal with these issues. I do not regard the status of the case before the Montana courts as amounting to an impediment to the return of the child.

[46] The second matter arises from fresh evidence concerning the residency status of the mother in the United States. Although this evidence was available at the time of the original hearing, it is in the interests of justice to respond to this matter. Accordingly, I would admit that evidence together with the father's opinion evidence on the residency issue in the United States.

[47] As a result of the mother's absence from the United States, she has had her residency card confiscated by United States border officials. This puts her ability to reside permanently in the United States in doubt and it may be that she will only be able to reside in Montana as a visitor for a period of up to six months in any one year. Whether that is the ultimate outcome is uncertain because she has avenues of redress against the loss of her card as well as other remedies or opportunities to re-establish her right to live permanently in the United States. One

cannot know what the final position may turn out to be. One can say, however, that the mother can return to Montana and live there as a visitor.

[48] Again, I do not see this issue as providing a reason not to order the child returned to the United States. The mother's residency rights are a matter for the United States. More particularly, the implications of those rights (including, for example, how many months in any year the mother may live in the United States) are matters that are no doubt material to the disposition by the court there of the custody and access issues before it. One could imagine a court permitting the mother and child to return to Canada for periods of time or otherwise crafting orders that respond to the mother's residency rights in a way designed to protect the child's best interests. However those issues may be resolved, they are matters for the relevant court in the United States, not for a court in this province to pre−empt. In my view, doing so would fail to apply the principle of comity and would interfere with the custody and access laws of those courts.

The cross-appeal

[49] I turn now to consider the father's cross-appeal. It will be recalled that the judge made orders imposing a variety of conditions on the child's return, including conditions related to spousal and child support. I note that these did not reflect undertakings offered or extracted in connection with the child's return. Nothing in these reasons should be taken as a comment on the availability or appropriateness of the use of undertakings in connection with a child's return.

[50] There was no application before the court for the relief that was ordered. Indeed, there already existed a consent order in Provincial Court addressing child support. In my view, there was no basis on which the judge could make those orders, and making such orders is inconsistent with the reasoning of the Supreme Court in *Thomson* (at p. 603). Accordingly, I would set aside the order awarding spousal and child support.

[51] The judge also ordered that the child live with the mother in Billings until a United States court orders otherwise. In my view, this order purports to take effect in Montana. As such, it seems to me to be beyond the jurisdiction of a court in British Columbia to make such an order. I would set it aside. I refrain from commenting on whether the living circumstances of a child pending adjudication of custody in the domestic court may, in appropriate circumstances, properly be the subject of undertakings.

[52] The judge also made a number of other orders requiring payment of money for transportation and rental accommodation as a condition of the child's return. In my view, issuing orders is an inappropriate way of achieving this valid purpose. I would also set aside the order that the father provide a letter without an end date stating that the mother can return to Canada with the child. In my view, such an order interferes improperly with the substantive merits of the custody and access issues to be decided by a United States court.

[53] The father also appealed the order that each party bear their own costs. It may well be that such an order is unusual in light of the purpose of the *Convention* to discourage wrongful removal of children and the success of the father in receiving an order for the child's return, but I would not disturb it, given the discretion owed to orders for costs in the Supreme Court.

Conclusion

[54] In the result, I would dismiss the mother's appeal. I would allow the cross-appeal and set aside those terms of the order, save the order as to costs.

[55] I would order the return of the child to the United States within two weeks of the date of this judgment. Returning the child within two weeks reflects the intent of the original order.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Mr. Justice Lowry"

I agree:

"The Honourable Madam Justice D. Smith"