IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (FAMILY)

Citation: *Ryan v. Ryan*, 2010 NLTD(F) 37
Date: 20101207
Docket: 201002F0731

BETWEEN:

JOHN RYAN APPLICANT

AND:

KRISTINE RYAN

RESPONDENT

Before: The Honourable Mr. Justice J. Douglas Cook

Place of Hearing: St. John's, Newfoundland and Labrador

Summary:

Father sought return of two of the parties' sons to Vermont, their habitual residence, pursuant to the Hague Convention on the Civil Aspects of International Child Abduction.

Mother's submission that Father was not exercising custody rights to older son, at the time of his retention or removal, rejected because of the wording of the relevant Convention articles and relevant case law interpretations.

Return to Vermont ordered because Mother did not meet the heavy onus of establishing, on the balance of probabilities, grave risk that their return would expose the children to physical or psychological harm or otherwise place them in an intolerable situation.

Appearances:

Raman Balakrishnan	Counsel for the Applicant
Laura Brazil	Counsel for the Respondent

Authorities Cited:

CASES CONSIDERED: **Pollastro v. Pollastro** (1999), 45 R.F.L. (4th) 404 (Ont. C.A.); **Moore v. Moore**, [1992] W.D.F.L. 246 (Ont. Dist. Ct.); **G.(S.A.) v. G.(C.D.)**, 2009 YKSC 21; **S.(J.W.) v. M.(N.C.)** (1993), 50 R.F.L. (3d) 59 (Alta. C.A.); **Thomson v. Thomson**, [1994] 3 S.C.R. 551; **C. v. C. (Abduction: Rights of Custody)**, [1989] 1 W.L.R. 654 (UKCA); **C.(J.R.) v. McDougall**, [2008] 3 S.C.R.41;

STATUTES CONSIDERED: *Children's Law Act,* R.S.N.L. 1990, c. C-13, section 54.

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, 1986, S.N.L. 1986, c.42, Sch.D.; Rule 56A Division XI.

TREATIES CONSIDERED: *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Can. T.S. 1983 No. 35.

REASONS FOR JUDGMENT

COOK, J.:

INTRODUCTION

[1] John Ryan, the father of William Ryan (referred to by the family as "Will), born October 31, 2001 and John Thomas (referred to by the family as "JT"), born June 21, 2005 applies to have his two sons returned to Vermont pursuant to the terms of the *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980**,** Can. T.S. 1983 No. 35 which is part of the law of this Province by virtue of section 54 of the *Children's Law Act,* R.S.N.L. 1990, c. C-13.

[2] The return is opposed by Kristine Ryan, the mother of Will and JT, who submits that their return would expose them to physical or psychological harm or otherwise place them in an intolerable position. Although admitting that the boys' habitual residence is in Vermont Ms. Ryan also makes a preliminary submission that Mr. Ryan was not actually exercising custody rights to their son Will at the time of his removal or retention.

BACKGROUND

[3] Counsel have not raised any procedural irregularities under *Rule 56A Division XI* of the *Rules of the Supreme Court, 1986*, 1986, S.N.L. 1986, c.42, Sch.D. or under the Hague Convention itself. This includes Ms. Ryan acknowledging that the removal or retention of Will and JT is admitted under the Convention, such that the children should be returned to Vermont, their admitted habitual residence, unless, of course, Ms. Ryan's evidence meets the burden set out in Article 13(b) of the Convention.

[4] John Ryan was born in Boston, Massachusetts, United States of America, on January 10, 1966. Kristine Ryan was born on July 6, 1967, in St. John's, Newfoundland and Labrador, Canada. She grew up in Ferryland.

[5] When the parties met, Ms. Ryan had a home on Freshwater Road, St. John's. The parties quickly moved in together. Mr. Ryan left and returned throughout late 2000 and into early 2001, living with Ms. Ryan while in this Province. Ms. Ryan sold her home on Freshwater Road and the parties moved together to Ferryland, a community where Ms. Ryan has roots, in June 2001.

[6] Ms. Ryan had a child from a previous relationship, Sidney Ryan, who was born June 1, 1993 in this Province. Sidney is not named in the application due to his age and the prohibition under the Hague Convention pursuant to Article 4 which does not permit applying the Convention after a child attains 16 years.

[7] The parties had their first child, William Ryan, (referred to by the family as "Will") who was born at St. John's on October 31, 2001. The Birth Certificate for Will names Mr. and Ms. Ryan as his parents.

[8] On or about November 2, 2001, the parties moved into Mr. Ryan's mother's home in Aquaforte.

[9] In April 2002 the Ryan's moved to Milton, Massachusetts and stayed until August 2003. They later relocated to Wellesly, Massachusetts. In August 2004 the parties moved with the family to Brattleboro, Vermont, where they have lived together ever since except when travelling.

[10] Mr. Ryan is a splicing technician which is labour intensive. He has worked with Verizon and its predecessor companies for the past 23 years. He has spent various periods of time working away from the family homes in the United States, primarily to earn extra monies, including monies to purchase the parties present home in Brattleboro which they both agreed to purchase. He often stayed during the week with his sisters in Boston but would return on weekends if his work assignments were within a reasonable distance from the family home. Mr. Ryan maintained frequent telephone contact with his family during his absences away from Brattleboro. Mr. Ryan's has not had to work outside of Brattleboro since May 2009.

[11] Ms. Ryan is a Registered Nurse but she only worked outside of the family home, as an RN, for approximately two years in 2007 to 2009, following training to reenter the workforce. During this period she hired Yolanda Maynard as a homemaker and they developed a friendship.

[12] John Thomas (referred to by the family as "JT") was born in Brattleboro June 21, 2005.

[13] Ms. Ryan maintained a strong connection through numerous telephone calls with many of her Newfoundland friends and relatives, some of whom visited the Ryan family in Brattleboro. These include: Ms. Ryan's aunt and uncle, Stan and Peggy O'Brien, for four weeks in 2005 and two weeks in 2006; Rhonda O'Keefe for a week in 2005 and Tanya O'Brien for a week in 2006. Ms. Ryan considers these people, and several others on the Newfoundland Southern Shore, as having provided, as well as now providing, support to her.

[14] The number of friends which Ms. Ryan had and does have in Vermont is in dispute.

[15] The Ryan family had a vacation in Newfoundland in 2007 with Ms. Ryan going to the Southern Shore with the children for five weeks and Mr. Ryan, because of work commitments, arriving five weeks later to spend approximately ten days with the family. They all returned together to Brattleboro without incident.

[16] In or about October 2009, the parties attended counselling. Issues surrounding the parties' marriage and issues surrounding Mr. Ryan's use of alcohol were also addressed.

[17] Mr. Ryan admits consuming alcohol and smoking Marijuana in the past but testified that he has now stopped.

[18] On June 17, 2010, Ms. Ryan and the three children as well as Mr. Ryan's mother, Mrs. Eleanor Ryan, left to drive from Brattleboro, Vermont to Newfoundland and Labrador, for a vacation. It was decided that Mr. Ryan would fly to Newfoundland in late July 2010 and the parties and the three children would drive back to Vermont together in August 2010.

[19] Ms. Ryan and the children and Mrs. Ryan arrived in this Province on or about June 20, 2010. At that time Mrs. Eleanor Ryan stayed at her home in

Aquaforte while Ms. Ryan and the children stayed at a rented house located in Ferryland owned by Ms. Ryan's good friend, Rhonda O'Keefe. Ms. Ryan and the children stayed there until shortly before Mr. Ryan arrived on July 22, 2010.

[20] After Mr. Ryan's arrival the family stayed at Mrs. Eleanor Ryan's home in Aquaforte where they remained until August 2, 2010. On August 2, 2010, Ms. Ryan left the Applicant. She removed Will and JT and brought some personal belongings to the Iris Kirby House in St. John's. Sidney stayed with a friend of Ms. Ryan's.

[21] On August 6, 2010 Ms. Ryan applied for, and was granted on an ex parte basis, an Emergency Protection Order ("EPO") which stipulated that no contact was to occur between Mr. Ryan and Ms. Ryan and their children. In the EPO Ms. Ryan alleged physical abuse, hitting-restraining, choking in Newfoundland and Labrador and Vermont since November 2001 to the present date. Ms. Ryan also alleged damage to property and pushing and verbal threats to Sidney Ryan.

[22] An Originating Application seeking custody and support was filed by Ms. Ryan at this Court on September 7, 2010. It was personally served on Mr. Ryan on September 12, 2010. Mr. Ryan had commenced an action out of the Vermont Superior Court (Windham Unit) seeking divorce and other orders pertaining to parental responsibility on August 31, 2010. Ms. Ryan was personally served on September 11, 2010.

[23] Ms. Ryan filed a Response to the Originating Application on October 14, 2010, requesting that William and JT be permitted to stay in Newfoundland and Labrador pursuant to Article 13 of the Hague Convention.

[24] Mr. Ryan returned to Vermont August 14, 2010. Ms. Ryan and the children remained in this Province.

[25] On October 6, 2010, Mr. Ryan filed an Originating Application for the Return of the Children under the Hague Convention. It is this Application which is before this Court for analysis and decision.

[26] In early October 2010, Ms. Ryan agreed that the family would reunite and return to Brattleboro following which Mr. Ryan purchased plane tickets, as agreed. This attempt to reconcile however quickly fell apart.

[27] On October 26, 2010, a telephone conference was held between the Supreme Court of Newfoundland and Labrador, Trial Division (Family) and the State of Vermont Superior Court (Windham Unit) as a result of a decision by Judge Zonay of the Vermont Superior Court on October 21, 2010, respecting the parties. Present during this teleconference were the writer, Newfoundland and Labrador counsel, Raman Balakrishnan and Laura Brazil, as well as Judge Zonay and the parties' Vermont Attorneys, John Maabie and Jean Kiewel.

[28] As a result of this teleconference, Judge Zonay stated he would not make any court orders in Vermont pertaining to parental responsibility until the Hague application decision was made in this jurisdiction. Accordingly, there are no court orders existing in Vermont affecting the parties or the children.

[29] Ms. Ryan self-referred herself and her children to Mr. George Andrews for counselling and "family therapy" to enable all to adapt to the transition in moving from Vermont to Ferryland. Two sessions have been held thus far with Mr. Andrews, including at least one joint family session. Mr. Andrew's "opinions" were based solely on information from Ms. Ryan and he has yet to contact any people in Vermont, including Mr. Ryan. He was also not prepared to make recommendations until he had completed at least eight sessions.

POSITIONS OF THE PARTIES

[30] Counsel for Mr. Ryan submits that the evidence presented by Ms. Ryan does not prove, on a balance of probabilities that JT and/or Will will be in grave danger or be exposed to an intolerable situation if returned to Vermont. He submits, on the contrary, that the evidence including the attachments filed with this Application show that the children are healthy, well adjusted children who love their father and have never been abused by him in any manner.

[31] In support of counsel's submissions, he relies in particular on the following evidence: the absence of any physical harm directed at the children, at any time, by their father as confirmed by Sidney Ryan; Ms. Ryan testifying that she never contacted any authorities in the United States or in Canada for alleged abuse and there were no hospital records which show William or JT being abused;

[32] Counsel also points to Ms. Ryan's inconsistency as to abuse which she allegedly suffered and her sworn EPO filings in this Province. In particular, counsel refers to Ms. Ryan alleging "hitting and chocking" "since November 2001" while the only evidence before the Court was one alleged chocking incident in 2001 or 2002 here in this Province. Counsel also refers to the absence of "cornering" in the EPO documentation which was referred to in her testimony.

[33] Counsel also emphasizes the very real discrepancy in the evidence provided to substantiate Mr. Ryan drinking excessively every night and passing out drunk and drinking excessively every weekend. In support of this not occurring counsel refers to Sidney Ryan's evidence that he had a friend who would come by the Ryan home in Vermont, as well as Ms. Ryan's evidence that other children would arrive and play at their home with Will and JT. He asserts that this is inconsistent with the picture presented by Ms. Ryan, that Mr. Ryan consistently passed out drunk and there were regular arguments and drinking. Counsel also points to Mr. Ryan regularly attending Will's varied sporting activities as being inconsistent with the degree of drinking allegedly done by Mr. Ryan.

[34] Counsel also maintains that physical abuse, hitting-restraining, choking in Newfoundland and Labrador and Vermont since 2001 to the present date, in addition to damage to property and pushing and verbal threats to Sidney Ryan did not happen. He also maintains that such drinking would be inconsistent with Mr. Ryan's 20 year employment record with the same company. In addition, he relies on Ms. Ryan not taking issue with Mr. Ryan's driving her and the children when she believed he was drinking.

[35] Counsel relies on similar inconsistencies with the evidence tendered by Ms. Ryan concerning Mr. Ryan's smoking of marijuana.

[36] Counsel acknowledges that that Mr. Ryan did not deny drinking alcohol and smoking marijuana but emphasizes that the frequency and amount of both are disputed as is the scenario which Ms. Ryan wishes the Court to believe.

[37] Counsel also relies on the evidence supporting the children being happy, healthy and well adjusted in Vermont.

[38] Counsel submits that these are return proceedings taken pursuant to the Hague Convention and not a "parenting" proceeding governed by the best interests of the child. He also states that Ms. Ryan does not believe that she would be denied a fair and proper hearing in Vermont where, the Court has agreed to put proceedings on hold, pending the outcome of the return application before this Court.

[39] Counsel for Ms. Ryan submits that the evidence clearly illustrates that to return Will and JT to Vermont would: place them at substantial risk of an intolerable situation because they would be returned to an alcohol and drug infested environment; subject the children and their mother to grave risk of physical and psychological harm and emotional neglect because of Mr. Ryan's addictions and his failure to acknowledge his problems and seek adequate treatment. As a result of their relationship to their mother, the children would be further victims of any abuse inflicted upon her by witnessing such abuse. They would be returned to a place where they have no support network of family and friends, while at the same

time they would be removed from their "sanctuary" in Ferryland as well as exposing the children and their mother to the possibility of further psychological, emotional and physical harm which is a glaring reality, in light of the Mr. Ryan's entrenched and long-standing patterns of inappropriate and abusive behaviour.

[40] In addition, Counsel for Ms. Ryan submits that if either of Will and/or JT is ordered returned to Vermont there is absolutely no requirement on the part of Ms. Ryan or Sidney to return to Vermont. The children could be separated from their mother, a primary caregiver, and from their oldest brother, Sidney, who has occupied the role of the secondary parent to the younger children throughout their lives. Furthermore, if Will is not returned under Article 13(a), JT could be returned to live in Vermont alone, without his brothers or mother. However devastating it would be to have Will and JT return together to Vermont without their mother or Sidney, she says one could only speculate on the horrific effect JT would experience if separated from all major figures in his life.

[41] Counsel maintains that Ms. Ryan is not "forum shopping". She argues that the threats made by Mr. Ryan that he would "torture" her if she left him and his pattern of abusive and controlling behaviour, made it impossible for her to safely leave Vermont prior to coming to Newfoundland and Labrador.

[42] Counsel contends that Ms. Ryan has always been aware of Mr. Ryan's drug and alcohol addictions. However, only recently has she realized the seriousness of the situation. She states that appropriate facilities may exist in Vermont to deal with this matter but the problem is that Mr. Ryan has already breached a court order out of this jurisdiction and would likely have no issue doing so again in Vermont. Accordingly, any protective measures put in place would be useless.

[43] Counsel maintains that the evidence adduced on behalf of Ms. Ryan is not untrue or unbiased. She also maintains that Ms. Ryan is a woman whose life and children have been subjected to years of emotional and psychological abuse and emotional neglect, the result of living with addictions and her testimony was very honest in demonstrating this.

[44] Counsel for Ms. Ryan submits that to remove the children from their "sanctuary" in Ferryland and return them to Vermont, where the possibility of further psychological, emotional and physical harm to them and Ms. Ryan is a glaring reality, especially in light of Mr. Ryan's entrenched and long-standing patterns of inappropriate behaviour.

[45] Decisions relied on by Counsel for Ms. Ryan include: **Pollastro v. Pollastro** (1999), 45 R.F.L. (4th) 404; **Moore v. Moore**, [1992] W.D.F.L. 246 (Ont. Dist. Ct.) and **G.(S.A.) v. G.(C.D.)**, 2009 YKSC 21.

PRELIMINARY SUBMISSION

[46] Ms. Ryan does not dispute that her sons, Will and JT were habitually resident in Brattleboro, Vermont and they were wrongfully retained in Newfoundland and Labrador.

[47] Counsel for Ms. Ryan does maintain however because Will was born prior to the parties' marriage, and Mr. Ryan has not yet applied for a "parenting order" in Vermont, to establish parenting rights to Will, that Mr. Ryan was not actually exercising rights of custody to William at the time of his removal or retention.

[48] Counsel argues that Vermont law does not, except in limited specified circumstances, recognize a "presumption of parentage".

[49] Counsel relies on the Alberta Court of Appeal decision in **S.(J.W.) v. M.(N.C.)** (1993), 50 R.F.L.(3d) 59 (Alta. C.A.) in support of Mr. Ryan not, at this time, being able to seek Will's return because he had not been exercising custody rights to Will at the time of his removal or retention.

[50] This case, in my view, can be distinguished because J.W.S., although the infant's father, did not pursue his request under the Hague Convention for the

return of his son to the United States. Instead he sought guardianship and custody of the child which was denied on the merits. This was also after the child had been adopted by parents with the consent of the child's biological mother.

[51] In reaching the conclusion that Mr. Ryan (in concert with Ms. Ryan), was actually exercising custody rights to Will (and JT) at the time of their removal or retention I rely on the wording of the Convention itself as well as case law including that established by the Supreme Court of Canada.

[52] Article 3, of the Convention states:

> The removal or the retention of a child is to be considered wrongful where –
> a) it is 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.

[53] La Forest in **Thomson v. Thomson**, [1994] 3 S.C.R. 551 at paragraph 46 states:

> 46. Custody, as understood by the Convention, is a broad term that covers the many situations where a person lawfully has the care and control of a child. The breach of rights of custody described in art. 3, it will be remembered, are those attributed to a person, an institution or any other body by the law of the state where the child was habitually resident immediately before the removal or retention. Article 3 goes on to say that custody may arise by operation of law. The most obvious case is the situation of parents exercising the ordinary care and control over their child. It does not require any formal order or other legal document, although custody may also arise by reason of a judicial or administrative decision, or by agreement.

[54] Support for my conclusion is also found in the English Court of Appeal decision in **C. v. C. (Abduction: Rights of Custody)**, [1989] 1 W.L.R. 654 (UKCA) where it was held that the definition of "custody" in Article 5 of the Convention had to be read into Article 3.

[55] I have also considered the following excerpts from Lord Donaldson of Lymington M.R., at page 663 of **C. v. C.***(supra)* as instructive.

> "We are necessarily concerned with Australian law because we are bidden by article 3 to decide whether the removal of the child was in breach of "rights of custody" attributed to the father either jointly or alone under the law, but it matters not in the least how those rights are described in Australian law. What matters is whether those rights fall within the Convention definition of "rights of custody." Equally, it matters not in the least whether those rights would be regarded as rights of custody under English law, if they fall within the definition."

> "Custody," as a matter of non-technical English, means "safe keeping, protection; charge, care, guardianship" (I take that from the *Shorter Oxford English Dictionary*, 3rd ed., rev. (1973)); but "rights of custody" as defined in the Convention includes a much more precise meaning which will, I apprehend, usually be decisive of most applications under the Convention. This is "the right to determine the child's place of residence." This right may be in the court, the mother, the father, some caretaking institution, such as a local authority, or it may, as in this case, be a divided right…"

[56] To accept the position put forth by counsel for Ms. Ryan would also, in my view, be inconsistent with Article 5 of the Convention which states, in part:

> For the purposes of this Convention –
> a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence; …

[57] I find that it cannot be seriously argued that both Mr. Ryan and Ms. Ryan did not have an undivided right to determine their children's place of residence, whether it be in Vermont, Newfoundland and Labrador, or otherwise.

[58] The preliminary submission is thus rejected because Mr. Ryan was exercising his parental rights as defined by the Convention and as interpreted by the case law referenced. There is also, of course, no evidence from which I can conclude that Mr. Ryan consented to or subsequently acquiesced in Will's and JT's removal or retention.

ANALYSIS

[59] I will next move on to consider, and ultimately determine, whether the evidence presented by or on behalf of Ms. Ryan satisfies the requirements of Article 13(b) of the Convention.

A. The Law

[60] In **Thomson v. Thomson**, *(supra)*, it states, in part:

> It is clear from the wording of the preamble and art. 3 of the Convention, … and from the travaux préparatoires that the primary object of the Convention is the enforcement of *custody* rights. …

[61] Article 13 states:

> Notwithstanding the provision 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.

[62] Narrow interpretations of Article 13 are supported by numerous judicial authorities including the leading case of **Thomson v. Thomson** (*supra*) where, La Forest, J. speaking for the majority, states the following at paragraph 82:

> 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 Art. 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 (Aus. F.C.); *Re A. (A Minor)(Abduction)*, [1988]. 1 F.L.R. 365 (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 (H.C.); *Re N. (Minors)(Abduction),* [1991] 1 F.L.R. 413 (H.C.); *Director-General of Family & Community Services v. Davis* (1990), 14 Fam. L.R. 381 (Aus.); *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:
>
> … 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".

[63] Article 19 states:

> A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.

[64] In **Pollastro** (*supra*) however Abella, J.A. (as she then was) took the approach that a child's best interests are not necessarily irrelevant in considering Article 13(b). Her views follow in the paragraphs numbered:

> 20 In *Thomson v. Thomson*, [1994] 3 S.C.R. 551 (S.C.C.), the Supreme Court of Canada established the interpretative framework for deciding cases under the Hague Convention generally and Article 13(b) in particular.
>
> 21 In that case, the parent who removed the child from his home was the mother. She had left Scotland with her 9-month-old son to visit her parents on their farm in Manitoba. During this visit, she decided to remain with her family in Manitoba. In resisting the father's request under the Hague Convention for the return of the child to Scotland, the mother invoked the exception in Article 13(b), arguing that since she had been the child's primary caretaker throughout her 13-month stay in Manitoba, her separation from him would cause the child to suffer a grave risk of physical or psychological harm.
>
> 22 La Forest, J. concluded at p. 596 that the facts did not meet the threshold of harm contemplated by s. 13(b), namely, the requirement that the harm be "to a degree that also amounts to an intolerable situation".
>
> 23 It must be a "weighty" risk of "substantial" psychological harm, "something greater that would normally be expected on taking a child away from one parent and passing him it another" (at p. 597, quoting with approval *A. (A Minor)(Abduction)*, *Re,* [1988] 1 F.L.R. 365 (Eng. C.A.)). Both the risk and the harm must be substantial.
>
> . . .
>
> 25 *Thomson* held that the determinative rule for interpreting the Hague Convention was in accordance with the ordinary meaning of the treaty's terms "in their context and in the light of [the treaty's] object and purpose … including its preamble": see: Art. 31 of the *Vienna Convention of the Law of Treaties, 1969*, [1980] C.T.S. 37, *Thomson* at p. 577. Using this approach, La Forest J. made the preliminary finding that the preamble's clause stating that "…the interests of children are of paramount importance in matters relating to their custody" means the "interests of children" generally, not of the particular child before the court.
>
> 26 This observation, combined with the requirement in Article 16 of the Hague Convention that the state being asked to return a child "shall not decide on the merits of rights of custody" until a determination is made that the child should not be returned, resulted in La Forest J.'s conclusion that in deciding whether to return a child, the court should not consider the child's "best interests" in the same way as in a custody case.

27 In my view, what is meant by La Forest J's comments is that the decision whether to return a child pursuant to Article 12 should not be based on who should have custody. That explains why the "best interests: test is not applied at this stage. The presumptive interests which do apply in deciding whether to return a child promptly are those set out in the preamble, namely the interests of children generally in not being wrongfully removed from their habitual residence.

28 La Forest J. does not, however, state that the interests of the particular child before the court are irrelevant for all purposes under the Hague Convention, including Article 13(b). Indeed, it is difficult to see how the assessment required under Article 13(b) of risk, or harm, or of whether a situation is intolerable, can be made *without* reference to the interests and circumstances of the particular child involved in the proceedings.

29 In this case, Beaulieu J. ignored the evidence with respect to the particular child before the court, and in doing so, he erred. By saying that "evidence of harm generally goes to the merits of a custody hearing", Beaulieu J. appears to be saying that evidence of harm is not relevant in deciding whether the criteria under Article 13(b) have been satisfied. This conclusion, with respect, misconstrues *Thomson*. Justice La Forest said that "the merits of rights of custody" should not be decided until a determination is made that the child should not be returned; he did not say that evidence of harm was irrelevant to an Article 13(b) analysis. By disregarding the evidence of harm, Beaulieu J. disregarded evidence relevant to the assessment he was obliged to undertake pursuant to Article 13(b).

30 Since this provision refers explicitly to the risk of harm, evidence of such harm is clearly relevant to assessing whether returning a child to his or her habitual residence would likely result in serious harm or an otherwise intolerable situation. One cannot be expected to satisfy the onus that a child not be returned because of a grave risk of physical or psychological harm unless evidence of such harm can be presented and considered by the court deciding whether the s. 13(b) threshold has been met.

31 The evidence must. of course, be credible and must in addition meet the high threshold of "grave risk" set out in *Thomson*. This is very different from Beaulieu J.'s conclusion that evidence of harm is admissible only as part of a custody hearing. Such an interpretation essentially deprives s. 13(b) of its content.

. . .

33 Although every case depends on its own facts and the onus remains on the person resisting the child's return, it seems to me as a matter of common sense that returning a child to a violent environment places that child in an *inherently* intolerable situation, as well as exposing him or her to a serious risk of psychological and physical harm.

[65] Article 5 of the Convention states in part:

> For the purposes of this Convention –
>
> a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
> . . .

[66] Article 4 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.

[67] Article 13 states, in part:

> … 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.

[68] I shall now consider and determine whether Ms. Ryan's evidence satisfies the requirements of Article 13(b) and the relevant case law.

[69] Excessive consumption of alcohol and smoking marijuana constitute a major thrust of Ms. Ryan's submission why Will and JT should not be returned to Vermont. I shall therefore initially deal with this issue.

Mr. Ryan's consumption of alcohol and smoking marijuana.

(i) alcohol

[70] Ms. Ryan's evidence includes that she was aware from the start of their relationship, from their very first date onwards, that Mr. Ryan drank daily and used marijuana extensively. She nevertheless, because she "loved him", agreed to cohabit followed by marriage. Throughout their married life Ms. Ryan testified that she continued to "tolerate it".

[71] Mr. Ryan was forthright and did not deny consuming alcohol or smoking marijuana, it is the frequency and amount with which he takes issue.

[72] There was evidence from Ms. Ryan, her son Sidney, and to a lesser extent from Tanya O'Brien and Rhonda O'Keefe, who each stayed separately with the Ryan family in Brattleboro, for one week, to at least partially support evening drinking by Mr. Ryan. These people are not impartial witnesses and I did not find their evidence as convincing as Mr. Ryan's evidence. I find that Sidney's evidence at times troublesome and at other times not troublesome. I certainly find it troublesome on the issue of Mr. Ryan's alcohol consumption, primarily because he admitted on cross-examination that "I just want to support my mom".

[73] Mr. Ryan specifically takes issue with drinking and "passing out from drinking" every night while watching sporting events on television. He candidly admits "dozing off" while watching sports on television but argues that this is caused by "a hard day's work". As to why Mr. Ryan fell asleep watching sporting events after consuming alcohol, I find his testimony just as compelling as that of Ms. Ryan and Sidney Ryan. This is because Mr. Ryan did work long hours at a labour intensive job. The fact that he has been able to work for the same employer for 23 years and did not present as a malingerer also tends to cast some doubt on the frequency and amount of alcohol which he allegedly consumes.

[74] Mr. Ryan's unrebutted sworn testimony that he was able to quit both alcohol (and marijuana) on September 1, 2010 because his family was taken away from him, also cannot be ignored.

[75] I reject Counsellor Andrews' submission that stopping drinking alcohol "cold turkey" is not enough because counselling and joining Alcoholics Anonymous ("AA") is also necessary for anyone to continue to stop drinking. I reject this submission because no empirical evidence has been tendered to support it. In addition, I am comforted by Mr. Ryan's willingness to go to counselling or AA even though he thinks he does not now need alcohol (or marijuana) in his life. Such evidence was verified by Julia Halfyard, a credible and impartial witness, during Mr. Ryan's supervised access to his three children.

[76] The fact that neither the police nor child protection authorities have ever been called to the Ryan home in Vermont, because of excessive alcohol consumption by Mr. Ryan, also cannot be ignored.

[77] Mr. Ryan was also never arrested for drunk driving and this casts some doubt on the degree of alcohol which Ms. Ryan states he consumed while driving. Ms. Ryan also acquiesced in such alleged driving with Mr. Ryan as well as letting the children drive with him during such alleged circumstances.

[78] Mr. Ryan candidly admitted consuming alcohol. I am convinced however, because of all of the evidence presented, including that previously referred to and analyzed, that if Will and JT are ordered returned to Vermont, they would not be returning to an alcohol infused environment as submitted by Counsel for Ms. Ryan.

(ii) marijuana

[79] Mr. Ryan, as with the alcohol issue, takes issue with the frequency and amount of marijuana that he smokes. He does not deny smoking marijuana,

something which Ms. Ryan has not only known about since the start of their relationship but, as with alcohol, something which she testified she has "tolerated".

[80] The evidence as to Will and JT's lack of knowledge about Mr. Ryan smoking marijuana is, in my view, important. This is because Mr. Ryan's evidence shows that Mr. Ryan made a conscious effort not to smoke marijuana in front of the children. This was accomplished primarily by Mr. Ryan smoking marijuana on the patio deck and in the garage. He also stored the marijuana high up in a kitchen cupboard so the children could not see it. This evidence was corroborated by Tanya O'Brien and Rhonda O'Keefe, two very close friends of Ms. Ryan.

[81] Sidney testified that he found marijuana in a high cupboard and his mother told him what it was. Sidney also testified however that he never saw his father smoke marijuana but could smell it on him. His testimony also includes Will and JT, seeing their father, at least once, "smoking" which to them meant he was smoking cigarettes. Will and JT, whose return to Vermont is sought, thus have no knowledge of their father smoking marijuana.

[82] I cannot conclude, as submitted by counsel for Ms. Ryan that Mr. Ryan's marijuana usage remains a major concern to Will and JT's safety. This is supported by Mr. Ryan's unrebutted evidence that he has discontinued smoking marijuana, evidence which I accept. In fact, considering the evidence provided by Sidney and referred to, I have genuine doubt that Mr. Ryan's usage of marijuana was ever a major concern to Will and JT's safety.

Physical and verbal abuse.

[83] Ms. Ryan's sworn evidence in support of obtaining an Emergency Protection Order ("EPO") against Mr. Ryan says in part:

> "Since John's arrival in St. John's, NL on July 22, 2010 and prior to that he has continually and routinely on a daily basis partaken in daily drinking and marijuana abuse that has resulted in daily verbal abuse against all family members and shunning of family responsibilities so that he can participate and fuel his

> addictions. Since Monday, August 2nd I have taken action to protect my children . . . he has threatened our safety by saying we can do this the easy or the hard way. If I don't go back with him, I will regret it, I feel if he sees the children or I, he will resort to extreme violence towards us so that we can be in his control once again . . ."

[84] In the sworn evidence in support of obtaining the EPO Ms. Ryan wrote: "physical violence – hitting and restraining – choking, NL and VT since November 2001 – present"; "damage of property in Vermont while frightening the children"; pushing and verbal threats to oldest son, challenging - him asking if you want to take me on?

[85] To the question – Have any children witnessed any of these incidents? Ms. Ryan wrote, "yes – all the children".

[86] To the question – Have you had to get medical care because of family violence? Ms. Ryan's answer was "yes" – "psychological support counselling".

[87] To the statement – I believe that family violence will continue or resume because . . . was completed by Ms. Ryan by writing because "of his abusive behaviours that are magnified by his alcohol and drug addictions".

[88] To the statement – I fear for my own safety and/or safety of a child/(ren)'s because . . . was completed by Ms. Ryan as follows: "his anger and abusive behaviour is a daily threat that I have only now had this opportunity to leave and get to safety. This vacation was agreed upon by both of us and has served as a safe exit for my children and I."

[89] To the statement – I need protection on an urgent basis because . . . was completed by Ms. Ryan as follows: "he will resort to physical violence to reclaim us and get us back in his control".

[90] Ms. Ryan also ticked NO to the question – have you ever applied for an Emergency Protection Order?

[91] Mr. Ryan's sworn Affidavit in Reply states the following:

> "I admit to being a social drinker, but there is not an alcohol or drug addiction. Furthermore, I do not, nor ever have, abused my wife or children, physically or verbally. The police, in NL nor VT have never been called because of, or investigated any allegations of abuse.
>
> With respect to allegations that I shun responsibility, I have a full-time job in which I have worked for 23 years. I am the sole provided for my family.. My pay is deposited into a joint account to which my wife has access for food, clothing, bills, etc. Furthermore – I love my family. I return home from work every evening to spend time with my family and only go out with my wife socially.
>
> I have not contacted Kristine since August 3rd. I have tried to contact her 2 – 4 times with no answer. I did not leave a message. In particular there were no threats.
>
> In regards to me saying, "we can do this the easy way, the hard way," this was in the context of whether I could see my kids without the involvement of lawyers."

[92] Ms. Ryan admits that "choking" did not occur in Newfoundland and Vermont since 2001 to the present. She and her counsel nonetheless wish me to place much emphasis on the 2001 (or 2002) "choking allegation" which occurred at Aquaforte.

[93] I place little weight on this allegation because of the following: Ms. Ryan did not testify that Mr. Ryan tried to choke her but that he "grabbed me by the throat"; Mr. Ryan denied that it was a physical assault; Sidney testified that his father put his arms around his mother's neck, yet ironically, Sidney was not present; Ms. Ryan never reported the incident to the police and there is no evidence of physical harm requiring medical attention. In short, I have concluded that the so-called "choking" incident was minor in nature and relying on one isolated minor incident nine or ten years ago does little to strengthen Ms. Ryan's position that she has been physically abused by Mr. Ryan over a period of time.

[94] Concerning physical abuse against Ms. Ryan, from the alleged choking incident onwards, I find the evidence which follows as persuasive in concluding that it was essentially non-existent both insofar as Ms. Ryan as well as the children were concerned.

[95] Mr. Ryan provided convincing evidence that he never physically restrained Ms. Ryan and any "touching" was done in a loving manner by consent. Mr. Ryan also stated that, "we merely fooled around as husband and wife" and he would never grab her by the arm because she would never stand for that.

[96] Ms. Ryan's evidence is that at times, Mr. Ryan "grabbed me by the wrist" and "cornered" me while making sexual advances, which she stated she didn't like. This is surely not evidence of the degree of physical abuse normally tendered in evidence, if it was abuse at all. Ironically, "cornering" was also not referred to in Ms. Ryan's application to obtain an EPO.

[97] Tanya O'Brien also testified, during cross-examination that John never struck Kristine nor did he threaten any of the family.

[98] Sidney Ryan also testified that he was never physically struck by his father (or mother). This, in my view, also adds credibility to Mr. Ryan's testimony that he was approached by Sidney in an angry manner after Sidney was lifting weights to which Mr. Ryan responded "what do you want to do, take me on?" It also makes Ms. Ryan's evidence that Mr. Ryan says he would challenge Sidney or "give him a good poke" and Sidney was afraid of his father, at that time, as evidence neither credible nor reliable. Likewise, Ms. O'Keefe's testimony that on one specific occasion Mr. Ryan was angry and upset and screamed at Sidney to "fuckin take me on" also appears to lack reliability because it is not consistent with the other evidence.

[99] The evidence also discloses that Sidney denied any abuse to Will, JT or himself from their father. He also testified there was never any physical contact or hitting of any sort of physical abuse.

[100] Sidney also testified that "Dad treats Will and JT "all right". He also agrees with his father taking away Will's game "when Will is acting up and angry". He also says that Mr. Ryan treats his mom "all right" but they argue a lot. I do not consider arguing by a married couple to be verbal abuse by Mr. Ryan or by Ms. Ryan.

[101] Although Tanya O'Brien disagreed with Ms. Ryan's role in taking care of the house and kids, and with Mr. Ryan being the head of the household and Sidney's having a supplemental role in looking after his younger brothers, she appeared to interact reasonably well with Mr. Ryan in Vermont. This included playing cards with Mr. and Ms. Ryan, and having meals with the family which went fine. She also testified that John and Kristine got along for the most part and not every day was "bad" and not every weekend was "bad". She did however state that it would be difficult to judge a relationship based on spending only a week with the Ryan family.

[102] In determining Ms. Ryan's credibility, I also cannot ignore that she has also "imagined" things in any effort to prove physical abuse; one example of this is testifying she had concerns for her personal safety and she was fearful because Mr. Ryan grabbed her by the neck and put her in a car, which on cross-examination admitting that such an incident never occurred and she had no reason to think that such an incident would occur.

[103] Many of the EPO allegations have been analyzed and determinations made without specific reference to such allegations. Although, there may be some duplication, I nevertheless wish to place on the record that which follows, for the sake of completeness.

[104] I find the evidence does not support that: Mr. Ryan's drinking and marijuana usage before and after July 22, 2010 resulted in daily verbal abuse against all family members and shunning of family responsibilities; Mr. Ryan damaged property in Vermont while frightening his children; the children witnessed physical violence, hitting and restraining; Ms. Ryan had to obtain psychological support counselling for family violence and she will need protection on an urgent basis

because Mr. Ryan will resort to physical violence to reclaim her and the children to get the family under his control.

[105] Ms. Ryan did not seek "psychological counselling" because of "family violence" as alleged in her EPO application. The only counselling which she sought and obtained was to save her marriage and to deal with her health issues.

[106] Ms. Ryan also testified that if she returned to Vermont she would be living in fear and she would constantly have to phone the police and the kids would be suffering emotionally and psychologically. This submission is not supported by the evidence and I deem it more in the nature of unrealistic speculation.

[107] I have concluded that the evidence supports a total lack of physical and verbal abuse by Mr. Ryan against his children. The only tangible evidence of Mr. Ryan allegedly "choking" Ms. Ryan, which he denies, took place some eight or nine years ago and has been given little, or any weight for the reasons previously stated. I have therefore concluded that Ms. Ryan as well was not physically or verbally abused by Mr. Ryan.

OTHER CONSIDERATIONS

The children's relationship with their father in Vermont and the children's lives generally in Vermont.

[108] Ms. Ryan admits that Mr. Ryan loves their children. The evidence supports this being reciprocal, even with Sidney, who admitted that their relationship is "all right".

[109] Mr. Ryan testified that he loves "Will with all my heart" and he considers him "bright" and "funny". Sidney also testified that his father treats JT "good" as well as loving and interacting with him.

[110] The children's good relationship with their father was also confirmed, in my view, by Ms. Halfyard's impartial evidence; this includes the children being very happy to see their father, especially the younger boys, and that they were sad when the access visit ended. She also testified that her belief was that the children missed their father. I also cannot ignore Sidney's testimony that at the supervised access visit both Will and JT wanted to go home to Vermont.

[111] Ms. Halfyard's impartial evidence also casts serious doubt on Ms. Ryan's evidence being reliable. This is because she testified that the children were upset when they saw their father and with what he said during his supervised access with his children.

[112] Sidney also, as indicated previously, acknowledged that Mr. Ryan exercised appropriate discipline to William when he acted up.

[113] Although acknowledging that Mr. Ryan loves the children, Ms. Ryan maintains that quality time is a challenge for Mr. Ryan. This is offset however, at least to a certain extent, because it is undisputed that Mr. Ryan is involved with the children's sporting activities, such as with Will's hockey and especially his soccer and baseball activities.

[114] Will has been involved in structured sporting activities in Vermont. Sidney, although not involved with structured sporting activities, is involved with school activities and snowboarding.

[115] Sidney has "a bunch of friends" who visit the Ryan home on weekends as do some of Will's friends.

[116] Ms. Ryan testified that the family sometimes went out to restaurants and Tanya O'Brien confirmed, during her visit with the family in 2006, that she participated in a family dinner which went "fine" during which there was interaction between "John and the family", following which he cleared the table.

[117] All children are doing well in school; they are healthy and have friends who regularly visit their home. There is no evidence to support that Sidney or Will needed extra help with schoolwork or required a special education teacher. Similarly there is no evidence that any of the children were ever treated by their family doctor, a psychologist or a psychiatrist for serious physical or for psychological problems, while living in Vermont, because of the way in which they, or their mother, was treated by Mr. Ryan or because of his behaviour generally. In addition, neither the police nor child protection authorities were ever requested by Ms. Ryan to come to the family home in Brattleboro because the children were at risk of physical or psychological harm as a result of Mr. Ryan's behaviours.

[118] I am not condoning Mr. Ryan's occasional racist remarks. Neither am I condoning his somewhat chauvinistic attitude as to his role and Ms. Ryan's role when it comes to household chores. Neither do I condone Mr. and Ms. Ryan's many arguments, some of which occurred when Mr. Ryan was drinking and some when he was not drinking. Such behaviour between husband and wife, is not unique however and for the purposes of this decision, despite Mr. and Mrs. Ryan's inability to cease their arguing, the evidence shows that Will and JT's life in Brattleboro since moving there in 2006 could be considered, by and large, relatively normal.

Ms. Ryan's life in Vermont

[119] As with all moves, Mr. Ryan's evidence that it was a joint decision to purchase the Brattleboro property is undisputed.

[120] Mr. Ryan was the primary breadwinner and Ms. Ryan was a homemaker for most of their married life. The only exception was when Ms. Ryan worked for approximately two years as a Registered Nurse. There is no evidence to suggest that either party took serious issue with the roles. The evidence also shows that despite Mr. Ryan's somewhat chauvinistic attitude towards house care, there is independent evidence that he cleaned the dinner table and his testimony was that he performed some other household chores as well.

[121] Mr. Ryan testified that his employment away from Brattleboro led to lots of arguments but there was no talk of separation until the Fall of 2009 when Ms. Ryan asked him to go to counselling, which he ultimately did. Mr. Ryan's evidence that "we learned to accommodate each other", would appear to be confirmed by Ms. Ryan who indicated that she "tolerated" their situation.

[122] Ms. Ryan, although residing in Vermont, kept a very wide network of family and friends in Newfoundland and Labrador, some of whom visited her, including: Stan and Peg O'Brien, Tanya O'Brien and Rhonda O'Keefe, all of whom interacted with Ms. Ryan. Despite geography, Ms. Ryan admits that she has support in Vermont from her Newfoundland and Labrador network of family and friends, some of whom phone her regularly.

[123] Ms. Ryan downplays her network of friends resident in Brattleboro. I do not; this is because the evidence shows that she has friends from various sources, these include: from her retraining to get back into the workforce; from working as a Registered Nurse for approximately two years; from getting to know mothers of her boys' school friends; her neighbors and Yolanda Maynard, who although starting off doing cleaning for Ms. Ryan when JT went to daycare, was, as admitted by Ms. Ryan, now a friend. Many of the foregoing friends also visited the Ryan family home in Brattleboro.

[124] Ms. Ryan admits that she would get a fair custody and access hearing in Vermont, where she has already retained counsel. The foregoing evidence shows that she would also have the benefit of Newfoundland and Labrador and Vermont support in getting her through such a hearing, if it is held in Vermont.

FURTHER CONSIDERATIONS

(i) Forum Shopping

[125] Ms. Ryan admitted having confidence in the judicial, police and child protection authorities in Vermont, where she has already retained counsel. She chose however to remove Will and JT approximately six weeks after arriving in this Province after, she had time to "think". Forum shopping, as submitted by counsel for Mr. Ryan, therefore cannot be ruled out.

(ii) Reconciliation

[126] I place some emphasis on Ms. Ryan agreeing to a reconciliation, which made Will and JT excited about returning to Vermont, and also agreeing with Mr. Ryan (who had by then returned to Vermont because of work commitments), to purchase plane tickets for the family to return.

[127] The fact that Ms. Ryan subsequently changed her mind, as she had a right to do, is not what I find significant and relevant to the within return application. What I determine as significant and relevant is why Ms. Ryan would agree that the family would all return to Vermont, if she genuinely believed that Will and JT would be at grave risk because they would be exposed to physical or psychological harm or otherwise placed in an intolerable situation.

[128] Further support that Will and JT would not be so exposed to grave risk also can be reasonably inferred from the evidence of both Tanya O'Brien and Rhonda O'Keefe. This is because even though they had dislikes for certain aspects of the Ryan home environment, both supported a reconciliation when told about it by Ms. Ryan, albeit with some concerns being expressed by Ms. O'Brien. Such support for a reconciliation from two of Ms. Ryan's closest friends and supports, who actually stayed in the Ryan house in Brattleboro, in my view, casts some very real doubt as to the degree of Mr. Ryan's alleged inappropriate behaviours.

[129] Ms. Ryan also testified that she no longer "loved" Mr. Ryan. This is justification for commencing divorce and custody and access proceedings. It is not, in and of itself, justification for bringing your children to Newfoundland and Labrador and attempting to retain them in this Province.

(iii) The evidence of Counsellor George Andrews,

[130] Mr. Andrews candidly admitted that he would like eight sessions before he would make recommendations. I am not prepared to consider any of Mr. Andrews evidence because of this and also because he has yet to contact any authorities, or any people in Vermont, including Mr. Ryan. The only information that he has yet to have been provided with came from Ms. Ryan. I do state as well that I am also somewhat disturbed by Mr. Andrew's commencing therapy with the view to the children adjusting to life in Ferryland from Brattleboro, Vermont. It is my view, that he should not adopt this role until a court, either in this Province or in Vermont, is deemed to have the jurisdiction to rule on custody and access, a principal component of which would be where the children will live.

(iv) Breaching Emergency Protection Order

[131] Counsel for Ms. Ryan states that Mr. Ryan has already breached a Court Order out of this jurisdiction and would likely have no issue in doing so again in Vermont. That which counsel is relying on is Mr. Ryan contacting Ms. Ryan's relatives in breach of the EPO submitting that this was another attempt to influence Ms. Ryan into submission and to have her return to Vermont. I disagree and reject this submission because Mr. Ryan was only trying to reach his family. It also cannot be ignored that in early October 2010, while the EPO was current, Ms. Ryan telephoned Mr. Ryan in Brattleboro and this ultimately led to telephone discussions which led to a mutually agreed reconciliation, albeit of short duration.

(v) Best Interests

[132] Counsel for Ms. Ryan maintains that it would be devastating if I order Will and JT returned to Vermont and either Ms. Ryan and Sidney, or one of them, does not return to Vermont. As admitted by counsel for Ms. Ryan, such a scenario is only speculation and I therefore attach no weight to it. There was also nothing, explicitly nor implicitly, in Ms. Ryan's evidence from which I can conclude that Ms. Ryan will abandon her nine and five year old children if this decision results Will and JT being ordered returned to Vermont.

[133] In **Pollastro v. Pollastro** *(supra)*, Abella, J.A. fine-tuned La Forest's interpretation of best interests in conjunction with Article 16 and 19 of the Convention, which prohibits deciding on the rights of custody.

[134] Abella, J.A.'s views are stated in part in paragraphs 27, 28, 30 and 31 which follow:

> 27 In my view, what is meant by La Forest J's comments is that the decision whether to return a child pursuant to Article 12 should not be based on who should have custody. That explains why the "best interests: test is not applied at this stage. The presumptive interests which do apply in deciding whether to return a child promptly are those set out in the preamble, namely the interests of children generally in not being wrongfully removed from their habitual residence.
>
> 28 La Forest J. does not, however, state that the interests of the particular child before the court are irrelevant for all purposes under the Hague Convention, including Article 13(b). Indeed, it is difficult to see how the assessment required under Article 13(b) of risk, or harm, or of whether a situation is intolerable, can be made *without* reference to the interests and circumstances of the particular child involved in the proceedings.
>
> . . .
>
> 30 Since this provision refers explicitly to the risk of harm, evidence of such harm is clearly relevant to assessing whether returning a child to his or her habitual residence would likely result in serious harm or an otherwise intolerable situation. One cannot be expected to satisfy the onus that a child not be returned because of a grave risk of physical or psychological harm unless evidence of such

> harm can be presented and considered by the court deciding whether the s. 13(b) threshold has been met.
>
> 31 The evidence must. of course, be credible and must in addition meet the high threshold of "grave risk" set out in *Thomson*. This is very different from Beaulieu J.'s conclusion that evidence of harm is admissible only as part of a custody hearing. Such an interpretation essentially deprives s. 13(b) of its content.
>
> . . .

[135] I agree that Will's and JT's interests are inextricably tied to their mother's psychological and physical security. I have not however concluded that Ms. Ryan's psychological and physical security would be adversely affected because if she returned to Vermont she would be returning to a intolerable situation putting Will and JT at grave risk so as to satisfy the requirements of Article 13(b).

[136] Because of the foregoing, **Pollastro v. Pollastro** *(supra)*, can be distinguished. It can also be distinguished because the evidence clearly established that: there was credible evidence of the father's abuse; there was medical evidence to support grave risk of serious harm to a child and because the Court deemed the potential for violence as overwhelming.

[137] **Moore v. Moore** *(supra)*, can be distinguished because the court found that the mother had a history of having to seek refuge in battered wives' shelters because of her husband's violence against her; a child reacting negatively to meetings with their father and one child vomited each time she had to see her father.

[138] **G.(S.A.) v. G.(C.D.)** *(supra)*, can also be distinguished because the father acknowledged a history of physical violence against the mother in the presence of their child; a social worker, who interviewed the father, recommended supervised access only after family violence program completed and evidence was accepted that the father threatened to kill the mother and take the child away from her if they separated.

CONCLUSION AND DISPOSITION

[139] I thank Counsel for their dedicated work in this matter and for their extremely thorough presentations.

[140] Flowing from my cumulative consideration of all the foregoing, I have concluded that Ms. Ryan has not provided evidence, on the balance of probabilities, to satisfy the very high threshold, that there is a grave risk that Will and JT, if returned to Vermont, would be exposed to physical or psychological risk or that they would otherwise be placed in an intolerable situation.

[141] Therefore, pursuant to Article 12 of the Convention, it is ordered that William Ryan, born October 31, 2001 and John Thomas Ryan, born June 21, 2005 be returned to Vermont, one of the United States of America, forthwith.

[142] It will be before the Superior Court of Vermont, where issues of custody and access will be determined by a full examination of the children's best interests, if the parties do not reconcile.

[143] The Central Authority for this Province is requested to help facilitate the return of the children to Vermont in the most sensitive way possible.

Order accordingly.

_____

J. DOUGLAS COOK
Justice