Toronto (North York) Registry No. D45036/08
DATE: 2008·VIII·25
CITATION: *D.P.M. v. S.-A.D.*, 2008 ONCJ 798

ONTARIO COURT OF JUSTICE

B E T W E E N :

D.P.M.,
Applicant,

— AND —

S.-A.D.,
Respondent.

Before Justice Stanley B. Sherr
Heard on 20 August 2008
Reasons for Judgment released on 25 August 2008

CONFLICT OF LAWS — Custody of or access to child — Return of wrongfully removed child — Declining return of child — Grave risk of harm to child — Risk of sexual abuse — Parents moved to Australia 11 years ago, married and had son (now almost 6 years old) — About 18 months ago, they separated and, with help of counsellor, they negotiated temporary parenting arrangements and even signed agreement that neither would leave Australia with boy without mutual consent, until their divorce was finalized — Father remained intimately involved in son's life, seeing him daily and having him for 1 overnight visit every weekend — He provided very generous financial support for mother and child — Over past several years, mother had taken boy on extended vacations to Ontario to visit her family — When mother planned another such trip last year, father booked and paid for flight in expectation that they would return within 4 months — He even drove them to airport and agreed to look after their home while they were away — Once in Ontario, however, mother decided to remain and informed father of her intentions — Father promptly launched claim for son's return under (Hague) *Convention on Civil Aspects of International Child Abduction* and had been in daily telephone contact with son ever since boy came to Canada — When he came to Canada to attend Convention hearing, he was again seeing his son daily — In meantime, mother began to cohabit with new male partner and was now 2 months pregnant — Only in subsequent affidavit did mother resurrect old allegation that father had sexually abused boy in Australia but evidence revealed that child protection agency in Australia quickly dismissed it as without any foundation and, by her subsequent conduct, it was clear that even mother did not believe it, allowing child to continue having overnight visits

and extensive contact with father — By all accounts, child was happy, well-adjusted with no evidence of harm and showing no fear or anxiety with father — Ontario court rejected mother's desperate last-minute claim about sexual abuse.

CONFLICT OF LAWS — Custody of or access to child — Return of wrongfully removed child — Declining return of child — Placing child in intolerable situation — Parents moved to Australia 11 years ago, married and had son (now almost 6 years old) — About 18 months ago, they separated and, with help of counsellor, they negotiated temporary parenting arrangements and even signed agreement that neither would leave Australia with boy without mutual consent, until their divorce was finalized — Father remained intimately involved in son's life, seeing him daily and having him for 1 overnight visit every weekend — He provided very generous financial support for mother and child — Over past several years, mother had taken boy on extended vacations to Ontario to visit her family — When mother planned another such trip last year, father booked and paid for flight in expectation that they would return within 4 months — He even drove them to airport and agreed to look after their home while they were away — Once in Ontario, however, mother decided to remain and informed father of her intentions — Father promptly launched claim for son's return under (Hague) *Convention on Civil Aspects of International Child Abduction* and had been in daily telephone contact with son ever since boy came to Canada — When he came to Canada to attend Convention hearing, he was again seeing his son daily — In meantime, mother began to cohabit with new male partner and was now 2 months pregnant — Mother portrayed boy's current home environment in glowingly positive terms, claiming that boy had established roots in Canada and had developed wonderful relationship with her new partner, his son and her extended family — She argued that uprooting child from this idyllic setting would result in grave psychological harm under clause 13(*b*) of Convention — Ontario court rejected mother's position — Primary purpose of Convention is to discourage parents from attempting to create new *status quo* as result their own wrongdoing — Threshold for establishing grave psychological harm under clause 13(*b*) of Convention was quite high and, in this case, court conceded that boy might suffer some distress in leaving his mother but that distress did not meet threshold — In fact, mother produced no professional evidence to support her argument — On contrary, evidence showed that boy had warm and positive relationship with his father, enjoyed being in father's company and would be able to adjust to living with father in Australia — Moreover, mother's evidence was that she would return to Australia if court ordered child to be returned there, which would minimize any psychological distress.

CONFLICT OF LAWS — Custody of or access to child — Return of wrongfully retained child — Jurisdiction — Whether claimant enjoys custodial rights under law of child's habitual residence — (Hague) *Convention on Civil Aspects of International Child Abduction* makes distinction between custodial rights and access right, latter of which do not necessarily result in order for child's return — Mother argued that father had no custody rights to child and thus could not invoke Article 3(*a*) of Convention — Ontario court noted that nature of father's custodial rights would have to be determined under law of child's habitual residence, namely Australia — Ontario court examined relevant Australian federal statute under which separated parents continue to share custodial rights until court order states otherwise — In this case, mother had never sought cutback in father's custodial rights from Australian courts

— Ontario court also had benefit of affidavit from lawyer at International Family Law Section for Central Authority of Australia responsible for administering Convention that confirmed father's custodial status — Court concluded that father had custody rights with respect to child and could therefore invoke Article 3(*a*) of Convention.

CONFLICT OF LAWS — Custody of or access to child — Return of wrongfully retained child — Jurisdiction — Whether claimant was exercising custodial rights at time of wrongful retention — Parents moved to Australia 11 years ago, married and had son (now almost 6 years old) — About 18 months ago, they separated and, with help of counsellor, they negotiated temporary parenting arrangements and even signed agreement that neither would leave Australia with boy without mutual consent, until their divorce was finalized — Father remained intimately involved in son's life, seeing him daily and having him for 1 overnight visit every weekend — He provided very generous financial support for mother and child — Over past several years, mother had taken boy on extended vacations to Ontario to visit her family — When mother planned another such trip last year, father booked and paid for flight in expectation that they would return within 4 months — He even drove them to airport and agreed to look after their home while they were away — Once in Ontario, however, mother decided to remain and informed father of her intentions — Father promptly launched claim for son's return under (Hague) *Convention on Civil Aspects of International Child Abduction* and had been in daily telephone contact with son ever since boy came to Canada — When he came to Canada to attend Convention hearing, he was again seeing his son daily — In meantime, mother began to cohabit with new male partner and was now 2 months pregnant — Ontario court concluded that father enjoyed custodial rights under law of Australia and could therefore invoke Article 3(*a*) of Convention — Court also rejected mother's claim under Article 3(*b*) that father was not exercising those rights when she took child to Canada — Court recognized that parents, whether separated or still together, do not always make custodial decisions equally, but that does not mean that other parent does not exercise custody rights — In this case, mother had been boy's primary caregiver but father had been very involved in his life and decisions about him and evidence showed that these parents had conducted themselves as persons with joint parenting responsibilities for child in accordance with Australian law — Ontario court found that father was exercising his joint custody rights when child was brought to Canada.

CONFLICT OF LAWS — Custody of or access to child — Return of wrongfully removed child — Return of child subject to undertakings — At hearing under (Hague) *Convention on Civil Aspects of International Child Abduction*, Ontario court found that mother had wrongfully detained child in Canada in breach of father's custodial rights and ordered mother to deliver child to father with 5 days for child's return to Australia — Court directed father to provide mother with all flight details to give her chance to return to Australia on same flight — If mother returned to Australia within 14 days of father's and child's arrival, parents would share joint custody with mother's home as child's primary residence with generous specified access terms to father, subject to any subsequent ruling of Australian court — If mother did not return to Australia within 14 days of father's and child's arrival, father was set up instant messenger service and webcam to permit child to have daily internet contact with mother, pending further order of Australian court.

STATUTES AND REGULATIONS CITED

Children's Law Reform Act, R.S.O. 1990, c. C-12 [as amended], section 36 and section 46.

Convention on Civil Aspects of International Child Abduction, [1983] Can. T.S. No. 35, 1343 U.N.T.S. 89, 99 U.S.T. 11, 19 I.L.M. 1501, Article 1, Article 3, Article 3(*b*), Article 5, Article 12, Article 13, Article 13(*a*) and Article 13(*b*).

Family Law Act 1975, No. 53 of 1975 (Aust.) [as amended], section 61B, section 61C, subsection 111B(4), paragraph 111B(4)(*a*) and paragraph 111B(4)(*c*).

Family Law Rules, O. Reg. 114/99 [as amended], Form 10 and Form 14B.

CASES CITED

Courtney v. Springfield, 2008 CanLII 35920, 56 R.F.L. (6th) 64, [2008] O.J. No. 2830, 2008 CarswellOnt 4263 (Ont. Fam. Ct.).

Finizio v. Scoppio-Finizio, 1999 CanLII 1722, 46 O.R. (3d) 226, 124 O.A.C. 308, 179 D.L.R. (4th) 15, 1 R.F.L. (5th) 222, [1999] O.J. No. 3579, 1999 CarswellOnt 3018 (Ont. C.A.).

Re H.; Re S. (Abduction: Custody Rights), [1991] 2 A.C. 476, [1991] 3 All E.R. 230, [1991] 3 W.L.R. 68, [1991] 2 F.L.R. 262, [1991] Fam. Law 427 (H.L.).

Jackson v. Graczyk, 2007 ONCA 388, 86 O.R. (3d) 183, 283 D.L.R. (4th) 755, [2007] O.J. No. 2035, 2007 CarswellOnt 3216 (Ont. C.A.).

Lombardi v. Mehnert, 2008 ONCJ 164, 50 R.F.L. (6th) 305, [2008] O.J. No. 1413, 2008 CarswellOnt 2075 (Ont. C.J.).

P. v. P. (minors) (child abduction), [1992] 1 F.C.R. 468, [1992] 1 F.L.R. 155, [1992] Fam. Law 197 (Eng. Fam. Div.).

Pollastro v. Pollastro (1999), 43 O.R. (3d) 485, 118 O.A.C. 169, 171 D.L.R. (4th) 32, 45 R.F.L. (4th) 404, 1999 CanLII 3702, [1999] O.J. No. 911, 1999 CarswellOnt 848 (Ont. C.A.).

Thomson v. Thomson, [1994] 3 S.C.R. 551, 173 N.R. 83, 97 Man. R. (2d) 81, [1994] 10 W.W.R. 513, 79 W.A.C. 81, 119 D.L.R. (4th) 253, 6 R.F.L. (4th) 290, 1994 CanLII 26, [1994] S.C.J. No. 6, 1994 CarswellMan 91.

W.(V.) v. S.(D.), [1996] 2 S.C.R. 108, 196 N.R. 241, 134 D.L.R. (4th) 481, [1996] R.D.F. 205, 19 R.F.L. (4th) 341, 1996 CanLII 192, [1996] S.C.J. No. 53, 1996 CarswellQue 370.

Gary Gottlieb ..... counsel for the applicant father

Morley Halberstadt ..... counsel for the respondent mother

JUSTICE S.B. SHERR:—

1: OVERVIEW

[1] The applicant (the father) has brought an application for a declaration that the child, W.F.M., born on 21 October 2002, was wrongfully removed from Australia by the respondent (the mother) and is being wrongfully detained by her in Ontario. He seeks an order that the child be immediately returned to Australia, in his care, at the mother's expense. The father is proceeding pursuant to the (Hague) *Convention on Civil Aspects of International Child Abduction*, [1983] Can. T.S. No. 35, 1343 U.N.T.S. 89, 99 U.S.T. 11, 19

I.L.M. 1501 ("Hague Convention" or "Convention"), reproduced in the Schedule to section 46 of the *Children's Law Reform Act*, R.S.O. 1990, c. C-12, as amended.

[2] The mother opposes the father's claim. Her position is that she has not contravened the Convention. She claims that the child was not wrongfully removed from Australia or detained in Canada since the father did not have rights of custody to W.F.M. She argues in the alternative that the father was not exercising his rights of custody when she brought W.F.M. to Canada. In the further alternative, her position is that there would be a grave risk of physical or psychological harm to W.F.M., or that he would be placed in an intolerable situation, if this court ordered his return to Australia. She asks the court to dismiss the father's application, assume jurisdiction over the case and deal with the parenting and support issues.

[3] This hearing proceeded by way of argument based on extensive affidavit evidence filed on behalf of the parties.

2: BACKGROUND

[4] The parties met in Toronto in 1996. They moved to Australia in 1997 and married there on 19 September 1997. W.F.M. is their only child and was born in Australia. He is both a Canadian and an Australian citizen. The parties resided in Australia until they separated on 25 January 2007.

[5] W.F.M. lived primarily with the mother, in Australia, after his parents separated. He would spend one night each weekend at his father's home and the father would visit with him every day after work. In August of 2007, the parties agreed that the father would cut back on the frequency of the mid-week visits.

[6] The parties consulted a counsellor to work out their separation issues. They were able to agree on financial arrangements. They negotiated temporary parenting arrangements with the assistance of this counsellor. They signed an agreement that neither would leave the country with W.F.M., without mutual consent, until their divorce proceeding had gone through.

[7] In the summer of 2007, the parties reached an agreement that the mother could take W.F.M. to Canada for an extended vacation to visit her family. The father booked and paid for the flight. W.F.M. and his mother left Australia on 7 September 2007. The return ticket indicated that they were to leave Canada on 30 December 2007 and return to Australia on 2 January 2008. W.F.M. and his mother had taken similar trips to Canada in 2003, 2004 and 2005.

[8] On 17 October 2007, the mother sent the father an e-mail stating that she did not see herself returning to Australia. On 23 October 2007, she confirmed in another e-mail to him that she would not be returning. On 10 December 2007, the mother's lawyer sent the father a letter confirming that the mother and W.F.M. were not returning to Australia.

[9] The father took active steps to seek W.F.M.'s return to Australia. On 15 January 2008, he had his Australian counsel send a letter to the mother's Canadian counsel seeking her voluntary return of the child. On 12 February 2008, he filed his Hague Convention application with the Central Authority in Australia responsible for administering the Convention. When these efforts failed, he commenced this application (Hague application) on 3 July 2008.

[10] The mother has resided in Toronto since she came to Canada. She is now cohabiting with a new partner and his 19-year-old son. She is two months pregnant with her new partner's child.

[11] The father has been in daily telephone contact with W.F.M. since the child came to Canada. The father came to Canada before this hearing and has been seeing W.F.M. daily.

3: THE HAGUE CONVENTION

[12] Article 1 (all reference to "Articles" herein are to Articles of the Convention) sets out that the purposes of the Convention are: to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States. Australia and Canada are Contracting States to the Convention.

[13] The Convention's underlying rationale is that disputes over custody of a child should be resolved by the courts in the jurisdiction where the child is habitually resident; child abduction is to be deterred. The Convention presumes that the interests of children who have been wrongfully removed are ordinarily better served by immediately returning them to the place of their habitual residence where the question of their custody should have been determined before their removal. See *V.W. v. D.S.*, [1996] 2 S.C.R. 108, 196 N.R. 241, 134 D.L.R. (4th) 481, [1996] R.D.F. 205, 19 R.F.L. (4th) 341, 1996 CanLII 192, [1996] S.C.J. No. 53, 1996 CarswellQue 370.

[14] Article 3 reads:

> ***Article 3***
>
> 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.

[15] The Convention draws a distinction between rights of custody and rights of access.

Article 5 sets out this distinction as follows:

> ***Article 5***
>
> 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;
>
> (*b*) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

[16] Article 12 reads as follows:

> ***Article 12***
>
> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.
>
> Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

[17] Article 13 provides an exception to Article 12, even in the event that the court finds a wrongful removal or retention, in that a judicial authority of the requested state is not bound to order the return of the child if the person who opposes the 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.

4: ANALYSIS

4.1: Does the Father Have Rights of Custody to W.F.M.?

[18] The mother conceded at the hearing that Australia was W.F.M.'s habitual residence. She also agreed that the father did not consent or acquiesce to W.F.M.'s remaining in Canada. It was agreed that the father actively sought W.F.M.'s return to Canada and brought his application within one year of the child's removal from Australia.

[19] The mother argued that the father does not have custody rights to W.F.M. She argued that she has always been the primary caregiver for W.F.M. and the person responsible

for making all custodial decisions for him. She argued that the father only had access rights and that Article 3 does not apply. She relied on the distinction between custody and access rights set out in Article 5.

[20] In an Article 3 analysis, the nature of the custody rights of the party seeking an order for the return of children must be determined in accordance with the law of the habitual residence of the child. See *Finizio v. Scoppio-Finizio*, 1999 CanLII 1722, 46 O.R. (3d) 226, 124 O.A.C. 308, 179 D.L.R. (4th) 15, 1 R.F.L. (5th) 222, [1999] O.J. No. 3579, 1999 CarswellOnt 3018 (Ont. C.A.). As expressed by Justice Claire L'Heureux-Dubé in *V.W. v. D.S.*, supra, at paragraph [23]:

> **[23]** However, although the Convention adopts an original definition of rights of custody, the question of who holds the "rights relating to the care of the person of the child" or the "right to determine the child's place of residence" within the meaning of the Convention is in principle determined in accordance with the law of the state of the child's habitual place of residence . . .

[21] Since the child's habitual residence is Australia, we must examine Australian law to determine whether the father has custody rights to W.F.M.

[22] The father filed a letter from the Central Authority in Australia dated 21 February 2008 which states:

> As you will see from the application, the parents are married and no court orders have been made. Accordingly under Australian law, [Mr. D.P.M.] retains shared parenting responsibility for the child.

[23] This letter attached relevant portions of the *Family Law Act 1975*, No. 53 of 1975, as amended, of Australia ("the Act"). The sections of this legislation relevant to this case are as follows:

> **61B. Meaning of *parental responsibility*.—** In this Part, *parental responsibility*, in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.
>
> **61C. Each parent has parental responsibility (subject to court orders).—** (1) Each of the parents of a child who is not 18 has parental responsibility for the child.
>
> Note 1: This section states the legal position that prevails in relation to parental responsibility to the extent to which it is not displaced by a parenting order made by the court. See subsection (3) of this section and subsection 61D(2) for the effect of a parenting order.
>
> Note 2: This section does not establish a presumption to be applied by the court when making a parenting order. See section 61DA for the presumption that the court does apply when making a parenting order.
>
> Note 3: Under section 63C, the parents of a child may make a parenting plan that deals with the allocation of parental responsibility for the child.
>
> . . .
>
> **111B. Convention on the Civil Aspects of International Child Abduction.—**
> . . .

> (4) For the purposes of the Convention:
>
> (*a*) each of the parents of a child should be regarded as having rights of custody in respect of the child unless the parent has no parental responsibility for the child because of any order of a court for the time being in force; and
>
> (*b*) subject to any order of a court for the time being in force, a person:
>
> (i) with whom a child is to live under a parenting order; or
>
> (ii) who has parental responsibility for a child under a parenting order;
>
> should be regarded as having rights of custody in respect of the child; and
>
> (*c*) subject to any order of a court for the time being in force, a person who has parental responsibility for a child because of the operation of this Act or another Australian law and is responsible for the day-to-day or long-term care, welfare and development of the child should be regarded as having rights of custody in respect of the child; and
>
> (*d*) subject to any order of a court for the time being in force, a person:
>
> (i) with whom a child is to spend time under a parenting order; or
>
> (ii) with whom a child is to communicate under a parenting order;
>
> should be regarded as having a right of access to the child.
>
> Note: The references in paragraphs (b) and (d) to parenting orders also cover provisions of parenting agreements registered under section 63E (see section 63F, in particular subsection (3)).

[24] The mother's counsel asked me to interpret section 111B of the Act and, in particular, paragraph 111B(4)(*c*), to mean that only the mother had custody rights to W.F.M., on the basis that only she had day-to-day care of the child and was solely (she said) responsible for his long-term care, welfare and development. I cannot agree with this interpretation, as a plain reading of section 61C of the Act indicates that ***the father has parental responsibility rights unless they are removed by court order and paragraph 111B(4)(a) of the Act states that, for the purpose of the Convention, the father has rights of custody unless removed by a court order.*** There is no indication that paragraph 111B(4)(*c*) abrogates the effect of these provisions. The mother provided no expert or other evidence indicating that this was the case. In fact, I note that, while paragraph 111B(4)(*a*) refers only to parents, paragraph 111B(4)(*c*) has a much wider applicability, applying to persons. This provision would presumably be applicable to third parties who have cared for the child.

[25] The father filed an affidavit from Amanda Louise Bush, a lawyer employed as Principal Legal Officer in the International Family Law Section for the Central Authority of Australia responsible for administering the Convention. Her opinion, set out in her affidavit, was consistent with my interpretation of the Australian legislation. She wrote in Paragraphs (5) and (6) of her affidavit:

> (5) The effect of section 61C and [paragraph] 111B(4)(*a*) is that both parents of a child retain joint parental responsibility for the child until the child reaches the age of 18, unless that person's parental responsibility has been expressly taken away or diminished by an order of the court.

> (6) In this case, the applicant parent has stated that there have been no court orders in relation to the child. On the basis of that statement, the applicant parent has rights of custody in relation to the child, and these rights of custody have been breached within the meaning of Article 3 of the Convention.

[26] In *Finizio v. Scoppio-Finizio*, *supra*, when faced with two conflicting expert reports, the court said at paragraph [18] that:

> **[18]** **. . .** the determinative statement on the relevant Italian law and its application to the circumstances of the Finizio/Scoppia-Finizio family is found in the letter from the Italian Central Authority charged with administering the Convention in Italy.

In the absence of evidence to the contrary, I find the evidence from the Australian Central Authority responsible for administering the Convention to be the definitive statement of the Australian law.

[27] The father is married and no court has made an order diminishing his joint parental responsibility for W.F.M. I find that the father has custody rights with respect to W.F.M.

4.2: Was the Father Exercising His Custody Rights at the Time W.F.M. Was Brought to Canada?

[28] The mother argued that, even if Australian law gives the father custody rights to W.F.M., he was not exercising them at the time that W.F.M. was brought to Canada. She argued that this provides her with a complete defence to the application under both Articles 3(*b*) and 13(*a*).

[29] The onus is on the mother, on a balance of probabilities, to establish that the father was not exercising custody rights to W.F.M. at the time he was brought to Canada. In support of her argument, the mother reiterated her claim that the father was a mere access parent and that she made all custodial decisions for W.F.M.

[30] The mother cited the case of *Jackson v. Graczyk*, 2007 ONCA 388, 86 O.R. (3d) 183, 283 D.L.R. (4th) 755, [2007] O.J. No. 2035, 2007 CarswellOnt 3216 (Ont. C.A.), in support of this position and, in particular paragraph [47] where Justice John I. Laskin wrote:

> **[47]** On this evidence it was entirely reasonable for the application judge to find that Mr. Jackson was not actually exercising custody rights. Although he visited Jailen in Florida and was present for his birth, he was not actually involved in Jailen's life in a way that demonstrated the "stance and attitude" of a parent. Instead of caring for his newborn son, he chose to go out socializing with friends and to take two trips out of town. Although the threshold for demonstrating actual exercise of custody rights is low, the application judge did not err in finding that Mr. Jackson was not exercising these rights. On this basis, too, Mr. Jackson's appeal must fail.

[31] I find that the mother did not come close to meeting her onus. There are several distinctions between this case and *Jackson v. Graczyk*. In this case, Australian law creates joint custodial rights for married parents upon separation unless diminished by a court order.

The law in Ontario (which was applied in *Jackson v. Graczyk*) does not provide for this. In *Jackson v. Graczyk*, the father lived in a different jurisdiction from the child, visited infrequently and paid little support. He was nominally involved in the child's life. The situation is far different in this case. The father was intimately involved in W.F.M.'s life. He saw him daily (up until a few weeks before W.F.M. came to Canada) and W.F.M. would spend one night every weekend with him. He provided very generous financial support for the mother and W.F.M.

[32] The exercise of custody rights in the context of Article 3(*b*) "must be construed widely as meaning that the custodial parent must be maintaining the stance and attitude of such a parent." See *Re H.; Re S. (Abduction: Custody Rights)*, [1991] 2 A.C. 476, [1991] 3 All E.R. 230, [1991] 3 W.L.R. 68, [1991] 2 F.L.R. 262, [1991] Fam. Law 427 (H.L.). The father did maintain the stance and attitude of such a parent. In addition to the extensive time that he was spending with W.F.M., the father exercised custody rights as follows:

(a) He jointly made vacation arrangements for W.F.M. with the mother. She properly asked for his consent for the vacation to Canada. The terms of the vacation were negotiated between them. The father paid for the airline tickets and even drove W.F.M. and the mother to the airport. He agreed to look after the home while they were away. This was significant evidence of the parties making custody decisions jointly for W.F.M.'s welfare.

(b) He exercised his custody rights to determine W.F.M.'s place of residence, which is a relevant factor under Article 5. The parties negotiated an agreement that W.F.M. was not to be removed from the country, or even the state, without the other's consent for vacations, until the divorce was concluded.

(c) To the credit of the parties, they made a mature joint parenting decision to insulate W.F.M. from litigation over their separation and took steps to resolve their separation issues in a child-focused manner. They jointly retained a counsellor to assist them in negotiating the settlement. They were able to negotiate appropriate financial arrangements for W.F.M. They were able to work out a temporary parenting arrangement that ensured that W.F.M. maximized his contact with both of his parents. When the mother asked the father, a few weeks prior to her leaving, to reduce his mid-week visits (stating concern about disruption to W.F.M.), the father agreed. The parties were in the process of negotiating a final parenting agreement when the mother left with W.F.M. W.F.M. was doing well. The evidence indicated that the parties were successfully co-parenting him.

[33] It is also noteworthy that the mother never took steps to apply to an Australian court to diminish the father's rights of custody.

[34] Parents, whether separated or still together, do not always make custodial decisions equally. That does not mean that the other parent does not exercise their custody rights. Although the mother in this case has been W.F.M.'s primary caregiver, the father has been very involved in W.F.M.'s life and decisions about him. The parties conducted themselves as persons having joint parenting responsibilities for the child, in accordance with Australian law. I find that the father was exercising his joint custody rights when W.F.M. was removed

from Australia.

[35] I further find that the mother's retention of W.F.M. in Canada is wrongful and a breach of the father's custody rights under Article 3 of the Convention.

4.3: Would Returning W.F.M. to Australia Expose Him to a Grave Risk of Psychological or Physical Harm or Place Him in an Intolerable Situation?

[36] The mother relies upon the defence set out in Article 13(*b*) which reads:

> ***Article 13***
>
> Despite 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 that 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.
>
> . . .

[37] The mother's evidence on this issue can be summarized as follows:

(a) She has always been W.F.M.'s primary caregiver and they are closely bonded. She has been a stay-at-home mother. She argued that it would be harmful to W.F.M. to be removed from her care.

(b) She was terribly unhappy in Australia. She understood when she first moved to Australia that she and her husband would only live there for 3-5 years and then return to Canada, where her extended family lives. Her evidence is that she felt isolated and trapped there. She was anxious and depressed and deposed that she had daily panic attacks. She was seeing mental health professionals in Australia, and was prescribed medication, to deal with these feelings.

(c) She felt that the father did not appreciate her feelings. She said that he would work long hours and leave her alone with W.F.M. She said that he would verbally demean her. She characterized this as an abusive relationship. She did not allege any physical abuse, except for one incident of spitting. She also said that she contracted herpes from him.

(d) She is much happier in Canada. She claimed that she no longer suffers from depression. She expressed fear that her mental health will deteriorate if forced to return to Australia, where she does not have the support of family and friends. Her position is that W.F.M.'s happiness is directly related to her happiness.

(e) She states that W.F.M. is thriving in Canada and has developed a close relationship with her new partner, his 19-year-old son, as well as her extended family. She argued that it would be harmful to W.F.M. to be disrupted from this community. He is entering grade I in September and she also expressed

concern about disruption to his education.

(f) She does not believe that the father can care for W.F.M. on a day-to-day basis and provide him with the attention and care that he requires.

(g) She feels that it is in W.F.M.'s best interests to remain with her in Canada.

(h) She alleged that W.F.M. made a sexual abuse allegation against the father in April of 2007 in Australia, which she does not feel has been resolved. She also alleges that the father is upsetting W.F.M. by telling him on phone calls that he is bringing him back to Australia.

[38] In arriving at its decision to order the return of a child to Scotland, the Supreme Court of Canada, in *Thomson v. Thomson*, [1994] 3 S.C.R. 551, 173 N.R. 83, 97 Man. R. (2d) 81, [1994] 10 W.W.R. 513, 79 W.A.C. 81, 119 D.L.R. (4th) 253, 6 R.F.L. (4th) 290, 1994 CanLII 26, [1994] S.C.J. No. 6, 1994 CarswellMan 91, conducted an extensive study of the Convention and set out the general principles governing its interpretation by Canadian courts. With respect to Article 13(*b*), Justice Gérard V. La Forest stated, at pages 596-97 [S.C.R.]:

> 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. . . . 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".

[39] I find that this case does not fall within the description of Article 13(*b*). I reach this conclusion for the reasons that follow.

4.3(a): The Sexual Abuse Allegation

[40] I will deal first with the sexual abuse issue, since it was the most serious issue raised.

[41] In her affidavit of 8 August 2008, the mother deposed that W.F.M. told her in April of 2007, while she was in the bath with him, that "I massage Daddy's penis all the time and he loves it." The mother's counsel submitted that his client felt that this issue has not been resolved and implied, as a result, that W.F.M. would be at grave risk if returned to his father.

[42] I was not satisfied on a balance of probabilities that the father acted in a sexually inappropriate way with W.F.M., or that he poses a risk to W.F.M., for the following reasons:

(a) The matter was reported to the local child protection agency in Australia. It investigated the matter and found the allegation to be unsubstantiated. It closed the file at intake. It was aware that the father spent significant unsupervised time with the child and requested no restrictions on his contact with him.

(b) The child told the child welfare agency that this incident never happened.

(c) W.F.M. has never repeated the allegation.

(d) There was no independent verification of this allegation or that it was even made in the manner described by the mother.

(e) W.F.M. was very young when he allegedly made this statement and it should be treated with caution, especially without knowledge of the context in which the statement was made, the full detail of the discussion and an understanding of what the child might have meant.

(f) The child continued to have overnight visits and extensive contact with the father in Australia after this incident. He spoke to his father every day when he came to Canada. He has seen the father daily since the father came to Canada. He has shown no fear or anxiety with the father and has shown enthusiasm about seeing him. He is comfortable being with his father.

(g) The child is happy and well-adjusted and shows no evidence of harm. A letter was filed from a doctor whom W.F.M. often saw in Australia, who described him as a happy and healthy child, with excellent behaviour and demeanour.

(h) According to the father's affidavit (which was not contradicted), the mother told the child protection agency in Australia that: she did not believe that abuse had occurred, W.F.M. had a strong bond with his father, had told her that he had made up the remark and that she felt that it was an innocent remark made during the course of things that the child said at the time.

(i) The mother's behaviour has been consistent with that of a person who does not really believe there was sexual abuse, since:

  (i) She did not pursue the issue any further with child protection agencies in either Australia or Canada.

  (ii) She did not take W.F.M. to any professionals to pursue the matter.

  (iii) There is no independent evidence that she expressed concern, while in Australia, to any of the many professionals with whom she was dealing there, about the father's having unsupervised contact with W.F.M. There is no evidence that she expressed to any of these people that this was a reason why she wanted to leave Australia.

  (iv) She did not take any steps in Australia to restrict the father's frequent contact with W.F.M.

  (v) She has permitted the father to have unsupervised contact with W.F.M. in Canada.

  (vi) The mother filed a psychiatric report, dated 11 August 2008 from Dr. H. Dief, a Toronto psychiatrist. Although the psychiatrist mentions that the mother told him that the father was abusive to her, there is no mention of a

sexual abuse concern.

(vii) There was no mention of the sexual abuse issue in the letter of 10 December 2007, which the mother had her lawyer send to the father. This letter informed the father that the mother would remain in Canada and was unsparing and detailed in its criticism of the father's behaviour towards the mother. I find it highly unlikely that the mother would have overlooked raising the sexual abuse issue at this time, if she had thought that it had any validity.

(viii) She did not raise the sexual abuse issue until she was faced with the hearing date for W.F.M. to be returned to Australia.

(ix) She did not even mention this issue in her first affidavit of 14 July 2008 filed in this case.

4.3(b): Physical or Emotional Abuse of W.F.M.

[43] There was no evidence that the father has ever hurt W.F.M., physically or psychologically. To the contrary, the father's evidence was not contradicted that he and W.F.M. have a positive relationship and that W.F.M. is comfortable in his care. He denied that he is telling W.F.M. that W.F.M. will be returning to Australia. I have no way of knowing whether this is the case or not. I note that the mother brought W.F.M. to court on the first appearance of this case and, as a result, I made an order that W.F.M. not be brought to future court proceedings. It may be that both parents, under the strain of this case, are involving him in adult affairs more than they should.

4.3(c): Physical or Emotional Abuse of the Mother

[44] A child can be put at risk of psychological harm if he witnesses violence from one parent to another. See *Pollastro v. Pollastro* (1999), 43 O.R. (3d) 485, 118 O.A.C. 169, 171 D.L.R. (4th) 32, 45 R.F.L. (4th) 404, 1999 CanLII 3702, [1999] O.J. No. 911, 1999 Carswell-Ont 848 (Ont. C.A.). However, there was no persuasive evidence of physical abuse of the mother by the father. Further, the mother's evidence of mistreatment in this case does not come anywhere near the quality of evidence that has been produced in other cases where Article 13(*b*) has been applied. See *Pollastro v. Pollastro*, *supra*; *Lombardi v. Mehnert*, 2008 ONCJ 164, 50 R.F.L. (6th) 305, [2008] O.J. No. 1413, 2008 CarswellOnt 2075 (Ont. C.J.).

[45] The father conceded that the parties would call each other names when they argued, but otherwise, adamantly denied ever emotionally or physically abusing the mother.

[46] The mother provided no independent evidence of physical abuse. The independent evidence that she provided of emotional abuse was more related to her self-reporting of the emotional coldness and unavailability of the father. This type of evidence is insufficient to invoke the Article 13(*b*) defence.

[47] The evidence established that the primary reason for the mother's leaving Australia with W.F.M. was her deep-rooted unhappiness and loneliness in Australia and not a concern that either W.F.M. or she was being abused by the father. Evidence in support of this was as

follows:

(a) The mother's e-mail to the father of 17 October 2007, which explained that she was staying in Canada with W.F.M., made no reference to any emotional or physical abuse. The mother just stated in the e-mail that she did not feel loved by the father. In the e-mail, she wrote:

> . . . while I am here I realize more and more that I need to be here, that I was going downhill there. This has nothing to do with me trying to hurt you or [W.F.M.] in any way. . . . it is just the facts. I know this is not what you want to hear however my mental health is an important part of being a good mother to [W.F.M.]. Really [D.] if you every [*sic*] understood me at all. . . . I am a family person I function better when I have family and friends around who love and care about me. I need to feel secure and safe and I did not feel this way there. I have nothing there. This is my home, I never wanted to leave for good. . . .

(b) A letter dated 16 March 16, 2008 filed by the mother from Dr. Goodall, the doctor whom she was seeing in Australia, made no reference to complaints about physical or psychological abuse by the father. The doctor set out her issues as follows:

> Your main problem whilst you were in Australia was the anxiety condition produced by the severe strain you were under whilst coping with a new country and culture, the lack of family support, a marriage in which you felt "trapped" and mothering of a small child.

(c) In a separate letter to the mother's counsel dated 8 March 2008, Dr. Goodall elaborated (based on the mother's self-reporting) that the background for the mother's distress was "her husband's actions and disinterest, the long distance from her family, friends and country of birth, and her concerns about the effect on W.F.M. Jr., if like herself, he grew up without a father in the home".

(d) The mother filed a similar letter from her counsellor, Deborah Bonham, dated 8 November 2007. This letter also made no mention of physical or psychological abuse as the basis for the mother's move. Ms. Bonham wrote:

> [Ms. S.-A.D.], now the mother to [W.F.M.], told me how lonely and trapped she felt without the support of her family and friends and that she was for sometime and still, suffering from major panic attacks. Her husband, she said was emotionally unavailable and very unsupportive. She said that he worked long hours (13 hour days) and was unavailable even when she had to go to the hospital to have her tonsils out. She was extremely homesick and feeling desperate about her situation. These themes persisted in the time I saw [Ms. S.-A.D.] and eventually she separated from her husband.

(e) The mother filed an e-mail dated 28 February 2008, from the counsellor whom she and the father were seeing. It reads in part:

> . . . You both gave it a good try to see if your relationship could be improved. Unfortunately it proved to be unsuccessful as you both were very much on different pages. You always stated that you suffered with homesickness and that you felt tricked to coming to Australia. And as you explained the situation was exuberated [*sic*] by lack of emotional support and understanding by [Mr. D.P.M.]. . . .

(f) The mother's first real mention of abusive behaviour, by the father was contained

in her lawyer's letter of 10 December 2007, to the father, in support of her objective to remain in Canada.

(g) The mother never sought police assistance with respect to her husband. She frequently traveled to Canada with her son and always returned.

4.3(d): The Promise to Return to Canada

[48] The mother attempted to justify her retention of W.F.M. in Canada on the basis that the parties had allegedly agreed to stay in Australia for only 3-5 years. This appears to be a rationalization for her wrongful behaviour. The parties lived in Australia for 10 years. This was W.F.M.'s habitual residence. She had agreed not to remove him from Australia, without an agreement with the father about vacations, pending the completion of the divorce. She took advantage of the father's good faith by negotiating the terms of the vacation, obtaining his consent to travel with W.F.M. and then failing to return the child. Her actions were wrongful and deceptive.

4.3(e): The Relevance of Best Interests

[49] The mother's argument that it is in W.F.M.'s best interests to remain with her in Canada also fails. In considering a Hague application, a court does not embark on a consideration of a child's best interests (unless it approaches the criteria for the Article 13(*b*) defence) until the court decides that the child shall not be returned under the Convention. That is an issue for the court where the child is habitually resident to decide. See *Thomson v. Thomson*, *supra*.

[50] Similarly, the mother's argument that it is in W.F.M.'s best interests to be with a happy, well-functioning mother is really not an appropriate consideration in a Hague application. In *Courtney v. Springfield*, 2008 CanLII 35920, 56 R.F.L. (6th) 64, [2008] O.J. No. 2830, 2008 CarswellOnt 4263 (Ont. Fam. Ct.), the court cited with approval the case of *P. v. P. (minors) (child abduction)*, [1992] 1 F.C.R. 468, [1992] 1 F.L.R. 155, [1992] Fam. Law 197 (Eng. Fam. Div.), where the mother made a similar argument, submitting that, in the United States of America, she was isolated and unhappy, and that this would impact negatively on the children. This court said at page 161 [F.L.R.]:

> That is not, however, the end of the mother's objections to the making of a return order. She relies also upon the submission that this is a case where there is a grave risk that the children's return would expose them to physical or psychological harm, or otherwise place them in an intolerable situation for the purposes of art 13(*b*). To support that, she relies upon the evidence I have already summarised to the effect that, if she was forced to return to the USA — and she has made it plain that if the children were ordered to return she would, without hesitation, accompany them — she would become once again a deeply unhappy person. An unhappy mother means unhappy children. These children are still of an age when they are acutely sensitive to their mother's feelings. There must therefore be, so it is argued, an appreciable risk that they would suffer psychological harm or be placed in an intolerable situation if they were obliged to return with their mother to New Jersey.
>
> Arguments of that kind are commonly raised within this jurisdiction. They

> are really, however, beside the point. That is not because the jurisdiction is inhumane. On the contrary, there is a humane purpose underlying it in ensuring that children are not subjected to disruption through arbitrary movement by one parent or the other. The reason why evidence of that kind is beside the point at this stage is the underlying assumption of the Convention which I have already mentioned, that the courts of all its signatories are equally concerned to ensure, and equally capable of ensuring, that both parties receive a fair hearing, and that all issues of child welfare receive a skilled, thorough and humane evaluation.

These comments resonate in this case. The mother should be addressing these issues in an Australian court.

4.3(f): The Impact on W.F.M. if Returned to Australia

[51] The mother argued that W.F.M. would suffer grave psychological harm and be placed in an intolerable situation if removed from his current positive home environment with her and returned to live with his father in Australia. She argued that W.F.M. has established roots in Canada and has developed a wonderful relationship with her new partner, his son and her extended family. This argument also fails for several reasons.

[52] First, the mother is trying to rely upon a *status quo* established through her wrongful actions. The mother entered into a new relationship and became pregnant knowing full well that she was facing a Hague application. A primary purpose of the Convention is to discourage parents from using self-help to establish a *status quo*. The Convention does contain a possible exception to this principle if the child has been in the new jurisdiction for over one year prior to the start of the case (Article 12), but that is not applicable here. The parent should apply for relief in the country where the child is habitually resident if he or she believes that it is in the best interests of the child to move with the child to another jurisdiction. To give credence to this argument by the mother would defeat the purpose of the Convention.

[53] Second, although W.F.M. is likely to suffer some distress leaving his mother, I received no evidence that such distress would approach the high threshold of grave risk of psychological harm or being placed in an intolerable situation as required by Article 13(*b*). The mother produced no professional evidence to support this argument. To the contrary, the evidence was that W.F.M. has a positive relationship with his father. W.F.M. was described as a healthy, well-adjusted child who loves both of his parents. W.F.M. should be able to adjust to living with his father in Australia. The mother's evidence was that she would return to Australia if I ordered W.F.M. to be returned there. Any psychological distress can be minimized if she does this. This will be within her control.

[54] Third, the mother did not establish that the father would be unable to adequately care for W.F.M. if she did not return to Australia. Although not as intimately involved with W.F.M.'s life as the mother, he saw him every day (until a few weeks before W.F.M. was brought to Canada) and had overnight visits with him. He fed, bathed and played with W.F.M. and would often put him to bed. The child enjoys being with him. The father appears from the evidence to be a dedicated parent who will do what is necessary to care for W.F.M. He set out an appropriate plan to care for W.F.M. upon his return to Australia.

[55] Last, there is no evidence that W.F.M. would suffer any harm living in Australia. There is no evidence that he would not receive an appropriate education, health care or other services there.

4.4: Final Comments and Transitional Terms

[56] This is the type of case that the Convention was designed to address. The father was negotiating the separation issues in good faith with the mother in Australia. The parties agreed that W.F.M. would live in Australia, subject to any travel agreements, pending the completion of the divorce. The mother led the father to believe that she was coming to Canada on a vacation and he very reasonably facilitated the visit, putting his child's best interests first. She had no justifiable reason for not returning W.F.M. as promised. The issues argued by the mother about W.F.M.'s best interests and her mobility claim should have been put before the court in Australia. That is still the case. It is not the mother's arbitrary decision to make.

[57] The following findings are made:

(a) The child was habitually resident in Australia at the time of his removal.

(b) The father has rights of custody to W.F.M. under the law of Australia.

(c) The father was exercising his rights of custody to W.F.M. when he was removed from Australia.

(d) The child is being wrongfully detained in Canada in breach of the father's custody rights under Article 3.

(e) Returning W.F.M. to Australia with his father would not expose him to a grave risk of physical or psychological harm or place him in an intolerable situation.

[58] This court can impose undertakings to smooth the return and to protect the children in the transitional period before the court of their habitual residence takes over. See *Thomson v. Thomson*, *supra*. At the hearing, I asked the mother's counsel what undertakings he sought if I decided to order the child returned to Australia. The mother's proposal, if I ordered W.F.M.'s return, was to wait at least seven months, until after she gave birth, as she is not prepared to fly to Australia while pregnant. She produced no medical evidence to support why she could not fly back to Australia while only two months pregnant. Even if this were the case, her proposal flies in the face of Article 12 which provides for the immediate return of the child to his habitual residence, once a finding has been made that there has been a breach of the Convention. I will order the mother to deliver the child to the father to ensure his return to Australia.

[59] The mother stated in her affidavit that she would return to return to Australia if I ordered W.F.M. returned there, but I am not sure that this will happen anytime soon, given her position about traveling to Australia until after she gives birth, her strongly expressed feelings about her unhappiness in Australia and her new relationships in Canada. To avoid any uncertainty for W.F.M., the child is to still be delivered to the father to be taken to Australia, even if the mother changes her mind about flying to Australia after receiving this

decision. However, if she does decide to return to Australia within fourteen days of the father's and W.F.M.'s arriving there, my order shall provide for undertakings that, upon W.F.M.'s return to Australia, the parties shall agree that W.F.M. be placed in the joint custody of his parents, with primary residence to the mother in their previous community and access to the father one overnight each weekend and three days each week after school, pending these issues being dealt with by an Australian court. This will facilitate W.F.M.'s transition back to Australia and reflects the *status quo* that existed prior to W.F.M.'s wrongful detention in Canada. If the mother returns to Australia more than fourteen days after W.F.M. and his father return there, she will need to apply to an Australian court to deal with temporary parenting terms.

[60] I will order the father to ensure, pending any further order of an Australian court, to set up an instant messenger service and webcam for W.F.M. and to facilitate daily internet contact between W.F.M. and his mother, in the event that she does not return to Australia.

[61] It is in W.F.M.'s best interests to have his affairs organized and have the opportunity to be prepared for the return to Australia. I will defer the transfer to his father for five days. The father indicated at the hearing that he did not believe that the mother was a flight risk. However, as a precaution I will order that the mother is not to remove the child from Toronto pending her delivery of him to the father. The child's passports and birth certificate are to be delivered immediately to the father. The mother shall pay W.F.M.'s air-fare for the flight back to Australia.

[62] The mother also filed an Answer-Claim [Form 10 under the *Family Law Rules*, O. Reg. 114/99, as amended] which included claims for custody, child and spousal support. Australia is the appropriate jurisdiction to decide these issues. The claims in her Answer-Claim are dismissed.

5: THE ORDER

[63] An order will go on the following terms:

(a) The mother shall deliver W.F.M. to the father on or before 30 August 2008 at 4:00 p.m., for the purpose of the father's returning W.F.M. as soon as possible to Australia. The exchange of the child shall take place at the mother's residence, or such other place that the parties agree to in writing. The mother's consent for W.F.M. to travel to Australia with the father is dispensed with.

(b) The mother shall pay (or reimburse the father, as the case may be) W.F.M.'s airfare back to Australia. If she fails to do so within 14 days of receipt of the airfare receipt, the father may bring a Form 14B motion to the court to specify the amount that the mother owes to the father, with proper documentation.

(c) The mother shall not remove W.F.M. from the City of Toronto pending her delivery of the child to the father and shall permit the father daily contact with W.F.M.

(d) The child's passports and birth certificate shall be delivered forthwith to the father. Any of these documents deposited with the court shall only be released to the father or his counsel.

(e) If the mother fails to deliver W.F.M. to the father as required by this order, or breaches my order in subparagraph (c) above, all police forces where the child is located, including, but not limited to the Toronto Police Force, Ontario Provincial Police and the Royal Canadian Mounted Police shall forthwith locate, apprehend and deliver the child to the father, pursuant to section 36 of the *Children's Law Reform Act*.

(f) The following undertakings are ordered by this court:

(i) Upon booking the flight to Australia, the father shall immediately provide the mother with all flight details, to give her the opportunity to return to Australia on the same flight.

(ii) In the event that the mother returns to Australia within fourteen days of the father's and W.F.M.'s arriving there, the parties will agree that:

(a) The child shall be in the joint custody of the parties.

(b) The child shall reside in the primary care of the mother in the community in which they lived in Australia, prior to coming to Canada.

(c) The mother shall ensure that the father visits with W.F.M. a minimum of one night each weekend and three days each week after work.

These undertakings shall continue until a contrary order, if any, is made by court of competent jurisdiction in Australia.

(iii) If the mother does not return to Australia within fourteen days of W.F.M.'s and the father's returning there, the father shall set up an instant messenger service and webcam to permit W.F.M. to have daily internet contact with his mother, pending further order of an Australian court.

(g) The claims set out in the mother's Answer-Claim are dismissed.

[64] In the event that the parties are unable to agree on the issue of costs, I will receive written costs submissions from the applicant within 10 days. The respondent shall have seven days from the receipt of these submissions to respond and the applicant shall have four days from the receipt of the response to reply. The submissions are not to exceed three pages, not including any bill of costs or offer to settle.

[65] The process to issue the order will need to be expedited. Upon receipt of the draft order, to be prepared by the father's counsel, the mother's counsel shall have 24 hours to approve it, or submit a Form 14B motion to the court outlining his objections to the form of the order. If he takes neither step, the father's counsel may submit the draft order to the court. The court office is asked at that point to expedite issuing the order. As I will be on vacation, counsel should direct any objection to the form of the order to Justice Harvey P.

Brownstone.

[66] Last, I wish to thank counsel for their excellent presentation of this case.