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[21/12/1999; Court of Queen's Bench (Family Division) of Manitoba (Canada); First Instance]
Mahler v. Mahler, 1999 A.C.W.S.J. 167730; 94 A.C.W.S. (3d) 313

COURT OF QUEEN'S BENCH OF MANITOBA (Family Division)

Little J.

21 December 1999

Docket : FD 99-01-56814 Winnipeg Centre

BETWEEN

E.M.

PETITIONER,

- and -

G.M.

RESPONDENT

REASONS FOR JUDGMENT

APPEARANCES:

Michael Paluk for the Petitioner

Janet Sigurdson For The Central Authority of the Province of Manitoba on behalf of Mr. M.

JUDGMENT: Little, J.: Mr. and Ms M. married in the state of New York in 1992. In February 1999, they separated and signed a separation agreement. They continued to reside in New York. The agreement says the parents have "joint legal custody" of their two children, L and LL, with "physical custody with the wife". In May, 1999, without Mr. M.'s knowledge or consent Ms M. brought the children (then 6 years of age and 15 months, respectively) to Manitoba to reside with her here.

Mr. M. applies under the Hague Convention for an order returning the children to their habitual residence in the state of New York. The Convention has two objects:

a)To secure the prompt return of children wrongfully removed from a Contracting State, and

b)To ensure rights of custody and access under the law of one Contracting State are

respected in another (Article 3).

Under the Convention, this court is required to return the children forthwith if a wrongful removal has occurred (Article 12), unless there is a "grave risk of harm", or they would otherwise be placed in an "intolerable situation" (Article 13). If a grave risk of harm is established, return of the children becomes discretionary, rather than mandatory.

The issues raised are these:

a)Was there a wrongful removal of the children in May 1999?

b)If so, will their return expose them to a grave risk of harm or an intolerable situation?

c)If a risk exists, how might it be managed or minimized?

FACTUAL BACKGROUND:

Mr. M. is a lifelong resident of New York State, as were the children until they came to Manitoba. Ms M., originally from Lake Manitoba First Nation in Manitoba, has lived in the United States since 1978 when she was placed for adoption as a teenager by the then Children's Aid Society.

The separation agreement signed by the parties in February 1999 provides:

> **the parties have agreed to joint legal custody with physical custody with the wife and therefore the immediate care and supervision of the minor issue shall be with the mother. [emphasis added]**

The agreement goes on to provide "visitation" is to be liberal, unrestricted and "worked out between the parties". A series of mutual clauses then follows affirming:

a)Neither will hinder the relationship with the other parent.

b)Each will notify the other of a change in address or phone number.

c)Each will consult on issues of health, education and welfare.

d)Both will cooperate to advance the children's health, emotional and physical well being; affection for both parents and a sense of security.

There is no clause specifically providing for ultimate or final decision making authority, but the separation agreement does say:

> **"any matters relative the custody and visitation of the minor issue as well as the support of the minor issue shall be referred to the Family Court of the State of New York, Chemung County".**

After signing the agreement, the parties continued to see a marriage counsellor to assist them with scheduling periods of care and control. Mr. M.'s rebuttal affidavit (hence not responded to by Ms M.) alleges a shared custody regime had been agreed to on or about May 1, 1999 whereby each of the parties would have rotating one week periods of care and control. His first week under that regime was to have begun on May 24, 1999, three days after she left the jurisdiction with the children. While there is some discrepancy, even

vagueness, in the affidavits about the frequency or duration of Mr. M.'s contact with the children, it is clear his contact was ongoing, and occurred with a degree of frequency and predictability.

Some less essential facts are also worth noting:

a)The parties, before and after the separation agreement, spoke about a potential move to Canada, yet there is no specific reference to "residency issues" in the separation agreement.

b)The agreement was drawn by Ms M.'s lawyer who witnessed both parties' signatures. Mr. M. waived counsel and acted on his own behalf.

c)After the separation agreement was signed and Ms M. indicated that if she moved, it would be just with the children, Mr. M. objected to any such move.

d)Ms M. did not tell Mr. M. she was leaving.

e)Neither did she tell the babysitter. Indeed, she reminded the babysitter that Mr. M. would be picking up the children on May 24. It appears she left the jurisdiction on May 21st.

f)Ms M. never told the school she would withdraw L from class.

g)Ms M. had by then advised her employer she would not be returning to work.

h)Mr. M. learned from the marriage counsellor one night before beginning his period of care and control that the children "might not be available the next day".

i)Mr. M. acted immediately, filing a missing persons' report, petitioning the court in New York, and obtaining an order providing for temporary sole physical custody to him within one day after learning of the departure.

j)The New York Court has proceeded progressively through a series of court hearings and adjournments from May 25th to October 21st (which is the last date for which evidence is before this court). Ms M. has not participated in any of these proceedings, has avoided or not cooperated with service and process, resulting ultimately in an order she appear or a warrant would issue for her arrest in that jurisdiction.

k)Since May 1999, Mr. M.'s only contact with his children has been by telephone.

WRONGFUL REMOVAL:

Article 3 of the Convention makes removal of children wrongful if it is in breach of "rights of custody" under the law of the state where the children habitually reside. Ms M. argues no wrongful removal has occurred because there is no breach of a "custody right" under New York law. She argues her right to "physical custody" and "immediate care and supervision" in conjunction with the change of address provision comprises all of the "rights relating to the care of the person of the child" within the meaning of Article 5 of the Convention. In short, what Mr. M. has is a right of "visitation" or "access" and that is not enforceable under the Convention. She further argues the requirement to consult on "health, education and welfare" given her physical custody of the children ought to be interpreted to require nothing more than that. Ultimate decisions on issues of residence, among other things, rest with her because that is within the realm of authority conferred by the agreement and is within the meaning of "physical custody".

I cannot agree. In the leading case of Thomson v. Thomson , [1994] 6 R.F.L. 4(th) 290 (S.C.C.) § 322, the Supreme Court of Canada interpreted the provisions of a Scottish court order in the absence of evidence of its legal effect, "without aid, from general principles and by analogy to Canadian law". Turning to this agreement, and as a matter of simple interpretation, I cannot conclude that the document ought to be construed in Ms M.'s favour, particularly given the circumstances of its execution. Even if contra proferentem does not apply, I note the agreement does not use the word "sole" or "primary" as a modifier to "physical custody". This is a distinction made in the "chasing order" granted to Mr. M. by the New York court after Ms M.'s departure - he was granted "temporary sole physical custody". It is also a distinction in one of the two New York attorneys' affidavits filed in these proceedings, where that attorney uses the word "primary" to describe a relationship where a child resides for the majority of time with one parent. Further, I take the reference to " immediate care" to be nothing more than "day to day" care. It is equally as persuasive therefore to argue that whatever rights of "physical custody" Ms M. has, they are something less than "sole".

Neither am I persuaded the mutual change of address clause gives Ms M. authority to change the habitual residence of her children. While there may be a general right of the mother to determine residence within the state of New York, itself, I am not persuaded she has authority to change their country of residence, in the absence of more specific wording. Indeed, if the matter of Ms M.'s possible relocation (with or without the children) or her ultimate decision making was the topic of discussion between the parties, before and after separation, why then is neither specifically reflected in the agreement? To accept Ms M.'s interpretation is to render the words "joint legal custody" practically meaningless at least as I understand the term under Canadian or New York law.

A closer legal analysis does not assist Ms M., either. Article 5 of the Convention defines "rights of custody" as including "rights relating to the care of the person of the child, and in particular the right to determine the child's place of residence" [emphasis added]. In essence, she insists that "physical custody" is synonymous with "rights relating to the care of the person" and because of that the right to determine residence is an included right. The case law is clear, however, that the "right to determine residence" is a right divisible from "the right to care for the child" (see Thomson supra § 320, para. 58). It follows therefore that one need not always include the other.

In that context, I must now look to the custody laws of New York. Counsel have provided me with affidavits of two New York attorneys and the decision of the New York Supreme Court, Appellate Division, in Trapp v. Trapp, 526 N.Y.S. (2nd) 95, 136 A.D. 2nd 178.

Mr. M. relies on his New York attorney's affidavit. Her affidavit deposes to facts unlikely to be within the realm of her personal knowledge, and which ought properly to have been presented as assumptions of fact upon which her opinion was then based. In my view, affidavits deposing to the law of a foreign jurisdiction may be of greater weight and assistance to the court if they come from someone other than an attorney hired by one party to effect a specific result.

The second attorney's affidavit is of more assistance. He indicates "legal custody" and "physical custody" are each recognized by New York law. The former deals with who makes the major decisions in the child's life (e.g. religion, health). The latter involves actual physical placement of a child with one or both parents. "Joint legal custody" provides each parent with some say in major decisions. " Primary physical custody" indicates the child resides with one parent for the majority of the time, while "joint physical custody" is a

shared or split placement between parents.

Turning now to Trapp v. Trapp , (supra), the New York Appellate Court has this to say: "Joint legal custody" gives both parents continuing rights and responsibilities as they had during marriage to participate in the decisions affecting their children. Day to day child rearing decisions are made by the parent with whom the children are living, while decisions with respect to the important issues such as religious training, education, medical care and sometimes even less significant matters, such as discipline, diet and the choice of a summer camp, are jointly made. (p. 98)

In Trapp , the rights associated with "joint legal custody" are many, diverse and severable. In that case, the court decided to give one parent decision-making authority on all but two issues, because otherwise the court had become the "ultimate arbiter of every fundamental child rearing issue" [emphasis added]. Nonetheless, the court maintained joint decision making on matters involving religion and citizenship "which form a profound part of a child's heritage and generally do not require daily and immediate intervention by the caretaker parent".

In my view, residency is both fundamental and more akin to matters concerning citizenship than to summer camp. What is more, the separation agreement requires consultation on several matters considered by Trapp to be more quotidian than religion and citizenship, or for that matter residency - e.g. health, education and welfare. Accordingly, and in the absence of any limitation in the M.s' agreement, I conclude, "residency" is otherwise included in the bundle of rights associated with "joint legal custody" under New York law.

Ms M.'s argument that "physical custody" is the equivalent of "rights of care of the person" under the Hague Convention is an overreaching interpretation. It presupposes the two concepts are synonymous. While physical custody is clearly "a right of care of the person", I can not conclude it encompasses all such rights of care. Simply put, Mr. M. has some rights to "care of the person" when consultation is mandated on health, education and other issues. Neither is a narrow interpretation of "custody rights" under the Convention in keeping with the decision in Thomson , supra , (cf. W. (V) v. S. (D) [1967] CR 108 (SCC).

"The right to determine residence" is a divisible concept from "physical custody" or "the right to care of the person". whether under the Convention or New York law. "Joint legal custody" under New York law does create a "right of custody" within the meaning of the Hague Convention and includes the right to determine residence. The father's rights are therefore not ones of access only and there has accordingly been a wrongful removal.

IS THERE A GRAVE RISK OF HARM?

The onus is on Ms M. to show her children would be exposed to harm or otherwise placed in an intolerable situation if returned. She has an evidentiary hurdle (that is proof on a balance of probabilities) and a "gravity of risk" test to meet (see Thomson , supra , 328, para. 80). "Best interests" considerations are not the test (see Thomson , supra and Hawke v. Gamble [1998] 43 R.F.L. (4th) 67 (B.C.S.C.)).

Ms M. says Mr. M. is an alcoholic, was unreliable in meeting his support obligations, and was physically and verbally abusive to her. When angry, he would "resort to pushing ... spitting in [her] face ... nudging [her], pounding his chest, kicking down doors and raising his voice and provoking [her] into altercations" (para. 13 of her Affidavit). All of these are denied by Mr. M. What is more, the separation agreement clearly says he is paying at a level almost two times that of the New York child support standard for the support of his

children, and he provides a series of cancelled cheques, some endorsed by Ms M. and some payable to third parties, which together he says meet his support obligations.

There is no evidence that Mr. M. has ever physically harmed his children. On the issue of psychological harm, Ms M.'s affidavit draws a link between Mr. M.'s conduct and his drinking, on the one hand, and L's bedwetting on the other. These incidents predate separation, but furthermore her explanations for L's "accidents" are inconsistent. In her reporting to Dr. Ellis (whose narrative psychological assessment is filed on behalf of Ms M.) she discloses L's most recent "accidents" since arriving in Manitoba are attributable to the child not wanting to stop what she is doing or drinking too late at night. She also describes to Dr. Ellis, L's "special relationship" with her father; that "L felt close to him" and indicates the children had more Equality time" following separation than before. These disclosures represent a qualitative difference from the impressions left by her affidavit.

Given the conflicting and inconsistent nature of the evidence, I can not conclude Ms M. has proved Mr. M. poses a risk to the children. The Hague Convention procedures are summary ones and except in the most unusual of circumstances are based on affidavit evidence (see Thomson , supra ; and Szalas v. Szabo , (1995) 16 R.F.L. (4th) 168 (Ont.. Ct. of Justice)). At the same time, I must recognize my ability to measure Mr. M.'s reporting is not as extensive as my ability to measure Ms M.'s. Most importantly, I am unable to conclude Mr. M. is an equal or better caretaker than Ms M. - a significant factor, as I turn to the single allegation of "risk of harm" for which I am satisfied there is proof.

At the heart of Ms M.'s case is the risk of psychological harm, particularly to LL, the younger child. Dr. Ellis' report focuses on bonding and attachment issues. He indicates it is unwise to disrupt a child's attachment with a primary caregiver between the age of four months and three years. Problems in bonding and attachment are the principal cause of personality disorders in adults and adjustment problems in children. Any change in principal caretaking before a final decision is reached on the best interests of these children is to be avoided - particularly so, given his conclusions these children have been the recipients of advantaged primary care to date. What is more, Mr. M.'s limited contact combined with LL's age makes it a virtual certainty he is a stranger to LL now.

Dr. Ellis indicates healthy and robust infants can survive the trauma of disruption - "possible survival" being a test far removed from "best interests". He says such children can reattach to new caretakers but this is highly dependent upon the quality of the new or substitute caretaker. Should children be exposed to less advantaged caretakers, there is a much increased risk. The risk of maladaption increases exponentially from there, if the new bond (which in this case would be one with Mr. M.) should be disrupted again in the short to medium term (one month to two years). Such a "bouncing" could occur if the New York order giving sole custody to Mr. M. were to remain in place, but on a final determination, the mother resumes primary care. As Dr. Ellis indicates at page 12 of his report:

There are risks inherent in any tampering with the original process of bonding and attachment formation. Many survive and some do not. The consequences to those that do not are profound and catastrophic. The chances of profound and catastrophic consequences are not doubled by a further change in caretakers but are increased many fold. For this reason, it is wise to give serious consideration to the decision to disrupt an attachment, and weigh the alternatives carefully in light of the risks inherent in any such decision, no matter how wisely they are made nor how justified they seem at the time.

From Dr. Ellis' report I conclude these children have had the advantage of strong primary caretaking and have a secure attachment to their mother.

Whether or not Mr. M.'s difficulty with alcohol exists, or renders him incapable of caring for the children, the fact remains he was never a primary care giver, and this, combined with his temporary custody order and the warrant that may have issued, may result in the children's immediate removal from Ms M.'s care upon her return. This in turn will expose LL to the risk of psychological harm outlined by Dr. Ellis. Ms M. also points out that if she returns to New York she has no home. no job. no reliable means of support and lacks other supports there which she has here.

But she does not stop there. Her trump card is this: her counsel indicates she will not return to New York with the children. She is staying here. In consequence the grave risk of harm will necessarily arise if a return order is made, or that at least is her submission.

It is essential Ms M. understand that the Hague Convention is not designed or intended to address the best interests of particular children. Its purpose is to prevent the unilateral severance by one parent of the other's relationship with their children, as well as the unilateral selection of a forum most convenient to the departing parent without prior assessment of the children's best interests. Where children are concerned, possession cannot be 9/10ths of the law. The selection of L's and LL's residence is a custody right which she does not hold alone. Whatever Mr. M. is or is not, he is, for now, a custodial parent.

And what of Ms M.'s refusal? Counsel for Mr. M. asks me to dismiss it as a specious proposition. She refers to the comments of Butler-Sloss, L.J. in C. v. C. (minor, abduction; rights of custody abroad) , [1989] 1 W.L.R. 654, [1989] 2 All E.R. 465 (C.A.)
The grave risk of harm arises not from the return of the child, but the refusal of the mother to accompany him. The convention does not require the court in this country to consider the welfare of the child as paramount, but only to be satisfied as to the grave risk of harm. I am not satisfied the child would be placed in an intolerable situation if the mother refused to go back. In weighing up the various factors, I must place in the balance and as of the greatest importance the effect of the court refusing the application under the convention because of the refusal of the mother to return for her own reasons. not for the sake of the child. Is a parent to create the psychological situation, and then rely on it; if the grave risk of psychological harm to a child is to be inflicted by the conduct of the parent who abducted him, then it would be relied on by every mother of a young child who removed him out of the jurisdiction and refused to return. It would drive a coach and four through the convention, at least in respect of applications relating to young children. (p. 471).

I decline to conclude that there will never be a situation where a mother's refusal to accompany her children will be successful in establishing a grave risk of harm. I note, though, that such a refusal has not carried the day in any of the cases to which I was referred (see Thomson ; re L. ; C. v. C ; Thorne ; supra). Nonetheless, as the Supreme Court stated in Young v. Young, [1993] 4 S.C.R. 3, 49 R.F.L. (3d) 117, and again confirmed in Thomson , supra (at 328 para. 81), "from a child centred perspective, harm is harm".

The facts of this case make Ms M.'s refusal to accompany the children untenable and unreasonable. Unreasonable, because safety concerns for herself and the children are neither proved, nor of the kind or degree set out in Pollastro v. Pollastro [1999] 45 R.F.L. (4th) 404 (Ont. C.A.). The test is a stringent one (see Thomson , supra). If Mr. M. poses a risk to the children because his caretaking skills are poor or because a bond with LL's mother may be broken, these can be managed by ensuring the children remain in her primary care upon their return. Furthermore, Ms M. has an obligation as a custodial parent to protect her children from unreasonable risks (of which LL's unaccompanied return is one) and to minimize any instability the children might experience (see Re A , supra § 375).

All in all, when the reasonableness of her refusal is viewed in light of the evidence I have, and weighed in the balance with the policy objectives of the Convention, Ms M.'s refusal cannot be sustained.

If she chooses instead to put her own current comfort and her support network here first, she places in doubt both her continuing role as a custodial parent, and her future candidacy as a sole custodial parent in any proceedings in New York. She, more than most, knows from experience how important family of origin and attachment issues are for children. If her decision not to return to New York is truly genuine, only two possibilities occur to me on the basis of the evidence before me:

a)She is more concerned with herself than her children and is unreasonably prepared to expose them to harm; or

b)Mr. M.'s parenting is not as deficient as she otherwise indicates it to be.

Neither places her in a favourable light. From the advantaged care Dr. Ellis describes these children having received, I can not believe the first of these propositions is true.

Subjectively, there are many reasons why a parent (in this case, Ms M.) would agree to joint custody or even equal care and control yet quickly come to realize the situation is hopeless in the long term. It may yet be that the long term best interests of these children are served in the primary care of their mother in Manitoba. But "best interests" is not, and can not be, the consideration for this court now. A considerable period of time will pass, too, before the New York courts can provide any final resolution. It is therefore essential these parents do now what this court cannot - focus on their children's best interests. Dr. Ellis' recommendations are written as much for the parties' sake as they are for the court. He identifies serious concerns for the children's short and long term well being. L is struggling with her parents' separation and the conflict associated with it. This must end.

The parties should ask themselves now what the evidence is really likely to reveal at a trial for sole custody. If Ms M. can establish herself in New York as the sole custodial parent, Mr. M. ought to recognize now that she may well be permitted to return to Manitoba. Reliable and meaningful distance access ought, in that event, to be negotiated. If Ms M. will not return, and if Mr. M. is indeed a capable parent, steps should be taken now to transition the children and assure them of frequent and regular contact with their mother pending trial or on a long term basis. Their interests are not enhanced by conflict, uncertainty or the prospect of multiple moves with or without Ms M. I beg each parent to reread Dr. Ellis' conclusions and recommendations and consider subordinating their own immediate interests to those of their children. A contest of wills is not going to serve these two little girls very well.

MANAGING THE RISK:

My review of the case law leads me to conclude:

a)How Ms M. views the prospect of return and its tolerability, is not the test, as important as the primary caregivers' state of mind may be in the long term for the children (see P. v. P. (minors) (child abduction), [1992] 1 F.L.R. 155, [1992] Fam. Law 197, [1992] 1 F.C.R. 468 (H.C.)

b)Alcoholism, lack of financial support, confrontational and abusive behaviour, even if proved, would not necessarily satisfy the "grave risk of harm" test set out in Thomson ,

supra . (Finizio v. Scoppio Finizio [1999] O.J. No. 3579 (Ont. C.A.) § 7 para. 37) (where mother was assaulted-return of children nonetheless ordered); Parsons v. Styger [1989] 67 O.R. (2d) 1 (Ont. S.C.)-(where threat to kill mother made by father-children still returned); B. v. B. (abduction; custody rights), [1993] 2 All E.R. 144 [1993] Fam. 32 (C.A.) (where inadequate housing/financial circumstances did not prevent return).

c)The circumstances of this case (but for the bonding issue) do not come close to the gravity of risk mother and child were exposed to in Pollastro , supra , (a case where return was not ordered).

d)While courts have split siblings, returning one child but not the other where there was evidence of harm in respect of only one (see Chalkley v. Chalkley , (1994) 96 Man. R. (2d) 56 (Q.B.); varied on appeal (1995) RFL (4th) 442; leave refused [1995] SCCA No. 33), it would be imprudent to separate the children here, given their ages and without further evidence from Dr. Ellis. Neither parent argued for this in any event.

e)Courts invariably recognize economic needs of the children and of the primary care giver upon a return (see Snetzko v. Snetzko [1996] 23 R.F.L. (4th) 488 (Ont. Gen. Div.); Finizio , supra; re L. supra).

f)Courts frequently are faced with the fact that a change in primary care giving might occur as a result of a "chasing order" issued in the former jurisdiction. Psychological harm to children may result by reason of the severance of that primary caregiver relationship. Yet in all cases to which my attention was drawn by counsel, the children have been ordered returned (see Thomson , supra ; re L. (child abduction) (psychological harm), Re, [1993] 2 F.L.R. 401 (H.C.); re A. (a minor) (abduction), Re, 18 Fam. Law 55, [1998] 1 R.F.L. 365 (C.A.); C. v. C. and Thorne v. Dryden Hall [1995] 18 R.F.L. (4th) 15 (B.C.S.C.).

g)These same courts have recognized that unqualified return orders can be detrimental to the short term interests of children wrenching them from their primary caregiver. As LaForest, J. indicated in Thomson , (supra):

> **Courts ... have deemed themselves entitled to require undertakings of the requesting party provided that such undertakings are made within the spirit of the convention ... [T]hrough the use of undertakings, the requirement in article 12 of the Convention that "the authority concerned shall order the return of the child forthwith" can be complied with, the wrongful actions of the removing party are not condoned. the long term best interests of the child are left for a determination by the court of the child's habitual residence, and any short term harm to the child is ameliorated. (p. 330, para. 84).**

I am satisfied this is an appropriate case for undertakings, to ensure these children will remain in the primary care of the mother, and so they will not be exposed to unwarranted short term harm, or even an intolerable situation, pending a full enquiry into their best interests by the New York court.

Undertakings have frequently been used as an effective tool to minimize or control short term harm to a child, and most often these have been offered by the parent seeking the return order. Such undertakings have included:

a)A return to the pre-abduction status quo in terms of time sharing with the child so any disruption to the child upon return is avoided or minimized;

b)Provision of travel costs;

c)Payment of support (recognizing an absconding parent, though acting wrongfully, will have economic needs that must be met in the short term);

d)Provision for housing or exclusive occupancy of the marital home;

e)A promise to refrain from enforcing warrants, pursuing contempt proceedings or otherwise enforcing chasing orders issued in the former jurisdiction; and

f)Provisions that neither party molest, annoy or harass the other.

In some of the cases, courts have gone further to supplement or dictate terms of undertakings - including provisions for housing, a vehicle, household furnishings, school placement, payment of support to the absconding parent, as well as restricting rights to enforce or pursue interim applications designed to punish or control the absconding parent. (See Snetzko ; Re L. ; and P. v. P. , supra).

The undertakings Mr. M. offers in the present case are less than precise. I adopt the remarks of MacPherson, J.A. who indicated in Finizio (supra):

> **The strong language of the Convention ... will inevitably result in many children being returned to the country from which they have been wrongfully removed. Given that prospect, both counsel should be prepared to deal fully with the issue of how the children are to be returned, and to do so before the judge hearing the initial convention application. (para 37)**

I have pieced together from Mr. M.'s material the following undertakings:

a)He is prepared to attend in Winnipeg to pick up the children should they be ordered returned;

b)He acknowledges his present custody order in New York is temporary, that a full hearing is required, and that if the mother returns to New York, he would expect "daily access to [his] children and extended access on weekends when [he] was not working" (para. 23 of his affidavit sworn November 5, 1999).

c)He will do whatever is necessary to prevent psychological harm to the children (see attachment to his APPLICATION FOR ASSISTANCE UNDER THE HAGUE CONVENTION ON CHILD ABDUCTION, para. VII).

Finally, during the course of argument, counsel for the father, conceded that Mr. M. could not very well object to an undertaking that arrears and ongoing support should be paid if the children were returned. After all, it was his position he provided proper support in the past; and nearly all of the cases on which he relies specifically provide for support of children upon their return. If the father's undertakings are formalized and appropriately supplemented so that events in New York unfold with some degree of control, the children (and particularly LL) can be appropriately insulated from any grave risk of harm on their return.

I have concluded the only practical way to resolve matters is to order the children's return to New York forthwith, and in compliance with the provisions of the Convention. However, I will stay my order on appropriate conditions to permit the mother a short time to reconsider

her position on accompanying the children. Should she not, undertakings are unnecessary. Should she do so, she should also have time to make inquiries respecting housing, child care, employment, legal advice and so on. The father, during that same time ought to be taking steps to confirm and provide evidence to this court or Ms M.'s counsel that satisfactory undertakings are in place. Within the time frame provided, some of these undertakings can in fact be completed.

It may yet be necessary for the parties to offer further submissions on the details of my order or the appropriateness of undertakings, or transitioning of the children. If so, and only if details can not otherwise be resolved between them, counsel may obtain a return date before me on an emergent basis. In such event, I reserve the right to modify, or supplement my order, the stay, or its conditions. For now some guidance should be given on what undertakings I consider appropriate on information now available. My order therefore is as follows:

a)L and LL M. shall be returned to Horseheads, New York forthwith and in any event by January 15, 2000.

b)The preceding order is stayed until further order.

c)For the period of the stay:

(1) Ms M. will provide reasonable telephone access to the father at her expense which access shall be unmonitored and shall be as frequent as once per day. Failing agreement that access will be at 7:00 p.m. Winnipeg time for a duration of 15 minutes. Should Mr. M. come to Winnipeg he shall have reasonable periods of care and control with the children. To that extent. LL, in particular, may require some reintroduction.

(2) Neither Ms M., Mr. M. nor any other person shall remove the children from the City of Winnipeg during the period of this stay, or until the undertakings have been satisfactorily confirmed between counsel or confirmed before this court.

(3) Mr. M. shall not consume alcohol six hours prior to any telephone access nor twelve hours prior to or during any in person periods of care and control.

d)It is my expectation that Ms M. will on or before Thursday, December 30, 1999 communicate to Mr. M. via counsel her intentions regarding return. Should she elect not to accompany the children or fail to communicate her intentions, the stay order may be lifted on application following which Mr. M. will be at liberty to have the children delivered into his care. It is essential that should this occur, the parties arrange an appropriate transition of the children in consultation with a professional therapist to assist in the reintroduction of the children, particularly LL, and the transitioning of care before Mr. M. leaves Winnipeg. I fully expect this will require Mr. M. to spend several days here. Arrangements for this should be made between counsel and if not agreed to, will be provided for by this court after further submissions.

e)Should Ms M. indicate she will accompany the children, the order remains stayed until the following undertakings have been confirmed to this court, or otherwise are satisfied between counsel. The undertakings which I consider reasonable on the evidence now available and on my review of the case law are these:

(1) Mr. M. will apply to the New York Family Court to vary the existing sole temporary custody order to terms which reflect the status quo, and pending a full hearing there. In this

case, that is the wording of the separation agreement i.e. "joint legal custody to the parties with physical custody to the mother and liberal visitation to be agreed upon".

(2) The New York Order may also provide for nonremoval of the children from New York by either parent pending a final hearing.

(3) Mr. M. will confirm the warrant issued by the Family Court has been cancelled and that he will not seek to further enforce the temporary order, or the warrant.

(4) Mr. M. will provide prepaid return transportation for the mother and children.

(5) Ms M. will have immediate needs on her return and until employment is secured. Mr. M. should provide a proposal as to how his ongoing support payments can be assured to be regular, timely, and enforced. As well, one half of the support arrears which have accumulated since May also ought to be paid to Ms M. to provide for the children's immediate needs upon their return. Arrears presently amount to approximately $10,000.00. One-half that sum should be paid to an attorney for Ms M. in trust that it be released to her upon her return to New York with the children.

(6) To the extent necessary, peace officers are authorized to enforce the provisions of this order.

The time afforded Mr. M. by this stay will permit him to confirm completion of his undertakings particularly the modification of the New York order, thereby eliminating any need I might have to be concerned with compliance. More than once courts have considered the enforceability of undertakings (see comments of L'Heureux-Dube, and McLachlin, J.J. (in dissent) in Thomson and the remarks of Waite, J. in P. v. P. , (supra)). Hopefully, this will also give Ms M. additional assurances the children will not be removed from her care, without due process. I also recognize the support requirement I impose does not take into account costs issues or any entitlement Mr. M. might have to variation/remission of that obligation under New York law. These can all be reserved to the New York court after all the evidence is heard. The fact is Ms M. and the children will require appropriate financial measures in place to obtain housing and to meet their fundamental needs until employment can be secured.

Last, but not least, I am requesting that The Central Authority forward a copy of these reasons to the court in New York for its information. As a matter of comity, I hope that court will facilitate the requisite undertakings which involve its orders. As well, I respectfully request the New York court consider the possibility of expediting trial dates to permit a "best interests" determination to be made for these children at the earliest possible date.

LIST OF AUTHORITIES:

A. (a minor) (abduction), Re , 18 Fam. Law 55, [1988] 1 R.F.L. 365 (C.A.)

B. v. B. (abduction; custody rights), [1993] 2 All E.R. 144 [1993] Fam. 32 (C.A.)

C. v. C. (minor; abduction; rights of custody abroad), [1989] 1 W.L.R. 654, [1989] 2 All E.R. 465 (C.A.)

Chalkley v. Chalkley (1994) 96 Man. R. (2d) 56 (Q.B.); valid on appeal (1995) ORFL (4th) 442; leave refused [1995] SCCA No. 33

Hawke v. Gamble [1998] 43 R.F.L. (4th) 67 (B.C.S.C.)

Finizio v. Scoppio-Finizio [1999] O.J. No. 3579 (Ont. C.A.)

Gordon v. Goertz [1996] 1 S.C.R. 27

L. (child abduction) (psychological harm), Re , [1993] 2 F.L.R. 401 (H.C.)

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

Parsons v. Styger [1989] 67 O.R. (2d) 1 (Ont. S.C.)

Pollastro v. Pollastro [1999] 45 R.F.L. (4th) 404 (Ont. C.A.)

Rechsteiner v. Kendell (1998) 39 R.F.L. (4th) 127 (Ont. G.D.F.C.); aff'd [1999] OJ No. 3929 (C.A.)

Snetzko v. Snetzko [1996] 23 R.F.L. (4th) 488 (Ont. Gen. Div.)

Szalas v. Szabo , (1995) 16 R.F.L. (4th) 168 (Ont.. Ct. of Justice)

Thorne v. Dryden-Hall [1995] 18 R.F.L. (4th) 15 (B.C.S.C.)

Thomson v. Thomson , [1994] 6 R.F.L. (4th) 290 (S.C.C.)

Trapp v. Trapp, 526 N.Y.S. (2^{nd}) 95, 136 A.D. (2^{nd}) 178

W.(V) v. S.(D) [1996] 2 S.C.R. 108

Young v. Young, [1993] 4 S.C.R. 31, 49 R.F.L. (3d) 117

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