Date: 20191126
Dockets: FD 19-01-23046 & FD 19-01-23451
(Winnipeg Centre)
Indexed as: Souza v. Krahn; Krahn v. Alves-Souza
Cited as: 2019 MBQB 174

COURT OF QUEEN'S BENCH OF MANITOBA
(FAMILY DIVISION)

DOCKET FD 19-01-23046

B E T W E E N:

	)	COUNSEL:
	)	
THIAGO ALVES SOUZA,	)	CANDRAY MEHKARY
	)	lawyer for the Central
applicant,	)	Authority for the Province of
	)	Manitoba on behalf of the
- and -	)	applicant
	)	
RACHEL ANNE KRAHN	)	DOUGLAS A. MAYER
(also known as RACHEL ANNE FROESE),	)	for the respondent
	)	
respondent.	)	
	)	
DOCKET FD 19-01-23451	)	
	)	
A N D B E T W E E N:	)	
	)	
RACHEL ANNE KRAHN,	)	DOUGLAS A. MAYER
	)	for the applicant
applicant,	)	
	)	
- and -	)	
	)	
THIAGO ALVES-SOUZA,	)	R. GRENVILLE WAUGH
	)	for the respondent
respondent.	)	
	)	JUDGMENT DELIVERED:
	)	November 26, 2019

MacPHAIL J.

[1] At this hearing I considered two applications involving the same parties. One is a request for return of a child to the United States of America pursuant to the provisions of the 1980 Hague *Convention on the Civil Aspects of International Child Abduction*, Can. T.S. 1983 No. 35 (the "Hague Abduction Convention"), with related relief ("Hague Convention request for return"). The other is a "set aside application" seeking an order setting aside, or in the alternative varying, a Protection Order granted pursuant to the provisions of ***The Domestic Violence and Stalking Act***, C.C.S.M. c. D93 (the "***DVS Act***"). Both applications are opposed.

[2] Although the same parties are involved in both proceedings, their names differ on the two styles of cause.

[3] The Hague Convention request for return initiated by Thiago Alves Souza refers to him by that name and to the respondent mother as "Rachel Anne Krahn (also known as Rachel Anne Froese)" (Froese being her surname by marriage). Rachel Anne Krahn applied for, and was granted a Protection Order, against "Thiago Alves-Souza" and the Order refers to the parties by those names, as does the set aside application brought by Mr. Alves-Souza as the respondent in the Protection Order proceeding.

[4] For ease of reference, throughout this decision I refer to Thiago Alves Souza (Alves-Souza) as "the father" and Rachel Anne Krahn (also known as Rachel Anne Froese) as "the mother" (collectively "the parents" or "the parties").

[5] The father's Hague Convention request for return and set aside application were heard concurrently, with the relevant portions of the evidence from each proceeding applying to both proceedings. Each of the parents filed several affidavits of their own and from other witnesses.

GENERAL BACKGROUND

[6] The father was born in Brazil in 1986. He came to the United States of America with his family as a young teenager in October 1999, and has resided there ever since. He is not a citizen of the United States of America. He lives with his mother in Fall River, Massachusetts, as he did at the times relevant to this proceeding, and has other relatives in the area.

[7] The mother is a Canadian citizen. She and her family, including her ex-husband and four older children (A.B., born in August 2003, A.R., born in February 2005, D.E., born in September 2007, and L.J., born in January 2010), reside in the Winkler, Manitoba area.

[8] The father and the mother met online. After a period of Internet and telephone communication, they met in-person for the first time in early July 2014 when the mother travelled to Massachusetts for a one-week visit. The visit went well and the mother returned for a second visit (of one week according to her; two according to him) that August, during which she became pregnant.

[9] The mother returned to stay with the father in Fall River, Massachusetts in March 2015 so their child could, as they planned, be born in the United States of America and have American citizenship. Vivian was born in Fall River,

Massachusetts on May 30, 2015. The father acknowledged parentage and was named on the child's birth certificate.

[10] Vivian has dual American and Canadian citizenship. The father signed documentation to facilitate the latter.

[11] Vivian remained in Massachusetts with both parents until, with the father's written consent, she and her mother returned to Manitoba on September 17, 2015. She was then three-and-one-half-months old.

[12] The mother returned to Massachusetts with Vivian to stay with the father on two further occasions of less than six months each, from February 15 to early July 2016 (a period of somewhat less than five months) and from September 9, 2017 to March 3, 2018. (She initially did not take issue with the duration of these stays, but in a later affidavit indicated she was in Massachusetts for four months each time.)

[13] Vivian has remained in her mother's care in Manitoba since March 3, 2018.

[14] The father expected that the mother and Vivian would return to Massachusetts in the fall of 2018, some six months after their departure for Canada. This did not occur and difficulties ensued in the parties' relationship.

[15] In October 2018, the father learned that the mother had commenced a relationship with another man, Brennan Syrota, and in early November the mother admitted this was so. By this time both parents appear to have viewed their relationship as at an end.

[16] In early December, the father attempted, unsuccessfully, to arrange for Vivian to spend time with him around Christmas. (His December 3, 2018 message referred to "days" when he could see Vivian.) The parties exchanged e-mails and the mother raised the possibility of her parents taking the child to the airport in Grand Forks, North Dakota where the father would arrange to have someone pick her up. These efforts by the mother were unsuccessful. Her parents were unwilling to transport the child. There was no evidence of any arrangements being made by the father. His last contact of any kind with the child was on December 24, 2018.

[17] The mother changed her telephone number and blocked the father on social media.

PLEADINGS AND COURT APPEARANCES

[18] In late spring of 2019, the father learned about the existence of the Hague Abduction Convention. He contacted American officials and on June 26, 2019 completed the standard Hague Abduction Convention request for return form seeking Vivian's return to the United States of America.

[19] On August 6, 2019, the mother applied for a Protection Order for her protection as well as that of Vivian and her four older children pursuant to the provisions of the ***DVS Act***. Judicial Justice of the Peace Zallack granted the mother's application for an order for her protection and that of Vivian, but dismissed the application respecting the other children. The Protection Order provided that the father not directly or indirectly communicate with or contact

the mother or child or attend within 200 metres of their residence, places the child regularly attends or the mother's workplace. The Order contained certain exceptions for Court proceedings. A Court file was opened for the proceeding in Morden Centre.

[20] Subsection 17(3) of ***The Child Custody Enforcement Act***, C.C.S.M c. C360, provides that the Manitoba Department of Justice is the Central Authority for the Province of Manitoba for purposes of the Hague Abduction Convention.

[21] The Family Law Section of the Manitoba Department of Justice is responsible for fulfilling the responsibilities of the province's Central Authority ("Central Authority"). In that capacity, in August 2019 they received notification of the father's position that Vivian was being wrongfully retained in Manitoba and that he intended to file an application with a request for the return of the child to the United States of America.

[22] In accordance with the June 2007 Court of Queen's Bench of Manitoba Procedural Protocol for the handling of Hague Abduction Convention cases and the related ***Court of Queen's Bench Rules***, Man. Reg. 553/88, the Central Authority filed requisitions requesting that a Court file be opened and providing notice of the alleged wrongful retention and that, pursuant to Article 16 of the Hague Abduction Convention, the Manitoba Courts "shall not decide on the merits of custody until it has been determined that the child is not be returned

under this Convention or unless an application under this Convention is not lodged within a reasonable time after receipt of the notice."

[23] Further in accordance with that Protocol, the father's return application was commenced in this Court by the Central Authority for the Province of Manitoba by filing a Notice of Application seeking an order for the return of the child and other related relief.

[24] The Central Authority received the father's original request for return (signed by him on June 26, 2019 and in the standard form used for requests under the Hague Abduction Convention) from the American Central Authority on August 26, 2019. On August 30, 2019 the Central Authority filed a Notice of Application on behalf of the father seeking, *inter alia*, an order that Vivian be returned to the United States of America. The father's original request for return form was attached to the affidavit of Maury Stephensen, Crown Counsel, sworn on September 4, 2019.

[25] The mother was served with the Notice of Application and Mr. Stephensen's affidavit on September 13, 2019 and the matter appeared before me on September 19, 2019, by which date the mother had retained legal counsel.

[26] At that appearance I pronounced an Interim Order, consented to by both parties. As required by the Court's Procedural Protocol, I ensured that appropriate timelines were established for the filing and service of further materials and set a hearing date for the father's application.

[27] In addition to addressing procedural matters, the Interim Order also provided pursuant to ***The Child Custody Enforcement Act*** and the Hague Abduction Convention that, until the father's application was dealt with on a final basis:

a) custody of the child would not be determined;

b) the mother deliver up her passport, and that of the child, to the Court for safekeeping;

c) the mother not apply to renew or replace either her passport or that of the child;

d) the child not be removed from certain designated areas of Manitoba;

e) the child continue to reside with the mother at one of two specified addresses, and the mother retain her current phone number, and forthwith advise her counsel, who was to forthwith advise the Central Authority, if she moved from one specified address to the other or changed her phone number; and

f) peace officers provide assistance with respect to the enforcement of certain provisions.

[28] At this appearance, the Central Authority advised that a Protection Order obtained by the mother had been entered on a Court file at the Morden Centre of the Court of Queen's Bench. Although the father had not been served with the Protection Order, the Central Authority had advised him of its existence and provided him with a copy. The prohibitions on the father's contact with Vivian in

that Order, have an impact on his Hague Convention request for return. He expressed his intention to obtain counsel and apply to set aside the Protection Order, impacting the potential scope of the hearing before me and the date on which it could be heard.

[29] A further appearance was scheduled before me on October 15, 2019 to discuss certain issues, including the father's intention to seek to have the Protection Order set aside. That further appearance was attended by the Central Authority, counsel for the mother and counsel retained by the father with respect to the Protection Order.

[30] Because of the nature of the issues in the two proceedings, all counsel agreed that it was preferable for same to be dealt with concurrently and the father's intended set aside application considered on the basis of affidavit evidence. I agreed and pronounced an Order that the Morden Centre "Protection Order" file be transferred to, and become a file of, the Court of Queen's Bench (Family Division), Winnipeg Centre, with the issues in that proceeding to be heard, together with the father's Hague Convention request for return, on the basis of affidavit evidence. Further filing deadlines were set, and some of the earlier filing deadlines adjusted, to take into account the Notice of Application to be filed by the father requesting that the Protection Order be set aside. Provisions also allowed for materials faxed by the father to be entered on the Court pocket and served on the Central Authority and the mother's counsel, with the originals to follow.

[31] The father filed his set aside application on October 22, 2019. The parties each filed further affidavits, and briefs respecting each of the applications.

[32] Both of the father's applications were heard on November 18, 2019.

HAGUE ABDUCTION CONVENTION REQUEST FOR RETURN

[33] As indicated in its preamble, the Hague Abduction Convention is intended to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence".

[34] Article 1 of the Hague Abduction Convention further states that:

> **Article 1**
>
> The objects of the present Convention are
>
> (a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
>
> (b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

[35] The Explanatory Report prepared by Professor Elisa Pérez-Vera as a commentary on the Convention, Acts and Documents of the Fourteenth Session (1980), Book III, Child Abduction, Hague Conference on Private International Law states at paragraph 19, "the Convention rests implicitly upon the principle that any debate on the merits of the question, *i.e.* of custody rights, should take place before the competent authorities in the State where the child had its habitual residence".

[36] The father has requested the return of the parties' child, Vivian, to the United States of America, and in particular, to Fall River, Massachusetts, pursuant to the provisions of the Hague Abduction Convention. He alleges that Vivian has been wrongfully retained in Canada since December 24, 2018. The mother opposes the father's application and denies that Vivian has been wrongfully retained.

[37] Article 3 and Article 4 of the Hague Abduction Convention provide:

> **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.
>
> **Article 4**
>
> The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

[38] As noted by the Central Authority, the first issue for determination, hotly contested in this proceeding, is whether Vivian was habitually resident in the United States of America on the date of her "alleged" wrongful retention in Canada on December 24, 2018. I say "alleged" because the mother does not agree that her retention of Vivian was in fact "wrongful".

[39] As a result of ***Office of the Children's Lawyer v. Balev***, 2018 SCC 16 (CanLII), the means by which habitual residence of a child is determined in Hague Abduction Convention proceedings has changed to a "hybrid approach":

> [65] . . . by focusing on the actual circumstances of the child, the hybrid approach best protects children from the harmful effects of wrongful removal or retention. Unlike the parental intention approach and the child-centred approach, it allows all relevant factors to be considered in a fact-based inquiry that does not rely on formulas or presumptions [citation omitted].
>
> . . .
>
> [68] In sum, the hybrid approach represents a principled advance on the parental intention and child-centred approaches. It recognizes that the child is the focus of the analysis, but acknowledges that it may be necessary to consider parental intention in order to properly assess the child's connections to a country [citation omitted]. It is an incremental response to the jurisprudence and the fact-based nature of the inquiry required by the *Hague Convention*.
>
> [69] In doing these things, the hybrid approach faces the shortcomings of the parental intention approach directly and moves beyond them. The fact is that the parental intention approach is unable to provide answers in all cases. Courts using this approach have admitted that in some circumstances — such as where parental intent is ambiguous or inconclusive — parental intent is not determinative, and they have considered objective factors connecting the child to the jurisdiction [citations omitted]. Similarly, courts using the child-centred approach have recognized that parental intention is a relevant factor [citation omitted]. The hybrid approach simply acknowledges that absolute approaches to determining habitual residence under the *Hague Convention* do not work.
>
> [70] The reality is that every case is unique. The application judge charged with determining the child's habitual residence should not be forced to make a blinkered decision that disregards considerations vital to the case under review. Nor should an approach that tolerates manipulation be adopted. The application judge is best placed to weigh the factors that will achieve the objects of the *Hague Convention* in the case at hand. In the end, the best assurance of certainty lies in following the developing international jurisprudence that supports a multi-factored hybrid approach.
>
> . . .

> [73] Applying the hybrid approach, the application judge considers the intention of the parents that the move would be temporary, and the reasons for that agreement. But the judge also considers all other evidence relevant to the child's habitual residence. The court must do so mindful of the risk of overlaying the factual concept of habitual residence with legal constructs like the idea that one parent cannot unilaterally change a child's habitual residence, or that a parent's consent to a time-limited stay cannot shift the child's habitual residence. The court must also avoid treating a time-limited consent agreement as a contract to be enforced by the court. Such an agreement may be valuable as evidence of the parents' intention, and parental intention may be relevant to determining habitual residence. But parents cannot contract out of the court's duty, under Canadian laws implementing the *Hague Convention*, to make factual determinations of the habitual residence of children at the time of their alleged wrongful retention or removal.

[40] In ***Ludwig v. Ludwig***, 2019 ONCA 680 (CanLII), the Court summarized the hybrid approach to determination of a child's habitual residence, mandated in ***Balev***, as follows:

> [30] The aim of the hybrid approach is to determine the "focal point of the child's life – the family and social environment in which its life has developed – immediately prior to the removal or retention": at para. 43. To determine the focal point of the child's life, the majority required judges to consider the following three kinds of links and circumstances:
>
> 1) The child's links to and circumstances in country A;
>
> 2) The circumstances of the child's move from country A to country B; and,
>
> 3) The child's links to and circumstances in country B.
>
> [31] The majority went on to outline a number of relevant factors courts may consider in assessing these three kinds of links and circumstances. Considerations include the child's nationality and "the duration, regularity, conditions and reasons for the [child's] stay," along with the circumstances of the parents and parental intention: at paras. 44-45. However, the list of relevant factors is not closed and the application judge must consider the "entirety of the child's situation": at para. 47. The child is the focus of the analysis and parental intention is only relevant as a tool to assess the child's connections to a given country: at para. 68.
>
> [32] Certain factors may be more relevant where the child is an infant or is very young. Where a child is an infant, the child's environment is

> "essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of": *Balev*, at para. 44. Accordingly, the circumstances of the parents, including parental intention, may be especially important in the cases of infants or young children: para. 45.
>
> [33] *Balev* establishes that habitual residence is a question of fact or mixed fact and law and that an application judge's determination of habitual residence is subject to deference. The court specifically stressed that the hybrid approach is "fact-bound, practical, and unencumbered with rigid rules, formulas, or presumptions": at para. 47. The application judge must consider the entirety of the child's situation and no one factor necessarily dominates the analysis: at paras. 44, 47.

[41] At paragraph 40, considering the conclusions in ***Balev***, the Ontario Court of Appeal in ***Ludwig*** provided the following guidance:

> 40. For ease of reference, I will summarize the governing analytical framework for *Hague Convention* applications below.
>
> Stage One: Habitual Residence
>
> 1) On what date was the child allegedly wrongfully removed or retained?
>
> 2) Immediately before the date of the alleged wrongful removal or retention, in which jurisdiction was the child habitually resident? In determining habitual residence, the court should take the following approach:
>
> a) The court's task is to determine the focal point of the child's life, namely the family and social environment in which its life has developed, immediately prior to the removal or retention.
>
> b) To determine the focal point of the child's life, the court must consider the following three kinds of links and circumstances:
>
> i) The child's links to and circumstances in country A;
>
> ii) The circumstances of the child's move from country A to country B; and
>
> iii) The child's links to and circumstances in country B.
>
> c) In assessing these three kinds of links and circumstances, the court should consider the entirety of the circumstances, including, but not restricted to, the following factors:
>
> i) The child's nationality;

ii) The duration, regularity, conditions and reasons for the child's stay in the country the child is presently in; and

iii) The circumstances of the child's parents, including parental intention.

End of Stage One: Two Outcomes

1) If the court finds that the child was habitually resident in the country in which the party opposing return resided immediately before the alleged wrongful removal or retention, then the *Hague Convention* does not apply and the court should dismiss the application.

2) If the court finds that the child was habitually resident in the country of the applicant immediately before the wrongful removal or retention, then the *Hague Convention* applies and the court should proceed to stage two of the analysis.

[42] The Court went on to thereafter provide direction regarding Stage Two of the analysis, applicable to cases where a child is found to be "habitually resident in the country of the applicant immediately before the wrongful removal or retention". Stage Two of the analysis considers the various exceptions to mandatory return under the Hague Abduction Convention.

[43] I now turn to considering the facts of this case within this analytical framework.

1) ***On what date was the child allegedly wrongfully retained?***

[44] The father alleges that December 24, 2018 is the date of Vivian's wrongful retention in Canada. The mother denies that her retention of Vivian was in fact "wrongful".

2) *Immediately before the alleged wrongful retention, where was the child habitually resident?*

[45] Vivian has links to both the United States of America and to Canada. She was born in the United States of America and has American citizenship. She has an American passport. She also has Canadian citizenship. Her mother has applied for, but has been unable to obtain, a Canadian passport for the child because of the father's status in the United States of America. He was unable to provide the necessary documentation required by Canadian passport officials. Vivian has received health care in Canada and the United States of America. In at least 2017, she and her mother received social assistance benefits in Manitoba.

[46] Vivian was three-and-one-half-years old at the date of her alleged wrongful retention and had spent over two-thirds of her life in Canada.

[47] Accepting the father's evidence respecting the dates the mother and Vivian lived with him in Massachusetts, the child spent the first three and one-half months of her life living with both parents in Massachusetts, before travelling to Canada with her mother.

[48] Vivian spent the next six months in Canada with her mother before they returned to the United States of America on February 15, 2016 (when she was eight-and-one-half-months old).

[49] She remained in Massachusetts with her parents until again returning to Canada with her mother in early July 2016 (when she was 13 months old).

[50] Vivian then lived with her mother in Canada for 14 months, when they returned to Massachusetts on September 9, 2017 (when she was 27 months old).

[51] Vivian returned to Canada with her mother on March 3, 2018 (some three months before her third birthday) and the child has remained here ever since.

[52] The father provided "open ended" signed travel authorizations for the child's three trips to Canada with the mother.

[53] Vivian has lived with her mother her entire life, in the United States of America and in Canada. The mother was unable to spend more than six months in the United States of America each calendar year. I have no doubt, however, that the father was involved in Vivian's care when the child was in Massachusetts, and tried to maintain contact when she was in Canada, to the extent possible given her tender age.

[54] Much of the parents' evidence focused on their perceptions, and bolstering their perceptions, of their intentions respecting Vivian's long-term residence.

[55] This case is a cautionary tale for international relationships.

[56] The parents met on the Internet. Their first in-person meeting occurred in early July 2014 when the mother travelled to Massachusetts and spent a week with the father. Their relationship "took off" and she returned for a further period of time in August when they became engaged, exchanged rings, and she bought a wedding dress and became pregnant with Vivian. All of this when she

had four minor children in Manitoba and was separated from her husband, Jacob Froese.

[57] The parents agree that they discussed where they would live together and considered both Canada and the United States of America. Their evidence then diverges.

[58] The father alleges that from an early stage they always intended to live in the United States of America. He stated in his September 12, 2019 affidavit that before Vivian's birth, the:

> [L]ong-term plan was that [the mother] would try to obtain status as a permanent resident in the United States and that [he] would move forward with the process to become naturalized as an American citizen. In an effort to make this plan work, we also decided that Vivian would be born in the United States such that she would immediately have American citizenship and improve our ability to be able to live long-term as a family unit in the United States.

[59] While Vivian was born in the United States of America, despite the mother's presence in Massachusetts for various lengthy periods, the anticipated wedding never occurred. There was no evidence the mother took meaningful steps to commence the process to immigrate to the United States of America, or the father took meaningful steps to become naturalized as an American citizen. More than four years after Vivian's birth he simply indicated in his September 12, 2019 affidavit that "I … *intend* to formalize American citizenship with the assistance of a lawyer" [emphasis added]. In his October 11, 2019 affidavit he stated that he planned to follow his brother's path to obtain American citizenship and "have been communicating with the lawyer he used for that process."

[60] The plan alleged by the father also included the mother's older four children moving to the United States of America. There was no evidence of any steps being taken by the mother to enable such a move to occur. The mother did not sell her home in Winkler.

[61] The father stated the mother left various items of personalty, including clothing and toys, in Massachusetts. I place little weight on that given the nature of the items, the child's age, the lengths of time between trips and the costs of transporting items.

[62] I expect that at various times, particularly in the early portion of their relationship, the parents dreamed many dreams and optimistically mused about how they could achieve a life together with Vivian. They apparently considered doing so in Canada (the mother's father even tried to arrange employment for the father) or in the United States of America. No concrete steps were taken by either party to do so. There was no clear shared or sustained parental intention respecting Vivian's residence. Both the mother and the father were apparently content to have matters drift along until the mother entered into her new romantic relationship.

[63] Using the hybrid approach set out in ***Balev*** and considering the "focal point of the child's life – the family and social environment in which its life has developed – immediately prior to the . . . retention", I agree with the mother that Vivian was not habitually resident in the United States of America as at December 24, 2018. She was then, and is now, habitually resident in Canada.

[64] My determination of Vivian's habitual residence means that the return provisions in the Hague Abduction Convention do not apply in this case. I need not consider whether Vivian's retention in Canada was wrongful, or, had I made such a finding, whether any of the exceptions to return under Article 13 of the Convention apply.

[65] The father's Hague Convention request for return is dismissed.

[66] Even if I am in error with respect to the state of Vivian's habitual residence, there is also a real question whether the father has a right of custody under the law of the state he alleges is the child's habitual residence.

[67] Section 10 of the Massachusetts state custody legislation, MA Gen L ch 209C § 10 (2018), (attached to the father's original request for return form) provides:

> (a) Upon or after an adjudication or voluntary acknowledgment of paternity, the court may award custody to the mother or father or to them jointly …
>
> (b) Prior to or in the absence of an adjudication or voluntary acknowledgment of paternity, the mother shall have custody of a child born out of wedlock. *In the absence of an order or judgment of a probate and family court relative to custody, the mother shall continue to have custody of a child after an adjudication of paternity or voluntary acknowledgment of parentage*.
>
> [emphasis added]

[68] Although there is no question that the father provided a "voluntary acknowledgement of parentage", as Vivian was a child born out of wedlock and there was no evidence of any custody order, it appears that the mother has custody under the Massachusetts legislation that the father provided with his request for return.

[69] The custody provisions in the Manitoba legislation, ***The Family Maintenance Act***, C.C.S.M. c.F20, differ when, as in this case, a child lives with both parents after birth.

SET ASIDE APPLICATION

[70] On August 6, 2019, Judicial Justice of the Peace Zallack granted the mother's application for an order for her protection and that of Vivian pursuant to the ***DVS Act***.

[71] Although the father was never served with the Protection Order, the Central Authority advised him of its existence. He retained counsel to and filed an application to set aside the Order.

[72] Because Protection Orders are made without notice to the responding party, an applicant has an obligation to fully disclose all matters related to the request for protective relief. The Judicial Justice of the Peace clearly advised the mother of that obligation.

[73] Once a Protection Order is granted, the respondent may apply, within 20 days of service or such further period as allowed by the Court, to have the Order set aside (s. 11(1) of the ***DVS Act***). At the hearing of such an application, "the onus is on the respondent to demonstrate, on a balance of probabilities, that the protection order should be set aside" (s. 12(2) of the ***DVS Act***).

[74] In ***Baril v. Obelnicki***, 2007 MBCA 40 (CanLII), in considering subsection 12(2) of the ***DVS Act***, Steel J.A. stated (at para. 127):

> … the most effective remedy in these circumstances would be to read s. 12(2) in a manner consistent with *Charter* values, and that can be

> accomplished by restricting the burden imposed by the section to an evidentiary burden only. Thus, the respondent must demonstrate, on a balance of probabilities, that it is just or equitable that the judge set aside the order. He may show among other possibilities that, on a balance of probabilities, full disclosure was not made or that the restraints on his liberty are unnecessary or too restrictive or that the stalking will not continue or based on the weight of the evidence at the review hearing the order should be set aside.

[75] Clearly in this case the mother failed to make full disclosure to Judicial Justice of the Peace Zallack.

[76] The mother minimized the time she and Vivian spent in the United States of America. When the Judicial Justice of the Peace asked the duration of her visits, she responded "[u]sually I would go there for a week maximum, fly back, because my kids from my previous marriage, I have shared custody." She later referred to going for her last visit at the end of 2017 for Christmas and returning in 2018. (A period of time that she later indicated in an affidavit was of four-months' duration, and the father alleged was closer to six-months' duration.) She did not mention remaining in the United States of America for three and one-half months after Vivian's birth or for four months (five months according to the father) in 2016.

[77] She submitted a child support agreement that she swore he signed on one of her visits that his mother witnessed. The agreement indicated he signed it on February 28, 2016. Messages between the parents referred to her (with his acquiescence) copying his signature on the agreement.

[78] She relied on an affidavit from her former employer, Mark Klassen, who attested to the father repeatedly calling the mother and others at the restaurant

where she worked. No timeframe was specified in the affidavit and at the hearing before me, the mother's counsel confirmed his client had not received direct calls from the father since approximately October 2018. The mother's evidence to the Judicial Justice of the Peace left the clear impression that Mr. Klassen's affidavit referred to more recent events.

[79] The mother testified that the father had tracked her whereabouts on social media and continued to do so, providing screen shots of messages from April 2019. The father did, through *Google*, have access to the mother's whereabouts in late October and early November 2018, which information confirmed her new relationship. The April 2019 "tracking" consisted of the father sending the "old" October/November information again.

[80] The parties had very different explanations for how the father had received notices of the mother's whereabouts in late October and early November 2018. Perhaps not surprisingly, each said it was due to the other's actions. No expert evidence was provided to confirm whether both explanations were feasible or one explanation more likely. There was no evidence that the father had any ability to "track" or otherwise determine the mother's whereabouts after early November 2018.

[81] The mother told the Judicial Justice of the Peace that a few days before the August 6, 2019 hearing, the father sent "me a video . . . saying that I don't know what I have coming to me and that he's going to be here in less than two months." She then clarified the father had not sent the video to her, but to her

boyfriend and (unspecified) family members. The video was not provided to the Judicial Justice of the Peace, nor did her boyfriend or family members provide evidence at the hearing about the video or other alleged communications from the father.

[82] The mother told the Judicial Justice of the Peace that in October 2018, the father threatened to come and get Vivian and take her away. No confirming messages were provided. She did not tell the Judicial Justice of the Peace that she had raised the possibility of a shared parenting arrangement with the father that fall or that she tried, unsuccessfully, to have her parents facilitate a visit between the father and Vivian at Christmas 2018.

[83] The timing of the mother's application is also exceedingly suspect. Her written application for a Protection Order was signed on May 31, 2019, yet it was not until two months later on August 6, 2019 that she proceeded with a hearing before the Judicial Justice of the Peace and completed the form with evidence in support of her application. She indicated she had "been wanting to do this for a while [sic]. With work it's kind of hard to get in."

[84] Earlier the day of the hearing, the father had sent the mother a message, through his mother's e-mail, in which he referred to the "Hague Convention" being advised of their case. She made no mention of that message to the Judicial Justice of the Peace.

[85] The mother's claim for protective relief for Vivian rested on an incident in November 2017 and her statements that the father said he was coming to Canada to get Vivian.

[86] At the hearing before the Judicial Justice of the Peace, the mother indicated that in November 2017 the father grabbed and struck Vivian while she and the grandmother were out, and locked her in a room when she tried to find her mother. Her description of this event differed in her later affidavit material. After this incident, the mother and Vivian remained in Massachusetts until early March 2018. Before she left, she offered to have Vivian remain longer with the father. She subsequently sent many messages of a romantic nature to the father (even expressing regret late that summer that she did not become pregnant before she left), raised the possibility of a shared parenting arrangement and tried, unsuccessfully, to arrange for Vivian to spend time with the father at Christmas of 2018. She did not advise the Judicial Justice of the Peace of these circumstances, nor did she disclose that she had also spanked Vivian.

[87] The mother described incidents of abuse that she said occurred in late 2014 and in August 2015, which incidents were denied by the father. Despite these incidents, she returned to Massachusetts for extended periods of time in the following years and continued to send romantic messages to the father.

[88] Protection Orders are granted on a without notice basis and intended to provide civil protection to persons subjected to domestic violence and stalking.

[89] Subsection 6(1) of ***DVS Act*** provides that a designated justice of the peace may grant a without notice Protection Order in certain circumstances.

> **Granting a protection order without notice**
>
> 6(1) A designated justice of the peace may grant a protection order without notice if the justice determines that
>
> (a) the respondent
>
> (i) is committing or has committed domestic violence against the subject, or
>
> (ii) is stalking or has stalked the subject;
>
> (b) the subject believes that the respondent will continue or resume the domestic violence or stalking;
>
> (c) the subject requires protection because there is a reasonable likelihood that the respondent will continue or resume the domestic violence or stalking; and
>
> (d) due to the seriousness or urgency of the circumstances, the protection order should be made without delay.

[90] In order to grant the mother's request for a Protection Order, the Judicial Justice of the Peace had to be satisfied of a number of factors.

[91] First, that the respondent has committed domestic violence against, or has stalked, the applicant and the applicant believes it will continue or resume. While the parties' relationship became unpleasant in the fall of 2018 when the father learned the mother was involved in a new relationship and she no longer facilitated his contact with Vivian, some of that unpleasantness was to be expected. The mother's evidence of the father's alleged abuse of her and Vivian was dated and inconsistent with her own actions and communications with the father. Before the Judicial Justice of the Peace, she exaggerated his actions and minimized (or failed to disclose) her own. She was less than forthright in her testimony on August 6, 2019, to put it mildly.

[92] The Judicial Justice of the Peace also had to be satisfied the applicant required protection because there was a reasonable likelihood that the respondent will continue or resume the domestic violence or stalking and that due to the seriousness or urgency of the circumstances, the protection order should be made without delay. The father lives in Massachusetts, has never entered Canada and was pursuing relief under the Hague Abduction Convention. There was no evidence of urgency in this proceeding or that any domestic violence or stalking was likely to occur. The mother could have filed and served pleadings seeking a ***DVS Act*** prevention order, and a motion seeking such an order on an interim basis, giving the father notice and the opportunity to respond to her requests. She did not do so, even after the father expressed his intention to apply to set aside the Protection Order and filed an application seeking that relief.

[93] The mother failed to provide full or accurate disclosure when she appeared before the Judicial Justice of the Peace on August 6, 2019. The totality of the evidence does not support a finding on a balance of probabilities that domestic violence or stalking occurred, that it would occur or that the circumstances were of a serious or urgent nature requiring an order be granted without delay, and on a without notice basis. It is just and equitable that the Protection Order be set aside.

[94] The father's set aside application is granted and the August 6, 2019 Protection Order is set aside in its entirety.

CONCLUDING COMMENTS

[95] As I am certain the Central Authority has indicated to the father and counsel for the mother has indicated to his client, my dismissal of the father's Hague Convention request for return means that Vivian is not to be returned to Massachusetts for parenting (custody and access) arrangements to be determined by the Courts in that state. My decision is not a determination with respect to those issues. Any claims respecting parenting arrangements (custody and access) should proceed before the Courts in Manitoba. Presumably the parents will each be discussing their legal options with their counsel and one or both of them will commence proceedings in Manitoba to address these important issues.

_____ J.