Toronto (North York) Registry No. D40035/07
DATE: 2007·IV·02
CITATION: *Espiritu v. Bielza*, 2007 ONCJ 175

ONTARIO COURT OF JUSTICE

B E T W E E N :

EDTHEN ESPIRITU,
Applicant,

— AND —

SAMUEL BIELZA,
Respondent.

Before Justice Robert J. Spence
Heard on 26 March 2007
Reasons for Judgment released on 2 April 2007

CONFLICT OF LAWS — Custody of or access to child — Return of wrongfully removed child — Declining return of child — Grave risk of harm to child — Philippino parents of boy (now 7½ years old) separated before his birth when mother moved to Texas where child was born and lived most of his life — Despite various efforts by mother, father took no interest in child and declined invitations to relocate to Texas — About year ago, mother began Texas divorce petition in which she claimed custody and to which father filed waiver, dispensing with need for any further notice of proceedings to him — Some 11 weeks later, mother committed suicide and child briefly resided with paternal aunt in Texas — In meantime, child's maternal aunt from Toronto arrived to make funeral arrangements and applied to Texas courts for custody, which she obtained by default when paternal aunt surrendered child, claiming to have been stressed by entire incident — Child's lawyer (appointed by Texas court) approved of this arrangement — Because of his waiver, father was never served with notice of custody proceeding — Maternal aunt promptly secured health and dental coverage for child and ensured that child got psychological counselling with respect to trauma of mother's death — Then 4 months ago, while his Texas lawyer applied to have custody order declared invalid, father applied for visa to United States with intention of bringing boy to Philippines — Aunt was served with notice of father's challenge but within days, she returned to Ontario taking child with her — Upon arriving in Texas on temporary visa, father succeeded in getting custody order invalidated and he then invoked (Hague) *Convention on Civil Aspects of International Child Abduction*, claiming aunt's wrongful removal or retention of child to Ontario and seeking child's return to Texas — Ontario court ruled that there

was no wrongful removal of child but, even if there were, this was situation where, under section 13 of Hague Convention, Ontario court should decline to order child's return — Evidence of Texas psychologist contained praise for aunt's efforts in stabilizing child's perception of world that had been shattered by mother's unexpected death — Uprooting boy from aunt's home and forcing him to return to Texas to father who was complete stranger to him and about whose parenting abilities court had little or no information would place child into intolerable situation — Situation would only be made worse by father's avowed intention to move child once again from Texas to Philippines, into setting entirely alien to boy — Court knew absolutely nothing about what boy could face in Philippines, how woman with whom father was cohabiting would receive boy and what support he get in his grieving over loss of his mother — Finally, by this date, father's temporary visa would have expired and he would presumably have been required to return to Philippines — Ontario court had no information about who, if anyone, would even receive child if he were returned to Texas — Under section 13 of Hague Convention, Ontario court had to decline making order for child's return, even if child had been wrongfully removed.

CONFLICT OF LAWS — Custody of or access to child — Return of wrongfully removed child — Whether removal wrongful — Claimant's "rights of custody" under law of foreign state where child habitually resided at time of removal — Philippino parents of boy (now 7½ years old) separated before his birth when mother moved to Texas where child was born and lived most of his life — Despite various efforts by mother, father took no interest in child and declined invitations to relocate to Texas — About year ago, mother began Texas divorce petition in which she claimed custody and to which father filed waiver, dispensing with need for any further notice of proceedings to him — Some 11 weeks later, mother committed suicide and child briefly resided with paternal aunt in Texas — In meantime, child's maternal aunt from Toronto arrived to make funeral arrangements and applied to Texas courts for custody, which she obtained by default when paternal aunt surrendered child, claiming to have been stressed by entire incident — Child's lawyer (appointed by Texas court) approved of this arrangement — Because of his waiver, father was never served with notice of custody proceeding — Maternal aunt promptly secured health and dental coverage for child and ensured that child got psychological counselling with respect to trauma of mother's death — Then 4 months ago, while his Texas lawyer applied to have custody order declared invalid, father applied for visa to United States with intention of bringing boy to Philippines, even though he was effectively stranger to child — Aunt was served with notice of father's challenge but within days, she returned to Ontario taking child with her — Upon arriving in Texas on temporary visa, father succeeded in getting custody order invalidated and he then invoked (Hague) *Convention on Civil Aspects of International Child Abduction*, claiming aunt's wrongful removal or retention of child to Ontario and seeking child's return to Texas — Ontario court rejected father's claim because, at time of her return to Ontario, aunt had lawful custody under Texas court order and was no in breach of any "rights of custody" that father could assert — Father was not seeking custody from Texas court, but only declaration that original custody order was invalid — Father's reliance on presumption in Texas statute favouring parent over non-parent in custody claims was flawed because presumption applied only if parent had "shown the ability to act in the best interest of the child" and

because even Texas case law recognized danger in uprooting child from non-parent in circumstances that could impair child's emotional development — Child's habitual residence had indeed been Texas, but father's motive was not to restore child to Texas but rather to take boy to Philippines to conditions and circumstances about which neither Ontario nor Texas courts had any evidence — Father had no custodial rights and was not entitled to invoke section 3 of Hague Convention as legal basis for seeking child's return to Texas.

CUSTODY OF CHILD — Jurisdiction — Jurisdiction despite lack of habitual residence — Six-part test under clause 22(1)(*b*) of *Children's Law Reform Act* — Availability in Ontario of substantial evidence about child's best interests — Subclause 22(1)(*b*)(ii) does not require that *all* evidence about best interests be available in Ontario, only that "substantial" evidence be available — In 3½ months since child came from Texas, "substantial" evidence would now be available in Ontario and any records not in Ontario could be subpoenaed from Texas, if necessary.

CUSTODY OF CHILD — Jurisdiction — Jurisdiction despite lack of habitual residence — Six-part test under clause 22(1)(*b*) of *Children's Law Reform Act* — Balance of convenience to exercise jurisdiction in Ontario — Although on balance, Texas (where boy, now 7½ years old, had habitually resided until devoted maternal aunt brought him to Ontario 3½ months ago after his mother's tragic death) had more evidence about his best interests than Ontario, sending boy back to Texas was out of question — Child would be at grave risk of psychological harm where his father, who was total stranger to him, about whose parenting skills nothing was known and who was in Texas on temporary visa, intended to transport child to Philippines to face circumstances about which Ontario court had no evidence — Balance of convenience favoured Ontario over Texas.

CUSTODY OF CHILD — Jurisdiction — Jurisdiction despite lack of habitual residence — Six-part test under clause 22(1)(*b*) of *Children's Law Reform Act* — Child's real and substantial connection with Ontario — In light of upheavals in young boy's life in past year since his mother's suicide, maternal aunt's creditable efforts at stabilizing his world since bringing him from Texas to her home in Ontario 3½ months ago had resulted in creation of real and substantial connection with Ontario.

STATUTES AND REGULATIONS CITED

Children's Law Reform Act, R.S.O. 1990, c. C-12 [as amended], subsection 22(1), clause 22(1)(*a*), clause 22(1)(*b*), subclause 22(1)(*b*)(ii), subclause 22(1)(*b*)(v), subclause 22(1)(*b*)(vi), subsection 22(2), section 23, subclause 23(*b*)(iii), section 25 and section 28.

Convention on Civil Aspects of International Child Abduction, [1983] Can. T.S. No. 35, 1343 U.N.T.S. 89, preamble, article 1, article 3, article 4, article 5, article 12, article 13, paragraph (*b*) of article 13 and article 14.

Texas Family Code [as amended], §153.001, §153.002, §153.005 and §153.131.

CASES CITED

Astudillo (Pesantes) v. Bayas (Ponce), 1997 CanLII 11576, 70 A.C.W.S. (3d) 499, 10 O.F.L.R. 207, [1997] O.J. No. 1438, 28 O.T.C. 389, 1997 CarswellOnt 986 (Ont. Gen. Div.).

Chan v. Chow (2001), 152 B.C.A.C. 176, 2001 BCCA 276, 90 B.C.L.R. (3d) 222, 250 W.A.C. 176, [2001] 8 W.W.R. 63, 199 D.L.R. (4th) 478, 15 R.F.L. (5th) 274, [2001] B.C.J. No. 904, 2001 CarswellBC 868 (B.C.C.A).
Chavez v. Chavez (2004), 148 S.W. 3d 449 (Tex. Ct. App.).
In re De La Pena (1999), 999 S.W. 2d 521 (Tex. Ct. App.).
Jabbaz v. Mouammar (2003), 171 O.A.C. 102, 226 D.L.R. (4th) 494, 38 R.F.L. (5th) 103, 2003 CanLII 37565, [2003] O.J. No. 1616, 2003 CarswellOnt 1619 (Ont. C.A.).
Rodriguez v. McFall (1983), 658 S.W. 2d 150 (Tex. S.C.).
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.

Brahm D. Siegel ..... for the applicant maternal aunt
Roselyn Zisman ..... for the respondent father

[1] JUSTICE R.J. SPENCE:— This case is concerns a young boy, Daniel, age seven years. More specifically, it is about where, and with whom, Daniel will live. He currently resides with the applicant, Edthen Espiritu, his maternal aunt ("aunt") in Toronto. The respondent, Samuel Bielza, is Daniel's biological father ("father"). He brings a motion claiming that the aunt has wrongfully detained Daniel in Ontario and he seeks Daniel's return to Texas, U.S.A., pursuant to article 3 of the (Hague) *Convention on Civil Aspects of International Child Abduction*, [1983] Can. T.S. No. 35, 1343 U.N.T.S. 89 (the "convention"). In the alternative, the father seeks an order that this court lacks jurisdiction to make a custody order in favour of the aunt, pursuant to sections 22 and 23 of the *Children's Law Reform Act*, R.S.O. 1990, c. C-12, as amended (the "Act") or, in the final alternative, that this court ought to decline to exercise its jurisdiction pursuant to section 25 of the Act.

[2] The aunt opposes the father's motion. In her own motion, she asks this court to dismiss the father's claim for relief under the Convention, to assume jurisdiction over Daniel, and to make a temporary custody order in her favour, as well as a temporary order restraining Daniel's removal from Ontario without her prior written consent, or court order.

1: BACKGROUND

[3] This case has a somewhat complex and rather unusual factual background. However, in order to better understand the analysis in these reasons, it is necessary to devote some time to explaining what has led up to the present litigation.

[4] Daniel's mother ("Emy") and father were married in 1998 in the Philippines. Following the marriage, the father, who is a life-long resident of the Philippines, remained in the Philippines, while Emy went to live in Texas. She was about one month pregnant when she went to live in the United States. Daniel was born in Houston, Texas on 7 November 1999. It was the father's wish that Emy return to live in the Philippines. However, Emy preferred to remain in Texas and, in turn, expressed the wish that father join her in Texas.

For whatever reason, the parents remained separate and apart and never resumed cohabitation following Daniel's birth.

[5] Regrettably for Daniel, he had almost no contact with his father. According to the aunt, the father had no interest in coming to the United States. The aunt says that the only contact between Daniel and his father occurred in October 2000, when Emy brought Daniel to the Philippines to visit with his father. The aunt says that the visit lasted for only a few hours, even though Emy remained in the Philippines for a full month. The aunt's evidence is corroborated in large part in the affidavit sworn by Ms. Priscilla Laceras of Sugarland, Texas, one of the few disinterested parties who swore evidence in this proceeding. Ms. Laceras had a 15-year relationship with Emy and she attested to Emy's many attempts to involve the father in Daniel's life, all of which were rebuffed by the father.

[6] The details of the October 2000 visit are not denied by the father. However, he says that, beginning in 2001, Emy took "extraordinary steps to prevent" the father from having "any kind of relationship" with Daniel. This evidence is entirely inconsistent with the aunt's evidence and, more importantly, with the evidence of Ms. Laceras.

[7] In addition, the father's claim is inconsistent with the affidavit sworn by his own sister, Ms. Evangeline Jiminez ("Evangeline"), who is supporting the father in this proceeding. In paragraph 2 of Evangeline's affidavit sworn on 26 January 2007, she stated that she and the aunt had conversations in the summer of 2006 (my emphasis added):

> . . . regarding Emy's sudden change of vacation venue and how Emy came to my house one Sunday afternoon in mid-May 2006. She was ***asking for advice on how to let her son meet his father.***

What is beyond dispute is that, by the time this litigation had commenced, the father was a virtual stranger to Daniel.

[8] On 11 April 2006, Emy commenced a divorce proceeding in a Texas court. On 23 May 2006, the father was served with and signed a document in that proceeding, called a "Waiver of Citation" ("waiver"). In that document, which was notarized in the Philippines, the father deposed as follows:

> I, SAMUEL M. BIELZA am the Respondent in the [divorce proceeding] . . . I have been given a copy of the Original Petition for Divorce that has been filed in this cause, and I have read it and understand it. I hereby enter my appearance in this cause for all purposes and waive the issuance and service of process. I agree that the cause may be taken up and considered by the Court, including by a duly appointed Associate Judge or Master of the court, without further notice to me. I further waive the making of a record of testimony in this cause.

[9] Attached to the waiver was an "Agreed Final Decree of Divorce" ("decree") that the father also signed. That document provided that sole conservatorship ("custody") of Daniel was to go to Emy. It also provided for specified access to the father, as well as granting the father access to information concerning Daniel's welfare. The father's physical access was to include holidays, Thanksgiving, Spring Break and extended summer vacation periods. The father, by signing the waiver and the decree, was agreeing to the terms of the

divorce and, further, to a waiver of any further notice of the divorce proceedings.

[10] The father's extensive access detailed in the decree would have been inserted at Emy's instructions. That extensive access is entirely inconsistent with the father's claim that Emy took "extraordinary steps" to prevent the father from having a relationship with Daniel.

[11] On 29 June 2006, Emy committed suicide. In Emy's last will and testament dated 27 August 2001, she named the aunt, both as her executrix, as well as Daniel's legal guardian. This will was found to be valid and was subsequently probated in a Texas court. However, on the day prior to her suicide, Emy left a hand-written note requesting Evangeline, who also lives in Texas, to assume "full custody" of Daniel. In his affidavit sworn on 12 February 2007, Ned Gill, the aunt's Texas lawyer stated that the parties were all aware of this note during the course of the litigation in Texas, but:

> I knew that the suicide note would carry little or no weight with the court because the mother was obviously not of sound mind and certainly did not have fully functioning mental faculties when she committed suicide.

[12] On the same day as his mother's tragic death, Daniel went to live in the home of Evangeline and her family ("paternal family").

[13] On 2 July 2006, the father executed a power of attorney in the Philippines, whereby he appointed to Evangeline and Evangeline's husband his power to:

> exercise temporarily parental authority over [Daniel] . . . to be my son's actual custodian and guardian . . . until such time as I have him under my custody.

Neither the aunt nor her lawyer in Texas was made aware of the existence of this power of attorney. Nevertheless, in his affidavit, the father deposed that it was always his intention to have Evangeline and her husband care for Daniel "until I could get to the United States to pick up my son and bring him home [to the Philippines] with me." To that end, he stated that he immediately began the process of applying in the Philippines for a visa to enter the United States.

[14] Daniel remained living exclusively with the paternal family until about 26 July 2006.

[15] As soon as she heard about Emy's death, the aunt took a leave of absence from her job in Toronto and flew to Texas to look after the details of Emy's burial. She then briefly returned to Toronto to take care of some financial matters, returning to Texas one week later.

[16] On or about 24 July 2006, the aunt instructed her Texas lawyer, Mr. Gill, to file a "Petition in Intervention" ("intervention") in the divorce proceeding, whereby she sought custody of Daniel. Evangeline was served with the intervention. The father was not served. As noted by Mr. Gill, it was not necessary to serve the father as he had previously signed the waiver, thereby giving up any further right to appear in the proceeding.

[17] On 26 July 2006, Evangeline served her own intervention, seeking custody. She did not disclose that she was doing this on behalf of the father (assuming that this was her

real intention). On the same day, the aunt and Evangeline agreed to a temporary, or "band-aid", court order whereby Daniel would spend alternate weeks rotating between the aunt and the paternal family's residences, until the custody issue could be finally resolved. Also on the same day, Ms. Nina Schafer was appointed "*amicus* attorney" ("child's lawyer") for Daniel.

[18] The aunt deposed that, although the shared custody arrangement worked "pretty well for the first few weeks", Daniel was having difficulty in the paternal family's home and he was asking to spend more time with the aunt. It is important to note that the aunt had enjoyed a long-standing relationship with Daniel since the date of his birth. The aunt deposed that "by October, Daniel was telling me he wanted to live with me forever". Evangeline denies that Daniel was feeling this way and, instead, she deposed that Daniel expressed his preference to remain with the paternal family, who had always lived relatively close to Daniel, before the death of his mother.

[19] In September 2006, the aunt obtained her own apartment in Texas to accommodate both herself as well as Daniel. She also acquired private dental and health insurance for Daniel. In addition, she retained the services of Dr. Jay Bevan, a psychologist, for Daniel to attend on a regular basis, in order to assist Daniel "to talk about his feelings" arising from the death of his mother. There is no evidence that the paternal family had taken any similar steps for Daniel's benefit.

[20] Evangeline deposed that, in early November 2006:

> Because of litigation pressure, financial, emotional and physical stress to my family and especially to Daniel, I decided to ask my lawyer . . . to request [the aunt] to write me a letter indicating a release of responsibility for me present and future . . .

[21] I stop here to note that Evangeline's foregoing statement is perplexing. If, as she deposed, she was litigating, not for her own benefit, but strictly in the capacity as power of attorney for the father, why was she experiencing "litigation pressure" and "financial, emotional and physical stress"? If she was merely advancing her claims for the benefit of the father, it ought to have been the father who bore the brunt of the litigation pressure and the financial and emotional stress. This causes me to wonder whether, despite the existence of the power of attorney, Evangeline was in fact pursuing custody for herself, rather than for the benefit of the father. In fact, in his affidavit sworn on 12 February 2007, the aunt's Texas lawyer, Ned Gill, stated:

> It was certainly my impression that it was [Evangeline] who wanted custody, not [the father]. She was the one who filed an Intervention and requested the Court to appoint her as the Sole Managing Conservator of the child, not [the father].

[22] In any event, on 8 November 2006, Evangeline having decided to drop out of the litigation, and with the consent of the child's lawyer, the aunt obtained a final custody order. The father was not served. That order gave the aunt all the usual incidents of custody, including the "exclusive right" to designate the child's residence. In Mr. Gill's affidavit, he further deposed:

> During the Texas Court Process, [the aunt] was upfront and always honest with the Texas Court. The Texas Court appointed an attorney for the Child who's only interest is the child. The attorney for the child is required to perform her due diligence which she did and also concluded that it was in the best interest of the child for [the aunt] to be appointed [sole custodian] of the child.

[23] On 8 December 2006, the father's newly retained lawyer filed a motion, returnable on 3 January 2007 to declare the order of 8 November 2006 void and to have that order dismissed, with prejudice. The argument in support of this request was that, upon Emy's death on 29 June 2006, the divorce petition that she had begun on 11 April 2006 effectively ceased to have any legal life. In such a case, the argument continued, the subsequent interventions, as well as the temporary and final custody orders were all without force and effect. The aunt was served with this motion.

[24] On 23 December 2006, on the strength of the final custody order dated 8 November 2006 — the validity of which was now before the Texas courts — the aunt returned to Toronto with Daniel, without giving notice to the father or to the court.

[25] On 31 December 2006, the father arrived in Texas, his visitor's visa to the United States having been granted to him on or about 21 December 2006. The visa was valid only until 1 April 2007.

[26] The return date of 3 January 2007 for the motion in Texas was adjourned to the following day. On 4 January 2007, a Texas court declared the custody order of 8 November 2006 in favour of the aunt to be void. At the conclusion of that hearing, the father's lawyer requested the aunt's lawyer, Mr. Gill, to facilitate Daniel's return to the father. It was then that the father learned that Daniel and the aunt had left the jurisdiction on 23 December 2006.

[27] The order of 8 November 2006 provided that:

> Each person who is a party to this order is ordered to notify each other party, the court, and the state case registry of any change in the party's current residence address, mailing address, home telephone number . . . on or before the 60th day before the intended change . . . [or, if the party does not know of the change within 60 days] before the fifth day after the date that the party knows of the change.

It is not disputed that the aunt failed to give the notice, as required in the order of 8 November 2006.

[28] On 5 January 2007, the aunt brought an application in this court, seeking custody of Daniel pursuant to the *Children's Law Reform Act*. On the same day, she brought a motion, without notice, seeking a temporary custody order. That motion was heard by me on 5 January 2007. In support of her motion, the aunt deposed to much of the foregoing history, some of which is now contradicted in subsequently-filed affidavits by the father's counsel. However, what has never been contradicted is that the aunt made extraordinary efforts to set aside her own life, including her job and to make Daniel's care her first priority following

Emy's death. Nor is it contradicted that the aunt had spent considerable amounts of time with Daniel, from the time of his birth, until she arrived in Texas following the death of Emy.[1]

[29] In preparation for her return to Toronto with Daniel, the aunt arranged a parental leave with her employer, Bell Canada. She earns a salary of $63,000 per year and is entitled to receive 55% of that salary while on leave, together with a further $400 per week from the Canadian government. She also has savings with which to support herself and Daniel.

[30] As a result, the aunt will not have to return to work until July 2007. This enables her to see Daniel off to school each morning and to be at home waiting for him upon his return. The aunt has no children of her own. She therefore decided to enrol in, and she completed, a parenting course in November 2006. She also enrolled Daniel in school, which he has been attending since early January 2007.

[31] On the basis of facts contained in the aunt's affidavit, I concluded on 5 January 2007 that it was appropriate for the court to assume jurisdiction over the child pursuant to the Act, and I made a temporary "without prejudice" custody order in favour of the aunt. I also ordered the aunt's counsel to serve the father with all relevant court documents within four days, to permit a full hearing on the merits, which I scheduled for 16 January 2007. Both counsel subsequently agreed that further time would be necessary to obtain, serve and file all relevant documents, including evidence, factums and authorities. Accordingly, these motions were not argued before me until 26 March 2007.

2: ISSUES

[32] Each side is seeking custody of Daniel. The aunt wishes Daniel to remain in Ontario, living with her. The father wishes Daniel to be returned to Texas, so that he may assume custody and then take Daniel with him to the Philippines where he will reside on a permanent basis. In order to arrive at a decision in this case, I must address the following legal issues:

1. Is the father entitled to rely on the convention in the circumstances of this case?
2. If he is so entitled, has there been a wrongful removal or a wrongful retention by the aunt such that Daniel must now be returned to Texas?
3. In the event that I answer both of the foregoing questions in the negative, ought this court to assume jurisdiction over the child for the purpose of ultimately determining custody rights?

2.1: Does the Convention Have Applicability in the Circumstances of this Case?

[33] Article 1 of the Convention states:

> The objects of the present Convention are:

1. However, the father's evidence takes some issue with the extent of the aunt's involvement in Daniel's life.

(*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.

Article 3 states:

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 states:

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

Article 5 states (in part):

For the purposes of this Convention:

(*a*) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

. . .

Article 12 states (in part):

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. . . .

[34] I stop at this point and note the following:

1. Both Canada and the United States of America are "Contracting States".
2. Paragraphs (*a*) and (*b*) of article 3 are conjunctive, so that the father who is now claiming relief under the convention must establish that Daniel's removal to Ontario on 23 December 2006 was a breach of "rights of custody" (as defined in Article 5) ***and*** that, at the time of that alleged wrongful removal, the father was either actually exercising those rights, or would have exercised those rights, but for the wrongful removal or retention.
3. It is not disputed that Daniel was "habitually" resident in the United States, specifically, in Texas, immediately prior to the alleged wrongful removal.

[35] When the aunt removed Daniel from Texas to Ontario on 23 December 2006, she did so pursuant to an order that gave her sole custody, as well as the right to determine the child's residence. Although that order was subsequently declared void by a Texas court on 4 January 2007, the order was still valid at the time of the removal on 23 December 2006.

[36] However, that same order required the aunt to give notice of her intention to change Daniel's address. She was aware that there was a motion before the court in Texas, seeking to declare the order of 8 November 2006 void and yet, she moved Daniel to Ontario, without giving the required notice. Nevertheless, that removal, while perhaps in breach of the notice provision in the order, was not, in and of itself, a "wrongful removal or retention" under paragraph (*a*) of article 3 of the convention, unless it is first established that the removal was a breach of "rights of custody".

[37] The father argues that the aunt's removal of the child from Texas while the court motion was pending to decide whether the order of 8 November 2006 was valid, constituted a wrongful removal. Reliance for that position stems from the leading Supreme Court of Canada case 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. At paragraph [64], the court stated (my emphasis added):

> It seems to me that when a court has before it the ***issue of who shall be accorded custody of a child***, and awards interim custody to one of the parents in the course of dealing with that issue, it has rights relating to the care and control of the child and, in particular, the right to determine the child's place of residence. It has long been established that a court may be a body or institution capable of caring for the person of a child.

[38] I might have been inclined to agree with the father's submission ***if*** what was before the Texas court was the issue of Daniel's custody. However, that was not the issue that the Texas court was asked to decide. Instead, the question placed before the Texas court was whether the custody order of 8 November 2006 in favour of the aunt was a valid order. If the answer was yes, then the aunt would retain custody, If the answer was no, then what?

[39] On behalf of the father, it is argued that, although the father did not obtain a formal custody order when the Texas court voided the order of 8 November 2006 on 4 January 2007, nevertheless having succeeded in his motion, the father thereby acquired "rights of custody" on 4 January 2007 by operation of Texas legislation and case law decided thereunder. This latter submission can only be determined by an examination of Texas law.

[40] In order to ascertain whether there has been a wrongful removal or retention within the meaning of article 3 of the convention, article 14 of the convention provides that this court:

> . . . may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child,. . . .

[41] Accordingly, as the habitual residence of the child was Texas, I now turn to the law

of Texas to assist in determining this issue.

[42] Section 153.005 of the *Texas Family Code*, as amended, states:

> **Sec. 153.005. Appointment of sole or joint managing conservator.**
>
> (*a*) In a suit, the court may appoint a sole managing conservator or may appoint joint managing conservators. If the parents are or will be separated, the court shall appoint at least one managing conservator.
>
> . . .

Section 153.131 of the *Texas Family Code* states:

> **Sec. 153.131. Presumption that parent to be appointed managing conservator.**
>
> (*a*) Subject to the prohibition in Section 153.004, unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator . . .
>
> . . .

[43] The father relies upon the foregoing, together with certain case law from Texas courts, to argue that, upon Emy's death, there was a presumption that custody would go automatically to the father, a presumption that is so strong that, in effect, there was no necessity for the father to seek a formal custody order.

[44] In *Rodriguez v. McFall* (1983), 658 S.W. 2d 150 (Tex. S.C.), the mother and father were separated and, by agreement, the child was living with the father who, in turn was living with his parents. Upon the death of the father, the father's parents sought to "retain" custody of the child. The mother sought a return of the child to her custody. The court held:

> Absent an immediate serious danger to the child, a parent is entitled to the immediate, automatic and ministerial grant of possession of the child as against a non-parent.

[45] In *Chavez v. Chavez* (2004), 148 S.W. 3d 449 (Tex. Ct. App.), the grandparents sought custody as against a parent. The parent was successful. The case notes indicate that there is a strong presumption that the best interest of a child is served if a natural parent is appointed as a managing conservator. For a court to award managing conservatorship of children to a non-parent, the non-parent must prove by a preponderance of credible evidence that appointing parent as a managing conservator would result in serious physical or emotional harm to child.

[46] It would appear, therefore, that when the Texas legislation is examined in the context of the foregoing case law, the ***presumption*** in this case would have favoured the father's obtaining custody of Daniel. On that basis, the father argues, the setting aside of the order of 8 November 2006 granting custody to the aunt, in effect conferred something akin to an "automatic" custody right upon him.

[47] However, in order to have a more complete understanding of the Texas law and the nature of these presumptive or impliedly-automatic rights, I turn to section 153.001, the public policy section of the *Texas Family Code*, which states (my emphasis added):

> **Sec. 153.001. Public policy.**
>
> (*a*) The public policy of this state is to:
>
> (1) assure that children will have frequent and continuing contact with parents ***who have shown the ability to act in the best interest of the child***;
>
> (2) provide a safe, stable, and non-violent environment for the child; and
>
> (3) encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage.
>
> . . .

[48] I must also consider section 153.002 of the Code (my emphasis added):

> **Sec. 153.002. Best interest of child.** The best interest of the child shall ***always be the primary consideration of the court in determining the issues of conservatorship*** and possession of and access to the child.

[49] On the basis of these latter two sections in the *Texas Family Code*, I ask this question: Is the father correct when he submits in his factum that upon Emy's death, "the father retained rights of custody to the child pursuant to the law of Texas"? In my opinion, the answer to that question is no. When Emy died, the father was still living in the Philippines. It was unclear and uncertain whether, as at 29 June 2006, he would ever be able to enter into the United States. Furthermore, he was a complete stranger to Daniel. In such circumstances, how could it be said, in light of the latter two sections of the *Texas Family Code*, that the father would automatically become Daniel's legal custodian.

[50] I also ask this question: Upon the Texas court's decision to void the order of 8 November 2006, did this confer automatic custody rights on the father? Once again, I would answer no. The presumption contained in the *Texas Family Code*, a presumption that is indeed reflected in the case law cited by the father, is merely a presumption. However, that presumption is based on the "best interest" of the child. Furthermore, the public policy enshrining "best interest" is inexorably intertwined with the expectation that the child will have frequent contact with that parent who has "***shown the ability to act in the best interest of the child"***.

[51] It is important to remember that, at the very time that the father argues that custody would have presumptively — in effect, automatically — reverted to him, either upon Emy's death on 29 June 2006 or, alternatively, when the order of 8 November 2006 was voided by the court on 4 January 2007, the father was a virtual stranger to Daniel. The father had never participated in providing care and guidance to the child; the father had not seen the child since prior to his first birthday and, only then, for a few hours; the father had taken no legal steps to try to enforce his parental rights. In short, the father had shown ***no*** "ability to act in the best interest of the child". Thus, the so-called presumptive or automatic reversion of custody rights to the father, either on 29 June 2006 or on 4 January 2007, which the father

argues would have occurred, could not have happened without running afoul of the public policy section of the *Texas Family Code*.

[52] Indeed, the Texas courts have recognized that there is a danger in uprooting a child from a non-parent in circumstances that could impair the child's emotional development. The court in the case of *In re De La Pena* (1999), 999 S.W. 2d 521 (Tex. Ct. App.), observed (at paragraph 21):

> Because safety, security, and stability are critical to child development, the danger of uprooting a child from a home with non-parent may in some instances rise to a level that significantly impairs the child's emotional development, so as to warrant appointment of a non-parent as conservator.

[53] Furthermore, when the court awarded sole final custody to the aunt in the order of 8 November 2006, that decision was supported by the child's lawyer who, as the evidence discloses had completed her "due diligence". In other words, while the order of 8 November 2006 was subsequently voided because it was made in the context of a divorce proceeding that terminated upon Emy's death, the ***substance*** of that order, namely, the issue of Daniel's custody, was sanctioned by both the child's lawyer and the Texas court. In fact, as Mr. Gill deposes in his affidavit (my emphasis added):

> [On the hearing date of 4 January 2007] the court asked the attorney for the child of her position and she stated that it would be ***unconscionable for the father to obtain custody of the child***.

[54] When the court made its order of 8 November 2006, it was aware that the father had signed the waiver and the decree, by which he signified that he had no interest in pursuing custody of Daniel. Simply put, as of 8 November 2006, notwithstanding what turned out to be a defective proceeding, a court in Texas decided, ***on the merits***, that it was in Daniel's best interest that he be in the aunt's sole custody.

[55] I find it noteworthy that, when the father brought his motion to set aside the order of 8 November 2006 granting sole custody to the aunt, he did not also request an order that he himself be granted Daniel's sole custodian. Although the father now argues that he had certain parental presumptions in his favour, surely it would have made sense for him to seek a formal custody order from the court. Whatever the presumption, no matter how strong, a court order would have removed any doubt as to the father's custodial rights. Had he obtained even a temporary custody order on 4 January 2007, he would have been able to make the argument that, at least from 4 January 2007 forward, the aunt was wrongfully "retaining" Daniel in Ontario. Instead, there is no evidence that the father made any claim for custody in Texas. Indeed, there is no evidence that, ***to this day***, the father has advanced a claim for custody in the Texas courts. In my view, the best that can be said for the father's position as of 4 January 2007 is that there may have existed a ***presumption*** in his favour that he ***could*** acquire formal custodial rights were he to have commenced a custody proceeding. However, this far-from-crystallized right to custody is not, in my opinion, what the Convention seeks to enforce.

[56] By these comments, I do not mean to suggest that, had the father made a formal

claim for custody in the Texas court, he would have failed. That is something that likely would have required a trial in order to determine what was in Daniel's best interests. I conclude merely, that the father's legal position was not yet clear and remains unclear to this day, because, for whatever reason, the father has taken no legal steps since his arrival in Texas to obtain a formal custody order.

[57] Accordingly, I have concluded that the father has failed to meet the test set out in paragraph (*a*) of article 3 of the convention, in that he has failed to establish that Daniel's removal or subsequent retention was in breach of "rights of custody" to Daniel.

[58] It follows, therefore, that the father fails to meet the test in paragraph (*b*) of article 3 of the convention because, if there were no "rights of custody", he could not have been exercising those rights — nor would he have exercised those rights — but for Daniel's removal or retention.

[59] There is a further reason — a policy reason — why the relief claimed by the father under the convention ought not to be given effect, on the facts of this case. The preamble to the convention states (my emphasis added):

> The States signatory to the present Convention,
>
> - Firmly convinced that the interests of children are of paramount importance in matters relating to their custody,
> - Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of ***their habitual residence***, as well as to secure protection for rights of access,
>
> . . .

In other words, the centrepiece of the convention is the return of the child who has been wrongfully removed or retained ***to his "habitual residence"***, being the place where the child has lived, the place where he can continue with his life prior to the wrongful removal or retention.

[60] In *Chan v. Chow* (2001), 152 B.C.A.C. 176, 2001 BCCA 276, 90 B.C.L.R. (3d) 222, 250 W.A.C. 176, [2001] 8 W.W.R. 63, 199 D.L.R. (4th) 478, 15 R.F.L. (5th) 274, [2001] B.C.J. No. 904, 2001 CarswellBC 868 (B.C.C.A), the father had wrongfully removed the child from Hong Kong, the child's habitual residence. At trial, the father proved that, if the child were returned to Hong Kong to live with the mother, the mother's circumstances would make it more likely than not that the child would be forced to leave Hong Kong with the mother. At paragraph [62] of the decision, Appeals Justice Patricia M. Proudfoot said (my emphasis added):

> **[62]** . . . An underlying purpose of the Convention is the achievement of ***continuity in the residence of children***. If Emily is returned to Hong Kong, she will be forced to move once more in the next few months, ***an intolerable situation for her*** in my mind.

[61] Here, the father is attempting to use the Convention for a purpose that runs counter

to the policy objective set forth in the preamble to the convention, as also reflected in the decision in *Chan v. Chow*, *supra*. The father is a permanent resident of the Philippines. He owns land and works as a farmer in the Philippines. He is apparently involved in a relationship with a woman, with whom he has another child in the Philippines. He seeks custody of Daniel so that he can take Daniel back to the Philippines with him. In effect, what he is attempting to do by invoking the convention, is to use Texas — Daniel's habitual residence prior to coming to Ontario — as a mere ***conduit*** in order to accomplish his ultimate goal of removing Daniel ***from his prior habitual residence***, and relocating him to the Philippines. If the policy objective of the convention is to secure the return of a child to his place of habitual residence because, as the preamble states, that is in the "interests of children", that policy would be entirely defeated were the father permitted to succeed in his convention claim. Simply put, the father has no intention of re-securing Daniel's place of "habitual residence".

[62] For all of the foregoing reasons, I have concluded that the father is not entitled to rely on the convention as the legal basis for seeking Daniel's return to Texas.

[63] However, in the event I am wrong in this conclusion, I turn to a consideration of the second issue.

2.2: Has There Been a Wrongful Removal or Retention Such That Daniel Must Now Be Returned to Texas?

[64] Should another court decide that paragraphs (*a*) and (*b*) of article 3 both apply and that Daniel's removal or retention was "wrongful", I turn to the issue of whether Daniel must therefore be returned to Texas.

[65] Article 13 of the convention provides for certain exceptions to the automatic return of a child, even where that child was wrongfully removed or retained:

> 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:
>
> (*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.
>
> . . .

[66] In determining whether, in this case, an exception applies under article 13, I focus on the wording of paragraph (*b*).

[67] The Supreme Court of Canada, in *Thomson v. Thomson*, *supra*, had occasion to consider the exception provided for in paragraph (*b*) of article 13. At paragraph [80] of that

case, the court stated:

> It has been generally accepted that the Convention mandates a more stringent test than that advanced by the appellant. In brief, although the word "grave" modifies "risk" and not "harm", this must be read in conjunction with the clause "*or otherwise* place the child in an intolerable situation." The use of the word "otherwise" points inescapably to the conclusion that the physical or psychological harm contemplated by the first clause of art. 13(b) is harm to a degree that also amounts to an intolerable situation.

Here, the father argues, there is no evidence Daniel would suffer the kind of harm contemplated by the convention were he to be returned to Texas.

[68] In her comprehensive brief of authorities, counsel (as she then was)[2] for the father relies on the case of *Jabbaz v. Mouammar* (2003), 171 O.A.C. 102, 226 D.L.R. (4th) 494, 38 R.F.L. (5th) 103, 2003 CanLII 37565, [2003] O.J. No. 1616, 2003 CarswellOnt 1619 (Ont. C.A.). In that case, the court referred to the decision in *Chan v. Chow*, *supra*, and stated, at paragraph 32 (my emphasis added):

> **[32]** In my view, *Chan* does not stand for the proposition that in ***every case***, movement of a child to another country within a few months of the child's return in accordance with the Convention constitutes an intolerable situation. That would set the intolerable situation test too low. Families, including children, often have to move from town to town and even from country to country. Such moves can be disruptive because they can interfere with schooling and making friends. However, I would not describe ***every such situation as intolerable***.

[69] Father's counsel also relied on the case of *Astudillo (Pesantes) v. Bayas (Ponce)*, 1997 CanLII 11576, 70 A.C.W.S. (3d) 499, 10 O.F.L.R. 207, [1997] O.J. No. 1438, 28 O.T.C. 389, 1997 CarswellOnt 986 (Ont. Gen. Div.), a decision of Justice Mary Lou Benotto. In that case, the father removed the 40-month-old child from the mother in Ecuador, where the child had lived for 34 months. By the time the case came before Justice Benotto, the child had not seen the mother for about two years. Notwithstanding this long delay in determining the proceedings, the court ordered the child to be returned to the mother in Ecuador.

[70] The question that I must answer, therefore, is whether the aunt is able to meet the high threshold test of establishing that Daniel would be placed in an "intolerable situation" were he to be returned to Texas. In my view, the facts lead inescapably to the conclusion that Daniel's return to Texas would place him at grave risk of psychological harm, to the extent that he would be in an intolerable situation.

[71] Prior to the death of his mother on 29 June 2006, Daniel had lived all his life with his mother in Texas. What happened immediately following his mother's death is something that no child should ever have to experience:

1. On 29 June 2006, Daniel was moved into the home of the paternal family in Texas. He remained in that home until 26 July 2006. All the while, he was grieving over

2. Two days following her appearance in this case, Ms. Zisman was appointed a judge of the Ontario Court of Justice.

the death of his mother.

2. Beginning on 26 July 2006, following the filing of the aunt's Intervention in Texas, Daniel's residence alternated one week on and one week off with each of the aunt and the paternal family.
3. On 8 November 2006, following Evangeline's decision to give up her legal claim for custody of Daniel, the aunt obtained a sole custody order and Daniel then moved into an apartment with the aunt, in Texas.
4. On 23 December 2006, Daniel moved once again, with the aunt, to Ontario.

Thus, in the space of only six months, Daniel was forced to move residences at least four times. I say "at least" because this does not include the period between 26 July and 8 November 2006 during which Daniel was moving from one residence to another, ***every week***.

[72] Furthermore, these moves must be put into context. These were not just moves, *per se* but, rather, moves for a child who had just experienced the death of the only parent he ever knew. At this point, it will be useful to refer to the evidence of Dr. Jay Bevan, the clinical psychologist whom the aunt retained in Texas to treat Daniel, specifically, to assist him in dealing with the loss of his mother.

[73] Dr. Bevan saw Daniel a number of times between 19 September 2006 and 7 December 2006. I quote at length from his affidavit sworn on 20 February 2007 (my emphasis added):

> Daniel was reluctant to discuss his mother in the sessions, generally not responding when I asked him questions about her or anything relating to her. At our very last session, he acknowledged missing his mother and did describe briefly that she had gotten sick and that he had been at the babysitters and was scared when his mother did not arrive to pick him up. . . .
>
> For most children who are grieving, especially at this early age, the reactions of adults around them and especially their ***ability to support and structure the child as they do as much as possible to maintain continuity and consistency in the child's life, is primary to the ultimate adjustment of the child to the loss experience***.
>
> [The aunt] has responded ***extremely well in terms of being able to care for Daniel and maintain as much normalcy and consistency in his life as possible***.
>
> I believe that Daniel's successful adjustment so far to the loss of his mother and the subsequent change in his life circumstances ***can be attributed to [the aunt's] presence in his life and the way in which she had been involved with him on an emotional level and in terms of providing consistency and continuity to him***.

[74] Daniel has continued to live with his aunt since arriving in Toronto on 23 December 2006. He has been enrolled in school since the beginning of January 2007. The aunt has moved into a new condominium residence with Daniel. The aunt states that Daniel is doing well in school, making friends and building ties with his family in Toronto, including his cousins Robin Rafael (age 11) and Ira Roque (age 3), as well as Theresa Rafael (Robin's mother) and Lulubel Roque (Ira's mother). In other words, according to this

undisputed evidence and the undisputed evidence of Dr. Bevan, the aunt is providing support, consistency and normalcy to this young child who suffered the death of the only parent he ever knew, just nine months ago.

[75] In the face of this evidence, I am unable to agree with the father's assertion that Daniel's return to Texas would not place him at grave risk for psychological harm. It is reasonable for me to infer that Daniel is still grieving over the loss of his mother, and that this grieving will likely continue for some period of time. It is also reasonable for me to infer that Daniel will need the support, continuity and consistency of routine to assist him with this grieving, and to provide positive structure in his life. Will this be accomplished by removing him from the aunt who has, to date, been the necessary "presence" in Daniel's life to support and sustain him during this time of crisis, and placing him with this father, who is a complete stranger to Daniel? In my view, the answer is clearly no. In my opinion, such a move, in the circumstances of this case, would be intolerable for Daniel.

[76] In addition to the fact that Daniel does not know his father, the intolerable nature of the return to Texas would be compounded by the father's actions of moving Daniel, yet again, from his place of habitual residence, Texas, to the Philippines, a country that is entirely alien to him. This court knows absolutely nothing about how Daniel would be received by the father's new partner. This court knows nothing about the location of any school that Daniel would attend in the Philippines. Nor does this court know what steps the father would take to assist Daniel to deal with his grieving over the loss of his mother. Would the father be supportive of this grieving? Or, given the vitriol revealed in the father's affidavit toward Emy, would the father act in such a way as to minimize Daniel's loss? All that is known about the father's wishes and plans for Daniel are contained in one paragraph in his affidavit sworn on 26 January 2007:

> I am Daniel's natural parent . . . I am ready and eager to take over the care and responsibility for my son, Daniel . . . I love him very much. Even though Daniel and I have only known each other through telephone calls[3] and family members, I believe it is in his best interest to be with me, his sole surviving natural parent and I can give him a good life, a safe place to live, a good education and all my love.

This is the full extent of the father's evidence regarding his plans for Daniel, and his motives for seeking custody of Daniel.

[77] Finally, I note the father's evidence that his visa to remain in the United States was to expire on 1 April 2007. During the course of argument, I inquired whether counsel had any information as to the father's ability to obtain an extension beyond 1 April. Counsel was not able to provide me with any useful information. At the conclusion of argument, I told both lawyers that I would be unable to render a decision for approximately one week. Neither counsel requested the opportunity to return to make further argument on the issue of the father's immigration status in the United States and, specifically, where the father would be situated after 1 April 2007. This, of course, raises the following question: Who would be present to assume physical custody of the child if he were ordered to be returned to Texas?

3. The assertion that there had been some telephone calls between Daniel and his father, following Emy's death, is denied or downplayed in other evidence filed in the court record.

[78] On the basis of the available evidence, I must assume that the father's visa did expire on 1 April 2007. I must also assume that he has returned to the Philippines. I have no evidence as to his ability to return to the United States. To whom would Daniel be returned if he were to go back to Texas? I can only speculate that the paternal family may be a possibility; but that is by no means a certainty. However, even if this were to occur, the last time the paternal family took Daniel into their home, Evangeline refused to continue with the custody litigation because, in her own words, she was unable to cope with the "litigation pressure, financial, emotional and physical stress to my family". Might that happen once again if Daniel were to go to the paternal family and the aunt decided to litigate the merits of the custody issue in Texas? Would Daniel then be required to move yet again if Evangeline had no wish to experience the same kind of litigation stress that caused her to give up the custody fight the last time around? One can only imagine the kinds of horrific scenarios that might befall Daniel were he to go back to Texas to be placed with the paternal family, given all these unanswered — and unanswerable — questions. In such circumstances, to say that Daniel would experience a loss of consistency, a loss of routine, a loss of normalcy and a loss of support, is a serious understatement.

[79] For all of the foregoing reasons, I have concluded that, even if the father can satisfy another court that Daniel was wrongfully removed or retained, the exception in paragraph (*b*) of article 13 would apply. Specifically, I find that Daniel's return to Texas would place him at "grave risk" of "psychological harm", amounting to an intolerable situation. Accordingly, I would decline to order Daniel's return to Texas.

2.3: Ought This Court to Assume Jurisdiction under the *Children's Law Reform Act*?

[80] The aunt's without notice motion argued before me on January 5, 2007, was based strictly on the provisions of the *Children's Law Reform Act*. At the return of this motion, on 26 March 2007, the aunt's counsel submitted that this court ought to assume jurisdiction, without first deciding the convention issue. The father's counsel correctly submitted that the convention issue must be decided first — and disposed of — before the provincial legislation comes into play. In *Thomson v. Thomson*, *supra*, the court adopted the following statement, at paragraph [86]:

> a court charged with determining a case by application of the Convention "shall not decide on the merits of rights of custody" unless it has first determined that the child is not to be returned under the Convention . . . if a conflict exists [between provincial custody legislation and the convention], the Convention must prevail.

[81] Having disposed of the Convention application relief sought by the father, I must now consider whether this court ought to assume jurisdiction over Daniel. I set out the relevant sections of the Act, as follows.

[82] Subsection 22(1) of the Act states:

> **22. Jurisdiction.—**(1) A court shall only exercise its jurisdiction to make an order for custody of or access to a child where,
>
> (*a*) the child is habitually resident in Ontario at the commencement of the

application for the order;

(*b*) although the child is not habitually resident in Ontario, the court is satisfied,

(i) that the child is physically present in Ontario at the commencement of the application for the order,

(ii) that substantial evidence concerning the best interests of the child is available in Ontario,

(iii) that no application for custody of or access to the child is pending before an extra-provincial tribunal in another place where the child is habitually resident,

(iv) that no extra-provincial order in respect of custody of or access to the child has been recognized by a court in Ontario,

(v) that the child has a real and substantial connection with Ontario, and

(vi) that, on the balance of probabilities, it is appropriate for jurisdiction to be exercised in Ontario.

Subsection 22(2) of the Act states:

(2) *Habitual residence.*— A child is habitually resident in the place where he or she resided,

(*a*) with both parents;

(*b*) where the parents are living separate and apart, with one parent under a separation agreement or with the consent, implied consent or acquiescence of the other or under a court order; or

(*c*) with a person other than a parent on a permanent basis for a significant period of time,

whichever last occurred.

Section 23 of the Act states:

23. Serious harm to child.— Despite sections 22 and 41, a court may exercise its jurisdiction to make or to vary an order in respect of the custody of or access to a child where,

(*a*) the child is physically present in Ontario; and

(*b*) the court is satisfied that the child would, on the balance of probabilities, suffer serious harm if,

(i) the child remains in the custody of the person legally entitled to custody of the child,

(ii) the child is returned to the custody of the person legally entitled to custody of the child, or

(iii) the child is removed from Ontario.

[83] The father's counsel submitted that clause 22(1)(*a*) does not apply as Daniel was not habitually resident in Ontario at the commencement of the application on 5 January 2007. Although I am inclined to agree, it is not necessary for me to decide the jurisdiction issue under that clause of the Act, in light of my following analysis.

[84] The father's counsel also submitted that clause 22(1)(*b*), specifically subclauses (ii), (v) and (vi), do not apply and, accordingly, this court ought not to exercise jurisdiction. I disagree with that submission.

2.3(a): Subclause 22(1)(b)(ii) — The Existence of Substantial Evidence

[85] In my view there is "substantial evidence concerning the best interests" of Daniel here in Ontario. Daniel has been in school in Toronto since early January 2007. His school teachers have had an opportunity to get to know him and would be able to comment on his level of adjustment. He lives with his aunt who permanently resides in Toronto. He has a relationship with cousins and other family members in Toronto. Although Daniel's previous school and health records are in Texas, those records may be subpoenaed, if necessary. Furthermore, there is no proposed caregiver currently residing in Texas, as the father has presumably been required to return to the Philippines.

[86] In any event, subclause 22(1)(*b*)(ii) does not require that ***all*** the evidence pertaining to best interests be available in Ontario, only that "substantial" evidence be available.

2.3(b): Subclause 22(1)(b)(v) — Real and Substantial Connection with Ontario

[87] For the reasons set out in the foregoing section, I also conclude that Daniel has a "real and substantial connection" with Ontario. Had this application been argued at the end of December, my conclusion on this point might have been different. However, given the changes in Daniel's life during the past several months that he has been living here, a real and substantial connection between Daniel and Ontario has in fact materialized.

[88] The father argues that, if this has occurred, it is only as a result of the temporary "without prejudice" order that this court made on 5 January 2007, maintaining Daniel in this jurisdiction. Although that may be true, this court cannot ignore what has become Daniel's reality, namely, that his life in Ontario has begun to develop and unfold and that his connection to this province has materialized in a very real way.

2.3(c): Subclause 22(1)(b)(vi) — Balance of Convenience

[89] In my view, the balance of convenience makes it appropriate for this court to assume jurisdiction over Daniel. Although there is no doubt that evidence concerning his best interests does exist in Texas, equally — perhaps more so — evidence concerning his best interests is to be found here in Ontario. However, the overwhelming consideration in deciding this issue flows from my analysis of paragraph (*b*) of article 13 of the convention, specifically, that Daniel would be at grave risk of psychological harm were he to be returned to Texas. Accordingly, the balance of convenience favours Ontario over Texas.

[90] Although I need go no further in my decision to assume jurisdiction pursuant to the Act, for the sake of thoroughness and to assist another court should that become necessary, I turn to section 23 of the Act.

[91] I would conclude, on the basis of the wording of section 23 of the Act, that it is

appropriate for this court to exercise jurisdiction over Daniel. There is no dispute that he is physically present in Ontario. I also find that subclause 23(*b*)(iii) applies, namely, that Daniel would, on a balance of probabilities, suffer harm were he to be removed from Ontario. Once again, in coming to this conclusion, I rely on my analysis in respect of paragraph (*b*) of article 13 of the convention — specifically, that Daniel would be at grave risk of psychological harm were he to be returned to Texas. The higher standard for establishing "harm" that is required by article 13 of the convention necessarily encompasses the somewhat lower standard of harm in section 23 of the Act. Even if the standard of harm in section 23 is not lower than that provided for in article 13 of the convention, I am of the opinion that the evidence discloses that Daniel would suffer "serious harm" were he to be removed from Ontario.

[92] Finally, relying on section 25 of the Act, the father asks this court to decline jurisdiction over Daniel. Section 25 states:

> **25. Declining jurisdiction.—** A court having jurisdiction under this Part in respect of custody or access may decline to exercise its jurisdiction where it is of the opinion that it is more appropriate for jurisdiction to be exercised outside Ontario.

[93] The only other place "outside Ontario" where jurisdiction could possibly be exercised is Texas. That would require this court either to make an order sending Daniel back to Texas or, in the alternative, to make no order at all, thereby leaving open the possibility that someone else — either the father or the paternal family — could seek an order in Texas, for Daniel's return to that state. Given my prior analysis regarding the grave risk of psychological harm that would befall Daniel should he be required to return to Texas, it would be inappropriate for this court to decline jurisdiction, thereby leaving Daniel at risk for a degree of harm which, I have already found, would be intolerable to him.

[94] One of the father's arguments in support of returning Daniel to Texas was his so-called inability to enter Canada, as his visa permits him to enter the United States only. However, there is no evidence that, if the father attempted to obtain a visa to enter Canada for the purpose of a pursing a custody proceeding in Ontario, he would be denied entry by Canada Immigration. Equally, there is no evidence that the father has any ***further*** ability to re-enter the United States, now that his American visa has expired. Accordingly, I give no effect to that argument on behalf of the father.

3: CONCLUSION

[95] The father's notice of motion seeks Daniel's return to Texas under the convention, as well as other specified ancillary heads of relief. For the reasons set out herein, I dismiss the father's motion in its entirety.

[96] The aunt's application and notice of motion seeks custody, temporary custody and a restraining order pursuant to section 28 of the Act, prohibiting Daniel's removal from Ontario without the aunt's prior written consent or court order. For the reasons set out herein, I am granting the aunt's motion for temporary relief, in the following terms:

1. The applicant, Edthen Espiritu, shall have sole temporary custody of Daniel Bryant Bielza, born on 7 November 1999.
2. Neither the respondent, Samuel Bielza, nor anyone acting on the respondent's behalf shall remove the said child, or cause the said child to be removed, from the Province of Ontario without the prior written consent of the applicant, or court order.

[97] As this order is temporary only, this matter must return to court for a case conference or a settlement conference. I will continue as the case management judge. Counsel for both parties shall make arrangements for a return date directly with the trial co-ordinator. My preference is to have the matter return within the next 60 days, if at all possible, so that the unresolved issues can be moved forward without undue delay. Given that the father's counsel is no longer available to continue with this case, I recognize there are practical problems that may make it difficult to remain within this 60-day period. However, I have no doubt that the aunt's counsel will fully co-operate with any new counsel retained by the father, so that a mutually convenient date can be arranged.

[98] I turn to the issue of costs arising out of these motions. Understandably, no submissions were made at the time the substantive issues were argued. If costs of the two motions cannot be settled, the parties will contact the trial co-ordinator to select a mutually agreeable date and time to appear before me to make oral submissions. I will accommodate an early morning appointment, if necessary, in order to convenience counsel.

[99] Finally, I wish to thank both counsel for the obvious hard work and organizational skills that were evident in the presentation of their respective cases. In a case as factually and legally complex as this case was, both counsel did all that was required to present their arguments in the most effective manner possible.