2002 CarswellNS 425, 2002 NSCA 127, 209 N.S.R. (2d) 248, [2003] W.D.F.L. 78, 33 R.F.L. (5th) 1, 656 A.P.R. 248, 220 D.L.R. (4th) 577, 117 A.C.W.S. (3d) 937

A. (J.E.) v. M. (C.L.)

C.L.M. (Appellant) and J.E.A. (Respondent) and A.D.M. (Third Party)

Nova Scotia Court of Appeal

Roscoe, Freeman, Cromwell JJ.A.

Heard: September 11, 2002; October 4, 2002
Judgment: October 23, 2002
Docket: C.A. 180806

Proceedings: varying (2002), 2002 NSSC 128, 2002 CarswellNS 207, 204 N.S.R. (2d) 349, 639 A.P.R. 349 (N.S. S.C.)

Counsel: *Craig M. Garson, Q.C.*, for Appellant

Christopher Berryman, for Respondent

Myrna L. Gillis, for Third Party

Alan J. Stern, Q.C., for Child, K.A.

Subject: International; Family

Conflict of laws --- Family law — Children — Custody — Child removed from jurisdiction by spouse or spouse refusing to return child

Mother made numerous unfounded allegations about father abusing daughter — Assessments consistently failed to confirm abuse and mother resolved to flee from Iowa with child — Mother went to British Columbia illegally, remarried, and then moved to Nova Scotia — Father learned of whereabouts when mother became involved in another divorce — Father's application for immediate return of child was granted — At time of trial, child was nine years old, had not had any contact with father for at least seven years and expressed view that she feared father and did not want to return to him — Trial judge gave views of child little weight in light of mother's manipulation — Trial judge also found that mere familiarity with community in Nova Scotia did not amount to being "settled in" so as to preclude removal — Also, mere disruption caused by transfer did not amount to "grave risk" — Mother appealed on ground that trial judge erred in failing to give effect to child's objection and failing to find she was settled in new environment — Order for return of child confirmed — Objectives of Child Abduction Act are deterrence of international child abduction, rapid return of child, restoration of status quo, and deference, in so far as determining child's best interests, to courts of place of habitual residence — Exceptions to return of child could include objection by child and

child being settled in new environment, but neither of these exceptions applied in circumstances — Trial judge found that there was no grave risk that child would be exposed to physical or psychological harm if returned to father and this finding was not challenged on appeal — Finding was recognition that Iowa court was capable of protecting child from any risk in course of determining issues of custody and access — Child's objection had been heard by trial judge but child had voice and not veto in matter — Evidence supported trial judge's finding that mother had prompted child's objection — Nor did trial judge err in finding that child was not settled in new environment within meaning of Act — Child's personal circumstances and those of mother were uncertain since they were in Canada illegally and mother was unable to work for that reason — Refusing to order return of child would seriously undermine Act's intent to deter international child abduction and to respect role of court of habitual residence in determining child's best interests — Child Abduction Act, R.S.N.S. 1989, c. 67.

Conflict of laws --- Family law — Children — Custody — Miscellaneous issues

Mother was paediatrician who made numerous unfounded allegations about father abusing daughter — Assessments consistently failed to confirm abuse and mother resolved to flee from Iowa with child — Mother went to British Columbia illegally, remarried, and then moved to Nova Scotia — Father learned of whereabouts when mother became involved in another divorce — Father's application for immediate return of child was granted — At time of trial child was nine years old, had not had any contact with father for at least seven years and expressed view that she feared father and did not want to return to him — Trial judge gave views of child little weight in light of mother's manipulation — Trial judge also found that mere familiarity with community in Nova Scotia did not amount to being "settled in" so as to preclude removal — Also, mere disruption caused by transfer did not amount to "grave risk" — Mother appealed and issue arose as to what transitional provisions, if any, were appropriate if trial judge's order was upheld — Order for child's immediate return varied and transitional provisions added — Father was to be returned to place of habitual residence, which was Iowa — However, unqualified return order would be detrimental to short term interests of child wrenched from de facto primary caregiver — Seven years had gone by since abduction and father had no meaningful contact with child since well before that time — Objective of transitional arrangements is not to attempt to restore relationship between father and child but to ameliorate any risk of harm resulting from return of child — Arrangements as to where child should live immediately on return and which professionals should be engaged to assist her were matters for Iowa court, which should address matter as soon as possible — Therefore, child should be returned on or before one month from date of judgement — Mother was to accompany child during return and child was to live with mother and mother's sister on arrival until further order of Iowa court — Mother was to report daily to local RCMP effective immediately — Child Abduction Act, R.S.N.S. 1989, c. 67.

Cases considered:

Ayala v. Ayala (May 3, 1990), Doc. D66/90 (Ont. Prov. Ct.) — referred to

Bielawski v. Lozinska, 1997 CarswellOnt 2923 (Ont. Prov. Div.) — referred to

C. v. C. (Abduction: Rights of Custody) (1988), *(*sub nom. *C. v. C.)* [1989] 1 W.L.R. 654 (Eng. C.A.) — followed

De L v. Director General, NSW Department of Community Services and De L (1996), 187 C.L.R. 640 (Australia H.C.) — referred to

Droit de la famille - 1763, 19 R.F.L. (4th) 341, *(*sub nom. *V.W. v. D.S.)* 196 N.R. 241, *(*sub nom. *W. (V.) v. S. (D.))* [1996] 2 S.C.R. 108, *(*sub nom. *W. (V.) v. S. (D.))* 134 D.L.R. (4th) 481, *(*sub nom. *S. (D.) c. W. (V.))* [1996] R.D.F. 205, 1996 CarswellQue 370, 1996 CarswellQue 370F (S.C.C.) — considered

Droit de la famille - 3193 (1998), [1999] R.D.F. 38, 1998 CarswellQue 4103 (C.S. Que.) — referred to

Finizio v. Scoppio-Finizio, 1999 CarswellOnt 3018, 124 O.A.C. 308, 179 D.L.R. (4th) 15, 1 R.F.L. (5th) 222, 46 O.R. (3d) 226 (Ont. C.A.) — followed

French v. Onderik, 1995 CarswellOnt 2239 (Ont. Prov. Div.) — referred to

Housen v. Nikolaisen, 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1 (S.C.C.) — considered

M.(P.M.) v. L.(S.K.) (May 19, 2000), Bonomy Lord (Scotland O.H.) — referred to

Mahler v. Mahler, 1999 CarswellMan 598, 143 Man. R. (2d) 56, 3 R.F.L. (5th) 428 (Man. Q.B.) — considered

Mahler v. Mahler, 2000 CarswellMan 51, 142 Man. R. (2d) 319, 212 W.A.C. 319 (Man. C.A.) — referred to

Medhurst v. Markle, 17 R.F.L. (4th) 428, 26 O.R. (3d) 178, 1995 CarswellOnt 1096 (Ont. Gen. Div.) — referred to

New Brunswick (Attorney General) v. Majeau-Prasad, 2000 CarswellNB 359, 10 R.F.L. (5th) 389, 229 N.B.R. (2d) 296, 592 A.P.R. 296 (N.B. Q.B.) — referred to

Soucie v. Soucie, [1995] S.L.T. 414 (Scotland H.C.) — considered

Szalas v. Szabo, 16 R.F.L. (4th) 168, 1995 CarswellOnt 889 (Ont. Prov. Div.) — referred to

Thomson v. Thomson, [1994] 10 W.W.R. 513, 173 N.R. 83, [1994] 3 S.C.R. 551, 6 R.F.L. (4th) 290, 97 Man. R. (2d) 81, 79 W.A.C. 81, 119 D.L.R. (4th) 253, 1994 CarswellMan 91, 1994 CarswellMan 382 (S.C.C.) — followed

Statutes considered:

Child Abduction Act, R.S.N.S. 1989, c. 67

Generally — considered

Treaties considered:

Hague Convention on the Civil Aspects of International Child Abduction, 1980, C.T.S. 1983/35; 19 I.L.M. 1501

Generally — referred to

Article 12 — considered

Article 13 — considered

Article 13(b) — considered

APPEAL by mother from judgment reported at 2002 NSSC 128, 2002 CarswellNS 207, 204 N.S.R. (2d) 349, 639 A.P.R. 349 (N.S. S.C.) ordering immediate return of child to Iowa.

2002 CarswellNS 425, 2002 NSCA 127, 209 N.S.R. (2d) 248, [2003] W.D.F.L. 78, 33 R.F.L. (5th) 1, 656 A.P.R. 248, 220 D.L.R. (4th) 577, 117 A.C.W.S. (3d) 937

***Cromwell J.A.*:**

I. Introduction:

1 In 1995, C.S. took her daughter, K., from their home in Iowa and fled to Canada. This violated the custody rights of Dr. S.'s former husband and K.'s father, J.A.. For over six years, mother and child eluded the father's attempts to locate them. Finally, in mid 2001, they were found in Nova Scotia, where they had been residing since 1997.

2 Mr. A. applied to the Supreme Court under the Nova Scotia *Child Abduction Act*, R.S.N.S. 1989, c. 67 for the return of the child to Iowa. After a five day hearing, Goodfellow, J. ordered K.'s immediate return. Dr. S. appeals, arguing that the judge erred by not giving effect to K.'s objection to being returned and by failing to find that she was settled in her new environment. Flinn, J.A. stayed the execution of the order under appeal pending the hearing and disposition of the appeal.

II. Brief Overview of the Facts:

3 J.A. and C.S. were married in Iowa in 1990. Their daughter, K., was born to them in January of 1992. Husband and wife separated later that year and were divorced in their home state of Iowa in 1993. Under the divorce decree, they had joint custody of K.. The decree also provided that Dr. S. had physical care of the child and that Mr. A. had specified visitation rights.

4 From the beginning, visitation was contentious. It became the subject of extensive proceedings in the Iowa courts. The divorce decree specified that there was to be no overnight visitation until Mr. A. established the habitability of his residence. He attempted to do so but was met by challenges from Dr. S.. This resulted in court proceedings in Iowa from the spring of 1993 into the summer of 1994 that led eventually to the commencement of visitation as contemplated in the decree.

5 In March of 1995, therapist Carole Meade was told by K. that she had been physically and sexually assaulted by Mr. A.. Immediately, Dr. S. initiated proceedings in the Iowa courts to modify the visitation provisions in the divorce decree based mainly on these allegations of physical and sexual abuse of K. by Mr. A.. The Iowa courts ordered that his visitation be temporarily suspended and then altered it to supervised visitation. Mr. A. strenuously denied the allegations. His name was entered on the Iowa child abuse registry and that entry was subsequently upheld on judicial review. The Iowa Department of Human Services recommended that child in need of protection proceedings should be commenced in juvenile court, but in July of 1995, a county attorney declined to adopt the recommendation.

6 Mr. A. took steps in the Iowa courts to enforce his supervised visitation rights, obtaining orders which were not carried out. He applied to court to cite Dr. S. for contempt for failure to obey the orders. In fact, however, he had no visitation after March of 1995.

7 In the midst of the Iowa court proceedings, an assessment of K. was carried out at the St. Luke's Child Protection Center in Cedar Rapids, Iowa. The assessment, referred to as an evidentiary interview and medical examination, resulted from a referral from the Iowa Department of Human Services following the concerns that K. had been physically and sexually abused. The results of the assessment were received in June of 1995: K. gave no history of sexual abuse being perpetrated upon her but did report that her Dad, J., spanked her on the bottom.

8 Dr. S.'s U.S. attorney, Ward A. Rouse, reviewed these results and advised Dr. S. that she should expect the Iowa courts to order some immediate visitation for K. with her father and that, even if the visitation were ordered to be supervised initially, she should expect it to change to unsupervised in the not too distant

future.

9 The attorney never spoke with or saw Dr. S. again. In July of 1995, she absconded with the then 3 year old K. from their home in Iowa. This was no impulsive act. Dr. S. had begun to make preparations to flee with K. even as the abuse allegations were being investigated. She obtained birth certificates for a mother and daughter from a nurse at the hospital where she worked. Using them, she obtained falsified U.S. passports. She set up a trust to help finance the abduction. (I use this word in the sense that the removal of the child from Iowa was wrongful). With the refusal of the state to commence protection proceedings and Mr. Rouse's advice about the likely outcome of the pending court proceedings, she made her final decision to flee.

10 With the help of a friend, Dr. S. and K. travelled to Canada by car and then flew from Winnipeg to Vancouver. They were picked up and driven to Saltspring Island. There they lived in a shelter for either "several months" or "only . . . two or three months" depending on whether one goes by Dr. S.'s affidavit or her oral evidence. After leaving the shelter, mother and daughter lived in a rented cabin for several months and then moved in with Dr. A.M..

11 Dr. S. and Dr. M. were married in October of 1996 and their daughter, Emily, was born in May of 1997. They moved to Nova Scotia in July. Here, Dr. S. successfully evaded Mr. A.' attempts to locate K. until mid 2001.

12 The new family — particularly Dr. S. and K. — were warmly welcomed into the life of their rural Nova Scotia community. The record is awash in evidence of the kindness, compassion and generosity shown to them by their new friends and neighbours. Mother and children developed and have maintained a strong network of loyal and devoted friends. K. has done well in school and is heavily involved in activities such as 4-H, riding and music lessons.

13 Over the past two years, however, life in Nova Scotia has started to sour. Dr. S. separated from Dr. M. and left the matrimonial home with the children in May of 2001. The separation, according to the record, had been preceded for a considerable period by conflict between Dr. S. and Dr. M.. In the time leading up to the separation, K. felt confusion as a result of the struggles and fights and daily arguing that she witnessed between them.

14 After separation, Dr. S. and the children stayed initially with friends in Halifax and then moved into a cabin on a friend's property closer to home. With the help of a community of friends, Dr. S. bought a small farm where she currently resides with K..

15 The relations between Dr. M. and Dr. S. have been acrimonious. Dr. S. petitioned the Supreme Court for divorce, falsely stating that there were no other court proceedings affecting the children. Since the filing of the divorce petition here, there have been many court proceedings and orders in Nova Scotia between Dr. S. and Dr. M. relating to custody and access. Apparently K. blames herself, of course wrongly, for the breakup of the marriage. The separation appears to have significantly disrupted K.'s schooling — she missed 36 days of school in 2000 - 2001, 30 of them between March and June of 2001.

16 At separation, K. and Emily remained in the day to day care of their mother, but there were serious problems between Dr. S. and Dr. M. concerning access. K. was expressing the view that she did not want to spend time with Dr. M. and in fact has not gone voluntarily to see him since the separation. At one point in June of 2001, K. was removed by the police and taken to Dr. M.'s home against her will. Subsequently, Emily went to live with Dr. M. while K. remained with her mother. That, we are told, is the current situation. K. has limited contact with Emily and virtually none with Dr. M..

17 As the separation between Dr. S. and Dr. M. was unfolding in the spring and summer of 2001, Mr. A. located K.. He called her on the telephone and told her that he missed her. The reaction to this event was described by Mr. Whitzman (a therapist) in these terms:

> . . . K. indicated that this call frightened her, as she was not sure where he was calling from. She wondered if he was in Nova Scotia and she further expressed concern that he would hurt her. Cherie [i.e., Dr S.] took her children to another location for over a week in order to restore K.'s sense of security.
>
> K. clearly experienced anxiety as she recalled the incident involving J.'s phone call. It was the uncertainty of J.'s whereabouts that was causing the most distress. She continued to present with fears even though her Mother had a safety alarm wired into their home. K. felt that the police would not be able to respond quickly enough to an alarm as she felt that J. was capable of harming her in a short amount of time.
>
> . . .
>
> By August 7th, K. and family had returned to their home. A friend initially stayed with the family at night to provide some comfort. Cherie was able to purchase a dog that was trained to protect the family . . .
>
> . . . On October 9th, K. discussed her fears in more depth and was able to acknowledge that her fears were related to J. and being abducted by him. . . . (Emphasis added)

18 In leaving their home in reaction to this call, Dr. S., with whom K. and Emily were residing at this point, did not tell Dr. M. where she was going so that he could only contact them through friends or by cellular telephone.

19 As noted earlier, Mr. A. applied to the Supreme Court for an order directing K.'s return to Iowa. Dr. M. vigorously supported Mr. A. in his application, while Dr. S. and counsel appointed for K. opposed her return to Iowa. As noted, the judge ordered the immediate return of K. and that order is the subject of this appeal.

20 The separation and the fact that mother and child have now been located has had considerable impact on the world that K. had come to know in Nova Scotia. According to the most recent material filed from Mr. Whitzman, K. was "clearly unsettled" by the many changes in her life resulting from the court proceedings, the fact that Emily has gone to reside with her father and the resulting limited contact with her and by the possibility of having to return to Iowa. In addition, the location by Mr. A. of mother and child has brought their immigration status to a head. Dr. S. and K. are in Canada illegally. Their ability to remain here is in doubt. Dr. S., who is at present living mostly on spousal and child support, has no prospect of working in this country until her immigration status is resolved. There is no reason to think that this will occur in the near future.

III. Issues:

21 Dr. S., supported by counsel for K., says that the judge ought to have refused to order her return for either of two reasons: first, because she objected to being returned and second, that she was settled in her new environment. The main issue is whether the judge erred in law or fact in failing to refuse the order returning the child on either or both of these grounds. All of the seven grounds of appeal advanced by Dr. S. are concerned with more specific aspects of this basic question.

IV. The Child Abduction Act:

22 The judge's decision and this appeal concern the interpretation and application of the *Hague Convention on the Civil Aspects of International Child Abduction* which is incorporated into the law of Nova Scotia by the *Child Abduction Act*. (In light of the fact that the *Act* completely incorporates the Convention, I will generally refer simply to it, recognizing that it is the *Act* which gives the Convention the force of law in Nova Scotia.) It will be helpful to begin the analysis of this case with a brief discussion of the purposes and a brief review of some key provisions of the Convention.

23 The Convention deals with one fundamental question: the extent to which child custody orders in one country should be respected and enforced in another. The Convention's general response to this question is quite straightforward. Other than in exceptional circumstances, the best interests of children in custody matters should be entrusted to the courts in the place of the child's habitual residence. To accomplish this, the courts of the country in which an abducted child is found give effect to the custody orders made by the courts of the place of the child's habitual residence by directing that the child be returned to that place.

24 This general approach is compelling. A person who abducts a child in violation of rights of custody determined by the courts of the place of habitual residence is, by the abduction, attempting to circumvent the due process of law in that place. In addition, the abducting parent is seeking to establish new and artificial jurisdictional links with the courts of another place more to his or her liking. The abducting parent is, therefore, not only unilaterally severing the child's relationship with the other parent but also is unilaterally selecting a forum most convenient to the abducting parent for consideration of the child's best interests.

25 The general rule that a child's best interests should be determined by the courts of the place of habitual residence may be seen as a fundamental and animating principle of the Convention. This was well described by the High Court of Australia in *De L v. Director General, NSW Department of Community Services and De L* (1996), 187 C.L.R. 640 (Australia H.C.) at para 11:

> . . . the Convention is concerned with reserving to the jurisdiction of the habitual residence of the child in a Contracting State the determination of rights of custody and access. This entails preparedness on the part of each Contracting State to exercise a degree of self-denial with respect to "its natural inclination to make its own assessment about the interests of children who are currently in its jurisdiction by investigating the facts of each individual case."

26 This underlying principle is supported by an underlying assumption. The Convention is premised on the capacity of the courts in the place of the child's habitual residence to protect the child and make suitable arrangements for his or her welfare: see for example *Medhurst v. Markle* (1995), 26 O.R. (3d) 178 (Ont. Gen. Div.), at 182. As did the Ontario Court of Appeal in *Finizio v. Scoppio-Finizio* (1999), 46 O.R. (3d) 226 (Ont. C.A.), I would adopt the following statement from Lord Donaldson of Lymington M.R. in the English Court of Appeal in *C. v. C. (Abduction: Rights of Custody)* (1988), [1989] 1 W.L.R. 654 (Eng. C.A.), at 664:

> It will be the concern of the court of the State to which the child is to be returned to minimize or eliminate this harm and, in the absence of compelling evidence to the contrary or evidence that it is beyond the powers of those courts in the circumstances of the case, the courts of this country should assume that this will be done. Save in an exceptional case, our concern, i.e., the concern of these courts, should be limited to giving the child the maximum possible protection until the courts of the other country — Australia in this case — can resume their normal role in relation to the child.

27 The purposes of the Convention all flow from this underlying principle and supporting assumption. The Convention seeks to secure the prompt return of children wrongfully removed and to ensure effective

respect of rights of custody and access: Convention, Article 1. The Convention presumes that the interests of children who have been wrongfully removed are ordinarily better served by immediately repatriating them to their original jurisdiction where the merits of custody should and, but for the abduction, would have been determined: see, for example, *Thomson v. Thomson*, [1994] 3 S.C.R. 551, [1994] S.C.J. No. 6 (S.C.C.) at paras. 39 - 49 and *Droit de la famille - 1763* (1996), [1996] 2 S.C.R. 108 (S.C.C.) [Hereinafter *V.W. v. D.S.*] at paras. 21 - 29 and particularly at paras. 36 - 37.

28 The strong policy of the Convention in favour of ordering immediate return is " . . . intended to deter the abduction of children by depriving fugitive parents of any possibility of having their custody of the children recognized in the country of refuge and thereby legitimizing the situation for which they are responsible.": see *V.W. v. D.S.* at para. 36. As has been said, " . . . the foundation of the [Convention] is the rapidity of the mandatory return process and the principle that the merits of issues related to the custody of children who have been wrongfully removed or retained are to be determined by the courts of their habitual place of residence . . . ": *V.W.* at para. 38.

29 Deterrence of international child abduction is therefore one of the most important objectives of the Convention. This deterrence is achieved through the refusal by the courts of the place where an abducted child is found to accord any legal recognition to the circumstances resulting from the abduction. As Elisa Pérez-Vera put it in "Explanatory Report" (1982), 2 Acts and Documents of the Fourteenth Session of the Hague Conference on Private International Law 426 at 429:

> . . . since one factor characteristic of the situations under consideration consists in the fact that the abductor claims that his action has been rendered lawful by the competent authorities of the State of refuge, one effective way of deterring him would be to deprive his actions of any practical or juridical consequences. The Convention, in order to bring this about, places at the head of its objectives the restoration of the *status quo*, by means of the prompt return of children wrongfully removed . . . (Emphasis added)

30 It follows that the Court which is asked to order return is not to address the child's best interests in anything other than limited and exceptional respects. Instead, the Court's primary obligation is to ensure the return of the child to the place where those best interests ought to be determined: see *Thomson* at para. 42. Consistent with this purpose, a judge considering an application for return under the Convention is not to approach the task as he or she would an application for interim or permanent custody. That would involve determining what is in the best interests of the child, something which is to be determined by the courts in the place of habitual residence. The Convention *prohibits* the court in which an order returning the child is sought from addressing the issue of custody *at all* unless it decides not to order the child's return: see Convention, Article 16. As stated by Pérez-Vera at p. 429, " . . . the problem with which the Convention deals . . . derives all of its legal importance from the possibility of individuals establishing legal and jurisdictional links which are more or less artificial." What the Convention seeks to prevent is the abducting parent convincing the courts of the place to which he or she has fled to issue a decision that will "legalize" a fact situation which is not only contrary to the law of the place of habitual residence but which legitimizes to some degree a situation — the abduction of a child — which neither legal system wished to see brought about: Pérez-Vera at p. 429.

31 The watchwords of the Convention, thus, are deterrence of international child abduction, rapid return of the child, restoration of the *status quo* and deference, in so far as determining the child's best interests is concerned, to the courts of the place of habitual residence.

32 Even though the prompt return of an abducted child is the strong policy underlying the Convention and the *Act*, an order for return is not automatic in all cases. There are exceptions. By means of these excep-

tions, the Convention and the *Act* try to reach a compromise which balances the flexibility needed to deal with particular cases and the effectiveness needed to deter international child abduction: see *V.W.* at para. 37.

33 Two exceptions to an order for immediate return are relevant here. The first is that the judge has a discretion not to order return if persuaded that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views: Article 13. The second arises if it is demonstrated that the child is settled in his or her new environment. For convenience, I will set out the relevant provisions of the Convention:

> **Article 12**
>
> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.
>
> . . .
>
> **Article 13**
>
> Notwithstanding 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 which opposes its return establishes that:
>
> . . .
>
> (b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views. (Emphasis added)

34 On appeal, Dr. S. argues that the judge erred in finding that neither exception applies in this case. After noting some matters not in dispute and the appropriate standard of appellate review, I will deal with each of the two exceptions in turn.

V. Analysis:

1. Matters not in issue:

35 I should begin the analysis of this case by noting some matters which are not now in dispute. First, it is common ground that Dr. S.'s removal of K. from Iowa was wrongful under the Hague *Convention on the Civil Aspects of International Child Abduction* as implemented in Nova Scotia by the *Child Abduction Act*. This follows from the facts that the child had been habitually resident in Iowa and that her removal was in breach of the joint custody rights of her father, Mr. A..

36 Second, it is also not in dispute — and this is extremely important — that there is not a grave risk that K.'s return would expose her to physical or psychological harm or otherwise place her in an intolerable situation. The judge made a clear finding to that effect which is not challenged on appeal.

37 Third, no issue is raised on this appeal concerning the capacity of the Iowa courts to act in K.'s best interests. I mention this because in her affidavit evidence (with similar sentiments repeated in her oral testimony), Dr. S. says that she fled Iowa because she " . . . considered it [her] responsibility to do what the State was either ill-equipped or unprepared to do — protect K. from the perpetrator of this abuse." However, contrary to Dr. S.'s attempted self-justification, the record in this case shows that the Iowa courts acted with caution and care as regards K.'s well-being. As soon as the allegations of abuse were made, access by Mr. A. was suspended entirely. The allegations were thoroughly and professionally investigated. At the time of flight, the courts of Iowa had not taken any step that could even remotely be thought to endanger K. in any way. It must be clear that, on the record before us, these allegations by Dr. S. concerning the alleged inadequacy of the Iowa courts to protect K. have no basis in fact. No such submission was advanced by Dr. S. in this Court. Indeed as noted, the judge's finding that there is *no* grave risk that ordering K.'s return will expose her to psychological or physical harm is not challenged by Dr. S. on appeal.

2. Standard of Review:

38 An appeal is not a retrial of the case or an opportunity for three appellate judges to substitute their views for those of the judge of first instance. The role of the Court of Appeal is to review the judge's findings to determine whether he or she was correct on issues of law and not plainly wrong on issues of fact leading to a wrong result: *Housen v. Nikolaisen*, [2002] S.C.J. No. 31 (S.C.C.). Even with respect to the proper inferences to be drawn from the evidence, the Court of Appeal should not intervene absent clear (or to use the traditional language, palpable) and overriding error: *Housen* at paras. 21 - 25. As the majority of the Supreme Court of Canada put it recently in the *Housen* case at para 23: " . . . it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence." Deference is also to be extended to the judge's exercise of discretion. It should only be interfered with on appeal if the judge has erred in principle or the decision is patently unjust.

3. K.'s Objection:

39 The Convention provides that an order for return of a child may be refused if " . . . the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.": Article 13. In this way, the Convention recognizes that a child at the centre of child abduction proceedings should have a voice in the process of deciding whether he or she will be returned to the place of habitual residence.

40 K. objected to being returned. Her objection was related to the judge by counsel engaged on her behalf. It was based on fear of her father. She told Mr. Whitzman that "I am not interested in going back to the States. That is where my Dad lives. I am frightened. I might get abused."

41 In addressing K.'s objection, the judge said:

> [53] There is no doubt from the evidence of the Affidavits and from Martin P. Whitzman, etc. that K. is a bright, articulate and mature young child, advanced somewhat for her age eleven (sic). The solicitor for K. quite properly made an inquiry and related to the Court that K. wishes to remain in Nova Scotia.
>
> [54] The problem, as I see it, is that one must take a careful look at the background leading up to the expression by the child of her wishes. K. has been on the run for almost seven years and has, of necessity, lived a life of deception and falsehood as to her identity, the necessity of which I conclude was con-

> stantly reinforced by her mother. There is a strong dependency by K. upon her mother from the totality of the circumstances and it raises serious doubts in my mind as to the expression of her desire to remain in Nova Scotia being a free expression beyond that which a child would normally express about being uprooted and in this case being an expression more of what was expected of her and indeed, consciously or unconsciously, demanded of her by her mother. I am not at all satisfied that the expression by K. is of her own free will and, in any event, this is not a case for the exercise of discretion where there is, as I have found, no grave risk to K.'s return to Iowa and that Doctor S. has not, for example, established the threshold required of K. being "settled in" in her Nova Scotia environment. If I were to give in to the expression by K., it would virtually mean that in every case the child could simply state, "he/she did not wish to be uprooted and wanted to stay where they were" and that such an expression would prevail.

42 As I read these reasons, the judge is saying two things. The first is that K.'s objection, while entitled to consideration by virtue of her age and maturity, should not be given great weight because of concern that the objection had been strongly influenced by her mother, the abducting parent, and by the circumstances arising from the abduction itself. The second is that, in situations in which the objection is based on fear of the other parent but where returning the child does not create a grave risk of physical or psychological harm, only rarely, and not in this case, should such an objection be relied on to exercise the discretion not to order the child's return. To do so would seriously undermine the purposes of the Convention. In short, the judge weighed the evidence in light of the standards set out in the Convention and refused to exercise his discretion not to order K.'s return to Iowa.

43 Counsel on behalf of Dr. S. attacked each sentence in these two paragraphs of the judge's decision as disclosing palpable and overriding errors of fact and/or errors in law. However, I can find no error of either type. There is no basis for appellate intervention.

44 I will turn first to the alleged legal errors. These are set out in the second and third grounds of appeal:

> THAT the trial Judge erred in law by applying the wrong legal test to be met under Article 13 of The Convention with respect to the child's objections to being returned.
>
> THAT the trial Judge erred in law in concluding that the child's objections alone, under Article 13 of The Convention, are insufficient to justify a trial Judge exercising a discretion not to order the child's return.

45 In summary, the submission is that the judge failed to recognize that the child's objection is an independent basis upon which his discretion not to order the child's return may be exercised.

46 I agree that the child's objection is the basis of an independent exception under the Convention which, on its own, may support the exercise of discretion to refuse to order return. I also agree that a child's genuine fear, even if not justified in fact, is nonetheless relevant and should be considered. However, in this case, where the objection was based on fear of abuse at the hands of the father, the objection and the risk of harm are obviously interrelated. I think that the judge recognized this. Far from failing to treat them as independent grounds, he recognized the inescapable point that, in this case, they were closely interconnected.

47 If the child's fear of abuse at the hands of her father is justified in fact, this will be relevant to consideration of the risk of harm created by the order returning her. (Of course, the presumed capacity of the courts in the place of habitual residence to protect the child must also be given due consideration.) If the child's fear is not justified in fact, but is nonetheless real to the child, it is relevant to the risk of psychological harm which a return order may create. But where the objection is based on fear of harm, it must not be permitted, in effect, to lower the bar with respect to the type and extent of risk of harm which must be demonstrated to

fall within the harm exception to the immediate return of the child.

48 The judge found that there was no grave risk that ordering K.'s return to Iowa would expose her to physical or psychological harm or otherwise place her in an intolerable situation. That, I repeat, is not challenged on appeal. The finding is not so much an assessment of the allegations of abuse made against Mr. A. as it is a recognition of the fact that the courts of Iowa are capable of protecting K. from any risks there may be to her in the process of determining custody and visitation by her father and mother. The Iowa courts were in the midst of doing just that when Dr. S.'s abduction of the child thwarted further effective action there.

49 As a result of this unchallenged finding, we are bound by the conclusion that K.'s return does not expose her to a grave risk of physical or psychological harm at the hands of her father and, as well, that returning her in the face of her fear does not expose her to grave risk of psychological harm. In light of this finding and the fact that K.'s objection was based on fear of her father, I do not think the judge erred in concluding that, to give effect to K.'s objection in these circumstances, would substantially undercut the objectives of the Convention and the *Child Abduction Act*.

50 Having found no legal error, I will move on to the submissions alleging errors of fact. These make up the first ground of appeal and, in my view, are of no substance.

51 It is argued that the judge so seriously understated the evidence of K.'s maturity that his statement constitutes reversible error. The judge, as noted, said that K. is a "bright, articulate and mature child." The appellant devotes several pages of her factum to a partial review of the evidence with the object of showing that the judge did not give sufficient weight to the evidence concerning K.'s maturity. Ignored by the appellant, however, is other evidence which was before the judge to the effect, for example, that K. " . . . often struggles when trying to explain what she knows and how she knows it" and that "she's got too much on her plate". In my view, the judge's description of K.'s level of maturity is a fair, if brief, summary of the evidence as a whole on this point and certainly does not constitute a palpable and overriding error.

52 More fundamentally, the premise of this submission seems to be that the judge did not take K.'s objection into account. I do not think that is the case at all. On the contrary, the judge considered her objection in the context of the record as a whole and determined in his discretion that, in light of all of the circumstances, he would not give effect to it.

53 In my view, the judge did not err in taking this approach. He concluded from the evidence that, notwithS. K.'s young age, it was appropriate to take account of her views. Having done so, he was obliged to decide how much weight to give to her objection. The Convention, after all, gives the child a voice, not a veto. In deciding how much weight to give the objection, the judge had to consider the whole context in which it came to be expressed. The appellant does not dispute that. The judge found that he had serious concerns about how independent K.'s objection was and the degree to which it appeared influenced by her mother and the circumstances.

54 The appellant says that the judge had no proper basis for his concern that K.'s objection was not an expression of her own free will or to support his " . . . serious doubts" that it was " . . . an expression more of what was expected of her and indeed, consciously or unconsciously, demanded of her by her mother."

55 With these submissions I most emphatically disagree. The appellant's suggestion that K.'s objection to being returned was not strongly shaped by the circumstances resulting from the abduction itself and her mother's views of her father ignores evidence in the record which the judge was obliged to consider. His concerns in this regard and his decision to take them into account in weighing K.'s objection are amply supported by the record.

56 There was a mountain of evidence to the effect that K., not surprisingly, has been and continues to be very dependent on her mother. It was said that K. showed outward signs of a lack of independence, that when she was younger, she was "extremely connected to her mother" and perceptive of her actions and that at present, she is "a very high-strung, nervous child" who "always needed to know where her mother had gone and when she would be back". The evidence described that K. needed to phone her mother three times for reassurance prior to staying overnight with a woman admittedly very close to her. There was also the evidence of Mr. Whitzman to the effect that it is very common that children seek approval of the primary caregiver and that in the case of child and parent in flight, it is common for an intense co-dependency to develop between them. There was ample evidence to support the applicability of this common phenomenon to the case of K. and her mother.

57 In my view, the judge had a proper basis in the evidence for his concerns about what prompted K.'s objection and to ground his refusal to exercise his discretion not to order her return.

58 The appellant argues that the judge misapprehended K.'s objection because he stated that she " . . . wishes to remain in Nova Scotia". Instead, says the appellant, the judge committed reversible error by not parroting Mr. Stern's submission that " . . . she objects to being removed from this jurisdiction and going back to Iowa." It is suggested that there is an important difference between not wanting to be removed from Nova Scotia and not wanting to go back to Iowa. In the context of this case, where everyone understands that one necessarily involves the other, I do not think the judge's characterization of the objection was inaccurate, let alone a reason for appellate intervention.

59 I would conclude, therefore, that the judge did not make any reversible error in law or in fact with respect to his assessment of K.'s objection.

4. Is K. now settled in her new environment?:

60 As noted earlier, the Convention provides that, " . . . even where [an application to return has] been commenced after the expiration of the period of one year . . . [the court] shall also order the return of the child, *unless it is demonstrated that the child is now settled in its new environment*.": Article 12 (emphasis added). The next set of arguments advanced by the appellant relates to this "settled" exception. The submissions are summarized in grounds of appeal 4, 5 and 6 as follows:

> 4. **THAT** the trial Judge erred by applying the wrong test as to whether K. was "settled in" under Article 12 of the Convention.
>
> 5. **THAT** the trial Judge failed to give appropriate weight to the uncontradicted evidence that K. was, in fact, "settled in" to her new environment.
>
> 6. **THAT** the trial Judge misapprehended critical aspects of the evidence of therapist Carole Meade, Ward A. Rouse, Martin P. Whitzman and the Appellant which, when considered in the context of the case as a whole, contributed materially to his erroneous conclusion that the Appellant had failed to establish that K. was "settled in" and that K. objected to be returned to Iowa.

61 The "settled" exception is particularly difficult to apply. It requires the court to weigh directly certain aspects of the child's best interests — particularly that of not being uprooted — even though the individual child's best interests are not generally the focus of the inquiry under the Convention. The difficulty is that refusal to return based on the assessment of the child's best interests tends to undermine the fundamental objectives of the Convention. Thus, if interpreted too broadly, the settled exception would undermine the effective operation of the Convention. On other hand, if interpreted too narrowly, the exception would be robbed of any practical effect.

62 It is, therefore, essential to apply the settled exception with careful attention to both the individual circumstances of the child whose return is sought and the broader purposes of the Convention. This was succinctly put in *Soucie v. Soucie*, [1995] S.L.T. 414 (Scotland H.C.), at 417 where the Scottish Court said that the key question is whether " . . . the interest of the child in not being uprooted is so cogent that it outweighs the primary purpose of the Convention, namely the return of the child to the proper jurisdiction so that the child's future may be determined in the appropriate place."

63 As has been said, one of the prime purposes of the Convention is the immediate return of an abducted child to the place of habitual residence. A court which is asked to make a return order is not to deal with the overall best interests of the child. This supports another prime purpose of the Convention that the merits of the custody and access issues concerning the child are to be dealt with by the courts in the place of habitual residence.

64 The settled exception must be understood in light of these considerations. Reference to them explains in part why the settled exception comes into play only after one year has elapsed between the wrongful removal and commencement of the return proceedings: see Article 12. After one year, the Convention's objective of prompt return has been seriously undercut by the passage of time and the restoration of the "*status quo*" may be difficult or impossible. As time goes by, the likelihood increases that " . . . forced return . . . [may] only serve to cause [the child] further distress and accentuate the harm caused by the wrongful relocation.": see Paul R. Beaumont and Peter E. McEleavy, *The Hague Convention on International Child Abduction*, (1999) at 203. The settled exception recognizes these results of the passage of time.

65 The debate leading up to the adoption in the Convention of the one year time period as a dividing point, as summarized in *Beaumont and McEleavy* at p. 203-204, strongly reinforces this view:

> Initially a dual system was proposed. Where the presence of the child was known a return would be mandatory if less than six months had elapsed from the time of the abduction, but, where the location was not known, the time period would be extended to twelve months. At the XIVth Session this solution was rejected in favour of a single time limit, while there was support for both longer and shorter time periods a general consensus soon emerged in favour of one year.
>
> Nevertheless many delegates also held the view that the Convention should not exclude the possibility of a child being returned even after twelve months had elapsed. To this end a provision was introduced, albeit by a very small majority, to permit an indefinite extension of the return mechanism. Article 12(2) states that, even where Convention proceedings have been commenced after the expiration of the one-year period, the judicial or administrative authority shall still order the return of the child unless it is demonstrated that the child is now settled in its new environment. To return a child after he has spent a substantial period of time away from his State of habitual residence is however very different from the classic Convention case: a summary return in the immediate aftermath of an abduction. Indeed, the Chairman of the XIVth Session went so far as to state that Article 12(2) 'does not sit easily with the other provisions . . . '. (Emphasis added)

66 To the same effect are the observations of Pérez-Vera at p. 458:

> . . . the article [i.e., Article 12] brings a unique solution to bear upon the problem of determining the period during which the authorities concerned must order the return of the child forthwith. The problem is an important one since, in so far as the return of the child is regarded as being in its interests, it is clear that after a child has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights exercised over it — something which is outside the scope of the Convention. Now, the difficulties encountered in any attempt to state this test of 'integra-

> tion of the child' as an objective rule resulted in a time-limit being fixed which, although perhaps arbitrary, nevertheless proved to be the 'least bad' answer to the concerns which were voiced in this regard. (Emphasis added)

67 I would conclude, therefore, that the settled exception ought to be approached not simply by examining the child's present circumstances in the new environment, although that is an important part of the inquiry. In addition, the child's present circumstances need to be assessed in light of the underlying objectives of the Convention and in particular how ordering return of the child is likely to further those objectives.

68 It will be helpful, therefore, to consider how the key objectives of the Convention relate to the specific circumstances of the child whose return is sought. To repeat, the relevant objectives include first, general deterrence of international child abduction by parents; second, prompt return of the child facilitated by precluding a full inquiry into the "best interests" of the child in the state to which the abductor has fled with the child; third, restoration of the *status quo*; and, fourth, entrusting to the courts of the place of habitual residence the ultimate determination of what the best interests of the child require. I shall review how, in my opinion, each of these relates to the circumstances of this case.

69 It is, I think, obvious, that not all of the Convention's objectives are particularly relevant to the facts of this case. Specifically, it is no longer possible to ensure the prompt return of K. to Iowa and it is at best doubtful that there is any meaningful *status quo* to be restored.

70 Consider the objective of prompt return. Of course, the word "prompt" is not a very precise adjective. It must be understood in the context of the Convention's adoption of the one year automatic return rule. If proceedings for return are commenced within one year of the wrongful removal, the settled exception does not apply and cannot be considered by the court asked to order return. In addition, the Convention calls for return "forthwith" for cases falling within that one-year period but simply for return in cases outside it in which the settled exception is not made out. I would conclude, therefore, that after a year, the objective of "prompt" return becomes less compelling. This recognizes the fact that, no matter how unfortunately or unfairly that time has come to pass, court orders cannot turn back the clock.

71 It has now been seven years since Dr. S. abducted K. and more than that since she has seen her father. Prompt is not an apt description of any return ordered under these circumstances. The achievement of this objective has been defeated by the passage of time brought about by the success of Dr. S.'s deception. I would conclude that ordering return here will not serve to achieve in any meaningful way the Convention's objective of securing K.'s prompt return to Iowa.

72 I turn next to the objective of restoring the *status quo*. As has been pointed out, a case such as this one is quite different from the " . . . classic Convention case [of] a summary return in the immediate aftermath of an abduction." see *Beaumont and McEleavy*, *supra*, at 204. The settled exception was included in the Convention in part to recognize the fact that, as time passes, it becomes less realistic to think that there is any meaningful *status quo* to be restored.

73 This is certainly the case here. At the time of the abduction, K. was living with her mother and had not seen her father for some months. Although the parents had joint custody of K., the family was involved at that time in what was essentially an access dispute centred on allegations of abuse by the father. Those allegations were being investigated and addressed in the Iowa courts at the time of the abduction and remain matters that will have to be dealt with. The abduction thwarted the resolution of those issues and removed any possibility of the father's access being restored. But the abduction did not bring about the interruption of access. That resulted initially from orders of the Iowa courts. The *status quo* was one of suspended, and then supervised, access and ongoing litigation focussed on the abuse allegations. At the time of the abduction, the

status quo did not involve any meaningful contact between K. and her father. It is questionable that restoration of that *status quo* is a compelling objective in the circumstances of this case.

74 I conclude that prompt return and restoration of the *status quo* are not realistic objectives in this case. However, two other factors strongly support the view that the settled exception should not be applied here.

75 The first is the deterrent purpose of the Convention. Ordering return prevents an abducting parent from gaining through abduction and flight what he or she could not gain in the courts of the place of habitual residence. By removing any benefit from abduction and flight, such conduct is deterred. This was put succinctly by Little, J. in *Mahler v. Mahler* (1999), 3 R.F.L. (5th) 428, [1999] M.J. No. 566 (Man. Q.B.) at para. 30 (affirmed (2000), 142 Man. R. (2d) 319 (Man. C.A.):

> It is essential that [abducting parents] understand that the Hague Convention is not designed or intended to address the best interests of particular children. Its purpose is to prevent the unilateral severance by one parent of the other's relationship with their children, as well as the unilateral selection of a forum most convenient to the departing parent without prior assessment of the children's best interests. Where children are concerned, possession cannot be 9/10th of the law. . . .

76 Deterrence of abduction is enhanced by certainty that return will be ordered. Refusal to order return detracts from that certainty and therefore detracts from the deterrence intended by the Convention. This consideration supports, in general, a rather limited scope for the operation of any exception to ordering return. Consistent with this view, the Supreme Court of Canada has stated that a narrow interpretation should be given to the exceptions to ordering return, including the settled exception: see *V.W. v. D.S.*, supra at para. 37; see also *New Brunswick (Attorney General) v. Majeau-Prasad* (2000), 10 R.F.L. (5th) 389, [2000] N.B.J. No. 363 (N.B. Q.B.).

77 Of course, taken to its logical conclusion, the deterrent purpose of the Convention could be used to negate virtually any exception to ordering return. That is clearly not the Convention's intent. However, the present case is a strong one for underlining and emphasizing the deterrent purposes of the Convention. For a time, Dr. S. used the Iowa courts to vigorously and continually assert her rights and her claims as to what was in K.'s best interests. However, she ultimately thwarted the judicial process in Iowa before it came to a conclusion. Such conduct, if not checked, would make it impossible for any parent to be secure in any court ordered custody and access. The extent of Dr. S.'s deception and the long success of her abduction are breath taking. This was no impulsive flight, making it all the more important to deter others from doing likewise. And she has not done it all alone. Dr. S., and any who have knowingly assisted her in this abduction must be made to understand how firmly and unequivocally the courts of this Province will deal with international child abduction. It also must be clear that Nova Scotia is not a haven for child abductors. In all of these respects, the facts of this case call for a response stressing precisely the deterrence which is at the core of the Convention's objectives.

78 That brings me to the next and most important consideration. It is fundamental to the whole scheme of the Convention that the best interests of an abducted child should generally be determined by the courts of the place of habitual residence. As pointed out by Pérez-Vera, there is a strong link between this objective and the settled exception. The exception recognizes that after a child has become settled in a new environment, return should take place only after an examination of the merits of the custody rights being exercised with respect to the child by the courts of the place in which the child has become settled. In short, the settled exception ought to apply where the policy in favour of entrusting the best interests of the child to the courts in the place of habitual residence is no longer a strong one in the circumstances of the particular case.

79 That is not the case here. Of course, K. has lived in Nova Scotia almost twice as long as she did in

Iowa, a place where she has not been for the last 7 of her 10 years. Most of the world, as K. now knows it, is here. So are most of the people best placed to inform the court about her current needs and circumstances. However, her links to Iowa, even after all this time, cannot be ignored and neither can the justice and logic of entrusting her best interests to the Iowa courts. Her father and members of her extended family are there. So are the professional persons most directly involved in the investigation of the allegations of abuse. It seems clear that those matters must be resolved judicially and addressed therapeutically before there can be any realistic prospect of Mr. A. having a meaningful relationship with K.. The long passage of time notwithS., the Iowa courts are well placed to continue the process set in motion there in 1995 and to adjudicate issues concerning K.'s relationship with her father.

80 To sum up, ordering K.'s return to Iowa after all this time away would further the general deterrent purposes of the Convention in the particularly compelling circumstances calling for such deterrence which are present here. Return would also underline the appropriateness of the outstanding issues concerning her best interests being adjudicated in the Iowa courts. In other words, there are sound and compelling reasons based on the circumstances of this case and the objectives of the Convention not to apply the settled exception here.

81 This purposive and contextual analysis is only part of what is required to consider the claim that K.'s return should be refused because she is settled in her new environment. The concept of being settled is one of degree and requires a careful examination and assessment of the child's circumstances here and a balancing of them with the objectives of the Convention.

82 Most of the Canadian authorities have focussed primarily on the factual aspects of the inquiry: see for example, *Ayala v. Ayala*, [1990] O.J. No. 2751 (Ont. Prov. Ct.); *Bielawski v. Lozinska*, [1997] O.J. No. 3214 (Ont. Prov. Div.); *French v. Onderik*, [1995] O.J. No. 3626 (Ont. Prov. Div.); *Droit de la famille - 3193*, [1998] Q.J. No. 4097 (C.S. Que.); *Szalas v. Szabo*, [1995] O.J. No. 1918 (Ont. Prov. Div.); *Majeau-Prasad*, *supra*. The idea of settled is seen as having a physical element, relating to being established in a community, and an emotional element, relating to security and stability: see, for example, *Director-General Department of Families, Youth and Community Care v. Moore* [1999] FamCA 284 (Full Court of the Family Court of Australia). The aspect of stability includes the child's future prospects as well as his or her current circumstances.

83 In making the assessment of the extent to which the child is settled in his or her new environment, I would respectfully adopt as a helpful general statement of the matters to be considered the following passage from Lawrence Collins et al, *Dicey and Morris on the Conflict of Laws* (13th, 2000) at para. 19-096:

> . . . "Settled" is to be given its natural meaning, which includes an examination of the existing facts demonstrating the establishment of the child in a community and an environment, and a consideration of the perceived stability of the position into the future. . . . The "new" features of the situation are to be examined: they will include place, home, school, friends, activities and opportunities, but not *per se* the continuing relationship with the abducting parent. The court has to consider whether the child is so settled in its new environment that it is justifiable to set aside the otherwise mandatory requirement to return the child, whether the interest of the child in not being uprooted is so cogent that it outweighs the primary purpose of the Convention.

84 The appellant says that there is compelling evidence that K. is settled in her new environment. She points to evidence concerning not only the length of time she has been in Nova Scotia but also to the extensive and moving evidence concerning her friends, her activities, including 4-H, music lessons and riding, and to her school and home environment. Mr. Whitzman opined that K. has adjusted well to her new home and has settled in at school, home and community, that she has made friends and become involved in community

events.

85 I agree that the evidence concerning place, home, school, friends and activities supports the view that K. is now established in her community in this province. However, these factors of place, home, school, friends and activities are not the only relevant considerations. The question of whether a child is settled requires as well examination of the perceived stability of her position into the future. When one does so in this case, it is apparent that there is little true stability here.

86 K. and her mother are illegally in Canada; their ability to remain here is, at best, uncertain as the trial judge found. K.'s "new" family has broken up and her relationship with her stepfather and her half-sister have been causing K. stress. There are obviously serious issues to be addressed between Dr. and Dr. M. and no reason to think that their acrimony is likely to subside in the near future. Moreover, the fact that K.'s father has located her at long last has dramatically changed the world as K. has known it for the last several years. Prior to July of 2001, when her father found her, K. was well-established in a world that did not include him. Whether she goes back to Iowa or remains here, that world no longer exists. In summary, K. is now caught once again in a battle between her mother and father, with the consequences of abduction now added to the ramifications of the allegations of abuse. Her illegal presence in this country has come to light. Her "new" family has broken up and is in the midst of its own, apparently bitter, struggles.

87 I think, as well, that in considering the question of whether K. is settled, the degree to which her mother is settled is a relevant consideration: see, for example, *M. (P.M.) v. L. (S.K.)*, [2000] Scot. J. No. 124 (Scotland O.H.) at paras. 24 - 28. While creating as stable and secure an environment for K. as circumstances will permit, Dr. 's own situation is far from settled. Her illegal presence here not only raises the question of whether she will be able to remain in Canada, it makes it difficult if not impossible, to work here. The ongoing issues arising from the failure of the marriage between Dr. and Dr. M. also contribute to instability in the present and uncertainty about the future.

88 With all due respect to the appellant, to characterize the evidence as overwhelmingly supporting the conclusion that K. is settled in her new environment is to ignore many of the facts as they appear in the record. The heartrending circumstances in which this little girl now finds herself, thanks to decisions made by adults on her behalf, may be described as many things. Settled is not one of them. There is certainly no palpable and overriding error in the judge's assessment of the record which led him to that conclusion.

89 The appellant submits that the judge applied the wrong legal test for settled, but has not identified any specific error. Rather, it is submitted that the judge's conclusion shows that he must have applied too stringent a test. This is because the evidence that K. was settled, according to the appellant, was so compelling that any other finding must have been premised on a wrong legal principle. This argument is really one of fact, not law and, for the reasons just given, is of no substance.

90 The appellant submits that the judge failed to give appropriate weight to the "uncontradicted" evidence that K. was settled and that he misapprehended highly relevant evidence. It is argued that the judge " . . . misapprehended critical aspects of the evidence of therapist Carole Meade, Ward A. Rouse, Martin P. Whitzman and the Appellant . . . " which contributed to his erroneous conclusion that K. was not "settled in" her new environment. In my view, these arguments do not withstand careful scrutiny.

91 I fail to see, for example, how the evidence of Dr. Meade relates to the issue of whether or not K. was "settled in" her new environment. She gave no evidence about K.'s present circumstances. According to her affidavit, her last session with K. was in July of 1995. Dr. Meade's affidavit and testimony are relevant to the question of whether there is a grave risk of harm to K. if she is returned to Iowa, but, as noted, the judge's finding that there was not is unchallenged on appeal.

92 The appellant says that the judge misapprehended the evidence of Mr. Rouse, the appellant's U.S. attorney. The judge said that Mr. Rouse reported to the appellant that the St. Luke's report concerning the alleged abuse "would come back founded". Mr. Rouse in his affidavit had said rather that the report "came back founded". I fail to see the significance of his slight difference, let alone how it could possibly affect the judge's conclusion on the question of whether K. was settled in her new environment.

93 Next it is said that the judge was speculating that pictures of Mr. A. which had been distributed in the community by Mr. Waldman (a close friend of Dr. and K.) had come to K.'s attention, thereby adding to the environment of deception and fear. Mr. Waldman, apparently after the telephone call from Mr. A. to K. in July of 2001, had distributed pictures of Mr. A. and told people to call the RCMP if they saw him. The judge said nothing more than that this activity and its possible consequences caused him concern. I see nothing wrong with that.

94 I would conclude that, while K. is well integrated into the day to day life of her community, the judge did not err in finding that she is not settled in her new environment within the meaning of the Convention. Her personal circumstances and those of her mother are highly uncertain and refusing to order return would seriously undermine the Convention's intent to deter international child abduction and to respect the role of the Courts of Iowa in determining what K.'s best interests require.

5. Other issues:

95 The final submission by the appellant, summarized in the seventh ground of appeal, is that the judge erred in allowing his adverse finding of credibility against the appellant to become the overriding issue in arriving at his decision rather than whether the evidence presented established the exceptions put forward under Articles 12 and 13 of the Convention. Significantly, however, the judge's conclusions about the credibility of Dr. are not challenged on appeal.

96 Having concluded, as I do, that the judge did not err in either fact or law in his consideration of the two exceptions relevant to this appeal, nothing would be gained by addressing this argument further. No judge, nor anyone else who attaches importance to the rule of law, could be other than dismayed at Dr. 's conduct. There is nothing in the decision of the judge, however, even remotely suggesting that he failed in any way to exercise his grave responsibilities in this matter judicially.

97 To conclude on the merits of the appeal, the judge did not err in fact or law in ordering K.'s return to Iowa. That leaves for consideration the issue of what transitional arrangements should be made in order to facilitate her return.

VI. Transitional Arrangements:

98 Once it is determined that a child is to be returned as required by the Convention, the question remains as to how that return should be effected.

99 I agree with the Ontario Court of Appeal in *Finizio, supra*, that counsel appearing on a Convention application should deal fully with the issue of how the child should be returned if return is ordered: see *Finizio, supra* at para. 37. In this case, we requested additional written and oral submissions on this subject as it had not been addressed by the judge at first instance or by counsel in their initial submissions to this Court.

100 To begin, one must address what is meant by transitional provisions. In my view, transitional provisions are the arrangements put in place by the Court ordering return to deal with the transitional period. I would define this transitional period as being the time between the making of the return order and the time the child is taken before the courts of the place of the child's habitual residence: see *Finizio, supra*, at para

36.

101 The Convention does not explicitly address the question of transitional arrangements. Moreover, as held in *Thomson*, *supra*, the court in which return is requested under the Convention should not attempt to mix proceedings under it with the exercise of more traditional domestic jurisdiction over children: see *Thomson* at para. 93. However, as the Supreme Court of Canada stated in *Thomson*, " . . . the court [acting under the Convention] must be assumed to have sufficient control over its process to take the necessary action to meet the purpose and spirit of the Convention.": at para. 96. The Court also held that transitional provisions may be worked out by the Court requiring undertakings of the parties, provided such are made in the spirit of the Convention: see *Thomson* at para. 84.

102 Transitional provisions will not be necessary or even desirable in all cases. In the more usual situation contemplated by the Convention, the return order will simply restore the child promptly to the custody of the parent who had been exercising care and control of the child prior to the abduction. In such cases, " . . . it is neither necessary nor desirable to proceed otherwise than with the utmost expedition.": *Thomson* at para. 95.

103 The present case, of course, involves a totally different situation. Seven years have gone by since the abduction and Mr. A., whose rights of custody are the foundation of the return order, has had no meaningful contact with K. since well before the abduction occurred. As noted by LaForest, J. in *Thomson* at para. 83, " . . . courts have recognized that frequently an unqualified return order can be detrimental to the short term interests of the child in that it wrenches the child from its *de facto* primary caregiver." In my opinion, this is such a case. So I think it is clear that transitional provisions are essential in this case given the long passage of time and the lack of any present relationship between K. and Mr. A..

104 The objective of transitional provisions is very simple: to ameliorate any harm to the child resulting from the return order. As has been said, children should not be made to suffer twice from the wrongful abduction: see Helper, J.A. as quoted in *Thomson* at para. 83. Without undermining the objectives of the Convention, the transitional arrangements ought to be child centred, addressing, to the extent possible, the needs and interests of the particular child who is being returned.

105 In doing this, however, courts must keep in mind the proper limits, both practical and jurisdictional, of transitional provisions. Such provisions must not, for example, be so complex or cumbersome that they lead to further proceedings and the delay they will likely involve. Nor should the transitional provisions attempt to bind the courts of the place of habitual residence to take or refrain from taking certain action: see generally, Stephen Bourke, et al. *Issues Surrounding the Safe Return of the Child (and the Custodial Parent)* (revised version of a paper presented by the Delegation from the Commonwealth of Australia to International Child Custody, a Common Law Judicial Conference, September 18 - 21, 2000, Washington D.C., Hague Convention on the Civil Aspects of Child Abduction, Discussion Topic No. 3). What is called for is a child centred approach, but one that recognizes the practical and legal limits of what can be done in the particular circumstances.

106 We have had the benefit of written and oral submissions from the parties concerning transitional provisions. While they all agree that transitional provisions are required in order to ameliorate the impact on K. of the return order, there is consensus about little else. Dr. requests that return be delayed until the end of K.'s school term on December 20 and will undertake to return to Iowa with K. immediately thereafter. She proposes to reside with her sister in Des Moines and have K. continue to see therapist Martin Whitzman. Dr. M. and Mr. A. urge that K. be returned to Iowa immediately. While they do not object to her mother travelling at the same time, they propose that K. be accompanied by a third person (such as Dr. M. or one of the access supervisors, Ms. White or Ms. Campbell-Gallagher). We were advised that the two last named per-

sons are willing to do so. Mr. A. and Dr. M. propose that K. should not reside with Dr. 's sister because they allege that she facilitated K.'s abduction in 1995. They do not want Mr. Whitzman's involvement to continue and propose the involvement of the Rachel Foundation upon K.'s return to Iowa. Mr. A., recognizing that a comprehensive transition process is called for, undertakes not to enforce the "pick up" order currently in force in the Iowa Courts and to instruct his Attorney to commence proceedings before the Iowa Courts as soon as the proposed arrival date of K. is known. Both Mr. A. and Dr. M. express concern that Dr. continues to be a flight risk and request that any transitional arrangements recognize this.

107 In considering these submissions, it must be remembered that this Court, in making transitional arrangements, is not and should not be attempting to restore the relationship between K. and her father. The objective of transitional arrangements is much more modest: to ameliorate the risk of harm resulting from the return of the child to Iowa. Simply put, our role is to put in place arrangements that will get K. to Iowa as painlessly as possible under the circumstances. The rest is up to the Iowa courts. It follows that issues such as who should have day to day custody of K. in Iowa, where she should reside, what professionals should be engaged to assist her and so on are all matters for the Iowa courts.

108 In my view, transitional arrangements put in place by this Court should address only the following issues: 1. When should K. be returned to Iowa? 2. How is she going to get there? 3. Where is she going to go upon arrival? and, 4. How can obedience to the removal order be assured? I will address each in turn.

109 First, timing. While I accept the opinion of Mr. Whitzman and the submissions by Mr. Garson that some delay in return is appropriate, I think that two months is excessive under all of the circumstances. The order for immediate return was made in May of this year and while it has been stayed pending this appeal, return to Iowa has been something which K. has had to address at least since then. I doubt that two more months are essential to help with the adjustment. I understand K.'s wish to finish out her term at school. However, that would require her return to Iowa very close to the holidays which may well complicate matters in other ways. What is most needed, in my opinion, is for a court to address K.'s best interests comprehensively and as soon as possible. That is what the return to Iowa is supposed to achieve. While allowing some time to make arrangements, to reduce anxiety and to say au revoir is sensible, delaying return to the end of the year in my view is not.

110 I would conclude therefore that K. should be returned to Iowa on or before November 22. I would encourage K.'s continuing involvement with Mr. Whitzman during the time she remains in Nova Scotia.

111 I turn next to travel arrangements. K. has strongly expressed the wish to travel with her mother and her mother is willing to accompany her to Iowa. I agree that this is appropriate under the circumstances. I, therefore, would direct, given her mother's stated willingness to accompany her, that K. travel to Iowa with her mother.

112 Where should K. go upon arrival in Iowa? Once K. has arrived in Iowa, the arrangements for her care are within the jurisdiction of the Iowa courts. Given that there will be advance notice of her arrival, it is quite possible that the Iowa courts will have had an opportunity to address the issue of K.'s care, including her place of residence, before she arrives. I wish to make it clear, therefore, that any direction we give in this regard is aimed at filling any gaps in the arrangements during the transitional period and is subject to any other order which the Iowa Courts might make.

113 Everyone acknowledges that it would be most undesirable to have the pick-up order given by the Iowa courts some years ago enforced at this stage and under the present circumstances. I would, therefore, accept Mr. A.' undertaking not to enforce that order until there has been the opportunity for the Iowa court to consider the matter in light of current circumstances.

114 Dr. proposes that, upon return to Iowa, she and K. reside in Des Moines with Ka.S.. Subject to any other order which may be made in Iowa, I direct that she do so until further order of the Iowa courts.

115 I turn finally to steps to help assure that the return order is carried out. In this regard, I would direct as follows:

1. Dr. S. shall travel with K. to Des Moines Iowa by the most direct route on or before November 22, 2002.

2. Not later than November 1, 2002, Dr. S. will advise the Court through the Registrar and serve on all other parties a copy of the travel itinerary showing the dates and times of all travel between Halifax and Des Moines.

3. Dr. S. and K. will be accompanied during travel by Ms. Jessica White or Ms. Margaret Campbell-Gallagher. Dr. S. shall be responsible for the return travel expenses and reasonable fees of the person accompanying her.

4. Effective immediately, Dr. S. will report daily before 3:00 p.m., in person or by telephone as the officer-in-charge may direct, to the RCMP Detachment, 140 Morrison Drive, Windsor, Nova Scotia, BON 2T0 or by telephone at (902) 798-2207. Any failure by her to so report shall be communicated forthwith to the Registrar of this Court. Counsel for Mr. A. shall see to it that a copy of our order is served forthwith on the officer-in-charge of the Detachment.

VII. Disposition:

116 I would dismiss the appeal, except to the extent of varying the order for immediate return to an order for return no later than November 22, 2002 and adding the transitional provisions set out above. I would order that the appellant pay to the respondent J.A. his costs of the appeal fixed at $3000 plus disbursements but would make no other order as to costs.

Order accordingly.

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