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

B E T W E E N:

DARNELL CHARLES CALLICUTT,)	<u>Appearances:</u>
)	
Applicant,)	<u>W. Post and C. Lang</u>
- and -)	for the Central Authority for the
)	Province of Manitoba, on behalf
)	of the Applicant
)	
KARA MICHELLE CALLICUTT)	
)	<u>L. Mirwaldt, Q.C. and C. Sarna</u>
Respondent)	for the Respondent
)	
)	JUDGMENT DELIVERED:
)	July 9, 2014

HATCH J.

INTRODUCTION

[1] This case considers the interpretation of the Hague *Convention on Civil Aspects of International Child Abduction*, Can. T.S. 1983, No. 35, ("Hague *Convention*") in respect to its purposes, its procedures, the exceptions to the return of children, and whether evidence of domestic and family violence is sufficient to trigger the grave risk exception.

[2] The father seeks an order pursuant to the Hague *Convention* that the children be returned to Guam. The mother denies that the removal or retention of the children was wrongful on the basis that the children were not habitually resident in Guam and that the father was not exercising his custody rights at the time of removal.

[3] If the removal was wrongful, the mother relies on the exceptions set out under Article 13 which give the court discretion to decline to grant the return order. She submits that the father implicitly or explicitly consented to the removal of the children, and that a return order would expose them to grave risk of physical or psychological harm or place them in an intolerable situation.

ISSUES

[4] The issues are:

- i. Were the children wrongfully removed from Guam by the mother?
- ii. Were the children habitually resident in Guam at the time of their removal?
- iii. Was the father exercising his custody rights pursuant to Guam law at the time of removal?
- iv. Did the father consent to or subsequently acquiesce in the mother's removal or retention of the children?
- v. Is there a grave risk that the return of the children to Guam would expose them to physical or psychological harm or cause them to be placed in an intolerable situation?

- vi. Whether the court should exercise its discretion to decline to grant the return order if any of the exceptions exist.

THE HAGUE CONVENTION

[5] Guam is an island territory of the United States, located in the western Pacific Ocean. Canada and the United States are contracting states under the Hague *Convention*.

[6] Section 17 of ***The Child Custody Enforcement Act*** C.C.S.M. c C360 provides that the Hague *Convention* is in force in Manitoba and designates the Department of Justice as the Central Authority for Manitoba in respect thereto.

[7] The preamble of the Hague *Convention* includes the goals “to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to ... their habitual residence.”

[8] Article 1 outlines the objects of the Hague *Convention* as follows:

- 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.

PROCEDURAL PROTOCOL

[9] The children were removed from Guam by their mother on October 29, 2013.

[10] The "Procedural Protocol" for the Handling of Return Applications Under the *1980 Hague Abduction Convention* (the "Protocol"), established by our court, was followed. It is attached hereto as **Appendix "A"**.

[11] The Family Law Branch of Manitoba Justice, appointed by the Department of Justice as the Central Authority in Manitoba, filed the Requisition and Notice on February 12, 2014 and the Notice of Application on March 7, 2014.

[12] Pursuant to our Protocol, an Interim Order pronounced by consent on March 18, 2014, fixed time lines for the filing of materials by the parties and scheduled the hearing date of June 3, 2014. The mother was ordered to deliver the passports of herself and the children to the court for safekeeping pending a final determination of the matter, and to provide contact particulars to the Central Authority for the Province of Manitoba. The order contained a non-removal clause from Winnipeg with a specified exception.

THE LAW

[13] I am mindful of the well-established principle articulated in the leading case of *Thomson v. Thomson*, [1994] 3 S.C.R. 551 (S.C.C.), that return applications under the Hague *Convention* are not to be treated as custody hearings where the sole test is the child's best interests (p. 578).

[14] Article 12 of the Hague *Convention* requires that if I find that the children have been wrongfully removed or retained, I must order their return, unless one of the following exceptions articulated in Article 13 exist:

- 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.

[15] The onus is on the person opposing the return order to prove, on a balance of probabilities that an exception is present.

WRONGFUL REMOVAL OR RETENTION

[16] According to Article 3 of the Hague *Convention*, “[t]he 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.

[17] In *Thomson*, the mother breached an interim custody order that “contained a non-removal clause.” It is not necessary that the interim custody order contain a non-removal clause to constitute a wrongful removal (See *Lombardi v. Mehnert*, 2008 ONCJ 164, 50 R.F.L. (6th) 305). Nor is it required that an order be in place.

[18] Pursuant to Article 4, for the Hague *Convention* to apply, the child (under 16) must have been “habitually resident in a Contracting State immediately before any breach of custody or access rights.”

[19] Feldman J.A. in *Korutowska-Wooff v. Wooff*, [2004] 242 D.L.R. (4th) 385 (Ont. C.A.), articulates “principles” to consider in determining a child’s habitual residence, two of which refer to the requirement of a “settled intention” (at para. 8):

. . .

- the habitual residence is the place where the person resides for an appreciable period of time with a "settled intention";
- a "settled intention" or "purpose" is an intent to stay in a place whether temporarily or permanently for a particular purpose, such as employment, family, etc.

[20] As Lafrenière J. observed in *Csoke v. Fustos*, 2013 ONSC 2417, [2013] O.J. No. 1927 (QL) (at para. 247):

The determination of “**habitual residence**” is a fact based determination. The court must look at the facts, the shared intentions of the parties, the history of the child’s location and the settled nature of the family prior to the facts giving rise to the request for return.

THE FACTS

[21] The parties began dating in October 2008, and were engaged on February 27, 2009. During that time, the mother resided in Winnipeg with her parents and worked at Ma Mawi Wi Chi Itata Centre. She is a Canadian citizen.

[22] The father resided in Everett, Washington ("Everett"). He is an American citizen. He continues to be employed as a Petty Officer, Second Class, with the U.S. Navy.

[23] The mother relocated to Everett on April 30, 2009 to join the father. They were married there on May 18, 2009.

[24] Their twin boys, A. and E., were born on April 18, 2010, in Everett. The children have American and Canadian citizenships. They are also Status Indians through Norway House First Nation.

[25] When the children were two months old, the father was deployed to Dubai, Malaysia and Singapore from June 2010 to April 2011, a period of approximately 10 months.

[26] The mother and the children remained living in Everett, until the end of August 2010, when they went to stay with the father's parents in Houston, Texas for a little over one month.

[27] The mother and the children then resided with her mother in Thompson, Manitoba from October 2010 until the end of April 2011, a period of seven months.

[28] After the father's return, the parties and their children lived in Everett, from the end of April 2011 until November 2012.

[29] The father was ordered to relocate to Guam, for a three-year period, commencing November 27, 2012.

[30] The mother's evidence is that during their marriage, the father physically and verbally abused her and that she agreed to go to Guam with him on the joint understanding that if their marriage did not improve, she and the children would return to live in Thompson, Manitoba.

[31] The family resided in Guam from November 26, 2012, until the mother left with the children on October 29, 2013.

[32] During this time, there were numerous incidents of domestic and family violence, which included physical abuse of the children and the mother.

[33] On October 3, 2013, after the father repeatedly hit the child E. with a belt, the mother left the father on a final basis. Following a protection hearing held on October 16, 2013, the mother obtained a protection order pronounced October 23, 2013 from the Guam court.

[34] The protection order prohibited the father from coming within 500 feet of the mother's place of residence or employment, or contacting the mother directly or indirectly, except for "coordinating the time and location of exchange of custody of the minor children."

[35] The Guam court also ordered that as a means of "protecting" the mother from the father's abuse, the parties would alternate weekly care of the children for the first six months of the protection order, subject to further action by the child protection authorities and a custody order.

[36] The court stated in its decision dated October 23, 2013:

For purposes of protecting Petitioner from abuse, during the first six months of this order the Parties shall temporarily share joint legal and

physical custody of the minor children. The parties shall alternate the physical custody of the minor children each week. The length or terms of their temporary custody order is furthermore subject to any further action by Guam Child Protection Services or any order of custody by any court with home jurisdiction over the Parties.

[emphasis added]

[37] On October 24, 2013, the day after the protection order was pronounced, the father's Commanding Officer ("CO") recommended that the parties proceed with an Early Return of Dependant Application ("ERD").

[38] The father states in his affidavit of April 1, 2014 (at para. 30):

... My Commanding Officer expressed concern about my future career with the military, given the number of domestic incidents that had occurred between Kara and myself. My Commanding Officer further explained to me that in the event that an ERD Application was approved, it would have the financial benefit of covering all of Kara's travel costs back to Canada, as well as the cost of shipping her personal belongings.

[39] The father's evidence is that he was concerned that custody of the children had not been resolved on a final basis, but his CO advised him that the ERD process takes several weeks; that custody would have to be resolved before the mother would be permitted to leave on the ERD; and that if the mother was granted custody of the children by the Guam court, their costs of travel and shipment of personal belongings off the island would be paid for.

[40] On October 24, 2013, the father signed the ERD, requesting that transportation for the mother and the children, and shipment of his household goods and privately-owned vehicle be "furnished from Guam to Thompson, M[a]nitoba, Canada."

[41] The reason he listed was, "Legal separation from spouse pending divorce due to numerous domestic complaints."

[42] The ERD states that the father will continue in his "present duty station until approximately December 2015," and that he understands that "the return" of his "dependants to the overseas area is subject to approval" and "granted only under unusual circumstances."

[43] The mother's evidence is that she was anxious to return to Canada, as the father's CO told her that the Navy no longer wanted her to remain in Guam, "due to the number of domestic violence incidents" involving her and the father.

[44] Attached to the ERD is a memorandum prepared by the Navy, which at point 2, summarizes the mother's concerns in respect to the father's abusive behavior and records her joint request for "an Early Return of Dependents to Canada (where her support system is located)."

[45] Point 3 of the memorandum reads that the parties "are both in agreement to the Early Return of Dependents request with the exception of child custody, which will need to be legally arranged and agreed upon, before any return occurs."

[46] When the mother learned on October 25, 2013, that her mother had passed away unexpectedly on October 24, 2013, she wanted to return to Canada immediately and to bring the children with her to attend her mother's funeral.

[47] The father refused to allow the mother to leave to attend the funeral, unless she agreed to dismiss the protection order against him and to return to Guam with the children on November 27, 2013, after only a 30 day period.

[48] The mother's evidence is that she only agreed to these conditions unilaterally imposed by the father, in order to leave Guam and to keep the children and herself safe from further "assaults and abuse by" him.

[49] On October 25, 2013, the mother filed her motion to request that the court dismiss the protection order.

[50] On October 25, 2013, the father signed travel consent documents, permitting the mother to travel with the children outside the United States from October 29, 2013 to November 27, 2013.

[51] On November 5, 2013, the court dismissed the protection order.

[52] The mother has remained in Manitoba with the children since her departure on October 29, 2013.

[53] The mother has attended counseling for domestic abuse, through Klinik in Winnipeg, since her return.

[54] The children are special needs children. The child A. has sensori-neural hearing loss and experiences pain in his kidneys, and the child E. has delayed speech. The children attend speech and occupational therapy at St. Boniface Hospital, and have been referred to attend the Manitoba School for the Deaf.

WERE THE CHILDREN HABITUALLY RESIDENT IN GUAM?

[55] The mother argues that the removal of the children was not wrongful, as the children were not habitually resident in Guam at the time of her removal of them. She submits that Guam is not the location in which the parties and the children spent most of their time.

[56] She notes that the children lived a total of 22.5 months in Everett, one month in Houston, Texas, six months in Winnipeg and Thompson, Manitoba, and 11 months in Guam.

[57] I appreciate that the children resided in Guam for less than a year of their lives. However, there is no minimum time requirement designated in the Hague *Convention* for a child to have lived in a country, to trigger the habitual residence definition.

[58] Members of the military reside with their families in various locations for varied time periods, to fulfill their duties to serve their country.

[59] The case law is clear that the amount of time that the child resides in the particular country, is only one factor to consider (See ***Korutowska-Wooff, Csoke; A.E.S. v. A.M.W.***, 2012 ABQB 753, 83 Alta L.R. (5th) 86).

[60] The mother submits that there was no shared settled intention of the parties to make Guam their home and that she only intended to stay in Guam for the purpose of determining if her marriage to the father could be salvaged.

[61] The father's evidence is that the family was settled in Guam.

[62] In *Csoke*, Lafrenière J. refers to the definition of “settled intention” given in Cheshire and North’s *Private International Law*, 13th ed. (London: Butterworths, 1999) at pp. 166-167, cited in *Chan v. Chow*, 2001 BCCA 276, [2001] B.C.J. No. 904:

[253] ... There is no need to show a person intended to stay there permanently or indefinitely. The settled intention can be for a limited period, a period limited by the immediate purpose such as employment. ...

[63] The parties intended to stay in Guam for the father’s employment.

[64] The mother’s evidence that her intention was to return earlier if the marriage did not improve, continues to fall within the definition of “settled intention.”

[65] The family lived in military housing on the naval base, and then in a home off the base. The children attended daycare and speech therapy in Guam.

[66] I find that the children were habitually resident in Guam at the time of their removal by the mother.

[67] Both parents have equal parental authority in Guam.

[68] Guam’s Code Annotated, Title 19, Personal Relations, Chapter 4, Parent and Child states:

§4106. Custody. The father and mother of a legitimate unmarried minor child are equally entitled to its custody, services and earnings. If either the father or mother be dead or unable or refuse to take the custody or has abandoned his or her family, the other is entitled to its custody, services and earnings.

§4107. Living Separate; Rights Are Equal. The husband and father, as such, has no rights superior to those of the wife and mother, in regard to the care, custody, education, and control of the children of the

marriage, while such husband and wife live separate and apart from each other.

[69] The father would have exercised his rights of custody, had the children not been removed. His rights were breached by the mother's action of retaining the children beyond the date that the father had authorized on the travel consent form.

[70] I find that the children were wrongfully removed from Guam by the mother, within the meaning of Article 3 of the Hague *Convention*.

[71] Accordingly, the court must order the return of the children to Guam for the custody proceedings to take place, unless the mother is able to prove that an exception under the Hague *Convention* applies to permit the children to remain in Manitoba pending the family proceedings.

[72] The mother contends that all three exceptions set out in Article 13 of the Hague *Convention* apply.

FAILURE TO EXERCISE CUSTODY RIGHTS

[73] The court has discretion under Article 13(a), not to order the return of the children to Guam, if the father was not exercising his custody rights at the time of removal or retention.

[74] The protection order granted October 23, 2013, which gave the father alternate weekly periods of care of the children, was in effect on October 29, 2013, the day that the mother left Guam with the children.

[75] The order was not dismissed until November 5, 2013.

[76] There is no evidence in the affidavits filed by the parties, as to whether or not the father was exercising his custody rights under the protection order at the time the mother left.

[77] I find that the mother has not proven that this exception applies.

CONSENT TO REMOVAL

[78] The mother submits that there has been no breach of custody rights because the father “had consented to or subsequently acquiesced in the removal or retention” of the children by her, which under Article 13(a), would constitute a further exception to the return of the children.

[79] In *Katsigiannis v. Kottick-Katsigiannis*, [2001] O.J. No. 1598 (QL) (Ont. C.A.), Osborne A.C.J.O. (as he then was), on behalf of the Ontario Court of Appeal, reviewed a number of authorities and concluded at paras. 47 and 49, that the words “consent” and “acquiescence” should be given “their plain, ordinary meaning” and that the evidence to establish their presence must be “clear and cogent”:

[47] “To consent” is to agree to something, such as the removal of children from their habitual residence. “To acquiesce” is to agree tacitly, silently, or passively to something such as the children remaining in a jurisdiction which is not their habitual residence. Thus, acquiescence implies unstated consent.

[49] ... to trigger the application of the Article 13(a) defence there must be clear and cogent evidence of unequivocal consent or acquiescence.

[80] The mother contends that the father’s consent to the children’s removal is proven by the fact that he signed the ERD.

[81] She submits that he only inserted the one-month travel condition, “at the eleventh-hour” when the mother was dealing with the death of her mother and that he “coerced” her into discontinuing her protection/custody proceedings.

[82] The father signed the ERD for the purpose of ensuring that his employer would pay the transportation costs of the mother and children from Guam to Manitoba.

[83] I find that the father’s consent to the children moving to Manitoba, given on October 24, 2013 when he signed the ERD, was a conditional consent, that required custody and access to be resolved either by agreement or court order, before the move was to take place.

[84] When an urgent departure was required as a result of the mother’s mother’s funeral, the father provided a time-limited, one month travel consent.

[85] When the mother ceased contact with the father on November 10, 2013, and did not return to Guam with the children, the father retained legal counsel in Guam in November 2013, to commence divorce proceedings and request sole custody. His actions do not demonstrate subsequent acquiescence.

[86] In the circumstances, I find that the mother has not established that the father consented to or subsequently acquiesced in her removal or retention of the children.

DOMESTIC VIOLENCE AND THE GRAVE RISK EXCEPTION

[87] As a further defence, the mother submits that the “grave risk” exception articulated in Article 13(b) of the Hague *Convention* applies. She argues that a

return of the children to Guam would place the children at grave risk of “physical or psychological harm,” or in an “intolerable situation”.

[88] In *Thomson*, La Forest J. cites with approval, the definition of the “grave risk” exception enunciated in *Re A. (A Minor) (Abduction)*, [1988] 1 F.L.R. 365 (Eng. C.A.) (at p. 597):

. . .

... the risk has to be more than an ordinary risk, or something greater than would normally be expected on taking a child away from one parent and passing him to another. I agree . . . that not only must the risk be a weighty one, but that it must be one of substantial, and not trivial, psychological harm. That, as it seems to me, is the effect of the words 'or otherwise place the child in an intolerable situation'.

[89] The exception is a narrow one. Unlike the case at bar, in *Thomson*, the evidence before the court did not include child and spousal abuse allegations, rather the concern was whether separation from a parent constituted an “intolerable situation.”

[90] In *Achakzad v. Zemaryalai*, 2010 ONCJ 318, [2010] O.J. No. 3259 (QL) (Ont. Ct. Jus.), Murray J. reviews a number of cases respecting domestic violence and the grave risk exception in Article 13(b), and concludes that domestic violence to a parent can constitute a “grave risk of harm” to a child in her care. In *Achakzad*, as in the case at bar, the mother’s only motive to leave the place of the child’s habitual residence was due to domestic violence concerns.

[91] Murray J. refused to grant a return order. Factors that she considered included the escalating, numerous incidents of domestic violence, the wife’s fear

of the husband, her lack of friends and family for support and protection in the requesting state, and that future harm could result in reunifying the parties.

[92] Similarly, in *Krishna v. Krishna*, 1997 WL 195439 (N.D.Cal.), the court found at para. 4, that given the history of domestic violence, a return order “would pose a grave risk to the child’s well-being” and “would only serve to reinstate the child in a highly stressful and psychologically damaging environment,” noting in particular that the mother had “relatively limited familial support” in the requesting state.

[93] According to *Walsh v. Walsh*, 221 F.3d 204, 2000 U.S. App. Lexis 18007, at p. 35, the risk need “only” ... “be grave,” not “immediate.”

[94] In *Walsh*, Lynch C.J., citing a number of articles respecting domestic violence, states (at pp. 41 and 42):

... credible social science literature establishes that serial spousal abusers are also likely to be child abusers. ... both state and federal law have recognized that children are at increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser. ...

[95] A 2011 Case study, conducted by the Permanent Bureau of the Hague *Convention* to examine the relationship between domestic violence and the grave risk defence, reports at para. 22 that children who are exposed to domestic violence, either directly or indirectly, suffer during their childhood and adulthood from “aggressive and antisocial” and “fearful and inhibited” behaviours, “lower social competence,” and higher rates of “anxiety, “depression,” ... (Domestic and Family Violence and the Article 13 “Grave Risk” Exception in the Operation of the

Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A Reflection Paper (Preliminary Document No 9 of May 2011 for the attention of the Special Commission of June 2011 on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention).

GRAVE RISK: CORROBORATION OF DOMESTIC VIOLENCE

[96] The evidence in this case is overwhelming, that the mother and children have been subjected to a pattern of escalating, physical and emotional abuse and violent behavior by the father.

[97] Many incidents of the domestic violence on the mother and children were independently corroborated by photographs showing injuries to the mother and children, reports by the U.S. Navy and Guam Child Protection authorities, and the protection order granted by the Guam court, all of which I have placed significant weight on.

[98] In July 2013, the father was requested by his CO to move off of the naval base because of repeated domestic incidents.

[99] The mother indicates that this was triggered by an incident in July 2013, where she and the father were arguing and she insulted him. He pushed her into a mounted T.V. stand, and dragged her from the bedroom, screaming profanity and telling her to leave his house. A photograph depicts extensive bruising to the mother's arms resulting from the incident.

[100] The mother's evidence is that the father has choked her during these altercations. A photograph produced shows significant bruising to her neck, consistent with a "choke hold" which she states resulted from the father choking her in April 2013.

[101] Following the October 3, 2013 incident where the father beat the child E. on his thigh with a belt, the father's CO expressed concerns to him about his future career with the military due to the frequent family domestic incidents he was involved in. The father was requested to sign an ERD to have the mother and the children leave the island.

[102] There is evidence that the domestic violence has a longstanding history.

[103] The first signs of the father's temper revealed themselves three months after their marriage, when the mother told him that she had become pregnant. He became extremely upset with her and punched a hole in the door in their apartment. His explanation for his reaction is he "had been planning to get out of the military, and the pregnancy caused me to feel trapped in this career."

[104] The mother alleges that during her 12th and 16th weeks of pregnancy, he hit her in her stomach, causing cramps and vaginal bleeding, which necessitated her to attend for emergency medical care. The father denies this.

[105] On his return in April 2011, from a 10 month deployment, the father came to Thompson to see the mother and children, and promised the mother that he would change his behavior towards her. She agreed to move with him to Everett, where he was based.

[106] Once there however, the father's physical and verbal abuse of the mother increased dramatically. The police were frequently called to their home. This is not challenged by the father in his responding affidavit.

[107] The mother deposes that on one of these occasions she told the police that she started the fight, in order to prevent the father from being charged criminally and losing his job which supported them financially.

[108] According to the mother, the father punched her in the face in October 2011, while she was holding the child E., causing her to drop him. The child E. was crying and upset. The father denies that this incident took place.

[109] The parties acknowledge that in Guam, their marriage involved a high level of conflict.

[110] The father explains that the domestic incidents occurred because the mother drank alcohol to excess and would become violent, which forced him to be on the defensive, and that "sometimes" his "defensive actions resulted in physical contact" with the mother.

[111] The mother denies the father's allegation that she abused alcohol. She states that the father was the aggressor, that he subjected her and the children to "excessive levels of physical violence and verbal abuse" and that she "defended" herself and the children when he was abusing them.

[112] The mother deposes that she often had to flee the residence to go to the neighbors for help, and to ask them to phone the military police to protect herself and the children.

[113] The military police and Fleet and Family Services attended at their home on several occasions. Each time, the father was removed from the home and the parties would separate for a period of several days.

[114] The Navy's Incident Determination Committee ("IDC") conducted a hearing after each domestic incident and made findings regarding the incident. There were seven IDC hearings involving the parties, between November 2012 and October 2013.

[115] The mother's evidence is that the father was found guilty of spousal abuse of her on at least three occasions. The father does not deny same.

[116] The IDC incident report of September 26, 2013, verifies that the father was found guilty of spousal physical abuse of her on that date.

[117] The mother deposes that of the seven hearings, she stayed silent at three of them, "for fear" that the father "would be discharged from the Navy and that our family would lose its income." This is not denied by the father.

[118] Although the father would have access to all the IDC reports in Guam, the only report he produces for these proceedings is the report for the May 23, 2013 hearing, when the mother stayed silent, and the IDC found that she had inflicted physical abuse on the father.

[119] The mother states that the father choked her on May 23, 2013, and that the IDC told her that he could be arrested and charged criminally with attempted murder for choking her. She feared that he would be incarcerated and discharged from the Navy, leaving her and the children "stranded in Guam

without financial support.” The mother’s evidence, not denied by the father, is that after the incident, she and the father agreed that she should tell the IDC that she was the aggressor.

INJURIES TO THE CHILDREN

[120] On March 28, 2013, the father hit the child A., who was two years of age, repeatedly on the thigh with a thin orange belt. A photograph of the child in his diaper, verifies the serious nature and extent of the injuries to the child’s thigh, and indicates that the child was hit more than once by the father with the belt.

[121] On October 3, 2013, when the child E. would not go to bed, the father became angry and beat the child on the left side with a belt, causing a “welt that measured over 6 inches long and 2 inches in width.” The injuries to the child’s leg are confirmed by a photograph. The child was only three years of age at the time.

[122] After the child E. was hurt, the mother contacted her mother for advice, who suggested that she leave the home immediately and take the children to the hospital. The Emergency Medical Discharge sheet confirms bruising to the child’s left thigh, and indicates “alleged abuse.”

[123] The doctor who treated the child E., reported the child’s injuries to the Navy. On December 12, 2013, the IDC reported that they met to review the incident and determined that the father had physically abused the child.

[124] The mother contacted Guam Child Protective Services and advised their social worker that the father had injured the child and that she was afraid of the father further abusing herself and the children.

[125] A child abuse investigation by the Guam police department commenced. The investigation has been left open, given that the department has not interviewed the children yet.

[126] On October 9, 2013, the mother filed a petition for protection from abuse, and a motion for a temporary restraining order.

[127] On October 16, 2013, the Guam Court conducted a hearing in which both parties participated. The court found that in July 2013, the father had "attempted to choke the Petitioner by placing his hands around her neck and squeezing" and that he "also used degrading and explicative terms when referring [to] the Petitioner."

[128] The court, in its decision, held that:

Based upon this incident and the others described at the hearing the Court finds that the Petitioner has by a preponderance of the evidence sufficiently alleged facts to support a finding of Respondent's abuse of the Petitioner. ... The Court does not find that the facts and evidences, asserted and alleged, establish the Respondent's abuse of the Parties' minor children.

[129] Attached to the ERD that the father signed, is a memorandum copied to both parties, dated October 24, 2013 written by P. J. Whitehall, which indicates in part that the parties:

- "were seen individually on 04 and 07 October ... for an assessment of the latest concern- a report of child abuse that was allegedly perpetrated by" the husband "against his son on 03 October 2013" ...

- the wife states that the husband "was physically/emotionally abusive towards both children, and stated that the incident of 03 October was frightening and the worst incident of abuse that has occurred."
- the wife "reported she needs to put her children's physical/emotional safety first, and stated that she can no longer trust" ... the husband "to be in the home and around the children."
- "She has obtained a civilian Temporary Restraining Order that prevents" the husband's "contact with her and their children, unless under supervised visitation with the children."
- the wife "requests an Early Return of Dependents to Canada (where her support system is located) as she believes that this is what is in the best interest for her and her children."

[130] When the mother needed to leave on an urgent basis with the children, following the passing of her mother, the father demonstrated how manipulative and dishonorable he is when it comes to dealing with her.

[131] He refused to allow her and the children the freedom to attend her mother's funeral and pay her final respects to her mother, unless she agreed to dismiss the protection order that the Guam court had granted in her favour.

[132] This action by the father speaks volumes. It demonstrates his disregard and disrespect for the judicial system. It also reveals his devious and exploitative manner and controlling behavior that he shows to the mother, who clearly was in a vulnerable position.

[133] The father's application under the Hague *Convention* that he completed and signed on December 30, 2013, received by the Manitoba Family Law Branch on February 12, 2014, contains false statements, such as, that his CO decided to begin the process of an ERD "because of the ongoing problems Kara was causing" and that "Previously in April 2013, she was found guilty of child neglect."

[134] The father is not someone who can be trusted to follow the rules. When it comes to his relationship with the mother, he will manipulate and deceive to get his way.

[135] Abella J.A. (as he then was), stated in *Pollastro v. Pollastro* (1999), 43 O.R. (3d) 485 (QL) (Ont. C.A.) (at para. 17):

... it seems to me as a matter of common sense that returning a child to a violent environment places that child in an inherently intolerable situation, as well as exposing him or her to a serious risk of psychological and physical harm.

[136] On March 6, 2013, after contact via Skype occurred between the children and the father, the child E. experienced nightmares for the following week, and began to display clinging behaviour towards the mother's father.

PHYSICAL OR PSYCHOLOGICAL HARM

[137] I find that there is credible evidence that both the mother and the children were subjected to a longstanding pattern of domestic violence, involving both physical and emotional abuse.

[138] Because of the father's explosive temper and his propensity for violence, I am concerned that there is a real risk that the children would be exposed to physical harm and/or psychological harm if they were returned to Guam. He has demonstrated his lack of respect of court orders, using manipulative and coercive behaviour to have the protection order dismissed. In the circumstances of this case, it is probable that a protection order obtained in Guam would not

adequately protect the mother and the children. In my opinion, their safety would be at grave risk.

[139] I am concerned that even with a protection order in place, the father would not tend to respect it and would make attempts to contact the mother and the children. This would expose them to further physical and/or psychological harm.

[140] In *Achakzad*, as Murray J. observed (at para. 86):

Is the danger of future harm lessened, because the parties are no longer cohabiting? Although judges a generation ago may have held that belief, we know now that the risk of domestic violence actually increases following separation. Separation can mean a loss of control and an abusive spouse is often anxious to re-assert control. ...

[141] Given the evidence, I am satisfied that the mother has met the heavy onus required by Article 13(b), that a return order would place the children at grave risk of physical or psychological harm.

INTOLERABLE SITUATION

[142] I also find on the evidence, that there is a grave risk that a return order would place the children and the mother in an intolerable situation.

[143] The mother has no funds and no place to live in Guam. In the past, the military supplied her housing on the naval base at no charge because she was a spouse of a member.

[144] The mother has no family support in Guam, or friends who could be caregivers or provide general support to her. In addition to being isolated from

her support network, the mother is afraid to return to Guam, for fear of the father's violent behavior towards her and the children.

[145] The mother has been unable to obtain counsel in Guam to represent her. The lawyer from the Public Defender's office who represented her for the Protection Order Application cannot represent her on a divorce and custody application. The lawyer she paid a retainer to has left Guam. She has been unable to find a new attorney in Guam to represent her as the two attorneys she tried to retain have refused to take her case.

[146] She has no financial resources to allow her to return to Guam. She could not afford to visit the children should they be returned to Guam. The mother has part-time employment as a cook and server and receives an income subsidy from social assistance. Her previous work in Guam would not supply her with adequate income to support her and the children, notwithstanding support from the father.

[147] I am satisfied that a return order would place the mother and the children in a financially and psychologically vulnerable position without supports.

[148] Factors such as: lack of financial means; lack of emotional support; and isolation have been found to satisfy the "intolerable situation" test (See *Harris v. Harris*, 2010 FamCAFC 221).

[149] In *Harris*, the trial judge, as quoted by the appeal court, found (at para. 149):

... from the child's perspective, not only without provision of basic essentials but reliant upon the mother as his primary carer who would

almost certainly be isolated and terrified. ... there is compelling evidence the mother genuinely and reasonably believes her life is at risk from the father if she returns ... The seriousness of the past domestic violence ... would place her in an intolerable situation. Because of the child's reliance upon her for the entirety of his physical and psychological needs, these factors add to my satisfaction that a return order would also place him in an intolerable situation.

[150] The presence of the mother's father, who helps her with the care of the children, moderates the risk of harm to the mother and the children if custody proceedings take place in Manitoba.

UNDERTAKINGS

[151] Counsel for the Manitoba Central Authority provided me with a list of undertakings that the father is prepared to make.

[152] These undertakings include: that he would travel with the children from Winnipeg to Guam and pay their travel costs; that he would proceed with a custody application expeditiously in Guam; that if the mother returns to Guam with the children, he would limit his contact with her to e-mail and only for the purpose of discussing issues relating to the children; and that if the mother does not return to Guam, he would re-enroll the children in, and transport them to their daycare on the days he is working.

[153] Counsel for the Manitoba Central Authority submits that the legal system in Guam could provide the protection that the children require to mitigate the risk of any future harm.

[154] However, as noted in *Harris*, at para. 142, quoting Hale LJ (as her Ladyship then was), in *TB v. JB*, [2001] 2 FLR 515 (at para. 57):

Usually, of course, it is reasonable to expect that the home country will be able to provide such protection. But in this particular case, it is the totality of the situation in which the children found themselves, a combination of serious psychological and economic pressures, which creates the risk. A protection order, were it to be readily available, would not solve all their problems ...

[155] The Hague *Convention* does not require a parent to prove whether such protection exists (See *Achakzad*).

[156] In *Achakzad*, Murray J. notes that in the United States (at para. 28):

... over the past ten years, the courts at both the trial and appellate level in that country have noted the pitfalls in the use of undertakings in cases where there is serious risk of domestic violence and other types of child abuse and have raised doubts to whether undertakings should be relied upon routinely in attempts to control that risk.

[157] The father has physically and emotionally abused the mother and children, and manipulated the mother in relinquishing her protection order. I am not satisfied that any undertakings I may make, would protect the mother and the children from the father, given the longstanding pattern of domestic violence in this case, nor lessen the grave risk to the children I have found.

DECISION

[158] Given the culmination of the evidence in this case, I am satisfied that if the children are returned to Guam with the mother, the mother, and the children would be placed at a grave risk of physical or psychological harm, or in an “intolerable situation.”

[159] I do not find that undertakings in the present case will protect the children from the real risk of harm if a return order was made. In my opinion, in the

circumstances of this case, where the father has a propensity for violence and has a history of emotionally and physically abusing the mother and the children, a return order cannot be safely made.

[160] In making my decision, I have determined that this is an exceptional case, and I have not approached it as a custody case, where the children's best interests are paramount. I have considered the purposes articulated in the Hague *Convention* to prevent international child abduction and ensure that children are returned to their place of "habitual residence", the exceptions provided for in the Hague *Convention*, and the serious corroborated evidence of a well established pattern of domestic violence before me. Having balanced same, I find that returning the children to Guam, even subject to undertakings would expose the children to a grave risk of physical or psychological harm and place the children in an intolerable situation.

[161] I exercise my discretion to dismiss the father's application.

[162] There shall be no costs in this matter.

_____ J.