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

B E T W E E N:

SIMON MPOYI MBUYI,	)	CANDRAY D. MEHKARY
	)	lawyer for the Central
applicant,	)	Authority for the Province of
	)	Manitoba on behalf of the
- and -	)	applicant
	)	
RACHEL KABENGELE NGALULA,	)	JESSICA A. SCHOFIELD
respondent.	)	for the respondent
	)	
	)	
	)	JUDGMENT DELIVERED:
	)	November 8, 2018

MacPHAIL J.

[1] The applicant father requests return of the parties' two infant children to the United States of America (in particular to Iowa City, Iowa) pursuant to the provisions of the 1980 Hague *Convention on the Civil Aspects of International Child Abduction*, Can. T.S. 1983 No. 35 (the "Hague *Convention*"). The respondent mother opposes the return of the children.

[2] Certain matters were conceded by the mother, including that the children are habitually resident in the United States of America, the children were

wrongfully retained by her in Canada within the meaning of Article 3 of the *Convention*, and, at the time of the wrongful retention, the father had rights of custody respecting both children and was exercising those rights.

[3] The mother relied on certain exceptions to the requirement for the prompt return of children in Hague *Convention* cases.

[4] She argued that after the wrongful retention the father subsequently consented to, or acquiesced in, her continued retention of the children in Canada within the meaning of Article 13(a) of the Hague *Convention*.

[5] The mother also argued, in addition or in the alternative, that returning the children to the United States of America (in particular to Iowa City, Iowa) would expose them to "physical or psychological harm or otherwise place [them] in an intolerable situation" within the meaning of Article 13(b) of the Hague *Convention*.

[6] The issues in this proceeding, therefore, are:

a) After the wrongful retention of the children, did the father subsequently consent to, or acquiesce in, the mother's continued retention of the children in Canada?

b) Would return of the children to Iowa City, Iowa, in the United States of America expose them to physical or psychological harm or otherwise place them in an intolerable situation?

c) If the answer to either of the foregoing questions is yes, should I exercise my discretion to order the return of the children?

BACKGROUND

[7] The father and the mother were each born in the Democratic Republic of Congo.

[8] The father is an American citizen. He immigrated to the United States some seven years ago and settled in the Iowa City area where a number of his family members reside.

[9] The mother immigrated to Canada and resided in the City of Winnipeg in the Province of Manitoba, where her immediate family continues to reside. She is a Canadian citizen with a "green card" that enables her to work in the United States of America.

[10] The parties met at a wedding in Toronto in 2012. Although they were married in Winnipeg on March 22, 2014, the father returned to Iowa City after the wedding and the mother continued to reside with her family. She moved to Iowa City after the parties held a wedding celebration on July 4, 2015.

[11] The parties' two children were born in Iowa City, Bethel Mpoyi Mbuyi on May 26, 2016 and Peniel Mpoyi Musau on May 21, 2017.

[12] The family lived together in an apartment in North Liberty, in the Iowa City area, until June 16, 2018 when the mother left for Winnipeg with the children and her father, François Kabengele ("the grandfather"), for what was then agreed by the parents (with the involvement of family members) to be a one-month period of time. The father expected the mother and children would return shortly after her sister's wedding on July 14.

[13] In mid-July the mother advised the father that she did not intend to return to the United States with the children. Her evidence was that she wanted to remain in Canada indefinitely and, with the assistance of the grandfather, work with the father to improve their relationship. In August the grandfather left for an extended trip to the Democratic Republic of Congo. He is expected to return to Canada in December.

[14] In late July the father contacted "US Justice officials" and on August 18, 2018 completed a request for return of the children to Iowa City pursuant to the Hague *Convention*.

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

[16] The Family Law Section of the Manitoba Department of Justice is responsible for fulfilling the responsibilities of the province's Central Authority. In that capacity, on August 24, 2018 they received email notification of the father's impending request for the return of the two children to the United States of America and on August 30, 2018 they received the original request for return form signed by the father.

[17] In June of 2007 the Court of Queen's Bench of Manitoba approved a Procedural Protocol for the handling of Hague *Convention* cases. In accordance with that Protocol, the father's return application was commenced in this Court by the Central Authority for the Province of Manitoba filing a Notice of

Application seeking an order for the return of the children and other related relief. The Notice of Application was filed on August 30, 2018 and returnable on the September 18, 2018 Tuesday family motions' list. He completed an affidavit in support of his application on September 11, 2018.

[18] The mother retained counsel and on September 18, 2018, the Honourable Madam Justice Hatch granted an Interim Order, consented to by both parties. In accordance with the Court's Procedural Protocol, Justice Hatch ensured that appropriate timelines were established for the filing and service of further materials and set a hearing date for the father's application. In addition to addressing those procedural matters, the Interim Order also provided pursuant to ***The Child Custody Enforcement Act*** and the Hague *Convention*:

a) custody of the children would not be determined until the father's application had been determined on a final basis;
b) the mother deliver up her passport and the children's birth certificates by September 19, 2018, for safekeeping by the Court;
c) the children not be removed from the city limits of Winnipeg;
d) the mother continue to reside with the children at 131 Winterhaven Drive in Winnipeg and forthwith advise the Central Authority for the Province of Manitoba of any change in her address or phone number; and
e) peace officers provide assistance with respect to the enforcement of certain provisions.

[19] On October 3, 2018 the Interim Order was varied by consent by the Honourable Madam Justice Goldberg to allow the mother to take the children to Church services at Fellowship Tabernacle in New Bothwell, Manitoba, on specified days, during specified periods of time.

[20] The father's application for the return of the children pursuant to the Hague *Convention* was heard on October 19, 2018. Counsel for the Central Authority for the Province of Manitoba and counsel for the mother each filed comprehensive application briefs, with the authorities upon which they relied. Counsel each made extremely helpful arguments.

[21] Given the nature of some of the issues raised in this proceeding, at the October 19 hearing I indicated to counsel I might commence the process to arrange a teleconference judicial communication with a Judge of the Iowa Court. Their availability was canvassed and a judicial communication was scheduled and took place on November 1, 2018 with His Honour District Court Judge Lars Anderson, of the Sixth Judicial District of Iowa. That communication is described subsequently.

PURPOSE AND APPLICATION OF THE HAGUE *CONVENTION*

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

[23] Article 1 of the Hague *Convention* further states that:

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

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

[25] The father has requested the return of the parties' two children to the United States of America, and in particular, to Iowa City, Iowa, pursuant to the provisions of the Hague *Convention*.

[26] Although certain matters were conceded by the mother, there must be a determination by the Court whether the Hague *Convention* applies and, if so, whether the retention of the children was wrongful, before the provisions of the *Convention* with respect to return of the children to the state of their habitual residence come into play.

[27] Article 3 and Article 4 of the Hague *Convention* provide:

> **Article 3**
>
> The removal or the retention of a child is to be considered wrongful where
>
> (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph (a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.
>
> **Article 4**
>
> The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights. The Convention shall cease to apply when the child attains the age of 16 years.

[28] Both Bethel and Peniel are under the age of 16 years. They each resided in the State of Iowa, in the United States of America, from the time of their births in 2016 and 2017, respectively. There is no contest that the children were habitually resident in the United States of America (and in particular, in the Iowa City area of the State of Iowa) when the mother took them to Canada on June 16, 2018, and when she retained them beyond the agreed upon one-month period for their visit to Canada. The Hague *Convention* has been in force in Canada (in particular, in the province of Manitoba) and in the United States of America for over 30 years; both nations are "contracting states" within the meaning of the *Convention*.

[29] Unquestionably the requirements of Article 4 are satisfied and the Hague *Convention* applies to the children in this proceeding.

[30] The mother concedes that the retention of the children, beyond the agreed month-long period of time in Canada, was wrongful, and that it was in breach of the father's rights of custody, which rights were being exercised or would have been exercised but for the retention.

[31] The evidence is clear that the father had custody rights under the laws of the State of Iowa and was exercising those rights at the time of the children's wrongful retention in Canada. He only agreed that the children could be in Canada for a month.

[32] Taking the evidence and the mother's concessions into account, I find that the mother's retention of Bethel and Peniel in Canada after the expiration of the agreed month-long period of time for their visit to Canada constitutes a wrongful retention of both children within the meaning of Article 3 of the *Convention*.

[33] Article 12 of the Hague *Convention* requires the prompt return of wrongfully retained children. It provides:

> Where a child has been wrongfully … retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial … authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful … retention, the authority concerned shall order the return of the child forthwith.

[34] The Article 12 requirement for prompt return is subject to the exceptions set out in Article 13 and Article 20.

[35] As noted earlier, the mother argued that some of the exceptions in Article 13 apply in this case. No arguments were made that Article 20 applies to this proceeding.

[36] In particular, the mother argued that after the wrongful retention the father subsequently consented to, or acquiesced in, her continued retention of the children in Canada within the meaning of Article 13(a) of the Hague *Convention*.

[37] She also argued, in addition or in the alternative, that returning the children to the United States of America (in particular to Iowa City, Iowa) would expose them to "physical or psychological harm or otherwise place [them] in an intolerable situation" within the meaning of Article 13(b) of the Hague *Convention*.

[38] The relevant portions of Article 13 of the Hague *Convention* provide:

> **Article 13**
>
> Notwithstanding the provisions of the preceding Article, the judicial … authority of the requested State is not bound to order the return of the child if the person … which opposes its return establishes that –
>
> a) the person ... having the care of the person of the child ... had consented to or subsequently acquiesced in the … 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. ...

[39] The mother bears the onus of establishing that an exception exists under either Article 13(a) or Article 13(b) to the requirement for the children to be promptly returned to their state of habitual residence pursuant to the terms of the Hague *Convention*.

DID THE FATHER SUBSEQUENTLY CONSENT TO OR ACQUIESCE IN THE RETENTION OF THE CHILDREN IN CANADA?

[40] The mother contended that text message communications between the father and the grandfather in August left the impression that the father was content for the mother and children to remain in Canada indefinitely for the grandfather to assist the parties to improve their relationship.

[41] The mother deposed that before she left Iowa, she and the father agreed that they would have some time apart and that they would work with [the grandfather] to see if they could develop a healthy relationship. She stated she thought they "would be able to improve [their] relationship within the timeframe of the travel consent …"

[42] No evidence was provided about the nature of discussions or text message exchanges between the grandfather, the father and the mother with respect to "improving the parties' relationship" with the exception of certain August 12 and August 15 text messages. While these messages between the grandfather and the father make it clear some issues were being discussed at that time, the only statement that came even remotely close to possibly being construed as consent or acquiescence is in the following August 15 text message from the father to the grandfather that read:

> Thank you very much Papa for forgiving me. Given what Rachel told you (a bunch of crap) and the pastor. The whole family even in Africa already knows. We are together with everyone here. They said that if it's urgent you can go to Africa first. Because first of all we have to find a good compromise before we come to get her, and understand what's going on. I'm sorry but this is coming from my family. Thank you very much.

[43] In ***Katsigiannis v. Kottick-Katsigiannis*** (2001), 55 O.R. (3d) 456 (Ont. C.A.), the Court stated:

> [37] Beginning with In re H. and others (Minors), [1996] H.L.J. No. 43, the House of Lords, in considering the application of Article 13(a) of the Hague Convention, rejected the characterization of acquiescence as being either active or passive and substituted a strict subjective test with one exception, which they described as extraordinary.
>
> [38] In In re H., Lord Brown-Wilkinson set out several principles to guide the proper interpretation of "acquiescence" in the context of Article 13(a) of the Hague Convention. He stated that the test is entirely subjective. That is, the answer to the question whether a parent has acquiesced in the removal or retention of a child will depend on that parent's state of mind -- not the outside world's perception of the parent's intentions. Lord Brown-Wilkinson noted that his approach -- the subjective intention approach -- is consistent with the one adopted in both the United States and France. In concluding, he referred with approval at para. 25 to Millett L.J.'s comments in In re R., [1995] 1 F.L.R. 716 (H.L.) at p. 733:
>
> > Acquiescence is a question of fact. It is usually to be inferred from conduct; but it may, of course, be evidenced by statements in clear and unambiguous terms to the relevant effect.
>
> [39] Lord Brown-Wilkinson added at para. 35 that "attempts by the wronged parent to effect a reconciliation or to reach an agreed voluntary return of the abducted child" will not generally constitute acquiescence for Hague Convention purposes. He also stated at para. 42 that "[t]he trial judge, in reaching his conclusion on that question of fact [the consent or acquiescence question of fact] will no doubt be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his bare assertions in evidence of his intention. . . . [t]hat is a question of the weight to be attached to evidence and is not a question of law". I agree with this observation.
>
> [40] The exception that Lord Brown-Wilkinson carved out of the subjective test at para. 42 arises:
>
> > [w]here the or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his right to a summary return of the child and are inconsistent with such return, justice requires that that the wronged parent be held to have acquiesced.
>
> . . .
>
> [46] The words "consent" and "acquiescence" as used in Article 13(a) of the Hague Convention should, in my view, be given their ordinary

> meaning so that they will be consistently interpreted by courts of Hague Convention contracting states. In any case, I can see no logical reason not to give those words their plain, ordinary meaning.
>
> [47] "Consent" and "acquiescence" are related words. "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.
>
> [48] Subject to this observation, I agree with Lord Brown- Wilkinson's approach and analysis in In re H, supra. When Lord Brown-Wilkinson said that "[a]cquiescence is a question of the actual subjective intention of the wronged parent, not the outside world's perception of his intentions", he was, it seems to me, really speaking of the wronged parent's consent to a child's removal or retention based on evidence falling short of actual stated consent. That is what acquiescence is -- subjective consent determined by words and conduct, including silence, which establishes the acceptance of, or acquiescence in, a child's removal or retention.
>
> [49] To establish acquiescence in the Article 13(a) Hague Convention context -- "subsequently acquiesced in the removal or retention" -- the mother must show some conduct of the father which is inconsistent with the summary return of the children to their habitual residence. **In my view, to trigger the application of the Article 13(a) defence there must be clear and cogent evidence of unequivocal consent or acquiescence**. . . .
>
> [Emphasis added]

[44] The text messages between the father and the grandfather fall far short of constituting "clear and cogent evidence of unequivocal consent or acquiescence" by the father to the mother's continued retention of the children in Canada.

[45] The father's actions also belie any conclusion that he was consenting to, or acquiescing in, the children remaining indefinitely in Canada. He met with American government officials in July. Just three days after the August 15 text message to the grandfather, the father completed the form requesting the return of the children pursuant to the Hague *Convention.* The request for return was thereafter transmitted to the Central Authority for the Province of Manitoba and

his Notice of Application seeking, *inter alia*, the children's return was filed in this Court on August 30. In both his initial September 11, 2018 affidavit and his subsequent October 5, 2018 affidavit, the father was steadfast in his desire that the children be returned to the United States of America.

[46] The mother has failed to meet the onus upon her to establish an exception within the meaning of Article 13(a). She has failed to satisfy me that the father either consented to, or acquiesced in, the children remaining in Canada.

IS THERE A GRAVE RISK THAT THE RETURN OF THE CHILDREN WOULD EXPOSE THEM TO PHYSICAL OR PSYCHOLOGICAL HARM OR OTHERWISE PLACE THEM IN AN INTOLERABLE SITUATION?

[47] The mother argues that returning the children to Iowa City would expose them to physical or psychological harm or otherwise place them in an intolerable situation within the meaning of Article 13(b) of the Hague *Convention.*

[48] In her affidavit, the mother described a number of incidents of domestic violence during the years she and the father cohabited.

[49] The allegations of abuse by the mother include arguments between the parties, name calling, threats that the father would sleep with other women if the mother did not have sex with him, and threats with respect to the life of her brother or acts of violence that might be committed against her by some of his family members. She indicated that the father hit her multiple times in the face approximately two months after Bethel was born in May 2016 and that she tried to call 911, but he disconnected the telephone.

[50] She described an incident at the hospital at the time of Peniel's birth when the father was upset that she had a male doctor, and he smashed his cell phone, after which a social worker came and spoke to the mother.

[51] The mother indicated that after a family meeting in early June 2017, the father's cousin, Danny, said that the father had told his family to beat her, and that Danny could do so too. There was no evidence that Danny or any other member of the father's family had ever harmed the mother.

[52] All of these incidents were denied by the father in his October 5, 2018 affidavit.

[53] In an August 12, 2018 text message to the grandfather, however, the father made the comment, "Am I the first person in your family to hit a woman?" In his October affidavit he explained "The context is lost due to this being in a text communication. In this text message, I was challenging François on this allegation; I was not confirming it." If true, the father's message was a very odd way of challenging the grandfather. His explanation is unreasonable and I am left with the conclusion that on at least one occasion, the father, by his own admission, has hit the mother.

[54] Notwithstanding denying the acts the mother attributes to him, the father does concede in his October affidavit that their relationship was a volatile one. He then accused the mother of abusing him on several occasions, including with a knife, and states she has anger management issues. He made no mention of such behaviour in his request for return form or his September affidavit.

[55] The mother's counsel argued that I should place little weight on the father's October affidavit as none of the incidents of alleged violence by the mother had been mentioned in either the request for return form or his September affidavit, the *Queen's Bench Rules* respecting the scope of reply affidavits had clearly been breached and the mother was precluded from filing a further reply.

[56] The fact the father made no mention of these significant issues until his October affidavit does raise issues. It must be recognized, however, that requests for return under the Hague *Convention* are unique proceedings. It is not uncommon for the taking parent (here, the mother) to argue that there was not a wrongful removal or retention, or that certain exceptions exist to the requirement for prompt return. The left-behind parent may, in some cases, be able to anticipate those arguments, but in many they may not and they may not be able to anticipate the specific incidents or actions identified by the taking parent. They should have the opportunity to address those claims in a meaningful way. That being said, the taking parent should also have the opportunity to respond to new allegations raised by the left-behind parent.

[57] In the case at hand, although the mother sought and was granted leave to file the October 3, 2018 affidavit of Verna Sullivan (providing opinion evidence about the effect of domestic violence generally on children), she did not seek leave to file a further affidavit replying to the father's October affidavit.

[58] The weight I place on the father's October affidavit is impacted by these factors.

[59] Prior to the mother's departure for Canada, an incident occurred that was disturbing regardless of whose version of events is accurate. The mother indicated that the father assaulted her on June 9, and that thereafter on June 15 she quit her job and contacted the grandfather to come to Iowa City to pick her and the children up to travel to Canada. The father denied the mother's version of events and said that it was the mother who assaulted and injured him, and that the incident occurred on June 2, 2018.

[60] The mother said that on June 15 she advised her supervisor that the father had abused her (something she had denied the previous week when her supervisor asked her about her injuries). The mother stated that her supervisor called the police who attended to speak with her and offer assistance. She declined their offer.

[61] There is a very high threshold for establishing an Article 13(b) exception to return (***Thomson v. Thomson***, [1994] 3 S.C.R. 551 (SCC)).

[62] In determining whether or not a situation of alleged domestic violence is of such a nature that return of the children would expose them to physical or psychological harm or place them in an intolerable situation, the Court must in any Hague *Convention* proceeding start from the basis that, except in the most extraordinary of cases or where evidence is sufficient to establish the contrary, the Courts and the authorities in the state of the children's habitual residence will

be able to take measures to protect the children, including protecting their mother from any domestic violence.

[63] In ***Ellis v. Wentzell-Ellis***, 2010 ONCA 347, the Court allowed an appeal in a Hague *Convention* case where the application judge had relied on Article 13(b) in refusing to order the return of a child to England. LaForme J.A. ended the decision with the following statements at paragraph 50:

> I would conclude with this reminder. It must be appreciated that the court would not be forcing the mother or the child to return to live with the father. Rather, an order that the child be returned to England simply recognizes that the mother was not entitled to take the child from England and that custody proceedings should be decided by English courts. **Aside from recognizing that English courts are the appropriate forum to determine the merits of the custody case, a return order also recognizes and trusts that those courts are capable of taking the necessary steps to both protect and provide for the mother and the child in the present case. This is what underlies art. 13(b) and why there is such a high threshold for parents wishing to justify removing their children from one contracting state to another.**
>
> [Emphasis added]

[64] Without question, in some cases the nature of domestic violence will result in findings that return would expose a child to physical or psychological harm or otherwise place them in an intolerable situation within the meaning of Article 13(b) of the Hague *Convention*.

[65] Cases where the Court has found this to be the situation have generally involved clear evidence of domestic violence, including some or all of the following circumstances: photographs of injuries, third party (including police) evidence of violence, medical evidence of injuries, the granting of, and, in some cases, breaching of civil protection orders or probation orders, criminal charges

or convictions for abusive conduct, inability of the efforts of police or other authorities to restrain the abuser's behaviour, the abuser's disregard for court orders, abuse of the children. (See, for example, the situations in ***Callicutt v. Callicutt***, 2014 MBQB 144; ***Lombardi v. Mehnert***, 2008 ONCJ 164; ***Achakzad v. Zemaryalai***, 2010 ONCJ 318; ***Pollastro v. Pallastro***, 1999 CanLII 3702 (Ont. C.A.)).

[66] No evidence of this nature was provided by the mother.

[67] While some of the events described by the mother are certainly serious, the Iowa Court and law enforcement agencies should be trusted to take measures to protect the children, including protecting their mother from any domestic violence, if the evidence presented so warrants.

[68] On November 1, 2018, I participated in a judicial communication with His Honour District Court Judge Lars Anderson, of the Sixth Judicial District of Iowa. In accordance with the recommendations respecting communications with judges in other jurisdictions developed by the Canadian Network of Contact Judges (now the Judicial Committee on Inter-jurisdictional Child Protection) established by the Canadian Judicial Council, correspondence was sent to one of the designated American judges on the International Hague Network of Judges established by the Hague Conference on Private International Law, with the knowledge of one of the Canadian judges on that Network. In that correspondence I requested that a judicial communication take place with a judge of the Iowa Court with respect to this case. I indicated that there were a number of issues that I

wanted to discuss with a judge of the Iowa Court, to help me, and counsel, understand the options that would be available if, in fact, I did order the return of the children to Iowa City. I indicated that the specific questions I wished to discuss were:

> a) I anticipate that the Iowa Court has the ability to make interim or temporary orders with respect to custody, access, support and protection issues. Can hearings for such relief occur on an expedited basis? If such applications are filed, when could a hearing occur? What measures would be need to be taken, or be recommended, to expedite such an interim hearing?
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> b) Are civil protective orders available for spouses and/or children, and what resources are available for individuals wishing to seek same?
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> c) If I make an order with respect to occupancy of the family home, payment of rent on the family home, parenting arrangements, and other issues, to remain in place until such time as the Iowa Court can consider and rule on these issues, is that an order that will be recognized/accepted by the Iowa Court and enforceable in Iowa?
>
> d) If I record in a written decision the undertakings made by the father and the directions I provide to him (in addition to or in place of an interim, reviewable order) will that be recognized/accepted by the Iowa Court and enforceable in Iowa?

[69] I asked that the American International Hague Network Judge in question assist with respect to arranging this communication, and identified various dates and times when both counsel and I would be available for a teleconference. A copy of my correspondence to that American International Hague Network Judge was sent to counsel for the mother and for the Central Authority for the Province of Manitoba on October 23, 2018.

[70] Arrangements were made for the teleconference judicial communication and on October 26, 2018, counsel were advised in writing of the scheduled date

and time. I confirmed with District Court Judge Anderson that the father could be present at the Courthouse in Iowa City for the teleconference.

[71] The teleconference on November 1, 2018 was recorded and took place in the presence of both counsel and the mother in Winnipeg and the father in the Courthouse in Iowa City.

[72] Valuable information was provided by District Court Judge Anderson with respect to the ability to seek an order from the Iowa Court on an expedited basis, the ability to seek civil protection and other family-related orders and the availability of resources to provide information and assistance to individuals in domestic violence situations. Information was also provided with respect to the possible recognition in the Iowa Courts of any orders I may make to try to facilitate the return of the children to Iowa City.

[73] The Iowa Court can grant civil protection orders. Hearings can be expedited in urgent cases. Temporary civil protection orders can address protection, custody and support-related issues pending the hearing that must occur within the timeframe prescribed by statute. Applications for relief can be submitted on-line, using forms available on the Iowa Court's website. Their Court Clerks' office can provide information about procedures and filing of forms. The Domestic Violence Intervention Program in Johnson County (where Iowa City is located) has advocates who can provide assistance and information to individuals who have been subjected to domestic violence and identify various resources that may be of further assistance.

[74] As stated by the Ontario Court of Appeal in ***Ellis v. Wentzell-Ellis*** (and in many other cases), it must be remembered that an order for the return of the children to their habitual residence, in this case the United States of America, and in particular Iowa City, Iowa, is not an order that they be returned to the care of their father. It is an order that they be returned to their place of habitual residence so that the Court in that State can, considering the evidence adduced by each of the parents, consider what custody order would be in the children's best interests and what other orders might be appropriate. The parents may wish to raise other related family law, or civil protection, issues. The mother may wish to seek permission to change the children's place of residence to Canada. The father may wish to seek an order that the children remain in Iowa. All of those issues are best addressed by the Iowa Court.

[75] Clearly there are significant legal options available to the Court in Iowa City to deal with all of the issues in this case. Iowa is the jurisdiction where the parties and children resided, the events the mother and the father allege occurred and the witnesses to those events are available. The Iowa Court is best placed to determine the actual circumstances of this case and what orders are in the best interests of Bethel and Peniel.

[76] What was also clear from the mother's own evidence was that when the police were contacted about her situation (as she said her work supervisor did on June 15, prior to the date she left, with the children, for Winnipeg) they attended and interviewed her; she declined their assistance.

[77] In her affidavit the mother explained that "I refused the assistance of the police because I have been taught since I was a child that family conflict should be dealt with by the family and with the assistance of the Church."

[78] No evidence was provided that during her years in Iowa she sought such assistance from family members or a Church. Her only evidence was that she thought the grandfather could help her and the father improve their relationship during the period of time she was in Winnipeg. There was no evidence of any such efforts being made before the children were wrongfully retained in Canada.

[79] The mother also indicated that at the time the parties' younger child was born the father allegedly behaved in an inappropriate and angry manner at the hospital. The mother stated that a social worker from the hospital came to speak to her, and she chose not to discuss the situation with that professional.

[80] On one other occasion, the mother contended that she had attempted to call 911, but was unable to do so because the father ripped the phone from the wall. The father deposed that the parties had never had a landline.

[81] By her own evidence, therefore, the police and other agencies in Iowa were responsive to the mother's situation. It was she who, for cultural and religious reasons, chose not to avail herself of their assistance. I have nothing to suggest that officials in the State of Iowa, will not take steps to assist those alleging they have been the victim of domestic violence. Indeed, the mother's own evidence indicates that they certainly would do so in a timely way.

[82] As with the Article 13(a) exception, the mother bears the onus of establishing that an exception to the return of the children exists within the meaning of Article 13(b). She has not met that onus.

[83] Having found that the mother has not met the onus upon her to establish an exception to the return of the children under either Article 13(a) or Article 13(b), the third issue I identified at the beginning of this decision, whether I should exercise my discretion to order the return of the children despite the existence of one of those exceptions, does not arise.

ORDER

[84] The father's request for the return of the children to Iowa City, Iowa, in the United States of America pursuant to the Hague *Convention* is granted.

[85] The mother indicated that in the event the Court ordered the return of the children to the United States of America, she would drive with them to Iowa City. Her brother will accompany her and the children.

[86] The mother is ordered to forthwith return the children to Iowa City, and in any event to do so by no later than noon on Friday November 16, 2018. By that time she is to report to the Johnson County Courthouse at 417 South Clinton Street in Iowa City, Iowa, and advise them that she and the children are now present in Iowa City and provide her contact details for future Court proceedings in that state. (These timelines will enable the mother to commence civil proceedings in the Iowa Court for orders of protection, custody, support or other family-related relief, if she wishes to do so, and possibly even be granted a

temporary order pending a full hearing, should the Iowa Court feel that appropriate.)

[87] The mother is not to travel by air with the children. They are to be driven back to Iowa City as she proposed, and they are to enter the United States of America at the Emerson, Manitoba border crossing.

[88] The mother is to be responsible for all travel costs for the return of the children to Iowa City.

[89] The mother is not to take the children to any country other than the United States of America.

[90] As consented to this day, the mother's passport and the children's birth certificates presently being held for safekeeping by this Court are to be released to her counsel upon presentation of a signed copy of the Order incorporating the terms of this decision. The documents shall be released to the mother by her counsel no earlier than the day she will depart with the children for Iowa.

[91] As consented to this day, the mother's counsel shall advise counsel for the Central Authority for the Province of Manitoba when she has released the mother's passport and the children's birth certificates to the mother.

[92] As consented to this day, the mother is to notify her counsel of her address and phone number in Iowa. Upon being contacted by the mother, her counsel shall advise counsel for the Central Authority for the Province of Manitoba that the mother and children have arrived in Iowa City and of their address and telephone number. Counsel for the Central Authority for the

Province of Manitoba may advise the father that the mother and children have arrived in Iowa City, but shall not disclose their address or telephone number. Counsel for the Central Authority for the Province of Manitoba may, however, disclose the mother's address or telephone number to the Iowa Courts or any Iowa law enforcement agency requesting same.

[93] There will be a peace officer assistance clause.

[94] The father's application having been dealt with on a final basis, the non-removal, residency and passport/birth certificate provisions in the September 16, 2018 Interim Order (as varied in the October 3, 2018 Variation Order) are no longer in effect.

ADDITIONAL MATTERS

[95] Depending on the timing of any applications the mother or the father may make to the Iowa Court, as discussed in the November 1, 2018 teleconference, His Honour District Court Judge Lars Anderson may hear the proceeding. As he requested, a copy of this decision and the Order ultimately signed by me will be sent to him via e-mail, so he and the Iowa Court Clerks' office are aware of the orders I have made.

_____ J.