

 [R.V.W. v. C.L.W., \[2019\] A.J. No. 375](#)

Alberta Judgments

Alberta Court of Queen's Bench

A. Woolley J.

Oral judgment: March 7, 2019.

Judgment: March 15, 2019.

Docket: FL01 28628

Registry: Calgary

[2019] A.J. No. 375 | 2019 ABQB 175

Between RVW, Applicant, and CLW, Respondent

(21 paras.)

Case Summary

Family law — Custody and access — Offences and penalties — Child abduction — Hague Convention — Application by father for return of one-year-old child to Texas under Hague Convention allowed — Child was born in Texas, where parties were married and cohabiting at time — Parties had high-conflict, dysfunctional relationship — Child was habitual resident of Texas and his removal violated father's custodial rights — High threshold of demonstrating exception to return of child on basis of grave risk of physical or psychological harm was not met — Evidence did not establish clear pattern of abuse or alcoholism — While evidence raised concerns about father's suitability as parent, that was matter for Texas courts to decide.

Application by the father for the return of the parties' one-year-old child to Texas under the Hague Convention. The child was born in Texas, where the parties were married and lived together at the time. When the father lived in Canada, he was convicted of assaulting his former partner and refusing to provide a breath sample. The mother claimed the father and his family were emotionally and physically abusive to her and the father abused alcohol, both of which the father denied. When the mother was pregnant, they had an altercation during which she pushed her laptop into the father's face and he pushed her off a chair. The father consumed alcohol and drove too quickly with the mother in the car. The father caused a kitchen fire after consuming alcohol and, in the aftermath, pushed and locked the mother outside. The parties had a verbal and physical altercation involving the father's family members, the police came and the mother voluntarily left the house. After separation, the father kept the child from the mother over a three-week period because he was worried she would remove him from the U.S. The parties reconciled but again had an altercation. The police report noted neither was credible. The mother resisted the return of the child on the basis of the exception in Article 13(b).

HELD: Application allowed.

The child was habitually a resident of Texas prior to his removal. He was born there and lived nowhere else. Removal of the child violated the father's custodial rights in Texas, where proceedings had been commenced. The child's removal was wrongful. The mother had not demonstrated that returning the child to Texas would create a grave risk of physical or psychological harm or place the child in an intolerable situation. While the mother's concerns were not baseless, the high threshold under Article 13(b) was not met. The parties had a high-conflict, dysfunctional relationship during which both were aggressive, and the evidence did not establish a

pattern of abuse or clear alcoholism. There were concerns about the father's suitability as a parent, but that was a matter for the Texas courts to decide. Intolerability had to arise from the risk of harm and was not an independent ground, and was not established regardless, as the mother had not pursued her opportunities to return to Texas with the child.

Statutes, Regulations and Rules Cited:

Convention on the Civil Aspects of International Child Abduction, Article 3, Article 12, Article 13(b)

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Counsel

Michael A. Ghert, for the Applicant.

Brian Warrington, for the Respondent.

Reasons for Judgment

A. WOOLLEY J. (orally)

1 RWJ was born in Texas in September 2017. His parents RVW and CLW were married and living in Texas at that time, but CLW is Canadian. Their marriage broke down a few months later and, in January 2018, CLW returned to Canada with RWJ. RVW seeks RWJ's return pursuant to the operation of Article 3 and Article 12 of the Hague Convention. CLW resists the return on the basis that RVW is at grave risk of physical or psychological harm or will be otherwise placed in an intolerable situation.

Issues

2 The issues before the Court are:

- a) Was CLW's removal of the child RWJ from the state of Texas in January 2018 a wrongful removal pursuant to Article 3 of the ***Convention on the Civil Aspects of International Child Abduction*** (the Hague Convention) such that he ought to be ordered to be returned to Texas pursuant to Article 12 of the Hague Convention? In particular, was RWJ habitually resident in Texas immediately before his removal and was his removal in breach of the rights of custody attributable to RVW?
- b) If CLW's removal of RWJ was wrongful pursuant to Article 3, should this Court nonetheless not order the return of RWJ on the grounds that there is a grave risk that his return would expose RWJ to physical or psychological harm or otherwise place the child in an intolerable situation as contemplated by Article 13(b) of the Hague Convention?

Facts

3 The parties agree on some basic facts in relation to this Application:

- a) CLW and RVW began cohabiting in Calgary, Alberta in October 2015 and were married on January 28, 2017.
- b) While in Canada, RVW was convicted of two criminal offences. In November 2014 he was convicted of assaulting his former partner, J.C. He says in his Affidavit that he knocked her off a

stool and poured a beer on her. In December 2016 he was convicted of failing to provide a breath sample, and had his driving license suspended for 12 months.

- c) RVW was detained by Canada Customs in November 2015, and a deportation order was issued dated November 9, 2015. RVW stayed in Canada until February 12 2017 when he returned to Texas as a non-escorted deportee.
- d) CLW joined RVW in Texas where they both lived until CLW's return to Canada.
- e) RWJ was born in Texas in September 2017.
- f) The parties separated in November 2017. They were briefly reconciled in January 2018, but both had commenced proceedings related to the breakdown of the relationship in the District Court in Harris County, Texas in December 2017. RVW filed a Petition for Divorce, although he did not serve it. On December 29, 2017 CLW filed an Original Petition and Affidavit seeking custody of RWJ and a Temporary Restraining Order against RVW. On January 17 2018, RVW filed an Amended Petition for Divorce which he served on CLW on or about January 18, 2018.
- g) CLW came to Canada with RWJ on or about January 23, 2018.

4 The parties disagree with respect to how RVW's conduct in the relationship ought to be characterized. CLW claims that RVW and his family were emotionally and physically abusive to her, and that RVW abuses alcohol. RVW says that he was not abusive to CLW and that he does not have a drinking problem. In relation to the facts underlying these broader characterizations, the parties give conflicting accounts of what occurred. Fully resolving that conflict would require determinations of credibility which cannot be made on the record before me. I can, however, note the following in relation to the incidents in the parties' relationship and interactions relied upon by CLW in invoking Article 13(b):

- (a) In March 2017, while CLW was pregnant, the parties had an altercation over a laptop. RVW says that CLW pushed the laptop into his face and it cut his lip. CLW says that subsequently RVW pushed her off a chair. CLW does not dispute RVW's claim about her pushing the laptop and it cutting RVW. RVW does not dispute CLW's claim that he pushed her off a chair while she was pregnant. *I find that the parties had an altercation in which CLW pushed a laptop into RVW's face, cutting him, and that RVW then pushed a pregnant CLW off a chair.*
- (b) In June 2017 CLW and RVW drove home after an outing. CLW alleges that RVW had too much to drink, that he drove, that he drove too fast and cut people off, and that he would not slow down despite being asked by her to do so. RVW says he had two drinks. While he claims that the night was "very good" he does not dispute her statement that he drove or that he drove in the manner described by CLW. *I find that RVW drove after drinking and, while he may not have been intoxicated, he drove in an unsafe manner.*
- (c) In October-November 2017, CLW alleges that RVW came home drunk and caused a kitchen fire by forgetting about oil he had put on the stove to make empanadas. She claims that in the aftermath of the fire he pushed her out of the doorway, slammed the door in her face and locked the door. RVW denies being intoxicated (but not drinking) and says that the fire was quickly contained and that no danger arose. He does not dispute pushing CLW or locking her out. *I find that RVW was drinking, a kitchen fire occurred, and that in the aftermath of the fire, RVW pushed CLW and locked her out of the apartment.*
- (d) On December 13 2017, the parties had a verbal and physical altercation, at which two of RVW's female family members were present. The parties disagree about the nature and extent of the altercation. They disagree about the circumstances under which, after the argument, CLW left the house and left RWJ with RVW. An Incident Report from the Office of Sheriff Ed Gonzalez, filed by Officer Cummings, provides a description of the events. It states that both CLW and RVW made allegations of physical aggression against each other but that neither wanted to complete a voluntary written statement and that they both wanted the other to leave. The officer noted that

neither had visible injuries and that no one wished to pursue charges. The report says "After discovering RVW was unable to leave due to misplacing his keys in Colorado, CLW agreed to leave the house for the night". RVW claims that the Officer told CLW to leave. That claim is inconsistent with the Incident Report. The Incident Report is hearsay, but is also consistent with CLW's account of the circumstances in which she left. *I find that on December 13, 2017 RVW and CLW had a verbal and physical altercation involving RVW's family members, which did not result in any injuries, after which CLW left the house without RWJ, because RVW was unable to leave himself.*

- (e) After December 13, 2017 RVW took RWJ CLW saw RWJ no more than three times prior to January 7, 2018 (CLW says once; R.W. says three times). She was with a peace officer when she saw RWJ RVW says this is because he was concerned about CLW removing RWJ from Houston; he filed a supporting declaration stating that that had been his concern with the Texas Court dated January 18, 2018. CLW says she was breastfeeding at that time and had to pump; RVW denies that she was breastfeeding.

An incident report was created by the Office of Sherriff Ed Gonzalez in relation to an incident on December 26, 2017 where the police "provided [CLW] with an opportunity to check on the wellbeing of her child" in which the police said the "child was not reported to have been unhealthy or appear abused". It further stated that "C left the scene without further incident or complaint".

I find that RVW withheld RWJ from CLW for a 3 1/2 week period and prevented any meaningful contact between RWJ and CLW He did so because of concerns that CLW would remove the child from the United States. There is no evidence to suggest that RWJ was otherwise abused or unhealthy during that period.

- (f) CLW and RVW reconciled from January 6, 2018 to January 15, 2018. The parties had an altercation on January 15, 2018. Each describes the other as violent and aggressive during the incident. The police attended at the home. In the police report it says:

R stated today, he arrived home after going out for a few beers with friends and C started yelling at him about his drinking. R stated he wanted to play with his son as he hadn't seen him all day. When R tried to grab his son from C, C refused and an argument ensued...

C stated things got out of hand today when R came home drunk. C stated R tried to grab their son from her while she was leading him and was being rough with her. At one point, C stated R pushed her to the ground causing her pain on her buttocks. C stated she was still holding her son but was unable to explain how that was possible without injuring the child. C stated she wanted to pursue charges against R for assaulting her. C did not have any red marks or bruising and was not complaining of pain...

Deputies have been to this residence multiple times due to conflicts between R and C over custody of their child. Both R and C have shown willing to lie and be deceptive in order to get their way when law enforcement is involved. I did not find either party credible during this incident.

C agreed to leave the residence for the night but wanted to take her son who was currently with R. I advised C that her son would remain with R as R refused to give up the child. I contacted the Harris County District Attorney's Office...who declined charges due to the history at the location and neither party being credible. While on the phone...R set the child down on the bed to go to the restroom. While in the restroom, C grabbed the child and refused to give him up after being advised to leave the child with R. R came out from the bathroom and while C was packing her belongings, attempted to grab the child away from her.

I was forced to grab the child from both parties and detain them as they were both being uncooperative. After both parties calmed down, R and C came to an agreement and the child was allowed to go with C...

I find that after a one-week reconciliation, on January 15, 2018 the parties had a verbal and physical altercation which did not result in injuries to either party, after which CLW left with RWJ

- (g) Between January 18-19, 2018 CLW and RVW had verbal altercations in relation to CLW obtaining her possessions from their apartment, and RVW serving divorce papers on CLW. In addition, CLW and RVW's niece had an interaction in which their vehicles struck each other. Each party alleges that the other was responsible for the collision between the vehicles. An Incident Report from the Office of Sherriff Gonzalez notes that RVW "harassed the movers" and that the Officer "advised him to keep his comments to himself or wait outside". CLW deposes that the police told her that RVW would not agree to her taking any of her belongings, but the Incident Report contradicts this claim, stating that RVW said she could "take everything but the bed set in the main bedroom and the baby furniture and dining glass table". *I find that on January 18-19, 2018 the parties had verbal altercations about the serving of divorce papers and CLW obtaining her possessions, and that there was a vehicle collision between CLW and RVW's niece attributable to the high conflict between CLW and RVW and his family.*

Analysis

5 For me to conclude that RWJ's removal from Texas was wrongful pursuant to Article 3 of the Hague Convention, it must be established that he was habitually resident in Texas prior to his removal by and that his removal was a breach of the other parent's custody rights.

6 In *Office of the Children's Lawyer v Balev*, [2018 SCC 16](#) the Supreme Court of Canada held that a child's habitual residence under Article 3 of the Hague Convention should be established through a hybrid approach "which treats the circumstances of the children and the intentions of the parents as factors to be considered" (para 4). With respect to the child, the Court must look at the "'family and social environment in which its life has developed' -- immediately prior to the removal", taking into account "all relevant links and circumstances -- the child's links to and circumstances in country A; the circumstances of the child's move from country A to country B; and the child's links to and circumstances in country B" (at para 43).

7 RWJ was habitually resident in Texas prior to his removal. He was born there, and he had lived nowhere else. CLW made arguments in relation to RVW having an intention to reside in Canada; however, he had been deported from Canada. RVW's deportation means that, even if such an intention did exist, which RVW denies, it had no relevance to decisions about where RWJ was going to live at the time CLW removed him.

8 It is equally clear that RWJ was removed in breach of RVW's custody rights. Both CLW and RVW had commenced proceedings in the Texas courts. An affidavit sworn by counsel in Texas deposed that "Under Texas Law, since RVW and CLW were married, RVW and CLW were by law joint custodians/conservators/guardians of RWJ having parallel rights and duties regarding him. As such, RVW had rights of custody to RWJ within the meaning of the Hague Convention".

9 The removal of RWJ was thus wrongful pursuant to Article 3. The ordinary response to that determination is an order returning the RWJ to Texas. CLW claims, however, that RWJ ought not to be ordered returned because of Article 13(b), which says that this Court is not bound to order him returned because "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".

10 The onus of establishing a risk under Article 13(b) lies with CLW: *Pollastro v Pollastro* ([1999](#)) 43 OR (3d) 485. Article 13(b) is an exception to the operation of the Hague Convention's ordinary presumption "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 have been determined before their removal": *VW v DW* [[1996](#)] 2 SCR 108 at para 36.

11 Every case depends on its own facts (*Pollastro*); however, it is clear that the degree of risk must be high: *KJG v KJB*, [[2000](#)] A.J. No. 290 at para 92. In *Thomson v Thomson*, [[1994](#)] 3 SCR 551 at para 80, the Supreme Court held that the "physical or psychological harm contemplated by the first clause of Article 13(b) is harm to a degree

that also amounts to an intolerable situation":

...the risk has to be more than 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' (at para 80, citing **Re A (A Minor) Abduction** [1988] 1 FLR 365 (Eng CA))

12 The Court must assess both the severity of harm and its likelihood: **Andegiorgis v Giorgis** [2018 ONCJ 965](#) at para 55. Further, in assessing the significance and likelihood of harm, this Court must take into account the capacity of the courts in Texas to make suitable arrangements for RWJ: **Andegiorgis** at para 60. As noted by the British Columbia Court of Appeal in **Sampley v Sampley** [2015 BCCA 113](#) at para 38, the Canadian court ought not to "usurp the role of a court in the United States taking responsibility for protecting the child" absent a reason for doing so. The Court in **Sampley** noted cases where allegations of spousal abuse and drinking were not sufficient to meet the standard set out in Article 13(b) (at para 42; see also **Singh v Ramotar**, [2018 ONSC 2964](#) at para 36).

13 The determination about whether there is a grave risk of physical or psychological harm is *not* equivalent to a determination of custody, although it must be made with "reference to the interests and circumstances of the particular child in the proceedings" and, in particular, in light of evidence of harm: **Pollastro**.

14 CLW has not demonstrated that returning RWJ to Texas would create a grave risk that RWJ will be exposed to physical or psychological harm or that it would otherwise place the child in an intolerable situation. CLW's allegations centre on three issues in relation to RVW: 1) that he drinks to excess and will drink and drive such that he will put RWJ at risk of physical or psychological harm; 2) that RVW has engaged in physical abuse of his former partner and of CLW, such that he will put RWJ at risk of physical or psychological harm; and 3) that RVW withheld RWJ from CLW for three weeks when RWJ was very young, such that he will put RWJ at risk of physical or psychological harm.

15 The evidence before me shows that CLW's concerns in this respect are not baseless. RVW has two criminal convictions in Canada for related incidents, and he does not dispute that he drinks, that he has on at least one occasion driven dangerously, or that he acted towards CLW in a manner that was aggressive. He does not dispute that he withheld RWJ for three weeks, although since at least January 2018 he has maintained that this was due to his fear (which turns out to have been well-founded) that CLW would remove the child.

16 Nonetheless, this evidence is not sufficient to meet the very high standard imposed by Article 13(b). RVW and CLW had a high conflict and dysfunctional relationship. Both parties were physically aggressive and conflictual with each other as their relationship broke down. But even taken at face value, the evidence of CLW does not suggest a pattern of abuse or violence by RVW against her. The evidence of RVW's drinking is not clear or unambiguous, and does not support a finding of alcohol abuse or alcoholism. Further, and more importantly, it does not suggest any issues that cannot be addressed by the Texas courts and law enforcement.

17 RVW's withholding of RWJ in December of 2017, when the baby was only three months old, and RVW's pattern of alcohol consumption, particularly in light of his conviction for failing to provide a breath sample in Canada, do give me concerns about his suitability as a parent, and about whether being with RVW is in RWJ's best interests. But that is not the question before me. That question is one to be resolved by the Texas courts, which have jurisdiction over custody questions in relation to RWJ. The question before me is only whether the evidence of RVW's conduct is such as to show that returning RWJ to Texas will place him at grave risk of physical or psychological harm or otherwise place him in an intolerable situation. The evidence does not support that conclusion.

18 The Respondent submitted that I ought to consider the possibility that return will create an intolerable situation, apart from the issue of whether RWJ is at risk of physical and psychological harm. The Respondent relied on **Callicutt v Callicutt**, [2014 MBQB 144](#), where in addition to finding a grave risk of physical and psychological harm

because of clear evidence of "a pattern of escalating, physical and emotional abuse and violent behaviour by the father" (para 96), the Court also found that return of the child would create an intolerable situation. The mother had no funds nor a place to live in the other jurisdiction, had no family support or friends there, she was afraid to return, and she had no financial resources sufficient to allow her to return.

19 In *Thomson*, however, the Supreme Court treated "intolerable situation" as relevant in relation to the allegation of physical or psychological harm (that it is the risk of harm that amounts to an intolerable situation). In *Callicutt* itself, the intolerable situation arose in conjunction with risks of physical or psychological harm, not as an independent ground. In my view treating intolerability as an independent ground related to the difficulty for the removing parent returning to the child's habitual residence would undercut the exceptional nature of Article 13(b).

20 Further, even if I am wrong, and intolerability is an independent ground, the evidence filed by CLW does not demonstrate that her circumstances are sufficient to create an intolerable situation. She deposes in her Affidavit, sworn January 28, 2019, that she had an interview to obtain a green card in December 2018 but she did not show up for that interview, as a result of which "there is a denial to a possible US green card for me." She links her reason for not attending the interview to her return to Canada and what she says is RVW's stated opposition to her obtaining a green card. That explanation is inadequate given that by December 2018 CLW knew that this matter was before this Court, and that RWJ was subject to a potential removal order. She cannot fail to fully explore opportunities to be with her son should he be returned to Texas, and then use that failure to suggest his return to Texas would create an intolerable situation.

21 The Hague Convention exists to deprive a removing parent of the advantage to be obtained from abducting a child. It "protects against the harmful effects of wrongful removal or retention": *Balev* at para 25. It deters parents from child abduction: *Balev* at para 26. It does not determine the custody and access of a child, but simply returns the child "to the jurisdiction which is most appropriate for the determination of custody and access": *Balev* at para 24. The evidence before me does not justify avoiding the ordinary application of Articles 3 and 12 of the Hague Convention, and frustrating the satisfaction of these important objectives. I therefore order that RWJ be returned to Texas.

Dated at the City of Calgary, Alberta this 15th day of March, 2019.

A. WOOLLEY J.