

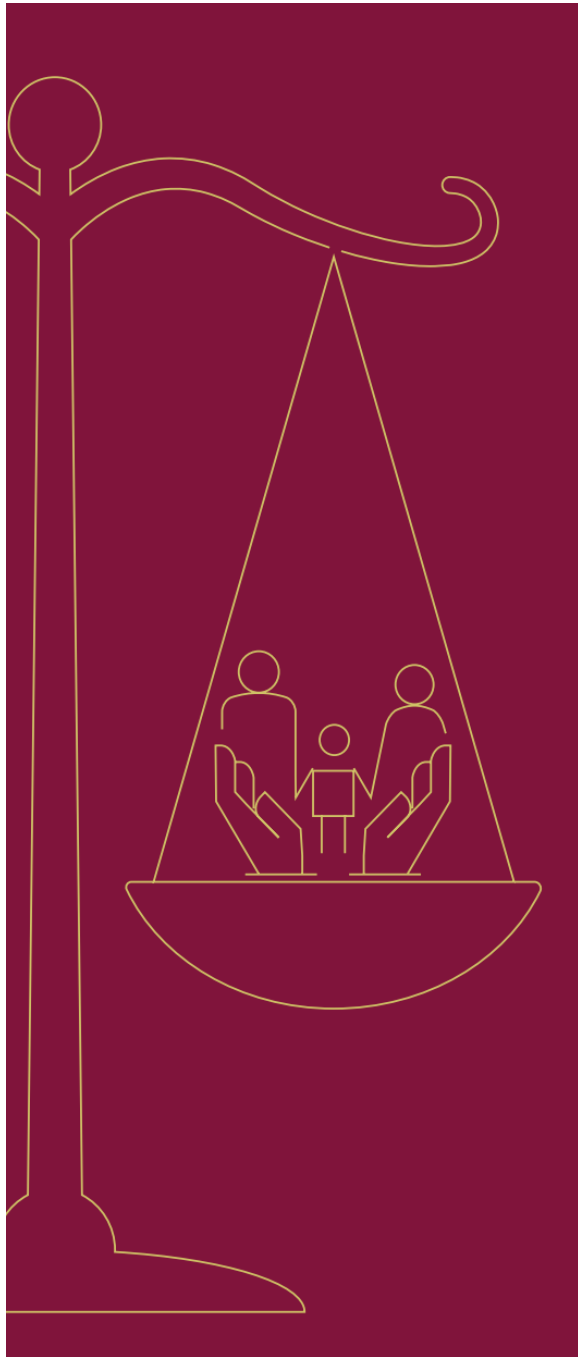
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# LEGAL BULLETIN

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Hague Convention Applications in Cases of Family Violence: *Harley v Harley*, 2023 ONSC 2563

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## Background of the Case

The Respondent of this case, the child's mother, left Ohio, USA with her child and relocated to Ontario, Canada. This occurred without the Father's permission. There was no existing custody order at the time. The Father sought the immediate return of his son to the United States, pursuant to the *Convention on the Civil Aspects of International Child Abduction* ("Hague Convention"<sup>1</sup>). Neither party disputed the fact that Newton Falls, Ohio is the child's habitual residence.

The Mother argued that the child should not be returned to the U.S. due to the exception under section 13(b) of the *Hague Convention*. This section states that a contracting party is not obliged to return a child to the primary residence if, by doing so, the child faces a grave risk of psychological or physical harm. The Mother further stated that, given the child's age (12 years old), their wishes should be considered as per section 13(2) of the *Hague Convention*. The Father argued that the Mother did not meet the high threshold required for a section 13(b) exemption or 13(2) considerations. The United States and Canada are both obligated to comply with the *Hague Convention*.

## Questions for the Court

The Supreme Court of Ontario was tasked with analyzing two issues in this case:

1. Whether the mother established, on a balance of probabilities, that the return of her child to the United States would place him at a grave risk of physical and psychological harm?

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<sup>1</sup> <https://assets.hcch.net/docs/e86d9f72-dc8d-46f3-b3bf-e102911c8532.pdf>

2. Whether the mother established that the child does not wish to be returned to the United States and that the child is of sufficient maturity that their views should be considered?

## Hague Convention

Article 1a of the *Hague Convention* states that its' main purpose is to "secure the prompt return of children wrongfully removed to or retained in any Contracting State". Removal of a child is considered wrongful when it violates an individual's custody rights to that child, and those rights were being exercised at the time of removal (Article 3). The *Hague Convention* is not used to determine custody, but to return the child to their country of habitual residence that can best address custodial disputes (*Office of the Children's Lawyer v Balev*, 2018). There are a few exemptions to the requirement to return a child to their habitual residence. Article 13(b) states that a country may refuse the return of a child if it would place the child at grave risk of danger. Further, Article 13(2) permits a judicial or administrative authority to oppose the child's return if they explicitly articulate that it is against their wishes.

## Evidence Produced

### *Firsthand Evidence*

The Respondent stated that she experienced years of domestic violence at the hands of the Applicant including controlling, intimidating and abusive behaviour. Her affidavit expressed that both she and her son experienced physical abuse, yelling, financial abuse, threats of violence, and verbal abuse. If the Respondent tried leaving with her child, the Applicant would say she "will regret it... you wait and see" (para 75). She expressed that she feared the Applicant would find and hurt her if she returned to Ohio. She further feared that if her son were forced to return to Ohio, that he would be punished by his father as an act of revenge against her.

The father engaged in coercive control against the mother, which is exemplified by his use of surveillance cameras (which he used to monitor his wife and child when he was not home) and by

requiring the mother to ask permission to leave the family home. With respect to their son, the father expected him to complete an extensive list of chores in order to serve his father. Some tasks were very dangerous considering the child's age, such as bringing loaded guns to his father (which the Applicant denies) or being taught how to operate paving tools. The Respondent admits to having frequently carried a loaded gun in his pocket and having recently taught the child to use a BB gun.

### *Third-Party Evidence*

Affidavits were also considered by third parties, including the Applicant's mother. The Applicant's mother affirmed that there were guns kept in the home, that he once threw the Respondent against a wall, and that he terrorized his wife and son for his own amusement. She stated that under the circumstances she fully supports the Respondent's decision to leave. Affidavits were also filed by two former employees of the bakery owned by parties. One former employee submitted that she witnessed the Applicant engage in relentless emotional torture, humiliation, and yelling directed toward the Respondent and her child. This was reaffirmed by another former employee's affidavit. She also stated the Applicant made a point of showing her his loaded gun collection and shared that she feared for her safety by providing this affidavit. Finally, a former friend (Mr. Zuschlag) of the father recounted that, when helping the Applicant with a project, the Applicant became infuriated, and started yelling and taking swings at him. Mr. Zuschlag stated that he knew of the Applicant owned guns and feared being shot, so he left the premises.

An affidavit was also produced by Morrison Reid from the Office of the Children's Lawyer. After speaking with the child, Mr. Morrison wrote that the child was a "mature, articulate, and intelligent 12-year-old" (para 109). He also shared that the child feared that his father would hit him again.

The child reported feeling uncomfortable with his father's surveillance devices, the racist comments made by his father, and described himself as a "slave labourer" for the Applicant (para 113). The Court affirmed that, through firsthand evidence

and third-party testimonies, the mother was able to exemplify that her son faced a grave risk of harm by returning to the United States.

### *Jurisdictional Dispute*

An issue was also raised on the fact that no legal proceeding was commenced in Ohio to resolve the matter of custody. The father claimed that he was unable to commence a proceeding as he could not afford it. Justice King did not accept this as a bona fide justification. If a parent is unable to pay the initial fees to commence a child custody proceeding, then it is not rational to conclude that the same parent can afford to provide a child with the basic necessities of life (para 222). ***Ordering the child to return to a home where the parent cannot afford preliminary legal fees is not in a child's best interest*** (para 230).

The Court also acknowledged that, if the required to return to the U.S., the mother would be unable to commence a legal proceeding right away given the expiry of her status as a Permanent Resident. She would need to wait six months before commencing an action to settle the custodial dispute. Justice King raised concern about returning the child to a jurisdiction where there is no proceeding being commenced to determine what is in their best interest. He stated that this would create a ***“legal vacuum”*** that would subject the child to a grave risk of further psychological harm (para 191).

The risk of harm cannot be engineered by the departing parent through their actions, or as it is seen in this case, through inaction (*Parmar v Flora*, 2022; *Brown v Pulley*, 2015). It was not contested that the mother self-engineered a risk of harm by failing to renew her immigration status, not advising the child's father of her intentions, and through the fact that she was aware of the challenges she would face in re-entering the States (which was communicated to her through legal advice she sought). However, Justice King affirmed that the mother's actions were necessary because otherwise she and her child would be subjected to an intolerable living environment. The mother's affidavit described the home as being akin to ***“living in a prison”***, and this is affirmed by the court (para 213).

## Court's Reasoning

Justice King affirmed that the child should not be returned to the United States on the basis of sections 13(b) and 13(2) of the *Hague Convention*. This means that the child was not required to return to Ohio and can continue living with his mother in Ontario.

### *Exception Granted Under s. 13(b): Grave of Psychological Harm*

The threshold for a grave risk of harm must be ***“greater than would normally be expected in taking a child away from one parent and passing them to another”*** (*Thomson v Thomson*, 1994). It requires that subjecting the child to this risk would cause “an extreme situation, too severe to be endured” (*Rayo Jabbar v Rolim Mouammar*, 2003). The Court held that the marital home of the parties was cruel and abusive, and that returning the child to that environment would place him at a great risk of psychological and physical harm. Contrary to the father's testimony, Justice King did not accept that the surveillance cameras were installed to monitor the bakery. Instead, he holds that they are clearly intended to control the Respondent and her child. In his decision, Justice King stated that the mother and her son were subjected to such a cruel environment that they were essentially made ***“captives in their own home”*** (para 160). Some of the chores required of the child also grossly exceed what should be imposed upon a child of his age.

Though having firearms in a home is not in itself grounds for an exemption under s. 13(b), the Applicant's use of loaded weapons is concerning. Having loaded firearms strewn throughout the home, fixed beside his recliner and even having his child carry the weapon poses a serious risk of harm. Given how the culmination of the Applicant's behaviours has caused the child severe psychological harm, and has the capacity to continue doing so, an exception was granted under s. 13(b) of the *Hague Convention*. This exemplifies the Court's recognition that coercive control can satisfy the threshold of psychological harm under the *Hague Convention*.

### *Consideration of s. 13(2): Respecting the Child's Wishes*

In accordance with s. 13(2) of the *Hague Convention*, a Court may offer discretion to the child's views with respect to whether the child has made good decisions of substantial nature previously, whether they have weighed the pros and cons of their decision, whether the decision was reached without undue parental influence, and whether the child's fear of returning is reasonable (*England v England, 2005*).

Neither party disputed the child's maturity or intelligence. The child was capable of accurately describing events that occurred within the family home and described feeling unsafe with his father to the Office of the Children's lawyer. An email sent by the father to the child was examined as proof that the child is mature given the language of the text. The Canadian justice system has previously utilized the wishes of children as young as 8 years old (*Borisovs v. Kubiles, 2013*).

Given the aforementioned considerations, Justice King held that the child need not return to Ohio (as per section 13(b) and 13(2) of the Hague Convention) given the gross psychological damage he has experience, the risk of harm he would face by returning, and his expressed wishes not to return to Ohio. This case illustrates the Canadian justice system adequately considering the relevance of domestic violence in custody disputes and alleged parental child abductions.

### Key Takeaways

Given the aforementioned considerations, Justice King held that the Child need not return to Ohio (as per section 13(b) and 13(2) of the Hague Convention) due to the gross psychological damage he has experience, the risk of harm he would face by returning, and his expressed wishes not to return to Ohio. This case illustrates the family court's recognition of family violence in determining children's best interests and the impact of this violence on adult victims and children as well as the importance of the voice of a child in these proceedings.

This bulletin was prepared by:

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