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Family Law Newsletters
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— Franks & Zalev - This Week in Family Law

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Issues: Ontario — Open Court Principle and *Hague Convention* Applications

One case. Two decisions from the Ontario Court of Appeal. Both penned by Justice Madsen. Both sharply illuminate the tension between open courts, child privacy and the best interests of children, and Canada's international treaty obligations.

Ultimately, *Kirby* 1 confirms that the constitutional open court principle must appropriately bend when a child's privacy and safety are at stake, and shows how anonymization with memorable pseudonyms can protect a vulnerable child while keeping the law accessible.

Kirby 2 makes it clear that when a child has already been granted refugee status, a *Hague Convention* return application is not a do-over. Courts must defer to the Refugee Protection Division (the "RPD") findings and apply the presumption of continuing risk without re-litigating the issue of credibility.

Finally, *Kirby* 2 underscores that fairness cannot be sacrificed at the altar of expedience — especially in a *Hague* hearing where credibility is contested and cross-examination is refused.

Kirby 1 addresses the thorny issue of when — and how — courts may restrict public access to family law files.

Two months later, in *Kirby* 2, a unanimous Court of Appeal explained how the *Hague Convention on the Civil Aspects of International Child Abduction, 1980*, C.T.S. 1983/35; 19 I.L.M. 1501 (the "*Hague Convention*"), the *Immigration and Refugee Protection Act*, S.C. 1001, c. 27 ("*IRPA*"), and the *Convention Relating to the Status of Refugees, 1951*, C.T.S. 1969/6; 189 U.N.T.S. 150, interact when a recognized refugee child is the subject of a return application.

Read together, the *Kirbys* now stand as leading authority as to how to balance:

(a) the constitutional open-court principle against a child's right to privacy; and

(b) Canada's obligation to return wrongfully retained children against its duty of non-refoulement — the international rule forbidding the expulsion or return of a refugee to a place where their life or freedom has been and would be threatened.

Background

The parents, citizens of an unnamed country (we will refer to it as "Narnia"), married in 2003 and had three daughters, including the youngest, X, born in 2011. They separated in 2015 and divorced in Narnia in 2019.

Parenting was shared equally until 2021, when the father allegedly slammed the middle child, Y, against a wall, causing documented injuries. After that, he had no contact with X until December 2023, when a Narnian court restored limited parenting time.

In January 2024, the father was arrested over the 2021 assault but the charge was later withdrawn, and his parenting time was expanded that April.

With the father's consent, the mother, her new husband, X and Y travelled to Ontario on July 4, 2024 for what was to be a three-week vacation. But they never returned. When the mother missed family-court dates in Narnia on August 1st and 7th, a warrant was issued for her arrest.

On August 14th, the mother and X applied for refugee protection in Ontario. As Narnia was a *Hague* signatory, the father launched a *Hague Convention* application in Ontario for X's return on September 17th, and the Office of the Children's Lawyer ("OCL") was appointed to represent X.

The Trial

Originally set for two days, the trial stretched to ten days over three months. The trial judge, emphasizing that *Hague* cases must proceed swiftly, denied early adjournment requests from the mother and the OCL, who had sought to await the ruling from the Immigration and Refugee Board (the "IRB").

In December 2024, the OCL sought to file evidence that the father had sent unsolicited material to the IRB, potentially delaying the refugee hearing, and the mother asked to cross-examine him. The court accepted a stipulation about the father's actions but refused cross-examination, noting that *Hague* cases are normally decided on affidavit evidence and that this case was not "a rare and exceptional case where *viva voce* evidence would assist in determining whether there is a grave risk of harm to the child's return to her habitual residence[.]"

During closing submissions in January 2025, the OCL informed the court that X had just been granted refugee status. Relying on *A.M.R.I. v. K.E.R.* (2011), 2 R.F.L. (7th) 251 (Ont. C.A.) at para. 74 ("*A.M.R.I.*."), the OCL argued that this created a rebuttable presumption that returning X to Narnia, her admitted country of habitual residence, would expose her to persecution — precisely the harm contemplated by Article 13(b) of the *Hague Convention*.

In May 2025, however, the judge held that she was not bound by what she called the IRB's "one-sided" process; she preferred the fuller record before her. She found the mother's abuse allegations unproven and stale, noted the father had never harmed X, and expressed confidence that the Narnian courts could protect X. The mother's decision to leave X with the father for a week in 2024 further weakened her case.

Finding no grave risk of harm and concluding that X's views had been influenced by the mother, the trial judge ordered that X be returned to Narnia.

The Motion Before Justice Madsen

The mother appealed the return order to the Ontario Court of Appeal and moved to limit public access to the file — a full frontal attack on the open court principle. She asked for anonymization of all names, a publication ban on identifying details, and a sealing of all *IRPA* documents, including the IRB's refugee decision. The OCL supported her motion; the father opposed everything except basic initialization and a ban on identifying the child. The media were notified but did not attend. (That is the first time we have *ever* heard of that happening.)

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Justice Madsen — echoing Justice Chappel's reasoning in *J.T. v. E.J.* (2022), 79 R.F.L. (8th) 65 (Ont. S.C.J.), which we discussed in "By A.F. and M.E.Z." in the March 4, 2024 (2024-09) edition of TWFL, had to balance the constitutional open court principle with the best interests of X and the stated need to protect the child's privacy. While s. 2(b) of the *Charter* guarantees open courts, Justice Madsen stressed that the open court principle is not absolute. Protecting children is a recognized countervailing value, reinforced by the *Convention on the Rights of the Child, 1989*, C.T.S. 1992/3, s. 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 70 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12, Rule 1.3 of the *Family Law Rules*, O. Reg. 114/99, and the privacy safeguards in s. 166(c) of the *IRPA* and IRB Guideline 3. Those are a lot of counterweights.

All will remember *Sherman Estate v. Donovan*, 2021 CarswellOnt 8339 (S.C.C.) ("*Sherman Estate*") where the Supreme Court considered the open court principle, making it clear that there is a "strong presumption of openness." Therefore, in considering the relief sought by the OCL on behalf of X, Justice Madsen had to consider the Best Interest/Child's Right to Privacy — s. 70 — Sharman Estate Triangle and which point of the triangle was most important on this factual matrix.

To this triangle, we would add another point (which we guess makes it more of a square): access to justice and development of case law. While it may sound trivial, the proliferation of initialed cases across the province — and across the country (to say nothing of Quebec where all family law cases are identified by what appear to be a string of LottoMax numbers) — makes it very hard to remember the names of cases on the fly. And this impacts the ability of counsel to find cases and to easily refer to cases while on their feet in court. When arguing a motion, it is much easier to search your memory banks to come up with "*Wildman v. Wildman*" or "*Peter v. Beblow*" on the fly, rather than *R.L. v. D.K.* [or worse, *L.(R.) v. K.(D.)*].

Citing *Sherman Estate*, Justice Madsen applied the three-part test for limiting openness: (1) a serious risk to an important public interest; (2) no reasonable alternative measures; and (3) the benefits outweigh the negative effects. She confirmed that privacy qualifies as such an interest when disclosure would reveal a person's intimate "biographical core" or cause psychological harm; that children receive heightened protection under Canadian law; and that restriction must be necessary and proportionate. Anonymization or a publication ban is preferred, full sealing is exceptional, and notice to the media is usually required.

Applying this test, Justice Madsen found that the record contained detailed allegations of violence and highly personal information about X, who feared for her safety if identified. She also noted that the IRB decision is confidential under s. 166(c) of the *IRPA*. Therefore, unregulated public access posed a serious risk to the important public interest in protecting a vulnerable child's privacy. Her Honour ordered anonymization of all family members and a publication ban on identifying details.

However, to keep the citation both protective and *practical* (addressing the 4th corner of our square), she chose the pseudonyms "Kirby" and "Woods" from an online random name generator, avoiding the common problem that initialized case names are nearly impossible for lawyers and judges to remember. What a clever solution. We can think of no issue with it (aside perhaps from having to be careful that the random name generator does not generate case-inappropriate names).

The Appeal

On appeal, the mother argued that the trial judge had misunderstood the refugee process and had failed to apply the *rebuttable presumption of risk* recognized in *A.M.R.I.*, which requires the left-behind parent to displace that presumption with clear, credible evidence that the original danger no longer exists. She further argued that the judge then compounded the error by refusing to hear oral evidence — other than from the father's expert — while subjecting *her* evidence to unusually harsh scrutiny. (This was very similar to *Shipton v. Shipton* (2024), 5 R.F.L. (9th) 17 (Ont. C.A.), where the Court of Appeal set aside the trial judge's decision because he had judged the evidence of the parties with uneven scrutiny.)

The OCL supported the mother's position and emphasized that the child's views — expressed repeatedly to an experienced clinician — were independent and should have been decisive.

The father countered that the trial judge had correctly applied the presumption and was entitled to rely on the fuller evidentiary record before her rather than defer to the RPD. He maintained that the mother's abuse allegations were historic and unsubstantiated and that the judge properly denied late requests for cross-examination.

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Five interveners added context.

The UN High Commissioner for Refugees stressed that a refugee child can be returned only if consistent with Canada's non-refoulement obligations, meaning the *Hague* judge must find new evidence that the original risk no longer exists.

The Canadian Association of Refugee Lawyers urged deference to the IRB's specialized process and proposed a framework for applying the presumption.

The Immigration and Refugee Legal Clinic described the evidentiary safeguards in refugee hearings, including National Documentation Packages and expert assessments.

The Canadian Council for Refugees highlighted procedural protections for child claimants and the role of designated representatives.

Finally, the Canadian Civil Liberties Association argued that returning a recognized refugee child always breaches s. 7 of the *Charter*, or at minimum demands a revised *Charter*-compliant approach to the grave-risk test.

The Court of Appeal was of the view that the trial judge erred in law by reciting, but not actually applying, the rebuttable presumption of risk, effectively reweighing the RPD's findings and dismissing its process as "one-sided" without the oral evidence or cross-examination needed to displace those findings. The court stressed that refugee determinations deserve a high degree of deference and that non-refoulement obligations require a forward-looking assessment of ongoing risk, with no onus on the refugee child. Furthermore, not all refugee hearings are "one-sided"; and this one was not. The mother had, in fact, been subject to cross-examination by the Minister.

The court then sets out key principles for *Hague* cases involving a child that has *already* been granted refugee status:

> 1. Judges must respect the RPD's specialized process and generally defer to its fact-finding and credibility assessments, avoiding any reweighing of the evidence.
>
> 2. If serious doubts arise about the RPD's findings, the proper course is to allow oral evidence or cross-examination, not to reject the refugee decision outright.
>
> 3. Country-conditions analysis, state-protection assessments, and internal-flight findings fall squarely within the IRB's expertise and should rarely be revisited, and a single expert will seldom outweigh the IRB's detailed National Documentation Package.
>
> 4. The return inquiry is forward-looking: the court asks only whether the original risk persists, with no burden on the refugee child to prove it.
>
> 5. Going behind the refugee decision is permissible only where there is concrete evidence of misrepresentation or concealment.
>
> 6. It will be rarely appropriate to draw an adverse inference or make negative credibility findings based on a refugee claimant's choice not to disclose confidential IRB materials.

Applying these principles, the Court of Appeal concluded that the trial judge failed to show the required deference to the RPD and effectively went behind its findings.

Despite the RPD's detailed credibility findings — made after oral testimony and, notably, after cross-examination — the trial judge reweighed the evidence on a paper record, questioned the mother's credibility, and relied heavily on the father's expert while excluding the mother's. She drew an adverse inference from the mother's refusal to disclose confidential refugee-claim documents and applied an unduly high "life-threatening" standard instead of the *Hague Convention's* "grave risk" test. Once

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the RPD granted refugee status, the presumption of ongoing risk shifted the onus to the father, yet the judge dismissed the RPD process and rejected cross-examination requests even after the refugee decision was released.

The Court of Appeal concluded that these missteps — disregarding the tribunal's expertise, overlooking the contemporaneous risk findings, and misapplying the rebuttable presumption — were errors of law that required setting aside the return order.

The Court of Appeal further found that the trial judge erred in her application of Article 13(2) of the *Hague Convention*, which gives a child an independent defence to return if they are old enough to express a genuine objection to return. Following the Supreme Court's guidance in *Office of the Children's Lawyer v. Balev* (2018), 5 R.F.L. (8th) 1 (S.C.C.), the court emphasized that judges must take a practical, fact-based approach to assessing a child's age, maturity, and the authenticity of their views. Both the *Convention on the Rights of the Child* and the *Hague Convention* require that a child's wishes be given due weigh — especially when, as here, the child has already been found by the IRB to face persecution.

In this case, X repeatedly told an experienced OCL clinician that she feared her father and did not want to return, and the RPD had already accepted that she faced a serious risk of harm. The application judge nevertheless discounted X's objections, relying instead on a single sentence from an inadmissible custody report. She allowed concerns about the mother's credibility, assessed only on a paper record, to overshadow the child's own voice. The appellate court found no evidence that X's views were inauthentic and ruled that dismissing her objection was a palpable and overriding error.

Having found that both the grave risk of harm and the child's objection exceptions to return under the *Hague Convention* applied, the Court of Appeal set aside the return order, confirmed that the Ontario court has jurisdiction over the parenting issues, and remitted the matter back to the Superior Court for a new hearing before a different judge to determine decision making and parenting time.

Conclusion

Kirby v. Woods delivers three key messages for counsel and judges handling international-child-abduction cases.

First, when a child has been granted refugee status, courts must give genuine deference to the Refugee Protection Division's specialized fact-finding and apply the rebuttable presumption of continuing risk with care — without re-litigating facts already tested in that forum.

Second, a child's independent objection to return carries substantial weight, especially when that child has already been found to face persecution. Courts must treat the child's voice as evidence in its own right, *not merely as a derivative* of parental credibility.

Third, while *Hague* proceedings are meant to be swift and summary, and judges have discretion to deny cross-examination, *Kirby* underscores the danger of doing so where credibility is central. Refusing even limited cross-examination in a case that turns on competing affidavits risks breaching basic procedural fairness and virtually invites appellate intervention.

For counsel, the lesson is equally sharp: when the other side requests cross-examination, even late in the process, it may be wise to seriously consider consenting. Had the father's counsel agreed to have him cross-examined, the appeal might well have unfolded differently, making it far more difficult or palpable for the Court of Appeal to set aside the trial judge's credibility findings.

Conversely, had the judge permitted cross-examination, the evidence elicited might have confirmed the RPD's assessment and shown that sending X back would indeed expose her to a grave risk of harm, an outcome (almost) all would want to avoid.

Together, the companion rulings confirm that the open court principle is not absolute, that child privacy requires robust protection, and that Canada's non-refoulement obligations can override the *Hague Convention's* presumption of return — all while warning that expedition cannot come at the expense of fairness.

Finally, *Kirby* is a reminder of the limited "prize" at stake in a *Hague* proceeding. The *Hague Convention* does not decide parenting time or decision-making. It only determines where those issues will be heard. Here, the child was wrongfully retained

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in Ontario in July 2024. It took until early May 2025 for a trial decision on the return application, another three months for the Court of Appeal to hear and decide the appeal, and the case has still not reached a merits hearing on parenting. For a left-behind parent, that delay may rival or exceed the time it would have taken to litigate custody and access directly in Ontario. While there can be sound strategic reasons to invoke the *Hague Convention*, counsel should weigh carefully whether insisting on a return application truly advances the client's interests, or whether it may be more efficient to accept the foreign jurisdiction and move straight to a best interests determination.

Circling back to the motion on anonymity, *Kirby* also confirms that anonymization through pseudonyms is more than cosmetic. Using "Kirby" and "Woods" instead of an alphabet soup of initials protects the child's privacy while producing a case name that is memorable, functional, and capable of guiding precedent. In this sense, *Kirby* not only advances the law on refugee children and the *Hague Convention* but also gives the bar and bench a practical model for how to reconcile the open court principle with the realities of parenting and child protection cases.

Thus endeth the lesson.

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