



OUTER HOUSE, COURT OF SESSION

[2025] CSOH 109

P789/25

OPINION OF LORD BRAID

in the Petition of

DM

Petitioner

for

orders under the Child Abduction and Custody Act 1985

Petitioner: Critchley; Turcan Connell

First Respondent: McAlpine KC; Brodies LLP

Second Respondent: McEwan; Balfour and Manson LLP

21 November 2025

Introduction

[1] The petitioner, his wife (the first respondent) and their two sons H (aged 14) and B (aged 8) have lived in Florida, United States of America, for some years and were, until the events of this summer, habitually resident there. The petitioner, the first respondent and H are British citizens holding a Green Card entitling them to permanent residence in the US, while B is a US citizen. On 14 July 2025, by agreement and on the basis that the trip would be temporary, the parties travelled with the children from Florida to the United Kingdom for a three-week holiday and to visit their respective families in England and then Scotland. The petitioner understood that they would all be returning to Florida at the end of the

holiday but on 26 July 2025, while visiting the first respondent's family, she told him that she proposed to remain in Scotland with the children, close to her family, and would not be returning with the children to Florida. The petitioner did not consent to that, and on 1 August 2025 the first respondent raised proceedings in Peterhead Sheriff Court and obtained an *ex parte* interim interdict which, among other things, prohibited the petitioner from removing H and B from her care and control, or from that of anyone to whom she had entrusted their care and control.

[2] Against that background, the petitioner seeks an order in terms of the Child Abduction and Custody Act 1985 for return of H and B from Scotland to Florida on the basis that they have been wrongfully retained here. The petition is opposed by the first respondent but is supported by H (the second respondent), who has lodged answers the primary purpose of which is to set out his view that he wishes to return to the US. (For ease of reading, references to "the parties" are to the petitioner and first respondent only; I will refer to the first respondent simply as "the respondent" and to the second respondent as "H".)

[3] The 1985 Act incorporated into domestic law the Hague Convention on the Civil Aspects of International Child Abduction, to which both the United Kingdom and the US are signatories. Article 1 of the Convention provides that the objects of the 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. Article 3 provides:

“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.”

[4] It is not disputed (and has been established on the basis of a report by a suitably qualified Florida lawyer, Laura Davis Smith) that the various elements of Article 3 have been satisfied and that the children’s retention in Scotland is wrongful. However, the respondent relies upon the defence in Article 13(b), which provides that the requested State need not order a return of a child if it is established that:

“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.”

[5] The principal issue in this case is whether the respondent has made out that defence. There is a secondary issue as to whether H’s (strong) wish to return to Florida is relevant in the assessment of the Article 13(b) defence, and, if it is not, whether his wish is such that, in the event the defence is established by the respondent, the court should nonetheless exercise its discretion to order his return.

The law

Article 13(b)

[6] There is little dispute between the parties as to the law which applies to an Article 13(b) “grave risk” defence (save, perhaps, as to the extent to which H’s views are relevant in considering that defence). The starting point is the Supreme Court case *In Re E (Children) (Abduction: Custody Appeal)* 2012 1 AC 144, from which the parties agreed that the following propositions relevant to this case can be taken:

- (i) The onus is on the respondent to establish the defence (subject to the “nuanced approach” taken to domestic abuse allegations, which are generally assumed to be true: see para [7]).
- (ii) The risk to the children must be a grave one. A real risk, or the return not being in the children's best interests, will not suffice. While “grave” characterises the risk rather than the harm, there is a link between the two, with a low risk of death or serious harm being likely to be a grave risk, but a low risk of minor harm not being likely to be such a risk.
- (iii) Article 13(b) contains two defences. The first relates to the exposure to a grave risk of physical or psychological harm. The second relates to placing the children in an intolerable situation. (A better formulation might be that there are *three* defences: grave risk of (a) physical harm, (b) psychological harm or (c) intolerable situation. In the present case, only (b) and (c) are founded upon; there is no suggestion that either child would be at grave risk of physical harm upon return to the US.)
- (iv) “Intolerable situation” means a situation that the children in the particular circumstances of these children should not be expected to tolerate. There is recognition in an intolerable situation defence that every child has to put up with a certain amount of rough and tumble, discomfort and distress as part of growing up.
- (v) Article 13(b) looks to the future: the situation as it would be if the children were to be returned forthwith to the US.
- (vi) If the risk exists, its source is irrelevant.

- (vii) A party's subjective perception of events, leading to a risk to her mental health, can found a grave risk defence: see, too, *In Re S (A Child) (Abduction; Rights of Custody)* [2012] UKSC 10. The issue is not whether the perception is reasonable or objectively based.

[7] Subsequent cases have elaborated on some of those propositions. The leading Scottish case is *AD v SD* 2023 SLT 439, in which the Inner House explained the approach to be taken in light of *In Re E*. In particular, where allegations of domestic abuse are made, the court must take a nuanced, staged, approach, in which the allegations are assumed to be true for the purposes of the exercise. The court should ask whether, if they are true, there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation. If so, the court must then ask how the child can be protected against the risk. If there are no efficacious protective measures, the court may have no option but to do the best it can to resolve the disputed issues. A delicate slide rule type balance requires to be struck between the assessed risk and the protective measures offered: a particularly high risk of the most severe harm will require to be balanced by more effective protection than a lower risk of either that or of less severe harm (Lady Wise, paras [26] and [27]).

[8] On the question of protective measures, it is assumed, in the absence of compelling evidence to the contrary, that the courts of the requesting country will be able to protect the child: *L v H* 2021 SCLR 467, Lady Wise at para [15].

[9] The “nuanced approach” referred to in *AD v SD* applies only to allegations of domestic abuse. Other facts relied upon by the respondent must be established on a balance of probabilities: *Petition of JL* 2024 Fam LR 26, Lord Stuart at [52]; *cf R (Child Abduction Parent’s Refusal to Accompany)* [2024] EWCA Civ 1296 Peter Jackson LJ at [38] and [41]. Given

that the court generally does not hear parole evidence in Hague cases, but is reliant upon affidavit evidence on which the parties cannot be challenged in cross-examination, the party upon whom the onus rests may fail to establish the defence in the absence of extraneous evidence supportive of their position. Where there are contradictions between affidavits and no other evidence to support a conclusion one way or the other, the general rule is that no conclusion can be drawn by the court: *D v D* 2002 SC 33, referring to *Re AF (A Minor)* [1992] 1 FLR 548. However, that may not be a complete statement of the position. What was actually said in *Re AF*, by Butler-Sloss LJ at 553-554 was:

“If a judge is faced with irreconcilable affidavit evidence and no oral evidence is available ... how does the judge resolve the disputed evidence? It may turn out not to be crucial to the decision, thus not requiring a determination. If the issue has to be faced on disputed non-oral evidence, the judge has to look to see if there is independent extraneous evidence in support of one side. That evidence has, in my judgment, to be compelling before the judge is entitled to reject the sworn testimony of a deponent. Alternatively, the evidence contained within the affidavit may in itself be inherently improbable and therefore so unreliable that the judge is entitled to reject it. If, however, there are no grounds for rejecting the written evidence on either side, the applicant will have failed to establish his case.”

[10] I take from this that independent extraneous evidence supporting the other party's account is not the sole reason for rejecting the evidence in a party's affidavit. It may also be rejected if it is inherently improbable; and, to that, I would add that it must follow from what Butler-Sloss LJ said that it may be rejected if there are other grounds for doing so (such as that the party is demonstrated to have been untruthful in relation to some other aspect of his evidence). The key point is that there must be an objectively justifiable basis for rejecting the evidence and preferring that of the other party.

[11] The separation of children from their primary carer can give rise to a grave risk defence, even if the separation comes about from that primary carer's refusal to return to the State of habitual residence; however, the primary carer's stated refusal to return should be

scrutinised closely lest it be tactical, or there may be a change of mind after an order is made:

R (Child Abduction Parent's Refusal to Accompany), above, paras [34] to [36].

[12] Suicide by a parent in the event of a return order being made would meet the threshold required for Article 13(b). However, the threat of suicide should be scrutinised with great care: *Director-General, Department of Families v RSP* (2003) 177 FLR 169, at para [39], referring to the decision of the first instance judge at [80].

[13] Finally, where the grave risk defence is established, the court retains a discretion to decide to return the children in any event. However, in *In Re M (Abduction: Rights of Custody)* [2008] 1 AC 1288, citing *In Re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619 at para [55], Baroness Hale of Richmond said, at [45], that it was inconceivable that a court which reached the conclusion that there was a grave risk that the child's return would expose him to a physical or psychological harm or otherwise place him in an intolerable situation would nevertheless return him to face that fate. That approach was endorsed by the Inner House in *AD v SD*, and it is certainly difficult to envisage circumstances in which a court would return a child to a grave risk of harm or to an intolerable situation.

UNCRC and the Hague Convention

[14] By virtue of the United Nations Convention on the Rights of the Child [UNCRC] (Incorporation) (Scotland) Act 2024, section 6, it is unlawful for a court to act, or fail to act, in connection with a relevant function in a way which is incompatible with the UNCRC requirements. Article 3 of that Convention provides that in actions concerning children the best interests of the child shall be a primary consideration, while Article 12 requires that a child be provided the opportunity to be heard in any judicial and administrative proceedings affecting them. In *FPS v SM* 2025 SC 61 an Extra Division expressed the view

that proceedings under the Hague Convention were relevant proceedings for the purposes of the UNCRC, Lady Wise explaining at para [32] that in keeping with this jurisdiction's domestic and international obligations, the Lord Ordinary in that case had to consider the children's objections. As Baroness Hale of Richmond put it in *In Re E* at para [16]:

“We now understand that, although children do not always know what is best for them, they may have an acute perception of what is going on around them and their own authentic views about the right and proper way to resolve matters.”

Reverting to Article 3, there is an apparent tension between its requirement that welfare is a primary consideration in any judicial proceedings concerning the child, and the jurisdictional requirement of the Hague Convention to return a child to the State of habitual residence as soon as possible, without inquiry into the child's welfare. The interaction between the two Conventions was explained by Baroness Hale in *In Re E*, at paras [12] to [18], as follows. Although the best interests of the child are not expressly made a primary consideration in Hague Convention proceedings, it does not follow that they are not at the forefront of the whole exercise. The (rebuttable) assumptions underlying that Convention are, first, that the interests of the child should be of paramount importance in resolving that dispute, and, second, that the best interests of the child will be served by a prompt return to the country where he or she is habitually resident, restoring a child to their familiar surroundings being seen as likely to be a good thing in its own right. The circumstances in which those assumptions could be rebutted were reflected in the defences available in a limited range of circumstances, of which the Article 13(b) grave risk defence is one. Baroness Hale therefore concluded that the Hague Convention had been devised with the best interests of children generally, and of the individual children involved in such proceedings, as a primary consideration.

[15] Those comments remain equally valid following the incorporation of UNCRC into domestic law. Subject to compliance with Article 12 of UNCRC, if the court faithfully applies the provisions of the Hague Convention, by proceeding on the basis that the children at the heart of the dispute must be promptly returned unless one of the defences is made out, then it will have had regard to the interests of the children as a primary consideration, and will not have acted unlawfully: *In Re E*, para [18]. There is no need to apply a separate welfare test by asking what the longer-term interests of the child require, that being a task for the courts of the State of habitual residence.

The evidence

[16] Both parties swore, and lodged, three affidavits in addition to affidavits from other witnesses, and numerous productions. H lodged two affidavits and some supporting productions. Much of the evidence related to welfare issues, with which this court is not primarily concerned, for the reasons explained above, except insofar as it pertains to any risk to which the children would be exposed upon their return to the US. The evidence relevant to the grave risk defence is best discussed under various discrete categories, as follows: education; house moves/homelessness/general lifestyle; future accommodation; healthcare/health insurance; influence and manipulation of the children; domestic abuse; the respondent's mental health, including the risk of suicide; the respondent's unwillingness to return to the US; and whether the respondent has been the children's main carer. In brief, it is the respondent's contention that it is the combination of all of these factors which leads to there being a grave risk to the children were the court to order a return; and that the petitioner's attitude towards the interim interdict granted on 1 August

2025 shows that he could not be trusted to comply with any protective measures available in the US.

[17] I now turn to consider the evidence under each of the above categories.

Education

[18] This is a hotly contested, and key, issue. It is also relevant to an overall assessment of the evidence insofar as it shows that the petitioner has sworn an affidavit which is untrue in a material respect, which necessarily casts a shadow over the remainder of his evidence.

[19] It is a matter of agreement that until the summer of 2024, the boys were enrolled at the Community School of Naples (CSN), a private (fee-paying) school. They did not return there for the 2024/25 academic year but were instead home-schooled by the Digital School of Florida (DSF). The petitioner was somewhat coy in his supplementary affidavit as to the reason for the change from private education to home-schooling. He said that it was a joint decision for the boys to be home-schooled. He stated that “[t]he boys could have returned to CSN if I paid the fees but they could not return as I needed to pay nearly \$50,000”. He did not explain why that sum was not paid, nor how arrears of that level arose, but it appears reasonable to infer, in the absence of any other explanation, that he did not pay the fees because he was unable to do so. The billing history for the boys, lodged in process, shows, among other things, a credit of \$25,000 which was returned, presumably because the petitioner did not have the funds to meet it. A message sent to the respondent by the school, lodged in process, confirmed that the reason the boys were not allowed to return to the school in 2024/25 was because of unpaid school fees of \$47,256. Certainly, the petitioner levels no criticism at the standard of education provided by the school. The impression given by the petitioner was that the change to home-schooling was not a big deal, but the

respondent painted a somewhat different picture in her first affidavit, stating that the petitioner prevaricated in telling the boys, and her, that they would be unable to return to CSN after the summer holidays, and that the boys were devastated at being unable to return. A large part of the respondent's affidavit evidence was devoted to an explanation of how the petitioner delayed the family's return to the US from a holiday to the UK in 2024, in an apparent attempt to mask the fact that not only would the boys be unable to return to school but the family home was in the process of being repossessed (see para [33]).

[20] B's home schooling by the DSF was, according to the petitioner, a success, under reference to an apparently supportive report card dated 9 June 2025, lodged in process.

Again, the respondent painted a different picture in her affidavit, stating that the work was challenging, that B did not receive the level of education he would at school, and that B did not enjoy it and had no motivation. H's report card, of the same date, is satisfactory insofar as it goes, but the petitioner stated that H was unable to continue at DSF without receiving his year-end results from CSN, which despite multiple requests were never provided. No further explanation (or vouching) was provided of why that might be, although one might reasonably infer that the non-payment of the school fees may have been a factor. The petitioner also stated that he arranged remote mathematics tutoring for H through an online platform to bring his maths up to the level required for entry into high school. The respondent gave a fuller description in her affidavit, in which she stated that H's education was even less effective than B's. H had no motivation or interest, and his home schooling stopped abruptly in December 2024 for unexplained reasons. That was confirmed to an extent by H in his supplementary affidavit, in which he stated that his home schooling lasted only from October 2024 to January 2025, when he "had a break". After January, he had a math(s) tutor, math(s) being what he focused on. He spent roughly 2 to 2½ hours per

day on his schooling, a typical day being one where he would wake up around 9.30am, have a shower then wait for B to finish his home schooling.

[21] As regards the future, the petitioner's evidence in his supplementary affidavit of 14 October 2025 was that, on return to the US, both boys would be attending a different school, Canterbury School, which he described as a strong private school. H's affidavits were somewhat ambivalent about which school he wished to attend on return to the US. In his first affidavit, he stated that he was excited to be starting at Canterbury School, the reason given to the boys for the change being that one of B's best friends was starting there. In his supplementary affidavit, however, he made it clear that as late as July 2025, he believed (and wished) that he would be returning to CSN, but that there were "then" complications about returning and he was happy to attend Canterbury School instead.

[22] Returning to the petitioner's supplementary affidavit of 14 October 2025, he also stated that he had signed contracts with Canterbury School, which were lodged in process, and that he had paid "approximately" \$10,000 towards school fees. A document said to vouch one of his payments was lodged in process (although it bore to show only that a payment of \$2,700 had been paid for "purchase from Canterbury school"). The signed contracts themselves show that a total deposit of \$12,610 was required and so even on the petitioner's own account, an insufficient sum was paid, without explanation as to why that was so. Even on that evidence, the boys could not have begun at the school upon return to Florida.

[23] However, these statements were contradicted by material lodged by the respondent, also on 14 October 2025, which included an e-mail from Canterbury School dated 10 October 2025, which stated that both boys had been removed from the school's registration and payment systems on 22 September 2025, and that the school had received only \$510.

[24] That prompted a second supplementary affidavit from the petitioner, in which he sought to explain the blatant contradiction between his earlier affidavit and the school's e-mail. He said that "in hindsight" only \$510 had been paid as opposed to the \$10,000 previously claimed, his explanation being that some of the payments made were not accepted by the school, because, he said, the payment provider he used was not compatible with the school's systems. He then sought to pray in aid the fact that he was mentally and emotionally stretched and apologised for failing to apply the level of care and diligence required when preparing his previous affidavit.

[25] As senior counsel for the respondent pointed out, the petitioner's excuse was eerily reminiscent of what he said in a slightly different context, when being chased in August 2025 by the respondent for repayment of car hire charges incurred by him but which were charged to her account, when he initially said that he had reimbursed the money to her, before then saying that he had sent the payment but it had not gone through.

[26] Several things can be taken from this chapter of evidence. First, the chances of either H or B being able to attend Canterbury School if returned to Florida appear to be vanishingly small. On H's evidence, he was looking forward to going there, but that will not be happening. To the extent that the petitioner led the boys to believe that they would be attending that school and that the fees had been paid, that was a lie. Even if the petitioner did scrape together enough money to pay the deposit, history shows that he would be unable to continue paying the fees. Nor is there any prospect of the boys being able to return to CSN, since there is still less prospect of those arrears being paid. To the extent that the boys were led to believe that they would or could return to CSN, that, too, was a lie. If a return order is made, the boys will, therefore, both require to attend a public school (or continue with home schooling). There is no evidence as to which school that

would be, but I accept that they would have a right to attend one and to receive free education. Since it is not known what school they would attend, the quality of the education they would receive can also not be known, although I observe that previously the parties chose to home-educate their children rather than send them to a public school.

[27] Second, the petitioner's evidence in his affidavit of 14 October 2025 was either a deliberate attempt to mislead the court, or, at best for the petitioner, unsatisfactorily lacking in important detail. Even on its own terms it did not show that the deposit had been paid in full, there being no explanation for the shortfall between the approximately \$10,000 claimed to have been paid and the \$12,610 which was due. The document founded upon as showing that \$2,700 had been paid towards the deposit was of dubious value even to show that, and in any event, it was unclear why only part of the alleged payment of \$10,000 was being vouched, since one would expect vouching to have been available for the whole of that sum. For that matter, it ought to have been possible for the petitioner to state with certainty exactly what sums had been paid to the school.

[28] Third, if it is true that the petitioner attempted to make payments which were not accepted by the school, one would expect there to be vouching to show that that had happened, but no vouching has been produced. The petitioner would naturally be keen to demonstrate to the court, if he could, that he had not set out to mislead it, and that the "error" in his supplementary affidavit was made in good faith, and so I infer that if vouching had been available, it would have been produced. Nor has the petitioner explained why the school apparently has no record of having received the \$2,700 for which "vouching" was produced, nor has he clarified whether the boys' removal from the school's registration systems was notified to him as one would expect it to have been.

[29] This, as senior counsel for the respondent submitted, does cast doubt over the whole of the petitioner's evidence, not least on his evidence as to his income and wealth, and does provide a proper basis for not accepting his evidence on any issue where it is in conflict with the petitioner's evidence or where it is simply unlikely (see paragraph [10]). So, to the extent that there is a conflict between the petitioner's evidence and that of the respondent, I prefer the respondent's, which is at least partially supported by documentary evidence and by what H said, although the petitioner's evidence is perhaps not so much inconsistent with the other evidence as lacking in detail which one would expect him to be able to provide; either way, I have no difficulty in saying that no weight falls to be attached to it.

House moves/homelessness/general lifestyle

[30] In her first affidavit, the first respondent said that the family had to move house on numerous occasions since moving to the US in 2014, at least sometimes because their houses were repossessed, culminating in the loss of their most recent home in Naples in 2024 (while the family was holidaying in the UK). As a result, the family had been homeless for the past year, living in hotels and other short-term temporary accommodation. She attributed the serial loss of homes to lawsuits against the petitioner for fraud or mismanagement of client funds in the course of his employment. The lawsuits would be served by process servers, often in the early hours of the morning, from whom she and the boys would have to hide. The petitioner kept her in the dark about the family finances. He controlled what she was able to spend by giving her different cards from time to time. Sometimes, when she presented a card, it would be declined, whereupon she would contact the petitioner and he would arrive with a different card. The petitioner often used the respondent's personal funds to pay for items such as business class flights or hotels.

[31] In his first supplementary affidavit, dated 14 October 2025, the petitioner set out in very general terms his alleged sources of income and his wealth, albeit that was not vouched in any comprehensible way by any of the productions to which he referred. Without going into that evidence in detail, the short point made by the respondent is a good one, namely that if the petitioner earned the sums he claimed to be earning, he would not be as short of money as he patently is. However, I will deal specifically with the petitioner's evidence about his current employment situation. In his affidavit of 14 October 2025, the petitioner stated that he had three fixed sources of income. Two of those are not vouched in any way, shape or form, and can be ignored, also having regard to my earlier comment in para [29] about the weight to be attached to the petitioner's affidavit evidence. The other is said to be a retention agreement for his services with Equity Asset Capital (EAC), under which he receives \$20,000 per month. A copy contract with EAC has been lodged by the petitioner, although not spoken to by him in his affidavit. It bears to be dated 1 August 2025. As senior counsel for the respondent pointed out, it is strange that the petitioner's first affidavit, also dated 1 August 2025, makes no reference to that employment. What that affidavit does state is that the petitioner is and has been the CEO and Principal of a different group of companies. However, the copy EAC contract, which provides for a base annual salary of \$240,000, states that the petitioner must devote his "best efforts and full working time, attention and energies" to EAC, subject to limited exceptions which would not include being the CEO and principal of a different group. It follows that either the petitioner's first affidavit was untrue, and he was not the CEO and Principal of a different group, or that his second one is. Further, again as senior counsel for the respondent pointed out, the petitioner's supposed income of \$20,000 per month has not been vouched, even though, had

that salary been paid, the petitioner would have received at least two monthly payments by the last date for lodging productions.

[32] The petitioner disputed that any houses were repossessed, instead stating they were transferred as part of a litigation settlement of which the respondent was aware and to which she had agreed, which somewhat misses the point, whether deliberately or not, which is that the houses were lost because of the petitioner's financial dealings; whether they were repossessed by a mortgage lender, or transferred in settlement of a debt is neither here nor there. Equally irrelevant is the fact that the respondent agreed to the settlements. The petitioner does not suggest that the debts were the responsibility of the respondent, or that she had any real choice in the decision to make the houses over to creditors. As regards the property lost in 2024, the petitioner stated that it had suffered repeated hurricane flooding rendering it uninhabitable and had been handed back to the mortgage company. He claimed that if it were sold, any equity would be returned to him and that the mortgage company had given him the opportunity to repurchase it for *circa* \$1.5 million. He disputed that the family had been homeless, appearing to take pride in the fact that they had stayed in upmarket hotels, Airbnb's and latterly at the Royal Palm Marriott Vacation Club, and had maintained Universal Studios annual passes, allowing them to visit the parks frequently.

[33] In her supplementary affidavit, the first respondent referred to a number of productions which on the face of it show that the property lost in 2024 was foreclosed (repossessed) and sold at auction for considerably less than its true worth. Other productions appear to indicate that the property is now being marketed at approximately ten times the price for which it sold at auction. While, as counsel for the petitioner submitted, no witness explained the precise significance of the productions referred to by the respondent, I do accept that, at the very least, they show that the most recent home

owned by the parties was repossessed as a result of a debt owed by the petitioner. As senior counsel for the respondent submitted, the family has since then been homeless in the sense that they have not owned, nor leased, a home, although not in the sense of having to sleep on the streets. As for the respondent agreeing to court settlements, I read nothing into that. The petitioner does not claim that she was involved in his businesses nor that the debts which led to the homes being lost were incurred by her. By the same token, nor does he explain in any of his affidavits the circumstances which led to that state of affairs.

[34] H's affidavits do not shed a great deal of light on the truth of the situation. One would not expect him, as a child, to have deep insight into his parents' financial dealings. He denied that the family had to hide from process servers, stating instead that they simply did not answer the door, although that might be a fine distinction.

[35] In summary on this issue, I do not accept the petitioner's evidence insofar as it conflicts with that of the respondent or is unvouched. I find that the family has frequently moved, due to the petitioner's financial dealings, and that for the past year they have led a peripatetic lifestyle. I do not accept the petitioner's evidence as to his current income or wealth. There is no reliable evidence that the petitioner is able to fund the lavish lifestyle that he likes to lead. There is evidence that he is frequently sued and that he has debts which he is unable to pay. That pattern is likely to continue on his return to the US. I do not accept that a large sum will wend its way back to the petitioner following the sale of the most recently repossessed house.

Future accommodation

[36] A linked issue is the accommodation to which the children will return, if the court makes the orders sought in the petition. The respondent's position is that they would be

returning to the same lifestyle as previously, viz, moving between short-term properties, although she did not know how that would be funded.

[37] The petitioner stated in his supplementary affidavit of 14 October 2025 that, after a new lease which had been negotiated on one property had been vacated (again, not vouched), a new lease had been entered into over a property in Estero, Florida for which he had paid the security deposit and first and last months' rent (being 3 x \$3,750). He said that his parents had offered to assist by guaranteeing 6 months' rent. If the respondent did not wish to stay with him on return to Florida, then she could stay there and he would reside with family friends, JB and EB, who lived with their 8-year old son, a best friend of B.

[38] In this instance, the petitioner has provided vouching for some of the foregoing. A copy of the lease and vouching for a payment of \$11,250 were lodged in process. The receipt for that payment is slightly curious in that it is from a "donotreply" mail box, and bears to confirm that the entire \$11,250 was to cover the security deposit, whereas in fact it was to cover that, plus 2 months' rent, but it does at least bear to show that \$11,250 has been paid. The lease is said to be for a term not exceeding 12 months, (although, in apparent contradiction, has a start date of 25 October 2025, ending on 1 November 2026). The premises are to be occupied only by the petitioner, H and B, and so it is unclear on what basis the respondent would be entitled to stay there; certainly, there is no confirmation that the landlord has given consent to that. It is unclear from the petitioner's affidavit where the children would reside, were he to live with JB and EB. An affidavit by JB was lodged, in which he confirmed that either the petitioner, or the respondent, and the children, could stay with his family until December 2026, for no payment. An affidavit by DKM, the petitioner's father was lodged in which he confirmed that he and his wife had transferred the first six months' rent and half the security deposit to the petitioner and that if additional rental

support was required it would be made available. He confirmed that he had a sum of £59,000 available, vouched by his financial adviser, although that sum appears to include the sum already paid. Nonetheless, that would be more than sufficient to cover the total sum payable under the lease. However, it does not appear that the petitioner's parents have guaranteed the rent, as the petitioner suggested they had. As senior counsel for the respondent submitted, the petitioner may have received financial assistance from his parents but there is no guarantee how he will spend it.

[39] The petitioner also stated in his supplementary affidavit that he is in the process of negotiating the purchase of a new home "in the area" for approximately \$1.2 million, and if required could purchase a suitable home for \$550,000 to \$750,000 in the short-to-medium term, having access to funds and parental support if necessary. Neither of those statements is vouched. The available parental support would not fund a purchase of even a \$500,000 house. The petitioner does not explain why he has committed himself to a 12-month lease and total payments of over \$40,000, if there is a serious prospect of his purchasing a property in which the family could live.

[40] In summary on this issue, I find that, on a balance of probabilities, the petitioner has entered into a lease and that there would likely be accommodation immediately available for him and the children were they to return without the first respondent. The petitioner's financial history, and the history of frequently losing accommodation, is, however, such that it cannot be said with any certainty that the lease will run its course. However, I do not consider that there is any realistic prospect of the petitioner purchasing a property as he claimed.

Health care/health insurance

[41] The respondent's evidence on health care was that the family used to have health insurance but had none for at least a year prior to the return to the UK in 2025. She did not have medical insurance cover for an appointment with her physician in October 2024. When medical advice was required, the family had to have remote consultations. The children had previously attended medical examinations around their birthday but had not done so for the last two years, due to the cancellation of cover. She had a particular concern regarding H's teeth. He had a brace fitted by an orthodontist in 2023, but had not attended for the recommended regular cleaning, due to financial constraints.

[42] The petitioner did not appear to take issue with any of that. He accepted in his affidavit that the family did not have health insurance for a period – he did not explain why – but said that they did not owe anything to doctors. When required, health care was paid “out-of-pocket”. Necessary prescriptions were paid for and renewed. He said that he had made healthcare arrangements for the respondent, H and B commencing on 1 September 2025, to be paid for out of his ongoing income. Payments made on 29 August 2025 and 29 September 2025 were said to be vouched by documents lodged in process.

[43] I treat that vouching with more than a degree of caution. It does appear to confirm that the petitioner entered card transactions on the dates specified for health insurance, but the amounts paid, the nature of the cover, the length of the period of cover and the persons covered are not vouched. Separate documents at 6/30/1 to 6/30/4 of process do bear to show that the family is covered, but for an unspecified period. Another document at 6/30/5 of process bears to show that there was cover for unspecified people for the period from 1 January 2025 to 31 December 2025. However, no weight can be attached to that, since according to the petitioner, cover was arranged to commence only on 1 September 2025, not

from 1 January 2025, and so any cover vouched by 6/30/5 must either have lapsed, or relate to different people. In summary, there is a mis-match between the petitioner's affidavit evidence and what has been lodged, and in any event no confidence can be attached to his assertion that any cover which is in place will last for any particular period, given his history of lack of funds and the fact that, on his own admission, there was, in the past, no health insurance in place for a significant period.

[44] It follows that if the children are to return to the US, it cannot be stated with any degree of confidence that there will be health insurance in place. That said, the State of Florida may provide free health care, though application must be made in advance; and if a child is in an emergency medical situation, the child must receive care without consideration of ability to pay (report by Laura Davis Smith, page 7).

Influence and manipulation

[45] The respondent's evidence is that the petitioner exerts improper influence on the boys and manipulates them, one example being B's apparent change in attitude following a recent contact visit (see para [49]); another being the speed with which H was able to instruct solicitors in the present case, and appeared to have been turned against the respondent's family; and another being the extent to which both boys had an inappropriate knowledge of the case. To an extent, that is supported by the evidence of the respondent's witnesses, although denied by the petitioner and by H himself. While the factors cited appear to lend some support to the respondent's position, I leave this factor out of account in my final analysis of the case.

Domestic abuse

[46] The respondent made allegations in her affidavits that she was the victim of domestic abuse, in the form of controlling, coercive and verbally abusive behaviour towards her. She described the petitioner as prone to frequent, sudden and extreme outbursts of anger in the presence of the boys, often reacting aggressively when challenged. He took charge of everything and had sole control over finances. He would control who she saw. He was verbally abusive. She spoke to one incident of physical abuse, in around March or April 2025. Whilst in the Dockside Hotel, Orlando, the petitioner lost his temper with B and was going to hit him. The respondent intervened to stop him, by hitting him on the back. The petitioner threatened to throw her out of the hotel, and pulled her by the feet across the floor to eject her from the room. She had felt increasingly fearful of his unpredictable temper and his control over financial and practical arrangements, especially in the months leading up to the return to the UK in 2025. That all said, it appears from the evidence that when she told the petitioner of her wish to remain in Scotland with the children, it was the petitioner rather than the respondent who first mentioned the possibility of divorce.

[47] The petitioner denied those allegations, which must, nonetheless, following the nuanced approach described above, be assumed to be true for present purposes.

The respondent's mental health

The respondent's evidence

[48] In her first affidavit, sworn on 22 August 2025, having described the family's transient lifestyle, the respondent stated that before travelling to the UK for their holiday in July 2025, she felt that she had no control over her life, resulting in feelings of depression, anxiety, and constant worry of the long-term effects on the children. H was staying in bed

until lunchtime with little or no motivation and had no structure or routine. B was nervous and anxious and developed a skin-picking condition; he also had no structure or routine to his life. The lifestyle inflicted upon her and the children by the petitioner affected her health adversely. She consulted a doctor in the US in October 2024. She was not charged for that appointment, for which she was not covered by health insurance. She was diagnosed as suffering from an anxiety disorder and was prescribed with medication for anxiety and insomnia. The petitioner did not take issue with the foregoing. He acknowledged in his affidavit that the respondent has long suffered from depression and mental health issues which arose before the parties met. Indeed, that is correct: as Professor MacPherson revealed, the respondent previously made an attempt on her own life in 2006, following earlier relationship difficulties.

The incident of 2 September 2025

[49] It is not disputed that on 2 September 2025, a mere 11 days after swearing her affidavit, the respondent made an attempt on her own life, overdosing on approximately 40 zolpidem tablets and 20 xanax tablets. She was discovered unconscious and unresponsive by B at breakfast time that morning and was rushed to hospital where she remained until discharged the following day. The respondent explained this incident in her second affidavit, dated 14 October 2025. B had returned from a contact visit with the petitioner, repeating things he had evidently been told by the petitioner. In particular, he told her that he would be fine without her. She found that heartbreaking and it was the tipping point: she lay awake contemplating what seemed a bleak and uncertain future and felt as though she could not face another day, and that suicide was the only option to release the immense pain she was feeling. Upon admission to hospital, she was treated for the

effects of the overdose of medication but no follow-up appointments were arranged with any medical professionals. She was however prescribed sleeping tablets.

[50] The foregoing is confirmed by a letter dated 4 September 2025 from a psychiatric nurse to the respondent's GP which narrates the contemporaneous account which the respondent gave of the events which led her to overdose. The respondent had said that she felt in a "no-win" situation, in that if she won "the custody hearing", her sons would not be happy here, but if they returned to the US, she would barely see them.

Post 2 September 2025

[51] The respondent arranged a follow-up appointment with a general practitioner on 9 September 2025, when she was prescribed an anti-depressant for her low mood. She said that she was currently being supported by the mental health charity, Penumbra, whom she met once per week, which (along with numerous visits from a domestic abuse support worker) was helping her to cope with her feelings and manage her stress a little better. Reflecting on events of 2 September 2025 she had feelings of guilt, shame and embarrassment. She now realised the hurt and upset her death would cause her children and family and had no further thoughts of suicide.

Professor Gary MacPherson

[52] The respondent lodged a report by Professor Gary MacPherson, Consultant Forensic Clinical Psychologist, who assessed her remotely for the purposes of offering an expert opinion on a range of matters, including: the respondent's vulnerabilities if required to return to the US, and whether her mental health was currently in such a state that she could realistically return to and cope with life in the US; whether the recent events on 2 September

2025 constituted a genuine attempt on her life; any diagnosis for the respondent and what further professional input might be required to support her mental health; and an assessment of any risks to her mental health if the court ordered the return of the children to the US, particularly if she felt compelled to follow them there. In preparing his report, Professor MacPherson had access to the pleadings, an affidavit of the respondent, a report from a liaison psychiatric nurse and recent NHS Grampian clinical records. I am satisfied that he has the necessary skills, knowledge and experience to offer expert opinion evidence.

[53] Professor MacPherson noted that the respondent's brother died from suicide 3 years ago and that she remains reactive to that loss. She had presented with symptoms of depression and been prescribed anti-depressants. As already noted, she had previously, in 2006, taken an overdose with suicidal intent in the context of relationship difficulties. She had been assessed by mental health services and received several sessions of crisis counselling and a telephone call from Samaritans. On her admission to hospital in September 2025, she had presented as anxious and distressed and had disclosed a background of acute stressors including what B had said, and longer-term stressors including allegations of coercive and controlling behaviour by the petitioner. He formed the view that her history of symptoms of depression and anxiety in relation to life stressors in 2006 and 2022 and her more recent history of symptoms were consistent with a diagnosis of Adjustment Disorder (DSM-5) with low mood and anxiety. That was not an illness but a variant reaction to a stressor(s) which was beyond normal reactions and was by definition a temporary response to the stressor, with symptoms that would resolve once the stressor ceased. The Adjustment Disorder had emerged due to stress in the relationship and court proceedings and would persist as long as proceedings were ongoing. The respondent completed the CORE-10, a self-report questionnaire recommended by the Scottish

Government to assess mental health symptoms over the past week. Her results indicated a moderate level of psychological distress, including symptoms such as anxiety, panic, sleep issues, difficulty coping, and unhappiness.

[54] Insofar as whether the incident in September 2025 was a genuine suicide attempt, Professor MacPherson declined to discuss it in those terms, but noted that the overdose was impulsive, taken with suicidal intent in the context of custody proceedings, and acutely precipitated by B saying that he wished to return to the US. Indicators would be any ongoing expression of intent to self-harm. The attempted suicide by overdose in 2006 was in response to stress in a relationship and feeling out of control of her life and so repeating her actions remained a risk if she continued to feel out of control. She had indicated to mental health practitioners and to him that she no longer had thoughts of suicide. If her symptoms persisted, he recommended cognitive behavioural therapy. From a psychological view, her main concern was not to be separated from her children, and she would be in a position to return to the US with them (leaving practical obstacles, such as lack of income and accommodation aside). That said, a court-ordered return of the children to the US would have an immediate negative impact on her mental health.

Respondent's unwillingness to return to the US

[55] The above issues all feed into the respondent's attitude towards returning to the US. At the time of swearing her first affidavit, the respondent said that if she were required to return there, she would be without medical insurance, a source of worry in view of her previous diagnosis of an anxiety disorder and her concern about her worsening mental health. If the court ordered the children to be returned, it would be intolerable for her to return as she could have no support network, no job and no financial stability. However,

she would find it difficult not to return and to be apart from the children if the court ordered their return, since B, in particular, would be devastated to be apart from her. She struggled to contemplate just how difficult life would be for her if she had to follow the children to the US. Her mental health was already fragile, and she would become significantly more anxious and stressed, which would have a serious impact on her ability to parent the children. In her supplementary affidavit of 14 October 2025, sworn after her suicide attempt, the respondent described her current mental state as still fragile and said she had a crippling fear that the children would be returned to the US and that she would not be able to join them due to the impact that would have on her mental health. She currently felt able to reach out to her family and professionals if she felt unable to cope with the stress caused by this case. Nevertheless, she felt unable to return to the US despite what she said in her first affidavit. The thought of her boys returning to the US led to the attempt on her life on 2 September 2025. Circumstances had not changed since then, and she remained terrified at the prospect that the children would have to return to face the chaotic life they faced while the family lived in the US.

[56] Finally, in her second supplementary affidavit sworn on 24 October 2025, the respondent confirmed that her current intention still is to remain in Scotland and not to return to the US. Professor MacPherson confirmed in his report that the respondent had told him that she did not feel able to return to the US due to insecurities in the residential and financial situation and the absence of a stable support network. If the children were returned, she believed that she would visit “maybe once a year, if that”.

(Professor MacPherson was unsure why she had taken that position; nonetheless, how much contact the respondent would exercise is a different issue.)

[57] While I am mindful of the need, emphasised in *R (Child Abduction: Parent's Refusal to Accompany)*, above, to scrutinise the respondent's position closely, I am satisfied that it is genuine, rather than tactical. It is not surprising that the respondent found the circumstances of family life, including the frequent changes of accommodation, financial uncertainty and the lack of health insurance, intolerable, and given her fragile mental health her decision not to return is both genuine and objectively reasonable.

[58] One consequence of the respondent's decision not to return to the US is that it would be difficult, at best, for her to raise proceedings in Florida to determine the issue of where the children should reside in the longer term. The report of Laura Davis Smith states that there would be no entitlement to legal counsel; a party can self-represent; in the event that a party wishes to engage counsel but does not have the financial resources to do so, there are "limited" free legal resources available. There is no evidence before me as to the ability to conduct proceedings remotely, from outwith the jurisdiction, nor as to the circumstances in which the limited free legal resources would be made available. The practical reality is that a return of the children to Florida would be determinative of their longer-term residence with the petitioner.

Primary carer

[59] I accept the evidence of the respondent that until recently she has been the main carer for both boys, and in particular, of B, who unlike H, has continued to reside with her while the boys have been in Scotland. That evidence is supported by the evidence of her mother, HB; her father-in-law, JGB; and her brother-in-law, JAB. It follows from my finding in the previous section that the respondent will not return to the US, that if an order is made

for return of the children, they will be separated from the person who until now has been their primary carer.

Dr Katherine Edward

Introduction

[60] Dr Edward is a chartered clinical psychologist who provided a report dated 22 September 2025. I should preface the discussion of her report by observing that the petitioner has objected to the admissibility of her evidence, under reference to *Kennedy v Cordia (Services) LLP* 2016 SC (UKSC) 59 at para [44], on the basis that it was unclear whether (i) she could assist the court with its task in adjudicating this petition and (ii) whether there was a reliable body of knowledge or experience to underpin her evidence. I will revert to these objections after narrating what her evidence was.

Dr Edward's report

[61] Having been provided with a brief summary of the background, and a selection of documents in the case, but without meeting either H or B, Dr Edward proceeded to answer various questions put to her as follows.

[62] Domestic abuse: if the respondent had been subject to domestic abuse witnessed by the children, that would likely have caused them lasting psychological harm. Witnessing domestic abuse would be traumatic for the children, causing distress, fear and anxiety. Depending on what they had witnessed, they may experience post-trauma symptoms such as intrusive images, hypervigilance, nightmares and lasting symptoms of anxiety and depression. They might have difficulty in forming healthy attachments in the short and long term. Their relationship with either parent could be damaged.

[63] Severance from primary carer: if the children returned to the US and for any reason the respondent was unable to return, that would fundamentally undermine their relationship. They may experience anger at the respondent for not accompanying them and if the separation of the parents was acrimonious and/or involved previous abuse they may align themselves more fully to their father, leading to an emotional as well as physical separation from their mother. On the assumption that the respondent was the children's primary carer, the children would experience separation as a loss and potentially also as a trauma, bringing a risk of emotional consequences such as anxiety, guilt, anger and depression. This could lead to significant issues in forming their own healthy attachments in later life.

[64] Influence and manipulation: if the court accepted that the children were being influenced or manipulated by the petitioner, that would be expected to fundamentally undermine their capacity to both form and express their own views. This could lead to a number of potential and probable risks to the children. It could lead to their needs not being met and be damaging to their ability to form and sustain healthy attachments.

[65] Lifestyle: a lifestyle characterised by financial instability, transient accommodation, disrupted schooling, lack of health insurance and social isolation would lack all the fundamental aspects of security that were essential to positive emotional development for children. It would place them at significant risk of anxiety and depression. Lack of social bonds would impact emotional development and the ability to form and maintain healthy relationships. These skills are learned in childhood and adolescence and if such opportunities were not available during this period it had lasting consequences into adulthood. Lack of secure and consistent schooling would impact academic achievement

and could lead children to cease to try academically or socially in a given situation. If health issues were not being met, that had obvious negative potential outcomes.

[66] Risk of parental mental health relapse: if the respondent's mental health relapsed further, there would be a tangible risk of a negative mental health impact on the children. Worry about their mother, even if not openly expressed or acknowledged, would be likely to cause distress and anxiety. Further, there was a real risk that the children would experience extremes of personal guilt if they perceived that their rejection of their mother had precipitated deterioration in her mental health. This might result in withdrawn or destructive behaviour patterns. In a worst-case scenario, there was the risk of separate attachment and bereavement which would be traumatic for the children and bring unavoidable and significant negative mental health consequences. Those risks would be associated with the possibility that the children may grow up without the love, support and nurture of their mother.

[67] Sibling dynamics: if the boys were separated from each other, they may experience loss and distress and the experience of isolation from their sibling.

Admissibility

[68] As regards whether there is a reliable body of knowledge or experience to underpin Dr Edward's views, the petitioner points out that she did not cite a single source, but the discussion in her report was based entirely on her experience, nor had she met the children. In her own words, her report was conjectural. In my view, this goes to weight rather than to admissibility. Psychology is a recognised discipline, and the petitioner does not dispute Dr Edward's qualifications and experience, nor does he suggest she is anything other than impartial. Turning to whether the evidence can assist the court, some of what she says does

fall within modern-day judicial knowledge, for example, that witnessing domestic abuse can cause children psychological harm; and the court hardly needs an expert to tell it that not attending school may impact upon a child's academic achievement, but other parts of it fall outwith judicial knowledge and are helpful adminicles of evidence.

Protective measures/interim interdict

[69] The interim interdict granted against the petitioner, in terms, prohibited him from removing the children from the care and control of the respondent. It is a matter of agreement that on 15 August 2025 the respondent agreed that H could accompany the petitioner to Yorkshire to visit paternal family members, that H returned to Scotland on 19 August 2025 and that on 20 August 2025 he was due to return to the respondent but has not done so. The petitioner's position is that H refuses to go back. The respondent argues that in these circumstances, the petitioner is in breach of the interim interdict, the purpose of which was to ensure that both children remained in the care of the respondent meantime, and that the petitioner had shown that he will behave however he wants as regards the children, irrespective of court orders, undermining the efficacy of any potential protective factors which would require the petitioner to agree to, adhere to, or avoid engaging in a particular type of conduct even where that is regulated by court order. The argument presented for the petitioner in response is that the person with care and control, literally read, is the person who at any particular time has the child in their care and control, that person currently being the petitioner. In short, the respondent could not retain care and control once H had come into the petitioner's care, and the petitioner could not have breached the interdict by continuing to exercise care and control.

[70] As counsel for the petitioner pointed out, these are not breach proceedings, nor has the respondent instigated breach proceedings in the sheriff court. I also acknowledge that if H is truly refusing to return to the respondent, that may, at the very least, have a bearing on whether the petitioner is wilfully refusing to comply with the order of the sheriff court. Having said all of that, I have difficulty in accepting the petitioner's argument. Its fallacy can best be demonstrated by observing that when the interim interdict was granted, H was in the care and control of the respondent; and, due to the petitioner's failure to return him following an agreed contact visit, and without the respondent's consent, he is now in the care and control of the petitioner. Even if he has not breached the letter of the interdict, he has undoubtedly breached its spirit, which is what is relevant in the context of assessing the efficacy of any future protective orders which might be made in the US, or the willingness with which the petitioner would comply with orders of the court in either jurisdiction.

The children's views

[71] H's view has been clear from the outset, and is articulated in the answers lodged on his behalf: he wishes to return to the US and in particular he wishes to be educated there, in the system with which he is familiar, rather than in Scotland. There is no doubt that he has the capacity to express his views, and that he has sufficient maturity and understanding to do so. As regards B, his views are contained in a Child Welfare Report obtained for that purpose. The reporter – experienced senior counsel – formed the opinion that B was an articulate and able boy who showed a level of understanding and maturity consistent with his intellectual ability and age. He had the capacity to express his views, which were clear, frequently stated and firmly held, that he wanted to return to the US. However, the reporter also formed the view that B displayed an inappropriate knowledge of the petition, which

she attributed to the petitioner (and to H, although she did not criticise him) and that there had been an attempt to influence him. Nonetheless the reporter's ultimate conclusion was that notwithstanding that attempt, B's views were held for more personal reasons, viz, his desire to return to his friends, his toys, and a place he considered as home.

Submissions

Respondent

[72] Senior counsel for the respondent submitted that the grave risk defence was made out, and that the petition should be refused. The Article 13(b) defence should be applied on its own terms, without regard to the over-riding purpose of the Hague Convention to return children promptly to their state of habitual residence. If the defence was established on a balance of probabilities, then a refusal to return was Convention-compliant. The Good Practice Guide (see below), relied upon by the petitioner, was simply advisory and recognised that every case was fact-specific: *M v C* 2020 Fam LR 136, Lord Malcolm at para [10]. In summary, the grave risk to the children of being exposed to psychological harm or otherwise placed in an intolerable situation arose from returning to the US with no stable accommodation; returning to the US with no school places and no likelihood of the petitioner keeping up with payment in relation to any future placements; returning to the US without the respondent; and being exposed to the very real risk of the respondent's mental health declining to include further suicide attempts. Expanding upon the last two of these, the respondent, due to her health and all the other circumstances of the case, could not reasonably return to the US. Were she to do so, there would be adverse consequences for her health and wellbeing. She would be dependent on the petitioner financially, but he could not be trusted or relied upon to meet his financial obligations as regards the

respondent and the children. The letter from the psychiatric nurse dated 4 September 2025, and Professor MacPherson's report, taken together, vouched that the respondent had a proper basis to adopt the position that she could not return to the US, and that her mental health was directly relevant to the children. It would be beyond intolerable for both children were the respondent's mental health to decline to the extent that she made a further attempt on her life. There were no protective measures in place to safeguard the children in the event of their mother's death. The petitioner had shown, by his attitude to the interim interdict, that he could not be trusted to comply with protective measures which might be put in place, nor to make financial resources available. H's views were not relevant in considering whether the Article 13(b) defence had been made out. It would be unconscionable to return him in if the defence were established. Finally, it would be open to the court to order the return of H but not of B. Each child must be considered individually.

Petitioner

[73] Counsel for the petitioner submitted that the petition should be granted. In approaching the assessment of grave risk, the court should have regard to the purpose of the Convention, which was promptly to return children who had been wrongfully removed or retained from their State of habitual residence, in order that welfare issues might be decided in that State. Regard should also be had to the Hague Convention Guide to Good Practice on Article 13(b). The allegations of domestic abuse were denied. It was telling that in her first affidavit the respondent did not attribute the wrongful retention principally to those allegations, rather her concerns were focused on economic considerations and poor financial management. Taking the allegations at their highest, as the court had to do, they did not amount to an Article 13(b) grave risk. A full range of protective measures was in any event

available in Florida. Irrespective of whether this court formed the view that the petitioner had breached the interim interdict, there was insufficient material before the court to allow a conclusion that the petitioner would breach any protective orders of the Florida court. The court should not embark upon a comparison between the respective living conditions in the US and Scotland. The circumstances which would pertain in the US should the children be returned there were not so drastic as to amount to a grave risk of harm, or an intolerable situation. The children would not be homeless. If the court did not accept that there were places at Canterbury School for them, it should assume that they would receive a satisfactory education at a public school. The children would have health care cover, and even if not, the state of Florida would provide emergency care. As regards the risk of the respondent committing suicide, that ought to be approached with great care. H should be returned, having regard to his views, even if no order were made to return B.

H

[74] As counsel for H acknowledged, he was not advancing a defence. However, the Hague Convention had to be interpreted in a manner consistent with UNCRC, which was now part of our domestic law. In terms of Article 3 of that Convention, the best interests of the child was a primary consideration, and the child must be given an opportunity to state his views, in terms of Article 12, as had been done. The simple point was that while H was not objecting to a return, his view was relevant and could not be ignored. In an objection case, the views of a 14-year-old child carried considerable weight and were almost determinative: *H, Petitioner* [2014] CSOH 79, a case in which the child objected to being returned to the state of habitual residence. The same approach should be adopted in the present case, which was the mirror image of an objection case. H's views were coherent,

clear and rational. It would be contrary to his interests to be compelled to remain in Scotland against his will. His view was relevant in assessing whether he would be returning to an intolerable situation. If the court did find that the Article 13(b) defence had been established by the respondent, this may be the very case in which the court could exercise its discretion to make a return order in any event.

Decision

Domestic abuse allegations

[75] I will deal first with the allegations of domestic abuse, which are assumed to be true for present purposes. Even taking them at their highest, I do not consider that they establish a grave risk of harm or of placing the children in an intolerable situation were they to be returned to the US. In the first place, the respondent does not intend to return, which, for the reasons given elsewhere, I accept is a genuine statement of her position. That substantially diminishes the risk of abuse. Second, it appears that when the respondent told the petitioner of her wish to remain in Scotland, she did not intend that the parties separate, but that the suggestion of divorce subsequently came from the petitioner; this is far from being a case where the respondent claims to have fled from domestic abuse. Third, if the respondent did after all return to the US, it must be assumed that protective measures against any risk of abuse would be available to her, and that the petitioner would be liable to be sanctioned were he to fail to observe those, notwithstanding the somewhat dismissive attitude he took towards the sheriff court interdict. In summary, while I cannot go so far as to say that there is no risk of domestic abuse, I am unable to conclude that, even if everything the respondent alleges is true, there would be a grave risk to the children were

they to be returned with, or without, the respondent. Those allegations therefore do not form a basis for refusing the petition.

Other factors

[76] Turning to the remainder of the factors relied upon by the respondent, the onus is on her to establish her Article 13(b) defence on a balance of probabilities. To summarise the core facts which I have found to be established on the evidence, set out in paras [18] to [68]: if returned, the children and petitioner, at least in the immediate future, are likely to have accommodation in the property for which the petitioner has entered into a lease, recognising, too, that notwithstanding the petitioner's financial travails, there has never been a night when the children have not had a roof over their heads; the children are likely to attend an unspecified public (state) school, since the petitioner will not have the funds to send them to a private school; and they are unlikely to have health insurance for the duration of their stay in the US but would receive emergency medical care should it be required. In terms of general lifestyle, the petitioner's financial circumstances are uncertain, but he does appear to receive money from time to time; the evidence does not show that the children would be living in penury.

[77] On any view, none of the foregoing is ideal. The petitioner's ability to maintain the lease for a year is unknown, and history would suggest that within a year the family will have to move again. The quality of the education they would receive, and where they would receive it, is unknown. Any future changes of accommodation may necessitate a change of school. Non-emergency medical needs, such as dental care, may not be met. There is no evidence before me as to how long it would take the Florida courts to resolve any dispute in those courts about habitual residence.

[78] There are, however, four further factors to add to the mix: separation of the children from the respondent if they are returned to the US without her; the risk to the children of harm caused by a deterioration in the respondent's mental health, including, but not limited to, the risk of suicide; the relevance of both children's wish to be returned; and the risk posed by a separation of the brothers (if an order were made for the return of H but not of B).

[79] As for the first of these, having accepted, for the reasons given in paras [55] to [57], that the respondent is both unwilling and unable to return to the US, and that she has been the children's main carer, even without Dr Edward's evidence I would have found that separating them from the respondent would be upsetting for, and potentially harmful to, them. That is bolstered by Dr Edward's opinion that there is a risk that separation of the children from the respondent could result in psychological harm to them. I take into account, too, that as I have found at para [58], a return to the United States is, in practice, likely to be determinative of where the children will reside in the longer term, notwithstanding the respondent's theoretical ability to raise proceedings in Florida to resolve that issue.

[80] This is related to the next factor, which is the state of the respondent's mental health. I accept Professor MacPherson's evidence that the respondent is suffering from Adjustment Disorder, the symptoms of which are likely to alleviate when the stressors giving rise to them are no longer present. One of those stressors is the possibility of both boys being returned to the US (and so, if they were returned, I infer that that stressor would not be removed). The respondent does not currently intend to commit suicide; however, having regard to her history of two overdoses with suicidal intent, and of depression, the possibility of a further attempt on her own life should the boys be returned cannot be ruled out. I am

again conscious of the need to scrutinise the evidence closely, but we are not dealing with a situation where the respondent has merely made a potentially empty threat to commit suicide as a tactical ploy: the events of 2 September 2025 vividly illustrate the reality of the risk, and the possibility of that being a tactical manoeuvre can safely be discounted. If the risk of suicide were to eventuate, we hardly need Dr Edward to tell us that their mother's suicide would be traumatic for both children and would cause them extreme psychological harm, as was accepted by counsel for the petitioner. Following the "slide rule" approach desiderated in *AD v SD*, even a small risk of such extreme harm may constitute a grave risk.

[81] It is not simply the effect which suicide would have on the children which must be considered, but also the extent to which they would worry about the possibility of that, in particular, and about the respondent's mental health in general, were they to be in the US without her. That, too, gives rise to a very real risk of psychological harm to them. It goes without saying, too, that if the respondent's mental health were to deteriorate short of another attempt on her life, that could also have an adverse effect on her relationship with the children.

[82] It may be that none of these factors, on its own, gives rise to a grave (as opposed to a real) risk that the children will suffer psychological harm or be placed in an intolerable situation should they return to the US with the petitioner. However, all of the foregoing factors must be viewed collectively, and in addition their impact must be considered in relation to each child separately.

B

[83] Insofar as B is concerned, if he were to return to the US without the respondent, to accommodation which is, on past performance, unlikely to be permanent, to uncertain

schooling, with uncertain health insurance, in the care of a father who is of uncertain means, with the added worry about his mother and her mental health, coupled with the very grave harm which would result were the respondent to commit suicide, it can be said that there is a grave risk of his being placed in an intolerable situation were he to be returned. Although he has expressed the wish to return to the US, that is based at least in part on what appears to be a false premise, namely, that he would be returning to his friends and toys. In any event, he is not of an age where his view carries a great deal of weight. I am satisfied that the Article 13(b) grave risk defence is made out in relation to him.

H

[84] The position is more complex with regard to H. First, there is an issue in principle which has not been considered in any case cited to me, or of which I am aware, as to whether his view that he wishes to be returned is relevant in considering whether the respondent has made out a section 13(b) defence. While regard must be had to the views of the child, that has always been in the context of a child's stated objection to being returned, which is a separate ground of defence under Article 13 where the court finds that the child has attained an age and degree of maturity at which it is appropriate to take account of his views. As a matter of principle it is, at first blush, difficult to see how a child's views could ever bear upon the separate question of whether he would be returning to a situation in which he would be at grave risk of harm. The latter is a question of fact, to which the views of the child as to whether he wishes to return or not, are entirely irrelevant. On that basis, the child's views could only be taken into account at the subsequent stage in the analysis of considering whether to exercise the residual discretion to return the child or not; even then, harking back to what Baroness Hale said in *In re M (Abduction: Rights of Custody)*, above, it is

difficult to conceive of a situation where a child would be returned where there was a grave risk of harm, whatever his views on the subject might be.

[85] On the other hand, the court must have regard to the views of the child when considering any petition under the Hague Convention, not simply where a stated defence is that the child objects, and nowhere does either the Hague Convention, or the UNCRC, state that regard must be had only to views which point in a particular direction. In the case of a 14-year-old child who has a strong wish to return to the State of habitual residence, as does H, it is difficult to hold that his views should not be factored into the final decision at all. On closer analysis, it seems to me that a distinction may fall to be drawn between physical and psychological harm, on the one hand, and of placing the child in an intolerable situation on the other. It is at least arguable that what is intolerable must, to an extent, depend upon what the particular child is able, and willing, to tolerate; or, at any rate, that there is room for the child's views to be taken into account in assessing, for that particular child, in the particular circumstances of the case, whether the situation to which he would be returning would be intolerable for him.

[86] Applying that approach to H, he is 14 years of age, and does appear, from his affidavits and the other evidence about him, to be of sufficient maturity that regard should be had to his views. He is aware of the fragility of his mother's health and better able than B to take an informed view as to whether he would find it intolerable to be living on the other side of the Atlantic from her in circumstances about which he is reasonably well informed. He is aware now that his father has been lying to him about which school he will be able to attend, but that has not altered his view. He is closer to the end of his school career and probably would find it more difficult than B to adjust to the Scottish curriculum, such that his view that he wishes to finish his schooling in the US carries considerable weight.

[87] I finally need to consider, in relation to H, what the effect would be of a return to the US without B. While it would obviously be better for him (and indeed for B) not to be separated from his sibling, I do not consider, on the evidence, that it is a factor of such significance that it should be determinative. There is a 6 year age gap between the boys, and in the not-too-distant future, H might fly the nest in any event, whether to go to college or pursue his career ambitions or otherwise. Regular video contact between the boys will be possible, notwithstanding the time difference, in addition to which it is hoped that both parties will make the effort to exercise contact to the son not residing with them, at the same time enabling contact to take place between the brothers.

[88] For these reasons, I have come to the conclusion that, factoring H's views into the equation along with the other factors also taken into account in relation to B, H would – unlike B – not be placed in an intolerable situation were he to be returned, nor would there be a grave risk of his suffering physical or psychological harm; and therefore, insofar as H is concerned, the Article 13(b) defence has not been established. He will fall to be returned to the US with the petitioner.

Discretion

[89] It remains to consider the exercise of my discretion in relation to B. Now that I have decided to order the return of H, the added factor to consider is whether the separation of the brothers would be so harmful to B that I should order his return, notwithstanding that the Article 13(b) defence has been established; which could, perhaps, be rationally justified if the risk of the harm caused by the separation would outweigh the risk caused by his return. For essentially the same reasons as applied to H, I do not consider that separating B from H would cause such harm that it does outweigh that risk. Accordingly, my decision in relation

to B is that he should not be returned. For completeness, the decision about whether there would be a grave risk in respect of H is so borderline that I consider that he should be returned on a discretionary basis, having regard to his views, in any event. Putting that another way, the circumstances to which he is returning, although far from ideal, are not so drastic, or intolerable that it is inconceivable that he be returned.

Disposal

[90] For all of the foregoing reasons, I will sustain the respondent's pleas-in-law as regards B, and repel them as regards H. Consequently, I will refuse the petition as regards B, and as regards H I will put the case out by order to discuss the practical arrangements for his return to the US. I will deal with the expenses of the petition at the by order hearing.

[91] Finally, and for completeness, H's plea-in-law is that "having expressed a firm, rational and independent view that he would wish to return to Florida, the court should accede to his views." That is an oversimplification, and not a correct statement of the law. I have not decided to order his return solely because of his views, which are simply one factor, albeit a weighty one, in the overall consideration of the case. I therefore find it unnecessary to dispose of his plea-in-law.