

CANADA / JUDGMENT

De Leon Saldierna v. Shergill

2023 BCSC 257

COURT

Supreme Court of British Columbia

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2023 BCSC 257 De Leon Saldierna v. Shergill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

De Leon Saldierna v. Shergill,

2023 BCSC 257

Date: 20230223

Docket: E02859

Registry: Abbotsford

Between:

Alejandro De Leon Saldierna

Petitioner

And

Simiran Kaur Shergill

Respondent

Before: The Honourable Madam Justice J. Hughes

Reasons for Judgment

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Counsel for the Respondent:

H.S. Sidhu

Place and Dates of Hearing:

Abbotsford, B.C.

November 24-25, 2022

December 1, 2022

January 6, 2023

Place and Date of Judgment:

Abbotsford, B.C.

February 23, 2023

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Introduction

- [1] This is an application by the petitioner, Alejandro De Leon Saldierna, seeking a declaration pursuant to Canada's international obligations under the Convention on the Civil Aspects of International Child Abduction, 25 October 1980, 1343 UNTS 89 (entered into force 17 December 1983, ratification by Canada 2 June 1983) [Hague Convention] that a child, Z.D.L., was wrongfully removed to Canada by the respondent, Simiran Kaur Shergill, and an order that Z.D.L. be returned to Tulsa, Oklahoma.
- [2] Z.D.L. is the child of the petitioner and the respondent. Z.D.L. was born in Tulsa on June 15, 2020. Z.D.L. was 15 months old when they were brought to Canada, and is presently approximately two and a half years old.

Facts

Parties' Relationship

- [3] The petitioner is a Mexican citizen who resides in Tulsa. The petitioner has resided in the United States since he was an infant and is enrolled in the Deferred Action for Childhood Arrivals program. He is presently undergoing the process of obtaining residency through a sponsorship from his brother, who is an American citizen. The petitioner testified that as a result of his immigration status, he cannot leave the United States.
- [4] The respondent is a Canadian citizen. She currently resides with her parents in Surrey, British Columbia.
- [5] The petitioner and the respondent are young adults who met online in March 2019. In June 2019, the respondent went to Oklahoma to pursue a relationship with the petitioner. The respondent did not intend to move to Oklahoma permanently. However, the parties learned that the respondent was pregnant in September 2019, and as a result, the respondent ended up staying in Oklahoma longer than originally expected.
- [6] When the respondent first arrived in Oklahoma, she stayed with the petitioner at his parents' home. In July 2019, the parties moved into their own apartment. However, after learning of the pregnancy, the parties decided that their apartment was not suitable for a child because it was too small and infested with insects, and moved back in with the petitioner's parents.
- [7] Z.D.L. was born on June 15, 2020. The parties were not married at that time and did not marry subsequently. The respondent was unable to work in the United States. As such, she was primarily responsible for taking care of Z.D.L. while the petitioner worked with his family's business in the construction industry. In July 2020, the parties moved into a mobile home.
- [8] The amount of time the petitioner spent caring for Z.D.L. prior to the parties' separation is disputed. It is difficult to make determinations on issues of credibility based solely on conflicting affidavit evidence. Neither party sought cross-examination on the affidavits filed herein. Doing so would also have undoubtedly caused further delay in the resolution of this application, which had already experienced delay by the time it came on for hearing, contrary to the expectation that such cases are to be resolved expeditiously: *Office of the Children's Lawyer v. Balev*, 2018 SCC 16 at paras. 82-84, 88-89 [Balev]. Nonetheless, I am satisfied that I can resolve these conflicts by reference to the undisputed and documentary evidence before me.
- [9] The petitioner claims to have been actively involved in caring for Z.D.L. by bathing them, changing diapers, bottle feeding them, and reading to them. The respondent says the petitioner was minimally involved; he preferred to spend time on his phone when he came home from work and only helped with Z.D.L. when the respondent begged him to. The

respondent says that from birth onwards, she bore the overwhelming majority of the burden of caring for Z.D.L. I am satisfied based on the undisputed evidence before me, particularly that regarding the parties' respective employment situations at the relevant time, that the respondent was primarily responsible for the majority of Z.D.L.'s day-to-day care prior to the parties' separation.

Family Violence & Allegations of Abuse

- [10] Both parties raise allegations of verbal and physical abuse by the other. The petitioner claims that the respondent would become verbally abusive when she was upset with him, and on one occasion, pepper-sprayed him.
- [11] The respondent in turn says that the petitioner was often physically and verbally abusive to her, choking her, hitting her, and pushing her into walls. The respondent admits that she pepper-sprayed the petitioner, but says she did so because he was choking her to the point where she could not breathe. The respondent also testified to another incident, which occurred in March 2021. She was bathing Z.D.L. when she says the petitioner put his knees on her chest, pinned her against the floor and choked her. The respondent tendered photographs showing what she testified are injuries caused by the petitioner. The photographs appear to be consistent with the allegations of physical violence she makes against the petitioner.
- [12] The petitioner denies being an aggressive person and says that he was never aggressive with the respondent nor did he ever "lay a hand on her". I do not accept this denial. The petitioner's evidence that he was "never" aggressive with the respondent is inconsistent with his admission that there were times when he pushed the respondent. His failure to address the circumstances precipitating the pepper-spray incident is also telling in its omission from his evidence.
- [13] The petitioner's denial of aggression is also inconsistent with an incident that occurred in December 2020, where he and members of his family were physically aggressive towards the respondent. The respondent testified that the incident arose when the petitioner's mother attempted to give Z.D.L. (who would have been approximately six months old at the time) a lollipop. The respondent objected to this and says that the petitioner responded by calling her a "whore" and a "bitch", that his mother was yelling in her face, and that the conflict escalated to the point where the petitioner's mother slapped the respondent. The respondent says that the petitioner and his mother then started shoving her, all while she was holding Z.D.L.

- [14] For his part, the petitioner says it was the respondent who grabbed Z.D.L. from his mother and started yelling at them. His version of the altercation is that his sister took Z.D.L. from the respondent, that the respondent then pushed his mother, which in turn resulted in his mother slapping the respondent. While the petitioner admits his mother slapped the respondent, he casts his mother's behaviour as an aberration brought on by what he characterizes as the respondent's aggressive behaviour.
- [15] I prefer the respondent's evidence regarding this altercation. Notably, the petitioner does not deny the altercation, does not deny that he called the petitioner a "whore" and a "bitch", does not dispute the physical nature of the altercation, and most importantly, admits that his mother slapped the respondent. The respondent's account is also consistent with text messages she sent to the petitioner at the time. While those messages downplay the physical violence and attempt to reassure the petitioner that she will not tell her father what happened, they are consistent the petitioner's mother acting aggressively towards the respondent and a physical altercation ensuing:

She came in my face, spit on it practically, nudged [me] in the face. She touched me.

She talked all that shit, touched me. Then she was good?

I ain't saying nothing, but what do you think my dad will react if I told her what she did? I won't tell, don't worry, just saying baby. I didn't do nothing to her, ain't point ain't nothing. I was good I sat down and stayed down.

- [16] The respondent also testified that while they were living together, the petitioner controlled every aspect of her life, continuously suspected her of cheating on him, and stalked her through security cameras he installed in their mobile home. The petitioner denies this conduct and says that he did not control the respondent's life or stalk her. Again, I prefer the respondent's evidence as it is more consistent with the preponderance of the other evidence before me, including text messages between the parties and the petitioner's own evidence. For example, the petitioner admits that there were video cameras on the outside of the mobile home "for security reasons and safety for [Z.D.L.]", but then goes on to say that they were "only up for a few weeks" before the respondent "tore them down" and that he left them down after that. The respondent's evidence that the petitioner was suspicious of her interactions with other men is also consistent with the petitioner's own evidence about an April 2021 incident--discussed in further detail below--where he accused the respondent of cheating on him after he testified that he saw her holding hands with another man, someone the respondent says was just a friend.
- [17] Considering the evidence as a whole, it is clear that the relationship between the petitioner and the respondent was often confrontational and volatile. On the issue of physical violence, I find that the respondent's evidence is more consistent with the circumstances and preponderance of the evidence before me than the petitioner's and demonstrates that following their separation, the petitioner at times behaved in a violent and abusive manner towards her. I accept the respondent's evidence that the petitioner was physically abusive at

times, and that on at least one instance--the December 2020 incident, which also involved his mother and sister--did so in a manner that also placed Z.D.L.'s safety at risk. In light of these findings, I reject the petitioner's assertion that his aggression towards the respondent only occurred in response to aggressive behaviour on her part.

Breakdown of the Relationship

- [18] At some point in late 2020, the parties' relationship began to deteriorate. The parties separated in or around April 2021. Each attribute fault for this to the other. I need not determine why the parties separated to determine the issues before me in this proceeding. However, the issue of the petitioner's involvement in Z.D.L.'s care and the respondent's allegations of physical and psychological abuse are relevant to the inquiry under Article 13(b) of the Hague Convention. As such and having considered the whole of the evidence before me, I set out below my findings on the facts that are material to these issues.
- [19] The petitioner says that the parties' separation was precipitated by a change in the respondent's personality and that she struggled to get along with his friends and family. The petitioner also claims that in April 2021, he discovered that the respondent had been cheating on him. He says that he caught the respondent holding hands with another man in a park, and that this resulted in an altercation between him and the other male, the result of which was that the other male punched the petitioner.
- [20] The respondent's account of this incident differs. She denies being unfaithful to the petitioner. She says that she was walking the parties' dog in the park when she ran into a male friend. The petitioner drove up in his truck with Z.D.L., who was crying in the back seat. The respondent went to check on Z.D.L., and the petitioner and the male friend began arguing. The respondent says she asked the petitioner to come with her and take Z.D.L. home, but he refused, so she drove home in the petitioner's truck. When she arrived home, the police were there because the petitioner had apparently reported that she had stolen his truck. The respondent was initially handcuffed, but released shortly thereafter. I need not conclusively determine what precisely occurred in respect of this incident. The material point for present purposes, is that both parties' versions of events are illustrative of the volatile and at times violent nature of their relationship in the months leading up to and following their separation.

Petitioner's Involvement with Z.D.L. Post-Separation

- [21] It is undisputed that following the parties' separation in April 2021, Z.D.L. resided solely with the respondent. What is disputed, however, is the extent of the petitioner's contact with Z.D.L. from April 2021 to October 2021, when the respondent brought Z.D.L. to Canada.

- [22] The respondent says that the petitioner had very little contact with Z.D.L. following their separation. She testified that he brought food and milk for Z.D.L. on only two occasions. The respondent says that the first time, the petitioner came inside the home to see Z.D.L., but the second time, he simply left the supplies outside and texted the respondent to let her know he had delivered them.
- [23] For his part, the petitioner denies not wanting to have contact with Z.D.L. and points to his filing of paternity proceedings in the Oklahoma courts as evidence of his desire to see them. The petitioner relies on an affidavit from his brother, Juan De Leon Saldierna, who testified that he regularly went with the petitioner to deliver supplies for Z.D.L. after the parties separated, sometimes as often as two to three times per week, but that the respondent was not welcoming of the petitioner's visits. Mr. De Leon Saldierna also offers his view that the petitioner was a good father and regularly cared for Z.D.L. I place little weight on Mr. De Leon Saldierna's evidence. His evidence is very general in nature and lacking in material details. By way of example, he does not provide the time frame during which he says he observed the petitioner actively parenting Z.D.L., or whether that occurred before or after the parties separated.
- [24] Considering the whole of the evidence before me, I prefer the respondent's evidence and find that the petitioner had little to no contact with or involvement in caring for Z.D.L. post-separation. In particular, the respondent's evidence is consistent with contemporaneous text messages she sent to the petitioner in May and June 2021 begging him to come and see her and Z.D.L. For example, on May 15, 2021, the respondent texted the petitioner as follows:

I even made you a cake and surprised and everything from my heart but you can't call and answer or come over

You don't [love] me

You don't and you definitely [enjoy] making me suffer all of you because I'm trying to communicate and none of your answer all leave me on read and you purposely play with me. You call me and then hang up when you know I need to talk to you

You decline my calls

You can't even come see [Z.D.L.]

You can't you let your parents run your life and you can't even come home to your own family

Alex come and see [Z.D.L.] you never do your parents don't allow you or either you don't want to come

- [25] Notably, the petitioner does not dispute that these messages were sent to him by the respondent and agrees that they were sent after the parties separated in April 2021. Additional text messages exchanged between the parties in June 2021 also show the respondent repeatedly indicating to the petitioner that he was welcome to spend time with

Z.D.L. at their home, most without any response from the petitioner. The petitioner's assertion that he was an involved and caring parent to Z.D.L. is also contradicted by his text messages to the respondent in which he said that he was too busy working in his family's construction business to spend time with her and Z.D.L.

- [26] The petitioner testified that he was unaware the respondent was planning to return to Canada with Z.D.L., and did not consent to her doing so. The respondent disputes this. She testified that on multiple occasions both before and after the parties separated in April 2021, she told the petitioner that she intended to move back to Canada with Z.D.L., and that the petitioner consented to this. She also testified that from April 2021 onwards, the petitioner repeatedly told her that he was booking her and Z.D.L. tickets to fly to Canada, and even asked the respondent's father to bring her home.
- [27] The petitioner's denial of any awareness that the respondent intended to return to Canada with Z.D.L. is difficult to reconcile with his communications with the respondent and the text messages he sent to both her and her father communicating that he wanted the respondent to return to Canada and that she was free to take Z.D.L. with her. For example, in one undated message, the petitioner texted the respondent: "That's why I'm just letting you take [Z.D.L.] like nothing bc 1 day [they are] going to come looking for me".
- [28] Further, in January 2021--before the parties separated but after the December 2020 incident involving the petitioner's mother--the petitioner and respondent exchanged the following texts:

Petitioner: Tell your mom you going home bc I already told my mom you are

Petitioner: Bye hoe.

Respondent: Fucky it

Petitioner: Moving on to bigger and better thing

Don't need a piece of shit like you

In my life

You're just a set back to me bro

As long as I get to see [Z.D.L.] then I'm good b

[Z.D.L. will] grow up and come to me one day watch hoe

Yeah [they're] going to grow up and realize that [their] momma is a hoe and fucked in the head

Well bye bitch

[29] The petitioner does not deny sending these messages. He simply says that he believes they were sent prior to April 2021, as his relationship with the respondent was breaking down. He says the messages were sent during arguments where both parties said hurtful things to each other and are now being taken out of context.

[30] The respondent also recorded video of a conversation she had with the petitioner--again, prior to separation--which she says is consistent with the petitioner having repeatedly told her he did not want Z.D.L. in his life. The petitioner was not aware that this conversation was being recorded. While the petitioner's tone in the video is difficult to describe, it is at best characterized by indifference towards Z.D.L. and at worst, callous disregard for their well-being. In the video, the petitioner is heard making the following statements to the respondent:

- a) "I'd rather fucking give you money and you take [Z.D.L.], and take care of [Z.D.L.] on your own";
- b) That he and the respondent "don't see eye to eye" in terms of wanting Z.D.L.; and
- c) That he does not want to take the respondent to court to fight for Z.D.L. because he does not like Z.D.L., and Z.D.L. does not like him.

[31] The latter statement suggests that while the video may have been recorded prior to separation, it was nonetheless made at a point in time where the end of the parties' relationship was imminent. The video recording then concludes with the following exchange:

Respondent: Because you don't like [Z.D.L.], [Z.D.L.] don't like you?

Petitioner: Yeah.

Respondent: Damn. That's fucked up. That's messed up. Not even if I leave you [the parties' dog]?

Petitioner: No.

Respondent: That's so sad.

Petitioner: Or you can leave [Z.D.L.], and then I'll keep [the dog], and then I'll just toss [Z.D.L.] in the trash.

[32] The last word in the video recording is difficult to make out. The respondent provided two transcriptions, one transcribed "toss [Z.D.L.] in the trash" as the last statement from the petitioner, the other transcribed "toss [Z.D.L.] in the street". I find this difference is not material; the message being conveyed by the petitioner is the same regardless of whether he stated he would toss Z.D.L. in the trash or the street.

- [33] The petitioner does not deny that he made the statements attributed to him in the video. He testified that this exchange occurred in one of the parties' then-daily arguments and that he did not know the respondent was recording it. The petitioner says that it is not a genuine interaction or example of his care and role in Z.D.L.'s life and that he was frustrated and simply answering the respondent's "antagonizing comments with indifference and to not to get into it further".
- [34] Considered within the context of the evidence before me, I have difficulty accepting the petitioner's evidence. In particular, his final comment about tossing Z.D.L. in the street or trash is not consistent with someone who is trying "not to get into it further". Rather, that comment could reasonably be interpreted as an unprompted threat and escalation on the part of the petitioner, not a response to the respondent's comments that him not wanting Z.D.L. was "sad". Taken as a whole, I find the petitioner's statements in the video recording to be reflective of his indifference towards Z.D.L. and his desire to have the respondent out of his life.
- [35] In support of her assertion that the petitioner told her to leave Oklahoma, the respondent points to various text messages. These messages are for the most part undated, but the respondent's uncontradicted evidence was that they all post-dated the parties' separation in April 2021. In one instance, the petitioner told the respondent to "get rid of what you need to get rid of and do what you need to get done so you can go home. Make sure you pay the phone off, we got you on the plane ticket". In another instance, the parties exchanged the following messages:

Petitioner: You still continuing with your lies.

When are you leaving tomorrow so I can say bye to [Z.D.L.]

Respondent: I'm not lying

And please just come home.

Petitioner: Ok bro.

No, that's not my home no more.

Respondent: please

Just come home

Petitioner: what time are you leaving

Respondent: Please

Just come [back]

I'm begging you

Just come back

Petitioner: you have to leave tomorrow

[emphasis added]

[36] The respondent also relies on text messages in which the petitioner suggested he would purchase a plane ticket for her return to Canada, for example:

Petitioner: I'll book a tick for Canada instead

Respondent: please don't

I don't want to go

I don't want to leave

Petitioner: Either you go to your uncles or I'll book a ticket for you

Respondent: I'm trying to fix shit

Please don't do this

I don't want to be without you

Please

Petitioner: I think they're only 285 rn

[emphasis added]

[37] The petitioner does not deny sending any of these messages or that they were sent after April 2021. He notes that they are undated and says that they are "examples of arguments and my attempt to end my relationship with [the respondent]", not his intention to send Z.D.L. to Canada permanently.

[38] Finally, text messages between the petitioner and the respondent's father show that the petitioner also asked the respondent's father to help the respondent return to Canada. These messages are also undated, but the respondent's uncontradicted evidence was that they were sent "from April 2021 onwards". In particular, the petitioner messaged with the respondent's father as follows:

Petitioner: Pls sir I beg you pls

She can take [Z.D.L.] with her I won't take her to court I promise

Respondent's Father: Alex I will I promise I'll get [Z.D.L.] out of there okay just chill for now

Petitioner: I just need [Z.D.L.] go so I can be good

Pls sir just take her away from me pls

I literally fought with my parents two hours ago bc I told them I was going to give her another chance

I even called my lawyer today to cancel everything bc I was going to give her another chance

Father: I'm handling Alex could you let me handle it as I asked you to I know I can fix it but let me fix it in my way I asked you not to call so don't call her

You got to listen to me kid

Petitioner: She's calling me now

I already told her to leave me along [sic]

Just take her back to Canada

[emphasis added]

- [39] The petitioner does not deny sending these messages to the respondent's father. He again notes that they are undated and says that they were sent when he was "quite emotional", in midst of a fight with the respondent and trying to end the relationship. He also says that he "took assurances from [the respondent's] response materials in the family law action that I had commenced that she did not intend to move to Canada with [Z.D.L.]".
- [40] Considering the evidence as a whole, I accept the undisputed evidence that the petitioner sent the above-noted text messages to the respondent, with the majority of them having been sent after the parties separated in April 2021. In light of the content of the messages, I do not accept that the petitioner was "unaware" that the respondent intended to return to Canada with Z.D.L. Rather, I find that this was repeatedly discussed between the parties, often at the petitioner's instigation or insistence.
- [41] Moreover, the evidence before me suggests--and I accept--that the petitioner wanted the respondent to return to Canada and was content for Z.D.L. to leave with her. Notably, in none of the above-noted correspondence does the petitioner indicate that he expects Z.D.L. to remain with him in Oklahoma, or that he had made any arrangements for their care if so. To the contrary, the preponderance of the evidence before me leads me to conclude that the petitioner was in no position to, and had no intention of, becoming a full-time parent to Z.D.L. if they were to remain in Oklahoma when the respondent did as he asked and returned to Canada.

Respondent's Return to Canada

- [42] On October 17, 2021, the respondent returned to Canada and brought Z.D.L. with her. It is unclear on the evidence before me who purchased the respondent's return ticket, or when it was purchased. That same day, the petitioner received a call from the Canada Border Services Agency advising him that Z.D.L. was in Canada with the respondent and that they had been detained.

- [43] The respondent testified that at no time after she returned to Canada with Z.D.L. did the petitioner ask her to send Z.D.L. to him, and that he only reached out to her by text message three times since she left Oklahoma: November 2021, January 20, 2022, and February 22, 2022. In November 2021, the respondent tells the petitioner that Z.D.L. is doing great, is happier and healthier. She also notes that she tried to call the petitioner, but he did not answer. The next text message from the petitioner is dated January 20, 2022, and he asks how Z.D.L. is doing. The respondent does not respond. On February 22, 2022, the petitioner texts the respondent and asks for an update on Z.D.L.
- [44] The petitioner also corresponded with the respondent's father in April and May 2022. In those messages, the respondent's father sends the petitioner videos and photographs of Z.D.L. In response, the petitioner thanks the respondent's father for sending the updates and photographs; he does not ask that Z.D.L. be returned.
- [45] The petitioner testified that "I thanked [the respondent's] parents for taking care of [Z.D.L.] but have always expressed that I wished [they were] with me." This evidence is, however, belied by the text messages noted above, and the petitioner adduced no evidence whatsoever to corroborate his contrary assertion. There is nothing in the record before me evidencing any correspondence between the petitioner and the respondent or her father in which the petitioner expresses that he wishes Z.D.L. was with him or asks the respondent to return Z.D.L. to Oklahoma. To the contrary, and as I noted above, the petitioner's text messages with the respondent and her father suggest the opposite, namely that he was content for Z.D.L. to remain in Canada with the respondent and at no point requested their return to Oklahoma.
- [46] I accept the respondent's evidence and find that at no point after the respondent returned to Canada with Z.D.L. did the petitioner indicate to her or her father that he did not agree to Z.D.L. remaining in Canada or that he wanted them returned to him in Oklahoma.

Procedural History

District Court in and for Tulsa County, State of Oklahoma

- [47] On April 21, 2021, after the parties separated, the petitioner filed a petition to establish paternity ("Paternity Petition") in the District Court in and for Tulsa County, State of Oklahoma ("Oklahoma Court"). In the Paternity Petition, the petitioner sought a judicial determination that he is Z.D.L.'s father, and an order granting him full custody of Z.D.L., with visitation rights to him and the respondent.
- [48] Contemporaneously with the filing of the Paternity Petition, the petitioner also purported to file an application for temporary order pursuant to Okla Stat tit 43 § 110, seeking temporary relief, including "sole custody and control of the parties' minor child during the pendency of this section, with the parties to have such visitation as the Court deems reasonable under the totality of the circumstances" ("Temporary Order Application"). The statutory

jurisdiction for both the summons (served with the Paternity Petition) and the Temporary Order Application was Okla Stat tit 43 § 110. On its face, that provision applies upon the filing of a "petition for dissolution of marriage, annulment of a marriage or legal separation". It is uncontroverted that the Paternity Petition is not one of the types of proceedings expressly contemplated in Okla Stat tit 43 § 110, namely a petition for divorce or legal separation.

- [49] The Paternity Petition and Temporary Order Application were served on the respondent on April 26, 2021. The affidavit of the petitioner's Oklahoma counsel, Luis Flores, purports to attach copies of the document served. However, other than containing the names of the petitioner and respondent in the style of cause, those documents are effectively blank. The summons is undated, it has not been endorsed by the Deputy County Clerk of the Oklahoma Court, it appears to be unfiled, and the portion of the document purporting to confirm service on the respondent is undated and unsigned. The automatic temporary injunction notice purportedly attached to the summons appears to be a standard form notice providing that an automatic temporary injunction comes into effect against both parties "upon the filing of a Petition for Divorce, or Legal Separation". The Paternity Petition was neither of those types of proceedings.
- [50] A printout of the Court docket for the Paternity Petition from its filing in April 2021 through to February 2, 2022 ("Docket") was tendered by the respondent through her Oklahoma counsel, Jonathan Watson. The respondent relies on the Docket to set out the steps taken in the Paternity Petition, and in particular, to show that no automatic temporary injunction notice was filed with the Oklahoma Court and that it had not made any custody orders prior to October 17, 2021. The petitioner did not object to the Docket being before the Court for this purpose and I have relied on it accordingly on this application.
- [51] The Docket does not include any reference to an automatic temporary injunction having been in effect in the Paternity Proceeding. Indeed and importantly, the parties agree that the Oklahoma Court did not make any order, direction, or other determination issuing any form of injunctive relief, whether automatic, temporary, or otherwise, in that proceeding.
- [52] On June 9, 2021, the petitioner filed a motion for default judgment in the Paternity Petition seeking to enter a default decree establishing paternity due to the respondent's failure to respond to the Paternity Petition. The motion for default judgment also sought a decree for dissolution of marriage, despite the parties having never been married, and that the petitioner be awarded the relief requested in the Paternity Petition.
- [53] On June 19, 2021, the petitioner's motion for default judgment was denied because he had not completed a parenting education course. The petitioner completed the required course and on July 15, 2021, his motion for default judgment was set for hearing on October 8, 2021.
- [54] On September 13, 2021, the respondent's Oklahoma counsel, Mr. Watson, entered an appearance in the Paternity Petition on her behalf. On September 23, 2021, the respondent filed an application for permission to file her response to the Paternity Petition out of time.

In support of this request, she pleaded that she is not a citizen of the United States, was residing within that jurisdiction on a travel visa, and was prohibited from holding employment such that she was required to obtain financial assistance from her family in British Columbia to secure representation.

[55] On October 1, 2021, the respondent filed two documents: a response to the Paternity Petition and a response to the Temporary Order Application. In her response to the Paternity Petition, the respondent admitted the petitioner's paternity of Z.D.L. and agreed that the Oklahoma Court had jurisdiction to make a child custody determination under the Uniform Child Custody Jurisdiction and Enforcement Act, Okla Stat tit 43 § 551-101. However, she denied the petitioner's claim for full custody and in her prayer for relief, sought to be awarded sole care, custody, and control of Z.D.L., subject to visitation in favour of the petitioner, absent agreement between the parties.

[56] The parties had their first and only court appearance on October 8, 2021. The petitioner testified that he requested visitation with Z.D.L. at that appearance and that "there was supposed to be another court appearance after this so that the judge could look into what an appropriate visitation schedule would be". There is no evidence before me corroborating the petitioner's assertion that he raised the issue of visitation at this appearance. Neither of the parties' Oklahoma counsel provided any evidence as to what transpired at that appearance, nor did the respondent.

[57] The petitioner's evidence that a date would be set for a further appearance for the Oklahoma Court to determine an appropriate visitation schedule is also inconsistent with Docket. The Docket contained the following entry for the October 8, 2021, appearance:

Bruce, Tammy: Petitioner present, represented by Luis Flores, Respondent present, represented by Jon Watson. Parties are ordered to attend mediation within 45 days. Petitioner's motion for default judgment is moot; Jon Watson has entered an appearance. Temporary order hearing is set 2-3-22 3:00 p.m. Respondent has not provided proof of completion of the parenting education course.

[58] There is no mention of visitation having been raised or addressed, or a future court date being set to consider an appropriate visitation schedule. Rather, the Docket suggests that the parties were ordered to attend mediation, though there is no order to that effect in evidence before me, nor did either of the parties or their counsel address this issue. The petitioner tendered what he indicated was all of the documents from the Oklahoma Court's file for the Paternity Petition, but those documents did not include any order from the October 8, 2021, appearance.

[59] Importantly, and consistent with the entries in the Oklahoma Docket and the documents from the Oklahoma Court file for the Paternity Petition, the petitioner concedes that:

- a) no automatic temporary injunction was ever in effect in the Oklahoma Court in respect of the Paternity Petition; and

- b) at no time prior to the respondent bringing Z.D.L. to Canada on October 17, 2021, did the Oklahoma Court make any temporary, interim, or final orders regarding Z.D.L.'s custody, or restraining their removal from Oklahoma.
- [60] The next entry in the Oklahoma Docket post-dates the respondent's return to Canada with Z.D.L. The Docket indicates that on October 18, 2021, the petitioner applied for an emergency order, which was denied on the basis that he had not established irreparable harm to Z.D.L. in the absence of an order being granted.
- [61] On October 20, 2021, the petitioner filed an amended application for an emergency order, which included assertions of irreparable harm to Z.D.L. arising from allegations of marijuana use by the respondent, an unkempt home, and that Z.D.L. appeared to be malnourished. The only evidence adduced in support of those allegations was an affidavit from the petitioner attesting to his alleged observations. On October 21, 2021, the petitioner obtained an emergency ex parte order from the Oklahoma Court in the Paternity Petition granting him emergency temporary custody of Z.D.L. with supervised visitation to the respondent, and ordering the respondent to return Z.D.L. to the state of Oklahoma ("Chasing Order"). The Chasing Order set a further "show cause" hearing for November 5, 2021.
- [62] The Oklahoma Docket indicates that Mr. Watson appeared on behalf of the respondent on November 5, 2021, but Mr. Flores did not attend for the petitioner and the show cause hearing was struck. Mr. Flores apparently contacted the Court sometime thereafter, and the show cause hearing was "passed by agreement" to February 4, 2022.
- [63] The Oklahoma Docket indicates that on November 5, 2021, the petitioner was denied a writ of habeas corpus and writ of assistance. The petitioner appears to have filed an amended application for writs of habeas corpus and assistance on November 29, 2021. That application was also denied. The petitioner filed a second amended application for writs of habeas corpus and assistance on December 6, 2021.
- [64] On December 9, 2021, the Oklahoma Court issued a writ of assistance directing peace officers and law enforcement agencies in Oklahoma to take physical custody of Z.D.L. and return them to the petitioner, pending further order of the Court ("Writ of Assistance"). The Writ of Assistance authorizes law enforcement to enter private property, use any reasonable force necessary, including breaking into a structure where they have probable cause to believe Z.D.L. may be located, and take physical custody of them at any time, whether or not during daylight hours. More specifically, the Writ of Assistance is directed to:

TO: ANY PEACE OFFICER OF THE STATE OF OKLAHOMA, TULSA COUNTY SHERIFF, CITY OF TULSA POLICE DEPARTMENT AND ALL OTHER LAW ENFORCEMENT AGENCIES IN THE STATE OF OKLAHOMA AND ANY OTHER APPLICABLE LAW ENFORCEMENT

and orders that:

.

YOU ARE HEREBY DIRECTED TO TAKE PHYSICAL CUSTODY OF [THE CHILD] AT ANY PLACE WHERE YOU MAY FIND THE CHILD.

ONCE CUSTODY HAS BEEN TAKEN OF THE MINOR CHILD, THE CHILD SHALL BE PLACED WITH PETITIONER' TO BE RETURNED TO THE PETITIONER, PENDING FURTHER ORDER OF THIS COURT.

[65] The Oklahoma Docket states that a further hearing date in respect of the Writ of Assistance was set for January 7, 2022, but "all fail[ed] to appear" on that date.

Hague Convention Application

- [66] On January 5, 2022, the petitioner emailed the American central authority purporting to make an application under the Hague Convention. However, the petitioner's email does not indicate that an application or supporting documents were in fact attached. The petitioner's evidence is that he did not initiate the Hague Convention application until January 2022 because of the intervening holiday period. The petitioner did not provide any explanation for the delay from late October to late December 2021.
- [67] One month later, on February 10, 2022, the petitioner followed up with the American central authority to inquire about the status of his application. On February 14, 2022, he received a standard form response. On February 17, 2022, the "Abduction Questions Team" asked the petitioner for additional information about where he had sent his application and where Z.D.L. had been taken to and from. The petitioner says that he continued to follow up with the American central authority, and received automatic responses on February 21 and March 3, 2022.
- [68] On April 8, 2022, the British Columbia central authority advised the petitioner that the American central authority did not have his application. It is unclear on the evidence before me when the British Columbia central authority became aware of the petitioner's application.
- [69] The petitioner says that on June 21, 2022, the British Columbia central authority confirmed receipt of the petitioner's application, but advised him that it was incomplete: further documentation and evidence was required. Unlike the correspondence with the central authorities discussed above, this correspondence is not in evidence, and the petitioner provides no explanation as to what additional documentation or evidence was required to complete his application.
- [70] The petitioner asserts, without explanation, that he was not able to obtain an affidavit of law outlining Z.D.L.'s custody rights under Oklahoma law until September 7, 2022. On September 7, 2022, Mr. Flores made an affidavit in the Oklahoma Paternity Petition. However, that affidavit was notably silent as to the status of the petitioner's custody rights in respect of Z.D.L. prior to their removal from Oklahoma.

- [71] This petition was eventually filed on September 27, 2022, just 20 days shy of one year after the alleged wrongful removal of Z.D.L. on October 17, 2021.
- [72] The respondent filed her response to petition on November 14, 2022. The petition first came on for hearing before me on November 24-25, 2022. Following an application to reopen by the respondent, which I granted to permit the parties to adduce additional evidence as to Oklahoma law and the steps taken in the Paternity Petition, the hearing concluded on January 6, 2023.

Evidence of Oklahoma Law

- [73] The petitioner initially tendered Mr. Flores' September 7, 2021, affidavit of law made in the Oklahoma proceedings as evidence on this application, despite it not having been made or filed in this proceeding. Tendered in this manner, Mr. Flores' affidavit was not properly before the Court. I also had significant concerns with Mr. Flores' evidence. It purported to confirm service of documents on the respondent without attaching copies of what was served, contained opinions regarding Oklahoma law that appeared to be inconsistent with the express wording of the applicable statutory provisions, was replete with argument, and proffered conclusions on the very issue before this Court. On January 6, 2023, counsel for the petitioner conceded that this affidavit was not properly before the Court in this proceeding and withdrew it.
- [74] The respondent did not initially tender any evidence as to Oklahoma law. She relied on various Oklahoma statutory provisions to establish her custody rights. By consent of the parties, copies of the Oklahoma statutes relied on by the respondent were put before the Court when the matter first came on for hearing. This is permitted by Article 14 of the Hague Convention, which contemplates judicial notice being taken of the law of the state of habitual residence of the child without the need for specific procedures for proof of that law that would otherwise apply:

In ascertaining whether there has been a wrongful removal or retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognised or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

[emphasis added]

See also *J.T. v. S.L.T.*, 2016 ONCJ 83 at para. 24; *W. (V.) v. S. (D.)*, [1996] 2 S.C.R. 108 at para. 19, 1996 CanLII 192.

- [75] On December 1, 2022, the respondent applied to reopen the hearing to provide evidence from her Oklahoma lawyer, Mr. Watson, regarding custody rights under Oklahoma law and a copy of the Oklahoma Docket for the Paternity Petition. I granted the respondent's application; however, the fresh evidence she sought to adduce was not in proper form. As

such, I directed that the respondent file Mr. Watson's evidence no later than December 9, 2022, and that the petitioner was at liberty to file responsive evidence, if any, no later than December 23, 2022. The matter was set down for a continuation on January 6, 2023.

- [76] On December 7, 2022, the respondent filed an affidavit from Mr. Watson in which he provided opinion evidence regarding, among other things, the respondent's custody rights under Oklahoma law and attached excerpts of the relevant statutes. Mr. Watson's affidavit also exhibits the Docket.
- [77] The petitioner objected to aspects of Mr. Watson's evidence wherein he purported to opine on Canadian law and the application of the Hague Convention in the present case. I have given Mr. Watson's evidence on those points no weight. However, Mr. Watson's evidence as to custody rights under Oklahoma law is admissible and is considered in further detail below.
- [78] In response to Mr. Watson's evidence, on December 28, 2022, the petitioner filed a further affidavit of his own, made December 23, 2022, in which he attached copies of the documents filed in the Paternity Petition. Additionally, when the matter came back on for hearing before me on January 6, 2023, the petitioner attempted to tender a further affidavit from Mr. Flores made January 2, 2023. This affidavit was filed and served late, not in compliance with my order of December 1, 2022, and suffered from some of the same defects as Mr. Flores' September 7, 2022 affidavit.
- [79] The respondent objected to Mr. Flores' affidavit being before the Court. Faced with this objection, the petitioner conceded that he only intended to rely on Mr. Flores' affidavit to confirm service of the Temporary Order Application and provide copies of the documents served. The respondent did not object to Mr. Flores' affidavit being before the Court for that purpose. As such, I ruled that Mr. Flores' January 2, 2023, affidavit was admissible for the limited purpose of proving service of the Temporary Order Application and have considered it solely for that purpose.

Analysis

- [80] I acknowledge that in considering and deciding the issues raised on this application, I have referred to authorities not cited by the parties. Given the urgency of this matter and the delay that has already accrued to date, including delay prior to this application being filed and that necessitated by the reopening application, time pressures did not afford an opportunity for further supplemental submissions from the parties.
- [81] The Hague Convention is aimed at enforcing custody rights and securing the prompt return of wrongfully removed or retained children to their country of habitual residence: Hague Convention, Article 1; Balev at para. 24, citing Thomson v. Thomson, [1994] 3 S.C.R. 551 at 579-581, 1994 CanLII 26. Prompt return serves three related purposes (Balev at paras. 25-27):
- a) to protect against the harmful effects of wrongful removal or retention;

- b) to deter parents from abducting children in the hope of establishing links in a new country that might ultimately award them custody, and
- c) to facilitate the speedy adjudication of the merits of a custody or access dispute in the forum of a child's habitual residence.

[82] Proceedings under the Hague Convention are to be determined using the most expeditious procedures available: Hague Convention, Article 2; Balev at para. 83. However, expeditiousness ought not to operate in manner that prejudices or pressures a party, especially when the usual requirements and practice respecting notice of expert evidence or evidence are derived from outside the trial court's jurisdiction: K.F. v. J.F., 2022 NLCA 33 at para. 96.

Application of the Hague Convention

- [83] Canada and the United States of America are both contracting states to the Hague Convention, and the Convention has the force of law in this jurisdiction at the time of the alleged wrongful retention of the child: Family Law Act, S.B.C. 2011, c. 25, s. 80.
- [84] Pursuant to Article 4, the Hague Convention applies to any child who was habitually resident in a contracting state immediately before any breach of custody rights and ceases to apply when the child attains the age of 16 years. Z.D.L. was one year and three months old at the time of the alleged wrongful removal, and the parties agree that they were habitually resident in Oklahoma at that time.
- [85] The Hague Convention thus applies in this case.

Concept of Custody Rights Under the Hague Convention

- [86] The primary object of the Convention is the enforcement of custody rights. By consequence, the mandatory return procedure dictated by the Hague Convention is limited to cases where the removal of a child is in violation of rights of custody--not access--of a person, institution, or other body: W. (V.) at para. 26, citing Thomson at 579, 581. The procedure set forth in the Hague Convention is thus set in motion only where a child has been removed or retained in breach of rights of custody: W. (V.) at para. 22.
- [87] Rights of custody under the Hague Convention may be vested in a person, an institution, or any other body under the law of the state in which the child was habitually resident immediately before their removal or retention. This is set out in Article 3 of the Convention which provides as follows:

The removal or the retention of a child is to be considered wrongful where

- a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

- b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

[emphasis added]

[88] Removal or retention of a child is therefore wrongful within the meaning of the Hague Convention where: (a) it is in breach of custody rights under the law of the state in which the child was habitually resident immediately before the removal or retention; and (b) those rights were actually being exercised or would have been exercised but for the wrongful removal or retention: Balev at para. 28.

[89] Rights of custody are defined in Article 5 of the Convention:

For the purposes of this Convention -

- a) "rights of custody" shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;
- b) "rights of access" shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

[90] The Hague Convention adopts an original definition of rights of custody. What constitutes "rights of custody" under the Convention is determined independently of the domestic law of the jurisdiction to which it applies: W. (V.) at para. 22. However, the question of who holds the "rights retaining to the care of the person of the child" or the "right to determine the child's place of residence" within the meaning of Article 5--and by extension, Article 3--of the Convention is determined in accordance with the law of the state of the child's habitual place of residence: W. (V.) at para. 23. In the present circumstances, this means that the question of who held rights of custody of Z.D.L. at the material time is to be determined in accordance with Oklahoma law.

Who possessed custody rights at the time of removal?

[91] The petitioner concedes that he did not have any personal rights of custody of Z.D.L. under Oklahoma law at any time prior to the allegedly wrongful removal. As such, this application is not predicated on Z.D.L.'s removal being wrongful in breach of the petitioner's custody rights. Rather, the petitioner asserts that as of October 17, 2021, the Oklahoma Court possessed rights of custody under Article 3 of the Hague Convention in respect of Z.D.L., and that the removal in breach of the Oklahoma Court's custody rights.

- [92] Importantly, and consistent with the entries in the Oklahoma Docket and copies of the documents from the Oklahoma Court file for the Paternity Petition tendered by the petitioner, it is undisputed that:
- a) no automatic temporary injunction was ever in effect in the Oklahoma Court in respect of the Paternity Petition;
 - b) the Temporary Order Application never came on for hearing or a determination on the merits before the Oklahoma Court; and
 - c) at no time prior to the respondent bringing Z.D.L. to Canada on October 17, 2021, did the Oklahoma Court make any temporary, interim, or final orders regarding Z.D.L.'s custody, residency, or restraining their removal from Oklahoma.
- [93] The petitioner's express disclaimer of any personal rights of custody distinguishes the present circumstances from the overwhelming preponderance of the Hague Convention jurisprudence, both in Canada and in other jurisdictions. I was not taken to any other instance in which a return order has been made under the Hague Convention where:
- a) the left-behind parent did not have any personal rights of custody and thus relied solely on a breach of a court's rights of custody; and
 - b) a removal was found to be in breach of a court's rights of custody under Article 3 of the Hague Convention in circumstances where the court had not made any custody, residency, or non-removal orders prior to the child's removal.
- [94] The petitioner's position on this application rests on his assertion that the Oklahoma Court acquired rights of custody within the meaning of the Hague Convention upon the filing of pleadings in the Paternity Petition, and from that point forward, was continuously actually exercising those rights through to October 17, 2021, when Z.D.L. was removed. The petitioner relies first on the filing of the Temporary Order Application having been brought as evidence of the Oklahoma Court's exercise of custody rights. However, he also maintains that the fact that filing of pleadings in which the parties each sought custody of Z.D.L. is sufficient to meet the test under the Article 3 of the Hague Convention. In the latter respect, the petitioner's position is that a foreign court acquires rights of custody upon filing of the originating pleadings, and, irrespective of what steps may or may not have been taken in the course of those proceedings, is "actually exercising" those rights for as long as the matter remains extant in the court file, until a final order is made.
- [95] The respondent disagrees and says that the filing of pleadings alone is not sufficient to: (a) vest rights of custody in the Oklahoma Court; or (b) establish actual exercise of any such rights. The respondent relies on the fact that she had sole custody of Z.D.L. under Oklahoma law, and the lack of any orders being made by the Oklahoma Court limiting or restraining her exercise of those rights, or prohibiting Z.D.L.'s removal from Oklahoma, in support of her position that Z.D.L.'s removal was not wrongful under Article 3 of the Hague Convention. In the respondent's submission, the filing of pleadings alone is not sufficient to

establish actual exercise of custody rights by the Oklahoma Court and ought not to be given the same effect in terms of imposing limitations on the lawful exercise of custody rights as a court order.

- [96] The inquiry as to whether Z.D.L.'s removal was in breach of custody rights under Article 3 of the Hague Convention therefore requires me to determine:
- a) whether the Oklahoma Court had rights of custody under the law of Oklahoma at the time of Z.D.L.'s removal; and
 - b) if so, despite not having made any orders as to custody or residency, whether the Oklahoma Court was actually exercising its rights of custody at the time of removal, or would have exercised them but for the removal.

Custody Rights Under Oklahoma Law

- [97] In support of her position that she had sole custody of Z.D.L. under Oklahoma law at the time of removal, the respondent relies on Okla Stat tit 10 § 7800 in support of her position, which provides as follows:

Except as otherwise provided by law, the mother of a child born out of wedlock has custody of the child until determined otherwise by a court of competent jurisdiction.

- [98] Consistent with that provision, Mr. Watson opines that pursuant to Oklahoma law, all custody rights of Z.D.L. rested with the respondent and that prior to the removal, no court in Oklahoma had issued any order awarding custody rights to the petitioner. Mr. Watson also opines as follows:
15. I state from my practice, professional experience with similar cases, and knowledge of Oklahoma law, that Oklahoma courts have assumed custody of a child born out of wedlock after the child is removed from Oklahoma by the mother, only when there was a court order prior to the removal specifically and categorically restraining the mother from removing the child pending custody proceedings.
 16. In the Oklahoma Proceedings, there was no court order restraining the Respondent from removing [Z.D.L.] from Oklahoma pending custody proceedings. Therefore, the Oklahoma courts did not have the child's custody at the time of [their] removal.

[emphasis added]

- [99] I accept Mr. Watson's opinion as to the respondent's custody rights under Oklahoma law and find that pursuant to Okla Stat tit 10 § 7800, the respondent had sole custody of Z.D.L. I also accept Mr. Watson's evidence--which is consistent with the Docket and documents filed with the Oklahoma Court--that the Oklahoma Court did not make any order granting custody or even access rights to the petitioner before the respondent returned to Canada with Z.D.L. on October 17, 2021.

[100] This is consistent with the petitioner's concession that he did not have any custody rights in respect of Z.D.L. when the respondent brought them to Canada. The petitioner confirmed this concession multiple times over the course of the hearing.

[101] In the result, I conclude that the respondent had custody of Z.D.L. by operation of Oklahoma law at the time of removal. However, this does not end the inquiry because for the purpose of the Hague Convention, rights of custody may be divided such that some rights may lie with the court as well as with one or both parents: *Johnson v. Jessel*, 2012 BCCA 393 at para. 40 [*Johnson* 2012 CA], leave to appeal to SCC ref'd, [2012] S.C.C.A. No. 483.

Article 3(a) - Did the Oklahoma Court have rights of custody?

[102] It is uncontested that the Oklahoma Court is a "institution or any other body" that can exercise custody rights under Article 3(a) of the Hague Convention: *Thomson* at 588; *Johnson* 2012 CA at para. 39; *Fasiang v. Fasiangova*, 2008 BCSC 1339 at para. 92.

[103] It is also uncontested that the parties filed pleadings in the Paternity Petition and in doing so, attorned to the jurisdiction of the Oklahoma Court for determination of the issues raised therein. The petitioner sought recognition of his paternity of Z.D.L. and, among other relief, an order granting him full custody of Z.D.L. In her response to petition, the respondent admitted the petitioner's paternity and counterclaimed for an order that she retain sole custody of Z.D.L., but affording visitation rights to the petitioner. The issue of Z.D.L.'s custody was therefore before the Oklahoma Court based on the pleadings filed in the Paternity Petition. However, the respondent says that her attornment to that jurisdiction is not sufficient to meet the test for breach of custody rights set out in Article 3 of the Hague Convention.

[104] The starting point for the determination of whether Z.D.L.'s removal was in breach of rights of custody held by the Oklahoma Court is the Supreme Court of Canada's decision in *Thomson*. In that case, the parents were married when the child was born, and each sought custody of their child. In November 1992, the Scottish court granted an interim custody order in favour of the mother, which also included a non-removal clause. In December 1992, the mother took the child to Canada to visit her parents and remained there thereafter. In February 1992, the mother applied to the Manitoba court for custody, while the father obtained a custody order from the Scottish court. In March 1993, the father applied to have the child returned to Scotland under the Convention.

[105] In *Thomson*, custody rights were found to be vested in the Scottish court by virtue of it having made an interim order awarding custody to the mother and containing a prohibition against the child being removed from Scotland. In that regard, the Supreme Court of Canada concluded that a court will have "rights of custody" under the Hague Convention where custody issues are before it and in the course of dealing with those custody issues, it makes an interim custody award: *Thomson* at 588. *Thomson* has consistently been interpreted in this manner, including in *J.T.* where the Court cited it for the proposition that "a temporary non-removal order issued in a dispute about a child's custody created a right

of custody in the court, because the purpose of the order was to preserve the court's jurisdiction to make a final order as to custody": J.T. at para. 21; see also Johnson 2012 CA at para. 49; T.A.S. v. S.S., 2018 BCSC 2472 at paras. 60-61.

Did the filing of the pleadings in the Paternity Petition vest rights of custody on the Oklahoma Court?

- [106] In light of his concession that the Oklahoma Court did not make any orders regarding Z.D.L.'s custody or residency prior to removal, the petitioner asserts that the filing of pleadings in the Paternity Petition was sufficient to vest "rights of custody" in the Oklahoma court under Article 3 of the Hague Convention.
- [107] The notion that a court can possess rights of custody once it is properly seized of a matter is consistent with the applicable international jurisprudence interpreting the Hague Convention. For example, in *In re H. (A Minor)*, [2000] 2 A.C. 291 [Re H. HL], aff'g [2000] 1 Fam. CR 225 (C.A.) [Re H. CA], the House of Lords held that the Hague Convention allows the possibility of a court having rights of custody once there is an application to the court in a particular case raising the issue of the custody, and that generally speaking, those rights can be invoked from the time of service of the application.
- [108] The factual context at issue in *Re H.*, involved an unmarried father who commenced proceedings in March 1996 to be appointed a guardian of the child: *Re H.* HL at 300. In April 1996, an interim order was made by the Irish court giving custody to the mother by consent and providing weekly access to the father. That order plainly contemplated that the court would remain seized of the matter and that further applications for directions about custody could be made in the existing proceedings as necessary. Two years later, in March 1998, the father made a further application for directions regarding custody and the rights of access of both parents. An interim order for access was made in May 1998, and the substantive issues, including guardianship and custody, were adjourned over to a fixed date, July 1998, for determination. One month later, in June 1998, the mother removed the child from the jurisdiction of the Irish court: *Re H.* HL at 300.
- [109] The father initiated proceedings under the Hague Convention before the Family Division of the High Court of Justice in England: *Re H.* HL at 301. That application was dismissed, with the Court rejecting the father's contention that he personally had rights of custody and also his contention that the District Court of Carrigaline in Ireland had custody rights. The issues on appeal to the Court of Appeal were whether the District Court had been possessed of rights of custody at the time of removal and whether the petitioner was entitled to rely on the breach of those rights. The Court of Appeal allowed the appeal and ordered the child be returned to Ireland: *Re H.* HL at 301.
- [110] The House of Lords dismissed the appeal and affirmed the order of the Court of Appeal. In doing so, the House of Lords concluded as follows as to the time at which a court acquires custody rights:

There are two aspects to this matter. First of all the application to the court must raise matters of custody within the meaning of the Convention and that will require in every case a consideration of the terms of the application. Secondly, a question arises as to the time at which the court acquires such right. It is clear that the interpretation which has been accepted of the Convention which allows the possibility of a court having rights of custody does not contemplate that happening unless there is an application to the court in a particular case raising the issue of the custody of one or more children. The date at which such application confers these rights is a matter which has not been the subject of detailed consideration in relation to the Convention. For the purposes of the Civil Jurisdiction and Judgments Act 1982, Schedule 1, article 21 and the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters which is scheduled to that Act (Schedule 1) it has been held that an English court becomes definitively seized of proceedings for the purposes of that Convention on the date of service of the writ at which point it has jurisdiction over the merits of the dispute: *Neste Chemicals S.A. v. D.K. Line S.A. (The Sargasso)* [1994] 3 All E.R. 180 and *Dresser U.K. Ltd. v. Falcongate Freight Management Ltd. (The Duke of Yare)* [1992] Q.B. 502.

In relation to the present Convention while in the wardship jurisdiction the issue of an application makes the child who was subject to the application a ward of the court I consider that generally speaking there is much force in using the service of the application as the time at which the court's jurisdiction is first invoked. It is true that interim orders may be made before service and special cases may arise but generally speaking I would think it a reasonable rule that at the latest when the proceedings have been served the jurisdiction has been invoked and unless the proceedings are stayed or some equivalent action has been taken I would treat the court's jurisdiction as being continuously invoked thereafter until the application is disposed of. In the present case no difficulty arises on this issue because at the time when the child was removed from Ireland the court had fixed a date for the determination of the application as a result of an earlier hearing at which both parties were represented. I would not think it necessary for the court of the jurisdiction to which the child has been removed to consider whether the pending application in the court of the child's habitual residence was in good faith or with merit. These are questions in my judgment for the court of the habitual residence to determine and if any doubt arises on these matters it should be resolved by application to that court.

[emphasis added]

[111] Re H. thus contemplates that a court may possess rights of custody once an application is made to the court raising issues of custody. This is also consistent with the Canadian jurisprudence, which likewise contemplates that a court may possess rights of custody where issues of custody or residence are before it.

[112] In the present case, the filing of pleadings in the Paternity Petition put the issue of Z.D.L.'s custody before the Oklahoma Court, albeit as a secondary determination to be made following a determination of the petitioner's paternity. As such, I agree with the petitioner that despite not having made any orders regarding Z.D.L.'s custody or residency, the Oklahoma Court can still be a "body or institution" having "rights of custody" within Article

3(a) of the Hague Convention. By virtue of the Paternity Petition having been filed, the parties put issues of Z.D.L.'s paternity and custody before the Oklahoma Court such that it acquired rights of custody pursuant to Article 3(a) of the Hague Convention.

- [113] However, simply possessing rights of custody does not end the inquiry as possession rights are not synonymous with their actual exercise. This is reflected in the dual aspect of Article 3, which requires both possession of rights of custody under Article 3(a) and actual exercise of those rights under Article 3(b). This is also consistent with the express language used in Article 3, which contemplates rights of custody arising "by reason of a judicial or administrative decision". Article 3 thus requires more than simply the vesting of rights in the court by the filing of originating pleadings; the court must be actually exercising those rights at the time of removal (or the circumstances be such that the Court would have exercised its rights but for the removal) for the removal to be in breach of rights of custody and therefore wrongful under Article 3 of the Hague Convention.

Article 3(b) - Was the Oklahoma Court "actually exercising" rights of custody at the time of removal?

- [114] The jurisprudence developed in the context of wrongful removals in breach of a court's rights of custody tend to consider Article 3 holistically, without distinction in the analysis of whether the court possesses rights of custody under Article 3(a) with whether it is actually exercising those rights under Article 3(b). This likely arises from the fact that in the vast majority of cases, the issue of whether the foreign court is actually exercising its custody rights is clearly demonstrated by the court having already made custody or residency orders. In many instances, those orders also include non-removal clauses expressly prohibiting removal of the child from the Court's jurisdiction.
- [115] Such were the circumstances in Thomson, where the fact of an interim custody order having been made and the inclusion of a non-removal clause in that order were key factors in the Court's conclusion that the foreign court was actually exercising rights of custody (at 588):

It seems to me that when a court has before it the issue of who shall be accorded custody of a child, and awards interim custody to one of the parents in the course of dealing with that issue, it has rights relating to the care and control of the child and, in particular, the right to determine the child's place of residence. It has long been established that a court may be a body or institution capable of caring for the person of a child.

This Court heard no evidence on the legal effect under Scottish law of the insertion of the non-removal clause in the interim custody order granted to Mrs. Thomson on November 27, 1992. Therefore we must interpret the clause without aid, from general principles and by analogy to Canadian law. Under Canadian law, a non-removal clause may be placed in an interim order of custody to preserve the court's jurisdiction to make a final determination of custody. It seems to me that when a court is vested with jurisdiction to determine who shall have custody of a child, it is while in the course of exercising that jurisdiction, exercising rights of custody within the broad

meaning of the term contemplated by the Convention. In the words of Article 3(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". As noted earlier, the travaux préparatoires envision this situation.

[*italic emphasis in original, underline emphasis added*]

- [116] Indeed, the Court specifically noted that the non-removal clause was inserted into the custody order to preserve jurisdiction in the Scottish court to decide the issue of custody on its merits: Thomson at 589; see also J.T. at para. 21. By consequence, the Scottish court became an institution or other body having custody rights within the meaning of Article 3 of the Convention.
- [117] Here, the Oklahoma Court did not make any orders regarding Z.D.L.'s custody or residency. In my view, in such circumstances, the Article 3(b) analysis takes on added force and careful consideration must be given to the issue of whether the court was actually exercising custody rights separate and apart from the Article 3(a) analysis. This involves determining whether the filing of the pleadings in the Paternity Petition, either alone or in conjunction with an automatic temporary injunction or the Temporary Order Application, is sufficient for the petitioner to meet his burden of establishing that the Oklahoma Court was actually exercising rights of custody under the Hague Convention, when Z.D.L. was removed on October 17, 2021.

Was there an automatic temporary injunction in effect upon filing of pleadings in the Paternity Petition?

- [118] The petitioner initially relied on an automatic temporary injunction, having come into effect under Okla Stat tit 43 § 110 upon filing of the Paternity Petition, as demonstrating that the Oklahoma Court possessed and was exercising rights of custody. However, upon production of the Docket--which contained no reference to a notice of temporary injunction or order being filed with the Oklahoma Court--the petitioner conceded that there was no evidence of any temporary injunction having come into effect upon filing of the pleadings in the Paternity Petition.
- [119] That concession is well-founded and properly made. Oklahoma Statute Title 43 § 110 provides that an automatic temporary injunction shall be in effect only in specific types of proceedings, of which petitions to establish paternity are not one:

upon the filing of a petition for dissolution of marriage, annulment of a marriage or legal separation by the petitioner and upon personal service of the petition and summons on the respondent

[*emphasis added*]

- [120] References to Okla Stat tit 43 § 110 applying to proceedings for dissolution of marriage or legal separation are replete throughout the provision, and no mention is made of this provision having any application in petitions to establish paternity. Mr. Watson's opinion is also consistent with Okla Stat tit 43 § 110 having no application in paternity petitions:
8. There was no Automatic Temporary Injunction applicable to the [Paternity Petition]. Pursuant to Oklahoma Statute Title 43 O.S. §110(A), an Automatic Temporary Injunction is automatically put in place by operation of law in all cases where a Petition for Dissolution of Marriage, Petition for Annulment of Marriage, or Petition for Legal Separation is filed. The [Paternity Petition] was a Petition for Paternity. Therefore, no Automatic Temporary Injunction was put in place. Oklahoma Statute Title 43 O.S. §110 is attached to this Affidavit as Exhibit B.
 9. When an Automatic Temporary Injunction is put in place, a Notice of Temporary Injunction is always filed along with the Summons. The required Notice of Temporary Injunction was not filed in the [Paternity Petition]. A copy of the [Docket] is attached as Exhibit C.
 10. I state from my practice, professional experience with similar cases, and knowledge of Oklahoma law, that the Automatic Temporary Injunction is not applicable to Paternity Petitions. Furthermore, all mentions of the applicability of the Automatic Temporary Injunction under Title 43 O.S. §110 specifically state "children of the marriage", further indicating that the plain reading of the Oklahoma statute is the correct one.

[emphasis added]

- [121] I accept Mr. Watson's evidence on this point. His opinion that Okla Stat tit 43 § 110 has no application to the Paternity Petition is uncontroverted and consistent with the plain language of that statutory provision.
- [122] The application of this provision being limited to proceedings in which parents of a child were married and are now seeking divorce or dissolution of marriage is also consistent with what appears--based on the very limited evidence of Oklahoma law before me--to be differential treatment of custody rights for married and non-married parents. In the case of married parents, both presumably acquire custody rights from birth, such that Okla Stat tit 43 § 110 operates to protect both parents' rights and preserve the status quo pending determination of the divorce or dissolution of marriage.
- [123] However, given the differential treatment of unwed parents under Oklahoma law, the same concerns do not arise where a child is born out of wedlock and the mother has sole custody of the child pursuant to Okla Stat tit 10 § 7800. In such instances, it would appear that, as the petitioner did here by filing the Paternity Petition, a father must first establish paternity before they can obtain custody rights. Unlike a married father, a father of a child born out of wedlock does not have presumptive custody rights under Oklahoma law that would require protection by way of temporary injunctive relief, pending further steps being taken or determinations being made in the litigation. Paternity must first be established.

Did the Temporary Order Application constitute actual exercise of rights of custody by the Oklahoma Court?

- [124] The petitioner says that the extant Temporary Order Application demonstrates that the Oklahoma Court was actually exercising rights of custody when Z.D.L. was taken to Canada. I disagree. The Temporary Order Application suffers from the same jurisdictional defect as the petitioner's reliance on the automatic temporary injunction: the Oklahoma Court had no jurisdiction under Okla Stat tit 43 §110 to grant the relief sought in that application in the context of a petition for paternity.
- [125] Oklahoma Statute Title 43 §110 contemplates that a party may apply "to the court for further temporary orders, pursuant to this section" and that "[a]fter a petition has been filed in an action for dissolution of marriage or legal separation either party may request the court to" issue a temporary order regarding, among other things, child custody, support or visitation (emphasis added). The jurisdictional basis for the Temporary Order Application is expressly stated to be Okla Stat tit 43 § 110. However, as I concluded above, that provision has no application to the Paternity Petition.
- [126] The fact that the respondent filed a response to the Temporary Order Application does not, in my view, change the analysis. The parties provided limited evidence as to Oklahoma law, and there is no evidence before me establishing whether litigants can confer jurisdiction on the Oklahoma Court that it does not have under the applicable statute simply by filing application materials. Foreign law is to be treated as a fact which, in theory, must be proved; however, where there is no such evidence, courts will apply domestic law: *W. (V.)* at para. 19; *T.A.S.* at para. 57; *Chan v. Chow*, 2001 BCCA 276 at para. 50. The law in British Columbia is well-settled that parties cannot confer jurisdiction by consent: see e.g. *Gourlay v. Crystal Mountain Resorts Ltd.*, 2020 BCCA 191 at para. 64; see also *W. (V.)* at para. 17.
- [127] Regardless, the Temporary Order Application did not come on for hearing before the Oklahoma Court on its merits, and no orders--temporary or otherwise--were ever made. In the result, I find that the Temporary Order Application was not properly before the Oklahoma Court and does not operate to establish that the Oklahoma Court was actually exercising custody rights by way of having that application extant before it at the time of removal.

Does the filing of pleadings in the Paternity Petition constitute actual exercise of rights of custody by the Oklahoma Court?

Canadian Jurisprudence

- [128] The petitioner relies heavily on *Johnson 2012 CA* in support of his position that the Oklahoma Court did not need to make any orders to be actually exercising rights of custody. He submits that properly interpreted, *Thomson and Johnson 2012 CA* stand for the position that as soon as a court has rights of custody--here, at the latest when the respondent filed her response to the Paternity Petition and attorned to the Oklahoma Court's jurisdiction--it

is immediately and continuously actually exercising those rights for as long as the proceeding remains extant, until a final order is entered.

- [129] For the reasons set out below, I disagree. Thomson expressly relies on the existence of the interim custody order containing a non-removal clause as evidencing the court's actual exercise of rights of custody and reservation unto itself the continued exercise of those rights. The petitioner's submission overlooks the importance of the interim order made by the Scottish court in Thomson. That order was a material fact underpinning the Court's analysis and the basis upon which the conclusion that the Scottish court possessed and was exercising rights of custody under Article 3 of the Hague Convention rests.
- [130] Johnson 2012 CA is, in my view, to the same effect. In that case, the court's actual exercise of rights of custody arose from the making of an interim order after a custody application had been brought before the British Columbia Provincial Court, but subsequently adjourned. The mother relocated her young children from British Columbia to Germany without the knowledge of the father. She obtained an ex parte interim order from the Provincial Court that granted her sole custody and guardianship of the children: Johnson v. Jessel, 2012 BCSC 1055 at para. 3 [Johnson 2012 SC].
- [131] The mother argued that the court's rights of custody were not being actually exercised at the time of removal because the custody application had been adjourned generally, such that the proceedings were essentially at an end: Johnson 2012 CA at para. 45. She further submitted that the Provincial Court did not retain custodial rights due to the lack of a non-removal clause in the interim order: Johnson 2012 CA at para. 49. The trial court did not accept her argument, concluding that the Provincial Court continued to exercise jurisdiction despite the interim nature of the order made: Johnson 2012 SC at para. 14. The Court also held that despite the adjournment, no final order on custody had been made such that the mother did not have a unilateral right to change the children's residence: Johnson 2012 SC at para. 16.
- [132] On appeal, the issue was framed as whether the mother "had 'rights of custody' by virtue of the interim order awarding her sole custody, to the exclusion of the courts, within the meaning of the Convention": Johnson 2012 CA at para. 42. The Court of Appeal found that having made the interim order, the Provincial Court implicitly reserved to itself the question of the right to remove the children from the jurisdiction and that the lack of non-removal clause in that order was not fatal to the court's actual exercise of custody rights at the time of removal:
- [48] On June 22, 2010, the court granted an interim order implicitly reserving to itself the question of the right to remove the children from the jurisdiction. In these circumstances the interim order cannot be construed in the same manner as a final order. Although interim orders often do govern questions of custody and access indefinitely, they are primarily designed to maintain the status quo: Leung v. Leung (1998), 44 R.F.L. (4th) 121 (B.C.C.A.) at para. 10, Eaton v. Eaton (1987), 11 R.F.L. (3d) 92 (B.C.C.A.), Prost v. Prost (1990),

30 R.F.L. (3d) 80 (B.C.C.A.), in chambers). Such orders provide a short-term solution to the parties until the court can engage in an in-depth analysis regarding the circumstances of the parties and the children: *Pumphrey v. Pumphrey* (1997), 148 Nfld. & P.E.I.R. 340 (Nfld C.A.), 29 R.F.L. (4th) 283.

- [49] Ms. Jessel argues that regardless of whether the June 22, 2010 order was interim or final, the court retained no rights of custody under the Convention. She contends that because there was no non-removal clause in the interim custody order, the court did not retain custodial rights over the children. I disagree. In *Thomson*, La Forest J. stated that when custody is a live issue, and a court awards custody on an interim basis, the court does retain custody rights under the Convention: *Thomson* at 588. While a non-removal clause may be placed in an interim order to preserve the court's jurisdiction, such a clause is not required. In the circumstances of this case, the Provincial Court was actually exercising its custody rights at the time of the removal. It follows that the removal of the children was unlawful within the meaning of the Convention. Were this not so it would follow that in any case of spouses asserting competing claims to sole custody of children, either one could simply obtain an *ex parte* order for interim custody on whatever he or she put before the court, and then take the children to another jurisdiction on the strength of that order. That cannot be either the correct interpretation of the reach of such an interim order or of the Convention.

[*italic emphasis in original, underline emphasis added*]

- [133] In my view, the ratio decidendi of *Johnson* 2012 CA is limited to the proposition that a non-removal clause is not required for a court to be actually exercising custody rights. The fact that an interim order had been made--despite it not containing a non-removal clause--was sufficient to establish actual exercise of rights by the Provincial Court at the relevant time. This is a material distinguishing fact from the case at bar where no orders were made by the Oklahoma Court.

- [134] The petitioner says that *Johnson* 2012 CA establishes that the Oklahoma Court did not need to make orders relating to Z.D.L.'s custody or residency to satisfy Article 3(b) of the Hague Convention. In particular, the petitioner says that in *Johnson* 2012 CA, the Court cited with approval an excerpt from this Court's decision in *Fasiang* holding that there need not be an order or residency in place for a court to be exercising rights of custody. The excerpt relied on by the petitioner is found at para. 39 of *Johnson* 2012 CA, where the Court refers to paras. 92-97 of *Fasiang* as follows:

- [39] Though the terminology of the Convention in which 'rights of custody' are attributed to an institution is less familiar in this jurisdiction than the use of the term 'exercise of jurisdiction', the law is well settled that a court may exercise the rights of custody within the meaning of Article 3 of the Convention: *Thomson* at 588, *Fasiang* at para. 92. This notion of the Court exercising rights of custody was explained by Madam Justice Martinson in *Fasiang* at paras. 92-97:

- [92] The law is clear that the court is an institution that can exercise rights of custody.
- [93] Counsel for Mr. Fasiang says that the law also provides that where a foreign court is properly and actively seized of an issue as to where the child should reside, and where, while those proceedings are pending, the child is removed from its place of habitual residence without the consent of the court, the court hearing the application for return must recognize those rights of custody in the foreign court. There need not be an order relating to custody or residency in place.
- [94] Counsel for Ms. Fasiangova does not dispute that statement of the law.
- [95] I agree with counsel for Mr. Fasiang. The statement of the law is supported by the following cases: Thomson; Re W, Re B (Child Abduction: Unmarried Father), [1998] 2 FLR 146 (H.C.J. Fam.D.); Richards v. Goldsmith, (3 July 2001) Case No. FD 01 P 00707 (H.C.J. Fam.D.); Brook v. Director General Department of Community Services (2002), 167 FLR 243 (Fam. Ct. Austl.).
- [96] There is a sound policy basis for the law. When a parent places issues concerning the child that are in dispute, including the issue of where the child should reside, before a court, the court has the right to decide the disputed issues, including the right to decide where the child should reside.
- [97] One parent cannot circumvent the court's right to make that decision by unilaterally deciding to change the residence of the child. To hold otherwise would again defeat the objectives of the Hague Convention.

[emphasis added]

- [135] I do not interpret Johnson 2012 CA as relying on Fasiang for the proposition asserted by the petitioner. Rather, the Court of Appeal referred to Fasiang in the context of its general discussion of the notion of a court exercising rights of custody under the Hague Convention. Nor did Johnson 2012 CA cite Fasiang for the proposition that no order is necessary for a court to be actually exercising rights of custody under Article 3(b). That issue was not alive on the factual context before it given the existence of the Provincial Court's interim order, and thus does not form part of the ratio decidendi of that decision. As such, I find that Johnson 2012 CA does not go so far as the petitioner suggests to say that a court is actually exercising rights of custody under Article 3(b) in circumstances where no custody order--non-removal or otherwise--has been made.
- [136] Fasiang is also of limited assistance in the case at bar as the circumstances of that case were materially different. In Fasiang, the parties were married when the child was born, and it appears to have been uncontested that the left-behind father had custody rights by operation of law. He had also signed a letter of permission for the child to travel to Canada with the mother: Fasiang at paras. 12-13, 20. It is unclear from Fasiang what the petition for a custody order entailed, what steps had been taken (if any) in those proceedings, or whether the issue was put before the Slovakian court for a determination on the merits before the mother and child left for Canada.

- [137] Further, and despite the mother's apparent recognition of the father's presumptive custody rights, Fasiang did not, for reasons which are unclear on the face of the judgment, consider whether the removal was in breach of the father's custody rights. Instead, after finding that the father had not agreed to change the child's habitual residence to Canada, the Court only considered whether the removal was in breach of the court's custody rights: see e.g. paras. 90-91. The Court in Fasiang also does not appear to have turned its mind to the issue of when a court is actively exercising rights of custody under Article 3(b), separate from the issue of whether the court possessed rights of custody under Article 3(a), likely on account of the issue not being disputed by the parties: see e.g. paras. 93-94.
- [138] Moreover, to the extent that Fasiang interprets Thomson as supporting the proposition that there need not be an order relating to custody or residency in place for a court to be "properly and actively seized of an issue as to where the child should reside" (emphasis added), I find that that interpretation does not accord with the ratio decidendi or proper interpretation of Thomson. It bears repeating that Thomson at 588-589 specifically relied on the inclusion of a non-removal clause as a means of preserving the court's jurisdiction to make a final order as to custody. Thomson thus does not, in my view, provide authority for the proposition that actual exercise can be established under Article 3(b) in the absence of a court making any custody or residency orders.
- [139] The same result was reached in *Thorne v. Dryden-Hall*, 35 B.C.L.R. (3d) 174 at para. 20, 1997 CanLII 3236 [Thorne CA], aff'g *Thorne v. Formerly*, 1995 CanLII 2414, [1995] B.C.J. No. 2009 (S.C.) [Thorne SC]. In that case, a mother applied to the English court for permission to remove the parties' two children from the United Kingdom so that she could return to live in Canada. The English court made a residency order, ordering that the children live with the mother and setting out specific access provisions for the father. The application to remove the children from the United Kingdom was dismissed by consent. By operation of ss. 3(1), 8, and 13 of the Children Act 1989 (U.K.), the residency order brought into effect a statutory prohibition against removing the children from the United Kingdom absent "written consent of every person who has parental responsibility for the child or leave of the court" such that the removal was in violation of United Kingdom law: *Thorne SC* at paras. 6-9, citing Children Act, s. 13(1).
- [140] In those circumstances, this Court found that the children were wrongfully removed because in making the residency order, the English court had triggered the operation of statutory non-removal provision, thereby reserving unto itself the final decision as to whether the children could be removed from the United Kingdom permanently:
- [12] I conclude that the rights of custody contemplated by the Convention include the right to determine the children's place of residence. When the County Court of Bournemouth dismissed, by consent, the application by the mother to remove the children from the United Kingdom, it put in place a residence order. This event triggered s. 13 of the United Kingdom's Children Act, subjecting the mother to the statutory requirement that she not remove the children from the United Kingdom without either the written consent of the

father or leave of the Court. This circumscribing of the mother's rights is set out expressly in the order. In making its order the Court, by operation of law, reserved unto itself the final decision as to whether the child could be removed from the United Kingdom permanently.

[emphasis added]

- [141] This conclusion was upheld on appeal, with the Court of Appeal echoing the lower court's finding that the right to determine the children's residence was reserved, by operation of the Children Act, to the English court to be exercised in accordance with that Act, namely with the consent of the respondent father or by leave of the court: *Thorne CA* at para. 27. Here, unlike *Thorne CA*, the Oklahoma Court did not make any order regarding Z.D.L.'s custody or residency, nor was I taken to any provision of Oklahoma law that would operate to the same effect as the United Kingdom's Children Act reserving unto the Court the right to make a final decision regarding custody or residency.
- [142] The weight of Canadian jurisprudence confirms the importance of some form of order having been made in the actual exercise of a court's rights of custody. *Johnson 2012 CA* is to similar effect, and likewise rights of custody were found to be established where orders had been made in *Brown v. Pulley*, 2015 ONCJ 186 at paras. 147-151, and *Lombardi v. Mehnert*, 2008 ONCJ 164 at para. 19. In *Brown*, the Ontario Court rejected the proposition that an interim ex parte custody order in favour of the mother rendered a removal not wrongful because the effect of that order was to deprive the father of his rights of custody, and in doing so referred to *Johnson 2012 CA: Brown* at paras. 147-149. In those circumstances, the issue of custody was found to be before the foreign court for adjudication of all incidents of custody such that that court was exercising its custody rights at the time: *Brown* at para. 151. Once again, the Court's active exercise of custody rights was established through the making of interim orders regarding custody.
- [143] The respondent asserts that he raised the issue of visitation at the October 8, 2021, court appearance and that a date was to be set to consider the issue. That assertion is not corroborated by his legal counsel, the Docket, or the documents in the court file for the Paternity Petition. Regardless, even if the issue of access was put before the Oklahoma Court, this would not assist as the Hague Convention is concerned only with rights of custody and not rights of access to children by non-custodial parents: see e.g. *Johnson 2012 CA* at para. 37, citing *Thomson* at 579-580, *W. (V.)* at 130; see also *W.K.I. v. B.W.I.*, 2005 BCSC 771 at para. 44.
- [144] Finally, the assertion that the filing of pleadings alone is sufficient to both vest rights of custody in a court and establish actual exercise of those rights is difficult to reconcile with the Supreme Court of Canada's decision in *W. (V.)*. In that case, the father moved his daughter from Maryland to Michigan and, later, from Michigan to Quebec without the mother's consent: para. 50. The mother obtained an ex parte order in the Maryland district court, awarding her custody until a final determination of custody and visitation issues: para. 7. The Supreme Court found that the mother could not rely on an ex post facto order

to establish custodial rights and thus the child's removal from the United States was not wrongful. The father's rights of custody at the time of removal were not altered by the pending proceedings, as they related to access rights only: W. (V.) at paras. 51-52.

[145] The main issue before the Supreme Court of Canada was whether the Quebec statute, An Act respecting the civil aspects of international and interprovincial child abduction, R.S.Q., c. A-23.01 ("Quebec Act") applied, and the Court noted that the concept of custody under the Hague Convention and the Quebec Act was "crucial" to resolving that issue: para. 16. Section 3 of the Quebec Act implementing the Hague Convention was substantively identical to Article 3. However, the Quebec Act also included an additional provision, s. 4, which is not found in the Hague Convention. Section 4 of the Quebec Act provided as follows:

4. In addition to the cases contemplated in section 3, the removal or the retention of a child is considered wrongful if it occurs when proceedings for determining or modifying the rights of custody have been introduced in Quebec or in the designated State where the child was habitually resident and the removal or retention might prevent the execution of the decision to be rendered.

[146] With respect to s. 3 (Article 3), the Court affirmed that the Quebec Act is triggered where a child is removed in breach of rights of custody, not rights of access only: W. (V.) at para. 38. Turning to s. 4 of the Quebec Act, the Court characterized this as an "original initiative" by the Quebec Legislature and held that it merely expands the concept of wrongful removal, but did not broaden the Act's definition of rights of custody: W. (V.) at paras. 39, 40. In my view, if s. 3 of the Quebec Act (Article 3 of the Hague Convention) already provided that a court could both possess and be actually exercising rights of custody based on the filing of originating proceedings alone (or proceedings having been "introduced" to use the language of s. 4 of the Quebec Act), then s. 4 of that statute would be superfluous, and the Supreme Court of Canada would not have characterized it as an "original" initiative, as it did in W. (V.).

[147] In the result, I reject the petitioner's position that the filing of the Paternity Petition alone was sufficient for the Oklahoma Court to both possess and be exercising rights of custody within the meaning of Article 3 of the Hague Convention. In my view, such a finding would be contrary to the weight of the domestic jurisprudence on point and inconsistent with binding authorities, including Thomson, W. (V.), and Johnson 2012 CA. It also fails to account for the lack of precedent in the jurisprudence for a finding of actual exercise of custody rights in circumstances where the foreign court had not made any orders, interim or otherwise, regarding custody or residency of the child in issue.

International Jurisprudence

[148] Nor does the international jurisprudence support the petitioner's position that the filing of pleadings alone demonstrates actual exercise for the purpose of Article 3(b) of the Hague Convention. The petitioner says that *Fawcett v. McRoberts*, 326 F 3d 491 (4th Cir 2003), is supportive of his position. I disagree. In *Fawcett*, the United States Court of Appeals for the Fourth District assumed--without deciding--that a court may have rights of custody if an application to the court raises matters of custody within the meaning of the Hague Convention, based on the English decision in *Re H*. HL: *Fawcett* at 500. *Fawcett* expressly did not decide the issue, nor did it need to, as the petitioner in that case had conceded in oral argument that she had not sought a residence order in any application pending before the Sheriff Court, but instead sought an order prohibiting the respondent from leaving Scotland. In the result, the United States Court of Appeals concluded as follows (at 501):

Therefore, the matter pending before the Sheriff Court did not "raise matters of custody within the meaning of the Convention," In *re H*, 1999 WL 1319095, at *3, and the Sheriff Court was not "actually exercis[ing]" any "rights of custody" over Travis at the time of his removal from Scotland. Convention, art. 3.

[149] Similarly, the petitioner's position is not endorsed in jurisprudence emanating from the United Kingdom. In *re W. (Minors) (Abduction: Father's Rights)* (1998), [1999] Fam. 1 (H.C.J. Fam. D.) [*Re W.*] is illustrative. *Re W.* dealt with two separate cases of children born to unmarried parents. The children were taken abroad by their mothers, who alone had parental responsibility for them under English law. Neither father had parental responsibility at the time, nor were statutory provisions or non-removal orders in place prohibiting the children's removal.

[150] The father of the *W.* children first applied for parental responsibility and contact orders. He then brought a second application for a residence order. The father's applications were set for a final hearing. However, the parties reached an agreement that saw the mother agree to limited interim contact along with preparation of a court officer's welfare report and review in six months, and that the father withdraw his application for a residence order. A final hearing of the father's application for contact and parental responsibility was set along with a second directions hearing.

[151] The court officer's report was obtained and recommended that the agreed contact continue and the father have parental responsibility. The mother failed to attend the directions or final hearing as, by that time, she had already relocated to Australia. Having concluded that the father did not have rights of custody, the Court went on to consider whether removal of the *W.* children was in breach of the rights of custody attributable to the court (*Re W.* at 15):

There is, however, another argument which is particularly applicable to the *W.* case. This is that removing these children was in breach of rights of custody attributable to the family proceedings court by virtue of the pending proceedings before it. This concept obviously applies when children are made wards of court, for the court becomes their guardian and has control over

every aspect of their lives: see *In re J. (Abduction: Ward of Court)* [1989] Fm. 85. The mother cannot then change the habitual residence of a ward without leave of the court: see *In re B.-M. (Wardship: Jurisdiction)*, [1993] 1 F.L.R. 979.

However, in *B. v. B. (Abduction: Custody Rights)* [1993] Fam. 32, in the Court of Appeal, it was applied to a court in Ontario where there were pending proceedings relating to the custody of the child. The judge had given directions for the substantive hearing and had made interim orders giving custody to the mother with access to the father. The mother left the next day. Sir Stephen Brown P. held, at p. 38:

"It seems to me that the court itself had a right of custody at this time in the sense that it had the right to determine the child's place of residence, and it was in breach of that right that the mother removed the child from its place of habitual residence."

(It so happens that the Supreme Court of Canada took the same view in very similar circumstances in the incoming case of *Thomson v. Thomson*, 119 D.L.R. (4th) 253, referred to earlier.) In *B. v. B. (Abduction: Custody Rights)* [1993] Fam. 32, of course, there were full blown custody proceedings on foot in which the court had already made orders. In the case before me, this argument is a little difficult to reconcile with a recent decision of the Court of Appeal in *In re B. (Abduction) (Rights of Custody)* [1997] 2 F.L.R. 594.

[emphasis added]

[152] In *Re W.*, the Court had made interim orders and went on to provisionally conclude that it was "doubtful" that the mere issue of proceedings is sufficient; "some action" by the court was required to invest it with rights of custody (at 19):

Prima facie, removing a child who is habitually resident here will be wrongful under the Hague Convention of 1980 if: (a) the father has parental responsibility either by agreement or court order; or (b) there is a court order in force prohibiting it; or (c) there are relevant proceedings pending in a court in England and Wales.

Relevant proceedings would obviously include proceedings for residence, parental responsibility or to prohibit removal of the child, as these are "rights of custody" under the Hague Convention of 1980. It may be that they should extend to any proceedings for an order relating to the child, but that does not arise in the present case. Similarly, proceedings will obviously be pending for this purpose if interim orders have been made and directions given for a final hearing. In the light of *In re B. (Abduction) (Rights of Custody)* [1997] 2 F.L.R. 594, however, it is doubtful whether the mere issue of the proceedings is sufficient. They should probably have been served and it is possible that some action by the court is needed to invest it with rights of custody. This could be making interim orders or it could be giving directions for the future conduct of the case.

[emphasis added]

- [153] It is thus evident from *Re W.* that the circumstances in which removals were found to be in breach of a court's rights of custody involved circumstances where custody proceedings were clearly actively ongoing before the court in that interim orders had been made, or where the child was a ward of the court pursuant to statute. In this regard, I note that the wardship phenomenon at play in the United Kingdom, in which the mere making of an application serves to make the child a ward of the court (see e.g. *Re H.* HL at 304; *Re H.* CA at 326-327), also explains why the English jurisprudence appears to trend more towards concluding that a court possesses custody rights from the point of service of pleadings than in other jurisdictions.
- [154] No such considerations appear to arise here. I was not taken to any equivalent provision in Oklahoma law, and Mr. Watson's evidence was that Oklahoma courts do not assume custody of a child unless there is a court order "specifically and categorically restraining the mother from removing the child pending custody proceedings" in place prior to removal.
- [155] Two points emerge from this review of the jurisprudence. First, Fasiang's reliance on *Re W.* is, in my view, overstated as the conclusions reached were provisional and, on the facts of that case, there was no question that the foreign court was actually exercising rights of custody by, among other actions, having made custody or related orders. Second, the jurisprudence reviewed in *Re W.* shows that the test under Article 3 of the Hague Convention was found to be met where the foreign courts were actively exercising rights of custody by making custody or residency orders. *Re W.* does not stand for the proposition that the mere issuance of proceedings is sufficient; some further action by the court is needed. This is consistent with my conclusion that while filing and service of pleadings may be sufficient to vest rights of custody in the Oklahoma Court under Article 3(a), something more is needed to establish actual exercise of those rights under Article 3(b) of the Hague Convention.
- [156] Finally, turning to *Re H.*, it is important to bear in mind that there was no issue in that case as to whether the District Court in Ireland was actually exercising its rights of custody at the time of removal as it had made multiple custody orders over the years. As the Court of Appeal noted, the Irish court was seized of proceedings in relation to the child "long before" they were removed from the jurisdiction: *Re H.* CA at 247. Indeed, the Court of Appeal specifically noted that "the court's adjudication in relation to custody of the child together with the court's imminent determination of the father's application for guardianship vested Article 3 rights of custody in the court": *Re H.* CA at 242.
- [157] Within that factual context, the House of Lords dismissed the appeal, concluding that the court's rights of custody were being exercised by reason of the father's pending application to be appointed guardian:

In the present case the contest is on whether or not the application for guardianship which was pending at the date of removal constitutes an application involving rights of custody within the meaning of the Hague Convention. The statutory provisions in Ireland have been carefully

described by Thorpe and Chadwick L.JJ. and there are full reports from experts to which they also refer. It is clear to my mind that under the law of Ireland once an unmarried father is appointed guardian he and the mother have equal rights in respect of the custody, in its wider sense, of the child. In particular both have the power of decision in relation to these matters and if they cannot agree the matter must be resolved by the court. In this case the mother had been awarded custody by consent but as Thorpe L.J. said it was implied in the consent as appears from the terms relating to access that the day-to-day care of the child would be exercised at the mother's address given in the application. Once the father had an appointment as guardian he had an equal right with the mother to determine where the child should live and in particular whether the child should be removed from the jurisdiction [of] the courts of Ireland. I do not regard the award of custody by consent in proceedings which were still pending and in which active consideration of an application for guardianship by the father was taking place at the time of the removal as destructive of the court's power to decide the place of the child's residence. In these circumstances I conclude that the District Court of Carrigaline had rights of custody in respect of H. at the time of her removal and that these rights were being exercised by reason of the pending application of her father to be appointed her guardian.

[emphasis added]

[158] The House of Lord's conclusion in *Re H.* that the District Court of Carrigaline was exercising rights of custody was thus based not on proceedings having been commenced, but rather on the pending application for guardianship. It is also relevant that unlike the case at bar, the Court had exercised its rights of custody by making the earlier consent custody order, and the father's guardianship application was under "active consideration".

[159] In my view, the weight of the leading international jurisprudence is consistent in requiring something more than simply the filing of pleadings for a court to be actually exercising rights of custody. Like the Canadian decisions on point, it establishes that actual exercise of rights of custody is demonstrated where the court in issue has made custody or residency orders, even if only on an interim basis. Moreover, what is plainly apparent is that each case must be considered and determined on its own facts, with careful consideration given to the steps taken in and status of the proceedings in the foreign court.

[160] In light of the above, I conclude that the petitioner's assertion that the mere filing of pleadings in the Paternity Petition is sufficient for the Oklahoma Court to be actually exercising its rights of custody under Article 3(b) of the Hague Convention is not supported in the jurisprudence. Rather, the jurisprudence--particularly *Thomson, W. (V.)*, *Johnson 2012 CA*, and *Thorne CA*--suggests that for a court to be "actually exercising" custody rights under Article 3(b), some affirmative step or action must have been taken towards a determination on the merits of an issue of custody or residency. A conclusion to the contrary would, in my view, impermissibly conflate Articles 3(a) and (b), thereby rendering (b) meaningless.

- [161] In the present case, the parties did not take steps to put the issue of Z.D.L.'s custody or residence before the Oklahoma Court for a determination on the merits. At no point prior to Z.D.L.'s removal did the Oklahoma Court make any substantive decisions or orders in the Paternity Petition, let alone orders regarding matters falling within the definition of rights of custody under the Hague Convention. There was no automatic temporary injunction in place; the Temporary Order Application was not properly before the Court and not pursued in any event; and the petitioner's application for default judgment was rendered moot by the respondent filing her response.
- [162] Further, and despite the respondent admitting the petitioner's parentage of Z.D.L. in her response to the Paternity Petition, the petitioner took no steps to have that admission formalized by way of court order. Had this been done, the Oklahoma Court could then have been in a position to consider whether an order granting the petitioner visitation (access) or custody of Z.D.L. ought to be made. None of this occurred here.
- [163] Moreover, the petitioner's assertion that the issue of Z.D.L.'s custody was continuously and actively before the Oklahoma Court from April 2021 onwards is at odds with his contemporaneous out of court behaviour including:
- a) his lack of demonstrable involvement in Z.D.L.'s day to day life when they were still in Oklahoma;
 - b) his text messages with the respondent telling her to leave and saying he would not take her to court if she did;
 - c) his text messages with the respondent's father asking him to "just take her back to Canada"; and
 - d) his statement in the video recording that he would leave Z.D.L. in the trash or the street if the respondent left them with him.
- [164] In my view, the petitioner ought not to be permitted to tell the respondent and her father that he wants her to leave Oklahoma and will not take her to court if she does, but then assert to his benefit in this proceeding that Z.D.L.'s custody and residency were actively before the Oklahoma Court at the time of removal. As the Court of Appeal noted in *Re H.*, when dealing with the vesting of rights in a court, "the issue of an arguable meritorious application may be offset if thereafter by inactivity or inconsistent statement the applicant belies his seeming intention to obtain judgment": *Re H.* CA at 238. In my view, the same considerations apply here such that the petitioner's assertion that the Oklahoma Court was actually exercising rights of custody is offset by his out of court conduct and inactivity in pursuing a determination of custody on the merits.
- [165] Nor do the circumstances of this case lead to a finding that the Oklahoma Court would have exercised its rights of custody but for the removal. First, aside from the relief sought in the originating pleading, there was no application extant before the Oklahoma Court in which the petitioner sought interim or final orders regarding visitation with or custody of Z.D.L.

The Temporary Order Application was not properly before the Court in the Paternity Proceedings. The petitioner's assertion that he raised the issue of visitation at the October 8, 2021 appearance is unsubstantiated by the Docket and even if true, would have only put the issue of access, not custody, before the Oklahoma Court. Second, the notation in the Docket that the parties were ordered to attend mediation is not consistent with custody issues being under "active consideration" or about to be imminently determined by the Oklahoma Court. This case is not akin to *Re H.*, where the left-behind parent's application for guardianship was under active consideration at the time of removal.

- [166] Rather, on the facts of this case, a finding that the Oklahoma Court would have exercised its rights of custody but for the removal would be tantamount to accepting the position I found was unsupported in the jurisprudence, namely that the filing of originating pleadings alone amounts to ongoing actual exercise of those rights. Again, this will have the effect of conflating possession of rights under Article 3(a) with the actual active exercise of those rights under Article 3(b).
- [167] Finally, in my view and in the unique circumstances of this case, accepting the petitioner's assertion that the Oklahoma Court was actually and continuously exercising rights of custody from the date the Paternity Petition was filed onwards would permit the mere filing of a paternity petition to interfere with the lawful exercise of custody rights before an order recognizing his paternity had even been made, let alone orders as to Z.D.L.'s custody or residency. Interpreting the Hague Convention in this manner would, in my view, be inconsistent with its intended purpose, namely to protect--rather than limit or impede--the exercise of rights of custody, contrary to the large and liberal interpretation of the concept of custody under the Hague Convention. In this regard, as the Supreme Court of Canada recognized in *W. (V.)*, the Hague Convention (and in that case the Quebec Act) cannot be interpreted in a way that prevents the custodial parent from exercising all the attributes of custody:
- [33] In my view, the possibility of severing the right to determine the child's place of residence from rights of custody must be considered in light of the fundamental purpose of the Act: to prevent any person, including the non-custodial parent, regardless of whether he or she has rights of access, from removing or retaining a child, custody of whom has been awarded to one parent, to or in a place other than the child's habitual residence. From this perspective, the Act clearly suggests a large and liberal interpretation of the custody concept. More specifically, rights of custody within the meaning of the Act cannot be interpreted in a way that systematically prevents the custodial parent from exercising all the attributes of custody, in particular that of choosing the child's place of residence, but, on the contrary, must be interpreted in a way that protects their exercise.

[emphasis added]

[168] In the result, I conclude that the Oklahoma Court was not actually exercising its rights of custody under Article 3(b) of the Hague Convention when Z.D.L. was removed from Oklahoma to Canada because it had not made any orders regarding Z.D.L.'s custody or residency, nor were any applications for orders of that nature under active consideration or an imminent determination pending at the relevant time. The petitioner has not met his onus of establishing that Z.D.L.'s removal was in breach of rights of custody under the Hague Convention and the removal was not, therefore, wrongful.

Does an Article 13 mandatory return exception apply?

[169] My conclusion that the Oklahoma Court was not actually exercising rights of custody as required by Article 3(b) of the Hague Convention is sufficient to dispose of the petition in the respondent's favour. However, in the event that I am wrong in that regard, I will address the respondent's submissions that one or both of the exceptions to mandatory return set out in Article 13 of the Convention apply and apply that provision to the facts as I have found them.

[170] This petition was filed on September 27, 2022, just 20 days shy of one year having elapsed from Z.D.L.'s removal on October 17, 2021. As such, pursuant to Article 12 of the Convention, had I found that Z.D.L.'s removal was wrongful under Article 3, their return would have been mandatory:

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

[171] However, Article 13 of the Convention provides two exceptions to the mandatory requirement set out in Article 12 for return of a child to their place of habitual residence:

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

- a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or
- b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

[172] The respondent bears the onus of establishing on a balance of probabilities that one of the Article 13 exceptions applies: *Medina v. Pallett*, 2010 BCSC 259 at para. 39, citing *Matzke v. Matzke*, 2009 BCSC 1532 at para. 29.

[173] The respondent relies on both exceptions, asserting in respect of Article 13(a) that the petitioner consented to Z.D.L.'s removal, and that a return order would expose Z.D.L. to a grave risk of physical and psychological harm, or otherwise place them in an intolerable situation. The petitioner says neither exception applies.

Article 13(a) - Did the Oklahoma Court consent or acquiesce to removal?

[174] Article 13(a) provides that a court is not bound to order the return of a child if the "person, institution or other body having the care of the person of the child" was: (a) not actually exercising the custody rights at the time of removal or retention; or (b) consented to or subsequently acquiesced in the removal or retention. In order to rely on Article 13(a) of the Hague Convention, the respondent is required to provide "clear and cogent evidence of unequivocal consent or acquiescence": *Batten v. Batten*, 2021 BCSC 2507 at para. 36, citing *C.M. v. J.M.*, 2015 BCSC 2339 at para. 64.

[175] The respondent submits that the petitioner consented to Z.D.L.'s removal to Canada. However, given the petitioner's concession that he did not have rights of custody at the time of removal, and my finding that the Oklahoma Court possessed rights of custody under Article 3(a), the Article 13(a) exception must be analyzed from the perspective of the Oklahoma Court. As such, whether or not the petitioner consented to Z.D.L.'s removal is not the relevant question in the present circumstances.

[176] There is no evidence that the Oklahoma Court consented to Z.D.L.'s removal. Nor however, was there any obligation--whether imposed by operation of law or judicial decision in the Paternity Petition--on the respondent to seek the Court's consent. This case is not akin to *Thomson*, where non-removal orders were in effect; *Thorne SC*, where the applicable statutory provisions required leave to be sought; or the United Kingdom, where the wardship phenomenon may come into play.

[177] Article 13(a) also contemplates that a removal will not be wrongful if the body possessing rights of custody is not exercising those rights at the time of removal: *Medina* at para. 40. In the unique circumstances of this case, my conclusion that the Oklahoma Court was not actually exercising any rights of custody at the time of removal is also determinative of the Article 13(a) exception. I am not bound to order Z.D.L.'s return because the Oklahoma Court was not actually exercising rights of custody at the time of removal.

[178] This brings some consistency to the analysis as it limits the petitioner's ability to maintain inconsistent positions. It also addresses the incongruity that would be created if the petitioner were able to on the one hand, ask the respondent to leave and enlist her father's assistance in accomplishing this, but then avoid the consequences of his actions by relying on the Oklahoma Court's rights of custody in place of his own, and then assert that the Oklahoma Court's lack of consent vitiates his own contrary representations to the respondent.

Article 13(b) - Is there a grave risk of physical or psychological harm or an intolerable situation?

- [179] The test to be applied under Article 13(b) of the Hague Convention is whether on the evidence before me, Z.D.L. will be exposed to a grave risk of physical or psychological harm or otherwise be placed in an intolerable situation if they were to be returned to Oklahoma: J.H.F. v. S.H.F.N., 2015 BCSC 349 at para. 58.
- [180] The physical or psychological harm must be substantial and not trivial: Thomson at 596-597; J.H.F. at para. 54, citing Achakzad v. Zemaryalai, 2010 ONCJ 318 at para. 12. The risk must be something greater than would normally be expected from taking a child away from one parent and passing them to another: F. v. N., 2022 SCC 51 at para. 79, citing Thomson at 597.
- [181] The respondent bears the onus of establishing by way of evidence that is credible and meets a high threshold that the child is at grave risk of harm if returned to their place of habitual residence: Batten at para. 55, citing Thomson at 596; Medina at para. 49; see also F. v. N. at para. 69. The assessment is highly individualized and focuses on the particular circumstances of the child, rather than on a general assessment of the society to which the child would be returned. Only situations that an individual child should not be expected to tolerate meet the threshold that would be a defence to the principle of automatic return: F. v. N. at paras. 72-73.
- [182] The respondent adduced no expert opinion evidence before me regarding the potential risk of physical or psychological harm to Z.D.L. that may result from a return order in the present circumstances. However, as the Court noted in F. v. N., a trial judge may accept generalized evidence on the risk of harm accompanying separation and extend those findings to the particular children: para. 102.
- [183] The respondent says the high threshold is met here because of the petitioner's violent and abusive nature towards her, and the resulting risk of psychological or physical harm to Z.D.L., including his statement that he would throw Z.D.L. in the trash or street if the respondent left Z.D.L. with him.
- [184] The petitioner says there is no evidence that he has ever harmed Z.D.L. or suggestion that he would do so. I disagree, particularly with respect to the latter assertion. As set out above, I accept the respondent's evidence regarding the violent altercation that occurred between the petitioner, his mother, and his sister for the one part, and the respondent for the other part, and find that while the petitioner did not directly harm Z.D.L., this incident nonetheless establishes a real risk that they may be physically or psychologically harmed, including by neglect, while in his care.

- [185] Further, while I do not interpret the petitioner's statement that he would toss Z.D.L. in the trash or the street if the respondent left them with him literally, I do find that it is indicative of a callous disregard for Z.D.L.'s safety and well-being, and is consistent with the tenor of his text messages with the respondent. This is all the more so the case when the petitioner's statements are considered in conjunction with my finding that he acted in a violent and abusive manner towards the respondent.
- [186] However, despite my findings that the petitioner at times engaged in violent and abusive conduct towards the respondent and potential neglect to Z.D.L. if they are left in his care, the burden on the respondent under Article 13(b) of the Hague Convention is high. I find that the respondent has not discharged the heavy burden required by Article 13(b) by way of these findings alone.
- [187] That being said, I am satisfied that so long as the Chasing Order and Writ of Assistance remain extant, those orders give rise to a grave risk that a return order would expose Z.D.L. to psychological harm or otherwise place them in an intolerable situation. This is because if a return order is made, the Chasing Order and Writ of Assistance require Z.D.L. to be taken by law enforcement and given to the petitioner, thereby separating them from the respondent, the only caregiver they have known for the majority of their young life. This is clear on the face of the Writ of Assistance, which directs Oklahoma law enforcement to take physical custody of Z.D.L. and place them with the petitioner using "any reasonable force necessary, including breaking into any structure", "whether or not during daylight hours". Once apprehended, Z.D.L. is to be turned over to the care of the petitioner, who has never had custody of Z.D.L., has never been their primary caregiver, and was not involved in their daily life prior to their removal from Oklahoma.
- [188] The issue of harm associated with a young child being separated from their primary caregiver was addressed by the Supreme Court of Canada in *F. v. N.* While that case dealt with a return order under s. 23 of the Children's Law Reform Act, R.S.O. 1990, c. C.12, the Court nonetheless referred extensively to Article 13(b) of the Hague Convention and the jurisprudence developed in that context. In particular, the Court noted the possibility that serious harm may be established where a child is separated from their primary caregiver and returned to a situation where they may be left without care or with an unsafe caregiver:
- [80] The analysis of harm associated with separation under s. 23 must be individualized and based on evidence specific to the child involved (Ojeikere, at para. 92). The child's age, and, where relevant, their special needs and vulnerabilities, may mitigate or aggravate the risk of harm (see, e.g., *Hage v. Bryntwick*, 2014 ONSC 4104, at para. 63 (CanLII)). Moreover, expert evidence accepted by the trial judge in this case shows that the relationship between a child and their known alternate caregiver and the left-behind parent, as well as the environment to which a child will be returned, may also affect how an abducted child responds to the separation from their primary caregiver (trial reasons, at para. 309). Therefore, if a child is separated from their primary caregiver, but is nevertheless returned to their capable left-behind parent and other known caregivers, in a safe and familiar environment, the high

threshold of harm may not be met (for the Hague Convention, see Guide, at paras. 64-65). Conversely, if the evidence demonstrates that the child would be returned to an environment where they will be left without care or that they feel unsafe with their alternate caregiver, it is very possible that the serious harm threshold will be met (see, e.g., Aldush, at para. 158).

[emphasis added]

[189] Further, one of the aims of the Hague Convention is to restore the status quo that existed prior to a wrongful removal and courts have recognized that in some circumstances, a chasing order can in fact interfere with that objective: J.H.F. at para. 54, citing Achakzad at para. 12. Thus, as in Thomson at 598, where such an order would cause the child to be separated from their primary caregiver, this would represent a change in status quo that would be detrimental to the interests of the child.

[190] In my view, the present circumstances reflect the very situation contemplated in F. v. N., namely the child being returned to an environment where they will be left without care or may be unsafe with their alternate caregiver, such that the serious harm threshold will be met. In the result, I am satisfied that the continued existence of the Chasing Order and Writ of Assistance create circumstances in which a return order would place Z.D.L. in an intolerable situation.

Effect of Undertakings

[191] The use of undertakings made by the left-behind parent to assist in the return of children has been endorsed in Hague Convention cases: F. v. N. at para. 98, citing Thomson at 599; see e.g. Viltman v. Borovskaia, 2022 BCSC 381 at paras. 87-90, 96; Johnson v. Schubert, 2018 BCSC 74 at paras. 53-54. As set out in F. v. N., undertakings provided by a left-behind parent are relevant in the analysis of harm:

[81] When assessing the severity of the harm, judges should also consider whether undertakings made by the left-behind parent to the primary caregiver in the proceedings -- also called "protective measures" -- could be joined to the return order made pursuant to s. 40 of the CLRA in order to lift the obstacles to the parent's return or to address any other aspect of the anticipated risk of harm to the child (for the Hague Convention, see Guide, at paras. 36-37 and 64-66; see also R. Schuz, *The Hague Child Abduction Convention: A Critical Analysis* (2013), at pp. 291-92; P. R. Beaumont and P. E. McEleavy, *The Hague Convention on International Child Abduction* (1999), at pp. 156-57; for non-Hague Convention disputes in Ontario, see Bolla). These could include, for example, an undertaking from the left-behind parent to facilitate daily contact between the abducting parent and the child or to attend to financial or administrative obstacles to the primary caregiver's return (see, e.g., P. (J.) v. P. (T.N.), 2016 ABQB 613, 90 R.F.L. (7th) 211, at paras. 52-60). Of course, protective measures only attenuate the risk of harm if there is satisfactory evidence that they would be respected and enforceable in the foreign jurisdiction (Schuz (2013), at p. 292). I will address the role of

undertakings within s. 40 orders in greater detail below.

[192] The petitioner submits that whether or not undertakings are provided--or by corollary, the sufficiency thereof--is not relevant in Hague Convention proceedings because if the removal is found to be wrongful and none of the Article 13 exceptions apply, then return of the child is mandatory, with or without undertakings. The petitioner also says that the potential impact of undertakings in alleviating harm to the child is not a relevant consideration. In doing so, he distinguishes *F. v. N.* on the basis that it was not a Hague Convention case, having been decided under the Ontario statutory scheme for return orders to non-Hague Convention signatory jurisdictions.

[193] I disagree. The weight of the jurisprudence establishes that despite issues regarding enforceability of undertakings in the foreign jurisdiction, they are routinely proffered and relied on by the Court when making return orders. Undertakings have also been endorsed as a means of safeguarding children from the harm alluded to in Article 13(b) of the Hague Convention: *F. v. N.* at para. 98. In furtherance of these objectives, courts have ordered the return of children subject to undertakings that the left-behind parent assist the abducting parent in obtaining immigration status and provide financial support: see e.g. *Brown* at para. 199; *Batten* at paras. 66-67, 95; *Viltman* at paras. 89, 96.

[194] The petitioner did not provide any undertakings to this Court when the matter first came on for hearing. It was only after the issue was raised by the Court that counsel advised that the petitioner was prepared to make the following undertakings to ensure Z.D.L. is returned to the status quo as it existed prior to the respondent's return to Canada:

- a. Not to take steps to enforce the chasing orders and in particular, the emergency temporary order awarding him sole custody.
- b. Not to take physical custody of the child until the District Court permits such custody.
- c. That the child will remain in the State of Oklahoma pending final order or agreement.
- d. To re-commence the custody proceedings in Oklahoma rapidly to determine on a final basis the care and control of the child.

[195] In my view, the undertakings proffered by the petitioner suffer from a material lack of specificity and clarity, and do not address the circumstances that would place Z.D.L. in an intolerable situation had I ordered their return. Most significantly, the petitioner's undertakings do not address the Writ of Assistance, which I have found gives rise to a grave risk of Z.D.L. being placed in an intolerable situation if they were to be ordered returned to Oklahoma. The petitioner says that he cannot control what will happen in accordance with the Writ of Assistance if Z.D.L. is returned to Oklahoma. This provides little comfort to the Court given that on its face, the Writ of Assistance requires the removal of Z.D.L. from the respondent using "any reasonable force necessary" to ensure Z.D.L.'s return to the petitioner.

- [196] Further, while the petitioner says he will not take steps to enforce the Chasing Order, he does not say that he will take steps to have that order, or the Writ of Assistance, vacated or set aside. Likewise, while he says that he will not take physical custody of Z.D.L. until the Oklahoma Court "permits such custody", this assurance is of little comfort given that the Oklahoma Court has already granted him custody by way of the Chasing Order, and directed law enforcement to ensure that the petitioner obtains physical custody of Z.D.L. by way of the Writ of Assistance.
- [197] In addition, the petitioner's undertakings are lacking in terms of any proposal for support of the respondent and Z.D.L. were they to return to Oklahoma. This is a material oversight given that the respondent is only permitted entry to the United States on a tourist visa and is not permitted to legally work in that jurisdiction.
- [198] Finally, the petitioner's assurance that he will take steps to re-commence the custody proceedings in Oklahoma "rapidly" rings hollow given what can, in my view, be properly characterized as his dilatory approach to the pursuit of this petition and significant delay occasioned as a result. Z.D.L. had been in Canada for almost one year by the time the petitioner filed this petition. Even without attributing fault to the petitioner for the delay in the American central authority proceeding with his application--though the petitioner does not appear to be blameless in that regard as at least part of the underlying issue appears to be his failure to provide proper materials--there are multiple additional periods of delay that are left without satisfactory, or any, explanation. These periods of delay include:
- a) an initial delay of approximately two months from October 17, 2021, to the December 2021 holiday period;
 - b) an additional two-months delay from April 8, 2022, when the petitioner was first advised that the American central authority did not in fact have his application, to June 21 when the British Columbia central authority confirmed receipt of an incomplete application;
 - c) a further 2.5-months delay from June 21, 2022, to September 7, 2022, when it appears that the petitioner finally completed his application by providing the affidavit of law of Mr. Flores (which as it turned out was deficient in multiple respects to the point of being withdrawn by the petitioner); and
 - d) a delay of almost three weeks from September 7, 2022, when the petitioner presumably obtained Mr. Flores' affidavit, to September 27, 2022, when this petition was eventually filed.
- [199] Moreover, despite a six-week adjournment in hearing of this petition to permit the parties to tender additional evidence as to Oklahoma law and the status of the proceedings before the Oklahoma Court, there is no evidence that the petitioner has taken any steps to "re-commence" the Oklahoma proceedings, to have the Chasing Order or Writ of Assistance vacated, nor does he provide any indication of what steps are necessary to do so or the expected timeline for doing so. In my view, this further belies his assertions of urgency--particularly when considered in conjunction with his prior dilatory conduct--and limits the

weight that I can give to his proffered undertakings.

- [200] Finally, and notably, the petitioner does not undertake to attempt to have the undertakings he proffers to this Court codified into an order of the Oklahoma Court: see e.g. Brown at paras. 170, 199; see also J.H.F. at para. 55, citing Achakzad at para. 29. Had a return order been warranted, this would have provided significant assurances to this Court in terms of mitigating the potential harm of the ongoing existence of the Chasing Order and Writ of Assistance.
- [201] In the circumstances, the petitioner's proposed undertakings do not assist in maintaining the status quo or mitigate the potentially serious and harmful effects of the Chasing Order and Writ of Assistance. Nor do they provide any assurance that the status quo as it existed prior to the removal will be maintained. Rather, they would effectively permit a reversal of the status quo as prior to removal, Z.D.L. resided solely with the respondent who was also responsible for the overwhelming majority of their care. The petitioner did not have custody of Z.D.L. and, on the evidence before me, had little to no contact with them from early 2021 onwards. In the circumstances, I conclude that the petitioner's proffered undertakings do not overcome the grave risk of harm and intolerable situation that I have found would result to Z.D.L. if they were returned to Oklahoma.
- [202] In the result, I am satisfied that the evidence before me--particularly the continued existence of the Chasing Order and Writ of Assistance--meets the high threshold necessary to establish that there is a grave risk that Z.D.L. will suffer serious psychological harm amounting to an intolerable situation if they were to be returned to Oklahoma and into the petitioner's care, thereby being indefinitely separated from the respondent.
- [203] In the result, had I found that Z.D.L.'s removal was wrongful, I would nonetheless have found that the exception set out in Article 13(b) applied and not ordered their return to Oklahoma.

Conclusion

- [204] The petition is dismissed. The respondent is entitled to her costs at Scale B. If the parties are unable to agree on costs, they are at liberty to set down a further hearing before me within 60 days.

"Hughes J."

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