

Action No.: FL01-30861
E-File No.: CVQ19CHING
Appeal No.: _____

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

IN THE MATTER OF THE
INTERNATIONAL CHILD ABDUCTION ACT, S.A. 1986 C. 1-6.5

AND IN THE MATTER OF THE CHILD

M.T.M., III BORN OCTOBER 27, 2018

BETWEEN:

G.R.C.

Applicant/Respondent

and

M.T.M., JR.

Respondent/Applicant

H E A R I N G
(Excerpt)

Calgary, Alberta
May 24, 2019

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre, Calgary,
2 Alberta

3
4 May 24, 2019 Afternoon Session

5
6 The Honourable Court of Queen's Bench
7 Madam Justice Hollins of Alberta

8
9 A. Hayher For G. Chin

10 L. Taylor For G. Chin

11 (Student-at-Law)

12 M. Blitt, Q.C. For M. Mills, Jr.

13 K. Salguero Court Clerk

14
15
16 THE COURT: Good afternoon. Please be seated.

17
18 MR. BLITT: Good afternoon.

19
20 **Decision**

21
22 THE COURT: All right. This is my oral judgment in the matter
23 of Geisha Rene Chin and Matthew Timothy Mills, Jr.

24
25 The parties met on-line and began their relationship in 2015. In December of 2015, Ms.
26 C., "the mother", moved to Bermuda. The parties were married there on June 24th, 2016,
27 and resided together in Bermuda until December of 2018. There was one child, M.T.M.,
28 III, "the child", born to them on October 27th, 2018, in Bermuda.

29
30 On December 11th, 2018, the mother left Bermuda with the child to visit her family in
31 Toronto for Christmas. The child was travelling on a Bermudian Passport and with the
32 consent of Mr. M., Jr., "the father", although he says this was only on the understanding
33 and/or the agreement that she and the child would return January 2019.

34
35 They did not return. The mother's decision not to return to Bermuda and her
36 communication of that decision to the father is the subject of further discussions later in
37 these reasons.

38
39 On February 5th, 2019, the father initiated his claim in Bermuda by filing an application
40 for assistance under the convention on the civil aspects of International Child Abduction,
41 also known as the *Hague Convention* or "the Convention".

1
2 On March 11th, 2019, the mother filed an application for parenting in this court, which was
3 responded to by the father's application under the Convention. The father seeks the return
4 of the child to Bermuda under article 12 of the Convention.
5

6 At the conclusion of the hearing of this matter on Thursday, May 16th, 2019, I ordered the
7 child returned to Bermuda with my reasons to follow today. I also directed the parties,
8 with or through their counsel, to consider a number of practical issues arising from my
9 decision last week. I will canvass those with you at the conclusion of these oral reasons.
10

11 As this judgment is being delivered orally, in the event that a transcript is ordered, I will
12 review it for any grammatical or typographical errors and, if necessary, to add full case
13 citations but I will not change the substance of anything I say today. I also note that given
14 the age of the child and the nature of this application, any transcript will remove any
15 identifying information.
16

17 *The Hague Convention*

18

19 Both Canada and Bermuda are contracting states under the *Hague Convention* and bound
20 not just by its procedural and substantive legal provisions but by its stated objective:
21 namely, to secure the prompt return of children wrongfully removed to or retained in a
22 contracting state. Article 12 of the Convention says that:
23

24 Where a child has been wrongfully removed or retained in terms of
25 article 3, and at the date of commencement of the proceedings before
26 the judicial or administrative authority of the contracting state where
27 the child is, a period of less than one year has elapsed from the date
28 of wrongful removal or retention, the authority concerned shall order
29 the return of the child forthwith.
30

31 As this application is brought well within one year of the child leaving Bermuda on
32 December 11th, 2018, the only remaining issue under article 3 is whether or not the child
33 has been wrongfully removed or retained. Article 3 of the Convention provides the test for
34 when a child has been wrongfully removed or retained necessitating the child's return. It
35 says that:
36

37 The removal or the retention of a child is to be considered wrongful
38 where -
39

- 40 a) it is in breach of rights of custody attributed to a person, an
41 institution or any other body, either jointly or alone, under

- 1 the law of the State in which the child was habitually
2 resident immediately before the removal or retention; and
3 b) at the time of removal or retention those rights were actually
4 exercised, either jointly or alone, or would have been so
5 exercised but for the removal or retention.

6
7 The rights of custody mentioned in sub-paragraph a) above, may arise
8 in particular by operation of law or by reason of a judicial or
9 administrative decision, or by reason of an agreement having legal
10 effect under the law of that State.

11
12 The father filed the affidavit of Simone Smith-Bean, a practicing attorney in Bermuda, to
13 prove that on the date the mother left Bermuda, on December 11th, 2018, the father had
14 rights of custody jointly with the mother under Bermudian law. This was appropriately
15 conceded by the mother, as was the fact that the father was exercising those rights of
16 custody prior to December 11th, 2018. This exercise of rights would have included his
17 consenting to the mother travelling to Canada with the child.

18
19 Accordingly, the only remaining variable for consideration under article 3(a) of the
20 Convention is the child's habitual residence. As set out in article 3, the determination of
21 where a child is habitually resident is made with reference to the child's circumstances
22 immediately prior to the date of the wrongful removal or retention of the child. The parties
23 disagree on the applicable date.

24
25 The father says that while he consented to the mother's visit to Canada with the child, he
26 expected them back in January of 2019. He did not consent to her decision to stay
27 indefinitely with the child in Canada, and therefore the child was wrongfully retained at
28 the moment she decided not to return.

29
30 The mother submits that the child was not wrongfully retained in Canada until the filing of
31 the March 11th, 2019, application in these courts. The import to this, at least in the minds
32 of the parties, is that the mother argues that by March of 2019, the child had established a
33 new habitual residence here in Canada. While I will review the facts on this issue in more
34 detail, suffice it to say at the outset that I would not have found the child's habitual residence
35 to have changed between January and March, in any event.

36
37 The child was born on October 27th, 2018. The maternal grandmother had been in
38 Bermuda both before and after the birth of the child and, in fact, only left Bermuda to return
39 to her home in Canada a few days before the mother followed on December 11th, 2018.
40 Originally, both parents were going to go to Canada for Christmas but there was increasing
41 acrimony between them and ultimately the father decided not to go. He did sign a form on

1 December 10th, 2018, indicating his consent to the mother and child travelling to Canada.
2 There was no return date indicated on that form and he knew that they were travelling on
3 a one-way ticket.
4

5 However, neither party contested the fact that the mother's intention, at least as
6 communicated to the father before the trip, was that she would return to Bermuda. Whether
7 or not he understood how unhappy she was, there is no evidence that she communicated
8 any intention to leave with the child and not return. I therefore accept his evidence that he
9 would not have signed the consent form had he known.
10

11 The parties argued vehemently about the admission of an audiotape of a conversation
12 between them on December 2nd, 2018. The father made this recording without the
13 mother's knowledge or permission. While this is not illegal, it certainly is surreptitious and
14 thus falls within a category of evidence which, at least in family law, is an uneasy fit with
15 historical evidentiary rules.
16

17 I agree with Justices Pentelechuk in *A.J.U v. G.S.U.* and Feehan in *St. Croix v. St. Croix*,
18 that surreptitious recordings should only be admitted into evidence on rare occasions.
19 However, had I any serious remaining questions about whether the father believed the child
20 was coming back to Bermuda after Christmas, I would certainly have given more
21 consideration to the admission of this tape on which the mother indicates her intention to
22 come back in January, although she will not specify a date. This evidence, while arguably
23 inherently prejudicial because of the nature in which it is collected, might have been
24 sufficiently probative had it been necessary to resolve a factual dispute about what the
25 father genuinely believed.
26

27 In the end, however, it was not necessary. I accept the father's evidence regarding his belief
28 that they were returning to Bermuda after Christmas because there is no contrary evidence.
29 While the mother's affidavit makes it very clear that she was very unhappy in her marriage
30 and the reasons therefor, there is no evidence that she had determined - much less
31 communicated to the father - that she would not or even might not return with the child at
32 all. In fact, the mother's own evidence is that she was only able to "think more clearly
33 about her marriage" once in Canada, and that she called him on December 16th, 2018, five
34 days later, to tell him that she wanted to end their marriage.
35

36 At that point she says the "possibility of any return to Bermuda became untenable",
37 although it appears that she did not unequivocally tell him in the December 16, 2018,
38 telephone call that neither she or the child would be coming back. I say this because there
39 are text messages through mid to late January 2019 in which the father repeatedly asks her
40 to confirm that she is coming back with the child. Whether she was equivocating with him
41 or not, her own evidence establishes her intention not to return as of December 16th, 2018.

1 I also note that she posted on social media on December 28th, 2018, that she was not
2 returning to Bermuda, although that post was not sent to the father.

3
4 There is an argument, although in my view not a compelling one, that a retention can only
5 be wrongful once consent is withheld, and consent can only be withheld once the departed
6 parent finally discloses her true intention not to return. In this case, the mother argues that
7 because she equivocated with the father about whether and when she might return, despite
8 her subjective intentions and her communications to others, he did not have enough
9 information to withdraw or withhold consent and, therefore, her retention was not
10 wrongful.

11
12 In my view, it would be a strange state of affairs if she could make the decision not to
13 return and begin to lay the groundwork to establish a new habitual residence, all the while
14 extending her time to do so by deceit. Accepting as I do that the father would not have
15 consented to her leaving with the child had he known she would not return, it follows that
16 she was wrongfully retaining the child as soon as she decided she was not returning,
17 knowing that he believed they were coming back whether she communicated her decision
18 to him or not.

19
20 The mother relied on a case from the Nova Scotia Court of Appeal, *Beirsto v. Cook*, 2018
21 NSCA 90, in support of a proposition that the date on which a child is wrongfully retained
22 is when the left behind parent first formally asserts his rights. With respect, I am not
23 convinced that that approach should prevail, although certainly the law expects the left
24 behind parent to move with dispatch. I say no more as the *Beirsto* case is readily
25 distinguishable from this case for a number of reasons, including that Court's finding that
26 the travel consent given was open-ended. While the mother in this case had not given a
27 precise date, she had certainly never sought or obtained consent to an open-ended trip to
28 Canada with the child.

29
30 For these reasons, the date of wrongful detention is December 16th, 2018, when the mother
31 admits she knew she was not returning. However, I will note here that because of the short
32 period of time between December 2018 and March of 2019, and the age of the child, the
33 following analysis on habitual residence would have been the same regardless of the date
34 of wrongful retention, even if that was when formal steps were taken under the Convention
35 by the father on February 5th, 2019, or even March 11th, 2019.

36
37 The next question therefore is, what was the child's habitual residence immediately prior
38 to the wrongful retention? The test for determining habitual residence was definitively set
39 out by our Supreme Court of Canada in *Office of the Children's Lawyer v. Balev*; 2018
40 SCC 16. While there were previously two approaches, the test of parental intention and
41 the test of the child's acclimatization, the Supreme Court of Canada has adopted a hybrid

1 test in which both the parents and the child's circumstances are relevant; paragraph 42.

2
3 The parental intention test is exactly as described, a consideration of where the parents
4 intended the child's habitual residence to be. Under this approach, time-limited travel to
5 which the applying parent has agreed will not change the child's habitual residence;
6 paragraph 39 of *Balev*.

7
8 It should be apparent that this can cause some difficulty in situations where the consent to
9 reside elsewhere was given for a long period of time and then either retracted or
10 dishonoured after the child had spent a long time in the new place and, therefore, had a de
11 facto new habitual residence. Hence, the acclimatization test, said to be more child-
12 focussed because it looks at the family and social environment that the child has developed
13 during that time; paragraph 41 of *Balev*.

14
15 Applying the hybrid test and considering the situation from both parents' perspective, and
16 the child's perspective, the habitual residence of this child is unquestionably Bermuda. This
17 child is not yet seven months old. He has formed no social network outside of his
18 immediate family. To say that he is attached to his mother or his maternal grandmother is
19 to state the obvious, but to say that he has no attachment or could have no attachment to
20 his father is equally obviously wrong.

21
22 Because the child is so young and, therefore, less able to form social or cultural connections
23 unique to his new residence, the parental intentions will dominate, even within the hybrid
24 test, which brings us back to my finding that before she decided she was not returning to
25 Bermuda, the evidence clearly establishes that the parents' collective intention was that this
26 child would reside in Bermuda.

27
28 Having made out the elements of the test in article 3 for wrongful retention and habitual
29 residence, an order returning the child to Bermuda under article 12 is mandatory unless the
30 mother can establish a grave risk of harm in doing so.

31
32 Grave risk. Article 13 of the Convention reads as follows: (as read)

33
34 Notwithstanding the provisions of the preceding Article 12, the
35 judicial or administrative authority of the requested State is not bound
36 to order the return of the child if the person, institution or other body
37 which opposes its return establishes that -

- 38
39 b) there is a grave risk that his or her return would expose the
40 child to physical or psychological harm or otherwise place
41 the child in an intolerable situation.

1
2 Both parties acknowledge that the test to refuse to return a child in reliance on this provision
3 is a very high threshold. While the child's best interests incontrovertibly govern the
4 ultimate custody and access issues, the analysis under article 13(b) is something quite
5 different. As our Supreme Court of Canada said in *Thomson v. Thomson*, the risk must be
6 of substantial psychological harm; [1994] 3 SCR 551 at p. 597. There is no evidence, nor
7 any allegations here, of domestic violence. There has never been any police or state
8 involvement with this family.

9
10 It may be worth noting that the *Beirsto* case from Nova Scotia relied on by the mother
11 involved admitted domestic violence by that father and, in fact, an attempt by the applicant
12 father to steal the 18-month-old child back during a court-ordered visit. Here, there are no
13 allegations of abuse or addiction, nor any indication that the Bermuda courts cannot
14 properly adjudicate further proceedings involving this child. The challenges of returning
15 the child to Bermuda simply do not rise to the level of permanent harm or severe degree of
16 psychological harm required, and I reference there *Friedrich v. Friedrich*; 78 F. 3d 1060
17 (1996, U.S. Court Appeals, 6th Circuit) and *Re: L*; [1993] 3 FLR 401 (Eng HCJ) from the
18 English High Court, which was quoting *Re: C.*; [1989] 1 FLR 403 at 413.

19
20 The mother's affidavit deposes that since she left the father has moved back in with his
21 mother, the child's paternal grandmother. The mother complains of their money problems
22 while they were living together, although the father is employed as an EMT firefighter and
23 is still attempting to keep alive the fitness studio that he and the mother opened together.

24
25 When contrasted with the child's current circumstances here in Calgary, where the mother
26 has a part-time job at her father's company and the maternal grandparents are providing
27 financial support and childcare, it may be tempting to say that the child is better off here,
28 but that is not the question. This is not a determination of the child's best interests; *De*
29 *Oliveira v. Campbell*; 2019 BCSC 623 at paragraph 30.

30
31 I have no jurisdiction to determine the best living arrangement or the best parenting
32 arrangement for this child. I say this to emphasize, particularly to the mother, that this
33 decision is not a rejection of her evidence on parenting or what she thinks would be the
34 best for this child. I am not choosing one parent over another in any way, merely fulfilling
35 the objectives of the *Hague Convention* and extinguishing any advantage the mother might
36 otherwise have gained by the reason of wrongful retention of the child here in Canada.

37
38 As our Supreme Court said in *Balev*, "The return order is not a custody determination ..."
39 article 19, paragraph 24:

40
41 It is simply an order designed to restore the status quo which existed

1 before the wrongful removal or retention, and to deprive the wrongful
2 parent of any advantage that might otherwise be gained by the
3 abduction. Its purpose is to return the child to the jurisdiction which
4 is most appropriate for the determination of custody and access.
5

6 Having found that the child was habitually resident in Bermuda prior to his wrongful
7 retention in Canada, and that there is no grave risk in his return to Bermuda, I have ordered
8 his return there under article 12 of the Convention. This order will serve all three purposes
9 identified at paragraphs 25 to 27 of *Balev*; to protect against the harmful effects of the
10 wrongful retention of a child, to deter other parents from abducting children in order to
11 establish links elsewhere, and to assist the Bermuda courts in making a timely adjudication
12 of the merits of the parties' respective positions on the parenting of this child.
13

14 Before I hear from counsel on any costs issues, I would like to hear from them on what
15 arrangements, if any, have been made by consent regarding the transportation of the child
16 back to Bermuda and arrangements for his care pending a hearing there.
17

18 **Submissions by Mr. Blitt**

19
20 MR. BLITT: Probably I should go first, My Lady.

21
22 And, My Lady, this may assist the Court. I did provide my learned friend with a draft order
23 and this may be an appropriate time to hand it up --
24

25 THE COURT: Sure.

26
27 MR. BLITT: -- as we go through. My Lady, in terms of costs,
28 I did talk to my learned friend and given his tight time frame, I don't know what your
29 pleasure is but I -- I believe we should probably submit something to you at a later time,
30 unless --
31

32 THE COURT: Sure, that is fine.

33
34 MR. BLITT: Is that fine?

35
36 THE COURT: Yeah.

37
38 MR. BLITT: We would probably do that within 30 days?

39
40 THE COURT: Yeah, we can deal with that after. Let us talk
41 about the --

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MR. BLITT: Thank you.

THE COURT: -- other parts of it.

MR. BLITT: Sure, the logistics. So I can advise, My Lady, that my client has rented an apartment for a one-year period in Bermuda. He has signed the lease, he had to do that. He has paid the damage deposit, which I believe is -- I have the copy of the lease here. These are Bermuda dollars, \$815 was the damage deposit and he has paid the first month's rent because the lease commences June 1, and that is 1,700 Bermudian dollars and that translates into about 3,400 Canadian.

You have already heard evidence, My Lady --

THE COURT: Sorry, total, or it is double, Bermuda dollars are --

MR. BLITT: They're -- they're 1.34 --

THE COURT: That is what I thought.

MR. BLITT: Yes.

THE COURT: Okay.

MR. BLITT: So when you add the two, it's about 2,550 Bermudian dollars, the damage deposit and the first month's rent. That equates to \$3,432 Canadian.

THE COURT: Okay.

MR. BLITT: That's paid, so that he has a place to stay. It's not furnished but he has indicated to me that he will put the furniture he has, a Queen-sized bed, a television, and a crib for the -- the baby into that residence. He also advises me that the location -- there was some suggestion that this is three hours from anyplace in Bermuda. The whole island can be covered from tip to toe in about one hour and 45 minutes, so while it is at a certain location on the island and we have maps, it apparently is close to public transit.

My client only has one vehicle, he does not have a vehicle and a motorcycle. He sold the motorcycle, so the accommodation is in place. I would submit, My Lady, given that he's

1 paid that, he also paid \$2,800 - you heard that in the evidence at the domestic special - that
2 whatever more has to be done for mom and this child can be dealt with expeditiously in
3 the court in Bermuda.

4
5 And I just received this yesterday, My Lady, there is an ex parte order that was secured by
6 my client's counsel in Bermuda yesterday, ex parte, and I'll hand that up, where the court
7 has ordered joint custody of the child in question and that the mom -- well, I'll just hand it
8 up. It's quite brief, and what's probably most important for this Court is there's a further
9 hearing on Thursday, May 30th, at noon. So --

10
11 THE COURT: I am sorry? Oh, next week.

12
13 MR. BLITT: Next week, so things are moving quickly and
14 from what I -- what I understand, there is no reason why the Court cannot make some
15 interim directions about custody and access, and about child and spousal support. And I
16 know that my learned friend will refer to an affidavit from the lawyer that Ms. C. has
17 retained in Bermuda. In fact, our Bermuda counsel spoke to the lawyer for Ms. C., I believe
18 it's Mr. Richard Adam (sic).

19
20 And they -- our counsel in Bermuda said she's prepared to negotiate and sit down and
21 expedite whatever has to be done on a go forward basis to deal with support, and that can
22 be done quickly, contrary to the affidavit of Mr. Richard Adam. And, unfortunately, our
23 counsel could not put together an affidavit; it's a holiday in Bermuda, I understand, but she
24 did provide a letter and I can hand that up. And my learned friend can hand up the affidavit
25 from their Bermuda counsel. I think the gist of it is, steps can be taken quickly in the
26 Supreme Court if both parties' counsel are prepared to do so, and Ms. Smith-Bean is
27 prepared to do so.

28
29 So I can hand up this letter, My Lady. I just received it this morning. So that deals with
30 the fact that there is in place in Bermuda joint custody. It doesn't say that the child has to
31 be turned over to the father, it just says mom has to deliver up the Passport of the child
32 upon arriving. She can't take the child out of Bermuda. The order is to be registered with
33 Intelligence and at the airport, and a friendly hearing next Thursday.

34
35 We have accommodation for mom. It's effective June 1. That's the date we would like to
36 see this Court mandate the return of mom, and in terms of any further obligations, financial
37 or otherwise, that mom would like to advance against my client, I would simply submit,
38 My Lady, you've already made a finding that mom is the author of her own misfortune to
39 have wrongfully retained the child and I can say - and I provided this to my learned friend
40 - my client has incurred \$42,000 between Bermuda counsel and our office. The breakdown
41 is \$30,000 to our office, Canadian, and approximately \$11,000 Canadian, converted to

1 Bermuda dollars of Ms. Smith-Bean, and that was strictly related to the *Hague* proceedings.

2
3 So, I would submit he's been punished enough financially, emotionally, not having seen
4 his child for five months, and that the mom should be ordered back June 1. She should be
5 responsible for all other financial obligations, getting herself and the child to Bermuda,
6 whatever other costs are necessary, and this Court - based on what you've requested from
7 counsel, and I've just indicated to the Court - is sufficient to satisfy any undertakings that
8 this Court may want to impose and the rest should be left up to the jurisdiction of the
9 Bermuda court because, really, this is a Bermudian matter and the *Hague Convention*
10 should not be used as a tool to deal with custody, child support, or spousal.

11
12 Those would be my submissions, My Lady.

13
14 THE COURT: So returning for June 1st, I guess we will hear
15 about that.

16
17 MR. BLITT: Yes.

18
19 THE COURT: Then I gather that arrangements would be made
20 to adjourn the May 30th date in Bermuda to a date after that?

21
22 MR. BLITT: Whatever counsel are instructed to do. I mean,
23 if my learned friend indicates she can't deal with things on May 30th, I -- I don't see why
24 she can't instruct her Bermuda counsel from here until she gets there, and provide -- they
25 could provide some instructions about agreeing to child and spousal support.

26
27 THE COURT: All right. Well, let us hear from --

28
29 MR. BLITT: Sure.

30
31 THE COURT: -- Mr. Hayher.

32
33 **Submissions by Mr. Hayher**

34
35 MR. HAYHER: Good afternoon, My Lady.

36
37 There were six issues that when we left last that you wanted us to address -- address
38 respectively: the timing, the travel, expenses, accommodation, contribution from Mr. M.,
39 and the timing and availability -- availability of the Bermuda court.

40
41 So I'll start backwards, we did do an affidavit. I provided it to Mr. Blitt. This is from

1 counsel in Bermuda and it just sets out what sort of a time frame, exactly what you had
2 asked, to sort of deal with these issues. And I appreciate that we have now a letter from
3 Ms. Bean advising that they're agreeable to negotiate to get this done. He's sort of set out,
4 you know, in order for her to apply for support, it's interesting the -- the -- the legality is
5 that she -- that she can't even apply under one act until they've been divorced for -- for --
6

7 THE COURT: Married.

8
9 MR. HAYHER: -- married for a period of three years, so there's
10 some -- some area that they can't even -- she can't even apply for some maintenance until
11 then.
12

13 But, in any event, what I think a solution may be is, I don't foresee a reason to adjourn the
14 May 30th date, but if people are working in good faith, maybe what we can do is bump the
15 return date back a little bit so that we know what she's walking into. If they're going to --
16 if we're going to negotiate a deal outside of court - which I think everybody needs, that's in
17 everybody's best interests - rather than have a June 1st date, let's get that done to satisfy --
18 to -- to -- so that she's got some financial -- some financial situation she can walk into that's
19 -- that's not zero and then go forward from there.
20

21 Often -- like, again, this is an ex parte order. I know she's had some discussion with Mr.
22 Richards. I don't know what the next step is. If it's like this court where you have to book
23 a special, well, maybe we're -- we're going down the -- the field a little bit, so maybe a --
24 you know, and I don't know what the right number is. Maybe it's an extra three weeks
25 rather than a -- rather than a -- a June 1, it's June 21st or something like that in order -- so
26 that we can be satisfied that there's some arrangement been made, and we'll pull
27 everybody's feet to the fire to get this resolved before -- at least a band-aid on this before
28 people are going back.
29

30 In terms of the June 1st date that Mr. Blitt provided, I can advise the Court that Ms. C. has
31 an ultrasound that's on June 4th related to her C-section, that's here, so if the Court was
32 inclined to go with that earlier date, it would at least have to -- we'd ask that the Court take
33 that into consideration before mandating a -- a -- a return on that date.
34

35 In terms of contribution, although the accommodation -- the lease, I -- we just need some
36 confirmation. In his affidavit he said that he -- or in a letter that I had from Mr. Blitt, some
37 communication, he's no longer living with his mother. I just want to confirm that he's going
38 to be in a separate home. This is not a leased home where they're all going to live together,
39 and I don't know if we have any clarity on that.
40

41 MR. BLITT: Oh, I have no doubt.

1
2 THE COURT: The draft order says that the accommodations
3 have been arranged for mom and the child.
4
5 MR. HAYHER: Okay, and we just wanted to make -- make sure
6 that there's some clarity on that.
7
8 THE COURT: Okay.
9
10 MR. HAYHER: There may be -- the concern is that this is a -- I -
11 - I understand that Bermuda is a small place, the -- the three-hour travel in terms of the
12 accommodation was by way of bus. Apparently the bus system is not very good. Where
13 the accommodation has been secured is close to where the tourists get off and Bermuda, I
14 guess when the bus is full, it doesn't even stop, so it fills up with tourists because they can't
15 rent cars in Bermuda and it sort of goes on from there, so her concern was that it's quite far
16 away from where they resided in Hamilton Parish, it's somewhere on the south side of
17 Sandys Parish where they -- where they are now.
18
19 And she -- her -- in my discussion with her, she's not even certain that she'll remain in that
20 spot because it's so far away from the family doctor and so far removed from where they
21 were living before, that she may try to find alternative accommodation. I just wanted the
22 Court to be aware of that.
23
24 THE COURT: Yeah, so there are obviously -- I cannot figure
25 out --
26
27 MR. HAYHER: Yeah, yeah.
28
29 THE COURT: -- you know, his name is on the lease. It is a one-
30 year lease. She is going to have to figure that out. If she does not want to stay there --
31
32 MR. HAYHER: Right.
33
34 THE COURT: -- and she does not have to, but there may be
35 financial implications from that.
36
37 MR. HAYHER: Right. And I think the balance of the issues is or
38 my instructions are to seek that the travel back be shared because just, she's just in a
39 financial position where she can't afford to -- to travel back.
40
41 One of the other things, My Lady, that she did ask, and I don't know that it's in your purview

1 to order this, is that upon the return of the child, because it has to be a flight from here to
2 Toronto, then Toronto to Bermuda, that there be some stayover in Toronto, maybe even
3 like half a day so that it's not bang, bang, get on the flight and go with an eight-month-old,
4 and she said she just wants to have a little bit of a break in Toronto in -- in the flights. And
5 I don't know whether we can just organize that between counsel but she did want me to
6 mention that today -- today, too.

7
8 She's not working for, like a week --

9
10 THE COURT: If it is a longer layover but not an overnight, it
11 should not change the price of the flight.

12
13 MR. HAYHER: Right. Yeah.

14
15 And then, My Lady, the draft order that Mr. Blitt handed up, there's a few things that I -- I
16 had spoke -- spoke to him of this. Clause number 1 of that draft order says that the
17 jurisdiction of Sandys Parish. I had some discussion with Mr. Blitt and I don't think he has
18 any quarrel with this, that just to remove that and just say Bermuda.

19
20 MR. BLITT: Taken out.

21
22 THE COURT: It has been crossed out on my copy.

23
24 MR. HAYHER: Okay, all right. And -- and clause number 3
25 requires Ms. C. to submit her Passport, as well.

26
27 THE COURT: Hm.

28
29 MR. HAYHER: Lodging -- lodging the child's Passport is fine but
30 I don't see a reason why they would -- she would have to lodge her Passport.

31
32 THE COURT: Oh, okay, hang on.

33
34 MR. BLITT: I believe the Bermuda order just speaks to the
35 child's Passport, so I --

36
37 THE COURT: But this paragraph 3 of your order, Mr. Blitt, says
38 Mr. Hayher or his agent shall undertake to provide the Passports of the child and the mother
39 to the mother upon receiving confirmation of travel from you. So this is just about the fact
40 that you have got both Passports, do you not?
41

- 1 MR. HAYHER: Right. And so --
- 2
- 3 THE COURT: You have to give them to her to travel.
- 4
- 5 MR. HAYHER: So this rings -- this now this raises one other
6 issue. There was a -- prior to us getting on this file, this file was with another law firm.
- 7
- 8 THE COURT: Right.
- 9
- 10 MR. HAYHER: Mr. Blitt had an order granted deposit -- with the
11 Passports to be deposited with this court and --
- 12
- 13 THE COURT: Oh, is that where they are?
- 14
- 15 MR. HAYHER: Well, here's what's happened is, counsel got off
16 the record, didn't sign the order. I told Mr. Blitt that, look, I need the order the clerk's notes
17 just to satisfy myself this was what's ordered. By the time the hearing took place, I still
18 had them so we --
- 19
- 20 THE COURT: The Passports?
- 21
- 22 MR. HAYHER: The Passports are still in our office, so I don't
23 know whether we need to vary the order that was previously granted just so that we have a
24 clean file, or whether we can just go -- just go with this. I -- I'm happy to have that order
25 varied to say that they be released back into our care because they're not with the court,
26 they're with us.
- 27
- 28 MR. BLITT: And that's fine. I understand the predicament.
29 Previous counsel didn't sign the order. I trust my learned friend. He's got the Passports.
30 The Court can simply direct that that previous order is vacated and that whatever you direct
31 today is what we deal with.
- 32
- 33 THE COURT: Does anyone have a date of that order?
- 34
- 35 MR. BLITT: It was the same date, I probably do, My Lady.
- 36
- 37 MR. HAYHER: The 24th, does that sound right?
- 38
- 39 MR. BLITT: It would have been the same day as that other
40 order.
- 41

- 1 MR. HAYHER: April 24th.
2
- 3 MR. BLITT: I think it was April 24th. It would have been
4 Madam Justice Nixon, as well.
5
- 6 MR. HAYHER: Yes.
7
- 8 THE COURT: I see. All right. Okay, that is fine. We can write
9 that in.
10
- 11 MR. BLITT: And -- and the reason for the provisions about
12 my learned friend or an agent delivering the Passports is just a -- a security issue. I have
13 been put in that identical position. I went to the airport, gave Passports to my client. I
14 didn't really like doing that but I did it. I was ordered to do it. She went through security.
15 I gave the Passports and she got on a plane and went.
16
- 17 MR. HAYHER: Well, we all know who the agent is going to be
18 if -- if somebody is going, so I'm okay to leave that in.
19
- 20 MR. BLITT: And -- and I'm sure Mr. Hayher's office will pay
21 for a --
22
- 23 THE COURT: So, what is it, then? I am not sure I understand
24 the interplay between paragraphs 3 and 4. Is he to give them to you now or is he to take
25 them to the airport?
26
- 27 MR. HAYHER: And I -- I think that what it is, is because the
28 previous order had said they be deposited with the court, this order would allow them to
29 come to me and then I would then have to deliver --
30
- 31 THE COURT: So then can we not just cross out paragraph 3 of
32 this order and leave paragraph 4?
33
- 34 MR. BLITT: Yes. Sure.
35
- 36 THE COURT: Okay. I am not going to mark this up until we
37 are all sure what we are doing here. So there will be paragraph 3 will come out. There
38 will be an addition, I guess it will just replace paragraph 3, saying that Justice Nixon's order
39 of April 24th dealing with the Passports is vacated.
40
- 41 MR. BLITT: Yeah, or we can -- we can pen it and sign it,

1 whatever the Court wishes.

2

3 THE COURT: It is completely up to you but I will tell you this.

4 I am away -- we are all away next week --

5

6 MR. BLITT: Yes.

7

8 THE COURT: -- so there will not even be anyone here to sign
9 anything until Thursday. That may or may not -- so I prefer to write, to mark this up, sign
10 it.

11

12 MR. BLITT: Sure.

13

14 THE COURT: If you want a clean copy, I am totally fine to have
15 you send it back and I will sign a clean copy, if it turns out you do not needs something.
16 But just in case you do, you will have a signed order in your possession, at least.

17

18 MR. HAYHER: My Lady, just moving along onto clause 5, we
19 can cross out Sandys Parish, just leave it as -- leave it as --

20

21 THE COURT: Yes, and also the Passports of herself, right? It
22 would just be the Passport --

23

24 MR. HAYHER: Yes, that's correct.

25

26 THE COURT: -- of the child.

27

28 MR. BLITT: And -- and perhaps, My Lady, paragraph 5 to just
29 follow suit with the Bermuda order should just refer to the order -- or the Passport going to
30 the Supreme Court of Bermuda, because that's the drop --

31

32 THE COURT: Is that what they -- that is what they have
33 ordered, okay?

34

35 MR. BLITT: That's what they've ordered.

36

37 MR. HAYHER: So you're going to cross that out, too, then?

38

39 MR. BLITT: Yeah, okay.

40

41 THE COURT: Okay.

1
2 MR. HAYHER: And I think that clause 7, again, just the -- the --
3 the Sandys Parish --
4
5 THE COURT: Sandys Parish, yeah.
6
7 MR. HAYHER: And I think clause 8 because we're going to make
8 this determination.
9
10 THE COURT: I will just put that costs are reserved.
11
12 MR. HAYHER: Okay.
13
14 MR. BLITT: Yes.
15
16 MR. HAYHER: So, My Lady, really the two issues that you're left
17 on direction is the date and direction as to the cost of the return.
18
19 THE COURT: Of the flight?
20
21 MR. HAYHER: Yes.
22
23 THE COURT: Okay.
24
25 MR. BLITT: And if it helps the Court, My Lady, if Ms. C. has
26 an ultrasound, let her have the ultrasound done.
27
28 THE COURT: Yeah. I think a few days, frankly for a bunch of
29 reasons, is a good idea. Obviously the doctor's appointment, we will need to accommodate.
30 There is no reason why we would not, and I think also to -- you know, if there is going to
31 be some discussions around that May 30th date, I think she wants to -- whether it is here
32 or there, she does not want to be in transit around that time and have the difficulty of trying
33 to give instructions to her lawyer if he or she is involved in some discussions at that point.
34
35 So, I am thinking no later than Friday, June 14th. So essentially just over two weeks, two
36 weeks from -- three weeks from today.
37
38 MR. BLITT: No objection to that date.
39
40 THE COURT: All right. Thank you.
41

1 MR. HAYHER: Do you want us to initial any changes or do we
2 need to --
3
4 MR. BLITT: Yeah.
5
6 MR. HAYHER: And then I can just get them to copy --
7
8 MR. BLITT: Yeah.
9
10 THE COURT: Was Justice Nixon's order about the child's
11 Passport only?
12
13 MR. BLITT: No, it was both.
14
15 THE COURT: Or, no?
16
17 MR. HAYHER: No, it was both, both Passports.
18
19 THE COURT: It was both? All right. I will just say the
20 Passports, then.
21
22 MR. BLITT: Yes. Yes.
23
24 THE COURT: Has anyone looked into what the cost is going to
25 be of the flights?
26
27 MR. HAYHER: It looks like it's about -- a one-way ticket from
28 Calgary is about \$230 U.S., plus an \$80 baggage fee.
29
30 THE COURT: \$280 for Bermuda?
31
32 MR. HAYHER: \$300 -- \$230 U.S., plus an \$80, because it's a
33 one-way ticket.
34
35 THE COURT: Wow.
36
37 MR. BLITT: I'm going.
38
39 THE COURT: No kidding. What am I doing here? Okay.
40 Yeah, I think I will agree to Mr. Blitt's proposal that she will pay the cost of that
41 transportation, in part because she is at least walking into a situation where she has got,

1 you know, a place to stay, at least for a couple of weeks. Damage deposit is paid. She will
2 have the option of maintaining that lease if she wants to, so she will not have any immediate
3 pressing financial circumstances given the rather nominal cost of the travel. And, of
4 course, the circumstances which brought us to this place, in any event, I think that is
5 reasonable.

6
7 All right. So then I will give you back this material that you have -- that there is the signed
8 order and the material that each of you handed to me. Oh, and this is --

9
10 MR. BLITT: Ms. Simone --

11
12 THE COURT: There is an unfiled affidavit, so --

13
14 MR. HAYHER: Yes.

15
16 MR. BLITT: Yes.

17
18 THE COURT: -- Mr. Hayher, you can just make sure that gets
19 filed --

20
21 MR. HAYHER: I'll just file that, I will.

22
23 **Discussion**

24
25 THE COURT: -- for completeness. And then why do we not
26 have you make -- if you are content, I will suggest written submissions on costs and I will
27 just do an endorsement on that issue.

28
29 MR. BLITT: Why don't we just do it at the same time?

30
31 MR. HAYHER: (INDISCERNIBLE)

32
33 MR. BLITT: He's thinking. I think we just make submissions.
34 I mean, really it's -- there's no secret. I'm going to be asking for what my client has paid.
35 Is it either going to be full indemnity or one of the columns or a multiple of the columns.
36 I'm going to give you the case that I've been involved in, some I haven't, that give the Court
37 principles and directions about costs. And at the end of the day, this Court has ultimate
38 discretion.

39
40 THE COURT: Sure. So I am going to give Mr. Hayher the
41 opportunity to respond, I think that is appropriate.

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MR. BLITT: Okay.

THE COURT: And so, Mr. Blitt, I will ask for your submissions - and again, I do not need a lot of submissions on costs, I do need the case citations. I am not familiar with how courts deal with costs, if it is -- obviously I retain the discretion but it would certainly be helpful for any jurisprudential guidance that there is, so if you could have any cases in any kind of a short Bench brief, and I am kind of thinking two or three pages, max, to me by June 14th.

And then, Mr. Hayher, if you can have any response to me by, I guess the 28th, June 28th?

MR. HAYHER: That's fine.

THE COURT: End of the month. Okay.

MR. BLITT: So, June 14th, yes.

THE COURT: Yes. Okay. I will put those dates in my calendar. Anything else, counsel?

MR. HAYHER: No, that's it. Thank you, My Lady.

MR. BLITT: Thank you, My Lady.

THE COURT: Thank you very much.

PROCEEDINGS CONCLUDED

1 **Certificate of Record**

2
3 I, Karina Salguero, certify this recording is the record made of the evidence in the proceedings
4 in Court of Queen’s Bench, held in courtroom 1004, at Calgary, Alberta, on the 24th day of
5 May, 2019, and that I was the court official in charge of the sound-recording machine during
6 the proceedings.
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1 **Certificate of Transcript**

2
3 I, Norma Lynn Gibbon, certify that

4
5 (a) I transcribed the record, which was recorded by a sound-recording machine, to the best
6 of my skill and ability and the foregoing pages are a complete and accurate transcript
7 of the contents of the record, and

8
9 (b) the Certificate of Record for these proceedings was included orally on the record and is
10 transcribed in this transcript.

11
12 Norma Lynn Gibbon, Transcriber
13 Order Number: AL-JO-1003-3077
14 Dated: June 5, 2019
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