

Action No.: FL01-34345
E-File Name: CVQ21YANOKD
Appeal No.: _____

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

BETWEEN:

DEREK YANOK

Plaintiff

and

KAREN YANOK

Defendant

PROCEEDINGS

Calgary, Alberta
June 17, 2021

Transcript Management Services
Suite 1901-N, 601-5th Street SW
Calgary, Alberta T2P 5P7
Phone: (403) 297-7392
Email: TMS.Calgary@csadm.just.gov.ab.ca

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Calgary, Alberta

2
3 June 17, 2021

Afternoon Session

4
5 The Honourable Madam
6 Justice Grosse (remote appearance)

Court of Queen's Bench of Alberta

7
8 F. Gordon (remote appearance)
9 M. Blitt, QC (remote appearance)
10 S.G. Maxwell (remote appearance)
11 K.M. Berlin (remote appearance)
12 G. Squirell

For D. Yanok (remote appearance)
For K. Yanok (remote appearance)
For C. Yanok
For Alberta Central Authority
Court Clerk

13
14
15 **Discussion**

16
17 THE COURT:

Good afternoon, everyone else, counsel, parties,

18 Mr. Yanok, Ms. Yanok. It is nice to see you all again. Thank you so much for making time
19 to come on here this afternoon. I am going to sort of warn you in advance that the decision
20 is not short because I have tried to cover as thoroughly as I can in a relatively constricted
21 timeframe all of the materials that you put before me, both in terms of evidence and law.
22 Because I have tried to make a decision in a fairly short timeframe, under what we need to
23 do under the Convention and in these types of circumstances, I will not cite every piece of
24 evidence you put before me or every case. I have read them all many times now but it just
25 is not practical to cite everything. That said, I have tried to explain in a thorough fashion
26 my reasons for the decision.

27
28 The one thing I wanted to start with, counsel, as a matter of housekeeping and we can talk
29 about logistically how it would work, I had thought it may make sense so as to preserve
30 the record to mark my email to you regarding some of the Connecticut law and your various
31 responses as just an exhibit for identification in these proceedings so that it would be
32 preserved on the court record if it were ever needed for future reference. Are there any, I
33 guess, objections to that or thoughts about that? I suppose the other way to do it would be
34 simply to direct that they all be filed.

35
36 MR. BLITT:

My Lady, Max Blitt for Karen Yanok. My
37 preference is to just have them filed as part of the record.

38
39 THE COURT:

Just on the court file, not marked as an exhibit?

40
41 MR. BLITT:

Will it make a difference?

1
2 THE COURT: I don't know that there is any practical difference.
3 It just looks a little different; right? One way, mister clerk would -- I would get them to
4 him in the courtroom and he would put the little exhibit stamp on there and the other way,
5 they would have a filed stamp on them on the general court file.

6
7 MR. BLITT: I'm comfortable either way, My Lady.
8 Personally, I don't think it makes a difference, but I leave it up to the Court.

9
10 THE COURT: Do any of the other counsel have a view on that?
11 Mr. Gordon?

12
13 MR. GORDON: My Lady, whatever is simpler. I don't take any
14 position. I think perhaps having them exhibited would be fine.

15
16 THE COURT: Ms. Maxwell or Ms. Berlin?

17
18 MS. MAXWELL: My Lady, I'm not sure I take a position, but it
19 might be easier to find them, I suppose, if they're exhibited to the decision.

20
21 THE COURT: Ms. Berlin?

22
23 MS. BERLIN: From -- from Berlin, it would be my preference
24 that they would be exhibited because then it's preserved as far as how many pages the
25 materials was and so on. Sometimes this can be uncertain when we just file these things on
26 a court file. It's hard to tell what the extent of the email correspondence was and how many
27 pages were -- were originally included. So I would prefer that and that's the reason why.

28
29 THE COURT: Okay. And because I hadn't discussed this with
30 you, I haven't taken the step in advance - mister clerk and I aren't in the courtroom together
31 - of having a package prepared for him. So what I would propose to do is just bear with me
32 here for a moment. I can't necessarily count the pages for you because I am looking at them
33 electronically, but basically it would be my email to you, which I believe was -- I am sorry,
34 I thought I had had all these put in one place for me but they are not all here. Just one
35 second. But we do need to have the date for the record.

36
37 All right. So it would be my email to counsel of May 28 of 2021. Then we had a response
38 email from Ms. Berlin dated also on May 28th, 2021. We had a letter from Mr. Gordon
39 dated May 31, 2021. We had a letter from Ms. Maxwell dated May 31, 2021, and we
40 received an email from Mr. Blitt dated May 28, 2021, with an attachment being the email
41 from US counsel, I believe. I am just checking the date. So, yeah, there was a letter from

1 Mr. Blitt dated May 28, 2021, and then an attachment to that letter from US counsel. And,
2 of course, my email also had some attachments.

3
4 Am I missing anything in terms of that exchange of correspondence, to the best of your
5 records, counsel?

6
7 MR. GORDON: No, Ma'am.

8
9 MR. BLITT: I don't think so.

10
11 THE COURT: Okay. So I think Mr. Blitt and Mr. Gordon have
12 confirmed that is the list. Ms. Maxwell was shaking her head no, and so what I will do is I
13 will arrange to have those documents printed and delivered to mister clerk when I am --
14 when we are finished here today, and then those -- mister clerk, I take it those can be made
15 just an exhibit for identification in these proceedings?

16
17 THE COURT CLERK: I'm not exactly sure how to -- what we're going
18 to do there. So it wouldn't be an exhibit in the -- was this a trial? I don't anything about this.
19 This is first -- first -- this is the first I've seen this matter. So this was a trial?

20
21 THE COURT: It was not a trial. All of the other materials went
22 in in writing so there wouldn't be any exhibits already. So if it is easier for you, mister
23 clerk, I can put them in a package and just have them filed on the court record somehow.

24
25 THE COURT CLERK: Well, my -- my concern, Ma'am, is that if you
26 make them an exhibit, then it becomes an exhibit card. They go off to exhibits. They're --
27 they're not on the file any longer. They're now in the exhibit control centre. They wouldn't
28 travel with the file, if that's what you were -- you were hoping for. They also wouldn't be -
29 - if they are marked for identification, I don't understand them to be part of the -- the -- the
30 whatever it was, the hearing was, proper. So I'm not sure if marking them as identification,
31 I'm not -- I'm not sure exactly how this will all work but...

32
33 THE COURT: Okay.

34
35 THE COURT CLERK: I know if you just put them on the file, they'll get
36 filed on the file. That's probably the easier way.

37
38 THE COURT: Yeah, it's fine. We have done it before, marked
39 them as identification mostly so that if the record went up to the Court of Appeal, they
40 would be part of that, but it is fine. I think the parties can still manage that just as they
41 might do with any briefs that they put before me if they needed to refer to those. So we can

1 have that. I will figure out a way to get them onto the court file. I mean, in a written decision
2 I suppose they could have been appended, but even then I wouldn't normally append
3 something like that to a written decision. It is just a way of getting them formally on the
4 court record when they came directly to me, but I will take care of that.

5
6 Any further comments on that, counsel, before we go ahead? Thank you.

7
8 Okay. And I just want to direct some comments right now to Ms. Yanok and Mr. Yanok. I
9 may want to speak to you again at the end, but I want to say something now. I think I
10 acknowledged this last time. I know that this is so hard. It is so personal. I can see from the
11 record that you both love Cherie very, very, very much, and here you are with lawyers
12 talking about -- and judges talking about details such as how matters can be made an exhibit
13 or put on the record, and I acknowledge that that must feel strange at the least, maybe even
14 offensive in some ways. So we are going to get down to talking about the heart of the matter
15 in a minute here.

16
17 I am going to warn you of two things. As I said earlier, it is not short. So I understand that
18 can be hard to listen to so, please, I hope you have a glass of water or something and you
19 can bear with me. It is just that it is easier to get you a timely decision orally than to go
20 through the process of having it published and, secondly, when I give a decision like this I
21 like to look people in the eye and see them because of the humanity that is involved here.
22 It is not just a piece of paper. So there is that.

23
24 The second thing is I am going to say some things in respect of both of you that you
25 probably will disagree with and that you won't like, and I want to say in advance I know
26 that that can be hard to hear. I have made an objective and frank assessment of the situation
27 to the very best of my abilities in doing my job. But I just acknowledge that because this is
28 a very, very human situation and I want you to know that I know that and I am very aware.

29
30 With that, I am prepared to give you my decision. Sorry, there is one other thing I should
31 tell you is that there are some things that don't translate well into the oral world like some
32 parenthetical notes and footnotes and citations and things like that that I have to do to
33 organize my thoughts but that don't translate well. So I am going to do my best to
34 communicate those to you.

35
36 We may well end up with a transcript, whether ordered by me or ordered by one of you of
37 this decision. I do reserve the ability to go back when it is put in written form and try to
38 add headings or make the headings make sense because they just come out as part of the
39 narrative otherwise, to fix up citations, to fix up places where I have obviously tripped over
40 a word or that sort of thing, but you can be assured, of course, that the substance of the
41 decision would not change in any way.

1
2 **Reasons for Judgment**
3

4 THE COURT:

Derek Yanok seeks return of his daughter Cherie Yanok to Connecticut pursuant to the *Hague Convention on the Civil Aspects of International Child Abduction*, which I will refer to at times as the “Hague Convention” or just the “Convention”. Cherie has been in Alberta since February, 2020 with her grandmother, Karen Yanok. Ms. Yanok opposes Mr. Yanok’s application.
9

10 I note for the record that Karen Yanok is not Cherie's biological grandmother. Ms. Yanok
11 was married to Derek Yanok's father, Peter Yanok, who has since passed away. Nothing
12 turns on this and all parties acknowledge that Cherie and Karen enjoy a
13 grandmother/grandchild relationship.
14

15 The Hague Convention is in force in Alberta by virtue of the *International Child Abduction*
16 *Act*, RSA 2000, c. I-4.
17

18 The following issues are live:
19

- 20 1) Has the Alberta Provincial Court assumed jurisdiction over guardianship or parenting
21 in respect of Cherie?
22
- 23 2) If the Alberta Provincial Court assumed jurisdiction, does that oust the application of
24 the Hague Convention?
25
- 26 3) Did Derek Yanok attorn to Alberta as the jurisdiction to decide guardianship or
27 parenting, or as it is used in the Hague Convention, custody of Cherie?
28
- 29 4) If Derek Yanok attorned to Alberta, does that oust the application of the Hague
30 Convention?
31
- 32 5) Was Cherie wrongfully removed or retained, as those terms are used in the Hague
33 Convention, and if so when?
34
- 35 6) Where was Cherie habitually resident at the time of any wrongful removal or retention?
36
- 37 7) Has Karen Yanok established that there is a grave risk that Cherie’s return would expose
38 Cherie to physical or psychological harm or otherwise place Cherie in an intolerable
39 situation? If so, should the Court exercise its discretion to refuse return?
40
- 41 8) Has Karen Yanok established that Cherie objects to being returned and has attained an

1 age and degree of maturity at which it is appropriate to take account of her views? If
2 so, should the court exercise its discretion to refuse return?
3

4 **Factual and Procedural Context**

5
6 There are a number of facts in dispute between the parties. Unless otherwise noted, the
7 following facts are uncontested.
8

9 Cherie was born in North Carolina on September 25, 2008 to Derek Yanok and Brittany
10 West.
11

12 Mr. Yanok has sole custody of Cherie pursuant to a final Order of the General Court of
13 Justice of North Carolina, District Court Division dated on or about June 15, 2010.
14 Brittany West has not had any material involvement in Cherie's life for many years and
15 her whereabouts are unknown.
16

17 Between approximately 2009 and February, 2020, Cherie lived in Torrington, Connecticut
18 under Mr. Yanok's custody. Between 2009 and 2014, Mr. Yanok relied on his father Peter
19 and his stepmother Ms. Yanok for assistance in caring for Cherie, sometimes residing with
20 them, and other times residing elsewhere but them having significant childcare
21 responsibilities for Cherie.
22

23 In September 2014, Peter Yanok passed away. For a period in or about 2015, Mr. Yanok
24 refused contact between Ms. Yanok and Cherie. However, contact then resumed and Ms.
25 Yanok again spent significant time with Cherie. In or about 2017 or 2018, Ms. Yanok re-
26 married and moved to Calgary, Alberta. Since then, she has visited Cherie in Connecticut
27 and Cherie came to Calgary to stay with Ms. Yanok and her husband for most of her school
28 summer breaks in 2017, 2018 and 2019.
29

30 In early 2020, Mr. Yanok and Cherie found themselves without a place to live. Mr. Yanok
31 was staying at the homes of one or more friends, and arranged for Cherie to stay with other
32 friends. At some point, Cherie called Ms. Yanok, raising concerns about her living
33 situation. Ms. Yanok and Mr. Yanok agreed that Cherie would go to Calgary to stay with
34 Ms. Yanok. The details and effect of their communication in this regard are addressed
35 further below. It is undisputed that there was no specific agreement on how long Cherie
36 would remain in Calgary. Ms. Yanok made flight arrangements and Cherie travelled to
37 Calgary on or about February 22, 2020.
38

39 On February 25, 2020, Ms. Yanok filed an ex parte application for guardianship for Cherie
40 in the Alberta Provincial Court. On March 6, 2020, Ms. Yanok obtained an Order styled
41 Interim Guardianship Order. The matter came on for review June 4, 2020, and Ms. Yanok

1 obtained a further order confirming that as interim guardian, she could enroll Cherie in
2 school and activities, apply for health coverage and other such matters. Ms. Yanok advised
3 Mr. Yanok that she was obtaining the interim guardianship order. There is a dispute as to
4 whether she advised him of the June 4 appearance. He was not present for either
5 appearance.

6
7 By the next appearance in Provincial Court on or about July 29, 2020, a dispute had
8 crystallized. The parties agree that by that time, Ms. Yanok was seeking permanent
9 guardianship for Cherie and wanted to keep her in Alberta, Mr. Yanok was aware of this,
10 and he opposed. On July 29, 2020, the Provincial Court appointed counsel for Cherie.

11
12 The matter returned to Provincial Court on September 2 and September 23, 2020, to the
13 best that I can gather. The specific dates are of limited importance. On the latter appearance,
14 it was set for trial on December 8, 2020. Before the December 8, 2020 hearing, Mr. Yanok
15 had sent his request for return of Cherie under the Hague Convention to the American
16 Central Authority, but it had not been received in Canada. On December 7, 2020, Ms.
17 Yanok filed a parenting application to be heard at the December 8, 2020 hearing.

18
19 I have used the term parenting in a number of places in this decision because that is the
20 term used in our *Family Law Act* in Alberta, though I recognize that the term custody is
21 used in the Hague Convention.

22
23 A trial on the merits of jurisdiction, guardianship, and parenting went ahead on December
24 8, 2020, and the Court reserved decision. On December 9, 2020, Mr. Yanok's Hague
25 application arrived in Alberta. The Provincial Court has held delivery of its decision in
26 abeyance pending the outcome of the Hague Convention proceedings in this Court.

27 28 **The Alberta Provincial Court Jurisdiction and Attornment**

29
30 The first 4 issues that I outlined above all relate in some way to jurisdiction. I will address
31 them together, starting with jurisdiction on its own.

32 33 ***Jurisdiction***

34
35 First, I have difficulty accepting that the Alberta Provincial Court assuming jurisdiction to
36 hear a parenting application or a guardianship application could, on its own, oust the
37 application of the Hague Convention if the Convention would otherwise apply. In fact,
38 Hague Convention cases often arise where there are parallel proceedings in two
39 jurisdictions. The purpose of the Convention would be undermined if its application were
40 dependent on whether a party could obtain some sort of explicit or implicit ruling on
41 jurisdiction from a local court before the other party perfected their application under the

1 Hague Convention. Conventions like the Hague Convention generally try to avoid or
2 mitigate races to the court house, not encourage them.

3
4 While not raised in argument before me, I note that Ms. Yanok's argument in this regard
5 would appear to run contrary to Article 17 of the Hague Convention.

6
7 In any event, I do not accept Ms. Yanok's argument that the Alberta Provincial Court
8 assumed final jurisdiction over parenting or guardianship in this case. Ms. Yanok does not
9 argue that the Court did so by issuing any of the interim guardianship orders. Rather, she
10 argues that on December 8, 2020, with jurisdiction squarely in issue, the Provincial Court
11 made a final ruling on jurisdiction. Ms. Yanok says that if Mr. Yanok did not like that
12 ruling, he ought to have appealed and that his Hague Application is a collateral attack.

13
14 Ms. Yanok relies on the following passage from the Provincial Court transcript from
15 December 8, 2020, which occurred in the context of a discussion as to whether the Court
16 wanted closing submissions after the evidence went in:

17
18 The COURT: So, this is what I'd -- I'd actually like very brief
19 written -- very -- you don't have to go through all of the evidence.
20 What I'm looking for is two scenarios, one is what an order would
21 look like if -- or, what the terms of an order would look like if
22 Cheri [sic] was to remain here and what the terms of an order
23 would look like if Cheri [sic] was to be returned to the United
24 States because I am -- I'm not going to give my reasons right now,
25 but I am assuming this Court is going to assume jurisdiction here.
26 So, that is a given. The issues now are parent -- guardianship and
27 parenting....

28
29 The Court then went on to set a timeline for further submissions and a date for a decision.

30
31 In my view, the passage does not reveal a decision by the Court on jurisdiction. Rather, the
32 Court directs that for the purposes of the further submissions requested by the Court, the
33 parties are to assume that the Court will take jurisdiction and address the merits of
34 guardianship and parenting. This makes particular sense in a situation where jurisdiction
35 was briefed in advance, but the parenting application was filed the day before.

36
37 Moreover, to the extent that the Court made any ruling on jurisdiction, the Court clearly
38 did not intend that ruling to have any impact on any proceedings under the Hague
39 Convention. In the previous appearances, the Court had raised the issue of jurisdiction and
40 ordered advance briefs on that topic. Mr. Yanok did not file one, and when asked about it
41 on December 8, he referred to his Hague Application. The Court said:

1
2 So, Mr. Yanok, this is a completely different proceeding, this has
3 nothing to do with the Hague Convention. This is something that
4 has to do only with the jurisdiction of the Courts in Alberta to hear
5 this matter.
6

7 Again, with that statement by the Court, I cannot find that the Court intended to take
8 jurisdiction in a way that would affect the application of the Hague Convention, even if I
9 were to find that the Court did assume jurisdiction at that time.
10

11 *Attornment*

12
13 Ms. Yanok argues that Mr. Yanok attorned by actively participating in the Provincial Court
14 proceedings on December 8, cross-examining Ms. Yanok, giving his own evidence and
15 seeking relief from the Provincial Court. Even if I assume that a party could deprive
16 themselves of the opportunity to make a Hague application by attorning to the jurisdiction
17 of the requested state on parenting, I am not satisfied that Mr. Yanok so attorned on the
18 facts of this case.
19

20 I understand that the Court raised jurisdiction of its own motion in the appearance on July
21 29, 2020, and set the matter down for a hearing on residency and jurisdiction on September
22 2, 2020. When the parties appeared on September 2, the Court again confirmed that there
23 were concerns about jurisdiction. The hearing did not proceed that day because there were
24 a number of documents that each party wanted to rely on that had not been previously
25 exchanged. However, Mr. Yanok made it clear that he wanted Cherie returned to
26 Connecticut. Mr. Yanok advised that he would be filing his own paper work in Connecticut
27 and would try to get counsel.
28

29 The parties appeared again on September 9, 2020 and September 23, 2020. Before the latter
30 appearance, on September 16, 2020, Mr. Yanok wrote to the Provincial Court, advising
31 that he had spoken to the United States Department of State and had filed a Hague
32 Convention Petition with them. He was awaiting further information from them to engage
33 Alberta counsel. Mr. Yanok requested an adjournment to work with the government
34 representatives. The matter was adjourned to December 8, 2020, and my understanding
35 was that the parties were to provide briefs in advance on the issue of jurisdiction.
36

37 An issue then apparently arose with Mr. Yanok perfecting his Hague application because
38 he needed Cherie's original birth certificate, which he had sent with her to Canada. Mr.
39 Yanok maintains that either during a court attendance or in other communication with Ms.
40 Yanok's counsel, Ms. Yanok undertook to provide him with the birth certificate but there
41 was a delay before he received it. Ms. Yanok does not concede any of this to be the case,

1 but did not actively deny it either. The point is that there is at least some explanation for
2 the delay associated with the Hague Application, which was apparently confirmed received
3 by the US Central Authority on or about November 27, 2020.
4

5 At the outset of the hearing on December 8, the Court questioned Mr. Yanok about not
6 having provided his submissions on jurisdiction as previously directed. He pointed to his
7 Hague Application. As I noted a moment ago, the Court told him that was a “completely
8 different proceeding”. Mr. Yanok went on to say that he was waiting to hear from an
9 attorney, which he understood would be provided through the Department of State. The
10 Court then asked Mr. Yanok about other documentation he had previously indicated he
11 wanted to submit in response to some of the allegations made by Ms. Yanok, and he once
12 again replied that he had included those in the Hague application.
13

14 Ms. Yanok’s counsel then suggested to the Court that if a Hague application had really
15 been submitted in the United States on November 27, there would be a notice of it on the
16 Alberta court file. Ms. Yanok wanted the hearing to proceed. It is clear that she was
17 concerned that the mentions of the Hague application were simply attempts to delay the
18 matter. Counsel for Cherie agreed that the matter should proceed in light of not having
19 received any official word of a Hague Application. My understanding from the record is
20 that Mr. Yanok had not helped himself in any of this by refusing to provide copies of
21 whatever it was he had supplied to the US Central Authority when he was requested to do
22 so by one or both of the counsel.
23

24 In this part of the discussion in court, Mr. Yanok stated as follows:
25

26 I just would like fair representation and I can’t control how fast the
27 State Department gets back to me. I’m one person, I have a job, I
28 work, and I don’t have -- I’m not a lawyer and I don’t have a bunch
29 of money to be throwing around this. I’m a loving father and I love
30 my daughter. Mr. Blitt also made fun of me saying I don’t have
31 two nickels to rub together. I also believe that this, you know, all
32 I’m asking for is my daughter back and I’ve taken (sic) every step
33 I could and I’ve done everything as fast as I could do it. Like I
34 said, I’m following the motions that you guys set for me and I can’t
35 help the time that’s gone by.
36

37 After hearing all of these submissions, the Court found that it was in Cherie’s best interest
38 to proceed with the hearing and asked Ms. Yanok’s counsel to proceed with Ms. Yanok’s
39 case.
40

41 After the series of events that I have just referred to, Mr. Yanok participated in the case on

1 the merits. I cannot accept that by doing so, he attorned in a manner that would oust
2 application of the Hague Convention or that he otherwise waived his right to rely on the
3 Hague Convention. Jurisdiction was in issue. Mr. Yanok made it clear throughout that he
4 wanted Cherie returned to Connecticut. He said he was filing a Hague application and he
5 did so. He told everyone on December 8 that he had filed a Hague application and that he
6 wanted counsel. The Court decided to proceed anyway.
7

8 Nobody cautioned Mr. Yanok that by participating in the ensuing proceedings he may be
9 taken to have attorned or waived his Hague Convention rights. In fact, he was told that the
10 Hague proceeding was completely distinct. Perhaps a lawyer would have expressly stated
11 that Mr. Yanok's participation in the guardianship and parenting hearing on the merits was
12 subject to the Hague Application or was without prejudice to his position on jurisdiction
13 or some similar caveat. In my view, it ought to have been clear to everyone involved that
14 Mr. Yanok continued to rely on his Hague Application. Taken to its natural extent, Ms.
15 Yanok's position is that faced with the Court's decision to proceed on the merits of her
16 applications to permanently remove his child from his custody, Mr. Yanok had to utter
17 some magic words about conditional participation, or decline to participate altogether, in
18 order to preserve the Hague Application. I find that untenable.
19

20 I also note that while Ms. Yanok characterizes Mr. Yanok's participation as positively
21 invoking the jurisdiction of the Alberta court in that he asked for relief in the form of return
22 of Cherie, I see it differently. He filed no application. He was responding to Ms. Yanok's
23 application. The fact that in the course of so doing, and after having tried to rely on his
24 Hague Application to no avail, he stated that he wanted Cherie returned to him, is not
25 analogous to the cases on attornment cited by Ms. Yanok.
26

27 **Wrongful Retention and Habitual Residence**

28

29 The obligation to return a child under the Hague Convention arises if the child was
30 wrongfully removed or retained. Article 3 defines wrongful removal and retention as
31 follows:
32

- 33 a) It is in breach of rights of custody under the law of the state in
34 which the child was habitually resident immediately before the
35 removal or retention; and
- 36
- 37 b) At the time of removal or retention, those rights were actually
38 exercised.
39

40 There is no dispute that at all material times, Mr. Yanok had sole rights of custody in
41 respect of Cherie under the laws of Connecticut, whether by way of the original orders

1 from North Carolina, or the subsequent documentation that is on the record from
2 Connecticut, or both.

3
4 Mr. Yanok must establish that he was actually exercising those custody rights and that
5 Cherie's habitual residence prior to retention was in Connecticut. If not, his Hague
6 application must fail: *In the matter of C*, [2018] UKSC 8 at para 34.

7
8 ***Date of Retention***

9
10 In order to determine whether Mr. Yanok was exercising his custody rights and where
11 Cherie was habitually resident at the time of retention, I must determine when Cherie was
12 retained. This is not obvious in a case where she came to Alberta with consent, and there
13 was no date or other conditions specified for her return. It is further complicated by the fact
14 that Ms. Yanok claims she gradually formed the intention to retain Cherie over time, and
15 the evidence supports an inference that she was not transparent with Mr. Yanok as that
16 intention developed.

17
18 The parties arrived at a consensus in oral argument that I should focus on July 29, 2020 as
19 the date of retention. By that time, when they appeared in Provincial Court, it was clear
20 that Ms. Yanok sought to have Cherie remain in Alberta on a more permanent basis, and it
21 was clear that Mr. Yanok did not consent. I have concerns that Ms. Yanok had engaged in
22 what has been termed a "repudiatory retention" as early as March or April or 2020 (Re *C*
23 at para 50). However, given the agreement of the parties, I accept July 29, 2020 as the date
24 of retention. Moreover, whether the date was earlier or even later - for example, September
25 16, 2020 when Mr. Yanok wrote to the Court referring to this matter as "custodial
26 abduction" - the outcome on these facts would be the same.

27
28 ***Exercise of Custody Rights***

29
30 Ms. Yanok points out that at the time of her departure for Canada, Cherie had not been
31 living with Mr. Yanok for a period of some weeks and that he then consented to her moving
32 to Canada. However, Mr. Yanok was still exercising his custody rights. An incident of Mr.
33 Yanok's custody rights in Connecticut is the right to decide where Cherie resides. He was
34 clearly exercising this right when he sent her to Alberta. One need look no further than the
35 permission letter he signed for Cherie to travel: see also Re *C* at para 43.

36
37 ***Habitual Residence***

38
39 The more contentious question is whether, by July 29, 2020, Cherie's habitual residence
40 had changed from Connecticut to Alberta. I must determine habitual residence based on
41 the hybrid approach outlined and endorsed in *Office of the Children's Lawyer v Balev*,

1 2018 SCC 16 at paragraphs 5, 42 & 48 by looking at all relevant considerations arising
2 from the facts of the case. I am to consider the “focal point of the child’s life - the family
3 and social environment in which its life has developed” - immediately prior to the removal
4 or retention: *Balev* at para 43. The law instructs me to consider all relevant links and
5 circumstances, including the links and circumstances in country A; the circumstances of
6 the child’s move from country A to country B, and the child’s links to and circumstances
7 in country B: *Balev* at para 43. In this case, country A is Connecticut and country B is
8 Alberta.

9
10 It is clear that until her departure for Alberta, Cherie’s permanent residence was
11 Connecticut. She had lived there most of her life and all of her schooling was there. The
12 evidence shows that she did well in school. Cherie is estranged from her mother and her
13 mother’s family. The consistent adults in Cherie’s life have been Mr. Yanok, his father
14 Peter, Ms. Yanok, and Mr. Yanok’s mother. Mr. Yanok has been in Connecticut at all
15 material times, his father was in Connecticut until his passing in 2014, and Ms. Yanok was
16 in Connecticut until she moved to Alberta in or about 2017 or 2018. Mr. Yanok’s mother
17 was in North Carolina, but she passed away in or about 2015. As a single father, Mr. Yanok
18 has relied on friends to assist with Cherie and based on the record, all of those friends are
19 in Connecticut.

20
21 Cherie and her father enjoyed doing things together in Connecticut such as hiking,
22 watching shows and fishing.

23
24 As at July 29, 2020, Cherie had not cut her connections to Connecticut. At that time, she
25 continued to communicate regularly with her father. The evidence shows that she continues
26 to communicate right to the present with friends in Connecticut and that she misses her
27 friends. She wants to visit them.

28
29 Cherie was not a stranger to Alberta when she arrived in February 2020. She had already
30 spent almost all of her summer vacation here in 2017, 2018 and 2019. By virtue of those
31 visits, she was familiar with the area and had made some friends. She had long enjoyed a
32 strong relationship with Ms. Yanok and had come to know Ms. Yanok’s new husband well.
33 Cherie enjoyed activities with Ms. Yanok such as gardening. As at July 29, 2020, Cherie
34 had been living full time in Alberta for almost exactly 5 months and she was integrated
35 into the household of Ms. Yanok and her husband in terms of having a routine with
36 academic work and chores.

37
38 That said, Cherie was not enrolled in school between her arrival in February 2020 and July
39 29, 2020. And when I refer to school in that context, I mean to an actual school program
40 with the Board of Education. This was in part due to issues Ms. Yanok encountered in
41 registering her, and in part due to school closures arising from the COVID-19 pandemic.

1 Cherie did not attend online courses with Alberta students. Rather, she was home-schooled
2 individually by Ms. Yanok and her husband. While Ms. Yanok's messages to people in
3 Connecticut speak of Cherie already having friends in Alberta, and Cherie did confirm
4 having a friend next door at her grandmother's, the parenting expert reports that even at
5 the time of his work in spring 2021, Cherie said that all her friends are in the States and she
6 has not had a chance to socialize in Calgary due to the pandemic. Rather, she continued to
7 socialize with friends in Connecticut online. Understandably due to the pandemic, there is
8 no evidence of Cherie being enrolled in extra-curricular activities in Alberta.
9

10 While parental intentions are not dominant, they remain relevant under the hybrid
11 approach. They are part of the circumstances of the move from country A to country B
12 referenced in *Balev*. The evidence clearly establishes that Mr. Yanok's intention was
13 always that Cherie's stay in Canada be temporary and short-term. This is reflected in the
14 available correspondence. For example, when Ms. Yanok first proposed the idea of Cherie
15 coming to Canada, she said, "She could always come here 'til you get settled. Wouldn't
16 have to be permanent." Mr. Yanok replied, "I honestly don't know what else to do. I have
17 a place but it not open till April 1st."
18

19 He was in crisis and the move to Canada was arranged quickly. Also, Ms. Yanok was
20 family and Cherie had come and gone previously for substantial periods in the summer. In
21 these circumstances, not specifying an end date for Cherie's stay is still consistent with an
22 intention on Mr. Yanok's part that the relocation be short term.
23

24 In a further series of texts, Ms. Yanok told Mr. Yanok that her relative Brett could bring
25 Cherie to her friend Maria's to get her stuff and say "their temporary goodbyes." After
26 Cherie arrived in Alberta, and Ms. Yanok and Mr. Yanok were discussing his phone
27 account situation because Ms. Yanok needed to text him guardianship papers, he said:
28

29 I think it would be easier to home school Cherie until I get the
30 apartment and then she can come home.
31

32 When Mr. Yanok saw the guardianship paperwork Ms. Yanok had obtained from the
33 Provincial Court in March 2020, he said, "I'm not really feeling good about what was
34 written on the paperwork you sent me." He went on to ask, "Are you trying to take custody
35 of Cherie from me". In response to Ms. Yanok's statement that she was trying to provide
36 Cherie with a safe place to live and custody would depend on whether Mr. Yanok got his
37 life straightened out, Mr. Yanok said:
38

39 I've been busting my ass saving for the apartment I have for Cherie
40 and I on the 1st. I'm not a mess. You offered your assistance, not
41 to take my daughter from me. You told me that was for school.

1
2 In my view, the only available inference on the evidence as a whole is that Mr. Yanok
3 always intended Cherie's stay in Canada to be temporary.
4

5 It is an interesting question as to whether Ms. Yanok's intention is relevant. The law is
6 clear that one parent can unilaterally change the habitual residence of a child, even if the
7 other did not share that intention: *Balev* at para 46. However, Ms. Yanok is not a parent,
8 whatever the strength of her relationship with Cherie is. At the time the parties discussed
9 Cherie going to Alberta, Ms. Yanok had no parenting, guardianship or custody rights in
10 any jurisdiction. As at July 29, 2020, she had temporary guardianship rights, obtained at
11 least in part on the strength of Mr. Yanok's agreement for Cherie to come to Canada
12 temporarily. In these circumstances, it is fair to ask whether Ms. Yanok's intention as to
13 Cherie's habitual residence is relevant.
14

15 Assuming it is, her evidence now is that she gradually came to believe that Cherie should
16 stay in Alberta over the spring and into summer of 2020. With respect, I have significant
17 doubts about the accuracy or veracity of that evidence in light of messages she was sending
18 to people in Connecticut as early as March and April of 2020, gathering statements and
19 videos about Mr. Yanok, referring to her guardianship order as "a start", stating that she
20 was in the process of becoming Cherie's permanent guardian and asking the recipients not
21 to mention that to anyone as she did not want Mr. Yanok forewarned of what was in the
22 works. On all of the evidence, I find that Ms. Yanok's intention when she made the
23 arrangement with Mr. Yanok was that it was open-ended, and that she became determined
24 to make it permanent sometime between the date of Cherie's arrival and July 29, 2020.
25

26 On Cherie's part, she was happy to come to Canada and sought out advice from her
27 grandmother in respect to her living situation at the time in Connecticut. However, at the
28 time she came to Canada, she understood the arrangement to be temporary - perhaps for
29 the rest of the 2019-2020 school year. That is specifically set out in Dr. Singh's report at
30 paragraph 95, where Cherie refers to her dad agreeing it would be safer and more stable
31 for her to finish the school year here. Even now Cherie knows that her living arrangement
32 in Canada is not necessarily permanent and is subject to further court decisions. This was
33 confirmed by Cherie's counsel. By extension, Cherie knew that her stay was not necessarily
34 permanent if we are looking at July 2020 as the relevant time.
35

36 Looking at all the relevant factors, I find that as at July 29, 2020 - or even September 16,
37 2020 - Cherie's habitual residence remained in Connecticut. While she liked Alberta and
38 life with Ms. Yanok, she had been in Alberta for a relatively short time compared to her
39 time in Connecticut, she had not attended formal school in Alberta, she was not integrated
40 with peers in Alberta, and she maintained important connections in Connecticut. Further,
41 whatever Ms. Yanok's internal intentions may have been, there was clearly no agreement

1 that Cherie would move on any long-term basis to Alberta.

2
3 Does anybody need a break to go to the washroom or get some water or anything? Mr.
4 Gordon, do you think it would be appropriate to take a break? I can just see you nodding.

5
6 MR. GORDON: Yeah. Would you mind, Ma'am? Five minutes or
7 just to...

8
9 THE COURT: No, not at all. I do, as I acknowledged earlier, I
10 know it is long and you just have to sit there and listen to me drone on and on and really
11 what you want me to do is just get to the end and tell you the answer. I understand that, but
12 it is really important that you not only understand the answer but that you understand how
13 I got there.

14
15 So why don't we just give everyone a chance to stretch their legs. Mister clerk, it is just
16 before 3, why don't we come back at 3:10. Okay? And you don't have to log out. You can
17 just turn off your video and mute and then we will all just -- I will just wait until mister
18 clerks confirms to me by message that you are ready and I will come back on. Okay. Thank
19 you. We are adjourned.

20
21 (ADJOURNMENT)

22
23 THE COURT: Good afternoon again, everyone. Just before I
24 continue with the decision, I just wanted to note - because I am not sure I explicitly
25 referenced it - in our list of materials that we are going to file Mr. Blitt had actually sent
26 two different correspondences, one of May 28 that may have actually crossed with mine
27 and one of May 31. So it would be my intention to include both of those in the package
28 unless I hear an objection to the contrary right now.

29
30 MR. GORDON: No, none. Thank you.

31
32 THE COURT: Okay. Thank you. Okay. I am now going to deal
33 with the exceptions that have been raised under the Convention.

34
35 **Exceptions**

36
37 The Hague Convention "is aimed at enforcing custody rights and securing the prompt
38 return of wrongfully removed or retained children to their country of habitual residence":
39 *Balev* at para 24. The Court does not make custody decisions on the merits under the Hague
40 Convention. Rather, a return order is designed to restore the status quo which existed before
41 the wrongful removal or retention, and to deprive the - and we use this word in quotes -

1 “wrongful” parent of any advantage that might otherwise be gained by the wrongful
2 removal or retention. The underlying presumption is that orders about custody and
3 parenting are most appropriately made in the jurisdiction of habitual residence and that
4 having them made there is in the children’s best interests: *Balev* at paras 24 and 34.
5

6 However, the Hague Convention includes some exceptions to mandatory return. Ms.
7 Yanok relies on two such exceptions, both set out in Article 13 of the Convention. She
8 alleges that there is a grave risk that Cherie’s return would expose her to physical or
9 psychological harm or otherwise place Cherie in an intolerable situation. She also argues
10 that Cherie objects to being returned and has attained an age and degree of maturity at
11 which it is appropriate to take account of her views.
12

13 The exceptions in Article 13 of the Convention are exceptions. They should not be read so
14 broadly as to erode the general rule of return: *Balev* at para 76. I am to interpret the treaty
15 in good faith in accordance with the ordinary meaning to be given to the terms of the treaty
16 in their context and in light of its object and purpose: *Balev* at para 32. What is required is
17 a fact-based, common sense approach: *Balev* at para 76. Ms. Yanok acknowledges that she
18 has the burden of proof in respect of both exceptions: *Balev* at para 77.
19

20 In essence, both exceptions require a two-step approach. First, I must determine whether
21 the facts fall within the scope of the stated exception. If so, then I am not bound to return
22 Cherie to Connecticut, but I may still do so. I then have to determine whether to exercise
23 my discretion to refuse return.
24

25 In applying these exceptions - and in making a decision under the Hague Convention as a
26 whole - I must again be clear that I am not making a decision on custody, parenting,
27 guardianship or any of the tests that underlie those determinations. I am not making a best
28 interests determination or a fitness to parent determination. All I am deciding is whether
29 Cherie should be returned to Connecticut, such that whatever legal or other processes may
30 be applicable in Connecticut can take place there.
31

32 I am just going to pause because I have a warning triangle on Mr. Yanok's screen. He may
33 still be able to hear us. Sometimes it is just a video issue but if he can't hear us, I may pause.
34

35 Mr. Yanok, can you hear us?
36

37 MR. GORDON: Ma'am, I'm going to --

38
39 MR. YANOK: Yes.

40
41 MR. GORDON: -- try and contact him.

- 1
2 MR. YANOK: I hear you fine.
3
4 THE COURT: Oh, he says he --
5
6 MR. YANOK: I stopped my video.
7
8 THE COURT: -- can hear us. And it is --
9
10 MR. YANOK: I stopped my video.
11
12 THE COURT: It is totally okay to turn off your video, sir. I just
13 wanted to make sure we hadn't lost you on the audio as well.
14

15 ***Grave Risk of Harm***

- 16
17 MR. YANOK: No, I'm listening.
18
19 THE COURT: The grave risk of harm exception is set out in
20 Article 13(b) of the Hague Convention. In *Thomson v Thomson*, [1994] 3 SCR 551 at 596,
21 the Supreme Court of Canada held that the word "grave" modifies "risk", not "harm" and
22 must be read in conjunction with "otherwise place the child in an intolerable situation."
23 The physical or psychological harm contemplated by the first clause is harm to a degree
24 that also amounts to an intolerable situation.
25
26 In order to meet the threshold, there must be a weighty risk of substantial harm and both
27 the risk and harm must be substantial: *Pollastro v Pollastro* (1999), 3 O.R. (3d) 497 from
28 the Ontario Court of Appeal at para 23.
29
30 In assessing the applicability of this exception, I must consider whether there are steps
31 available to mitigate or eliminate any grave risk of harm that would otherwise exist, and I
32 must presume that the legal and social systems in Connecticut can and will protect Cherie.
33 The latter is very important in order to give effect to the principle of comity on which these
34 conventions are based.
35
36 There are, in effect, four aspects to Ms. Yanok's argument about the grave risk of harm.
37
38 1) Cherie will experience instability, emotional distress and psychological harm if she is
39 forced to leave the care of her chosen caregiver, Ms. Yanok, and return to her father.
40 Ms. Yanok acknowledged in oral argument that the distress of being removed from one
41 caregiver and returned to another is not, on its own, enough to trigger the exception in

1 Article 13(b) of the Convention. However, she argues that this should be considered
2 with the other evidence of harm.

- 3
4 2) Mr. Yanok uses and deals cocaine, and did so in the residence he shared with Cherie.
5 Mr. Yanok abuses alcohol.
6
7 3) With Mr. Yanok, Cherie leads a transient and chaotic life and she is neglected.
8
9 4) Mr. Yanok physically and verbally abuses Cherie.

10
11 Much of the evidence of alleged harm is contested. Ms. Yanok relies significantly on
12 unsworn statements made to her by people in Connecticut, or in the case of Mr. Leger, on
13 an unsworn recorded telephone call with counsel, now largely recanted under oath. There
14 is a sworn statement from Ms. Ahearn, but Mr. Yanok denies her allegations in his
15 affidavits. I have not had the benefit of viva voce evidence to assess credibility or reliability
16 and Ms. Ahearn was not cross-examined.

17
18 There are some concerns about the accuracy of some of Mr. Yanok's evidence. For
19 example, he swore on or about March 16, 2021 that he was in an intimate relationship with
20 Ms. Ahearn that ended acrimoniously. Then, in his Reply Brief, filed May 19, 2021, he
21 sought to correct what he termed his error, acknowledging that he and Ms. Ahearn were
22 never in a relationship. It is hard to understand how one could make an error about
23 something like that. I am not in a position to determine whether it is a matter of credibility
24 or reliability, understanding that reliability could encompass not carefully reading the
25 affidavit before swearing it. The point is that this and other discrepancies - such as his
26 initial reluctance to acknowledge that he knew about the guardianship application in
27 Alberta, under whatever auspices it may have been presented to him by Ms. Yanok - raise
28 issues about the accuracy of Mr. Yanok's evidence.

29
30 That said, I am unable to assess Ms. Ahearn's credibility and reliability. Even if there was
31 no intimate relationship, there was clearly some sort of working or other relationship,
32 including tenant and landlord or roommates or however you might phrase it, that has
33 soured. Further, some of Ms. Ahearn's depiction of the events is more dire than that that
34 has been shared by Cherie herself with the professional, Dr. Singh. And Ms. Ahearn
35 apparently made no reports to child welfare authorities at the time even though she now
36 relates grave concerns. So, one wonders if there is some exaggeration on her part. Again, I
37 am unable to say.

38
39 I have already noted that I have also have concerns about the accuracy of some of Ms.
40 Yanok's evidence as well, particularly as it relates to the formation of her intent to keep
41 Cherie in Alberta. There is also no question that Ms. Yanok has gone out of her way in

1 some of her filed materials, and specifically I am referring to the sworn evidence, to cast
2 aspersions on Mr. Yanok, raising, for example, the frequency or lack thereof with which
3 he allegedly visited his father prior to his father's death. Such a point is of questionable
4 relevance at best and leaves the impression that it is part of an attempt to paint Mr. Yanok
5 in the worst possible light. I acknowledge that sadly, this is often what participants in
6 family law litigation feel compelled to do, usually to the detriment of the children involved.

7
8 Ultimately, the record before me does not permit me to make any findings one way or the
9 other about Mr. Yanok's involvement with cocaine. The allegations concern me, of course,
10 and there is some evidence to support them, albeit contested. However, the evidence in
11 support is either hearsay, or evidence that requires credibility analysis as I have just
12 outlined. This is the case even if I accept Mr. Leger's call with counsel and the transcript
13 of that call as some admissible evidence. I trust these allegations regarding Mr. Yanok
14 using and dealing in cocaine, particularly in Cherie's presence, can be addressed in
15 whatever proceedings may take place on custody or guardianship.

16
17 There is sufficient firsthand evidence, including in Mr. Yanok's own correspondence, to
18 indicate that he has had some challenges with alcohol. However, I am satisfied that those
19 are, in effect, encompassed in the allegations of physical and verbal abuse or neglect that I
20 will turn to in a moment.

21
22 The record confirms that Cherie and Mr. Yanok have moved around a lot and he has
23 struggled to provide for them at times. However, it appears he has had more stable housing
24 in the last while. The reality is that many families struggle to make ends meet, but that is
25 certainly not enough to meet the grave risk of harm exception. The record shows that Cherie
26 regularly attended school and she did well in school. She was not in any sort of trouble and
27 is regularly described as a "good kid" or words to that effect. Dr. Singh's report does not
28 suggest that she felt her life was particularly chaotic until at least the beginning of 2020. I
29 would not find in this case that the potential for more moves or the allegations of neglect,
30 at least on the record as it is before me, would amount to grave harm as contemplated by
31 the Hague Convention.

32
33 The real point of concern here is the evidence that Mr. Yanok has physically disciplined
34 Cherie by hitting her in the head and of his explosiveness and yelling. While Mr. Yanok
35 denies that anything he did amounts to abuse, and the evidence diverges on the frequency
36 and severity of his actions, it is undisputed that he has at least cuffed Cherie in the head on
37 more than one occasion. I am particularly concerned about Cherie's own account to Dr.
38 Singh, which uses the word "violent" to describe her father, and reports being scared for
39 her life during the incident after she took the toy from Vanessa's child. Cherie's version is
40 corroborated by the affidavit of Ms. Ahearn.

41

1 I am concerned that Mr. Yanok downplays this incident. Whatever his perception may have
2 been, and even if he had no intent to hurt Cherie physically or psychologically, he is now
3 discounting, even after having heard her account, the way she perceived the event, and that
4 is troubling to me. He indicated in his evidence that if she gave the account to Dr. Singh as
5 presented in Dr. Singh's report, it was a lie. This does nothing to assure me that Cherie
6 would not be exposed to more of the same if I direct that she be returned to Mr. Yanok's
7 care. Cherie has expressed concern about how her father will react to her expression of a
8 desire to remain in Canada and she reports cutting off communication with him because
9 she felt he was being pushy about her request to stay in Alberta.

10
11 The finding I can make on the existing record is that both the risk of harm and the type of
12 harm faced by Cherie, particularly vis-à-vis the evidence on physical violence and verbal
13 abuse, is of sufficient weight to trigger the grave risk of harm exception in Article 13(b) of
14 the Convention if Cherie is returned to Mr. Yanok's care in Connecticut without any further
15 review by the appropriate authorities or a court.

16
17 That said, sorting through the extent to which Mr. Yanok has subjected Cherie to physical
18 or verbal abuse, whether any of his discipline is within the bounds of acceptability in
19 Connecticut, and whether any concerns can be overcome with support and education -
20 which they often can - would generally be a matter for the Courts and family welfare
21 institutions in Connecticut. This is particularly the case where many of the allegations are
22 contested and almost all the relevant evidence and the ability to truly investigate the
23 allegations lies in Connecticut.

24
25 In many cases, the obvious solution is to direct return of the child to the state of habitual
26 residence, but in the care of some other person pending a hearing on the merits of custody.
27 This accomplishes the goal of allowing the merits to be determined in the state of habitual
28 residence, but in a way that mitigates any risk to the child in the meantime. The conditions
29 of return are often enforced in the state of habitual residence by way of a parallel order
30 pending a hearing on the merits. It is generally anticipated that there will be such a hearing,
31 and it will be a hearing on the merits of custody between two parents where the test is best
32 interests of the child.

33
34 In this case, there is unlikely to be a custody hearing in Connecticut per se. The parties
35 agree that Ms. Yanok does not have standing under Connecticut law to bring a custody
36 claim. She could apply for what is known as visitation and she could intervene in an
37 existing custody dispute between the parents, but she cannot bring her own custody claim.
38 An example of the authority for that proposition is a decision that has been circulated
39 amongst counsel and the parties, which is *Fish v Fish* 939 A 2d 1040.

40
41 The positions of the parties on what, if any, standing Ms. Yanok may have to apply to be

1 appointed as Cherie's guardian are not as clear. I assume for present purposes that she
2 could not apply to be a co-guardian unless she first successfully applied to have Mr.
3 Yanok's guardianship terminated: *General Statutes of Connecticut*, Chapter 802h, sections
4 45a-614 and 45a-616, with great apologies to the State of Connecticut in the way I have
5 cited their law because it is probably not in the same convention that they would expect of
6 local jurists. It also appears that as part of such an application, Ms. Yanok could apply for
7 temporary guardianship or custody, and that is set out in section 45a-607 of the same
8 chapter of the *General Statutes*. Further, I assume that Ms. Yanok or one of the other people
9 who now seem to be eager to provide information about Mr. Yanok could report the
10 situation to the child welfare authorities in Connecticut. Any of these paths would
11 presumably lead to either the state authorities or the Court making some sort of
12 determination about Mr. Yanok's fitness to act as a guardian of Cherie.

13
14 I do not have confirmation that any of these scenarios could lead to a parallel order issuing
15 in Connecticut to mirror any conditions that I might place on Cherie's return. I presume
16 that such an order might be available if there was an application to remove Mr. Yanok as
17 guardian. This is all important because otherwise, there would be no way to enforce any
18 conditions I would impose to assure Cherie's safety pending whatever process may be
19 applicable under Connecticut law. For example, if I were to order that Cherie be returned,
20 but in the care of someone other than Mr. Yanok pending proceedings in Connecticut, what
21 would prevent Mr. Yanok from simply taking Cherie from that person?

22
23 Mr. Yanok has agreed to abide by any conditions or undertakings that this Court might
24 impose on him. Though I appreciate his submission in that regard, I see no particular way
25 to ensure enforcement in Connecticut without a parallel order or some other mechanism
26 that no one has drawn to my attention. Mr. Yanok has not offered any procedure by which
27 enforcement would be available, whether through a parallel order or otherwise. In fact, his
28 own submissions question Ms. Yanok's standing to bring any proceedings other than
29 visitation in Connecticut. He has not offered to voluntarily commence any sort of fitness
30 review with local authorities.

31
32 Further, the record permits an inference that Mr. Yanok has interfered with the willingness
33 of a witness to participate in the proceedings in this Court. While Mr. Yanok disagrees with
34 the characterization that he threatened Mr. Leger, Mr. Yanok does not deny that he
35 communicated with Mr. Leger about his involvement in this matter between Mr. Leger's
36 telephone call with Mr. Blitt and the questioning under oath where Mr. Leger refused to
37 acknowledge most of the information he had previously provided to Mr. Blitt. Mr. Yanok
38 said he could produce the text messages to confirm there were no threats but he never did
39 so. This type of interference, whatever form it may have taken, undermines any willingness
40 I might otherwise have to accept undertakings from Mr. Yanok at face value.
41

1 I should note that I am not suggesting Mr. Yanok had any legal obligation to take any of
2 the steps I have just mentioned in terms of offering some sort of proceeding or process in
3 Connecticut. I merely point out that there were ways in which he could contribute to the
4 Court's confidence in assuring Cherie's safety in Connecticut if she were returned, and that
5 has clearly been an issue throughout, and he has not availed himself of any of those
6 opportunities.

7
8 In this case, there is no issue about the inherent ability of the applicable authorities in
9 Connecticut to protect Cherie. There is some suggestion in the materials that because Mr.
10 Yanok cuts the hair of, or is otherwise friendly with some police officers, that police
11 protection would not meaningfully be available. I do not find this persuasive. Rather, the
12 issue here is trying to ensure that the applicable systems can be engaged or accessed in
13 Connecticut so as to do their work.

14
15 I have considered that an option of last resort, if no others were available, would be to order
16 Cherie returned to Connecticut but into the custody of the State, with information provided
17 by the Central Authority to the State about the concerns that have been raised in this Court
18 about Cherie's well-being in Mr. Yanok's care. I do not know exactly how that would work
19 in detail, but I assume for the moment that the two Central Authorities could arrange it.
20 Then, it would be up to the applicable institutions in Connecticut to determine how to deal
21 with Cherie on either an interim or permanent basis. In other words, they could make their
22 own assessment of the concerns that have been raised and determine what further steps
23 were required. I trust those institutions to do their work and respect their ability to protect
24 Cherie, however they might so do and whatever the result may be.

25
26 I do not like the thought of taking a child from a stable and loving home with a caregiver
27 she trusts, and sending her to a process that could well involve state child welfare
28 authorities, including as a failsafe, being placed into state custody at least temporarily. I
29 am not presuming at this time that physical custody of the state would be required, as I
30 expect that there would be ways to have Cherie placed with friends through some process.
31 I am also loathe to do anything that encourages Ms. Yanok to apply to have Mr. Yanok's
32 guardianship terminated. Having some sort of co-existing parenting or guardianship
33 relationship is one thing, having his guardianship terminated is another. These parties, who
34 both love Cherie very much and have cooperated in the past, need to work towards mending
35 fences and not filing even more divisive proceedings.

36
37 However, I am equally concerned that refusing return under Article 13(b) would unduly
38 undermine the entire premise of the Hague Convention on the facts of this particular case.
39 In Connecticut, the state of habitual residence, there is no parenting or custody dispute.
40 There is no basis for a "best interests" analysis as between Mr. Yanok and Ms. Yanok. The
41 presumption at law in Connecticut is that Mr. Yanok has custody of Cherie unless he fails

1 to meet the required standard of a guardian. In those circumstances, there is even more
2 overlap than in other Hague cases between the “grave risk of harm” analysis, and the
3 analysis “on the merits” as we often refer to it. Much of the evidence is disputed, and it has
4 been over a year since the events that give rise to the allegations against Mr. Yanok arose.
5 A lot can change in a year.

6
7 Further, almost all the evidence about Mr. Yanok’s fitness to parent - which is distinct from
8 a best interest analysis between two potential custodians - is in Connecticut. Connecticut
9 provides the legal and social context for Mr. Yanok’s parenting. In these circumstances, I
10 am concerned that the operation of the grave risk of harm exception could, in effect,
11 overtake the law of the jurisdiction of habitual residence by depriving that jurisdiction of
12 the opportunity to make its own assessment on fitness, while potentially breathing life into
13 a custody dispute in Alberta that would not otherwise exist.

14
15 A UK Court once noted that the abducting parent should not gain an unfair advantage in
16 these disputes by having it determined in the place to which she has come (*In re E*
17 (*Children*) (*Abduction Custody Appeal*) [2011] UKSC 27; [2012] 1 AC 144, as cited in *Re*
18 *C* at para 22. I am concerned that if the Court refuses to return Cherie to Connecticut, Ms.
19 Yanok could gain an unfair advantage right up to the point of creating a custody dispute
20 that would never exist in Connecticut.

21
22 All of this would be in circumstances where Mr. Yanok did the right thing by
23 acknowledging that he was struggling and agreeing to have Cherie come to Canada for her
24 own good. I am not saying that the Court could never refuse return in these circumstances.
25 Article 13(b) is there for a reason. However, where there is another option - albeit not
26 entirely desirable - that allows Mr. Yanok’s fitness to parent to be decided in the
27 jurisdiction of habitual residence, while allowing local authorities to be responsible for the
28 child’s safety in the meantime, I find that it is consistent with the policy underlying the
29 Hague Convention to use it.

30
31 Whether the availability of options to protect Cherie pending any state or court action in
32 Connecticut reduces the risk of harm below the grave risk threshold, or whether the
33 exception in Article 13(b) is triggered, and I exercise my discretion to order Cherie returned
34 to Connecticut in any event, the result is the same. I would not refuse return under Article
35 13(b) of the Hague Convention.

36
37 If my finding on this particular exception were determinative, I would invite further
38 submissions from the parties as to how to arrange for return in a manner that makes the
39 most sense for Cherie, whether by parallel consent order in Connecticut or otherwise, and
40 I acknowledge the Central Authority's offer previously to assist with any arrangements in
41 that regard or obtaining information from the local court or other local authorities if needed.

1
2 ***Cherie's Objection***
3

4 Article 13 of the Convention includes a distinct exception where the court in the requested
5 state may refuse to order return of the child “if it finds that the child objects to being
6 returned and has attained an age and degree of maturity at which it is appropriate to take
7 accounts of its views.”
8

9 If the two requisite elements of objection and age/maturity are satisfied, then I have
10 discretion as to whether to return. I should exercise my discretion based on all relevant
11 facts, including, but not limited to: the nature and strength of the child’s objections, the
12 extent to which they are authentically her own, the extent to which they coincide or are at
13 odds with other items relevant to her welfare, as well as the general Hague Convention
14 considerations: *Balev* at para 81.
15

16 The evidence here, including the evidence of both parties, and the report of Dr. Singh, leads
17 to the inescapable conclusion that Cherie has attained an age and degree of maturity at
18 which it is appropriate to take her views into account. At the time of the wrongful retention,
19 she was very close to 12 years old. This is at the low end of the range of ages where it may
20 be appropriate to take a child’s view into account, but more importantly, the specific
21 uncontradicted evidence about Cherie is that she is mature and independent. I have the
22 benefit of Dr. Singh’s expert analysis in that regard, but both parties expressly acknowledge
23 her to be mature and independent as well.
24

25 I am also satisfied that Cherie objects to being returned. There was some discussion about
26 this in argument for two reasons. First, Dr. Singh’s report stated that Cherie has a clear
27 preference to remain in Canada, but did not object outright to being returned. Second,
28 Cherie’s preference is, at least in part, focused on staying with her grandmother, as opposed
29 to a particular objection to Connecticut as a jurisdiction.
30

31 In *Wilson v Challis*, [1992] OJ No 563, (QL) (OCJ, Prov. Div.), the Court found that in
32 order to apply the objection exception, the child’s wishes had to be more than a mere
33 preference and go beyond the usual ascertainment of the child’s wishes in a custody
34 dispute: at para 9. In keeping with the underlying premise of the Hague Convention, and
35 the fact that non-return is an exception, I agree that the Court should consider whether the
36 child is merely stating a preference or is actually objecting. That said, it would be
37 inconsistent with the fact-based, common sense approach confirmed in *Balev* to require a
38 child to use some particular words or to apply a rigid test. To do so could actually result in
39 children being coached or pressured into taking a stronger stance between two potential
40 homes than they otherwise would, which is counter-productive to everything that
41 everybody is trying to achieve in custody proceedings.

1
2 In this case, Cherie is not saying she would be happy to live in either place, but prefers
3 Alberta. She has been consistently clear that she does not want to return to live in
4 Connecticut and that she wants to remain in Alberta. Again I have the benefit of Dr. Singh's
5 report but also submissions of Cherie's counsel. Cherie has articulated why she wishes to
6 remain in Canada, and her concerns about returning to live in Connecticut. Her reasons are
7 intelligible and understandable. I am satisfied that Cherie's views amount to an objection,
8 as that term is used in Article 13 of the Convention.
9

10 To his credit, Mr. Yanok, through counsel, agreed that I should not put undue weight on
11 the use of the word "preference" as opposed to "objection" in Dr. Singh's report.
12

13 The second point questions what Cherie objects to. Does the Hague Convention require
14 her to outright object to being returned to the physical jurisdiction of Connecticut itself,
15 even temporarily, as distinct from objecting to going back to living with her father? The
16 examples I used with the parties in argument was a child who objects to return to a state of
17 habitual residence because they are not free to express their gender or sexuality there, or
18 because they will be conscripted into military service. Must an objection be of that nature,
19 which would apply even to a period pending a hearing on the merits of custody, or do other
20 types of objections count?
21

22 In this case, Cherie in fact wants to go back to Connecticut to see her father and her friends
23 for visits. She simply wants to remain in Alberta with her grandmother as her day-to-day
24 residence. I have considered whether this really amounts to Cherie giving her views on
25 custody or parenting, as we would call it, as opposed to objecting to return to Connecticut
26 for the purposes of any further proceeding on the merits.
27

28 I have not seen any law that requires the child's objection to be in the nature of a refusal to
29 set foot ever again in the jurisdiction of habitual residence, even on a temporary basis.
30 Further, I have not seen any law requiring the objection to be wholly articulated by
31 reference to the state, as opposed to the parent living in the state. Again, avoiding these
32 types of rigid rules is consistent with the interpretive approach set out in *Balev*. Further,
33 even if an objection to return is present, this does not mean that the child is not returned.
34 The Court simply then has a discretion to not return. All of the relevant factors, including
35 the nature and articulation of the objection, and where it fits within the underlying policy
36 of the Hague Convention, can still be considered in the exercise of discretion.
37

38 I find that Cherie's interest in returning to Connecticut for visits does not preclude the
39 application of the exception in Article 13. She objects to going back other than for a visit.
40 Further, the fact that her wishes are expressed, at least in part, by reference to wanting to
41 remain with her grandmother is not determinative. These factors must be accounted for,

1 but at least in this case, they do not negate the existence of Cherie's objection.
2

3 Accordingly, I find that the requirements of the child objection exception in Article 13 are
4 met, and I have a discretion not to order Cherie's return to Connecticut.
5

6 There are very good reasons for me to exercise my discretion and order return
7 notwithstanding Cherie's objection. They include the following, and I am going to read
8 them as a bulleted list:
9

- 10 • There is nothing inherently unpalatable about the jurisdiction of Connecticut itself for
11 Cherie. In fact, she wants to go back there to visit her dad and her friends.
12
- 13 • Presumably, Cherie could return there and whatever steps would be taken on the merits
14 could be taken before the start of school in the fall to provide her with some clarity at
15 that time as to where she would be living and going to school.
16
- 17 • Under the laws of Connecticut, there would be no parenting contest between Mr. Yanok
18 and Ms. Yanok. But for the wrongful retention, Cherie would not be heard on whether
19 she wished to stay with one or the other. Her voice may well be heard in any fitness
20 proceeding in court or in any investigation or review by state authorities, but it would
21 not be on the issue of whether she preferred to live with her father or her grandmother.
22 That issue would simply not be on the table in Connecticut unless Mr. Yanok was
23 removed as a guardian. Many teens might prefer to live with their grandparents at
24 various points in their lives, but the option is simply not available to them without their
25 parent's consent and it is not their decision to make. Comity and the *raison d'être* of the
26 Convention weigh heavily in favour of letting the institutions in Connecticut assess Mr.
27 Yanok's fitness and then take it from there as between he and Cherie.
28
- 29 • As a matter of policy, we want to encourage parents like Mr. Yanok to ask for, and
30 accept, help when they need it, not make them scared that by so doing, they will
31 suddenly be left fighting for custody in a foreign court where they are ineligible for
32 legal aid. We can already see in this case some of the challenges Mr. Yanok had as a
33 self-represented litigant in the Provincial Court proceedings.
34
- 35 • Dr. Singh has confirmed that in his opinion, Cherie is able to appreciate the reasonably
36 foreseeable consequences of her views about staying in Alberta. I have no reason to
37 doubt his opinion. That said, Cherie is young enough that we would not assume she
38 necessarily can think through all the long-term consequences of moving permanently
39 to another country, away from her father.
40
- 41 • Cherie has not seen her father for a long time now. His living situation appears to have

1 improved and perhaps through hearing Cherie's voice already in the context of these
2 court proceedings, he has gained some important insight into how some of his past
3 behaviours were difficult for her to manage. While Cherie is comfortable here in
4 Alberta, perhaps with the proper support, she and Mr. Yanok could settle back in
5 together in a re-built and even stronger relationship. I am concerned that her wishes
6 now may be influenced simply by the stability of what has become the status quo. Of
7 course, the details of her relationship with her father, where that is at, and how it might
8 evolve, are best addressed in a proceeding on the merits - whatever and wherever that
9 may be. I simply cannot get into all of those detailed and nuanced options in this
10 proceeding. It is not before me.

- 11
- 12 • Mr. Yanok has raised concerns of undue influence on Cherie's views. I am certainly
13 concerned about some of Ms. Yanok's conduct in the course of this litigation. Dr. Singh
14 notes that Cherie reported to him Ms. Yanok having shared with her past difficulties
15 with Mr. Yanok. Dr. Singh's report also reveals that Cherie is stressed because this
16 litigation is making her grandparents stressed. Further, I am troubled by the way that
17 Ms. Yanok engaged Cherie in the gathering of evidence against her father for these
18 proceedings. The record is clear that Cherie contacted Eric Leger, armed with contact
19 information for Ms. Yanok's counsel. That is completely unacceptable.

20

21 All of that said, none of these factors necessarily mean that Cherie's objection is not
22 her own. Dr. Singh's report does not raise any flags about influence. In fairness, he was
23 not asked specifically to comment on influence or alienation. However, those topics are
24 certainly topics with which he would be familiar and that we would call on people like
25 Dr. Singh to raise in other circumstances and he did not raise any flags here beyond his
26 caution to both Mr. Yanok and Mr. Yanok about how important it is that neither of them
27 inhibit Cherie's ability to express and act on her love for the other. There is also
28 evidence that Cherie has had the opportunity to see counsellors other than Dr. Singh -
29 and by saying that I am not suggesting he was her counsellor; he was playing a different
30 role - but to see other professional therapists or psychologists. I appreciate Mr. Yanok's
31 objection as to the admissibility of any of those unsworn reports, and I need not rely on
32 their content. However, the fact remains that Cherie has had opportunities to work
33 through her situation with professional support. All of that weighs in favour of an
34 understanding that her thoughts are her own.

35

36 Cherie also has the benefit of independent counsel and the Court has the benefit of
37 hearing from independent counsel. Ms. Maxwell is relaying Cherie's position and is
38 not in a position to make a diagnosis of influence or alienation, but what is important is
39 that Cherie, through Ms. Maxwell, has relayed a consistent position and wish
40 throughout. I also have the evidence of Cherie's independence and her resilience. When
41 all of this is taken together, the record as it now stands, does not support a finding that

1 Cherie's objection has been unduly influenced or is not her own.

- 2
- 3 • Many of the same concerns I outlined in respect of the application of Article 13(b) apply
4 with respect to the child objection exception. The purpose of the Convention is to
5 discourage parents or those in the place of Ms. Yanok from taking the law into their
6 own hands. I am concerned that failing to order return results in Ms. Yanok gaining a
7 benefit by doing exactly that. That is not what the Convention is designed to do. In fact,
8 it is the opposite of what the Convention is designed to do.
9

10 On the other hand, there are also strong factors weighing in favour of the exercise of
11 discretion to refuse return and again I will read them as a bulleted list.

- 12
- 13 • Cherie has relayed concerns about physical abuse, verbal abuse, instability, volatility
14 and a fear of what will happen if she is sent back to her father in Connecticut after
15 having asked to stay in Alberta. Ms. Ahearn's credibility is challenged by Mr. Yanok,
16 and has not been tested, but her evidence does provide some independent corroboration
17 for Cherie's version of events. There is authority for the proposition that a child's
18 objections to return based on fear will rarely be relied on to exercise discretion not to
19 return where the evidence has been found insufficient to make out a grave risk of harm
20 under the separate exception: *CM v BM*, 2021 ABQB 151 at para 138. However, the
21 allegations of harm have not been dismissed here. Rather, I have found that they can be
22 managed by imposing conditions on return.
23
 - 24 • As already discussed, the usual option of ordering a child returned to the jurisdiction of
25 habitual residence, but in the care of the taking parent, is not necessarily available here.
26 I do not second guess in any way how the authorities or courts in Connecticut would
27 handle this family. That is up to them. However, the circumstances to which I would
28 be ordering Cherie returned are a relevant factor in my assessment of whether to send
29 her back over her objection. In this case, the circumstances are not necessarily in the
30 care of either of her parents pending whatever process may unfold as to her father's
31 fitness. She could end up again with friends or at worst, in the custody of the state.
32
 - 33 • Cherie's objection has been consistent over the period of time that her counsel has made
34 submissions, both in the Provincial Court and in this Court, it was consistent to Dr.
35 Singh, and she has relayed the same position to both her grandmother and her father.
36
 - 37 • Cherie has a significant level of maturity and independence for a child of her age. The
38 record is clear that her life with Mr. Yanok has required her to live separately from him
39 for certain periods, to be in the care of others frequently, and on more than one occasion,
40 to move, and to adapt to living with other people as she and Mr. Yanok often did not
41 reside on their own.

- 1
2 • On this topic of maturity, I was struck by Cherie's responses to Dr. Singh when asked
3 what her three wishes would be to make her life and her family's life better. Even in
4 the middle of all of this conflict and uncertainty for her, and having stopped speaking
5 to her father as a result of what she considered the unpleasant nature of their
6 conversations about her desire to stay in Alberta, none of Cherie's answers were about
7 herself or wanting something for herself. She said:

8
9 (1) For everyone in my family to have enough extra money so they never have to worry
10 about rent or food.

11
12 (2) For my dad to always have a stream of work.

13
14 (3) And, I want him [my dad] to always have a nice house that he likes and would make
15 him happy, whether that be an apartment or a mansion.

16
17 That speaks volumes to the maturity and insight of this young lady.

- 18
19 • Cherie's approach to her objection is mature. She is not refusing a relationship with her
20 father, which is sometimes what we see when children end up in this circumstance. In
21 fact, she wants to have one and she articulates that. Cherie could have tried to bolster
22 her position in this matter by going out of her way to denigrate her father with Dr.
23 Singh. I have already noted that adults often do that in litigation, including in this case.
24 But Cherie did not do that. She told Dr. Singh that while he is unpredictable, for the
25 most part, he is kind and loving. She knows he loves her.

- 26
27 • It was Cherie, at age 11, who took responsibility for her own situation in early 2020.
28 She and her father had lost their home, there was at least what she perceived to be a
29 significant incident of abuse by her father, she and her father were living separately
30 with different friends, and then her father placed her in a home - without warning her -
31 where she was exposed to domestic conflict that made her uncomfortable. She
32 recognized that she was in a difficult situation and she called her grandmother. Cherie's
33 instincts were good. She and Mr. Yanok were in a difficult situation. Mr. Yanok himself
34 eventually recognized the untenable nature of the situation in his exchanges with Ms.
35 Yanok, which are in evidence, wherein he essentially admitted the he was in a bad
36 situation and without other options for the time being. While several people have now
37 given Ms. Yanok and her lawyer statements about how concerned they were for Cherie
38 in Mr. Yanok's care, none of them raised her situation with authorities in Connecticut.
39 In a case where the young person was left to identify and raise her own challenge in her
40 own existing living situation, all other things being equal, I am inclined to give more
41 weight to their current objection to return.

- 1
- 2 • This is not a case where Cherie fled to her grandmother's because the rules were more
- 3 lax or because she was trying to avoid some boundaries or responsibility being placed
- 4 on her at home with Mr. Yanok. There is no evidence of that sort of reasoning on her
- 5 part. There was no existing custody dispute, so it cannot be said that Cherie came to
- 6 Alberta to try to manipulate such a dispute. I would have concerns about giving effect
- 7 to a child's objection to return in those circumstances. Here, it is quite the opposite.
- 8 Cherie came with the consent of all parties in circumstances where she was
- 9 demonstrating a high level of responsibility for her own well-being.
- 10

11 This is a very difficult set of circumstances to weigh. I have told you and I have outlined

12 for you all of the factors that go both ways. There is no easy answer and I have spent hours

13 and hours thinking about this. At the end of the day, when I weigh all of these factors,

14 looking at the Hague Convention itself and its purposes, and looking at all of the particular

15 circumstances of this case, I do find that the balance weighs in favour of exercising my

16 discretion not to return Cherie to Connecticut over her objection.

17

18 Accordingly, Mr. Yanok's application under the Hague Convention is dismissed.

19

20 I want to be clear that nothing herein is intended to pronounce, nor could I pronounce on

21 the jurisdiction of the Provincial Court on the merits of guardianship or parenting.

22 Refusing return under the Hague Convention does not mean that Ms. Yanok obtains

23 guardianship or parenting, and it does not mean Cherie stays permanently in Alberta. All

24 of the details and nuances of the relationships, fitness, best interests and all of those things

25 need to be addressed in a process on the merits.

26

27 Similarly, the parties have taken different positions on Cherie's immigration status. I make

28 no pronouncement on her status in that regard. That will be up to the appropriate authorities

29 and to the extent it is relevant in the ongoing dispute on jurisdiction, guardianship,

30 parenting, or whatever it may be, it can be addressed there.

31

32 If the matter is to proceed back to Provincial Court, I do ask the parties to consider whether

33 the Provincial Court may benefit from an update proceeding in light of the passage of time

34 since the last hearing and also in light of the circumstances in which the last hearing took

35 place.

36

37 So that is the decision. Again, I can only acknowledge the humanity here. I can

38 acknowledge that a lot of that was probably very hard for both of you to hear. I hope that

39 parts of it were actually heartwarming for both of you to hear in respect of what a strong

40 and healthy young lady you both love and have contributed to her development, but I know

41 in particular, Mr. Yanok, I would be a fool not to recognize how hard that was for you to

1 hear, particularly the last part, and I acknowledge that, sir.

2
3 **Submission (Costs)**
4

5 Counsel, there are two matters left. One is whether there is any application for costs or a
6 desire to speak to costs and, if so, I don't think we will do that today, but we can determine
7 how we are going to do that. And the second is whether with a short break or not, there
8 might be a willingness on behalf of you and/or your clients, and I totally understand if
9 somebody has to go because you have other commitments or if it is just too hard for the
10 parties to keep at it today, to just engage in a short sort of a -- we might call it a rule 4.10
11 case conference where we might talk more off the record or -- it will be on the court record,
12 but more in on a without prejudice basis about a few things that have come to my mind as
13 I review this matter.
14

15 MR. BLITT: My Lady, could we deal with the matter of costs
16 by way of written submissions? I'm thinking three pages and I would submit my argument
17 -- I have to do it before the -- I could do it in a week. I -- I have got to be away for the
18 month of July for medical reasons so I would have to get the costs brief to you. And in
19 terms of any further discussions, unfortunately, I have some other obligations that I have
20 to deal with after this.
21

22 THE COURT: Okay. What time does your next appointment
23 start, Mr. Blitt?
24

25 MR. BLITT: Probably within half an hour.
26

27 THE COURT: Oh, it won't be longer than that. I mean, it
28 wouldn't be longer than that. What I was -- I have a few things I thought I might be able to
29 help by just relaying to you and the parties on sort of -- again, sort of a without prejudice
30 basis, and to the extent that once you hear those things, you say, Well, we would like to
31 have another discussion, I would certainly make myself available. I suspect you won't. I
32 suspect they are just kind of some takeaways that I would like everyone to consider.
33

34 So if you could remain for even 10 minutes, Mr. Blitt, I think it would do that. In that
35 regard, if you can't, that is fine. I understand. I didn't ask you about that in advance.
36

37 MR. BLITT: No, that's fine, My Lady. I can -- the half hour,
38 that's fine.
39

40 THE COURT: Okay. Mr. Gordon, what about three pages each
41 on costs? Is that acceptable?

1
2 MR. GORDON: Yes. Okay. Thank you.

3
4 THE COURT: Ms. Maxwell, will you be involved in costs at
5 all?

6
7 MS. MAXWELL I can be but I'm not sure I will. I -- I -- if I can
8 submit something at the same time perhaps Mr. Gordon does, I will, but I -- I need to think
9 about it and run it by some other people here at Legal Aid.

10
11 THE COURT: Of course. Of course. Okay. So why wouldn't we
12 say no more than three pages each on costs. Of course, if I, after reading them, think I need
13 to hear from you, I will let you know, but I doubt that would be the case. If Mr. Blitt -- you
14 know, why don't we say if you could have yours in by the 25th of June that gets it off your
15 plate before you go away.

16
17 MR. BLITT: Yes, My Lady.

18
19 THE COURT: And then your friends could respond by, say, the
20 5th of July. I -- I wouldn't anticipate there is much of a need for a reply here.

21
22 MR. GORDON: That's fine. Thank you, Ma'am.

23
24 THE COURT: I am not sitting in July so I don't guarantee
25 exactly when I will get to it, plus I tend to deal with costs after I have got more reserves on
26 the merits out but, anyway, it will be there.

27
28 **Discussion (Rule 410 Case Conference)**

29
30 Okay. So can we just have a short kind of a without prejudice type or a -- you know, the
31 type of discussion we'd have more in an EICC or a case conference. Is that agreeable to
32 everyone?

33
34 MR. GORDON: Yes.

35
36 THE COURT: Mr. Gordon?

37
38 MR. GORDON: Yes.

39
40 MS. MAXWELL That's fine.

41

1 MR. BLITT: Yes, My Lady.

2
3 THE COURT: Ms. Berlin? Okay.

4
5 So first of all, I just want to say to the parties that I know some of the comments and the
6 findings I have made will sound harsh to you, critical of conduct that you have had. I don't
7 resilie from them at all. I made the findings that I felt were fair on the record and that I
8 needed to make, but I want to say that I realize that both of you love Cherie so much and
9 in many ways you are desperate and you feel the pressure of these court proceedings and
10 trying to boost yourself up and take the other one down, and I talked to you about that last
11 time and I am not going to repeat it, but I can see the damage that the litigation has done
12 and is doing here.

13
14 So we started -- when I look at all of these documents, we started with both of you
15 cooperating. You may not be best friends. You may have bones to pick with each other but
16 you are going back and forth talking about Cherie, and you are cooperating and you
17 cooperate to bring her to Calgary and then now we have devolved into where we are today
18 with mudslinging, and so far Cherie is rising above all of that but what Dr. Singh is telling
19 us is that that may not continue and that we have to look for ways to bring the conflict to a
20 close or at least take the temperature down.

21
22 I am concerned here about, you know, that there's these provisions in the Convention that
23 talk about trying to resolve things and yet there doesn't seem to be any particular way to
24 put those into effect. You know, for example, here it is not clear that Mr. Yanok was even
25 ever asked about whether he would agree to Cherie staying for another year before
26 litigation was more or less under way, and I think it is really hard and I think Mr. Yanok
27 may have taken a break. Mr. Gordon and I totally understand that. I mean, it is just -- he is
28 in a rough position today so I would ask you to pass this to him perhaps when the time is
29 appropriate.

30
31 But I think it is really hard for Mr. Yanok and would have been very hard for him to agree
32 to having Cherie stay in Alberta when that was being proposed to him on the basis that he
33 was a terrible father because what it does is it leaves this person in this terrible position
34 that they feel like if they agree to her staying, they are acknowledging that they are a terrible
35 father. And so, I am hoping that maybe, counsel, you can put your heads together when it
36 is appropriate, when the parties have had a little chance to digest things, and try to rewind
37 some of that. Take some sticks off the bonfire that I talked about last time.

38
39 So, you know, if we start by recognizing that Cherie is a great kid according to everyone,
40 you know, Ms. Yanok, please consider whether -- whether she's -- you know, the position
41 so far and, again, I appreciate the distinction between the position that has to be taken in

1 litigation and sometimes even what we feel in our heart. I don't know where your heart is
2 at. That is not for me to inquire. But perhaps instead of saying that Cherie is a great kid in
3 spite of Mr. Yanok, to recognize that he has contributed to her being a great kid whatever
4 -- whatever challenges he may have as a parent and we all have. Stop focussing on all the
5 bad things and focus on the positive.

6
7 And for Mr. Yanok I am hoping that maybe someone can help him see that you can be a
8 great parent and still allow your child to move away if that's -- for whatever reason, and I
9 think of kids that go to boarding school to obtain some sort of particular educational
10 opportunity. I think of kids that go off where I am from in small town Saskatchewan. They
11 go off and live with a relative in another town or a city so they can play hockey and -- or
12 they live not even with a relative. They live with a billet or sometimes they just happen to
13 have a relationship with an aunt or an uncle or somebody that just works better at certain
14 points of their lives. And none of those situations mean that the -- let's say the original
15 custodial parent is a bad parent. Not at all. In fact, often they are cases of a parent sacrificing
16 their own best interest and really, really missing their child in favour of supporting the child
17 in some endeavour that they want to undertake.

18
19 And, Mr. Yanok, I see you are back on camera. You should feel free to come and go as
20 you please, sir. You are having a difficult afternoon and what I have asked is that Mr.
21 Gordon, to the extent you aren't present for all of this that he relay it to you later at a time
22 when you might be in a better position to take some of it in. Okay. But basically what I am
23 saying, Mr. Yanok, I am not telling you what to do. I am not saying what I would do on
24 parenting. That is not my decision to make and I don't have it all in front of me. What I am
25 saying though is I want you to consider, sir, that there are lots of circumstances where
26 parents agree to have their child live somewhere else, whether that is boarding school or
27 with a billet to play sports or with a relative, all to further the child's interests, and it does
28 not mean that the parent who agrees to do that is a bad parent. It does not mean that at all
29 and it doesn't have to be an acknowledgement of the allegations that are being made against
30 you, sir.

31
32 So, again, I am not making any findings or directions, I am just trying to offer after all the
33 time I spent with this file another potential -- some other potential ways of looking at it for
34 everybody. It would be up to the parties and counsel, obviously, to try to figure out if there
35 is a way of making any of that feasible. I have talked about what I hope Ms. Yanok can see
36 in terms of what Mr. Yanok has brought to the table for Cherie already. I also hope that
37 Mr. Yanok can see, and I think he does, that Ms. Yanok cares very much for Cherie and is
38 fortunate to have Ms. Yanok and -- as a presence in Cherie's life, particularly at a time
39 when all of her biological grandparents are not available to her, her mother is not available
40 to her. And so a relationship with one parent figure does not have to diminish the
41 relationship with the other. Kids have so much love they can give in their heart to lots and

1 lots of people. So having a relationship with one does not have to be to the sacrifice or at
2 the detriment of another.

3
4 So, again, I hope that both of you can just consider whether there are some
5 acknowledgements that you can make in your heart and to the other person about the
6 important role that they have played and that they will continue to play for Cherie and to
7 celebrate the fact that Cherie has two people who love her very, very, very much and want
8 to try to do what is best for her, because not all kids have that. So that is actually a positive
9 not a negative to fight about.

10
11 I also just want to say to you that it is never too late for either of you to say -- in spite of
12 all the affidavits that have been filed, it is never too late to say, I got carried away in the
13 litigation, can we fix this. I have told you before that sometimes you need professional help
14 to do that. I am not a psychologist but I will say to you that on my reading of the affidavits
15 they suggest to me that at least some of this may well have roots in your relationship that
16 went back way prior to Cherie even being born. They may have roots in your respective
17 relationships with Peter, and you cannot let any old hurts and frustrations interfere with
18 Cherie's wellbeing now, and you may need help to resolve those between the two of you
19 and that is okay. It would be expected.

20
21 To the extent that you need legal backstop on anything you might be able to come up with,
22 your lawyers can help you with that, and I just urge you to think outside the box. This
23 doesn't have to be all or nothing. Get creative. Okay. So is there a way -- and, again, I am
24 just throwing things out. I am not -- this is no court authority. I am not saying this is how
25 it should be, but is there a way that Cherie can stay here in Alberta for a certain time by
26 agreement while she undergoes a therapy process with her dad to try to mend what has
27 happened between the two of them, get them back on a path, and at the same time Mr.
28 Yanok might undergo some parenting courses or some -- his own therapy in Connecticut
29 to try to help him have better insight into how some of his conduct was affecting Cherie.

30
31 And then have it all be reviewable at some point to see where Cherie is at, and maybe by
32 them she -- with some visits in the meantime and seeing where Mr. Yanok now lives,
33 maybe by then she would feel comfortable and everybody would feel comfortable that it
34 was time for her to go back to Connecticut. Or maybe she goes back to Connecticut now
35 with the appropriate supports in place, but with an idea that everyone will plan on her doing
36 an exchange year in Alberta with her grandma in grade 10 or something like lots of kids
37 go away on an exchange at that point in time. I don't know and, again, I am just throwing
38 out ideas, just brainstorm just to try to urge you to think creatively and not to think of
39 everything as an all or nothing, it is here or there or it is here with 6 weeks there. I think
40 there are some other options.

41

1 Of course they have to be in Cherie's interests. This is not about people's rights as parents
2 or grandparents. It is about her interests once you are past, you know, the point that I have
3 been dealing with, but I just urge you to be kind to each other. I urge you to -- to try to
4 really think about the benefits that each of you can bring for Cherie and I urge counsel to
5 try to help these parties think whether there is a creative solution that is different than just
6 going back for more court.

7
8 MR. GORDON: Madam Justice Grosse, would you be -- I'm just
9 -- I haven't spoken to my client -- willing to be further involved? I'm thinking of a JDR or
10 something like that or would you consider yourself functus.

11
12 THE COURT: I am certainly functus after this decision in terms
13 of any judicial authority I have. If the parties both by agreement came and said we would
14 like you to try to do, whether it is an EICC or a JDR or something like that, I would certainly
15 entertain that, Mr. Gordon, assuming our schedules could work and that sort of thing. Of
16 course, I would entertain that, but it would have to be, I think, by agreement of the parties
17 at this point in time.

18
19 MR. GORDON: Thank you.

20
21 THE COURT: And be clear, there would be no offence taken if
22 someone doesn't agree to that. Okay. I totally understand. But anyway, I am starting to
23 ramble now because obviously this is not scripted. This is just from my heart to all of you
24 after reviewing your matter and just trying to offer you a little bit of that insight or that
25 third party views that you might get in something like an EICC or a JDR. I am happy to
26 entertain any further discussion or questions. I also know it has been a really long afternoon
27 for all of you and that you probably have other things to do so I am really in your hands
28 about where we go from here. Thank you for hearing me on those points.

29
30 MR. GORDON: Thank you.

31
32 MS. MAXWELL This is Ms. Maxwell, but I'm just thinking,
33 counsel, that we should maybe schedule a conference maybe later next week to sort of talk
34 about this. I don't know if Ms. Berlin wants to be involved or may even be able to help try
35 and mediate something. You know, I -- I want to talk to Cherie but I think those were all
36 really good ideas that came out. I mean I think we still -- I can't remember, Mr. Blitt, if you
37 have already submitted, you know, possible parenting plans to Judge Airth or not. I -- I sort
38 of forget myself whether we went that far because that was our direction, but before we do
39 that maybe we can come up with some consent.

40
41 MR. BLITT: We did submit parenting plans. I just pulled mine

1 up as well as saw your own. Could I also ask the -- the clerk for the courtroom number? I
2 just --

3
4 THE COURT CLERK: It's courtroom 1602.

5
6 MR. BLITT: Thank you, sir.

7
8 But I'll talk to my client about the JDR. I will say, My Lady, we did offer that before your
9 ruling. I'll see if my client is still inclined to -- to participate. I don't -- I don't know at this
10 stage. I think we've got to let the dust settle.

11
12 THE COURT: I know. Of course you do, and also I want to be
13 clear, I mean I say all these things, I haven't been there for all the discussions. I don't know
14 what has been filed various places, what has been offered so, you know, it is easy for me
15 to sit here and talk and I don't know all the details, and I am very, very aware of that. I just
16 I feel as part of my obligation to at least throw out those thoughts for you in case they
17 haven't been covered. If they have, you know, so be it.

18
19 So it sounds to me like maybe we would break for today. Again, as I said, I would
20 encourage you to think, if you are going to back to Provincial Court about whether you
21 need, you know, someone will want to ask to at least have that opened up and not just have
22 a decision given. The time has passed but that is up to you. I can't direct that. So I guess all
23 I can say at this point is that I want to thank you for your patience this afternoon. I am sure
24 when you heard that you were getting an oral decision you did not think you were going to
25 be on here for two and a half hours. I didn't really think so either but it took a little longer
26 than I thought. So I really appreciate your patience. I appreciate the participation of both
27 parties in this so very much. I appreciate all of the work counsel has done. Thank you,
28 mister clerk, for sticking with us, and I just really wish all the best to Cherie and all the
29 best to all of you. I really hope that there is a path forward here that -- that can work for
30 everyone whether it is agreed or imposed.

31
32 MR. BLITT: Thank you, My Lady, for all your time and
33 efforts and the concern that you have exhibited about Cherie and the parties. Thank you.

34
35 MS. MAXWELL Thank you.

36
37 MR. GORDON: Thank you very much, Ma'am.

38
39 THE COURT: Thank you all very much. Good day to you.
40 Thank you, mister clerk. We are adjourned.

41

1 THE COURT CLERK:

Thanks.

2

3 MS. BERLIN:

Thank you, My Lady.

4

5 MS. MAXWELL

Thank you.

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9 PROCEEDINGS CONCLUDED

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1 **Certificate of Record**

2
3 I, Garry Squirell, certify that this recording is the record made of the evidence in the
4 proceedings in the Court of Queen’s Bench held in courtroom 1602 at Calgary, Alberta on the
5 17th day of June 2021, and that I was the court official in charge of the sound-recording
6 machine during the proceedings.
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1 **Certificate of Transcript**

2
3 I, Marcey Lepka, 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 Marcey Lepka, Transcriber

13 Order Number: AL16440

14 Dated: June 20, 2021

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