Court of Queen's Bench of Alberta

Citation: RVW v CLW, 2021 ABQB 531

Date: July 9, 2021
Docket: FL01 28628
Registry: Calgary

Between:

R.V.W.

Applicant

- and –

C.L.W.

Respondent

Memorandum of Decision
of the
Honourable Mr. Justice O.P. Malik

I. Introduction

[1] This matter came before me in morning Family Chambers on June 15, 2021. The parties provided written submissions on June 22 and June 24, 2021 and made further oral argument on June 25, 2021. I received additional Affidavit evidence from the parties on July 5 and 8, 2021.

[2] The Applicant father seeks an order pursuant to section 2(1) of the *Extra-Provincial Enforcement of Custody Orders Act*, RSA 2000, c. E-14 ("*EPECOA*") to enforce a final Decree of Divorce granted by the District Court of Harris County, Texas, U.S.A., on May 3, 2021 whereby the District Court ordered that the Respondent mother return the parties' child to the father in Harris County, Texas, by no later than May 9, 2021.

[3] Section 2(1) of *EPECOA* states as follows:

> A court, on application, shall enforce, and may make any orders it considers necessary to give effect to, a custody order as if the custody order had been made by the court unless it is satisfied on evidence adduced that the child affected by that custody order did not, at the time the custody order was made, have a real and substantial connection with the province, territory, state or country in which the custody order was made.

[4] Section 1(1)(c) of *EPECOA* defines "custody order" as follows:

> An order, or that part of an order, of an extra-provincial tribunal that grants custody of a child to any person and includes provisions, if any, granting another person a right of access or visitation to the child.

[5] Alternatively, the father seeks an order for the return of the child to Texas pursuant to this Court's *parens patriae* jurisdiction.

[6] The mother asserts that the child's welfare is at risk if he is returned to his father in Texas and argues that I should decline to order his return pursuant to sections 3(1), 3(3)(a) and 4 of *EPECOA* which state as follows:

[7] Section 3(1)

> A court may at any time by order vary a custody order as if the custody order had been made by the court if it is satisfied;
>
> (a) That the child affected by the custody order does not, at the time the application for variation is made, have a real and substantial connection with the province, territory, state or country in which the custody order was made or was last enforced, and
>
> (b) That the child has a real and substantial connection with Alberta or all the parties affected by the custody order are resident in Alberta.
>
> Section 3(3)(a)
>
> In varying a custody order under this section, the court shall give first consideration to the welfare of the child regardless of the wishes or interests of any person seeking or opposing the variation.
>
> Section 4
>
> Notwithstanding anything in this Act, when a court is satisfied that a child would suffer serious harm if the child remained in or was restored to the custody of the

> person named in a custody order, the court may at any time vary the custody order or make any other order for the custody of the child that it considers necessary.

[8] The mother further relies on Articles 12 and 13(b) of the *Convention on the Civil Aspects of International Child Abduction* (the "*Convention*") adopted by the *International Child Abduction Act*, RSA 2000, c. I-4, which stipulate that:

> Article 12
>
> Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.
>
> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.
>
> Article 13
>
> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that
>
> ...
>
> b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

II. The Facts

[9] This matter has some history in courts in both Alberta and Texas. In Alberta, this matter was considered by the Alberta Court of Queen's Bench in ***RVW v CLW***, 2019 ABQB 175, and by the Alberta Court of Appeal in ***RVW v CLW***, 2019 ABCA 273.

[10] The facts are not in dispute.

i. The Parties

[11] The father is a U.S. citizen. In 2015, the parties lived in Alberta while the father was in Canada on a Visitor Visa. In 2017, the parties moved to Texas and were married. The child was born in Texas in September 2017. The parties separated in December 2017 and shortly thereafter, the father filed a Petition for Divorce against the mother in Harris County, Texas.

ii. First Wrongful Removal and the Alberta Courts' Decisions

[12] In January 2018, the mother flew from Texas to Calgary with the child without the father's consent.

[13] In June 2018, the father brought an application before the Alberta Court of Queen's Bench in Calgary for the child's return.

[14] The application was heard by a Justice of the Alberta Court of Queen's Bench who considered two issues:

a) Was the child's removal from Texas a wrongful removal pursuant to Article 3 of the *Convention* such that he should be returned pursuant to Article 12 of the *Convention*?

b) If the child's removal was wrongful pursuant to Article 3, should the Court refuse to order his return pursuant to Article 13(b) of the *Convention* on the basis that there was a grave risk that returning the child would expose him to physical and psychological harm by the father or otherwise place the child in an intolerable situation?

[15] With respect to the first question, the Court found that the child was habitually resident in Texas prior to his removal. Under Texas law, each of the parents was the child's joint custodian, conservator, and guardian. The child's removal from Texas breached the father's custody rights. Consequently, the Court found that the child's removal from Texas was a wrongful removal pursuant to Article 3 of the *Convention*.

[16] On the second question, the Court concluded that while the parties' high conflict relationship involved incidents of physical and verbal altercations with allegations made by the mother regarding the father's excessive alcohol consumption and physical abuse, the mother failed to meet the high standard required by Article 13(b) of the *Convention*. The Court held that any concerns about the suitability of the father as a parent were best addressed by the Texas courts.

[17] The Court ordered that the child be returned to Texas.

[18] The mother appealed to the Alberta Court of Appeal.

[19] The Court of Appeal affirmed the lower Court's decision and found that the *Convention* does not entitle a parent to unilaterally take a child and go "forum shopping" (para 19). In its view, parenting issues should be decided by the courts in the child's habitual residence: Harris County, Texas. The Court of Appeal found that the exception allowable under Article 13(b) of the *Convention* for "grave risk" does not entitle a court in the receiving jurisdiction to make decisions about what parenting arrangements are in the child's best interests and that "parenting issues are to be left to the court of [the child's] habitual residence which must decide on primary residence, protection orders, spousal support and related issues" (para 19).

[20] Further, the Court of Appeal found that while the *Convention* does not generally recognize that an "intolerable situation" includes a parent's inability to return to the place where the child habitually resides due to immigration reasons or the inability of a parent to support him or herself in that jurisdiction, it recognized that there may be circumstances where a parent's separation from a child may constitute an "intolerable circumstance" such that no return should be ordered pursuant to Article 13(b) of the *Convention*.

[21] The Court of Appeal concluded that the parties had already invoked the jurisdiction of the Texas courts and that the child was habitually resident in Texas. The Court ordered the mother to return to Texas with the child.

[22] The Court of Appeal issued the following order:

- The father to pay the mother the sum of $1,500.00 to cover her travel expenses back to Texas;
- The father to provide an undertaking that the child be allowed to reside with the mother until the Texas court rules on the issue of the child's primary residence and that the father pay the mother monthly support in the sum of $2,500.00 USD commencing August 2019 unless otherwise directed by a Texas court; and
- The mother to return to Texas with the child within 15 days of the father fulfilling the above term of the Order.

[23] The mother returned to Texas with the child in July 2019.

iii. The Agreement

[24] In September 2019, the parties entered into a Mediated Settlement Agreement (the "Agreement") in Harris County, Texas.

[25] The Preamble to the Agreement states as follows (emphasis is the original):

> **THE FOLLOWING MEDIATED AGREEMENT IS NOT SUBJECT TO REVOCATION AND IS ENTERED INTO PURSUANT TO SECTIONS 153.0071 OF THE TEXAS FAMILY CODE. THIS AGREEMENT IS SIGNED BY EACH PARTY TO THE AGREEMENT AND EACH PARTY'S ATTORNEY WHO IS PRESENT AT THE TIME THE AGREEMENT IS SIGNED. A PARTY IS ENTITLED TO JUDGMENT ON THIS MEDIATED SETTLEMENT AGREEMENT NOTWITHSTANDING RULE 11, TEXAS RULES OF CIVIL PROCEDURE OR ANOTHER RULE OF LAW.**

[26] Clause 1 of the Agreement stipulates that "[a]ll parties agree that this agreement, as set forth below in Schedule A and B is in the best interest of the child/children the subject of this suit and is entered into for no other reason". Clause 7 reiterates that the Agreement is made "because it is in the best interests of the child".

[27] Clause 3 states that the Agreement is "performable in Harris County, Texas, and must be construed in accordance with Texas law."

[28] Clauses 4 and 5 acknowledge that the parties have entered into and signed the Agreement willingly. The mother entered into the Agreement with the benefit of legal counsel.

[29] Schedule A to the Agreement deals with various parenting and support issues:

- The father and the mother are appointed joint managing conservators of the child and are subject to the Texas Family Code (clause 1);
- The child's residence is "in Harris [County] and/or contiguous counties" (clause 2);
- The father to pay child support to the mother (clause 3);
- The mother to surrender her and the child's passports to her lawyer;
- The father and the mother are enjoined from "hiding or secreting the child from the other party";

- **THE CHILD IS NOT TO BE REMOVED FROM THE STATE OF TEXAS BY EITHER PARTY** (Clause 14);
- **THE CHILD IS NOT TO BE REMOVED FROM THE STATE OF TEXAS BY EITHER PARTY. THE CHILD IS ALLOWED TRAVEL WITHIN THE STATE OF TEXAS ONLY**.

iv. The Second Wrongful Removal

[30] In March 2020, contrary to the provisions of the Agreement, the mother flew with the child to Alberta without notifying the father and without having obtained his consent.

[31] In April 2020, the father filed a Notice regarding the child's abduction with the Central Authority for the Province of Alberta pursuant to Article 16 of the *Convention*.

v. The Agreed Temporary Order

[32] In May 2020, the District Court of Harris County in Texas granted an Agreed Temporary Orders In Suit Affecting Parent-Child Relationship ("Agreed Temporary Order"). Essentially, the Agreed Temporary Order ratified the terms of the Agreement on an interim basis subject to a final decree being granted by a Texas court.

vi. The Final Rendition

[33] The parties' divorce trial took place over the course of four days in December 2020 and in March 2021. Each of the parties testified and was represented by legal counsel.

[34] In April 2021, the District Court in Harris County, Texas rendered a Final Rendition, Findings of Fact and Conclusions of Law ("Final Rendition") in respect of the father's divorce petition. The Final Rendition provided a determination of the parties' various parenting issues that they had litigated at trial.

[35] The District Court made several findings of fact, including:

- The Agreement "did not designate either parent as having the temporary exclusive right to establish the child's domicile and residence. In lieu thereof, on a temporary basis, the child's residence was restricted to Harris County, Texas" (para D);
- At no time during which the child resided exclusively with the father from September 2019 to March 2020 "did the mother allege the father had ongoing drug/alcohol issues impairing his ability to provide for the best interests of the child" (para E);
- The mother had taken the child and "fled" to Canada and subsequently "…has remained in Canada…with no effort to re-establish residence in Texas. The father is unable to re-enter Canada. There is nothing precluding the mother from re-entering the United States" (para F);
- The District Court rejected allegations made by the mother against the father regarding the "criminal" nature of sexual abuse and inappropriate behavior towards her and the father's former partner's daughter, and determined that the father was credible. The District Court found that the father's residence in Harris County was stable and that he had family in the area to provide him with support (para G);

- Allegations made by the mother and various witnesses against the father regarding his past alcohol and drug abuse, physical abuse of his previous partner, threats made by him towards the mother, and the mother's fear for the child's safety were found to be "exaggerated". The District Court noted that the father's drug test came back negative (para I);
- The mother had not provided evidence that the father's "present environment constituted a serious immediate question concerning the welfare of the child" or that there was a "serious and immediate question concerning the current welfare of the child while in the father's continuous and unsupervised extended period of possession" (para I); and
- There was no evidence provided by the mother that "she intended to ever comply with the orders of any Court, domestic or foreign" (para J).

[36] Having considered the evidence, the District Court appointed the parties as the child's joint managing conservators. With respect to the father's rights and duties, the Court held that:

- He was to have the exclusive right to establish the child's domicile and residence within the continental U.S. unless the mother established a residence within or near Harris County, Texas within 6 months of the date of the District Court's decision, in which case the child's residence and domicile would be with the father in or near Harris County, Texas (para 2(a)); and
- He alone would maintain the child's U.S. and Canadian passports (para 2(g)).

[37] The mother was granted parenting rights provided she surrendered the child's U.S. and Canadian passports to the father and that she was "compliant with other terms set forth in this order to prevent international abduction" (para 3).

[38] The District Court additionally found that the mother's actions constituted international abduction of a child and imposed supervised access until no longer necessary (para 5(a)); that the mother could only spend time with the child at a "designated supervision site" and was not to remove the child from the Continental U.S. (para 5(b)); that the mother post a bond or security deposit in the sum of $25,000.00 USD to offset the cost of recovering the child from a foreign country (para 5(c)); that the child's removal from Texas was in contravention of the Agreement and in contravention of the rulings of the Alberta courts (para 5(d)); and that there is significant risk of the child being internationally abducted due to the mother's lack of connection to the U.S. and her continuing refusal to return the child to the U.S. (para 5(f)).

[39] The District Court concluded that the child's habitual residence is Texas (para 5(e)), and ordered the mother to return the child to the father in Harris County, Texas by no later than May 9, 2021.

vii. The Final Decree

[40] On May 3, 2021, the District Court issued a Final Decree of Divorce ("Final Decree"), whereby the Court found that:

- The child was wrongfully removed from Texas in breach of the Agreement, Temporary Order and contrary to the Alberta Courts' rulings;

- The child's habitual residence is Texas;
- The child must be returned to Texas and surrendered into the father's custody by no later than May 9, 2021;
- The father shall have the exclusive right to designate the child's primary residence within the continental U.S.A.;
- The child's primary residence shall be within the continental U.S.A. and the child shall not be removed from the continental U.S.A. for the purpose of changing the child's primary residence without a court order;
- The mother has engaged in child abduction and has refused to comply with court orders;
- The mother's parenting be continually supervised by the Harris County Domestic Relations Office (Supervised Program);
- The mother may qualify for unsupervised parenting time upon having surrendered the child's U.S. and Canadian passports to the father on May 9, 2021 and having complied with the terms and conditions granted under the Protection Order Against Risk of International Abduction;
- In any event, the mother must surrender the child's U.S. and Canadian passports by no later than May 9, 2021;
- The mother is prohibited from: exercising parenting time other than at a designated supervision site, removing the child from the continental U.S., and applying for a new or replacement U.S. or Canadian passport or international travel visa; and that
- The mother is to pay the father child support.

[41] The Final Decree issued the following Notice to State and Law Enforcement Agencies and the United States Custom Border Protection (emphasis is the original):

> **YOU MAY USE REASONABLE EFFORTS AND MEASURES TO ENFORCE AND TO PREVENT THE ABDUCTION OF THE CHILD... BY [THE MOTHER], A PARENT OF THE CHILD OR SOMEONE ACTING ON HER BEHALF.**
>
> **ADDITIONALLY, YOU MAY USE REASONABLE EFFORTS FOR THE PREVENTION OF INTERNATIONAL PARENTAL CHILD ABDUCTION SPECIFIED IN THIS ORDER AND PURSUANT TO THE TITLE III OF THE INTERNATIONAL CHILD ABDUCTION PREVENTION AND RETURN ACT (ICAPRA).**

[42] The Final Decree confirmed the various parenting orders issued by the District Court in the Final Rendition.

[43] In June 2021, the mother's lawyer filed a Notice of Appeal, a Stay of Enforcement of the Final Decree and a Motion to Modify the Final Decree (the "Appeal Proceedings").

[44] On June 21, 2021, The Texas Court of Appeals denied the mother's application to stay the Final Decree pending a determination of the Appeal Proceedings.

III. The Mother's Arguments

[45] The mother advances four broad arguments in support of her position that I should not order the child's return to Texas. I will address each in turn.

i. The Best Interests of the Child and Irreparable Harm

[46] First, the mother asserts that she cannot enter the U.S. and would therefore be separated from the child for the foreseeable future. This, she says, constitutes an "intolerable situation" pursuant to Article 13(b) of the *Convention*.

[47] Initially, the mother was able to live in the U.S. on a temporary tourist Visa pending a determination of her application for permanent residency. The father was her green card sponsor. The mother states that she was denied her green card in January 2019 because the father refused to attend her green card interview. She asserts that as the appeal period of her green card denial has now expired, it is unlikely that she will be issued a new tourist Visa. She does not know of anyone else in the U.S. who might sponsor a new green card application. Consequently, she argues that she would be precluded from visiting the child if he is returned to the U.S.

[48] However, in her Affidavit sworn on January 28, 2019, the mother deposed that "[b]ecause I did not show up [for my green card interview] I am now informed by US immigration there is a denial to a possible green card for me".

[49] The Alberta Court of Queen's Bench considered the mother's argument that her inability to visit the U.S. constituted an "intolerable situation" pursuant to Article 13(b) of the *Convention* such that the child should not be returned. At para 20 of its decision, the Court held:

> ...[the mother] links her reason for not attending the interview to her return to Canada and what she says is [the father's] stated opposition to her obtaining a green card. That explanation is inadequate given that by December 2018 [the mother] knew that this matter was before this Court, and that [the child] was subject to a potential removal order. She cannot fail to fully explore opportunities to be with her son should he be returned to Texas, and then use that failure to suggest his return to Texas would create an intolerable situation.

[50] I agree. In any event, I am not prepared to disturb the findings of the Alberta Court of Queen's Bench which held that, notwithstanding the father's blameworthiness, the mother's failure to exhaust all avenues reasonably available to her in obtaining a green card cannot now be used by her as the basis for arguing that her inability to return to the U.S. constitutes an "intolerable situation".

[51] Further, the mother states that she has "new evidence" before me regarding the father: she alleges abuse against his children from a previous relationship, alcohol abuse, failure to provide the child with health care, and an inability generally to properly care for the child. I do not find that the mother can meet the test for the introduction of fresh evidence (***CCO v JJV***, 2019 ABCA 356 at para 12) and in any event, her counsel fairly conceded that what the mother calls "fresh evidence" has previously been considered by the courts although it is new evidence before me.

[52] I do not find that the mother's evidence regarding the father's suitability as a parent is "new evidence" in respect of these proceedings. The mother's allegations regarding the father's abuse, alcohol addiction and general parental unsuitability have already been considered by the

Alberta and Texas courts and I am not prepared to disturb any findings of fact and credibility that those courts have reached. The District Court made specific findings following a four-day trial in which it concluded that the father is credible, that the mother's complaints against him and her fear for the child's safety are "exaggerated", that the father has a stable residence and supportive family to help him raise the child, and that there are no serious or immediate concerns regarding the child's welfare while in the father's care.

ii. The Father Should be Barred from Seeking Relief while in Contempt of Court

[53] Second, the mother argues that the father is in contempt of the undertakings he provided to the Alberta Court of Appeal as a pre-condition for the child's return to Texas in July 2019. The mother states that while he satisfied his obligation in respect of her travel expenses, he has only paid her two of the support payments that he should have made. In the result, the father should not be permitted to seek relief from this Court while he remains in contempt of the Alberta Court of Appeal's Order.

[54] The father says that he has complied with his undertaking to the Alberta Court of Appeal regarding payment of support to the mother. He asserts that he paid the mother child support from July 2019 to September 2019 when the parties entered into new terms for support pursuant to the Agreement. Clause 3 of Schedule A of the Agreement stipulates that the father has paid the mother support as per his undertaking to the Alberta Court of Appeal and states that the father will pay the mother ongoing child support as per the guidelines of the Texas Family Code. I have no evidence before me that the father has not paid support in accordance with terms of the Agreement or with subsequent Texas court orders. In any event, whether the father has fulfilled his support obligations under Texas law is a matter to be determined by the Texas courts.

[55] While I do not find that the father is in contempt of court, I conclude that the mother is in breach of her various obligations.

[56] The mother is in breach of the Alberta Court of Appeal's decisions that designated Texas the appropriate venue for dealing with the parties' parenting issues and which ordered the child's return to Texas. The mother is in further breach of the terms of the Agreement which she agreed were in the best interests of the child, prohibiting the child's removal from Texas and requiring her to surrender her and the child's passports to her lawyer. The mother is also in breach of the terms of the Temporary Order. Finally, the mother continues to be in breach of the Final Decree which, amongst other things, required that the mother return the child to the father's care in Texas by no later than May 9, 2021.

iii. Stay Pending Appeal of the Texas Court Decision

[57] Third, the mother argues that I should stay my decision of the father's application pending the outcome of her Appeal Proceedings filed in Texas. I am not prepared to do so.

[58] In family law cases, the tripartite test for the stay of an order (***RJR-MacDonald Inc. v Canada (A.G.)*** 1994 1 SCR 311) is modified such that the best interests of the child impacts each part of the test: "[f]undamentally, the decision as to what the child or children's best interests are, ultimately, is of central importance in relation to an application for a stay" (***CLS v BRS***, 2013 ABCA 349 at para 11).

[59] With respect to the first branch of the test, I accept that there is a serious question in respect of the Appeal Proceedings. But I have no "fresh evidence" before me that would allow

me to conclude the second and third branches of the test in the mother's favor. Indeed, the previous findings made by the Alberta and Texas courts, particularly the District Court of Appeal's findings of fact in its Final Rendition lead me to conclude that it is in the best interests of the child that he be returned forthwith to his habitual residence in the care of his father and that the child would not suffer harm as a result. And, in any event, the Agreement expresses what the parties believed to be in the child's best interests – that the child's residence is Harris County, that the child not be removed from Texas, and that the mother surrender the child's passports to her lawyer.

[60] As the District Court concluded, there was no evidence provided by the mother that she "intended to ever comply with the orders of any Court, domestic or foreign". I have similar concerns. Further, I am not prepared to grant the mother the benefit of a stay which would allow her to prolong her continuing breach of the Final Decree and her continuing denial of the father's legitimate parental rights.

iv. The Child's Established Residence is Alberta, Not Texas

[61] Fourth, the mother asserts that as the child has now lived in Alberta for over a year, his established residence should be Alberta, not Texas. The mother's argument derives from Article 12 of the *Convention*.

[62] The father served Notice of the child's wrongful removal on the Central Authority in Alberta in April 2020. The parties agree that merely providing Notice in this way does not constitute "the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is" pursuant to Article 12 of the *Convention* (***M (VB) v J(DL)***, 2004 NLCA 56 at paras 26-31; ***CB v BM***, 2021 ABQB 151 at paras 47-59) as it is this Court, not the Central Authority, that ultimately has the jurisdiction and authority to return a child pursuant to the *Convention*.

[63] In answer to my question as to why the father delayed commencing proceedings in Alberta, he said that he waited to receive the Final Decree before taking legal action. While that may not have been advisable, I hesitate to find fault with the father's delay in commencing these proceedings so long after he filed his Notice.

[64] Where, as here, the father did not commence proceedings until after one year from the date of the child's wrongful removal, section 12 of the *Convention* requires that I must order the child's return *unless it is demonstrated that the child is now settled in its new environment*. The mother asserts that this exception applies.

[65] How to approach the "now settled" exception was discussed at some length by the B.C. Court of Appeal in ***Kubera v Kubera***, 2010 BCCA 118, which held that I must undertake both a "factual assessment of the child's integration in the new environment" and a "purposive and contextual analysis of the policy of the *Convention* as it relates to the specific circumstances of the child" (para 43). Ultimately, my decision as to whether the exception applies involves a consideration as to whether the broad public policy interests in upholding the *Convention*'s objectives of protecting children from abduction outweigh the child's interests in not being uprooted (***Kubera*** at para 38).

[66] The purpose of conducting this factual inquiry is to:

> ...determine the actual circumstances of the child and, in so doing, the likely effect of uprooting a child who has already been the victim of one international

> relocation. This purpose can only be achieved if the court considers these questions from the child's perspective (***Kubera*** at para 46).

[67] The factual assessment regarding the child's integration is an important part of the inquiry, but not the only one (***Kubera*** at para 42). It is "child centric" and includes two aspects: the physical, that of "being established in a community", and the emotional, that of feeling secure and stable (***Kubera*** at para 44). Factors to consider include a child's relationship to "place, home, school, people, friends, activities and opportunities" but not necessarily the child's relationship with his or her abducting parent (***Kubera*** at para 45).

[68] The evidence required to prove the "now settled" exception is onerous, and must be "detailed and compelling":

> [T]he court must be careful to look beyond the outward appearances and superficial realities to determine the actual degree of settlement...The threshold is high and requires more than a mere physical adjustment to surroundings.
>
> Nonetheless, I reject the suggestion that the "now settled" exception requires a level of settlement which is itself "exceptional" beyond the high standard already discussed. (***Kubera*** at paras 74 and 75)

[69] As for how the child has "now settled" in Alberta, the mother deposes that the child's maternal family resides in Alberta, he has friends here, and he lives in an established home with all the amenities necessary for a four-year-old child. The child attends hip hop dance class and is healthy and active. It is clear that the child has a supportive, loving, and involved family here in Alberta. He attends preschool and is receiving the necessary therapy from a speech language pathologist two to three times per week to help him with his speech delay. The mother includes a letter from the child's speech-language pathologist which explains that the child's delayed language skills have a significant impact on his ability to communicate, socialize, and participate in the learning environment and that changing the child's school at this point would be detrimental to the progress he has thus far made.

[70] In the Appeal Proceedings, the mother requests that the terms of the Final Rendition be modified to require the father to enroll the child into a Montessori program, a course of speech therapy, and that the child be permitted to travel to Canada to visit the mother. Consequently, insofar as the child has received the therapy and educational supports in Alberta, I have no evidence that similar opportunities would not also be available to him in Texas. Indeed, the father deposes that prior to the child's wrongful removal from Texas in March 2020, the child was scheduled to attend pediatric speech therapy in Houston, Texas and that the child has the necessary health coverage to resume therapy upon his return.

[71] The mother deposes that the father has refused to take her offer to contact the child via phone or Face Time but this is contested by the father, who assets that the Final Decree mandated that the parents only communicate via Talking Parents which the mother has not yet signed up for. The father further alleges that the mother has not allowed the child to have any contact with the father's sister and extended family living in Calgary.

[72] For the purpose of this application, I find that I need not resolve some of the parents' clashing Affidavit evidence on the question of parenting. I pause to note that the mother is a loving and supportive parent who clearly loves her child. From what I can tell, she is a good parent who cares deeply about providing for her son, creating a health environment for him and

giving him all the supports he needs to succeed. But I am not seized with determining questions of parental suitability. These are questions for the Texas courts in which I will not interfere.

[73] The evidence before me does not allow me to reasonably conclude that the mother has satisfied the high onus of proving that the child is "now settled" in Alberta other than that the child has adjusted to his new environment and is functioning normally within a loving and supportive environment as I suspect any four-year-old child would. In my view, the child is simply too young to be "now settled" and I have no evidence that he cannot, just as he has adapted to his environment in Alberta, adapt to Texas upon his return.

[74] The purposive and contextual analysis which I must also conduct in assessing whether the child is "now settled" requires me to consider the *Convention*'s objectives as they relate to the circumstances of the child. These objectives include:

- General deterrence of international child abduction by parents;
- Prompt return of the child;
- Restoration of the *status quo*; and
- Entrusting the courts of the child's habitual residence to determine the child's best interests (***Kubera*** at para 42).

[75] In my view, the *Convention*'s objective of generally deterring child abduction weighs in favour of the child's return. Allowing the child to remain in Alberta would reward the mother for her flagrant disregard of the father's parenting rights, and her refusal to abide by the findings in the Final Rendition and the now-settled jurisdiction of the Texas courts to deal with parenting issues. Further, it would send a message to would-be-abductors that they need not be deterred by initial failure – that the answer to a court finding that they have wrongfully removed their child is to simply to try again.

[76] As for the child's prompt return, this can be achieved by way of court order. I have canvassed the mechanics of how the child's return might be conducted and I understand that the father can make himself available to travel to the U.S.-Canada border on short notice to reunite with the child. Of course, the timeline of the child's return may well be affected by appeal proceedings in Alberta but I am nevertheless satisfied that there are no impediments to the child's prompt return back to Texas.

[77] I do not see why the *status quo* cannot be restored, particularly given the relatively short length of time the child has resided in Alberta and the child's age. I have no evidence that would suggest that with a loving and supportive environment, similar activities, a suitable school attuned to his challenges and the necessary supports to help him with his speech pathology, the child cannot re-acclimatize himself to his previous environment with the father in Texas.

[78] Consonant with the Alberta courts' rulings that parenting and support issues should be addressed by the Texas courts, I find that the *Convention*'s objective of entrusting the courts of the child's habitual residence weighs in favor of his return. It is in Texas, in which the District Court heard and considered evidence in respect of the parties' divorce trial and in which the mother has filed Appeal Proceedings where a determination of the child's best interests should occur. The parties have clearly attorned to the jurisdiction in Texas. The evidence in respect of parenting and the father's suitability as a parent is in Texas. The mother has accepted the Texas courts' continuing jurisdiction over parenting by filing Appeal Proceedings there. It is for the

Texas courts to determine what the appropriate parenting arrangements ought to be and to impose any terms regarding the child's therapy, educational needs or other supports that the child requires and to decide what the mother's access rights to the child will be. In my view, a determination of what the child's best interests are should take place in Texas.

IV. Analysis

A. Enforcing the Final Decree

[79] I see no basis to deny the father's application to enforce the Final Decree pursuant to section 2(1) of *EPECOA*.

[80] The Final Decree granted the father primary custody (parenting) of the child with limited parenting access (supervised or unsupervised) to the mother. The child's habitual residence was found to be Texas and his primary residence to be anywhere within the continental U.S.A. The District Court did not permit the mother's parenting rights to be exercised outside of the U.S.A.

[81] The mother argues that the child does not have a substantial connection to Texas as he has spent most of his life in Alberta, that he would suffer serious harm were he returned to his father's custody and that, consequently, I should vary the parenting terms set out in the Final Decree pursuant to sections 3(1) and 4 of *EPECOA*.

[82] Both parties rely on J.A. O'Ferrall's dissenting judgment in the Alberta Court of Appeal's decision of ***MM v ST***, 2014 ABCA 120. In ***MM***, the majority of the Court found that under *EPECOA*, the Alberta Courts had jurisdiction with respect to a parents' application for parenting and child support where a custody order granted in Newfoundland and Labrador (the child's habitual residence) allowed the parents to exercise joint parenting in both that province and in Alberta such that the child (who shared time in both provinces) was both habitually resident in, and had a substantial connection to, Alberta.

[83] Writing in dissent in ***MM***, J.A. O'Ferrall remarked at paras 29, 33, and 34 that section 2 of *EPECOA*:

> ... is clear. It states that an Alberta court must enforce the custody orders of any province, territory, state or country unless it is satisfied that the child affected by the custody order did not have any real and substantial connection with the province, territory, state or country. The provision is mandatory and the evidence was clear that the child did have a real and substantial connection to Newfoundland at the time the custody order was made. Indeed, the child still has a real and substantial connection to that a province.
>
> ...
>
> In [*EPECOA*] the requirement to enforce foreign custody orders is mandatory. The powers to vary foreign custody orders in that Act are merely permissive and expressly limited...
>
> While I agree that two purposes of [*EPECOA*] may have been to prevent forum shopping and to deal with the wrongful removal of a child from one jurisdiction to another, it may also have been enacted as an act of comity whereby provinces and countries voluntarily undertake to respect the orders of others. [*EPECOA*] not

> only applies to custody orders of other provinces, it also applies to custody orders of the United States and other foreign countries.

[84] In this case, the Alberta and Texas courts have concluded that the child's habitual residence is Texas and that the Texas courts have jurisdiction over parenting and support issues.

[85] In ***AG v CW***, 1994 ABCA 126, the Alberta Court of Appeal considered the meaning of "real and substantial connection" in section 3(1) of *EPECOA*. The Court found at para 10 of its decision that section 3 "does not deal with the personal relationships of the child, however important these may be", but with the "legal status in the jurisdiction - with questions such as the child's residence, and his domicile". The Court went on to state as follows at para 15:

> Under the current legislative regime, we prefer an interpretation of "real and substantial connection" which would involve a continuing legal connection to the jurisdiction, such as would be found where a child was improperly removed from the jurisdiction in the face of a valid custody order. In such a case the child's residence and domicile would not have been lawfully changed...

[86] Consequently, I am not prepared to vary the Final Decree granted by the Texas District as I am not satisfied that the child does not have a real and substantial connection with Texas. This does not mean that the child may not also have a personal connection with Alberta. But I find that any connection the child has developed with Alberta has arisen out of his wrongful removal from Texas and involves, as the majority explicitly recognized was not at issue in ***MM***, "child abduction or refusing to return a child to another jurisdiction" (***MM*** at para 14). Consequently, I find that I have no jurisdiction pursuant to section 3 of *EPECOA* to vary the Final Decree granted by the District Court in Texas.

[87] In the alternative, the mother asserts that I may vary the Final Decree pursuant to section 4 of *EPECOA* where I am satisfied that the child would "suffer serious harm if the child remained in or was restored to the custody of the person named in a custody order". Section 4 of *EPECOA* is titled "extraordinary power of court" and accordingly, should not be used other than in extraordinary circumstances.

[88] The Alberta Court of Queen's Bench found that the child would not be exposed to "grave risk" if returned to the father. The Final Rendition dismissed the mother's fears about the child's safety if returned to the father. The Final Decree ordered that the child be returned to the father's primary custodial care. I have not heard any new evidence not already considered by previous courts or litigated by the parties' legal counsel. Based upon the evidentiary record, I cannot reasonably conclude that the child will suffer serious harm if returned to his father. Further, I cannot identify anything in the record that would allow me to conclude that throughout these legal proceedings the legal process has been flawed, that the mother's legal rights have been abridged or that some compelling circumstance exists that justifies this Court exercising the extraordinary power conferred upon it by section 4 of *EPECOA*: that of replacing a previous custody order granted by another court with its own.

[89] In the result, I find that I must enforce the Final Decree.

B. Exercising the Court's Jurisdiction Pursuant to the Doctrine of *Parens Patriae*

[90] The father asks that I exercise this Court's *parens patriae* jurisdiction and order the child's return to Texas on the basis that doing so is in the child's best interests.

[91] Neither of the parties provided me with written argument or made oral submissions regarding this point.

[92] Given my decision which recognizes the jurisdiction of the Texas courts to deal with parenting issues and my decision to enforce the Final Decree, I find that I need not assume *parens patriae* jurisdiction.

C. The Application of Articles 12 and 13(b) of the *Convention*

[93] For the reasons set out above, I dismiss the mother's applications brought under Articles 12 and 13(b) of the *Convention*.

V. Disposition

[94] I make the following Order:

With respect to:

RAY VICTOR WILSON JR. born on September 9, 2017 (the "Child"); and

RAY VICTOR WILSON, the Child's father (the "Father")

CHALYNN LACEY WILSON, the Child's mother (the "Mother")

i. The Child shall be returned into the Father's custody in accordance with the Final Decree of Divorce issued by the District Court of Harris County, Texas on May 3, 2021, by no later than noon on August 1, 2021.

ii. Counsel for the parties shall, in order to accommodate the deadline for the Child's return, confirm a date and time for the Child's return to the Father.

iii. The Child's return shall occur at the U.S. - Canada border crossing at Sweetgrass, Montana. The Child shall be accompanied through border control by the Child's maternal grandmother, April Miller (D.O.B. Sept 30, 1968) who will ensure, to the extent permitted by U.S. Customs and Border Protection, that the Child is personally received by the Father.

iv. The Mother shall surrender the Child's passports to the Father at the time that the Child is returned to the Father.

v. If a party or any other person on their behalf breaches any term of this Order regarding the Child's return to the Father, a Peace Officer may do such lawful acts as may be necessary to give effect to the Order including, if necessary, arresting, detaining and bringing the party at the earliest possible time before a Justice of the Court of Queen's Bench to show why they should not be held in contempt. Before enforcing this Order, a Peace Officer must first ensure that the party has been served with a copy of the Order. If not served, that party shall be shown a copy of the Order by the Peace Officer and be given reasonable time to comply with the Order.

vi. In the event the terms of this Order are not complied with, the Father and his counsel have leave to bring this matter back to this Court on an emergency basis.

vii. If either the Mother or Father needs further assistance from the Court *to give effect to this Order*, they have leave to bring this matter back to this Court on an emergency basis.

viii. The issue of costs is reserved.

[95] Heard on June 15 and June 25, 2021 with Affidavits and written submissions received on June 22 and June 24, 2021 and further Affidavits received on July 5 and 8, 2021.

Dated at the City of Calgary, Alberta, on July 9, 2021.

O.P. Malik
J.C.Q.B.A.

Appearances:

Sasha R. Joshi
for the Applicant, R.V.W.

Joshua Wasylciw
for the Respondent, C.L.W.