

# X.L. v. C.B., 2024 ONSC 3895 (CanLII)

Date: 2024-07-11  
 File number: FC-24-00000010-0000  
 Citation: X.L. v. C.B., 2024 ONSC 3895 (CanLII), <<https://canlii.ca/t/k61jw>>, retrieved on 2025-03-20

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**ONTARIO**

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**SUPERIOR COURT OF JUSTICE**

**FAMILY COURT**

**B E T W E E N :**

X.L.

Applicant

**- and -**

C.B.

Respondent

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)  
) Jérémie Nadeau, counsel for the applicant  
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)  
) Chantal McCollum, counsel for the respondent  
)

)  
) Kathryn Junger, Agent for the OCL on behalf of the child  
)  
)

) **HEARD:** March 18, 19, 22, 26, and 27, April 2, 3, 4, 5, 8, 9, 10, 11, 12, 16, 17, 18, 22, 23, 24, 26, 29, and 30, May 1, 2, and June 28, 2024  
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**THE HONOURABLE JUSTICE W. L. MacPHERSON**

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## REASONS FOR JUDGMENT

### INTRODUCTION

- [1] This is an application where the applicant mother, X.L., is alleging the parties' five-year-old daughter, S.B., was brought from China to Canada by the respondent father, C.I.B., for a visit in October 2022. The mother claims that the child's habitual residence is China, and that the child is being wrongfully retained in Ontario and should be returned to China.
- [2] The father alleges that the child came to Canada with the mother's consent. He claims that the child's habitual residence is Ontario. However, if the court determines that the child's habitual residence is China, the father asks that the court assume jurisdiction because the child will suffer serious harm if she is returned to China.

### OVERVIEW/BACKGROUND

- [3] The mother, X.L., is 37 years of age. She was born in China and is a Chinese citizen. She has lived her entire life in China.
- [4] The father, C.I.B., is 41 years of age. He was born in the United Kingdom ("U.K.") but moved with his family to Canada as a teenager. He is both a U.K. citizen and a Canadian citizen. He travelled to China in 2013.
- [5] The parties lived together in China. According to the mother, this cohabitation began in November 2013. According to the father, this began in May 2015. The parties married on August 17, 2016 in Shijiazhuang, China. They resided together in China until October 20, 2022.
- [6] The parties only child, a daughter, S.B., was born in Hohhot, China on October 3, 2018. The child has a Chinese birth certificate, but the parties never applied for a Chinese passport. She is a Canadian and U.K. citizen because of her father's citizenship status. In July 2021, the parents obtained a Canadian passport for S.B.
- [7] The father and child travelled to Canada arriving on October 22, 2022. Until the child's arrival in Canada in October 2022, she had lived her entire life in China.
- [8] The mother travelled to Canada in the spring of 2023 for a six-week visit, staying at the paternal grandparents' home. She then returned to Qinhuangdao, China and the father and child remained in Canada.
- [9] On August 30, 2023, via a WeChat message, the father advised the mother that the marriage was over.
- [10] On September 27, 2023, the mother travelled to Canada. The mother has a multiple entry visitor's visa which allows her to remain in Canada for six months at a time. The visa under which the mother entered Canada in September 2023 expired on March 25, 2024. The mother applied to extend this visa and she is now authorized to remain in Canada until September 25, 2024.
- [11] On January 9, 2024, the mother commenced this application requesting that the child be returned to China.

### ISSUES

- [12] These are the issues to be decided by the court:
1. Where is the child's habitual residence – Ontario or China?

2. If the child's habitual residence is China, should the Ontario court assume jurisdiction because of the child's connections to Ontario?
3. If the child's habitual residence is China, should the Ontario court assume jurisdiction because a return to China would result in serious harm to the child?
4. If the court does not assume jurisdiction, should a return order be made?

## LITIGATION HISTORY

- [13] The application was issued on January 9, 2024. The answer was filed on February 27, 2024.
- [14] The first meeting was held on January 16, 2024 and an order was made that neither party was to remove the child from the Niagara region, the father was to provide the child's Canadian passport and travel documents from China to his counsel, and the mother was to provide the child's Chinese passport and travel documents, if any, as well as her Chinese passport to her counsel.
- [15] At the subsequent attendance on January 26, 2024, the parties had entered into temporary minutes of settlement providing for the mother to have parenting time three times per week supervised by Brayden Supervision Services. The matter was adjourned to January 31, 2024 to permit counsel to confirm the availability of Brayden to accept the case. Intake forms were to be done by January 29, 2024 and each parent was to pay one-half of the cost.
- [16] The father submitted his intake form on February 1, 2024. Through counsel, it was arranged for the mother to have unsupervised parenting time on February 2, 2024, which according to father's counsel "went smoothly". However, the parties and counsel were unable to agree on any additional parenting time pending the involvement of Brayden Supervision Services.
- [17] When the matter came back in front of me on January 31, 2024, the mother was to have parenting time during Chinese New Year (February 10 and February 11). If there was an impasse reached on the parenting time or in implementing the temporary minutes of settlement, time before me could be arranged through the Trial Coordinator. Although it was opposed by father's counsel, the matter came before me on February 23, 2024 at the request of OCL counsel. Despite efforts by Brayden Supervision Services to reach the father to complete the intake process and move forward with the supervised parenting time, he had only spoken to them on February 22, 2024. His explanation was that he had hoped the parties could attend mediation and not follow through with Brayden Supervision Services given the cost and distance to utilize their services. The mother was granted unsupervised parenting time on Saturday, February 24, 2024 from 1:00 p.m. to 4:00 p.m. and on Tuesday, February 27, 2024 from after school until 6:00 p.m.
- [18] The trial scheduling conference was held on February 28, 2024 and the hearing was confirmed to commence on March 18, 2024. Another speak-to date was arranged for March 4, 2024 to allow parties and counsel to work out a parenting time schedule. They were unable to agree, and on March 1, 2024, the mother brought a motion for temporary parenting time which was heard on March 7, 2024. Oral reasons were provided on March 8, 2024. The following order was made:
1. The mother shall have parenting time with the child from Saturday, March 9, 2024 at noon until Wednesday, March 13, 2024 at 5:00 p.m.;
  2. The father shall have parenting time with the child from Wednesday, March 13, 2024 at 5:00 p.m. until Friday, March 15, 2024 at 5:00 p.m.;
  3. The mother shall have parenting time with the child from Friday, March 15, 2024 at 5:00 p.m. until Sunday March 17, 2024 at 7:00 p.m. at which time the

child shall be returned to the father's care.

4. The exchange place for the above parenting time shall be the Kiwanis Center in St. Catharines;
5. Commencing the week of March 18, 2024, the following parenting schedule shall be followed:
  - i. The father shall have parenting time with the child from Sunday at noon until Wednesday when the child is taken to school.
  - ii. The mother shall have parenting time with the child from Wednesday after school until Sunday at noon.
6. The exchange place for the parenting time shall be Prince Phillip School or the Kiwanis Center in St. Catharines;
7. Neither party shall remove the child from the Niagara region.

## THE TRIAL

- [19] Although originally expected to last a few weeks, the trial took place over seven weeks with a total of 26 sitting days. The initial approach had been that the main witnesses (the mother, the father, and the clinician from the Office of the Children's Lawyer ("OCL")) would provide their evidence by way of affidavits to limit the trial time needed for those witnesses. They were expected to provide brief updating oral evidence and then be subject to cross-examination.
- [20] The court was cognizant of the requirement that wrongful removal/retention cases are to be dealt with expeditiously. Although not strictly bound by the six-week requirement for *Hague* cases to be finalized, even as a non-*Hague* matter it was to be given priority so that it could be scheduled and concluded promptly.
- [21] Regrettably, one of the unintended consequences of these goals of expediency meant that counsel was somewhat rushed in preparing comprehensive affidavits. Given the importance of the issues at hand, the parents' evidence was significantly augmented by oral testimony. There was very thorough cross-examination, not just by parents' counsel, but also by OCL counsel for the child.
- [22] The length of the trial was also impacted by the fact that the mother was more comfortable testifying through a Mandarin interpreter as English was not her first language. Although she was an English teacher to foreign language speakers (primarily children and some adults), it was apparent through her testimony that she did not always appreciate the nuances and some common English language expressions. It was important that the mother be able to give her evidence in her mother tongue. However, and quite unfortunately, the Mandarin interpreters that were assigned were not up to the task, and whether it was a dialect issue, a lack of grasp of Mandarin, or in one instance a lack of comprehension of the English language, the mother expressed much frustration with the manner in which her answers were interpreted. As a result, throughout her testimony, at various times, a question might be asked in English and interpreted for the witness, and the mother would answer in Mandarin, but after same was interpreted she then added to or corrected the interpreted answer in English. This was a significant issue with the mother's evidence.
- [23] Even the father, who described himself as having "survival Mandarin", agreed that the interpretation skills of the first two interpreters were lacking. Finally, with the third interpreter, the mother and other witnesses expressed satisfaction that the questions and answers were being properly translated.

[24] Adding to those issues was the fact that most of the mother's witnesses testified virtually from China. They also required use of Mandarin interpreters which added to the length of their testimony. In addition, there was the challenge of accommodating a 12-hour time difference between China and Ontario.

[25] Finally, there was illness on the part of the father and the father's counsel that delayed the hearing by several days.

[26] In all, in addition to each of the parties testifying, the following witnesses were called:

**Mother's Witnesses**

1. M.B. - Friend of mother
2. H.Y.L. - Friend of mother
3. J.W. - Friend of mother
4. Q.P.D. - Parties' former employer
5. R.J.Z. - Maternal grandmother
6. W.L. - Maternal grandfather

**Father's Witnesses**

7. D.G. - Friend of father
8. L.B. - Paternal grandmother
9. I.B. - Paternal grandfather
10. C.B. - Paternal aunt
11. Noella Iradukunda -Worker - Family and Children's Services of Niagara
12. H.M. - friend of father

**The Office of the Children's Lawyer**

13. Mary Polgar - OCL clinician

**The Expert Witnesses**

14. Jeremy Morley - called by father
15. Rui Huang - called by mother
16. Rong Kohtz - called by OCL

[27] As set out below, rulings needed to be made as to the qualifications of the father's expert and the mother's expert.

[28] In addition to hearing that testimony, much hearing time was taken up listening to surreptitious audio recordings made by the mother and ruling on their admissibility.

[29] Finally, counsel necessarily required and were given an extended amount of time to make written closing submissions after such a long trial. Given the issues to be decided and who bore the onus of proof, the mother and OCL filed submissions first on the habitual residence

issue, the father then filed submissions on the habitual residence and serious harm issues, the mother and OCL responded, and then the court received brief reply by the father.

- [30] Undoubtedly, it might be suggested that the trial should not have been allowed to continue so long as it is now seven months since the application was brought, and counsel should have been made to give oral submissions immediately following the conclusion of the trial or made to file their written submissions sooner. However, I am guided by the Ontario Court of Appeal in *Geliedan v. Rawdah*, 2020 ONCA 254, 446 D.L.R. (4th) 440, where Justice Fairburn stated, “While it is important that applications arising from alleged child abductions move with dispatch, this cannot be done at the expense of justice.”

### **Summary of Trial Evidence**

- [31] This was a very lengthy trial which spanned seven weeks. It would be impossible to summarize all the evidence, particularly given the need to release a decision expeditiously.
- [32] In the analysis below, reference is made only to the most relevant aspects of the testimony and evidence tendered during the trial. While not all the evidence presented has been discussed, the testimony of each witness has been considered. Although voluminous, each exhibit has also been reviewed. As required, I have considered the totality of the evidence in my determination of the substantive issues.
- [33] For ease of reference and to provide some context for the evidence, the summary is broken down by specific topics.

### **The Parties’ Life in China**

- [34] The parties met when they were both English teachers in Qinhuangdao, China. The father confirmed that he went to China in 2013, working for just over a year with Education First. In 2015, he and the mother moved together to Liyang, working at the Shane School teaching English. At some point, he considering leaving the relationship to move to Thailand but could not get released from his contract, and so the parties remained together to the end of his contract in May 2016. C.I.B. then returned to Canada to see his family after an absence of three years.
- [35] Both parties described significant conflict in their relationship while living in Liyang.
- [36] They both testified that they engaged in many verbal arguments. They also spoke about certain physical altercations having occurred in the early part of their relationship.
- [37] The father described an incident that had begun as a verbal argument and escalated. He had gone into his bedroom to put some distance between them. When the mother could not get in, she threw knives and wine bottles at the door. Later, when the father opened the door, he observed wedges in the door from the kitchen knives that had been thrown and smashed wine bottles on the floor. He testified that in cleaning up the mess, the mother had thrown the broken bottles into the bathtub, chipping the enamel, causing damage to the tub. The father also testified that when they left that residence the cost of replacing the door and fixing the bathtub were deducted from their final pay.
- [38] The mother denied this incident had ever taken place or that there had been any damage to the door or the bathtub. She stated that given the substantial physical size difference, as the much smaller person, she was never the aggressor in their fights.
- [39] The mother described four physical altercations that took place in Liyang. Some of them were about the father’s refusal to do his share of household chores. Many of them occurred when the father had been drinking heavily and was returning home early in the morning and the mother had not opened the door quickly enough. She described one time when the father

put his arm around her neck so that she could not speak and put her onto the ground. Another time, he had thrown an empty water bottle and hit her right eye. Later, she spoke of an incident where he had thrown a glass bottle that she was able to duck from, but the bottle left a mark on the wall.

- [40] One incident she recalled vividly began when she complained that the father had not cleaned the litterbox. She tried to enter his room to continue the conversation, but he slammed the door, catching her fingers in the door. She needed medical attention and when the father refused to open the door or assist her in getting to the hospital, the mother called their employer, Q.P.D., who attended at their residence.
- [41] Q.P.D. confirmed that the father refused to exit his room, and he took the mother to the hospital for medical care. There was a great deal of blood and her one finger was bent backward, but there were no broken bones. He did not return the mother to the residence, instead taking her to the school.
- [42] Q.P.D. testified that he did not notice whether there were any marks on the father's door, as his focus was on the mother. He did confirm that after the parties left that residence the door had been damaged and needed to be replaced. He could not confirm how the damage had been done. He was not asked about the bathtub and whether there was damage to this.
- [43] The father acknowledged that this incident took place. He did not recall how it began, although he was clear that this was separate from the "knife/bottle throwing" incident. However, he reported that this was not done deliberately, as he was only trying to keep the mother from coming into his room. The paternal grandmother disagreed this was an incident of domestic violence, instead describing it as an accident, as it was not done intentionally.
- [44] Neither party reported any other incidents of physical altercations. They both testified that many verbal disagreements did continue to occur.
- [45] In his testimony, the father attributed these incidents to cultural differences between he and the mother (where he would say something that she found offensive and he would be in the doghouse for days), both drinking too much, and both lacking in maturity. He determined on his trip back to Canada in mid-2016 that he needed to make changes in his life, and with that realization, he returned to China and got engaged. The parties were married on August 17, 2016.
- [46] There was a second wedding ceremony in 2017 when the paternal grandparents came to China and met X.L. for the first time and met the maternal grandparents for the first time. This was the second time that the maternal grandparents had met C.I.B., the first being when the parties had married the previous year.
- [47] The parties returned to live in Qinhuangdao in the fall of 2016. They lived in a small three-bedroom apartment in a building owned by the mother's parents. They were not required to pay rent. The father had many complaints about the condition of the building although neither of the maternal grandparents were asked about this.
- [48] The maternal grandparents resided in Hohhot, in Inner Mongolia, China. Hohhot is 780 kilometers west of Qinhuangdao. According to the father, it could take as long as 13 hours by train to travel between the two homes. The mother testified that there were faster trains. However, it was evident from the testimony of the parties, as well as the maternal grandparents, that even with such a significant distance the parties did maintain regular contact with the maternal family.
- [49] The father testified that before S.B. arrived the parties would have a minimum of two visits to Hohhot each year, always for the Spring Festival/Chinese New Year in late January and to celebrate Chinese National Week (for one week in October), and sometimes another trip

during the winter.

- [50] This contact increased dramatically with the arrival of S.B. The mother became pregnant in late 2017. The maternal grandmother came to stay with the parties in Qinhuangdao when X.L. was about six months pregnant. Shortly before the mother was due to give birth, she moved in with her parents in Hohhot, where she gave birth on October 3, 2018.
- [51] The paternal grandmother travelled to China around the time that S.B. was born. It was unclear whether she was there for ten days or 14 days, whether she was there for mere days or weeks after the child's birth, whether she shopped only for herself during her stay, or whether she bought the necessities for the newborn (diapers, bathtub, crib, clothing) or the maternal family and relatives contributed to this. I heard an inordinate amount of evidence as to which side of the family purchased what items for S.B., none of which was relevant to the issues to be decided.
- [52] All witnesses agreed that the paternal grandmother was helpful in educating the parents in caring for an infant and establishing breastfeeding, given the grandmother's training as a nurse. They also agreed that it was a very difficult delivery for the mother. Despite this, the father and paternal grandmother made note of the fact that in the days after the child's birth, the grandmother had to wake up the mother to breastfeed. The paternal grandmother also expressed surprise at how little time X.L. spent with S.B. while the paternal grandmother was there. Later, the paternal grandmother conceded that Chinese cultural traditions might have played a role in this.
- [53] Following the child's birth, the mother returned to work as an English teacher. Initially, she would travel to the school, but later with the COVID-19 pandemic, the work was done online. At times she was teaching at three different jobs.
- [54] According to the father, he never did return to work as an English teacher because the Chinese government had changed the rules for foreigners. Instead, he took online courses on a full-time basis through Falmouth University in the U.K. This took two years, from 2018 until 2020 when he obtained his Honours B.A. in Music.
- [55] As far as employment, the father testified that he began to do voiceover work which was done from home. He also worked as a musician with the band Grass Mudd Horse, but this disbanded once the COVID-19 pandemic began in later 2019. In 2021, he began to do work as an actor as there was a scarcity of foreign actors available in China.
- [56] There was much contradictory evidence heard as to who earned how much money and who supported the family. There was certainly insufficient evidence for the court to conclude whose version was correct. It was apparent to the court that this was a persistent source of tension between the parties.
- [57] There were many times between 2019 and 2022 that the family (mother, father, S.B.) was not in Qinhuangdao. It was routine for them to travel to Hohhot for Chinese New Year (end of January/early February) and for Chinese National Week in October. The family would stay at the maternal grandparents' home. Typically, after one week or so, the mother would return to Qinhuangdao and the father and S.B. would remain behind in Hohhot. The mother and maternal grandmother testified that the mother's early departure was necessitated by the mother's work commitments and the need to take care of the family pets. The father testified that it was due to the strained relationship between the mother and the maternal grandmother.
- [58] On the one hand, the father testified that the maternal grandmother was very abusive to the mother, without providing any examples. On the other hand, to show the mother's nasty temperament, he pointed out and chastised her for calling her mother the "C word" in text messages. It was evident throughout the text messages that both parties used that word on a regular basis, in reference to each other and to others as well.[1]



- [59] As to X.L.'s relationship with her mother, she denied there were arguments. However, she expressed that since the parties have separated, she believed that the father has gone to great lengths to make it sound worse than it was. The maternal grandmother acknowledged that she and the mother would disagree about how to care for S.B. but denied that it posed any major difficulties between them.
- [60] The paternal grandmother testified about an argument that she observed between the two women shortly after S.B.'s birth and her shock at the level of fury between them.
- [61] Once the COVID-19 pandemic began at end of 2019, the visits to Hohhot lasted longer due to lockdowns that were put in place. For example, the father testified that in February 2020 the lockdowns extended their stay in Hohhot for several months.
- [62] Following Chinese New Year in the spring of 2021, the father and S.B. remained in Hohhot. The father was scheduled to be away filming for four and a half to five months. According to the father, X.L. did not want to be left alone with S.B., so she returned to Qinhuangdao and the child remained with the maternal grandparents for that time. The father returned to Hohhot for one week in the middle of the shoot, but according to the father, X.L. did not go back once to Hohhot in that time. The maternal grandmother testified that during this occasion and whenever S.B. was in Hohhot without her mother, there were video calls between S.B. and X.L. on an almost daily basis.
- [63] The father described this as setting a precedent that was followed for the next two years; if he had to work away from home, he would take S.B. to Hohhot to be cared for by the maternal grandparents. There were several other acting jobs that year, but those lasted weeks at a time rather than months.
- [64] In 2022, the family travelled to Hohhot for Chinese New Year as they had done in previous years. The father had been hired to do a science fiction movie, but due to extreme lockdowns that went into effect in Hohhot and elsewhere, he and S.B. once again were "trapped" having to remain in Hohhot for many months. X.L. was able to return to Qinhuangdao and S.B. and C.I.B. eventually returned there as well.
- [65] In addition to the family making frequent trips to Hohhot after S.B.'s birth, there was also a routine of the maternal grandmother travelling to Qinhuangdao and spending many weeks with the family there. Although no one provided evidence as to the exact dates, it was apparent from the testimony, as well as the photo book produced, that these trips to Qinhuangdao occurred frequently.

### **S.B.'s Life in China**

- [66] S.B. enjoyed a very active life in the first four years that she spent in China.
- [67] She attended Red Yellow Blue ("RYB") preschool from a very young age. In August 2022, she began attending kindergarten.
- [68] During the OCL's examination of the mother, she reviewed in a very thorough manner a photo book detailing S.B.'s life in China. This consisted of 81 pages and 311 photos, covering such topics as S.B. as a baby; engaged in cultural events; S.B. and the mother; S.B. and the maternal grandparents; S.B. with her pets; S.B. with her friends; S.B. in motion; and S.B. involved in activities and at school. The mother described each of the photographs in great detail. S.B. participated in such activities as art classes, swimming classes, and tae kwon do lessons. These pictures also showed S.B. dressed in traditional Chinese clothing and participating in many festivals and related activities.
- [69] It was the mother's evidence that she was the primary caregiver for S.B. She breastfed her for almost two years. She was the parent involved in the daily routines for the child. In her

view, the father did very little to care for S.B. This too was a constant source of tension between them. The mother testified that she was the parent who took S.B. to preschool every day and, other than Wednesdays, she was the parent who would pick her up. She needed to father to do that pickup (texts confirming that she had to remind him of the times) as she had a class to teach.

- [70] The only other people who assisted with S.B.'s care was the maternal grandmother and, to a lesser degree, the maternal grandfather.
- [71] The maternal grandparents confirmed this to be the case, based on the extensive amount of time that they spent with the family. When the family was with them in Hohhot, it was the three of them (maternal grandmother, maternal grandfather, and X.L.) providing for the child's care. The father spent most of the time in his bedroom, only coming out for meals prepared by the maternal grandmother. Both maternal grandparents described taking S.B. to the park and teaching her to roller skate and doing many other activities in Hohhot. Sometimes the father participated, but mostly he chose not to.
- [72] As to the sleeping arrangements in Hohhot, the grandparents testified that S.B. slept with them. The father indicated that the child slept with him but acknowledged that S.B. might go into the grandparents' bedroom in the middle of the night, because the maternal grandmother kept snacks in her room.
- [73] When the maternal grandmother went to Qinhuangdao, she testified that it was her and her daughter who cared for S.B. The few times that the father was asked to look after S.B., he put her in front of the television or put a program on his iPad to keep her busy. She also described that during these stays in Qinhuangdao, she did all of the cooking, while the mother and her did the cleaning. The father did none of the household tasks.
- [74] This description of events was in stark contrast to the father's recollection of S.B.'s care.
- [75] In his trial affidavit he described that the mother's parents would "spend time" with the child and "helped" to care for S.B.
- [76] While he agreed that the mother did breastfeed the child for about two years, he emphasized that his participation included supplementing her feedings with formula, always being the one responsible for changing diapers and bathing her. He adamantly denied that the mother was ever in a primary caregiving role for S.B., as she did not like to be left alone with the child.
- [77] When S.B. became older, he testified that he was the parent who bathed her, put her into pajamas, and did the nighttime routine of reading and singing with her at bedtime. He was the parent who got up with S.B. in the morning, made her breakfast, got her dressed, and then took her to school or art class or whatever activity she was attending. If the mother came along, it was only after S.B. was ready for the day.
- [78] The mother participated in none of the nighttime routine, instead locking herself in her room at 10:00 p.m. every night.<sup>[2]</sup> The father agreed at some point the mother needed to go to sleep early as she had to be up very early to teach morning English classes. He then added that the routine was that she would take a bottle of wine, the dog and cat with her, and use the bolt she had installed on her door to keep him and S.B. out.
- [79] The mother denied this, insisting that it was the father wanted the door be closed as he was upset with the noise from her teaching lessons. She also denied locking the door each night or that she would routinely prevent the child from entering.

## **Parents' Mental Health Issues**

## *Mother*

- [80] The father described several behaviors by the mother that were of concern to him.
- [81] He referenced the incident in Liyang when the mother was out of control and threw wine bottles and knives at his door.
- [82] He described that, in or about 2017, he witnessed the mother about to engage in self-harming behaviour. He saw her crying uncontrollably and poking at her wrists with rusty scissors. As the maternal grandmother was staying with them, he called her to come back to the apartment so that he could leave for work. The maternal grandmother dismissed his concerns, suggesting that the mother was only looking for attention. The father then called the maternal grandfather, who persuaded the maternal grandmother to come back.
- [83] The father described the mother as 95 percent of the time being a smiley, cheery, bubbly and outgoing person and the other 5 percent of the time being terrifying. He testified repeatedly that she was the only person that he genuinely feared would stab or kill him, as her anger was on a level he had never witnessed.
- [84] He testified that the mother was verbally and emotionally abusive toward him. This included calling him slut and cunt, and in Mandarin calling him Dan Bi, which translated into egg cunt. She constantly called him lazy and told him he was a bad father to S.B. She routinely “beat him over the head” about his mental illness struggles.
- [85] Other examples that he provided were that she would constantly threaten to divorce him, knowing that he would then not have status in China and she would make him take S.B. to art class even though he did not have the proper health code to enter the building. The fact that he had to use the service elevator and was being forced by the mother to do this contributed greatly to his stress and anxiety.
- [86] The mother acknowledged that she routinely referred to him as slut, as he walked around naked. This was not used in a derogatory manner, but in an affectionate and teasing way. The text message exchanges confirm the frequent use of that term and the “C word” and colourful swearing by both. The mother advised that she had learned the swear words from the father.
- [87] The mother did not believe that she ever specifically called him lazy, but it was an accurate description. Both the maternal grandmother and the mother’s friend, H.Y.L., confirmed this description, not from having heard the mother say so, rather from their own observations of the father doing very little to care for S.B. or to contribute to household chores, instead spending most of his time in his bedroom.
- [88] The mother denied that she had threatened to divorce the father. She was aware that, if they divorced, he would lose the family visa status, However, he could have obtained another type of visa as he had done when he first came to China.
- [89] The father expressed throughout his testimony that he lived in fear of the mother and what she could do to him.
- [90] In addition to being abusive toward him, the father testified about concerning behavior by the mother toward S.B. As early as when S.B. was only a few months old, he noticed a strange jealousy when the mother accused the father of putting S.B. first. He had concerns that something was not right. He did speak with the paternal grandmother and about the possibility that this could be postpartum depression.
- [91] He provided two examples of the mother becoming physical with the child. The first one was that when S.B. was a baby, she would take off the mother’s glasses. The mother would slap the child’s hand or threaten to do so. He described that S.B. taking off her mother’s glasses

was a real “trigger” for the mother’s anger. When questioned about this, he agreed that he had never actually witnessed the mother do this, but she told him that she had done this repeatedly. He begged her to stop.

[92] The mother denied that she had ever done that or told the father that she had done that.

[93] At another point, when he was being challenged on being the primary caregiver for a child who had been breastfed until she was the age of two, he then stated that he did not really have serious concerns about the mother’s treatment of S.B. until she was a toddler. It was at that age and stage that S.B. would do things that would set the mother off.

[94] The second example of a physical incident was an occasion when S.B. was about two and a half years old. She had gotten into the mother’s makeup on the vanity, and the mother’s response was to throw the child about a meter across the room. S.B. was crying uncontrollably and he comforted her.

[95] The mother initially denied that she would ever have thrown S.B. It was clear from text messages and audio recordings that she did, her explanation being that the father was supposed to be watching S.B. Instead of doing that, he allowed the child to come over to the mother’s vanity where S.B. tried to remove some makeup. What she had done was push the child toward the father to get him to take responsibility for her. She denied that the child was hurt, unlike two other occasions when the father had allowed the child to fall off a ladder onto the back of her head or another time when she fell and ended up with a bloody mouth.

[96] The father expressed that he always had to be the consistent parent and the one to discipline S.B. The mother was more like a sister or best friend, refusing to set boundaries until S.B. misbehaved and then the mother would lose control, as he had observed so often firsthand.

[97] X.L. denied ever physically disciplining the child. She would correct the behaviour by talking to her daughter and explaining what she had done wrong. The maternal grandmother and the mother’s friend, H.Y.L, (who was also a teacher) clearly recalled the mother’s techniques of talking to S.B. and never yelling or hitting her.

[98] The father also identified two incidents where the mother had threatened to physically harm S.B.

[99] The first occurred in October 2018 (according to the mother) or in October 2019 (according to the father). The message exchange between the parties read:

Mother: “I really wish ur university could finish soon. I was under massive pressure and stress. ANd I’m still shaking.”

Father: “You, you, you”

Mother : “Do u have to pick a fight right now?”

Mother: “I didn’t tell u but I’m about to get the depression back these days. I even planned to commit suicide [sic] with the baby too.”

Father: “Please do not do it to the baby”

[100] The father was in school between 2018 and 2020, taking online courses toward his music degree. The mother’s recollection was that she made this comment in 2018 shortly after S.B.’s birth. She recalled that her emotions were up and down at the time, possibly due postpartum depression. The mother explained that she felt that the father was ignoring her and S.B., instead choosing to spend time in his room on his courses and his music. She did reference suicide not because she intended to harm S.B. but rather to get him to pay

attention. Knowing of his past experiences with depression and suicide, she hoped that he would become more involved with them.

[101] The father believed that the message was sent in October 2019. Based on this, he testified that he was very concerned about what the mother might do. However, he did not speak to anyone in the mother's family nor to anyone in his own family about this incident. He did confirm that it was possible that the mother suffered from postpartum depression immediately after S.B.'s birth but not still at one year later.

[102] The second incident was a WeChat message that occurred on September 10, 2022:

Mother: "Both of you are torturing me in different ways, and both of you are consuming my happiness and joy. I am too tired to live a normal life."

Mother: "You're always in pain, endlessly. I'm really too tired."

Mother: "Today, she dirtied the water with her hands, which was the last straw for me."

Mother: "I broke down in the restaurant, yelling and shouting"

Mother: "I wanted to kick her to death at that moment"

Mother: "Yeah, I want her t die"

Mother: "she should die. so that i could finally have a break"

Father: "can we talk?"

Father: "someone needs to walk the dog soon...she is asleep again...i can do it...but can u plz just open door and keep an ear on her, shes pretty sick...or u can walk him if youd like"

Mother: "i really don't give a fuck"

[103] The mother confirmed that she had sent that message to the father while she was driving with S.B. in the car. She testified that the message that appears was transcribed by a function on her phone where she would speak into the phone and the words were sent as a WeChat message.

[104] The mother vehemently denied that she had ever wanted to harm her daughter. She explained that this was a mistranslation of a few words by the phone app. In particular, she noted that the Mandarin word for "four" and "die" are very similar. Instead of having said, "kick her to death", she was referencing that S.B. was four years old. She confirmed that four is not a good number in Mandarin, due to it sounding like "die".

[105] When asked about the fact that some letters were missing (t instead of to) or that beginning of sentences were not capitalized, she testified that she was driving and was not typing the words, but she then recalled that she was also checking the map to get driving directions, and suggested maybe something was deleted in that process.

[106] The mother testified that as soon as she came home, she went into her room to conduct an online English class. She did not even look at the messages until later. In her view, the father knew that this was an incorrect translation rather than that she intended to harm her daughter. The mother was adamant that she was not upset or frustrated with her daughter, but she was very frustrated with her husband for not helping her as he should have.

[107] There are no time stamps to verify when the messages were sent and responded to.

[108] The paternal grandmother became aware of this WeChat message when the father forwarded the text exchange to her later that day, along with the following:

Father: “then locked herself in her room and left me too...by the way [S.B.] is pretty sick again and now says her ear hurts...”

Father: “i got her to sleep and snuck out to walk the dog quick...sent [X.L.] a mssg to just keep an ear out...came back asap to find [S.B.] woke up to find herself alone in the dog [dark] and was hysterical....[X.L.] still in room door locked....behaviour i couldn't ever do...and i wouldn't ever do...no matter how sick or anxiety ridden i am...”

Father: “actually when they got back [X.L.] turned round and fucked off by herself for hours...i being the bitch i am ordered her a bunch of roses to try and say sorry for being sick and not as myself this last couple of weeks”

Father: “I've never felt so alone, sorry to be dumping on u...but i literally have no one to turn to”

[109] The paternal grandmother testified that this message still disturbs her. She cannot imagine a mother making such threats against their own child, no matter how annoying the child's behaviour had been. No other messages between the paternal grandmother and the father were put into evidence. In her testimony, what she recalled of the conversation with her son was to support him and reassure him that he was doing the best that he could in a difficult situation. There was no evidence that they discussed that the father should ensure the mother not be left alone with the child.

[110] At some point, the paternal grandmother shared the text exchange with the paternal grandfather. Based on text exchanges provided between the paternal grandfather and the father from September 19 to September 24, 2022, there were discussions about getting money out of China, both for the father to bring with him and for the mother to wire more later.<sup>[3]</sup>

[111] There was no evidence of any discussions about the mother's “concerning” text message between September 25 and September 28, 2022 until the grandfather sent the following text on September 28, 2022:

Paternal grandfather: “...sorry to sound like a broken record but get the fuck out of China and that marriage”

[112] The grandfather denied that despite the reference to being “a broken record” he had previously provided advice to his son about his marriage, as that was “his business”.

[113] In his testimony, the paternal grandfather expressed that he was so concerned after seeing the threatening text message that he and his son immediately arranged for two flights for S.B. and the father to travel from China to Canada, which the grandfather charged on his credit card.

[114] The father's friend, D.G., testified that he met the father when they both taught English in China. D.G. continues to teach in that country.

[115] He confirmed that health codes were required to enter malls and train stations and that at certain times during the COVID-19 pandemic, the health codes would not work with foreigners' (non-Chinese) identification. However, he confirmed that on a few occasions he met C.I.B. at the mall where S.B. was attending a class. He could not explain any other reason that the father would be unable to obtain a health code. He confirmed that health codes are no longer required in China.

- [116] D.G. testified that the father had messaged him that he did not want S.B. to be left alone with her mother. He did not recall the date, only confirming that it was after the pandemic started. When the court asked if he knew the reason for the father's concerns, he said he said he did not.
- [117] Later in his testimony, he was able to recall the message with more clarity. The father was away for an acting job, and the mother had indicated that she would "put harm to the kid". He recalled that it was a verbal threat to the child, as the father never told by him that the mother had hit or hurt the child.
- [118] He also confirmed that although he was aware from being told by the father that there were some difficulties in the parties' relationship, the father never disclosed that he was afraid for his safety or that the mother might kill him.
- [119] H.M. is a longtime friend of the father and the paternal family.
- [120] She described an argument that took place on the mother's first trip to Canada in 2017. She referenced the mother rapidly becoming angry with the father. The level of yelling and screaming in a mix of English and Chinese was shocking to her. She believed that the argument was about the seating arrangements on the ten-hour drive, where the mother was seated in the back. There were no other disputes between the parties during this trip.
- [121] When cross-examined, the mother had no recollection of any fight having taken place. When she was recalled, she not only provided a picture of the father seated in the backseat of the vehicle, but now recalled that the argument started when the father had told her to go back to China. She agreed that they were both yelling. When confronted with the fact that she had previously not recalled the incident, she suggested that the interpreter had asked if there was a fight (as in physical altercation) instead of a dispute.
- [122] H.M. also provided a lengthy chat message between her and C.I.B. that was dated May 7, 2020. It is not complete in some sections, but does indicate a number of complaints expressed by the father:
- [123] Within the chat message, there is a partial message referencing there are some big issues with the mother towards him and S.B., but the major issue is his health. When H.M. describes that things are also very bad in Canada with Covid, the father comments that nothing could be as bad as it is in China.
- [124] H.M. confirmed that there were many other messages between them, but she selected which messages to provide and was looking for messages to show the mother being angry.

### ***Father***

- [125] The mother expressed concern about the father's behaviour toward her as he was prone to violence, citing the incidents above. She also expressed concern about his mental stability.
- [126] The father had been diagnosed with depression and anxiety many years prior to moving to China. He had been on anti-anxiety medication for this. He remained on this medication during his time in China, but he was forced to stop taking them at least one year before coming to Canada in October 2022. He explained that it was during a time that he and S.B. were staying in Hohhot and due to COVID-19 restrictions, all deliveries had stopped. As he had only a limited supply, he cut up the pills, taking less than the required dosage, until he stopped completely. He stated that he suffered severe withdrawal symptoms. That was one of the reasons that he needed to return to Canada, and he resumed these very quickly after October 2022.
- [127] The mother disputed that the father came off the medication only when the pills were in

short supply due to COVID-19. She suggested that he had come off the medication to be able to lose weight so as to be able to get more acting roles, and to perform better sexually.

- [128] Both parties did agree and the evidence in the text messages confirmed that just prior to leaving China in the fall of 2022, the father was not doing well emotionally or physically. He complained of a racing heart, high blood pressure, and suffering from panic attacks. He was convinced that he was going to have a heart attack. As he described it, it was difficult for him to get out of bed on many days. He also expressed that he was having a hard time being able to tell what was real and what was not real.
- [129] From the mother's perspective, she was aware of the father's mental health struggles. Based on what he had told her, he had attempted suicide on at least three occasions before he travelled to China. His anxiety caused difficulty for her and S.B. – as an example, yelling for them to rush to cross the street because of his wrong perception that a car would hit them; not being able to get out of bed; spending long periods of time in his bedroom, and not being able to assist in the care of S.B. as he was barely able to care for himself; and going days without changing his clothes or taking a shower.
- [130] The text exchanges between the parents confirm multiple times in August and September 2022 of the mother trying to give suggestions on how the father could deal with his anxiety from deep breathing, what to eat, and other words of reassurance.

### **Travel to Canada**

- [131] The mother made her first trip to Canada in 2017. She confirmed that on a trip to rural Ottawa, Ontario the parties had discussed the possibility of eventually moving to Canada in the future. After S.B. was born, this was also discussed, but the mother's evidence was that this would not take place until S.B. was much older.
- [132] The father also confirmed a relocation to Canada was a long-term goal that had been discussed, including having a music studio and living in a rural setting. He confirmed that there would need to be certain steps taken such as saving up a lot of money and sending money from China to Canada, as that was not easily done with limits being in place. There would also need to be immigration matters sorted out including obtaining Permanent Residence status for the mother, or as she referred to it, "getting her Maple card".
- [133] Beginning in 2022, the parties began to discuss steps that needed to be taken so that C.I.B. and S.B. could leave China and travel to Canada. In February 2022, the father wrote to the Canadian Embassy in Beijing to confirm that the mother's nine-year visitor's visa granted in 2017 was still valid and had not been affected by cancellation of certain visas.
- [134] In September 2022, the mother applied for a green exit and entry letter from the Chinese government obtained from the Canadian Embassy. The letter was valid from September 19, 2022 to December 19, 2022.
- [135] The text messages exchanged between the parents in September 2022 confirm that the mother wanted to obtain a blue exit letter which would allow for the child to leave and return to China multiple times. She testified that the father pressured her to get the green letter, for now, as it would be faster and easier to obtain. The father confirmed that he could not have obtained the exit letter without the mother's assistance and consent.
- [136] According to the mother, there were three reasons for C.I.B. and S.B. to come to Canada: so that the father could get medication for his mental health and other health issues; to allow S.B. to meet and spend Christmas with the paternal side of the family; and to give X.L. a break. She referenced that the father had written these three reasons on a whiteboard in their apartment in Qinhuangdao. It was her understanding that this was to be a visit, and that they would return to China by the end of January 2023 in time for the Chinese New Year.



- [137] The mother testified that she was feeling overwhelmed as she was the only one regularly working to support the family, caring for S.B., providing care for the pets (dog, cat, hamster, and turtle), and trying to support the father in his ongoing struggles with depression and anxiety. She also confirmed that added stress came from assisting her parents to navigate the numerous lockdowns and restrictions being imposed by the government.
- [138] According to the father, the reasons for leaving China were to get medication for his mental health and health issues and to get S.B. healthy, as she had been sick since August 2022. The situation became more desperate toward the end of September 2022, as another wave of COVID-19 had resulted in more lockdowns, with food rationing, unavailability of potable water and medication, and ambulance sirens blaring around the clock. He testified that he wanted to get himself and S.B. away from that situation as well as the threat posed by the mother.
- [139] In cross-examination by OCL counsel, when shown text messages exchanged on September 17, 2022, he confirmed that another reason for coming to Canada was to give the mother a break. As clearly indicated in the texts, her stress was noticeable to the RYB teachers and was also apparent to the father.
- [140] After two flight delays and a COVID-19 lockdown in their city, the father and child left China on October 20, 2022, arriving in Canada on October 22, 2022.

### **Spring Visit**

- [141] The mother arrived in Canada for a visit on March 29, 2023 and stayed until May 10, 2023.
- [142] The mother stayed in the basement of the home, being told by the paternal grandmother that she could use the grandfather's office. She had virtual English classes to teach, which took place at unusual hours.
- [143] It was clear from the paternal grandparents' evidence that the mother's visit was taxing for them. They did not like that the mother disrupted their accustomed lifestyle. They did not like that she had taken over the basement and the "boys'" bathroom in the basement, instead of using the "girls'" bathroom upstairs. She left her belongings all over the place. She was not respectful of their home.
- [144] The paternal grandfather was quite put out that the mother insisted on him opening their pool, even though it was early in the season and cost them money to do that.
- [145] They also noted that the mother did not respect S.B.'s routine of bedtime and mealtimes. They noticed that S.B. would give sass, which they had not observed before. They commented on the fact that S.B. would hiss at them.
- [146] During the visit, the father and his friend, H.M., made efforts to show the mother around the Niagara area. The parties had many discussions about whether the mother would eventually move to Canada and what steps needed to be taken, such as finding accommodations, finding employment, transferring money from China, saving up money, selling assets in China, and what they might do with the pets left behind in China.
- [147] There was also much evidence that the parents engaged in many arguments. The paternal grandmother could not confirm what the arguments were about as the parents would often speak Mandarin. On occasion, the disputes got so loud, with both parents yelling, that the grandmother would feel it was best to remove S.B. from the room.

### **Events between August 30, 2023 and December 31, 2023**

- [148] Up until the spring visit, the mother had been having regular video calls with the child. The

father also facilitated video calls with the child and the maternal grandparents.

- [149] Following the mother's return to China in May 2023, the maternal grandparents testified about the calls being greatly reduced, both in frequency and duration. The mother also noticed increasing difficulties in being able to have regular video chats with their daughter.
- [150] This difficulty increased significantly after the father determined that the marriage was over on August 30, 2023. Many weeks would go by where the father did not facilitate contact between the mother and daughter, citing various excuses.
- [151] Before the mother had been told that the marriage was over, the mother had been making plans to travel to Canada to be here for S.B.'s fifth birthday on October 3, 2023. Although the status of the parties' relationship had changed, the mother made it clear that she would still be coming to Canada to see her daughter on her birthday.
- [152] The father's evidence was that he did not know when the mother would be arriving as she had at one point indicated that maybe she should cancel her flight. But after that single text, all messages sent by the mother confirmed she would be coming as planned.
- [153] The father was familiar with the flight schedules from China, and he knew that the flight on September 27, 2023 was the last flight that would allow the mother to be here for the birthday.
- [154] The mother had asked the father to bring S.B. to the airport to meet her as he had done in March 2023. Instead, on September 12, 2023, he advised the following:
- “you will have to pay for room, for food, you will have to find a way from airport and back to airport...when you are here, you can see [S.B.] only when I say its ok and cannot confuse her or interupt [sic] her routine...also youll [sic] need to find way to come see her from ur room and back again...”
- [155] The paternal aunt was also of the view that the mother had not communicated about her arrival date, she just arrived. The aunt was not aware that the father had refused to pick up the mother at the airport. She expressed surprise that he would have said that, as she stated, “You would absolutely not leave a young female at the Toronto airport on her own.” If she had known this, she would have gladly gone herself to pick up the mother.
- [156] The aunt was also not advised that the father had told the mother that she would have to find her own way to the paternal grandparents' home to see S.B. She knew that the mother's means of transportation was a bicycle she had purchased after arriving in Canada. After an incident where the mother was smacked by someone while riding her bike, C.B. mentioned to the father and the paternal grandfather that they should consider the mother's safety. The aunt did offer her a ride home a few times, but the mother refused, not wanting to tell where she was living.
- [157] The mother also would not tell the paternal family when she was leaving Canada. The aunt was instrumental in getting this information by going into the mother's bag while she was at the paternal grandparents' home for a visit. The aunt advised that she took a picture of the flight details and sent that to the father. Despite knowing that information as early as September 28, 2023, the father continued to tell everyone (FACS, the school, the OCL, the court) that he was concerned the mother was a flight risk and she would try to remove S.B. from Canada. It was not until the trial and the production of text messages that it became abundantly evident that the paternal family knew the details but continued to express concern that this justified the mother not being left alone with S.B.
- [158] In a text exchange between the paternal grandmother and the father, the father said:

“thanks to our kid sesrching[sic] her bag....i have some info”

And later:

“the worst newz is have her return fkight[sic] info....january 17<sup>th</sup>”[4]

- [159] From September 28, 2023 until December 23, 2023, the mother attended on a daily basis at the grandparents’ home to visit with S.B. On school days, she met the father at the school bus stop and then they walked home together. The mother stayed for an hour or two and then left to go back to where she was living. Initially, this was a hotel but eventually she obtained a room in an Airbnb. On weekends, the mother attended each day for a few hours.
- [160] The paternal family testified that the mother was not restricted as to where she could be with S.B. and that she had free reign of the house. She could have stayed as long as she wanted on the visits with S.B. but chose not to do so. The mother expressed that she was only allowed on the main level area with access to the kitchen and washroom, but not in the basement or the upstairs section of the house. She also indicated that her visits were impacted by the weather and the daylight as she travelled by bicycle to see her daughter.
- [161] During these visits, the mother stayed at the home with S.B., but there were three occasions where she did take S.B. to the park on her own: twice in November and once in December.
- [162] A birthday party was held for S.B. The paternal aunt stated that she helped to plan this by booking a princess to attend and making party favours. Rather than be involved, the mother simply sat and drank coffee.
- [163] Shortly after the father announced their separation, the mother began to tape record many of their conversations without the father’s knowledge. This started while the mother was still in China. It continued after she came to Canada.
- [164] The mother’s counsel sought to introduce a number of these recordings. Unfortunately, only snippets of much longer conversations had been transcribed. The mother’s counsel produced the entirety of the recordings which totalled more than 13 hours. Counsel did eventually agree on which portions of the recordings were relevant, which were then played as part of a *voir dire*. Even though surreptitious recordings are to be strongly discouraged in family law proceedings, and are presumptively inadmissible, after considering the matter in my ruling released on April 2, 2024, I did permit a portion of the recording between the parties taken on September 4, 2023, a portion of a lengthy recording taken on December 31, 2023 involving the mother, the paternal grandfather and paternal aunt, an undated recording between the parties concerning S.B.’s school, and a recording between the parties on October 31, 2023.
- [165] I do not intend to set out the recordings in detail but confirm that those portions that were deemed admissible have been considered as evidence in the trial.
- [166] The mother asked to speak with the teacher at S.B.’s school and to be allowed to attend there. The father refused, advising that as the sole guardian, only he had the right to do that. In the undated recording, the father offered to “do something nice”, namely allow the mother to come to S.B.’s teacher interview, if she would be honest and tell him what he wanted to know: 1. Where you’re staying; 2. If you’re working; and 3. When you plan to leave. As noted above, he already knew when the mother was leaving. Each parent has the right to be involved with a child’s schooling. Nevertheless, the father misled the mother, wanting to convey to the mother that he was the parent in control of the situation.
- [167] Ultimately, the mother was able to be added to the list of school contacts with the assistance of the Family and Children’s Services (“FACS”) worker who became involved with the family.

- [168] There were two separate investigations conducted by FACS. The first began in late November 2023 with the mother having expressed concerns about the state of the paternal grandparents' home, including black mold, loose wiring, the father's girlfriend sleeping in his bed where S.B. also sleeps, and the father's mental health issues with anxiety, depression, and a past suicide attempt. She also reported incidents of domestic violence in China.
- [169] The father responded to the allegations as follows: there were no hazards in the home; he denied that he had a girlfriend or that he slept naked in his bed, and said that S. had her own bed; he acknowledged that he had anxiety and depression, but denied that it impacted his parenting in anyway and said he had connected with his physician; he acknowledged there were verbal arguments between the parties in China, but denied any physical altercations; he stated that the parties had separated when S.B. was two years old, but remained living together; he stated that the mother's access needed to be supervised as she had never been the child's primary caregiver and when in China, she had made a comment "that she was overwhelmed and would harm the child".
- [170] The FACS worker, Ms. Iradukunda, did not find any hazards, there were no disclosures from the child that the father slept with anyone, the school reported that there were no concerns, and the father's family doctor confirmed the father had been diagnosed with general anxiety, he was on medication, and he had been referred to a psychiatrist. The file was closed with the worker noting no child protection concerns.
- [171] In cross-examination, the worker was shown pictures of the home taken by the mother, with several areas of mold being visible. The worker confirmed that, if she had observed this, she would have mentioned it to the family and had them fix it. She confirmed that there had been a few hours' span between the call to the father and when the meeting took place.
- [172] The worker confirmed that she did not have concerns about the father's mental health, relying on information from his doctor. However, she was not aware that the referral to the psychiatrist had been cancelled due to the father failing to follow up and schedule an appointment. She confirmed that if she had known that she would have reached out to the father and doctor for clarification.
- [173] The worker confirmed that the father had indicated the reasons he had left China were due to S.B. being sick and not being able to get medical care. He also referenced not being able to work as an English teacher. He did not mention that he left China out of fear that X.L. might harm S.B.
- [174] The worker was not able to verify domestic violence, noting that failure to verify a concern did not mean it had not happened. In any event, she did assess this to be as low risk as the parties no longer lived together. She did comment being uncertain about the parents' relationship while in China but believed that it was not a healthy one.
- [175] On December 20, 2023, after a visit with S.B. at the paternal grandparents' home, the father noticed that his cell phone was missing. She provided two explanations: initially, she had picked it up by mistake as the two phones are identical: and another time she expressed that perhaps someone had put it in her coat pocket. The phone was returned to the father the next day. The father testified that there were entire chat messages that had been deleted. The mother denied having erased anything.[5]
- [176] The first time that the father and his family had requested that the mother not attend at their house was on Christmas Eve day 2023. They had plans to go the paternal aunt's home. The mother arrived in the afternoon, but when the door was not answered she began yelling and banging on the door, insisting to be allowed to see her daughter. She then called the police, and although the paternal grandfather initially did not want to let them in, they were permitted to do a welfare check on the child. The mother then left the area.

- [177] The mother did have a visit with the child on Christmas Day 2023, and thereafter as she previously had been having, until December 31, 2023. On that day, the mother attended at the home expecting to have a visit with S.B. The paternal grandmother, father and S.B. had left the home to prevent S.B. from witnessing what happened. The paternal aunt came to the home to confront the mother. C.B. was extremely upset after learning the mother had contacted her ex-partner, M.L. The aunt advised that their daughter, E., had been physically and emotionally abused by M.L. as verified by FACS. Despite this, and the mother never having met him before, the mother contacted M.L. to discuss her poor treatment at the hands of the paternal family, and then advised him that she knew that the paternal grandparents had plotted to have him killed. Not only was this a lie, but the information was then shared with E., causing great distress to her and other family members.
- [178] It was unclear whether the mother was aware of the abusive conduct of M.L. toward E., although the paternal aunt assumed she had been told by C.I.B.
- [179] The mother recorded the interaction on December 31, 2023, which began with a conversation between the aunt and the mother about why she would have contacted M.L. The paternal grandfather later loudly intervened, stating to the mother that:
- “You stole my son’s phone. You deserve to be in prison”
- “You will now face the law over threatening a child”
- “You’re pure evil; a vile human being”
- “Get the fuck out...go back to fucking China, when we are finished, you’re gonna leave, you’re never coming back to this house. Never under any circumstances show that face within a hundred fucking yards of my house or I will have you deported. You do not deserve to be in this country. You do not deserve to be anywhere near my family. I have had it up to here. You’ve pushed one too many buttons now. Really, really made a big mistake.”
- [180] Following that exchange, the mother left the house without having a chance to visit her daughter. She was not permitted any more visits with her daughter until the OCL intervened to request that the mother’s parenting time be expedited.
- [181] On January 1, 2024, the mother went to the police station to make a report. The police station was closed and so she returned on January 2, 2024 and a police report was then sent to FACS.
- [182] As a result of this report, a second FACS investigation was opened on January 4, 2024 because of receipt of a police report regarding possible sexual abuse of S.B. in the care of the father. The mother had contacted the Niagara Regional Police Service because of the incident that occurred on December 31, 2023. According to the mother, in the course of making this report, the police officer reviewed pictures on the mother’s phone. These pictures included several of S.B. naked and playing in the bathtub, and a picture of a male with a green frog toy on his penis. There was also a video of two toys engaged in sexually suggestive behaviour. The matter was referred to the Child Abuse Unit, but as there were no disclosures made by the child, no further steps were taken. The officer noted that while the frog picture was odd behaviour, there was no evidence of a criminal offence.
- [183] As with the first FACS investigation, the father requested that the paternal grandmother be present when speaking with the worker. He denied any impropriety. The Society determined that there was no evidence of sexual harm, and the file was once again closed.
- [184] The father disconnected WeChat sometime between when his cell phone was taken by the mother (December 20, 2023) and the altercation on December 31, 2023. He confirmed that

WeChat had been the only means for the parents to communicate with one another, other than the daily visits. He did not advise the mother that he was turning off WeChat, nor did he advise her that she should only contact him through email. When this was pointed out to him, he suggested that she could have written him a letter. He agreed that he could have possibly contacted her through Facebook messenger or Instagram, but he pointed out that she did not do that either. When he noted that it was incumbent on her to take these steps as he was the aggrieved party, he denied cutting off communication with her had been done as retaliation.

- [185] The father left a few days later, travelling some ten hours away to H.M.'s father's home, on the Ontario/Quebec border. He was not present for the first meeting on January 16, 2024, only returning to the area on January 18, 2024. This was one day after the mother's flight had been scheduled to depart.
- [186] S.B. remained out of school until January 22, 2024.
- [187] The subsequent events are set out under litigation history.

### **Office of the Children's Lawyer**

- [188] In accordance with the current protocol and under the *Family Law Rules*, O. Reg. 114/99, the mother's wrongful removal/retention application was automatically served on the Office of the Children's Lawyer.
- [189] Kathryn Junger was assigned as OCL counsel for S.B. on January 17, 2024. A clinical assist, Mary Polgar, was also assigned to support counsel in providing evidence to the court on behalf of the child.
- [190] Ms. Polgar provided two trial affidavits, one dated March 16, 2024 and a second one dated on April 21, 2024. During her testimony, she confirmed a prior affidavit having been sworn on March 6, 2024, prepared in the context of a motion by the mother requesting unsupervised parenting time.
- [191] Ms. Polgar confirmed that the role of the OCL is to gather evidence by interviewing the child, parents, and others involved with the child, obtaining records from the police and any Children's Aid Societies, asking the parents to share any documents that they wish the OCL to review, and to then take a position on behalf of the child.
- [192] She confirmed that initially, as set out in the first affidavit, the focus was on the child having parenting time with her mother, in line with the child's expressed wishes. In subsequent affidavits, the focus was more on where the child considered "home" to be, in the context of providing evidence about the child's habitual residence.
- [193] Ms. Polgar clarified that although she has conducted assessments for cases dealing with parenting time and decision-making, that was not her role in this case. She disputed that she spent more time with the mother and S.B. than she did with the father and S.B. She also dismissed the suggestion that she met with S.B. at her mother's home and should have also met with S.B. at the father's home. She emphasized that the purpose was not to make observations of the child in the care of each parent (as would happen with an assessment), rather it was for each of the parents to facilitate one meeting, which is what happened.
- [194] In total, the OCL met with the child on seven occasions. Other than the two meetings facilitated by each of the parents (father at his lawyer's office/mother at her residence), the meetings took place at the child's school as this provides a neutral location. All of the

meetings with the child took place in private.

- [195] There were also two additional “chance” meetings when S.B. was at the St. Catharines Public Library with her mother. Ms. Polgar was there to meet other OCL clients. These occurred at the end of March and mid-April 2024. At the run-in at the end of March, the OCL observed that S.B. was animated and wanting to show off her ballet moves after having just read a ballet book with her mother. On the second occasion in mid-April, the OCL also observed S.B. to be animated and excited to show Ms. Polgar the library robot and how S.B. could make it speak and move. The father’s counsel expressed concern that he was not advised of these meetings.
- [196] Ms. Polgar described S.B. as being a very engaging and energetic five-year-old with a big personality. She was very animated and expressive during their many discussions. She described that S.B. loves the intricacies of playing with Polly Pockets, and that she loves to draw, to dance, and to sing.
- [197] S.B. talked with great energy about her life in China. She spoke enthusiastically about Chinese customs and such festivals as the Dragon Festival, the Lantern Festival, and Chinese New Year. She spoke spontaneously and in detail about how they celebrated Chinese New Year and how it differed from celebration of New Years in Canada.
- [198] S.B. described having family and friends in China, how much she enjoyed her school, and going swimming and attending ballet lessons. Central to that was her indicating to the OCL that she did all of these with her mommy. When asked what activities her father took her to, she paused, indicating that they just talked, then adding that he would get them their favourite food.
- [199] The OCL described having a very clear impression that it was the mother who was the person who was the child’s primary caregiver while in China. This was verified in such interactions with the child when on a brief phone call to schedule a meeting S.B. seemed very upbeat, and when asked about that, she explained she had begun having “sleepovers” with her mom, commenting “I am happier than I used to be”. This also came through in other ways. During their first meeting, S.B. stated that her father asked her if she wants to go to China, but then said she “did not want to say how she answered this question”. S.B. then spontaneously drew a picture with the number “100” and then drew a picture with the number “1”. She explained that she wanted to see her mommy “100 days” and her father “1 day”. When asked if she wanted to go to China if her mother were to return to China, she answered, “Yes, this is in my heart”. When asked when the “1 day” would be to see her daddy, she stated this would be the day she went to China. In cross-examination, the OCL confirmed that, at her age, S.B. was not being literal but was aware that the first number was big in relation to the second number.
- [200] S.B. used numbers at a later meeting when she was asked how many visits she wanted with her father – she wrote “1” on a notepad. Later on during the meeting, S.B. continued to add zeros to the one, explaining that this represented how many days she wanted to see her mom.
- [201] When the father’s counsel questioned how S.B. could have recalled events in China with such detail when she was much younger and suggested it was not possible to know whether these recollections were accurate, Ms. Polgar confirmed that based on S.B.’s personality and her observations, she was confident that if she did not recognize something S.B. would have said so. She explained that S.B. would not have known in advance that they would be discussing Chinese New Year, yet when this subject was raised, S.B.’s face lit up with a clear look of recognition, and then she launched into details about how this was celebrated in China. There was a similar reaction when S.B. was shown pictures from her life in China – at a swimming pool: “mommy took me...I went a lot of times”; in a playroom: “mommy was allowed to take me to the class but daddy did not want to because he said I was a big girl”; at

a dentist office; together with mommy “having my favourite food”; a photo of her lao lao (maternal grandmother); and a photo of her friend, Lemon, saying that she misses Lemon as she was her best friend. S.B. then stated that, “Mommy is my bestest, best, best, best, best, best friend.” (at least ten times). Ms. Polgar confirmed that there was no evidence that S.B.’s recollection of these events was incorrect.

- [202] When asked why no pictures of S.B. and her father were shown to the child, Ms. Polgar explained that the purpose of the pictures was to understand what activities and events S.B. had been engaged in while in China. There were no photos of that nature that included the father. The majority of the pictures shown to S.B. were of the child alone. Both parents had been invited to provide material; the mother provided pictures and other documents, but the father did not.
- [203] After S.B. had made the comment about her mother being her “bestest friend”, S.B. was asked if her daddy was also her best friend and she said nothing. She then drew a sad face, indicating she did not want to talk about daddy. When asked how she felt about her mommy, S.B. drew a picture of a happy face. Ms. Polgar noted that S.B. was not asked to draw a picture, she chose to do that.
- [204] Ms. Polgar shared that S.B. described herself as being both a Chinese girl and a Canadian girl, her explanation that she is a bicultural child.
- [205] In her affidavit, the OCL confirmed that when meeting with the father he emphasized the importance of having S.B.’s “true voice” heard. He stated that “[S.B.] is so strong, no one can put ideas into [S.B.]’s head”.
- [206] In her testimony, Ms. Polgar confirmed that her evidence does reflect S.B.’s true voice. S.B. has consistently and strongly expressed a wish to be in the care of her mother. She has been very clear that China is her home, that she came on a visit to Canada, and she wants to return to live in China.
- [207] Despite being cross-examined by the father’s counsel, Ms. Polgar was clear that there was nothing to suggest that S.B.’s stated wishes were because of influence by the mother. She noted that their first meeting took place when S.B. had not seen her mother for over a month, with regular overnight visits only beginning in early March 2024, by which time the OCL had met with S.B. on five occasions.
- [208] The OCL was asked by father’s counsel about the text exchange between the parents on September 10, 2022 and what role that played in the position being taken. In reviewing the FACS records, Ms. Polgar confirmed she did not believe that the actual text messages had been shared with FACS. There was a brief statement attributed to the father that, when they were in China, X.L. made a comment that she was overwhelmed and would harm the child (“wanted the child dead”). There was no further context provided. There was also no indication in the record that the Society discussed this statement with X.L.
- [209] The father also did not raise this text message as a concern in his meeting with the OCL. He did indicate that he wanted the mother’s parenting time supervised. He was concerned about her snooping and stealing phones. He finally realized that she is not trustworthy. He also did speak at about the mother being very abusive toward him, having anger issues, and turning everything into a fight. When asked to describe the mother’s behaviour, he said that when S.B. would make a mess, the mother would scream, and when S.B. was two and a half years old, the mother had thrown S.B. across the room for taking makeup from her vanity, and that she would hit S.B.’s hands for removing the mother’s glasses. He described having to follow S.B., cleaning up after her, “so she didn’t piss off [X.L.]” The other behaviour he noted was that the mother threatened to divorce him, which would cause him to lose the family visa.
- [210] Specifically, when asked as to the reasons that he came to Canada in October 2022, the



father indicated to the OCL that it was to get back on his anxiety medication, to get medication for S.B.'s bronchial infection, and with the worsening of lockdowns in China, he needed to get S.B. to his mother, thinking "she will be safe with my mother if I drop dead."

- [211] The mother did speak with the OCL about the father alleging she was a danger to her daughter. The mother explained that she spoke Mandarin into a WeChat app stating, "I'm frustrated at the moment" which was erroneously translated into English as "I want to kick her to death". She did not check the message before sending it. The father knew that it was inaccurate, but he is now trying to use it against her.
- [212] The court also asked for clarification as to why this text exchange was not a determining factor in the position taken by the OCL. Ms. Polgar explained that the text exchange had happened before the father and S.B. had come to Canada. The FACS records reflected the father raising a comment attributed to the mother to the FACS worker, but no context or further information was provided. In her view, if FACS suspected abuse based on the discussion with the father, she believed that the child protection agency would have investigated this. As the father did not seem to place much significance on the text, there would be no reason for the OCL to do so.
- [213] Finally, Ms. Polgar noted that when asked, S.B. confirmed that X.L. had "never done mean things to her". She then spontaneously recalled an occasion where the mother had written on chalkboard "Congratulations [S.B.]" and her father erased it. She expressed being unhappy when he did that.

## THE LAW

- [214] China is not a signatory to the *Convention on the Civil Aspects of International Child Abduction*, Can. T.S. 1983 No. 35 (the "*Hague Convention*"). This should mean that the provisions of the *Children's Law Reform Act*, R.S.O. 1990, c. C. 12, as amended ("*CLRA*"), apply to a determination of issues raised in this case.
- [215] The statutory scheme under the *CLRA* provides that an Ontario court can assume jurisdiction to make a parenting order with regard to a child on any one of four bases:
- Under s. 22(1)(a), if the child is "habitually resident" in Ontario at the time the application is commenced;
  - Under s. 22(1)(b), if though not habitually resident in Ontario, the child is physically present in Ontario at the time the application is commenced, and the other requirements of the section are met, including the requirement that no application for custody has been started in another place where the child is habitually resident;
  - Under s. 23, if the child is physically present in Ontario and would, on a balance of probabilities, suffer serious harm if removed from Ontario; and,
  - Under the court's *parens patriae* jurisdiction to protect children, preserved by s. 69.

See: *Ojeikere v. Ojeikere*, 2018 ONCA 372, 140 O.R. (3d) 561, at para. 12.

- [216] Sections 22 and 23 are found in Part III of the *CLRA*. Section 19 confirms that the overall purposes under Part III are to be determined based on the best interests of the child, ensuring that parenting issues are made in the place to which a child has the closest connection; to avoid concurrent exercise of jurisdiction in different places; and to discourage child abduction as an alternative to determination of custody and access rights by due process.
- [217] As confirmed by the Supreme Court of Canada in *F. v. N.*, 2022 SCC 51, the legislation is based on the premise that, following an abduction, the child's best interests are usually

aligned with their prompt return to the jurisdiction of their habitual residence. Therefore, where a child who is wrongfully removed to or retained in Ontario habitually resides in a country that is not a party to the *Hague Convention*, the [CLRA](#) provides that but for exceptional circumstances, courts will refrain from exercising jurisdiction and leave the merits to the foreign jurisdiction to which the child has a closer connection.

- [218] At the preliminary stage of deciding jurisdiction, it is not the role of the judge to conduct a broad-based, best-interests inquiry as they would on the merits of a custody application, as to do so would ultimately undermine the purpose of the serious harm exception, that is, to ensure decisions on the merits are made by the appropriate authority in accordance with the best interests of the child.
- [219] One exception is set forth in [s. 23](#) of the [CLRA](#): a court can exercise jurisdiction to make a parenting order where a child is physically present in Ontario and, on a balance of probabilities, the court is convinced that the child will suffer serious harm if removed from the province. The onus to prove that the child would suffer serious harm upon return rests on the abducting parent. The burden is demanding, and it is not enough to conclude that the return would have a negative impact on the child. It is also not enough to identify a serious risk of harm; the court must be satisfied, on a balance of probabilities, that the harm itself would be serious in nature. Serious harm inquiries are child-centered, and the analysis is highly individualized. When conducting their [s. 23](#) analysis, judges should consider both the likelihood and severity of the anticipated harm. The focus is on the particular circumstances of the child rather than a general assessment of the society to which they would be sent back.
- [220] Another relevant question as to the scope of [s. 23](#) is whether inconsistencies between the family law in the foreign jurisdiction and in Ontario should factor in a serious harm analysis. As long as the ultimate question of custody will be determined by the court that has jurisdiction to do so on the basis of the best interests of the child, inconsistencies between the local and foreign legal regimes will usually not amount to serious harm.
- [221] When a court is satisfied that a child has been wrongfully removed to or is wrongfully retained in Ontario, a return order presented by the left-behind parent is governed by [s. 40](#) of the [CLRA](#). Judges should consider the best interests of the child in exercising their [s. 40](#) powers. The return order procedure starts from the premise that the best interests of the child are aligned with their prompt return to their habitual residence so as to minimize the harmful effects of child abduction. If the evidence is insufficient to establish that Ontario courts should assume jurisdiction, judges should not use their residual [s. 40](#) powers to postpone indefinitely the child's return to the jurisdiction best positioned to decide the case on the merits.
- [222] Currently, there is a dilemma for Ontario court judges dealing with international abduction cases. As set out above, in my view, the proper approach in a “non-*Hague*” case would be to apply [s. 22](#) of the [CLRA](#) and relevant case law to determine habitual residence. In previous cases, and importantly in *Geliedan*, the Ontario Court of Appeal confirmed that the [CLRA](#) was a complete code for determining habitual residence and that it was not the same under *Hague Convention* cases and provincial statutes. This made sense given that the legislation specifically provides a definition for habitual residence under [s. 22\(2\)](#), which states that it is the last place where the child resided: (a) with both parents; (b) where the parents are living separate and apart, with one parent under a separation agreement or with the consent, implied consent or acquiescence of the other parent or under a court order; or (c) with a person other than a parent on a permanent basis for a significant period of time. There is no definition for “habitual residence” provided under the *Hague Convention*, except as now provided by the Supreme Court of Canada in *Office of the Children's Lawyer v. Balev*, [2018 SCC 16](#), [2018] 1 S.C.R. 398.
- [223] [Section 22\(3\)](#) of the [CLRA](#) then provides that the removal or withholding of a child without

the consent of the person having decision-making responsibility with respect of the child does not alter the habitual residence of the child unless there has been acquiescence or undue delay in commencing due process by the person from whom the child is removed, i.e., a parent cannot unilaterally change a child's habitual residence. In contrast, in *Hague Convention* cases such as *Balev*, there are circumstances where a child's habitual residence can in fact be altered.

[224] In *Zafar v. Azeem*, [2024 ONCA 15](#), the Ontario Court of Appeal made it clear that, although *Balev* is a *Hague Convention* case, the legal discussion around how to determine habitual residence is equally applicable in the non-*Hague* context.

[225] As such, the court must adopt a hybrid approach to consider the entirety of the child's circumstances:

- a. the child's links to and circumstances in country A;
- b. the circumstances of the child's move from country A to country B; and
- c. the child's links to and circumstances in country B.

[226] Subsequent Superior Court of Justice of Ontario decisions have adopted *Zafar* and applied the hybrid approach to determine habitual residence: See *Kalra v. Bhatia*, [2024 ONSC 1443](#); *Aldahleh v. Zayed*, [2024 ONSC 547](#). As well, the Ontario Court of Appeal in *Los v. Ross*, [2024 ONCA 122](#), confirmed the hybrid approach is what must be used.

[227] For purposes of my decision in this case, this court is bound to follow the Ontario Court of Appeal's direction in applying a hybrid approach to a determination of S.B.'s habitual residence.

## **CREDIBILITY**

[228] Both parents gave extensive oral evidence. Despite submissions to the contrary, neither party was wholly reliable as a witness, and in some respects, each of them gave evidence which was, in my view, inaccurate and untruthful.

[229] While in some areas the mother presented her evidence in a seemingly straightforward manner, in other areas, in assessing the mother's credibility, the court was struck by the mother's unwillingness to admit certain obvious facts. She went out of her way to deny that she had ever become frustrated with S.B.

[230] One clear example was the incident of S.B. getting into the mother's makeup. Throughout her testimony, the mother denied that she ever did or would throw her child. This is contrasted with the audio recording where the mother admitted to doing this. She then confirmed the child was not hurt, changing the subject to remark on two instances when the father was supposed to have been looking after S.B. and she was badly hurt.

[231] Another example was her refusal to acknowledge that she was angry when the father ended the marriage. That would certainly be an expected reaction, but the mother was insistent that she was not upset, just worried about S.B. Once again, rather than answering truthfully, the mother went to great lengths to present that she never became angry, knowing that was a major theme in the father's case.

[232] There were several times in cross-examination, when she was challenged and took offense at the father's counsel's description of events, becoming confrontational and stating somewhat harshly, "Did I make myself clear?"

[233] The court's concerns about the reliability and credibility of the mother's evidence pale in

comparison to its concerns about the father's evidence on many critical issues.

[234] On the important issue of the parties' relationship and when it had ended, the father told so many different versions it was difficult to keep track. Was it two years after S.B.'s birth? Before he and S.B. came to Canada? During the spring visit? After the spring visit? Over the course of the summer when he got his confidence back? Or was it August 30, 2023? Each of those dates would support a different narrative, and the father had difficulty keeping them straight.

[235] He testified about the mother's "trigger temper" and having to walk on eggshells to avoid setting her off. Yet he asked the court to believe that he had raised the issue of ending their marriage several times while they were both living together in China. How then could he feel threatened by the wife asking for a divorce?

[236] He testified that the child removing the mother's glasses was a triggering event that caused her to lose control. He never observed this happen.

[237] He spoke about being put under pressure by the mother who demanded that he take S.B. to RYB and kindergarten, even though he testified that he was the parent that always did that. He was unable to get correct health codes, but his friend, D.G., another foreigner who lived in China during the lockdowns, could not explain why he would have had such difficulty.

[238] I do not accept that the father left China because of S.B.'s health. The timelines do not add up. If S.B. was as ill as the father described, he would not have been able to get the child through so many COVID check points on the various modes of travel (train and plane) to be able to leave China. Two weeks after arriving, S.B. was well enough to begin attending kindergarten. The father did not bring S.B. to a walk-in clinic to be seen by a doctor until November 15, 2022, several weeks after being healthy enough to go to school. It's equally plausible that S.B. had by that time caught a "bug" from attending school, rather than some lingering illness from China.

[239] He lied about not knowing when the mother would be arriving in Canada, and he lied about not knowing the date of her return flight. The paternal aunt and grandmother kept up this charade to support their position that the mother was a flight risk, even though it was the father who had texted the mother insisting that she provide return flight details:

"Do you want to play games? [S.B.] is a UK citizen....we could both be in UK next week. When ur fuxking [sic] flight home."

[240] Aside from the concerns that the court had with the credibility and reliability of both parents' testimony, it was concerning to the court the level of manipulation that both parents exhibited in trying to control the situation at different points prior to and during this litigation. Some examples include:

1. The mother's insistence in making audio recordings of each interaction with the father. While a small amount of them were admitted, most could not be. As noted in most of the case law, such efforts often say more about the parent doing the recording than the other participants.
2. The mother stole the father's phone and then lied about it. When she was questioned by the FACS worker about where the photos came from that she had given to the police in January 2024, she maintained that she "mistook the phone by accident". It is clear to the court that she intentionally removed the phone with the hope of obtaining evidence to help her case.
3. Undoubtedly, the mother felt helpless and in a vulnerable position after the December 31, 2023 incident given the threats of jail and deportation made by the

paternal grandfather. She knew that he was a lawyer for the federal government and undoubtedly believed that he could follow through on these threats. He could not, but she did not know that. One of the reasons that this recording was admitted was so the court would know the tone and volume of the conversation, rather than just the words that were said. To be clear, the mother did not provoke the tirade that ensued.

However, the mother's actions of making a report to the police, when there was not a shred of evidence that the father had done anything sexually inappropriate with the child, was unacceptable. The mother may not have asked to have the "frog dick" photo sent to her phone by the father, but she went too far to then use that image to suggest to the police that it was indicative of something else, knowing full well that it was received as part of the practice of sexting they both engaged in as adults to and including August 30, 2023.

4. The mother contacting M.L. hoping to find an ally against the paternal family, similarly, went too far.
5. The father withholding the child from the mother for the month of January 2024, then disabling WeChat and providing no contact or means of communication for the mother and then taking the child out of the jurisdiction of the court until he thought the mother would have left Canada. He would not agree with the suggestion that it was not done in retaliation; it was.
6. The father's inexcusable delay to engage Brayden Supervision Services when he had consented to it. The suggestion that the parties had agreed to mediate and deal with access outside of court was not believable. It was another stalling tactic by the father.
7. Notwithstanding the father professed multiple times during the hearing that he would never keep S.B. from her mother and that the mother would always have the right to be included in the child's life, his actions tell a very different story.

[241] It was apparent that in each of those instances above, by engaging in such conduct, neither parent was looking out for the best interest of S.B.

[242] Further and overall, it was clear that in their interactions and dealings with one another, each could give as good as they could get. They were both quite able to hold their own in their frequent and ongoing disagreements with one another.

## **THE LAW APPLIED TO THE FACTS**

### **1. Where is the child's habitual residence?**

[243] As directed by the Ontario Court of Appeal in *Zafar*, in determining habitual residence in non-*Hague* cases, the hybrid test set out in *Balev* should be applied.

[244] The first part of the test is to consider links to and circumstances in country A (China):

- a. S.B. was born and raised in China for her first four years of life. She enjoyed a very active life in China: attending preschool (RYB) from a very young age; having started kindergarten in the three months prior to her departure; attending ballet and tae kwon do lessons; going swimming regularly; and enjoying time with her friends.
- b. There was much dispute about what each parent's involvement was in the care of S.B. The mother complained about the father's lack of involvement in S.B.'s

care. It is difficult to reconcile the father's description of his anxiety and inability to get out of bed with a person who was also capable of providing full-time care for a young, active child. The father was adamant that he was the primary caregiver for S.B., stating both that the mother did not want to be left alone with S.B. and that she was more interested in working than being a mother to S.B.

- c. The pictures reviewed with the mother by the OCL certainly tell a very different story as to the mother's role in raising S.B. It is also telling that in text messages, it was the mother who had to tell the father about when S.B.'s school ended and began. It was the mother (not the father) who packed S.B.'s bag for the trip to Canada, ensuring that she had essentials such as identification, vaccination records, and clothing – even though this meant that the paternal grandmother could blame the mother for not packing proper clothes for the trip, necessitating them having to purchase “an entire wardrobe” for their granddaughter.
- d. Certainly, what was undisputed was the active and routine involvement of the maternal grandmother. She regularly travelled a great distance to the parents' home in Qinhuangdao to help with S.B.'s care and to cook and clean for the family. She was also significantly involved in providing care for S.B. at her own home in Hohhot – either with one or both parents present or with neither parent present. These visits did not last a few days or a week, but rather were for extended times of a month to four or five months. In addition, the maternal grandmother maintained contact with her granddaughter with frequent video calls when the child resided in China.
- e. The final and significant aspect of S.B.'s life in China was her active participation in many Chinese festivals and other cultural events. The photo book and S.B.'s recollection of these events spoke volumes.

[245] The second part of the test is to look at the circumstances of the child's move from country A (China) to country B (Canada):

- a. For those of us living in western countries, the COVID-19 pandemic posed great difficulties with no rule book as to how to navigate the situation. There was much uncertainty with many changes in rules and protocols for everyday life, vaccinations, and travel. There was much illness and death. There were multiple lockdowns of varying degrees at different times. However, I am of the view that the reality of living through the pandemic in China was horrific. The restrictions and lockdowns were much greater and more frequent; the lack of water and food and medication was a real concern. I am satisfied that the father's version was closer to what it was like to be living in China. In her testimony, the mother downplayed these difficulties. The dreadful circumstances undoubtedly were a factor in the mother's decision to allow S.B. to travel to Canada for a visit.
- b. I am also satisfied that from the perspective of the father's health, this trip was urgent for him. Everyone testified as to how poor his physical and mental health was in the many months prior to his departure from China. In his words, “his anxiety was making it impossible to tell what was real and unreal”. It was evident that the mother did attempt to assist him with his anxiety and panic attacks, and it was evident she did believe that he needed to travel to Canada for treatment.
- c. As she clearly indicated in her testimony and in the text exchanges, before the departure of S.B. and the father, the mother was also feeling overwhelmed by the situation. Contrary to the suggestion that the only stressor came from the mother's inability to tolerate caring for S.B., it was evident that other factors were being the only one working, doing household and pet duty, as well as assisting her own

parents through COVID-19 lockdowns.

- d. I do believe that the mother understood the importance of S.B. meeting the paternal side of the family and being able to spend Christmas with them for the first time. It was in those circumstances the mother arranged to obtain a one-time green exit letter that permitted S.B. to leave China and travel to Canada.
- e. It was clear that this was not a permanent move to Canada. Most of S.B.'s belongings remained in China and many of C.I.B.'s belongings remained in China, including his prized guitar ("wherever this guitar is – that's where I will be"). The paternal grandmother and paternal aunt, as well as the father's close friend, H.M., all testified that when the father and S.B. came to Ontario in October 2022 they were coming for a visit. The father ultimately confirmed this as well in his text messages and testimony.
- f. It was also obvious that the mother had consented to S.B. being brought to Canada for a visit with the expectation that the child would return to China in January 2023 to celebrate the Chinese New Year with the maternal family, as they had done for the previous four years.
- g. I do not accept that the trip to Canada came about due to a concern about S.B.'s safety when in the care of the mother. This will be elaborated on under the serious harm section below.
- h. In considering this aspect of the hybrid test, some detail is important to elaborate on the father's conduct once the child was living in Canada.
- i. Early in August 2023, there were numerous texts between the mother and the father. These included:
  - i. the mother sending many texts to the father suggesting that a decision be made about where they would live (China or Canada);
  - ii. the mother asking the father why he seemed to be ignoring her and not taking her video calls;
  - iii. the mother asking for help about what documents she would need to apply for her Maple card, and when the father expressed that money would be needed for her to apply and explained that as her husband he could sponsor her, but he would need to prove he could support her for two years, stating, "it used to be u would auto get it as my wife...but chinese and pakis abused the system and ruined it", the mother suggesting some solutions like getting a work visa and getting some assets out of China;
  - iv. the mother confirming that she would be attending S.B.'s birthday and wanting to be there as her mother, and the father confirming the steps she needed to take including getting translations of degrees and transcripts, and getting job offers and a work permit to start. The father then also indicated that given his mental health issues, the mother would have to be the primary bread winner;
  - v. On August 25, 2023, after engaging in sexting (which was a common practice between the parties), the mother confirming that she was going to book her flight to Ontario that night;
  - vi. On August 27, 2023, the mother sending sexy photos to the father and him requesting she send more, which she did; and

vii. On August 30, 2023, the father accused the mother of sending those sexy photos to someone else or a dating app. When the mother responded stating she is married and asking why would she take them for anyone else, he then said, “maybe its finished between us though eh? What do you think?” The mother’s response was, “You are an emotionally unstable person. A few days ago, you said you would continue to work hard with me and start a new life. Today, you suddenly said you would end it with me.”

j. Despite the father’s vehement denial, it was evident to the court that the father had continued to lead the mother on to believe that he had still not reached a decision as to where the family would live, that the mother was always part of his plan, and that they would decide together, when in fact he unilaterally decided that S.B. would remain in Canada and that he would end the relationship. At best it was misleading, but at its worst it was deceitful and dishonest.

[246] The third aspect of the test to be considered are the child’s links to and circumstances in country B (Canada):

- a. S.B. has now been in Canada for 20 months and has acquired links to Canada.
- b. She has been attending school in St. Catharines, Ontario for most of the 2022/2023 school year and the entire 2023/2024 school year. She has adjusted to Canada and has learned to speak English by doing so.
- c. The child has a family doctor. She is in good general health but seems to suffer from ongoing issues with a runny nose and cough, which are now being investigated as caused by allergies. This had been a preliminary diagnosis by her doctor while in China.
- d. S.B. has resided the entire time with her father, in his parents’ home. She stays in a bedroom in the basement. This is the same room where her father sleeps. The father was firm in his view that S.B. has her own bedroom upstairs, but the evidence suggested instead that for S.B., she views this to be E.’s (her cousin’s) bedroom. S.B. has only slept there when E. has slept over. S.B. has never slept there on her own. According to the paternal grandmother, they are “in the process of acquiring bunkbeds” and beginning the process of transitioning S.B. to that room.
- e. In addition to the paternal grandparents, S.B. has regular contact with her paternal aunt, C.B. and her two children, E. and J. She is also in regular contact with the father’s friend, H.M.
- f. The family celebrates traditional holidays such as Easter (getting fish and chips for Good Friday) and Christmas (attending at the paternal aunt’s home for a visit from Santa on Christmas Eve; and present opening and dinner on Christmas Day). Several witnesses spoke about how much S.B. enjoys other western traditions such as Halloween, St. Patrick’s Day, and even dress-up days at school.
- g. The father spoke about the child having participated in soccer in 2023, but no details were provided. He is considering signing her up for swimming lessons but has not done so. There is a pool at his parents’ home.
- h. Like her father, S.B. is musical; she enjoys singing and playing the ukulele. She also enjoys Irish dancing, although she has not taken lessons.
- i. According to the mother, S.B. has lost most of her Mandarin language, having much difficulty to communicate with her maternal grandparents on video calls.



The father acknowledged that the child has lost most of her Mandarin language, although this has improved from being with her mother. He is considering getting a Mandarin tutor for her in Ontario, although the mother is opposed to this.

- j. The father stressed that he has made efforts to ensure that S.B. continues to know the Chinese culture, by celebrating Chinese New Year, purchasing two children's books on this holiday, and putting up decorations. On the evidence presented, the child's Chinese culture has not been celebrated by the paternal family.

[247] Considering the entirety of the circumstances and applying a hybrid approach, the evidence is overwhelming that S.B.'s habitual residence is China. Although the child has developed some connections to Canada, when the court considers the circumstances under which S.B. came to Canada, and S.B.'s ties to China, it is clear to the court that S.B.'s home is China, not Canada.

[248] The [CLRA](#) makes the concept of "habitual residence" central to jurisdiction. For completeness, I will now address the relevant sections of the CLRA which in my view also support that China is the child's habitual residence.

[249] Section 22(2) defines habitual residence as the place where the child resided in whichever of the following circumstances last occurred:

1. With both parents.
2. If the parents are living separate and apart, with one parent under a separation agreement or with the consent, implied consent or acquiescence of the other or under a court order.

[250] S.B. last resided with both parents in China. An overview of the text message exchanges from October 2022 to August 29, 2023 confirm that the parties had not made a decision as to whether they would reside in Canada or return to China. As stated by the father, "all options were on the table" when he and S.B. came to Canada. It is possible to parse out a text where the mother says in February 2023, "so you are not coming back to China?" but there are multiple texts from the father, before and after, stating that he will decide by the summer what they will do. The mother was constantly asking for and getting reassurances from the father that he was planning for them to be together as a family.

[251] The mother did come for a six-week visit in the spring of 2023. The parties did look at houses in a general way, but a comment about how nice the houses are here does not equate to a plan to move to Canada. There were discussions about the steps to be taken to secure appropriate immigration status for the mother, both so she could move to Canada and be able to work here to support the family. Curiously, when asked, the father confirmed that he never took any steps to commence this process. There were text discussions about the mother wanting to bring the pets from China, but again no steps were taken to finalize those arrangements. The suggestion that the mother described herself as a "newcomer" to someone trying to have her apply for a credit card is hardly an indicator that she had decided to move to Canada. As stated by the mother multiple times between October 2022 and August 29, 2023, the father went "backward and forward" on what the decision would be. In the end, when he determined that the relationship was over, there had been no concrete plan made by the parties to move to Canada, nor was there any evidence that the child had resided with both parents in Ontario.

[252] Turning to the second branch of s. 22(2), it is possible to establish habitual residence where a child lives with one parent with the consent, implied consent, or acquiescence of the other.

[253] The father in his affidavit and in his lengthy testimony on this issue went to great lengths to support the notion that the parties had in fact been separated for years prior to August 30,

2023. He told the FACS worker that they had in fact been living separately since 2020 when S.B. was two years old, but when asked at trial, he had no recollection of having said or meant that. In a conversation, he had told the mother that they had lived apart for so long that the parties were considered to be divorced under the *Divorce Act*. At one point, he suggested that “in his heart” he had been separated from the mother prior to coming to Canada. Later, he conceded that X.L. was not likely aware of this due to the fact that they were both in denial that their marriage was over.

[254] It is clear to the court this attempt to explain when they separated, and frankly an attempt at rewriting history, was done purposely to advance a position that the mother consented to the child coming with the father to Canada in October 2022 and now that the mother has allowed the child to remain for 20 months, she has acquiesced to the child remaining here. The mother consented to a visit, nothing more. The suggestion that the mother consented to the child being enrolled in school in Ontario is ludicrous. The father told the mother that it was the law for a child to be enrolled after two weeks in Ontario. That cannot be taken as the mother having consented to S.B.’s school enrollment, being based on false information. Even when the father raised the issue, he suggested that it was S.B. asking about kindergarten, to which the mother replied – “in Ontario or China?” The suggestion is also totally incompatible with the mother continuing to pay the school fees in China well into 2023.

[255] This is also incongruent with the paternal family’s understanding of the situation. They all confirmed that the parties remained a family unit when S.B. and her father came to Canada, when the mother came to the spring visit in March 2023, and after the mother left continuing until August 30, 2023 when C.I.B. asked for a divorce.

[256] Based on the parties having separated on August 30, 2023, the court must consider the evidence after that date to determine whether the mother consented or acquiesced to the child residing in Canada. This evidence is also relevant to s. 22(3) as the retention of a child without consent does not alter the child’s habitual residence unless there has been acquiescence or undue delay in commencing due process.

[257] As set out above, the context of what transpired in August 2023 cannot be emphasized enough.

[258] When the father suggested that the relationship was over, the mother made it clear that she was not consenting to the child remaining with the father in Canada:

Mother: “Even if you want to divorce me, the premise must be that my daughter lives with me.”

Father: “She won’t; she is Canadian”

Mother: “Then you wait for the legal summons”.

[259] Another factor was that although the father knew that the mother would be arriving on September 27, 2023 to be in Canada for the child’s birthday on October 3, 2023 and for Halloween as S.B. had asked, he made it very clear to the mother in a text on September 12, 2023 that she would “be on her own”. The mother’s reply was compelling:

“U know how hard my life will be there (a single asian foreign girl, no car...) But as [S.B.’s] mother, i will be strong and tough for my little girls happiness.”

[260] The paternal aunt denied that her brother would do such a thing as to leave the mother to her own devices. She did not know her brother very well nor the lengths that he would go to dissuade the mother from coming to Canada.

[261] The mother testified that she contacted a lawyer in China who recommended that she retain a

lawyer in Canada. Once in Canada, she contacted the Chinese Embassy in Toronto, Ontario but they were unable to offer assistance to have the child returned to China. She contacted two law firms in Toronto but was unable to pay the large retainer requested.

[262] On the day she arrived in Canada, she befriended a woman, M.B., at the train station. The mother was visibly upset and confused about what she should do. Although the mother was able to speak some English, this was not her first language. With M.B.'s assistance, the mother applied for Legal Aid, and after getting a Legal Aid certificate, she began the arduous task of getting a lawyer to accept the certificate. I take judicial notice of the fact that having a Legal Aid certificate is no guarantee of obtaining timely services of lawyer given a severe shortage of Legal Aid lawyers. M.B. confirmed that they contacted almost 20 lawyers and attended at some lawyers' offices when they did not respond to phone calls. Even after her current counsel agreed to take on her case, he was unable to meet with her until the end of November 2023. The application was prepared and submitted to the court on or about December 20, 2023, only being issued on January 9, 2024.

[263] Given the significant practical obstacles facing the mother, having learned that her marriage was over on August 30, 2023, a period of just over four months was neither undue delay to commence due process nor acquiescence to S.B. remaining in Canada.

### **Section 22 (1)(b)**

[264] The father's counsel submitted that the court should take jurisdiction under [s. 22\(1\)\(b\)](#) of the [CLRA](#) on the basis that the child is physically present in Ontario, there is substantial evidence in Ontario, and the child has a real and substantial connection with Ontario such that on the balance of convenience, it is appropriate for Ontario to take jurisdiction.

[265] I decline to do so for the following reasons:

- a. There is some evidence in Ontario given the length of time that she has been here;
- b. There is also significant evidence in China given the length of time that she had resided there;
- c. As set out in detail, the child's real and substantial connection is to China, not Ontario. The child's real home is China. The presumptive connecting factor for S.B. is China;
- d. The use of virtual technology will ensure that evidence in Ontario will be available to the court in China as they have recently implemented changes that allow that to happen. Just as this court was able to work through logistical and technological issues, time differences and language issues, the evidence from Ontario will readily be able to be considered in China;
- e. To permit the father to take a child from her habitual residence, to retain her in another jurisdiction and to then argue by virtue of that wrongful retention that the child has established ties to the new place such that this court should assume jurisdiction is contrary to the specific purposes under [s. 19](#) of the [CLRA](#) in abduction cases; and
- f. There was no acquiescence by the mother to the father's unilateral decision to alter the child's habitual residence. There was also no undue delay in commencing the court proceeding.

### **Section 23**

[266] If the child's habitual residence is China, should the Ontario court assume jurisdiction

because a return to China/a removal from Ontario would result in serious harm to the child?

- [267] *F. v. N.* is the leading case on serious harm cases which involve non-*Hague* countries. The Supreme Court of Canada confirmed enquiries must be child-centered, individualized and focused on “harm to the child”. The party asserting serious harm bears the onus of proof if they allege the country of return will not apply a best interests test.
- [268] When interpreting and applying s. 23, the court must keep in mind the governing principles of the [CLRA](#) to discourage child abduction, ensure parenting orders are made in the best interests of the child and that decisions should be made where the child has the closest connections, barring exceptional circumstances.
- [269] The holistic, non-exhaustive *Ojeikere* approach to the assessment of serious harm under s. 23 was endorsed by *F. v. N.* The relevant factors to consider include: risk of physical harm; risk of psychological harm; the views of the children; and the possibility that the primary caregiver parent would not return to the jurisdiction of the former residence even if the children were ordered to return. In assessing serious harm, the court must weigh the likelihood, severity, and risk of harm on the facts of each case. Harm may arise from a single consideration or from a combination of factors.
- [270] I turn now to whether serious harm been established in this case.
- [271] The father relied on the mother slapping the child’s hands as a baby for removing her glasses, throwing her toward him one time when she was a toddler, and two specific occasions where the mother had threatened to physically harm S.B.
- [272] The first threat occurred in October 2018 or October 2019.
- [273] Based on the evidence provided, and in the context of that text message exchange, I prefer the father’s evidence and find that it was more likely sent in October 2019. However, on the basis that the father took no action following same, I accept that the mother was seeking attention from the father. He was preoccupied with his studies and was ignoring her. It was most certainly done in an inappropriate way, but was not proof of the mother wanting to harm S.B.
- [274] The second incident was the text message exchange on September 10, 2022.
- [275] This is very concerning to the court. Threats of harm against a child must always be taken seriously. However, the seriousness of the threats cannot be determined looking only at the words written in the texts. Those words must be viewed in the context in which they were written and taking into consideration the conduct of the parties thereafter.
- [276] While still in China, I would note the following:
1. In response to the paternal grandfather’s advice in his text of September 28, 2022, the father testified quite clearly that he did not agree with what his father said and he chose to ignore it. He was looking to escape the horrific situation in China, but he had no plans of leaving the marriage. That would certainly lessen the seriousness of the text message from the mother.
  2. The father did not report any concerns to any protective agencies or to the police in China.
  3. The father did not take any steps to advise the maternal family about concerns that he might have had about the mother’s mental health and the comment made toward S.B. The maternal grandfather was a retired police officer, which might have given the father pause to formally lodge a report. However, it was evident

that father had a positive relationship with his father-in-law, describing him as one of the sweetest and kindest persons that he had ever met.

4. Clearly, on the evidence, the father did share the text message with his mother and sought her advice. However, there was no evidence that she indicated he should take immediate steps to ensure the child was never left alone with the mother.
5. It was apparent from the text message exchanges that followed that no such restrictions were imposed by the father. On the evidence, he was having considerable difficulty looking after himself, let alone a young child.

[277] Once S.B. and the father had arrived in Canada, the father's conduct was notably inconsistent with someone who was fearful of the mother or her actions toward S.B.:

- a. The father continued to regularly engage the mother and the maternal family with regular and frequent video calls with S.B.
- b. The father confirmed that the parties had maintained their relationship until August 30, 2023. They regularly engaged in conversations on video calls and WeChat text messaging.
- c. The mother stayed in the paternal grandparents' home for the six-week spring visit. She was not restricted in any interactions with S.B., she was not prevented from caring for S.B., nor was her time supervised as she was allowed to spend alone time with the child outside of the home.
- d. During the spring visit, the father testified that he had asked the mother to stay in Canada an additional two months. He had been offered a contract position at Brock University and could only take this position if the mother would provide care for S.B. while he (and his parents) worked. It is inconceivable that the father would have suggested this if he truly believed that the mother posed a serious risk of physical or emotional harm to the child.
- e. The family was involved with Family and Children's Services of Niagara as detailed above. The FACS worker was called as a witness by the father. The only reference to the mother having threatened S.B. was a comment attributed to the father "when they were in China, [X.L.] made a comment that she was overwhelmed and would harm the child." All FACS interviews with the father occurred with the paternal grandmother present. If the father or paternal grandmother were seriously concerned about the mother harming S.B., one would have expected that the actual text message would have been produced and context provided to support their concern for S.B.'s safety. The father provided no explanation as to why this was not done.

In the court's view, the reason is because the father did not take the text message to mean that the mother would actually harm S.B. There is no doubt, as confirmed by Ms. Iradukunda, that if the FACS worker had been made aware of a genuine threat of physical harm to a child she would have investigated same. There was no evidence presented by the father to support any such concern or the need to conduct a further review.

- f. The family also had direct involvement with the Niagara Regional Police Service. At no time did the father, nor any members of the paternal family, report any concerns about the mother having threatened to physically harm the child nor had she presented in that manner while she was in Canada.
- g. In the OCL's submissions, Ms. Junger noted there were 429 pages of messages

between the parties from September 2022 to September 2023. In the 493 messages from the father to the mother over those 13 months, the only time that the father specifically stated that he did not trust the mother to be alone with S.B. was on August 30, 2023.

- h. The father's position was that it had been the mother's behaviour and threat to S.B. that had compelled him to come to Canada (in addition to his and S.B.'s health issues). He planned remain married to her, but he wanted the mother to seek help for her anger issues. If that was such a major issue for him, logically you would think that would be a frequent topic of conversation between them. There was no evidence that it was even discussed. Until, of course, the father testified that it was her failure to "get help" that brought him to conclude that he had to end the marriage.
- i. Despite a court order that required the mother's parenting time to be supervised, the father permitted the mother to be unsupervised during multiple visits that took place at the Kiwanis Center and the library.
- j. The paternal grandmother's testimony about the risk of harm to S.B. was based exclusively on what she had been told by her son. She repeated that the mother would get physical with S.B., having smacked her and thrown her. Even if both of those incidents had occurred, they would not support risk of serious harm or a pattern of physically abusive behaviour.

This was in sharp contrast to the grandmother also testifying in all her contact with the mother while in the company of the child, she has never seen X.L. hit or be rough with S.B. nor has she observed S.B. to be distressed while with the mother.

- k. None of the other witnesses who testified at trial indicated that they had ever observed the mother to hit, threaten to hit, or physically harm S.B. This was the case throughout the spring visit, during the daily visits to the paternal grandparents' home from September 28, 2023 to December 30, 2023, and since visits began again in February and March 2024.
- l. The professionals (FACS worker and Ms. Polgar) saw no evidence of S.B. expressing fear, hesitation or being uncomfortable with the mother.

[278] In its analysis, the court has carefully considered totality of the evidence.

[279] This has included a consideration of the testimony of D.G. His testimony appears to corroborate the father's testimony about not trusting the mother. However, his explanation as to what that meant was vague. It was unclear when this topic had been discussed and he did not know why there was distrust. Later in his testimony, he came up with a date of 2021 and then recalled that it was about the mother "putting harm to the kid", a rather odd phrase. Although there is no proof, the court was left with the distinct impression that he could have been receiving information during his testimony to recall what he was supposed to say.

[280] With another witness, I.B., it became evident that the father had ignored the exclusion of witness order that had been made. I.B. spoke about evidence introduced at trial (a picture taken of his pill bottle that he kept in his office drawer) to support his view of the untrustworthiness of the mother. The paternal grandfather could only have known about this from the paternal grandmother (he said it was not her) or the father.

[281] H.M.'s evidence does corroborate some aspects of the father's version of events. In the May 2020 text, there is reference to the mother's treatment of S.B., her treatment of the father (with no specifics), the relationship between the mother and maternal grandmother (yet the father had no difficulty having the grandmother – a terribly abusive person – provide

substantial care for the child), and even threats of divorce, which the mother denied. That text is one moment in time and reflected how the father felt at that moment and as admitted by the witness was chosen to reflect the mother in a bad light.

[282] Certainly, that evidence cannot easily be reconciled with all of the other evidence that I have found to be credible, suggesting the obvious close bond between the child and the mother, the child's strong attachment to the maternal grandmother, the mother's concern about and attempts to help the father with his anxiety, and the child's consistent wish to be with the mother and exhibiting no fear or resistance to being in the care of the mother.

[283] It is crystal clear to the court that the mother sent the very concerning WeChat message in September 2022. It is also apparent that the mother's attempts to explain away the words have no believability whatsoever. What is also apparent is that the father has within the context of this case tried to make the text message take on heightened significance to persuade the court that harm will come to S.B. so that she can remain with him in Canada. The mother was frustrated with S.B. and she should have readily admitted this. She was extremely frustrated with the father and the situation at home, but to leap to the conclusion that she meant to cause harm to S.B. or that she would cause harm to S.B. is simply not warranted.

[284] Having considered the likelihood and severity of anticipated harm to S.B., and reviewing all of the evidence, I am not satisfied on a balance of probabilities that the harm would be serious in nature.

### **Expert Witnesses**

[285] It is necessary to consider whether inconsistencies between the family law in China and in Ontario could support a finding of serious harm, particularly as China is a non-*Hague* country. To that end, each of the parties retained an expert to assist the court.

[286] The father retained Jeremy Morley. For reasons set out in a separate ruling released on May 24, 2024, the court determined that Mr. Morley could not be qualified as an expert on Chinese family law nor on international family law concerning matters in China.

[287] The mother retained Rui Huang, a practicing lawyer in China. Her qualifications were opposed by the father. However, in a ruling released on April 30, 2024, Ms. Huang was qualified as an expert in Chinese family law and the best interests test for children and in relation to family law matters where one parent is a foreigner.

[288] The OCL also retained an expert, Rong Kohtz. Her qualifications were not disputed by the other parties. From reviewing her resumé, the court had no difficulty to qualify her as an expert in international family law (including *Hague* and non-*Hague* cases) and in Chinese family law and practice, including custody and access laws.

[289] There was significant overlap between the expert reports and testimony of Ms. Huang and Ms. Kohtz and, except in one area, they agreed on the law that would apply if S.B. was to be returned to China.

[290] In the interest of brevity, I do not propose to set out separately and in detail their evidence in these reasons. Their comprehensive reports and Ms. Kohtz's supplemental report were made exhibits at the trial.

[291] I accept the evidence of Ms. Huang and Ms. Kohtz as to the following:

- a. Under Chinese family law, the child's best interest is paramount in all matters concerning minor children, including custody and access.

- b. Chinese courts and Chinese law adopt a holistic approach when adjudicating custody and access matters. There are three essential components to this approach:
  - i. Paramountcy of the best interest of the child is the guiding principle in determining all issues concerning a minor child;
  - ii. There is a well-defined framework for conducting an analysis of the best interest of children regarding custody and access issues; and
  - iii. Chinese court has the discretion to consider the totality of the evidence of a case in determining best interest of a child in a case.
- c. The factors that underpin the best interest test in custody and access determinations within the Chinese legal context include, but are not limited to, the child's inherent right to have a meaningful relationship with both parents, the continuity of the child's care, the child's views, the child's age and maturity, the parents' agreement, the parents' respective relationship with the child and ability to care for the child, and any domestic violence.
- d. There are two distinct Chinese family law concepts – “custody” (fyang) which encompasses everyday care and support of the child and “guardianship” (jianhu) which confers upon parents the authority to make decisions concerning their children's overall welfare. Both parents are their minor children's guardians and share unalienable guardianship authority of their children regardless of their marital status or custody arrangements. Upon separation, residential custody of the child may be held primarily by one parent or shared by both parents according to the best interest of the child. As every parent has indisputable guardianship rights, custody disputes in Chinese courts are usually disputes over residential custody. Sole residential custody remains prevalent, although shared custody has become more common, if the parents agree.
- e. Chinese courts must consider the preferences of a child that is at least eight years old. Children older than eight years of age will always be interviewed. The views of a child under eight years old may be considered, depending on the maturity and strength of the child's wishes, but would not be automatic and would only be one factor for the court to consider.
- f. The best interest of the child test provided in Chinese law is aligned with international standards, specifically the United Nations Convention on the Rights of Children and attests to China's commitment to global cooperation in safeguarding children's rights.

[292] The father's counsel submitted that he would be at a distinct disadvantage as a male parent to a female child in being successful in a custody and access dispute in China. This was based on a provision stating that custody of girls under two and older than ten should be granted to the mother, with some exceptions. In her testimony, Ms. Huang confirmed that this is only one of many factors to be considered. S.B. is five and would not fit within this age categorization in any event.

[293] The father might also be disadvantaged as there is provision in the Chinese law that indicates if one parent has another child (not involved in the dispute), the other parent with no other child should be favored in their custody dispute. Technically, the father does have another child, but he has never had a relationship with her. In those circumstances, it is difficult to see how this would have any bearing on the Chinese court's decision on custody and access. In any event, Ms. Kohtz confirmed that recent amendments to Chinese law are proposing that this provision would be removed.



- [294] In cross-examination of the experts, the father's counsel focused on whether such factors as serious mental illness and specifically anxiety and depression, allegations of inappropriate sexual conduct, and allegations of domestic violence would factor into the best interest determination. Both experts confirmed that allegations would need to be proven. To the extent that they are verified and if they impact a parent's ability to properly care for a child, they would be considered.
- [295] Finally, the father's counsel submitted that given typical visitation schedules afforded to foreign nationals not living in China, the father's time would likely be extremely limited to video calls. As such, this should be considered in the serious harm analysis. I disagree. As was confirmed, Chinese courts will apply the wide range of factors in determining the child's best interest. In international cases, such as this, the additional factors of logistical challenges in maintaining a close relationship between the child and non-custodial parent across borders will be one of many factors to be considered.
- [296] Ms. Huang confirmed that she has represented many foreign clients in custody cases in China. In her opinion, a Canadian parent, even though a foreigner, would have access to fairness in the Chinese court. Both parties have the same rights as parents. While some of her clients were not happy with the result, it was not based on nationality but based on the court applying factors applicable to determining the child's best interest. Ms. Kohtz agreed with this.
- [297] There was one area where the experts seemed to disagree. In her report, Ms. Huang was asked to opine on whether an order made in Ontario for temporary visitation would be enforced by the Chinese court if it was not being followed. Ms. Huang clarified, and Ms. Kohtz confirmed, that such a visitation order would not be recognized by the Chinese court. However, the parent who is not getting visitation with the child would be able to bring an application in China based on the child's inherent right to have a meaningful relationship with both parents and the right of each parent to have contact with their child.
- [298] Finally, in Ms. Kohtz's supplemental report she testified that there are three proposed new rules to strengthen the Chinese law against parental abduction of children. The goal is to provide uniform guidance as to measures that could be taken by Chinese court to prevent and to deal with cases of abduction. In addition, an updated list of factors to be considered in assessing the best interest test has been proposed to address factors no longer relevant to family life in China today. To that end, the ability to have another child or having another child (other than child in dispute) are not in the proposed rule.
- [299] The amendments to the law have been distributed for feedback but could be implemented within the year. The draft laws have been implemented as a pilot project in several provinces including Heibei province, which is where the Qinhuangdao court is located.
- [300] Ms. Kohtz acknowledged that parental abduction has been an issue domestically and internationally in disputes over children. These proposed amendments represent an effort to address this issue.
- [301] Having heard from the expert witnesses and based on their knowledge of the Chinese legal system, I am satisfied that a best-interests analysis will be applied in deciding what custody and access order should be made. While there may be differences in some of the factors to be considered, these are not significant, nor do they support a finding of serious harm.
- [302] The father has not met the burden of proving on a balance of probabilities that serious harm would be caused to S.B. if she were returned to China with her mother.

#### **4. Should a return order be made under s. 40?**

- [303] This court is satisfied that S.B. is being wrongfully retained in Ontario.

- [304] A return order under s. 40 is discretionary. However, in the circumstances of this case, and in the best interests of S.B., it is appropriate that a return order be made. S.B. must be returned to her home in China. There must be certainty as to how this will happen.
- [305] Within ten days of today, the father's counsel must deliver to the mother's counsel the child's Canadian passport, together with all other passports, identification, and travel documents of the child to facilitate the return of the child to China.
- [306] The mother shall obtain airline tickets to travel with the child to China. Upon providing proof of the cost of same to father's counsel, the father shall pay one-half of the total cost within ten days.
- [307] There shall be police enforcement of this order.
- [308] The child shall remain in the care of the mother until such time as the court in Qinhuangdao, Hebei Province, China, determines the custody and access issues.
- [309] The child shall have reasonable virtual access to the father until such time as the court in China determines the custody and access issues.
- [310] The court will hear further oral submissions from counsel as to how best to implement the return order.

## COURT ORDER

[311] Pursuant to the *Children's Law Reform Act*, I make the following final order:

1. It is declared that the habitual residence of the child, S.B., is China.
2. It is declared that the child, S.B., was wrongfully retained in Ontario by the father pursuant to s. 40 of the *CLRA*.
3. It is declared that the Ontario Superior Court of Justice, Family Court has no jurisdiction to determine parenting issues pertaining to the child, S.B., pursuant to s. 23 of the *CLRA*.
4. The child, S.B., shall immediately be returned to her habitual residence in the City of Qinhuangdao, Hebei Province, China pursuant to s. 40 of the *CLRA* and in accordance with the terms of this order.
5. The child's Canadian passport, Chinese birth certificate, Chinese travel documents, and any other identification of the child, shall be provided by respondent's counsel to the applicant's counsel (or the police enforcing the return order, as necessary) within ten days of this order.
6. Any police force having jurisdiction in any area where the child may be, shall locate, apprehend, and deliver the child to the applicant for the purposes of paragraph 4 of this order. For the purposes of locating and apprehending the child to comply with the return order, a member of the police force may enter and search any place where he or she has reasonable and probable grounds to believe that the children may be, with such assistance and such force as are reasonable in the circumstances and such entry or search may be made at any time.
7. The applicant shall obtain airline tickets to travel with the child to Qinhuangdao, Hebei Province, China. Upon the applicant providing proof of the cost of same to the respondent's counsel, the father shall pay one-half of the total travel cost within ten days.
8. The child, S.B., shall remain in the care of the applicant until such time as the court in Qinhuangdao, Hebei Province, China, determines the custody and access issues.

9. The child, S.B., shall have reasonable virtual access to the father until such time as the court in China determines the custody and access issues.

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W. L. MacPherson, J.

**Date Released:** July 11, 2024

**CITATION:** X.L. v. C.B., 2024 ONSC 3895

**COURT FILE NO.:** FC-24-00000010-0000

**DATE:** 2024-07-11

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**FAMILY COURT**

**B E T W E E N:**

X.L.

Applicant

**- and -**

C.B.

Respondent

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**REASONS FOR JUDGMENT**

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W. L. MacPherson, J.

**Date Released:** July 11, 2024

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[1] The paternal grandfather expressed disgust about the mother’s frequent use of this term while in their home. He denied that the father ever did that. He also vehemently denied that the father used derogatory terms to describe people with black skin or people from Pakistan. This was disproven in the text message exchanges.

[2] No evidence was heard as to the child’s bedtime.

[3] The father stated, “whether we decide to stay in Canada permanently or not this time...we still need to get money out” which would seem to support the notion that this was only a visit.

[4] Much was made of the mother referring to S.B. as “the kid” in other instances, but clearly this was a common phrase used by the entire family and not used in a derogatory way.

[5] Despite direction from the court that complete text message chains should be shared, this was not done. The father explained that he was unable to do so, as the mother had stolen his cell phone on December 20, 2023. When she returned it the next day, many of his messages had been deleted. The mother denied doing this. Nevertheless, the father was able to retrieve some “deleted” messages during trial, without explanation. The mother explained that some of her messages were incomplete because the parents had deleted each other from WeChat which would erase the history. She also suggested that depending on where she had logged into WeChat (her laptop or her phone), the chat history produced would not be complete.

Ultimately, it was agreed between counsel that although neither party could produce a complete record of text messages, no negative inference should be drawn from the gaps in the text message chains.