

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bakker v. Bakker*,
2020 BCSC 1620

Date: 20200819
Docket: E200909
Registry: Vancouver

Between:

Ewan Theodore Bakker

Petitioner

And

Jing Jean Bakker also known as Jing Jean Zhou

Respondent

Before: The Honourable Madam Justice Fleming

Oral Reasons for Judgment

Counsel for the Petitioner:

A. Ngom

Counsel for the Respondent:

M. Katsionis
M.S. Salfi

Place and Date of Trial/Hearing:

Vancouver, B.C.
July 3 and August 12, 2020

Place and Date of Judgment:

Vancouver, B.C.
August 19, 2020

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Introduction

[1] **THE COURT:** The petitioner Ewan Bakker and the respondent Jing Jean Zhou are the parents of four-year-old Annabel. She and the parties are citizens of New Zealand. Dr. Zhou and Annabel left New Zealand on or about April 24, 2019, and arrived in Vancouver at some point in June 2019. Mr. Bakker applies for an order that Annabel be returned to New Zealand forthwith, pursuant to the *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Can TS 1983 No 35 (entered into force 1 December 1983) [*Hague Convention*].

[2] The parties separated in December 2018. Throughout their relationship, they lived in New Zealand. Dr. Zhou is a radiologist. In 2018 before the separation, she accepted a one-year fellowship in neuroradiology at Vancouver General Hospital (“VGH”), starting July 2019.

[3] Mr. Bakker asserts that he and Dr. Zhou had agreed that Annabel would spend the term of the one-year fellowship in Vancouver and return to New Zealand in July 2020. Enrolled in a graduate program, Mr. Bakker intended to spend some or most of that time here. Although he was initially opposed, in or about April 2019, Mr. Bakker also agreed that Annabel could travel to China with Dr. Zhou before coming to Vancouver.

[4] Dr. Zhou denies it was ever agreed Annabel would return to New Zealand in July 2020. She asserts that during the marriage, the parties planned to relocate to Vancouver, and the plan did not change after they separated, although she also states Mr. Bakker attempted to change the plan in March 2019.

[5] Around that same time, the parties reached a separation agreement that provided they would share Annabel's care equally.

[6] Mr. Bakker delayed his own departure for Vancouver until November 2019, but remained in contact with Annabel electronically.

[7] Prior to his arrival, Dr. Zhou filed a notice of family claim (“NFC”) in this Court. In the NFC, she sought sole guardianship, sole custody, and orders recognizing BC as having exclusive jurisdiction and declaring Annabel habitually resident in BC. Dr. Zhou also proposed minimal “parenting time” for Mr. Bakker, with none of it to be exercised in New Zealand until Annabel became a permanent resident or a Canadian citizen.

[8] Mr. Bakker argues that Dr. Zhou wrongfully retained Annabel in Canada when she filed the NFC, demonstrating at that point that she had no intention of returning Annabel to New Zealand in July 2020 or at all. Mr. Bakker also argues that Dr. Zhou wrongfully removed Annabel from New Zealand, in April 2019, because his consent to her removal was based on false pretences.

[9] Dr. Zhou denies that Annabel was wrongfully removed or retained, and takes the position that by the time she filed the NFC, Annabel was habitually resident in Canada. Dr. Zhou also argues that Mr. Bakker consented to, and subsequently acquiesced to, Annabel's retention in Canada. In addition, she suggests the law does not allow him to assert a wrongful retention prior to an agreed-upon return date.

Legal Framework

[10] The *Hague Convention* has the force of law in BC pursuant to s. 80 of the *Family Law Act*, S.B.C. 2011, c. 25 [FLA].

[11] The primary purpose of the *Hague Convention*, securing the return of abducted children, is set out in the preamble, which reads in part:

Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access ...

[12] Its objects, found in Article 1, are “to secure the prompt return of children wrongfully removed to or retained in any Contracting State” and “to ensure that

rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States".

[13] *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, explains that prompt return serves three related purposes: First, it protects against the harmful effects of wrongful removal and retention; second, it deters parents from abducting the child in the hope that they will be able to establish links in a new country that might ultimately award them custody; and third, prompt return is aimed at facilitating speedy adjudication of the merits of the custody dispute in the forum of the child's habitual residence.

[14] Article 3 of the *Hague Convention* provides the removal or retention of a child is wrongful if it is in breach of the rights of custody attributed to a person in the state where the child was habitually resident at the time of the removal or retention, so long as those rights were actually being exercised.

[15] Habitual residence is not defined in the *Hague Convention*.

[16] In *Balev*, the Supreme Court of Canada adopted a hybrid approach to determining a child's habitual residence under Article 3. In doing so, the court moved away from the parental intention approach, which had dominated Canadian jurisprudence, and rejected a child-centred approach. The majority explained that the hybrid approach best conformed to the text, structure, and purpose of the *Hague Convention*, and the principle of harmonization, a prime consideration in the interpretation of treaties that favours the interpretation with the most support in other courts thereby ensuring uniformity of state practice.

[17] Chief Justice McLachlin discussed the application of the hybrid approach as follows:

[42] ...the judge determining habitual residence under Article 3 must look to all relevant considerations arising from the facts of the case at hand....

[43] On the hybrid approach to habitual residence, the application judge determines the focal point of the child's life — "the family and social environment in which its life has developed" — immediately prior to the removal or retention:.... The judge considers all relevant links and

circumstances — the child's links to and circumstances in country A; the circumstances of the child's move from country A to country B; and the child's links to and circumstances in country B.

[44] Considerations include "the duration, regularity, conditions and reasons for the [child's] stay in the territory of [a] Member State" and the child's nationality:.... No single factor dominates the analysis; rather, the application judge should consider the entirety of the circumstances ... Relevant considerations may vary according to the age of the child concerned; where the child is an infant, "the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of":...

[45] The circumstances of the parents, including their intentions, may be important, particularly in the case of infants or young children ... However, recent cases caution against over-reliance on parental intention. ... The role of parental intention in the determination of habitual residence "depends on the circumstances specific to each individual case"...

[46] It follows that there is no "rule" that the actions of one parent cannot unilaterally change the habitual residence of a child. Imposing such a legal construct onto the determination of habitual residence detracts from the task of the finder of fact, namely to evaluate all of the relevant circumstances in determining where the child was habitually resident at the date of wrongful retention or removal....

[18] Returning to the *Hague Convention* itself, Article 5 defines rights of custody broadly and inclusively. Rights of custody include rights relating to the care of the person of the child, and in particular, the right to determine the child's place of residence.

[19] Article 12 makes it mandatory to order the return of the child forthwith, where she has been wrongfully removed or retained, and less than one year has elapsed from the date of the wrongful removal or retention to the date of the commencement of the proceeding. Article 12 also requires the child's return when more than one year has elapsed, unless the child has settled in her new environment.

[20] Exceptions to the Article 12 mandatory return are set out in Articles 13 and 20.

[21] Only Article 13(a) is asserted here. It reads:

... the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or

retention, or had consented to or subsequently acquiesced in the removal or retention ...

[Emphasis added.]

[22] Dr. Zhou relies on *Katsigiannis v. Kottick-Katsigiannis*, [2001] O.J. No. 1598 (Ont. C.A.) for its interpretation of the words “consent” and “acquiescence” in Article 13(a). The Ontario Court of Appeal determined these related words should be given their ordinary meaning:

47 ... “To consent” is to agree to something, such as the removal of children from their habitual residence. “To acquiesce” is to agree tacitly, silently, or passively to something such as the children remaining in a jurisdiction which is not their habitual residence...

[23] The court also concluded that acquiescence involves “subjective consent determined by words and conduct, including silence, which establishes the acceptance of, or acquiescence in, a child's removal or retention” (para. 48). In discussing what is required to establish acquiescence, the decision provides the taking parent must show some conduct on the part of the left-behind parent that is inconsistent with the summary return of the children to their habitual residence. At the same time, *Katsigiannis* emphasized, at para. 49, that “there must be clear and cogent evidence of unequivocal consent or acquiescence.”

Repudiatory or Anticipatory Wrongful Retention

[24] A question in this case is whether, as a matter of law, a child can be wrongfully retained before the agreed-upon date of return. I am told there are no Canadian authorities on point. Counsel agree that in accordance with the principle of harmonization discussed in *Balev*, I can rely on applicable international jurisprudence. I have been provided with two cases: the decision of the Supreme Court of the United Kingdom, *In the Matter of C (Children)*, [2018] UKSC 8 [*In the Matter of C*] and the decision of the Court of Appeal for England and Wales in that same case: *Re C (Children)*, [2017] EWCA Civ 980 [*Re C (Children)*].

[25] The facts in summary are these: the father agreed to the mother taking the children from Australia to England for an eight-week visit. The father then agreed to

an extension "for a year", leaving it unclear when the year would expire. The mother, without the father's knowledge, took various steps for the children to remain in England permanently, which included applying for their British citizenship. At the trial (decision indexed as: *Re P and O*, [2016] EWHC 3535), the father proposed three possible retention dates. The first was the date when the mother applied for the children's British citizenship and well within the extension "for a year" (paras. 39-41). The High Court judge concluded that no binding legal principle respecting the concept of "anticipatory breach" existed in relation to a *Hague Convention* application (paras. 49-50), before making findings about habitual residence.

[26] On appeal, the Court of Appeal unanimously concluded that "repudiatory" retention exists in law, meaning a wrongful retention can occur before the previously-agreed date of return, and determining whether a wrongful retention has occurred prior to that date is a question of fact. The court divided however over what is required to establish a repudiatory retention. In dissent, Lady Justice Black expressed the view that it exists when the intention not to return the child as agreed is communicated to the left-behind parent, or manifested by some action that has "reached his attention by other means" (para. 172). The majority decided that it is unnecessary for the retaining parent to communicate to the other parent either an intention to retain or any acts taken based on that intention (para. 176). The majority explained that although this will often be the case it is not essential, writing, "[w]e regard this as a practical question, not a theoretical one, to be judged by reference to the facts of the individual case" (para. 176).

[27] Lady Justice Black's dissent includes a comprehensive review of the British and international cases, endorsed by the majority and the Supreme Court of the United Kingdom: *In the matter of C* at para. 39.

[28] In support of her position, Dr. Zhou only relies on the very brief discussion in that review of *N F v. M C*, [2012] ZAWCHC 198 [South African H.C.], and *Falk v. Sinclair*, 692 F. Supp. (2d) 147 [US District Court]. Lady Justice Black commented however that neither *N F*, nor another South African case, advanced the debate

because "anticipatory breach", although mentioned was not discussed (para. 94). Regarding *Falk*, she wrote the court preferred the mother's argument that conveying an intention not to return the child cannot be a wrongful retention and the father had no such intention until he took action inconsistent with the parties' custody agreement.

[29] I note that Lady Justice Black's review included one Canadian case: *Snetzko v. Snetzko*, [1996] O.J. No 2530, 1996 CanLII 11326, an appellate decision of the Ontario Superior Court, which I have now read. It appears to endorse the concept of anticipatory breach in passing at para. 8. The relevant facts include: the family lived in New York. The father agreed to the children being with the mother in Ontario for about five months. Five days before the return date, the mother obtained an interim custody order in Ontario. The father appealed, challenging the court's jurisdiction. His appeal was dismissed but the appeal court was told an application under the *Hague Convention* had not been pursued in the lower court because his consent to the children remaining in Ontario had not yet expired. The appeal judge commented, "I would have thought the action of Mrs. Snetzko in applying for custody would have relieved Mr. Snetzko from any deemed continuation of the consent and entitle him to bring such an application based upon the anticipatory breach of the terms under which he permitted the children to come to Ontario in the first place."

[30] I also note and agree with Lady Justice Black's discussion of terminology. At para. 13 she writes that, although the term anticipatory breach is sometimes used, she prefers "anticipatory retention" to avoid the use of a contractual term of art, which may artificially confine or influence the consideration of the issue. Later on, at para. 114, she reiterates that importing contractual principles would be unhelpful in interpreting a global treaty, resulting as it "inevitably" would in a "plethora" of technical arguments based on contract law cases, and would be wholly inappropriate given the family context.

[31] For these same reasons I will use the term "anticipatory retention" in referring to what as I have indicated is also called "anticipatory breach" and repudiatory

retention; all of them referring to a wrongful retention that occurs prior to an agreed-upon return date.

[32] The Supreme Court allowed the mother's appeal, based on the findings of the High Court judge regarding the children's habitual residence: *Re C (Children)*. In *obiter*, however, the majority also strongly endorsed the Court of Appeal's conclusion that anticipatory retention is possible in law, writing at para. 50:

The objections to it are insubstantial whereas the arguments against requiring the left-behind parent to do nothing when it is clear that the child will not be returned are convincing and conform to the scheme of the Abduction Convention.

[33] The majority went on to discuss what is needed to constitute an anticipatory retention. At para. 51, Lord Hughes writes:

As with any matter of proof or evidence, it would be unwise to attempt any exhaustive definition. The question is whether the travelling parent has manifested a denial, or repudiation, of the rights of the left-behind parent. Some markers can, however, be put in place.

- (i) It is difficult if not impossible to imagine a repudiatory retention which does not involve a subjective intention on the part of the travelling parent not to return the child (or not to honour some other fundamental part of the arrangement). The spectre advanced of a parent being found to have committed a repudiatory retention innocently, for example by making an application for temporary permission to reside in the destination State, is illusory.
- (ii) A purely internal unmanifested thought on the part of the travelling parent ought properly to be regarded as at most a plan to commit a repudiatory retention and not itself to constitute such. If it is purely internal, it will probably not come to light in any event, but even supposing that subsequently it were to do so, there must be an objectively identifiable act or acts of repudiation before the retention can be said to be wrongful. That is so in the case of ordinary retention, and must be so also in the case of repudiatory retention.
- (iii) That does not mean that the repudiation must be communicated to the left-behind parent. To require that would be to put too great a premium on concealment and deception. Plainly, some acts may amount to a repudiatory retention, even if concealed from the left-behind parent. A simple example might be arranging for permanent official permission to reside in the destination State and giving an undertaking that the intention was to remain permanently.
- (iv) There must accordingly be some objectively identifiable act or statement, or combination of such, which manifests the denial, or

repudiation, of the rights of custody of the left-behind parent. A declaration of intent to a third party might suffice, but a privately formed decision would not, without more, do so.

- (v) There is no occasion to re-visit the decision of the House of Lords in *In re H; In re S* (para 28 above) that wrongful retention must be an identifiable event and cannot be regarded as a continuing process because of the need to count forward the 12-month period stipulated in article 12. That does not mean that the exact date has to be identifiable. It may be possible to say no more than that wrongful retention had clearly occurred not later than (say) the end of a particular month. If there is such an identifiable point, it is not possible to adopt the submission made to the Court of Appeal, that the left-behind parent may elect to treat as the date of wrongful retention *either* the date of manifestation of repudiation *or* the due date for return. It may of course be permissible for the left-behind parent to plead his case in the alternative, but that is a different thing. When once the actual date of wrongful retention is ascertained, the article 12 period begins to run.

[34] Ultimately, Dr. Zhou has not seriously suggested I should conclude that a wrongful retention cannot occur before an agreed-upon return date, or argue in favour of a different approach from the one articulated by the majorities in the English Court of Appeal and Supreme Court of the United Kingdom. Instead, she emphasizes that a wrongful retention is not made out here, because there was no agreement regarding a return date, importing the contractual analysis discouraged by Lady Justice Black.

[35] As matter of legal principle, I have no difficulty in concluding that a wrongful retention can occur before an agreed-upon return date. In other words, an anticipatory retention can properly constitute a wrongful retention. Whether this has occurred is a question of fact. To decide otherwise and require the left-behind parent to wait until the "plane lands without the child", strikes me as obviously inconsistent with the purpose and objects of the *Hague Convention*.

[36] Further, I agree with the analysis of Lord Hughes regarding what is needed to establish an anticipatory retention. I share the view that it is unnecessary for the repudiation to be communicated to the left-behind parent. Imposing such a requirement would serve and encourage concealing an act of anticipatory retention, and risk a change in the habitual residence for a child, without the knowledge of the

left-behind parent. Of course, not requiring communication creates the other risk of one year elapsing, along with a mandatory return under Article 12 of the Hague Convention. As Lady Justice Black noted, however, it is a mistake to think of that 12-month period as a limitation period. Its passing does not prevent a summary return, but instead makes it discretionary. Concealing a wrongful retention may well be an important factor in deciding to order the return.

[37] Turning to procedure for moment, applications for the return of a child under the *Hague Convention* are summary in nature and are required to be determined as expeditiously as possible, consistent with its purpose and objects. In British Columbia, return applications are subject to practice directions. In this Court, they must be commenced by petition, heard based on affidavit evidence and subject to the *Supreme Court Rules* with respect to notice, service, evidence, and procedure, and the case management authority of the presiding judge.

History of the Proceedings

[38] In this case, British Columbia's Central Authority filed an Article 16 notice on March 27, 2020, shortly after the court's operations were significantly reduced due to the COVID-19 pandemic. The first case management conference was scheduled for April 15, 2020. Anticipatory retention was raised as a jurisdictional issue, and so I directed parties to file brief written submissions, which were addressed at the subsequent conference on April 23, 2020. At that point I learned, as I recall, that Dr. Zhou was alleging her New Zealand counsel had failed to follow her instructions in response to an agreement drafted by Mr. Bakker that required Annabel to be returned to New Zealand in July 2020. In any event, at that conference, by consent, I ordered Dr. Zhou to produce all correspondence and records of communication between her and her counsel in New Zealand relating to the agreement proposed by Mr. Bakker on April 23, 2019, and a return date, and all correspondence to and from her New Zealand counsel that was blind cc'd to her. It was also at that conference that I established deadlines for the filing and exchange of materials but subsequently extended them, in part due to a delay in obtaining the documents ordered produced.

[39] The hearing of the return application was set for one day but did not complete and a second day was scheduled.

[40] The petition record was sizeable and dense. In addition to their own affidavits attaching a multitude of documents, the record includes an affidavit of law from a lawyer in New Zealand experienced in family law and *Hague Convention* matters, affidavits from Mr. Bakker's mother and sister, one of his long-time friends, his previous counsel, Dr. Zhou's mother and cousin, her current partner Dr. Stephen Delvisco, and a previous colleague.

[41] At the second hearing day, as I have said, the parties introduced additional affidavit evidence that addressed costs, the documents from Immigration Canada related to Dr. Zhou's application for permanent residence, further to a direction I made she produce a copy of her online application for both herself and Annabel;. Although, the Immigration Canada documents did not include her online application, I accept she requested it.

[42] In their submissions, the parties attack each other's credibility on various grounds, but no suggestion was made that cross-examination was required. Nor were any objections made to the admissibility of hearsay evidence. I have simply ignored unreliable hearsay and double hearsay, including significant portions of Dr. Delvisco's evidence.

Overview

[43] What follows is a chronological overview of the undisputed and disputed facts. It is detailed and lengthy, due in part to the issues in this case, but also because the sequence and timing of events and the content of many of the documents assist in resolving the material conflicts in the evidence and the dispute about credibility.

[44] Now in his early 30s, he lived in Christchurch, New Zealand most of his life.

[45] Dr. Zhou is originally from China, but she became citizen of New Zealand after living there for many years. Documents she provided to Immigration Canada show she attended medical school at Otago University in Dunedin, New Zealand. After graduating in 2011, she started working as a physician in Christchurch that same year. When she obtained New Zealand citizenship in 2017, Dr. Zhou was required to give up her Chinese citizenship because China does not recognize dual citizenship.

[46] For a number of years before they met, Mr. Bakker worked at the Canterbury District Health Board. Dr. Zhou started working there in November 2011. They began a marriage-like relationship in or about November 2012, and purchased a house in Christchurch. At the end of 2013, they moved to Dunedin, because Dr. Zhou had secured a residency in radiology at a hospital there.

[47] In Dunedin, Mr. Bakker and Dr. Zhou lived in a home owned by Dr. Zhou's parents but kept their house in Christchurch. The parties married on October 23, 2014, and Annabel was born on December 2, 2015. Mr. Bakker attended university while Dr. Zhou trained and worked as a resident. In 2018, after completing an undergraduate degree, Mr. Bakker began a Master's program in freshwater ecology.

[48] The parties dispute who was most involved in parenting Annabel until they separated. Both describe themselves as her primary caregiver. Although Dr. Zhou suggests otherwise, I have no doubt that, as a resident, she worked very long hours. Records she provided to Immigration Canada estimate she worked an average of 58 hours per week, including leave, additional hours, and "call backs". Mr. Bakker was for the most part a university student. Also present in the home was Dr. Zhou's mother who played an important role in Annabel's care. In fact, Annabel spent nine months with her grandmother in China, while the parties studied and worked in Dunedin. A letter from the parties sets out their consent to Annabel travelling with both maternal grandparents from March until December of 2017.

[49] Dr. Zhou's parents have permanent resident status in New Zealand and own several properties there.

[50] Mr. Bakker's family lives in Christchurch, including most significantly his mother, his sister (a single parent with three children who works full-time), and his brother. His father does too. He has been significantly disabled for many years due to a stroke. Christchurch is located several hours away from Dunedin by car. Mr. Bakker, his mother, and his sister describe their relationships with one another as having always been very close. However, while the parties lived in Dunedin, they were only able to visit his family a few times each year. Mr. Bakker deposes that he and Dr. Zhou rarely travelled to Christchurch due to the demands of her work schedule, and Annabel's young age and car sickness, which made the long drive very difficult.

[51] According to Mr. Bakker, before the separation, the parties' goal was to return to Christchurch, where many of their long-term close friends and family live, along with the family home. In addition, Dr. Zhou's parents owned a property and built a home there for themselves.

[52] Dr. Zhou deposes that, between 2016 and 2017, she and Mr. Bakker decided to pursue overseas opportunities instead of staying in New Zealand long term. According to Dr. Zhou, they often discussed a long-term relocation to Australia or British Columbia, which offer much better opportunities and compensation for medical specialists than Dunedin, which she described as a small city with limited employment opportunities for Mr. Bakker. Records Dr. Zhou provided to Immigration Canada show she was earning \$255,000 per annum by the time she stopped working in Dunedin.

[53] There is no dispute that Dr. Zhou applied for fellowship positions at hospitals in New York, Calgary, and Vancouver.

[54] Dr. Zhou deposes that throughout 2017 and 2018, she and Mr. Bakker made plans to move to Vancouver and that his influence played a central role in her accepting the VGH fellowship offer. She alleges that Mr. Bakker viewed Vancouver as a suitable place to raise a family where he would have a "plethora" of employment opportunities given his field of study, and could pursue his salmon

fishing hobby. Both of them, she adds, were keen to facilitate Annabel's Mandarin and considered it beneficial for Annabel, and Dr. Zhou's mother, to live in a large Mandarin-speaking community.

[55] Somewhat inconsistently, Dr. Zhou also deposes that Mr. Bakker was always aware that, if she were offered an extension, she would continue the fellowship for another year, and that the fellowship would be for a minimum of one year. Similarly, she states she had not completely discounted the idea of returning to New Zealand for work, but only after completing her subspecialty training and gaining work experience in a quaternary-level hospital.

[56] In her application to VGH, Dr. Zhou wrote that it was her plan to return to New Zealand after the fellowship:

After completion of my Fellowship I plan to seek a consultant radiologist position in New Zealand, where I would apply the specialist training obtained on my Fellowship to improve the service of Diagnostic and Therapeutic Neuroradiology at my local hospital.

[57] Dr. Zhou says she copied this language from a colleague's letter, which formed part of his application for a fellowship in oncologic imaging, and recognizes, in retrospect, that she should have changed her own letter to reflect her personal circumstances. But it is apparent from the two letters that she did in fact change hers to do precisely that in other parts of it.

[58] After travelling to Vancouver for an interview in February 2018, Dr. Zhou was offered a one-year fellowship in neuroradiology at VGH starting in July 2019. Although, she states that she also offered fellowship positions in New York and Calgary, and that her first choice was New York. Mr. Bakker alleges that Dr. Zhou failed the U.S. medical licensing exam required to obtain a fellowship there and he was never aware of a Calgary offer.

[59] Acknowledging he was aware of the possibility the fellowship in Vancouver could be extended, Mr. Bakker maintains that he and Dr. Zhou only ever agreed she would accept the one-year fellowship and they intended to return to New Zealand for

various reasons, including their long-term goal of returning to and settling in Christchurch, and the fact that Annabel would be starting school in January 2021.

[60] Both parties rely on different versions of a document from a website regarding the diagnostic neuroradiology fellowship program at VGH, accessed and printed on different dates. Both documents list the fellows by year up to and including Dr. Zhou and some others in 2019, which show the vast majority of fellows, approximately 90%, completed one-year fellowships. Mr. Bakker's version of the document also states that VGH offers a one-year fellowship. Dr. Zhou's version includes an additional 2019 fellow and states that VGH offers a one or two-year fellowship. Dr. Zhou also relies on a letter from a staff neuroradiologist who writes that the neuroradiology fellowship program is one to two years long and that there has been a focus in recent years on encouraging participation in two-year fellowships, despite Dr. Zhou's fellowship being for one year. Dr. Zhou accuses Mr. Bakker of altering his version of the document, a provocative attack on his credibility and one of several which include an allegation that he has a history of being untruthful about important matters. Mr. Bakker's counsel submits, and Mr. Bakker deposes, that his counsel, not Mr. Bakker, printed the document directly from the website, which I accept entirely.

[61] The parties separated in December 2018. Mr. Bakker deposes that after the separation, there was a lot of discussion about whether the "trip to Vancouver" would go ahead. Because the separation was amicable, Mr. Bakker was agreeable in principle to Annabel going to Vancouver with Dr. Zhou for the duration of her one year fellowship.

[62] In contrast, Dr. Zhou deposes that post-separation, the parties discussed how they could live together in Canada as a separated couple and share in Annabel's care. At the end of February 2019, she submitted "our family's" work permit and offered to help Mr. Bakker arrange his Canadian visa. Dr. Zhou also deposes that, post-separation, Mr. Bakker agreed that Annabel would accompany her to Vancouver for "at least one year". Dr. Zhou says that the parties discussed this

arrangement with their lawyers, referencing an email from Mr. Bakker's counsel Andrew More to her counsel on April 3, 2019, which is discussed further on. Elsewhere in her evidence, Dr. Zhou states the "agreed plan" in place from 2017 until March 2019 was that Mr. Bakker would come to Vancouver to finish his "studies" and look for an internship.

[63] In that same month, March 2019, the parties executed an undated written separation agreement. I note the parties' house in Christchurch is identified in the agreement as the Family Home. Most of the terms of that agreement relate to the division of property, but the agreement also provides that the parties will share equally in the care of Annabel.

[64] Under the separation agreement, Dr. Zhou assumed sole ownership of the Family Home. In settlement of their property division, she was required to pay Mr. Bakker \$245,000 NZD. She deposes to selling the home to her mother on April 23, 2019, the day before she and Annabel left New Zealand, because she was too busy to prepare it for sale and to "spare [herself] the responsibility of the mortgage". There are no documents confirming the sale or transfer. Dr. Zhou denies receiving rental income from the property, although documents showing the address of the home and listing both of the parties as owners, which Mr. Bakker identifies as rent receipts, show payments of over \$2,000 to Jing Zhou in April and May 2020.

[65] Dr. Zhou finished her residency in Dunedin at the end of March 2019.

[66] On March 24, 2019, Mr. Bakker sent her a text message that reads:

Hey, just wondering if you guys might be able to provide what your future ideas or potential plans are that specifically involve Annabel etc. I understand the house has been sold [that being Dr. Zhou's parents' house in Dunedin] and you are no longer working at the SDHB so there must be something occurring? At the moment I literally have no idea and feel left in the dark a bit. I only need Annabel specific information and would prefer an email or text.
Thanks!

[67] Dr. Zhou says she responded with a particular message that I accept she sent much later. Documents attached to Mr. Bakker's affidavit satisfy me that her

response sent the next day was different and stated, "[y]es. House is sold and my dad is coming next month to help moving some house hold items to Christchurch home. We plan to take a month holiday then fly to Vancouver mid June".

[68] Mr. Bakker writes, "[s]o will that mean you and mum will move to Christchurch as of two weeks time and no longer be based in Dunedin? Is the month holiday going to be based in New Zealand?" Dr. Zhou responds, "[w]e will move to Christchurch 3rd week of April. We will have a month holiday in Tianjin then to Vancouver early June."

[69] On March 26, 2019, Mr. Bakker sent a further message:

Hey, so I have been thinking about the timeline and plans you mentioned. I do not entirely agree with the plans. Firstly, you are making decisions that affect Annabel's access to me, as in, she wont be able to see me at all really, once you move to Christchurch and certainly not in China. Secondly, I have not been consulted at all on these plans (excluding Vancouver). I am soon going to be in a position to be able to have Annabel stay with me and would like to be able to continue access regularly until Vancouver. As I cannot move to Vancouver at the same time you do, my workload is too much at the moment and was delayed in starting it, this means Annabel and I will not see eachother until I can move and I simply cannot predict when that might be.

Ideally I want to continue Annabel's regular access to me, at least until Vancouver. I will also be in the position and able to have her live with me too, so that is also an option.

[70] After receiving no response, Mr. Bakker contacted his counsel, Andrew More, who wrote to counsel for Dr. Zhou on April 3. His letter includes:

...I have been instructed that Jean is intending to unilaterally take Annabel out of Dunedin to Christchurch shortly. From there she intends to fly to China with Annabel on April 24 and then straight from China to Vancouver in Canada. She will reside in Vancouver with Annabel for at least one year.

Ewan has been aware of the upcoming travel to Vancouver, but has not been made aware, nor has he given consent, for Annabel to travel to Christchurch and/or China.

...

Ewan is aware of the reasons behind the travel to Vancouver and had previously agreed to that in principle. Your client is well aware that Ewan's ability to travel to Vancouver is dependent on the progress of his master's degree study....

Ewan is deeply concerned that your client is unilaterally taking these steps – there has been absolutely no discussion or attempt to gain Ewan's consent to take Annabel away. He is distressed that his rights to parent Annabel are being taken off him.

... [P]lease advise your client that if a response acceptable to Ewan is not received by my office by close of business, Friday, 5 April 2019 then we reserve our right to file urgent application ... as well as filing for a CAPPS listing prohibiting Annabel's travel outside of New Zealand.

[71] Regarding the reference to Annabel residing in Vancouver for at least one year, Mr. More deposes, in contrast to Dr. Zhou, that at the time it was his understanding the parties had agreed Annabel would stay in Vancouver for a period of approximately one year, returning in July 2020. He says he used the term "at least" because the parties were free to change their agreement and allow for the stay to continue at the expiry of one year. Mr. More also deposes that at no point was he aware of any proposals or suggestions that the stay would go beyond July 2020.

[72] Also on April 3, 2019, Dr. Zhou sent Mr. Bakker a text messaging asking him to call her along with, "I understand you don't want us going on holiday ... earlier than May. but I been so tired and need a break before vancouver".

[73] Mr. Bakker replies that he would prefer text or email, stating he does not have the best memory for verbal conversations. He also writes he finds their conversations end up being emotional. She responds at length, again indicating she wants to talk verbally. Her response includes:

Secondly, you knew since 2017 we are going to Vancouver, in fact I signed for the job heavily based on the life of our family ... You can not act as if you are not aware of the year in Vancouver is long planned. As you planned it with me.

Thirdly the one month was also planned. We have discussed this previously the plan was to travel via China and see grandma before her heart fails.

[74] In his response, Mr. Bakker reiterates his concerns and makes a proposal:

You can still go ahead with your plans, however, you leave Annabel here in Dunedin and I will take care of her. I now live in a complete house and have everything required to provide full care for her and having been a primary

caregiver for Annabel, I am more than able to do this. I am willing to compromise as follows;

[75] He goes on to state he is willing to allow Annabel to leave New Zealand for China two weeks prior to the date of travel to Vancouver

[76] Mr. Bakker deposes that after the text exchange on April 3, 2019, and discussions with counsel, he agreed to Dr. Zhou's plan for an additional one-month holiday in China from April 24 to May 24, 2019.

[77] A letter from Dr. Zhou's counsel dated April 4, 2019, acknowledges that Mr. Bakker was unaware of the plans for Annabel to spend time in Christchurch and China before relocating. The letter also sets out Dr. Zhou's assertion that Mr. Bakker had previously agreed to relocate to Vancouver, referring to her acceptance of the job offer in 2017. There is no mention in the letter of a trip to anywhere other than China.

[78] Mr. Bakker deposes that on April 15, 2019, when Dr. Zhou arrived to pick up Annabel, she told him that she and Annabel were moving to Christchurch that very day and would not be returning to Dunedin. He emphasizes that, until then, Dr. Zhou had not informed him of the specific date of the move, despite his repeated attempts to gather that information. In a text message sent to her that day, he writes:

This is not on Jean, you cannot just go and constantly make plans and not give me any indication on the timings or dates. You said nothing about today going to Christchurch or even to let me know that today would be the last day I would see my daughter for months....

[79] Despite the acknowledgment in the letter of April 4, 2019, Dr. Zhou writes that she did make Mr. Bakker aware that she and Annabel were leaving for Christchurch that week and flying from there.

[80] Further, there is no dispute that instead of taking Annabel to Christchurch on April 15, Dr. Zhou took her to Wanaka for a holiday without Mr. Bakker's knowledge or consent. Mr. Bakker deposes that this only came to light after he negotiated

additional time with Annabel through counsel and was asked to pick her up in Wanaka, which is located some distance from Christchurch and Dunedin.

[81] Mr. Bakker states that, in response to Dr. Zhou's unilateral decisions and withholding of information about travel and holidays, and his concern she would breach their verbal agreement, he drafted an agreement on April 22, 2019 that reflected their previous discussions surrounding the care of Annabel and the trip to Canada. This agreement, which the parties refer to as the Annabel Agreement, includes terms providing for regular contact by video and phone from April 24, 2019 until Mr. Bakker's arrival in Vancouver, equally shared care of Annabel in Vancouver, subject to Mr. Bakker finding appropriate accommodation and means to care for her, a schedule, and Annabel's return to New Zealand in July 2020, followed by a continuation of the equally-shared care arrangement in New Zealand. In addition, there is a term regarding guardianship decisions that provides all decisions regarding Annabel's education, residence, holidays, culture, religion, medical treatment, etc., will be discussed and agreed to by the parties.

[82] On April 23, 2019, Mr. More sent the Annabel Agreement to Jenny Beck, the senior of two lawyers acting for Dr. Zhou, along with a cover letter advising that Mr. Bakker had drafted it himself and “[i]f your client is amenable to signing or agreeing to something like this it would go along (sic) way to meeting my client's concerns around not seeing his daughter over the next while.”

[83] Ms. Beck sent the Annabel Agreement to Dr. Zhou the same day by email, writing:

For myself I'm not sure about what he's asking you to agree to. It may not be viable for you in the end. Can you read it and let me have your response?

[84] Dr. Zhou responded on April 25, 2019, late in the evening, indicating they had arrived in China the night before. Regarding the Annabel Agreement, she wrote:

I don't feel comfortable signing Ewan's letter, as it is not feasible for us on a practical level.

Regarding Ewan's letter, my response is such

1. With the family travelling and the time differences, it is challenging to have set time for skype. However I will for sure arrange Skype sessions when we are able.
2. Where Annabel sleeps over night in Vancouver.

I have arranged for a 3 bedroom apartment. With my Vancouver specialist job, I don't work after hours. The after school extra curriculum activities for kids in Vancouver is great. So I will take Annabel to those :)

When Ewan arrives in Vancouver, if he has ability of provide up to standard accommodation and take her to daycare I am happy to let him takes care of her over night. But I would like to wait until that.

Thanks again Jenny.

What are your thoughts about my response?

[85] On May 12, 2019, Mr. Bakker sent a text message to Dr. Zhou asking her to confirm that she had signed the Annabel Agreement. Dr. Zhou responded the next day, writing that she had seen the document and communicated with her lawyer. She then discussed the scheduling of Skype calls.

[86] On May 17, 2019, Ms. Beck sent Dr. Zhou a letter asking her to touch base regarding the Annabel Agreement.

[87] On May 18, 2019, Dr. Zhou responded to Ms. Beck's associate, Ashleigh Mitchell, setting out the two points in her previous email, preceded by:

Regarding Ewan's letter for parenting

I have replied earlier as:

Regarding Ewan's letter, my response is such

[88] On May 23, 2019, Mr. More asked Ms. Mitchell for follow up. Ms. Mitchell responded the next day:

I have just now made contact with Jean, and she responds as follows:

1. Regular Skype sessions may be tricky, with the family travelling and the time differences. It is challenging to have set times so regularly, however, Jean will for sure arrange Skype sessions when she is able.
2. Jean has arranged for a 3 bedroom apartment. She doesn't work after hours. The after school extra curriculum activities for kids in Vancouver is great. So Jean is happy to take Annabel to those activities.

3. When Ewan arrives in Vancouver, Jean is happy for Annabel to have overnight contact. However she would like for Ewan to be settled in his accommodation, with room for Annabel prior to that.

Other than that Jean is happy with the Agreement, however she is now in Vancouver so signing will be tricky. It may be that I arrange a Skype interview with her to arrange that.

[89] Dr. Zhou deposes to never instructing her counsel that she would sign the Annabel Agreement, and "at no time" indicating her satisfaction or agreement with it, and also asserting there was no agreement in place prior to, during or after her departure from New Zealand. Dr. Zhou further deposes that Ms. Mitchell incorrectly stated to Mr. More that she was "otherwise [...] happy with the agreement", denying she ever directly or indirectly said so, and asserting she said the opposite, in addition to clearly asking to discuss the issue further. She further deposes that, Mr. More's May 23 email was never forwarded to her, and that she only became aware that Ms. Mitchell had told Mr. More she was otherwise happy with the Annabel Agreement through her current counsel in April 2020. I note, however, that in an email to Dr. Zhou on September 19, 2019, Mr. Bakker expressly quotes from Ms. Mitchell's email setting out this language specifically. He identifies it to Dr. Zhou as an email Ms. Mitchell sent in response to the Annabel Agreement.

[90] Mr. Bakker deposes to attaching all the documents he received from Jenny Beck Law, pursuant to the consent order granted by me on April 23, 2020, as Exhibit N to his first affidavit.

[91] Mr. Bakker identifies several documents attached to Dr. Zhou's affidavit that fall within the scope of the order but which were not produced to him.

[92] Among them is Ms. Beck's letter dated May 17, 2019, asking Dr. Zhou to touch base regarding the Annabel Agreement, and an email exchange between Dr. Zhou and Ms. Mitchell on October 15 and 16, 2019. Ms. Mitchell writes:

... Can you please advise when and where you and Ewan agreed you would return to [New Zealand] in July 2020.

Was this agreement in writing?

[93] Dr. Zhou responds:

To move to Vancouver was a joined family decision back when we still married. Ewan Bakker and myself never agreed verbally or in writing when or where exactly that I will return to [New Zealand].

[94] Ms. Mitchell then writes:

Why does Ewan think you are returning in July 2020?

[95] Dr. Zhou responds:

I don't know why he keeps saying that. But it might be that Ewan thinks the fellowship is for one year.

[96] She goes on to describe their discussion of moving to Canada or Australia and his preference for Vancouver. She also writes:

Ewan stated he would look for jobs in BC too, which [she says] sounds pretty long term to me.

[97] Based on this exchange, Dr. Zhou asserts that even her lawyer was not under the impression that there was an agreement in place regarding the return in 2020 and was not even familiar with Mr. Bakker's return date.

[98] The documents Mr. Bakker received from New Zealand counsel, however, included a subsequent letter dated October 25, 2019, from Ms. Beck to Dr. Zhou:

3. I have gone right back through the correspondence. Some of it of course dates back to April/May and we had to retrieve our file from our store room. Anyway I have done that now and talked at length to Ashleigh about what she recalls of the matter.
4. In April/May 2019 Ewan presented you with that Agreement. I was never delighted with it, because it was in the wrong format and I believed that more discussion needed to go into some of the items. However our file makes it clear – and this is our recall as well – that you actually did want to sign it. When you spoke to Ashleigh in particular in May 2019, you mentioned various points that you needed clarification on. However there was no disagreement regarding the return date in July 2020. That was included right from the beginning in the Parenting Agreement, ie from April 2019 onwards. As I said, you indicated you were willing to sign the Agreement and on the basis of your instructions we advised Ewan via Andrew More on 24 May 2019 that there were some points you were not happy with or that would not be practicable, but otherwise you were okay with the Agreement.

5. You will recall that all the emphasis back then was on actually getting to Canada and the nature of the contact Ewan would have once he arrived in Canada. There was not a great deal of discussion about your return date. However it is there in the Agreement. You did indicate to me right in the beginning (December 2018) that the arrangement would be of limited duration, but you said 18 months - 2 years.

[99] Ms. Mitchell outlined much the same in a letter she sent to Dr. Zhou in late November 2019:

2. My recollection is that you very much wanted to sign a Parenting Agreement prior to your departure to Canada. You were feeling particularly unsettled by Ewan's behaviour and wanted to minimise any potential conflict in the future, as far as Annabel is concerned. I sent the draft Agreement to you on April 23 2019. We had several phone discussions about the Agreement and considered its contents in detail. Your main concerns were about how Skype and contact would occur, rather than the duration of your stay in Vancouver. You stressed to me that it was always your intention to return to New Zealand within 12 to 24 months of your departure. ...
3. Attached is your email to me dated 18 May 2019 setting out your response to the draft Agreement. You had indicated they were the only changes you wished to make. You were otherwise eager to sign an Agreement securing Ewan's contact with Annabel. ...
4. [Redacted]
5. In summary my notes and recollection of our conversation make your intentions at the time very clear. Your time in Canada was to be of limited duration and you very much wanted to sign a Parenting Agreement securing Ewan's contact with Annabel.

[100] On September 15, 2019, Mr. Bakker sent Dr. Zhou an email advising his plan was to leave New Zealand around the start of November, with reference to progress on his Master's degree. He also discussed the Annabel Agreement and sharing care of Annabel once he arrived:

Before you left New Zealand I had prepared a document outlining what you and I had discussed and agreed upon in relation to Annabel's care, which your lawyer had informed you were amendable to signing and that she would arrange for that to happen. With that in mind, I want to confirm the following;

1. Upon myself securing a suitable accommodation and having settled in to usual daily routines, we can transition to day-to-day care for Annabel being evenly split (50/50) ... the details of which can be discussed (some examples of how this would work are already in the document prepared).

As such, can you please provide details around Annabel's current day-to-day activities, such as;

- A. The location of her scheduled activities (day-care, swimming and ballet etc). ...

Once I arrive, I'll be in the writing stage of my master's thesis and thus will be able to easily arrange my life around Annabel and the times that she would stay with me. ...

If you have any questions or comments, please email me.

[101] Dr. Zhou responded the next day. Regarding Annabel's care, she writes:

As for overnight arrangements. In order to keep the child's regular routine and also to be adherent to common practise of parenting law in [New Zealand]. May I suggest you have Annabel every second weekend? You can also have her over to your place during the week days for dinner as well as picking her up from preschool and taking her to her gymnastic, ballet and swimming classes after school?

I would not like Annabel to be living at yours for one week then back to my place for one week. It is too destructive for the child. ...

[102] In a subsequent email she writes:

The document you sent in May, which I received via my lawyer ... while we were on Holiday was never signed. That document has no authority. ...

[103] In response, as mentioned, Mr. Bakker outlines his understanding that Dr. Zhou was happy with the Annabel Agreement and amendable to signing it based on communication from her lawyers. At that point he writes:

Quoted from the email from Ashleigh Mitchell in response to the Agreement; Other than that Jean is happy with the Agreement, however she is now in Vancouver so signing will be tricky. It may be that I arrange a Skype interview with her to arrange that.

[Emphasis in the original.]

[104] He also highlights that he would not have let Annabel leave New Zealand if her intention had been not to agree. At the end of the email, he asks Dr. Zhou to confirm the understanding that the duration of the stay in Vancouver would be for one year from July 2019 to July 2020.

[105] On September 30, 2019, Dr. Zhou responds by restating her opposition to a one week on/off schedule, proposing they negotiate a parenting agreement if he

does not agree with what she is proposing through lawyers or by themselves. She says nothing about the duration of the stay or Mr. Bakker's comments about Ms. Mitchell's email. She concludes with:

...I have spoken to my lawyers and am prepared for a long, time consuming, and very costly process.

[106] On October 2, 2019, Mr. Bakker advises Dr. Zhou he will be arriving on November 6, and proposes they work together on a parenting arrangement "for the remainder of the 9 months in Vancouver" and after returning to New Zealand in July 2020, reassessing parental/shared care.

[107] Dr. Zhou does not respond.

[108] Mr. Bakker deposes to calling Annabel's daycare/preschool to introduce himself, inform them he will be arriving shortly, and requesting access to "Annabel specific newsletters", and possibly to talk to Annabel, assuming Dr. Zhou would have provided them with his identity and contact information.

[109] On both occasions, daycare staff were unable to identify who he was and repeatedly asked if he was Stephen.

[110] On October 4, 2019, Dr. Zhou sent Mr. Bakker a message accusing him of upsetting daycare staff by calling without her introduction, and advising him the school principal had asked for an immediate meeting with Annabel's parents arranged for October 7, 2019. Dr. Zhou also writes, "I would like to go through lawyers at this point. Please await to [be] contacted by the solicitors."

[111] Their text exchange continues, however. Mr. Bakker asks how he can be present for the meeting and whether Skype is an option. Dr. Zhou informs him that she and Stephen will attend the meeting instead.

[112] Mr. Bakker deposes to voicing concerns about who Stephen is, indicating Dr. Zhou had mentioned seeing someone named Stephen after their separation in New Zealand.

[113] On October 4, 2019, Dr. Zhou informed Mr. Bakker and his counsel she had "fast forwarded" the meeting at the daycare. Not informed of the time change, Mr. Bakker did not attend.

[114] On October 7, Mr. Bakker writes to the principal of the daycare introducing himself, apologizing for any upset he may have caused, and providing his contact details.

[115] That same day, Mr. Bakker receives an email from Stephen Delvisco, Dr. Zhou's new partner. After introducing himself he writes:

Your consent or lack thereof is meaningless. You do not have authority over Jean. Jean is an individual of sound mind and body and she chooses to be in a relationship with me. I choose to be in the relationship with her as a fully committed partner and with that comes the responsibility of Annabel. Jean, Annabel, and I have left [New Zealand] together, travelled to China, the USA, and Canada together, and are currently living together in Vancouver. Understand I already am and will be a parent in Annabel's eyes. ...

[116] Mr. Bakker deposes that this is the first time he was made aware of any of these facts. At this point, he realized Stephen was Dr. Stephen Delvisco, someone who Dr. Zhou worked with in the radiology department at Dunedin Hospital and was tutored by in preparing for an exam.

[117] Dr. Zhou says she and Dr. Delvisco have been living together since March 2019, and that she advised Mr. Bakker that Stephen was her new partner before leaving New Zealand. Dr. Zhou also states that he worked at another hospital, not in Dunedin, and at some clinics, and that they first met in November 2018, shortly before he tutored her briefly.

[118] Regarding Dr. Delvisco's reference to a US trip, Mr. Bakker states he assumed a trip to Disneyland that was mentioned, was to occur in China. It is clear he was not consulted about Annabel travelling a trip to the U.S.A. The only reference to it appears in a text exchange on May 27, 2019. Mr. Bakker proposes a time for video or phone contact with Annabel. In response, Dr. Zhou indicates that she and Annabel would be in "Orlando Disney World by then".

[119] Mr. Bakker reviewed the daycare registration document at the daycare in November 2019, which Dr. Zhou completed on June 25, 2019, screenshots of which are in evidence. Dr. Delvisco is listed as Annabel's father/guardian. Dr. Delvisco is also listed as Annabel's father on a Vancouver Coastal Health Form called "Immunization (Vaccination) Information for Childcare". There is no mention of Mr. Bakker on either form.

[120] Dr. Zhou deposes, however, that at the time Annabel was enrolled, it was clearly communicated that Dr. Delvisco was not Annabel's father, that Mr. Bakker was, and that he would be coming to Vancouver from New Zealand later in the year. Dr. Delvisco was listed as her parent, says Dr. Zhou, for "practical reasons". However, in addition to asking for parents/guardians to be identified, the form asks for the names, relationship to the child, and contact details for persons authorized to pick up the child and to be contacted in an emergency. Dr. Zhou's mother was listed under this category.

[121] Dr. Zhou also asserts that, in September 2019, she informed the principal "as soon possible" that Mr. Bakker would be arriving, in addition to sending "an official letter". She attaches a letter dated October 14, 2019, addressed to "Whom it May concern".

[122] Mr. Bakker's evidence includes a screenshot of a letter from Dr. Zhou dated October 16, 2019 also addressed to the principal and teachers at the daycare.. The October 14 letter is from Dr. Zhou alone; the October 16 letter is from her and Stephen. It begins by stating her ex-husband and Annabel's father "Ewan Bakker" would be visiting Annabel in Vancouver. Otherwise, the content of the letters are almost the same. Both provide that Dr. Zhou intends to introduce Mr. Bakker when he first visits the school and during "his visit in 2019". The letters also set out her agreement to Mr. Bakker picking up Annabel from the school, absent any upset or sign of refusing to leave, in which case Dr. Zhou asked the school to call her.

[123] Before this, on October 8, 2019, Mr. Bakker writes Dr. Zhou about where to store his belongings while he is in Vancouver, indicating he was not sure whether it was her intention to return to Dunedin or Christchurch in July 2020. She responds:

The future is open. I have no idea where I am going to be employed. The decision is yours to make on where to store your boxes.

[124] The following day, October 9, 2019, Mr. Bakker asks if she intends, as he understood, to return to New Zealand in July 2020. If not, he asks her to advise him of her intentions "come July 2020" concerning where she will be residing and applying for further employment.

[125] That same day, Dr. Zhou files her NFC which, as I have said, seeks sole guardianship under the *FLA*, sole custody under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), an order declaring Annabel habitually resident in BC, and an order that BC has exclusive jurisdiction over matters relating to Annabel under the *FLA*, and what I assume are alternative orders including an order declaring BC the *forum conveniens* and an order allocating to Dr. Zhou all parental responsibilities. She also seeks primary residence and parenting time for Mr. Bakker on an incremental increasing basis, starting with one unsupervised day visit every second weekend, progressing to consecutive daytime access, and eventually an overnight in Vancouver, but no parenting time in New Zealand until Annabel's residence and citizenship status are "finalized with the Federal Government of Canada". I note that, under the heading "Prior court proceedings and agreements", Dr. Zhou indicates there is no prior agreement relating to any of the claims made in the NFC. Her amended NFC filed in January of this year adds a reference to a written agreement dated March 26, 2019.

[126] There is no direct evidence about when Mr. Bakker was notified or served with the NFC, although it is apparent he did not become aware until some time after he arrived in Vancouver.

[127] On October 16, 2019, Mr. More sent a letter to Ms. Mitchell asking for confirmation that Annabel would be returning to New Zealand "as was my client's

understanding". The letter sets out that Dr. Zhou was refusing to confirm or commit to the previously agreed July 2020 return to "Christchurch, New Zealand" for Annabel, despite numerous requests. Mr. More also wrote that absent confirmation and an undertaking, he would be advising Mr. Bakker of his "potential remedies" under the *Hague Convention* on the basis of an anticipated breach of agreement.

[128] Dr. Zhou deposes that between October 22nd and early November 2019, she was offered an extension of her contract in three sections within the VGH radiology department. The first offer was from Cardiothoracic imaging, the second from ER/Trauma, and the third a two-year contract from Neuroradiology. She also deposes that she was waiting for Mr. Bakker to arrive Vancouver so she could inform him of the offers in person.

[129] Mr. Bakker's second affidavit includes a copy of a letter dated October 22, 2019, from UBC's Faculty of Medicine offering Dr. Zhou a one-year fellowship in Cardiothoracic imaging starting July 1, 2020, accepted and signed by her on November 9, 2019.

[130] Documents later produced by Immigration Canada show that Dr. Zhou submitted a copy of pages 1, 2, and 6 of what appear to be the same letter signed by her on October 23, 2019, as well as a letter offering a third fellowship from July 1, 2021 to June 30, 2022 in Emergency and Trauma Radiology, which was also accepted and signed by her on October 23, 2019.

[131] Mr. Bakker arrived on November 6, 2019. He met with Dr. Zhou on November 8, 2019. Her cousin was also present.

[132] Dr. Zhou deposes to telling Mr. Bakker about her "extended contract" and her jobs offers from three sections of radiology at the meeting and not accepting any offers until she had canvassed the topic with him. According to Dr. Zhou, he did not object to her accepting them. Instead, he asked questions about Vancouver, which delighted her. Dr. Zhou said she encouraged him to look for an internship, and he told them he had one lined up.

[133] In contrast, Mr. Bakker deposes that Dr. Zhou never mentioned receiving any offers or having signed an extension to her fellowship. She simply described how much she was enjoying her current fellowship, the work environment at the hospital, Vancouver, and what activities she and Annabel had been doing since they arrived. Mr. Bakker denies telling her and her cousin he had an internship lined up. Instead, he said he informed them he could likely get temporary work in Vancouver for the remainder of his time there through a contact at the university, but only after completing the "write up" of his masters. He also says he repeatedly reiterated his intent to proceed with the agreed-upon return to New Zealand in July 2020.

[134] On November 12, 2019, in an email to his current counsel and Mr. More not long after the meeting, Mr. Bakker wrote the following points came out of his meeting with Dr. Zhou:

- 1) Dr. Zhou confirmed her intention/wish to continue staying in Vancouver and not return to New Zealand in July 2020;
- 2) She sold the family house;
- 3) She said she never agreed to Vancouver only being for one year; and
- 4) She is happy to transition to 50/50 shared care.

[135] Mr. Bakker also wrote that he had indicated at the meeting that he would consider alternative options in relation to Vancouver, but that his current position was that he wished to return to New Zealand as per what the parties had agreed, and that he wanted to make it clear that he did not intend to stay.

[136] He suggested Dr. Zhou's cousin would confirm his account and concludes with:

I want to proceed in the best way forward by informing Jean that I want to return to New Zealand on July 2020 with Annabel as my understanding was. To give Jean enough time to either plan for that, or indicate her intention to go to court to dispute the matter.

[137] Dr. Zhou's cousin deposes that, at the meeting, Dr. Zhou told Mr. Bakker she had been offered an extension of her job and was very inclined to accept it. He asked about the fellowship and she told him it was going very well. Ms. Yin also deposes to telling Mr. Bakker herself that, at a minimum, Dr. Zhou was taking a one or more "year contract" at VGH. Like Dr. Zhou, Ms. Yin says Mr. Bakker told them he had an internship lined up. She also states vaguely that Mr. Bakker asked about plans to return to New Zealand and he was "under the impression" of going back there.

[138] On November 12, 2019, Mr. Bakker emailed Dr. Zhou requesting confirmation that she intended to remain in Vancouver beyond July 2020, which she did on November 14, 2019, writing:

Yes, we are not planning to return to [New Zealand] July 2020. As my job is stable and going great here. Annabel is doing great at daycare and enjoying her environment.

[139] Mr. Bakker deposes that same day he received this confirmation, he took immediate steps to start his application under the *Hague Convention* in New Zealand.

[140] In her November 14 email to Mr. Bakker, Dr. Zhou also suggests they register Annabel for kindergarten "next year". Dr. Zhou's email states that registration for private schools was the next day and that public school registration closed in December, and adds, "we need to register Annabel for a few just to be sure we get a good one".

[141] There are several other emails and text messages exchanged between the parties regarding kindergarten for Annabel. Dr. Zhou includes copies of text messages with no dates, which begin with Mr. Bakker stating that Annabel is ineligible for kindergarten next year because she will not be five in September or between September and October 15. Dr. Zhou explains that Annabel has to be five by the end of the year and that most of the other parents whose kids are turning four that she has spoken with had already registered.

[142] On or about November 16, Mr. Bakker sent Dr. Zhou an email that includes what appears to be a draft consent to registration:

To whom it May concern,

I Ewan Bakker, give my support for Annabel Bakker to enrol and attend kindergarten in Vancouver in 2020.

[143] In a letter dated February 7, 2020, Dr. Zhou's current counsel asserts that Mr. Bakker has not only acquiesced "to this jurisdiction by his action", but has agreed Annabel can remain in B.C. and register for the 20/21 school year starting September 2020, describing Mr. Bakker as actively discussing with Dr. Zhou the choice of schools and educational programs.

[144] On February 24, 2020, Mr. Bakker writes to Dr. Zhou:

Given the current situation around the wrongful retention of Annabel in Vancouver and additionally, the misconstruing of my words and intentions around my agreeing to engage schooling options back in 2019 for 2020, I would prefer to wait until things have been resolved either through the lawyers or the courts before further discussion occurs around schooling in Vancouver.

As it is definitely possible that Annabel will be returning to [New Zealand], Christchurch this year, have you had a chance to investigate some of the Kindergartens around the Aidanfield area or any other area that you may consider a good area with good schooling options for Annabel? I have looked at a few. I think it would be wise to look into some Kindergartens should we return to [New Zealand] as per the original agreement. I think, given the international travel situation of Annabel, some Kindergartens make special allowances and leave spaces open for children in such situations.

[145] Mr. Bakker explains his consent to registering Annabel and engaging in selecting a school for 2020 as follows:

- a) All my communication around schooling for Annabel has been specifically worded as "2020" with no acknowledgment or clear communication of the intention that this would also be for 2021. The academic year in New Zealand is from the start of each calendar year. My understanding in relation to the school year in Vancouver was that it ran similarly to how it works in New Zealand.
- b) I was concerned the Court proceedings would take a significant amount of time and I was concerned that if Annabel was still in Canada and we had not yet received a decision on the return to New Zealand, that she may have to start school in Canada until a Judge makes a decision. ...

- c) My intentions have been clear surrounding my desire for Annabel to return to New Zealand and Dr. Zhou was aware that I was going to be seeking Annabel's return to New Zealand.

[146] Earlier, Dr. Zhou began the process of applying for permanent resident status for herself and Annabel. A letter from Immigration Canada dated December 10, 2019 states that her application for express entry had been accepted and she was invited to apply for permanent residence. A further letter dated in April 2020 sought further information about her spouse or common law partner, because Dr. Zhou identified her marital status as common law, instead of legally separated in her application for permanent residence. That same day, she wrote to Immigration Canada indicating she ticked "the wrong box" and clarified her application is for herself and Annabel only.

[147] Dr. Zhou acknowledges she did not seek Mr. Bakker's consent or make him aware of her immigration application at the time, nor did she notify Immigration Canada that he was not aware. A document obtained by Mr. Bakker demonstrates that Dr. Zhou ought to have submitted a standard form that includes a declaration signed by the non-immigrating parent, indicating they have no objection to the child immigrating to Canada with the other parent. It does appear, however, that the separation agreement setting out the parties' agreement to share equal care of Annabel was among the documents she submitted to Immigration Canada.

[148] Although an email from Dr. Zhou says, as I have indicated, that she requested a copy of her online application for permanent residence, it was not produced by Immigration Canada. Instead, she received the documents she submitted in support of her application. She also deposes to making a Freedom of Information Request, but again, she did not receive her online application.

[149] Dr. Zhou and Dr. Delvisco are now engaged and plan to marry next year. Dr. Delvisco is a citizen of the United States. His affidavit indicates he too is now completing a fellowship in Vancouver. Dr. Zhou deposes he will be in Vancouver long term, having accepted a position in ER/Trauma radiology at VGH.

[150] As I have indicated, the documents produced by Immigration Canada include records related to Dr. Zhou's employment in New Zealand and correspondence. They include an email she sent to former colleagues in New Zealand requesting a reference letter from her former manager. In that email, she also writes about how much she is enjoying her fellowship along with, "I miss Dunedin ... If you have any locum opportunity in the future please let me know."

Positions of the Parties

[151] As I have said, Mr. Bakker asserts that Annabel was wrongfully removed and then wrongfully retained when Dr. Zhou filed the NFC on October 9, 2019. It is undisputed that Annabel's habitual residence was New Zealand when she was removed, and that Mr. Bakker was exercising his custody rights as of the dates of removal and the alleged wrongful retention. In any event, the affidavit of law from New Zealand lawyer James Guest satisfies me that, under New Zealand law, Mr. Bakker has "rights of custody" because he is a guardian, by virtue of being the birth father, having lived with Dr. Zhou when Annabel was born, and by being registered on her birth certificate. He also has rights of custody pursuant to their separation agreement.

[152] Dr. Zhou disputes Mr. Bakker's assertion that Annabel's habitual residence remained in New Zealand by the time of the alleged wrongful retention. In addition to denying that Annabel was wrongfully removed or retained, Dr. Zhou also takes the position that Mr. Bakker consented to Annabel's removal and retention, or alternatively subsequently acquiesced.

Issues for Determination

[153] The issues for determination, in addition to credibility, include deciding whether Annabel was wrongfully removed. If she was not wrongfully removed, I must determine whether she was she wrongfully retained, which is Mr. Bakker's primary position. In deciding this question, I must determine if Dr. Zhou engaged in an anticipatory retention that constitutes a wrongful retention. If I find the removal and/or retention to be wrongful, and Annabel's return therefore mandatory, I must

also decide whether Mr. Bakker consented to her removal or retention, and whether he subsequently acquiesced to her retention.

Credibility

[154] I turn first to the issue of credibility. As I have indicated, although each party suggests that the affidavit evidence of the other is not credible, neither party took the position, nor is it my view, that cross-examination was necessary to resolve the issue.

[155] In general, Mr. Bakker argues that Dr. Zhou's evidence includes multiple examples of misleading and outright untruthful statements. Most of these examples involve discrepancies between her evidence and objective documentary evidence, or involve statements made by Dr. Zhou that are demonstrably untrue when placed in the context of the documentary evidence.

[156] Some of the less serious examples are not canvassed in the overview. They include Dr. Zhou misstating when Mr. Bakker stopped working, misstating when Annabel started daycare in New Zealand, and exaggerating her own involvement in particular aspects of Annabel's care. He also refers to her evidence denying receipt of rent from the former family home, which I have discussed and accept.

[157] More serious examples, not canvassed in the overview, which I also accept, include Dr. Zhou providing third parties with inaccurate information about Mr. Bakker; for example, that he tried to get her to quit her fellowship and that he made statements in court that she is an inadequate mother.

[158] It will no doubt be apparent from the overview itself that I have significant concerns about the veracity of many aspects of Dr. Zhou's evidence. I do not propose to repeat the many inconsistencies within her evidence and as it relates to the documentary evidence, as well as some of the documentary evidence itself and her use of it.

[159] With regard to the documentary evidence, there is the obvious example of the different signing dates on the two versions of her second fellowship agreement. The one included in Mr. Bakker's affidavit evidence aligns with her assertion she waited to discuss the offers with Mr. Bakker at their meeting in November 2019 before accepting them, but the second one included in the records produced by Immigration Canada does not.

[160] In my view, some of the serious allegations Dr. Zhou makes against Mr. Bakker also significantly undermine her credibility. I have already mentioned that Dr. Zhou broadly asserts that Mr. Bakker has a history of being untruthful and suggests that he falsified a document from a website, despite his counsel's submission, and Mr. Bakker's evidence, that his counsel printed the document directly from the website.

[161] Dr. Zhou also alleges that Mr. Bakker was expelled from high school for disorderly conduct that included blowing up a chemistry lab, an allegation which he denies. Given her poor credibility, I do not accept it as true but regardless it is troubling that Dr. Zhou would include this kind of gratuitous allegation in her evidence. There is no suggestion that Mr. Bakker has engaged in misconduct, let alone dangerous conduct, as an adult or in their relationship. Further, although not mentioned in the overview, Dr. Zhou's evidence is rife with attempts to diminish or negate Mr. Bakker, despite the fact that much of the written communication between them is respectful and courteous.

[162] Finally, my assessment of Dr. Zhou's credibility is negatively impacted by her repeated breaches of Mr. Bakker's rights of custody, which involve failing to inform him, consult with him, or seek his consent in making many important guardianship decisions prior to and after leaving New Zealand, in addition to her portrayal of Dr. Delvisco as Annabel's father in the daycare documents. Dr. Zhou's breaches are multiple and serious, and worse still in the face of the separation agreement which requires her to share Annabel's care equally. Dr. Delvisco's frankly appalling email to Mr. Bakker in October 2019 only amplifies this concern.

[163] Mr. Bakker's evidence, in contrast is largely consistent, both internally and externally, except insofar as it conflicts with Dr. Zhou's evidence, and believable. Mr. Bakker's evidence is also reasonable. He is never gratuitously critical of Dr. Zhou. Any concerns I have about his evidence relate to minor points and have been highlighted in the overview.

[164] I am left to conclude that Dr. Zhou's evidence must be approached very cautiously and where it conflicts with Mr. Bakker's and is not corroborated by objective evidence, I cannot safely rely on it.

Analysis

Agreement Concerning a July 2020 Return Date

[165] I mention now that throughout Dr. Zhou's evidence and submissions, she appears to equate the absence of an agreement to the return date of July 2020 existed, with an entitlement to retain Annabel. Dr. Zhou also asserts that Mr. Bakker remained bound by an agreement to move made during their marriage, after the separation. Firstly, given my concerns about her credibility, I do not accept the parties planned to relocate to Vancouver, although it may have been that Mr. Bakker's position was more flexible about remaining in Vancouver longer if her fellowship was extended. More importantly, it is absurd in my view to suggest an agreement to move while they were an intact family would bind him after they separated. This is not a case where the parties executed a plan to move to another country before separating and then after moving and then separating one parent wishes to return with the children to the country of origin. Clearly, Dr. Zhou required Mr. Bakker's consent to both remove Annabel from New Zealand and to retain her in Canada, as well as to travel with her anywhere else in the interim.

[166] In this context, the issue of consent formally arises after a finding of wrongful removal or retention. However, I will address the factual question of whether after separation, the parties agreed that Annabel would be returned to New Zealand in July 2020.

[167] The Annabel Agreement, drafted and offered by Mr. Bakker was never signed by the parties. But, to be binding an agreement does not have to be made in writing. It is trite law that an agreement can be formed in writing, verbally, partly in writing and verbally, and by conduct.

[168] The basic test for determining whether a binding agreement has been reached is an objective one, discussed in *Salminen v. Garvie*, 2011 BCSC 339 as follows:

[27] ... it is "whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract"; it is "whether a reasonable... [person] in the situation of that party would have believed and understood that the other party was consenting to the identical term": *Fridman, supra*, p. 15; ...

[169] The court may consider the parties conduct prior to and after the formation of an alleged agreement: *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at para. 334; *Canlan Investment Corp. v. Gettling* (1997), 37 B.C.L.R. (3d) 140 (C.A.). Subsequent conduct is approached differently. But it may certainly be considered in assessing the credibility of the parties' evidence regarding the circumstances at the time of contracting.

[170] Applying an objective test, it is my view that the parties did enter into a binding agreement that Annabel would return to New Zealand in July 2020. I base my conclusion on Dr. Zhou's conduct, and the written communication from her counsel to Mr. More in May 2019 in response to the terms of the agreement drafted and proposed by Mr. Bakker in the Annabel Agreement. I do not intend to address whether an agreement was formed regarding the other terms.

[171] I note Dr. Zhou references the time in Vancouver as a year, during a written discussion with Mr. Bakker on April 3, 2019. In addition, after she received the Annabel Agreement on April 23, 2019, in both emails sent to her counsel that have been produced, Dr. Zhou expresses no opposition to the return date, despite detailing concerns about some of the other terms.

[172] Ms. Mitchell's May 24, 2019 email to Mr. More conveys Dr. Zhou's acceptance. That email, along with Ms. Beck and Ms. Mitchell's October 25 and late November 2019 letters reflect that their communication with Dr. Zhou about the Annabel Agreement included much more than her emails to them on April 25 and May 18, 2019. I simply do not accept Dr. Zhou's evidence that she did not receive Ms. Mitchell's email to Mr. More until almost a year later, or her very serious allegation that her counsel failed to seek or follow her instructions. Ms. Mitchell's inquiries about the return date, on October 15 and 16, 2019, are well explained by not having reviewed the file. Ms. Beck later says the file was in storage. Ms. Mitchell and Ms. Beck both stated they had reviewed it, before sending their subsequent letters.

[173] I have not forgotten, however, that Mr. Bakker and Mr. More also refer to the Annabel Agreement as a document and to the return date of July 2020 as Mr. Bakker's understanding. If I am wrong in finding an agreement that Annabel would return in July 2020 existed based on Dr. Zhou's acceptance of that term in the Annabel Agreement, I also find that following the parties' separation, and before removing Annabel from New Zealand on April 24, 2019, Mr. Bakker had only ever agreed to allow Annabel to leave New Zealand for the purpose of travelling to China for about one month, and Vancouver for approximately one year until she returned to New Zealand in July 2020. I also find that, absent a binding agreement, Dr. Zhou was well aware of this before she removed Annabel on April 24, 2019.

Wrongful Removal

[174] Turning to the question of whether Annabel was wrongfully removed, I come to no firm conclusion, because Mr. Bakker's primary position is that she was wrongfully retained, and I did not receive fulsome submissions on the question of whether a left-behind parent's agreement to remove based on false assurances as to the return date, would invalidate their consent.

Wrongful Retention

[175] The parties' positions regarding wrongful retention require me to determine Annabel's habitual residence immediately before the alleged anticipatory retention date of October 9, 2019. In doing so, I intend to follow the analytical framework that applies to habitual residence determinations under the *Hague Convention*, based on the hybrid approach established in *Balev*, as summarized in *Ludwig v. Ludwig*, 2019 ONCA 680 at para. 40:

- 2) ... In determining habitual residence, the court should take the following approach:
 - a) The court's task is to determine the focal point of the child's life, namely the family and social environment in which its life has developed, immediately prior to the removal or retention.
 - b) To determine the focal point of the child's life, the court must consider the following three kinds of links and circumstances:
 - i) The child's links to and circumstances in country A;
 - ii) The circumstances of the child's move from country A to country B; and
 - iii) The child's links to and circumstances in country B.
 - c) In assessing these three kinds of links and circumstances, the court should consider the entirety of the circumstances, including, but not restricted to, the following factors:
 - i) The child's nationality;
 - ii) The duration, regularity, conditions and reasons for the child's stay in the country the child is presently in; and
 - iii) The circumstances of the child's parents, including parental intention.

[176] Applying this framework, Annabel was born in New Zealand and she is a New Zealand citizen, as are both her parents. Annabel's paternal grandparents, aunt, cousins, and uncle reside there. She visited with her paternal grandmother, aunt, and some cousins or cousin a few times each year, separated by a long drive. Dr. Zhou's parents, Annabel's maternal grandparents, also have permanent residency in New Zealand and own several properties there. Except for the nine months in 2017 that Annabel spent in China with her maternal grandparents, and two short vacations she had there, Annabel lived in New Zealand with both her parents and her maternal grandmother until separation, and after that, was actively

cared for by all three of them until she left New Zealand with Dr. Zhou on April 24, 2019.

[177] Starting in late 2017, Annabel attended daycare. She also had playdates arranged by both parents and attended ballet classes.

[178] The circumstances of the move from New Zealand to Canada, as I have said, involved Annabel travelling with Dr. Zhou and Dr. Delvisco to China where they visited with Dr. Zhou's family members for about one month. Mr. Bakker was not aware that Dr. Delvisco accompanied them. Nor was he consulted about a trip to Florida that apparently occurred before all three of them arrived in Vancouver. Absent Mr. Bakker's written authorization, I have no idea how Dr. Zhou was able to remove Annabel from New Zealand and travel to and from China, to and from the United States, and enter Canada.

[179] After arriving in Vancouver, in late June 2019, Annabel began attending daycare or preschool and Dr. Zhou began working full-time at VGH at the beginning of July. Since their arrival, they have lived with Dr. Delvisco and Annabel's maternal grandmother in rental accommodation. Dr. Zhou says it is her intention to buy a house with her parents. Annabel plays with two children that live in the complex. Just prior to October 9, 2019, Annabel was involved in some extracurricular activities such as swimming lessons and ballet classes. Dr. Zhou also joined a church, although the parties were not involved with one, while together in New Zealand. If Annabel attended church before October 9, 2019, it was without Mr. Bakker's knowledge or consent. Since her arrival in Vancouver, Annabel has also had some contact with two adult cousins of Dr. Zhou.

[180] After Annabel's removal from New Zealand, and before Mr. Bakker's arrival in Vancouver, Mr. Bakker maintained contact with her through Skype or some other form of electronic connection.

[181] It is difficult to know when, prior to October 9, 2019, Dr. Zhou formed the intention for Annabel to remain permanently in Canada.

[182] Prior to the filing of the NFC, I accept that Dr. Zhou had not yet applied for permanent resident status for herself and Annabel, nor had she been offered the second and third fellowships.

[183] Furthermore, the evidence does not persuade me she actually sold the parties' home in Christchurch to her mother. If she did, the rent receipts indicate she has remained the beneficial owner.

[184] Considering all of this, and applying the hybrid approach articulated in *Balev*, I find that Annabel was habitually resident in New Zealand as of October 9, 2019.

[185] Bearing in mind my earlier conclusions that anticipatory retention can constitute a wrongful retention, and that it is unnecessary for the repudiation to be communicated to the left-behind parent, I am entirely satisfied that by filing the NFC, Dr. Zhou manifested in the strongest terms possible that she had no intention of returning Annabel to New Zealand in July 2020 or at all. The NFC seeks not only orders that would prevent Annabel's return, and significantly limit Mr. Bakker's time with her, but also a role for Dr. Zhou as sole custodian and guardian. Such orders would deny Mr. Bakker any authority to decide or participate in decision-making about Annabel, including where and with whom she resided.

[186] I have already found that if the parties did not form a binding agreement that Annabel would be returned to New Zealand by July 2020, Dr. Zhou was well aware that Mr. Bakker had only authorized Annabel's retention in Canada until then. I have firmly rejected Dr. Zhou's suggestion that absent an agreement between the parties, Mr. Bakker cannot avail himself of the concept of an anticipatory retention. Again, to conclude otherwise would be entirely inconsistent with the purpose and objects of the *Hague Convention*.

[187] There being no dispute Mr. Bakker had rights of custody and has been exercising them since Annabel was removed from New Zealand, and given the finding of habitual residence, I therefore find that the retention was wrongful. This proceeding was commenced within 12 months of the wrongful retention. Article 12 of

the *Hague Convention* mandates the return of Annabel to New Zealand forthwith, unless Dr. Zhou is able to establish that the Article 13(a) exception applies.

Absence of Consent or Subsequent Acquiescence

[188] Having determined that Mr. Bakker did not consent to Annabel being retained in Canada beyond July 2020, I wish to clarify that I also accept that he did not consent after the removal nor did he consent after the wrongful retention.

[189] I am also satisfied Mr. Bakker would have taken legal steps to try to prevent Annabel's removal from New Zealand had he known before she left that Dr. Zhou did not intend to return her in July 2020.

[190] Instead, not knowing, he planned to spend as much of the year-long fellowship term in Vancouver with Annabel as his graduate studies allowed, before she returned to New Zealand in July 2020. Dr. Zhou did not communicate her intention not to return Annabel until after Mr. Bakker's arrival in Vancouver, at least not clearly. I accept that once Mr. Bakker was made aware of Dr. Zhou's intentions in November 2019, he took steps to bring this return application. This was proceeded by contact with the New Zealand Central Authority and the B.C. Central Authority, their filing of the Article 16 Notice, and the onset of the COVID-19 pandemic, as well as responding to the NFC with pleadings that included a jurisdictional response denying the jurisdiction of this Court. After and since arriving in Vancouver, Mr. Bakker has sought to maintain and foster Annabel's connections to family and friends in New Zealand.

[191] Mr. Bakker's decision to remain here, rather than to return to New Zealand without Annabel pending the determination of his return application, certainly does not constitute subsequent acquiescence.

[192] Dr. Zhou argues, however, that Mr. Bakker's consent to register Annabel in kindergarten and his involvement in school selection does. I note that when he gave his consent, Mr. Bakker had been in Vancouver for a very short period and was under pressure from Dr. Zhou. While he would have come to understand

kindergarten here starts in September, I accept his consent and involvement were part of an effort to ensure that Annabel was not negatively affected by a prolonged proceeding, or in the event his return application was unsuccessful. Recognizing Annabel's first school year in New Zealand would not start until July 2021, I am not concerned by the timing of Mr. Bakker's communication in February 2020 to Dr. Zhou about kindergarten in New Zealand. Further, it is clear he was genuinely startled and dismayed by her counsel's allegation of acquiescence at the time.

[193] In the circumstances, I simply do not accept Mr. Bakker's consent and engagement constituted a tacit, passive, or unstated consent to Annabel's retention in Vancouver beyond July 2020. While consenting to school registration and engaging in school selection certainly could constitute clear and cogent evidence of conduct inconsistent with a child's summary return to their habitual residence, I am firmly of the view that is not the case here. In other words, examining the evidence contextually, I am entirely satisfied that the threshold for establishing acquiescence has not been met.

Conclusion

[194] I grant Mr. Bakker's application for an order that Annabel be returned to New Zealand forthwith.

“Fleming J.”