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CANADA / JUDGMENT

## A.K.S. v. J.S.S.

2021 BCSC 2011

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COURT

Supreme Court of British Columbia

DECIDED

20 September 2021

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2021 BCSC 2011 A.K.S. v. J.S.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.K.S. v. J.S.S.,

2021 BCSC 2011

Date: 20210920

Docket: E63172

Registry: New Westminster

Between:

A.K.S.

Claimant

And

J.S.S.

Respondent

Before: The Honourable Mr. Justice Veenstra

(via teleconference)

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant, appearing via telephone conference:

P. Malhi

Counsel for the Respondent, appearing via telephone conference:

P. Khaira

Place and Date of Hearing:

New Westminster, B.C.

September 14, 2021

Place and Date of Judgment:

New Westminster, B.C.

September 20, 2021

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- [1] THE COURT: The parties to this proceeding disagree as to the appropriate forum for determination of their family dispute. The applicant, who is respondent in this proceeding, applies for a declaration that the child of the marriage is a habitual resident of Ontario and to set aside a without notice protection order obtained by the claimant on August 24, 2021. The claimant has filed her own application for an order that the child is a habitual resident of British Columbia and that the Supreme Court of British Columbia should take jurisdiction. She also seeks an order that the child should reside with her in British Columbia and opposes the application to set aside the protection order.
- [2] I note that the applicant also sought an order requiring the claimant to forthwith make her phone available to the child to facilitate telephone access with the applicant. I am advised that the claimant has agreed to do so. I will say nothing further about that part of the application.

## Background Facts

- [3] The claimant, A.K.S., and the respondent, J.S.S., were married on January 16, 2014. They have one child, F.S., who was born on October 17, 2014, and will very soon be seven years of age.
- [4] J.S.S. moved to Surrey, BC, in December 2014 after being sponsored by A.K.S. under a spousal sponsorship program. The parties and F.S. thereafter lived with A.K.S.'s family. Others living in the home included A.K.S.'s parents, A.K.S.'s brother and his wife and son.
- [5] The parties differ in their evidence as to how large the house is. It is J.S.S.'s evidence the house had two bedrooms and a den, while A.K.S.'s evidence was that there were four bedrooms. J.S.S.'s evidence was that two of A.K.S.'s cousins lived there as well. A.K.S.'s evidence was that the cousins simply used the house as a mailing address. Regardless of these differences, it is clear that there were a significant number of people living in close quarters.
- [6] In July 2019, A.K.S., J.S.S. and F.S. moved to Windsor, Ontario, where they lived in a three-bedroom home that they purchased. Both J.S.S. and A.K.S. were on title, and both are parties to the mortgage by which the purchased was financed.
- [7] J.S.S. found work as a commercial truck driver crossing the border to Detroit multiple times on many days. A.K.S., who had completed an accounting/bookkeeping program at BCIT and worked as a bookkeeper for two years before moving to Windsor, was unable to find comparable work in Windsor. She thereafter completed a course in esthetics. However, she worked in that area for only a short time and has not worked since the COVID pandemic arose.
- [8] The house in Windsor is within a couple of blocks of J.S.S.'s sister's home. It appears from the evidence that J.S.S. was in regular contact with his family, but that A.K.S. was much less enthusiastic about contact with J.S.S.'s family.
- [9] F.S. was enrolled in an elementary school in Windsor, Ontario, where he completed kindergarten and grade 1. He was expected to return to the same school for grade 2 with classes scheduled to start on September 7, 2021.
- [10] A.K.S., J.S.S. and F.S. visited A.K.S.'s family in British Columbia in July 2020, returning after that visit to continue their lives in Ontario.
- [11] On July 23, 2021, A.K.S. and F.S. flew to British Columbia to visit A.K.S.'s family. They had a return flight booked on August 16, 2021. They did not take that flight.
- [12] The record includes a series of texts the parties exchanged in August 2021 in which it appears that A.K.S. is attempting to persuade J.S.S. to come to Surrey to live with her there, and J.S.S. is pleading with her to come back to Windsor, suggesting that he is willing to find a better house in Windsor but that it is far too expensive for them to live independently in Surrey. A.K.S. in response says "we can buy in Surrey Richmond Langley etc. We have

several options in BC". When J.S.S. insists that "Surrey was so expensive I can't afford", A.K.S. responds:

I don't need big house. I can live in a small house.

I don't demand for expensive things.

- [13] J.S.S.'s evidence was that he was in regular contact with A.K.S. and F.S. until August 10, 2021, when he began to have difficulty getting A.K.S. or her family members to answer any calls.
- [14] J.S.S. retained a lawyer in Windsor, Ontario, Mr. Dhaliwal, who wrote a letter that was emailed to A.K.S. on August 19, 2021, asking her to return F.S. to Ontario.
- [15] On August 24, 2021, A.K.S. commenced this family law proceeding in the British Columbia Supreme Court seeking orders with respect to parenting, child support, spousal support and property division. The notice of family claim did not include a claim for divorce. It cited only the Family Law Act, S.B.C. 2011, c. 25, in respect of the parenting orders that were sought.
- [16] That same day, A.K.S. applied for and obtained a without notice protection order in this proceeding pursuant to s. 183 of the Family Law Act. That order, based on allegations of family violence, orders that:
- [J.S.S.] must have no contact or communication, directly or indirectly, with [A.K.S.] and the child [F.S.]
- . [J.S.S.] must not go or be within 250 meters of any place where [A.K.S.] and the child [F.S.] lives, works, attends school, or worships, or happens to be
- any police officer who is provided with a copy of this order, is directed to remove [J.S.S.] from any place, including but not limited to, residence, business, school, place of employment, where [A.K.S.] and/or the child [F.S.] are present
- [17] The order was granted by Master Muir, who added to the order by hand a provision that:
- The respondent has leave to apply to set aside or vary this order on 7 clear days notice to the claimant.
- [18] The materials filed by A.K.S. in support of the application for this without notice protection order did not disclose the letter that was emailed to her on August 19, 2021. Her evidence was that she did not open the email and see the letter until after the order was granted on August 24, 2021.
- [19] J.S.S. commenced a family law proceeding in the Ontario Superior Court of Justice on August 27, 2021, seeking a divorce as well as orders with respect to parenting time and decision-making responsibility.

[20] The present applications in this action were filed on August 31, 2021 (by J.S.S.), and September 2, 2021 (by A.K.S.). They were initially set for September 10, 2021. On that day, the parties appeared before Master Robertson, who directed that the application be rescheduled to be heard by a justice on September 14, 2021, and gave directions for the filing of additional material.

## Issues

[21] The primary issue on this application is whether this court should assume jurisdiction over this family law matter given the provisions of ss. 72 to 74 of the Family Law Act and comparable provisions in the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).

[22] If the court determines that it should assume jurisdiction, then the court will need to determine whether the protection order should be continued and whether it should make any orders with respect to parenting time. If the court determines it should not assume jurisdiction, then the court will need to determine an appropriate disposition of the protection order.

## Applicable Law

[23] As noted in *D.L. v. M.Y.*, 2019 BCSC 881, at paras. 27 to 28:

[27] When a court determines whether to take jurisdiction over a dispute, it engages in a two-step analysis. First, the court determines whether it has territorial competence (sometimes called jurisdiction simpliciter) over the dispute. The burden of establishing territorial competence rests with the party asserting its existence: *Aleong v. Aleong*, 2013 BCSC 1428 at para. 80.

[28] Second, the court determines whether it ought to exercise that jurisdiction, or whether, instead, there is another forum that is "clearly more appropriate": *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 103 [Van Breda]. This second step is sometimes referred to as a forum non conveniens analysis. The burden in this analysis rests with the party asserting that another forum is clearly more appropriate: *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2015 BCCA 200 at para. 45.

[24] J.S.S. says the court should consider both the Divorce Act and the Family Law Act given that the alternative proceeding in Ontario seeks relief under both the Divorce Act and under Ontario's counterpart to the Family Law Act.

[25] The Divorce Act allocates jurisdiction amongst the various provinces based on where the parties were "habitually resident". Section 3(1) provides as follows:

## Jurisdiction in divorce proceedings

3 (1) A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been habitually resident in the province for at least one year immediately preceding the commencement of the proceeding.

[26] As noted above, the claimant in this proceeding did not seek an order of divorce in the notice of family claim. I infer that this reflects a conclusion that the requirements of s. 3(1) would not be met, in that she would be unable to establish habitual residence in British Columbia for at least one year immediately preceding the commencement of the action.

[27] With respect to corollary relief proceedings, s. 4(1) of the Divorce Act states:

### Jurisdiction in corollary relief proceedings

4 (1) A court in a province has jurisdiction to hear and determine a corollary relief proceeding if

- (a) either former spouse is habitually resident in the province at the commencement of the proceeding; or
- (b) both former spouses accept the jurisdiction of the court.

[28] The Divorce Act has specific provisions at s. 16.9(1) dealing with relocation of a child:

## Notice

16.9 (1) A person who has parenting time or decision-making responsibility in respect of a child of the marriage and who intends to undertake a relocation shall notify, at least 60 days before the expected date of the proposed relocation and in the form prescribed by the regulations, any other person who has parenting time, decision-making responsibility or contact under a contact order in respect of that child of their intention.

It provides for a parent who does not agree to the relocation to require the matter to be brought before the court for determination.

[29] The steps provided for in this section were not followed in respect of the relocation of A.K.S. and F.S. to British Columbia.

[30] Section 6.2(1) of the Divorce Act provides that:

## Removal or retention of child of marriage

6.2 (1) If a child of the marriage is removed from or retained in a province contrary to sections 16.9 to 16.96 or provincial law, a court in the province in which the child was habitually resident that would have had jurisdiction under sections 3 to 5 immediately before the removal or retention has jurisdiction to hear and determine an application for a parenting order, unless the court is satisfied

- (a) that all persons who are entitled to object to the removal or retention have ultimately consented or acquiesced to the removal or retention;
  - (b) that there has been undue delay in contesting the removal or retention by those persons; or
  - (c) that a court in the province in which the child is present is better placed to hear and determine the application.
- [31] In the Family Law Act, Div. 7 of Part 4 deals with "Extrajurisdictional Matters Respecting Parenting Arrangements". For purposes of that division, key terms are defined in s. 72 and certain purposes are set out in s. 73:

#### Definitions and interpretation

##### 72 (1) In this Division:

"extrajurisdictional order" means an order of an extrajurisdictional tribunal that is similar in nature to an order respecting guardianship, parenting arrangements or contact with a child;

"extrajurisdictional tribunal" means a court or tribunal, outside British Columbia, having authority to make an extrajurisdictional order.

- (2) For the purposes of this Division, a child is habitually resident in the place where the child most recently resided
  - (a) with his or her parents,
  - (b) if the parents are living separate and apart, with one parent
    - (i) under an agreement,
    - (ii) with the implied consent of the other parent, or
    - (iii) under an order of a court or tribunal, or
  - (c) with a person other than a parent on a permanent basis for a significant period of time.
- (3) The removal or withholding of a child without the consent of a guardian does not affect the child's habitual residence unless the guardian from whom the child is being removed or withheld acquiesces or delays in applying for an order of a court or an extrajurisdictional tribunal.

#### Purposes

##### 73 The purposes of this Division are as follows:

- (a) to ensure that court applications respecting guardianship, parenting arrangements or contact with a child are determined on the basis of the best interests of the child;
- (b) to avoid the making of orders respecting guardianship, parenting arrangements or contact with a child, respecting the same child, in more than one jurisdiction;

- (c) to discourage child abduction as an alternative to determining by due process the guardianship of, or parenting arrangements with respect to, a child;
- (d) to provide for effective enforcement of orders respecting guardianship, parenting arrangements or contact with a child, and for the recognition and enforcement of extraprovincial orders.

[32] Section 74 sets out limits on the jurisdiction of a British Columbia court to act under the Family Law Act:

### **Determining whether to act under this Part**

74 (1) This section applies if an order respecting guardianship, parenting arrangements or contact with a child may be made, respecting the same child, in more than one jurisdiction.

- (2) Despite any other provision of this Part, a court may make an order under this Part respecting guardianship, parenting arrangements or contact with a child only if one of the following conditions is met:
  - (a) the child is habitually resident in British Columbia when the application is filed;
  - (b) the child is not habitually resident in British Columbia when the application is filed, but the court is satisfied that
    - (i) the child is physically present in British Columbia when the application is filed,
    - (ii) substantial evidence concerning the best interests of the child is available in British Columbia,
    - (iii) no application for an extraprovincial order is pending before an extraprovincial tribunal in a place where the child is habitually resident,
    - (iv) no extraprovincial order has been recognized by a court in British Columbia,
    - (v) the child has a real and substantial connection with British Columbia, and
    - (vi) on the balance of convenience, it is appropriate for jurisdiction to be exercised in British Columbia;
  - (c) the child is physically present in British Columbia and the court is satisfied that the child would suffer serious harm if the child were to
    - (i) remain with, or be returned to, the child's guardian, or
    - (ii) be removed from British Columbia.
- (3) A court may decline to make an order under this Part if the court considers that it is more appropriate for jurisdiction to be exercised outside British Columbia.

- [33] The relevant legal principles governing territorial competence are reviewed at length by Justice Matthews in *Y.Q. v. J.D.*, 2021 BCSC 943 at paras. 34 to 58. She describes the above-noted provisions of the Divorce Act and the Family Law Act which set out rules dealing primarily with territorial competence, other than s. 74(3), which reflects the principle of *forum non conveniens* or appropriate forum. As she notes at paras. 51 to 52:
- [51] The definition of habitual residence of a child does not preclude the consideration of common law principles; however, the statutory definition will take priority: *Aslanimehr v. Hashemi*, 2019 BCSC 804 at para. 42. Accordingly, the case law on the meaning of habitual residence under the Divorce Act is relevant to applications under the Family Law Act, at least to the extent it does not conflict with the above definition.
- [52] Since both the Family Law Act and the Divorce Act address territorial competence for parenting, it is necessary to consider whether there is an operational difference between the provisions. In the circumstances of this case, the issue on which the case will turn, under either legislative regime, is whether A.D. is habitually resident in B.C and whether Y.Q. consented to her removal to China or delayed in seeking her return. I am satisfied that the definition of "habitually resident" in the Family Law Act is not materially different from the common law definition relevant to the Divorce Act.
- [34] With respect to the determination of habitual residence, Justice Matthews notes at paras. 57 to 58 that:
- [57] The habitual residence of a child is tied to the habitual residence of his or her parents: Family Law Act, s. 72(2). As noted, the definition in s. 72(2) does not preclude common law definitions of habitual residence, at least to the extent that they do not conflict with the statutory definition. Under the common law, "a 'habitual residence' is established by residing in a place for an appreciable period of time, with a 'settled intention': *Chan v. Chow*, 2001 BCCA 276 at para. 32; see also *Aslanimehr* at paras. 46--48, citing *Kong v. Song*, 2019 BCCA 84 at para. 75. A settled intention or purpose describes one's purpose for living where one does. If there is a settled intention or purpose, "it will stand out clearly as a matter of general impression": *Chan* at para. 34, citing *Cheshire and North's Private International Law*, 13th ed. (London: Butterworths, 1999) at 166-167.
- [58] Habitual residence is further described in *Rey v. Getta*, 2013 BCCA 369:
- [32] An habitual residence has been determined to be the place where children, who are wrongfully removed or wrongfully retained, resided for "an appreciable period of time" under the "settled intention or purpose" of their parents. A settled intention requires a "degree of settled purpose" that may include one or several purposes and be specific or general. While the duration of the residency may be a relevant factor, a settled purpose does not require a lengthy period of residency but may vary from a lengthy stay, to a fixed or limited period, or even as short as a day. A settled intention simply requires that "the purpose of living where one does has a sufficient degree of continuity to be properly described as settled".

[Citations omitted].

[35] The question of settled intention was considered in *Kong v. Song*, 2018 BCSC 1691, aff'd 2019 BCCA 84, at para. 20, where Justice Mayer adopted the approach set out by Justice Martinson in *Fasiang v. Fasiangova*, 2008 BCSC 1339, at paras. 60 to 71 and 74 to 75:

### Settled Intention

[60] A settled intention or purpose requires that "the purpose of living where one does has a sufficient degree of continuity to be properly described as settled." But all that is required is that there is a settled purpose. There is no requirement that there be an intention to settle indefinitely.

[61] Further, a settled intention or purpose describes one's purpose for living where one does and it can be for a limited period. If there is a settled intention or purpose "it will stand out clearly as a matter of general impression".

[62] A settled intention or purpose is "an intent to stay in a place whether temporarily or permanently for a particular purpose, such as employment, family, etc.".

[63] Madam Justice Stromberg-Stein listed the following factors that may be considered in determining settled intention , this list is not exhaustive:

1. Both parties have relocated to the new state;
2. The custodial parent is employed in the new state;
3. The custodial parent had taken steps to satisfy the immigration requirements of the new state;
4. The children were enrolled in school in the new state;
5. The parents had purchased one-way tickets to the new state; and
6. Accommodation has been arranged in the new state.

[64] Settled intent to change habitual residence is determined just prior to the physical move to the new habitual residence.

[65] When both parents share the intention to change the residence of their family, courts have not hesitated to find that the parents' intent controls the location of habitual residence.

[66] If a family decides to permanently move to another country, and takes the required steps to do so (e.g. sell their house, quit their jobs) the family has effectively changed the habitual residence of their children. If one parent then decides that the move is not really what she wanted, she cannot "simply and unilaterally" remove the children from their new habitual residence.

[67] In cases where parties no longer agree that they shared the intention to change their child's habitual residence, courts should not take the representations made by parties at their face value. Instead courts should determine, based on all the evidence, whether the parent has already agreed to change the child's habitual residence.

[68] Settled intention alone is not enough, for habitual residence to be established the child actually has to move and an appreciable period of time must pass.

#### Appreciable Period of Time

[69] Whether residence has been for an appreciable period of time is a question of fact.

[70] An appreciable period of time is not a fixed period.

[71] An appreciable period of time could be as short as one day.

[73] Factors to take into account when determining whether residence has been for an appreciable period of time such that habitual residence has been established can include, but are not limited to: bringing personal possession to the new country; taking the necessary steps to establish residence before travelling to the new country; having a right of abode in the new country; seeking to bring family members to the new country; and, having "durable ties" with the new country.

[74] The threshold for what constitutes an appreciable period of time will be different if the party is resuming habitual residence in a location rather than establishing residence in the location for the first time.

[citations removed]

[36] A.K.S. argues it is possible for a person to have two habitual residences, referencing *Johansson v. Janssen*, 2021 BCCA 190, at para. 27:

[27] The chambers judge concluded that the children had two habitual residences: Germany and British Columbia. The law recognizes that a child can have two habitual residences, however, it is usually in the context of where parents have joint parenting rights, and the child spends equivalent time in two jurisdictions: see *M.M. v. S.T.*, 2014 ABCA 120 at para. 16. Here, the situation is unusual in that the mother has two habitual residences, living in both Germany and British Columbia with the children for parts of each year.

[37] Turning to the question of appropriate forum, as was noted by Justice Smith at paras. 29 to 30 of the trial judgment in *Johansson v. Janssen*, 2020 BCSC 1738, *aff'd* 2021 BCCA 190:

[29] Factors relevant to the appropriate forum analysis under s. 74(3) are found in s. 11 of the [Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28]:

11 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

- (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
- a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
  - b) the law to be applied to issues in the proceeding,
  - c) the desirability of avoiding multiplicity of legal proceedings,
  - d) the desirability of avoiding conflicting decisions in different courts,
  - e) the enforcement of an eventual judgment, and
  - f) the fair and efficient working of the Canadian legal system as a whole.
- [30] The list in s. 11 of the CJPTA is not exhaustive. A court may also apply considerations arising under the FLA, including the best interests of the children: *Shortridge-Tsuchiya v. Tsuchiya*, 2010 BCCA 61 at para. 61.
- [38] As noted by Justice Brundrett in *C.L.Z. v. C.G.Z.*, 2018 BCSC 2172 at para. 52:
- [52] In considering whether a court should decline jurisdiction, the factors in s. 11 of the CJPTA, and the purposes of s. 73 of the FLA are both relevant, given their degree of overlap as stated in Schubert:
- [59] There is overlap between the factors expressed in s. 11 of the CJPTA and the purposes expressed in s. 73 of the FLA. In particular, the CJPTA and the FLA have common goals of avoiding a multiplicity of proceedings and conflicting judgments. The stated purpose of the FLA of avoiding abductions and the wrongful removal of children may be viewed as relevant to a consideration of the fair and efficient working of the Canadian legal system as a whole, as expressed in the CJPTA.
- [39] The question at the appropriate forum stage is whether another forum exists that is "clearly more appropriate": *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 108.
- [40] It appears to me that s. 6.2(1)(c) of the Divorce Act brings into play considerations of appropriate forum in much the same manner as s. 74(3) of the Family Law Act.

## Positions of the Parties

### Position of J.S.S.

- [41] J.S.S. argues that the parties' habitual residence has since July 2019 been in Windsor, Ontario. He argues that the actions of the claimant in removing F.S. from Ontario without his consent do not affect the parties' habitual residence, citing s. 72(3) of the Family Law Act.
- [42] He argues (and A.K.S. does not dispute) that:

- a) he did not consent, either expressly or impliedly, to the relocation; and
- b) he has not acquiesced to the removal, but rather acted quickly both by commencing proceedings in Ontario and by applying to challenge the jurisdiction of this court.

Thus, he says that the British Columbia courts do not have territorial competence under either the Divorce Act or the Family Law Act.

- [43] With respect to appropriate forum, J.S.S. argues that the bulk of the evidence of witnesses, other than A.K.S. and perhaps her parents, are in Ontario and that Ontario is clearly a more appropriate forum.
- [44] J.S.S. relies on the general legislative purpose as reflected in s. 73 of the Family Law Act as well as the various provisions of the Divorce Act that discourage parents from unilaterally relocating with a child without consent of the other parent.

#### Position of A.K.S.

- [45] A.K.S. argues that the decision to move to Ontario was at J.S.S.'s insistence and that she really did not want to move. She says that she feels safe in Surrey with her extended family. She argues that a party can have more than one habitual residence and that she has never really given up Surrey as her own habitual residence.
- [46] In any event, she argues that she and F.S. have been living in Surrey for several weeks now and habitual residence can be established after as little as one day. While she acknowledges that she initially flew back to British Columbia in July intending it to be a vacation, at some point in August she developed a settled intention to remain here indefinitely. From that time, British Columbia became the habitual residence of herself and F.S. She says that she has enrolled F.S. in grade 2 in Surrey which is further evidence that this is now their habitual residence.

#### Analysis

- [47] There are significant conflicts in the evidence. Those conflicts may need to be dealt with when the appropriate court deals with questions of parenting time, decision-making, relocation and conduct. At the present time, I need only determine whether there is sufficient evidence for a decision to be made as to jurisdiction and appropriate forum. For the reasons set out below, I conclude that there is.
- [48] With respect to the decision to move, the evidence of A.K.S. was that it was entirely the idea of J.S.S. to move to Ontario and that he did not consult with her. She said:

[J.S.S.] on his own accord purchased the home. He advised that I was going to be title and the mortgage. I was further advised the mortgage application would have both of names and we had sufficient income collectively to proceed. I had conceded at that point and hoped it was the right decision for our family.

[Emphasis added.]

- [49] In this case, the parties purchased a home in Ontario with respect to which both are mortgagees. A.K.S. at the very least acquiesced at that move, even if she may have been less than enthusiastic. The parties lived in that home for two years with F.S. F.S. attended both kindergarten and grade 1 in Ontario. J.S.S. has ongoing employment in Ontario. It is clear to me that the parties moved to Ontario with the settled intention to make that their long-term residence.
- [50] I find that F.S. was habitually resident in Ontario prior to the events giving rise to this action. The steps taken by A.K.S. to relocate to British Columbia without the consent of J.S.S. do not affect that habitual residence. Nor is this the sort of situation contemplated in *Johansson* where the parties had an established pattern of living part of the year in each of two different jurisdictions.
- [51] Thus, the criterion for this court to accept jurisdiction set out in s. 74(2)(a) of the Family Law Act and in ss. 3(1) and 6.2(1) of the Divorce Act is not met.
- [52] That leaves the questions of whether the court should assume jurisdiction pursuant to s. 74(2)(b) or (c) of the Family Law Act or s. 6.2(1)(c) of the Divorce Act.
- [53] Section 6.2(1)(c) is concisely worded, requiring the court to consider whether it is "better placed to hear and determine" any application for a parenting order. Section 74(2)(b) and (c) contain a series of factors that ultimately go to the same question of whether the British Columbia court is better placed to hear and determine parenting issues.
- [54] With respect to the factors in s. 74(2)(b), I note that the factors are conjunctive rather than disjunctive (the word "and" is used as part of factor (v)) such that the court should be satisfied that all six listed factors are present in order for s. 74(2)(b) to found jurisdiction. The fact that F.S. and A.K.S. are currently present in British Columbia provides at least some basis for the court to consider taking jurisdiction" under s. 74(2)(b)(i). It could arguably also found a real and substantial connection for purposes of s. 74(2)(b)(v). However, those provisions must be considered in light of s. 73 and the purposes that are to govern interpretation of the provisions, including the discouragement of unilateral relocations by one parent without consent of the other and in violation of the relocation provisions that appear in both the Divorce Act and the Family Law Act. In my view the court should be reluctant to find a real and substantial connection where the connection arises from a unilateral relocation accomplished without consent, in violation of the regime governing relocations, and where there has been no delay or acquiescence to such a move.
- [55] With respect to s. 74(2)(b)(iii), there is an application pending before the Ontario courts, so this criterion is not met.

- [56] The factors cited in s. 74(2)(b)(ii) and (vi) (the existence of substantial evidence in British Columbia and a balance of convenience favouring British Columbia) in my view bring into play many of the same factors considered in determination of appropriate forum (in particular, consideration of the "comparative convenience and expense for the parties in the proceeding and their witnesses"). This leads to a consideration of the nature of the issues that appear from the materials filed to date in this matter.
- [57] As noted above, A.K.S. obtained a protection order on August 24, 2021, based on her affidavit #1 which made a number of allegations. She alleged that J.S.S. abused her mentally, verbally and physically, that he would physically hit her, constantly abuse alcohol and become very violent both to her and to F.S. She deposed that she was not allowed to obtain a job in Ontario, and accused J.S.S. of various controlling behaviours. Among the accusations was one that J.S.S. "manipulated [F.S.] into calling the police," and that he "persuaded [F.S.] to inform the police that I was violently yelling at him," which A.K.S. said was untrue. She acknowledged that the Ontario child protection services became involved. She also alleged that when in July 2021 she asked J.S.S. to let her and F.S. visit family in British Columbia, he was enraged and refused, as a result of which she had to have her brother purchase the tickets.
- [58] J.S.S.'s affidavit #1 filed August 31, 2021, provides his response to these allegations (as well as his evidence in support of his application as to jurisdiction). His evidence was that:
- a) He had never stopped or discouraged A.K.S. from working and in fact had attempted to help her find accounting work, supported her in completing the esthetics training, and contributed to the cost of helping her set up a home-based salon.
  - b) He denied being mentally, verbally or physically abusive to A.K.S..
  - c) He also denied any history of alcohol abuse, noting that he is a commercial truck driver who crosses the U.S.A. border multiple times each day, works out daily at the gym, and has a drink approximately once a week.
  - d) He suggested that the main problem in their relationship was A.K.S.'s attachment issues with her family, that her family made it difficult for them to form their own family unit, and that their arguments while living in Windsor stemmed from her demands to move back to Surrey.
  - e) On two occasions he had called police as a result of violent behaviour by A.K.S., the Ontario child protection services had become involved, and at their recommendation, J.S.S. and F.S. had stayed away from the house for three to four days to allow A.K.S. to take control of her emotions. He gave evidence of other instances where A.K.S. was extremely aggressive and verbally abusive, sometimes in front of F.S., and said that he had asked A.K.S.'s brother to help persuade her to obtain counselling.

- f) He denied having any concerns about A.K.S. travelling to visit her family and exhibited to his affidavit air tickets he had purchased in April 2021 for A.K.S. and F.S. to fly to Vancouver in July 2021.
- g) He attached to his affidavit the text messages he exchanged with A.K.S. in August 2021 in which they had an exchange as to A.K.S.'s desire to move to British Columbia and his desire to stay in Ontario.
- h) He said he had been in regular contact with A.K.S. and F.S. over the summer of 2021 until about August 10, when he suddenly could not get through to her, her father or her brother, and that the one time A.K.S.'s mother answered her phone, she told J.S.S. that A.K.S. was too busy to talk to him.
- i) He expressed concern about F.S.'s safety in British Columbia given both his concerns about A.K.S.'s stability and about verbal and physical aggression from A.K.S.'s father.

[59] A.K.S.'s second affidavit sworn September 7, 2021, contains somewhat different evidence from her first with respect to certain contested matters, in particular:

- a) She acknowledged that J.S.S. had given her at least one suggestion for an accounting job and that she had completed a course in esthetics and worked for a few days after the course before being laid off due to the COVID-19 downturn. She agreed that she had also worked with an employment agency in efforts to find employment. Her allegation that J.S.S. refused to allow her to work became an allegation that J.S.S.'s mother called her on the phone, wanted her stay home with F.S., and told her that if she worked, she would have to turn over her income to J.S.S.'s sister.
- b) In response to J.S.S.'s evidence that he had in fact booked her a flight to Vancouver with a July 3, 2021 departure, she said that J.S.S.:

booked my flight to British Columbia without any consultation with me, and the main reason I had not to book [sic] anything was until he agrees to allow both [F.S.] and me to travel on our own.

She suggested that J.S.S. had booked the July 3, 2021 flight only for her; however, the ticket attached to J.S.S.'s affidavit included both A.K.S. and F.S.

- c) She denied that they had any discussion about the move to Ontario prior to April 2019, when J.S.S. suddenly announced he was going to Ontario to look for a home.
- d) With respect to the allegations concerning her own aggressive behaviour, A.K.S. denied that she had been violent or verbally abusive to either J.S.S. or F.S. She acknowledged two occasions on which J.S.S. had called the police with concerns about her. With respect to the second occasion, she said:

I was cooking at home with our son [F.S.]. [J.S.S.] was out helping his brother-in-law with some yard work. [J.S.S.] came into the house and said he was taking [F.S.]. I advised him that lunch was ready and he could take [F.S.] after lunch was done. [J.S.S.] immediately reacted and an argument occurred between me and [J.S.S.]. [J.S.S.] called the police again. Upon the police attendance, [J.S.S.] was requested to leave the house, and he stayed with his sister. He took our son with him. I had no objection to the police's suggestion.

- e) She acknowledged that J.S.S. was "in constant contact" with F.S. while she was in British Columbia, but said that J.S.S. had no interest in talking with her. She said that her phone stopped working and it took several days to get it working again, which is the reason that contact was abruptly cut off. She said that J.S.S.'s video contact with F.S. resumed until August 24, when it was cut off after the protection order was obtained.
- [60] J.S.S. provided a reply affidavit on September 8, 2021. In it he asserted that A.K.S. had been involved in discussions about a house in Windsor as early as December 2018, and attached text messages exchanged at that time about searches for potential properties in Windsor.
- [61] It appears from all this evidence that there will be contested issues in respect of parenting which will focus substantially on the parties' parenting activities from July 2019 to July 2021 while living in Ontario. There will presumably be evidence in respect of the involvement of Ontario's child protection service and with respect to the various police involvement. As well, the various friends and family members who interacted with the parties during the two years they lived in Ontario may also have relevant evidence.
- [62] There will, of course, be evidence from A.K.S. and perhaps from her family members in Surrey, but my assessment based on the contested evidence tendered on this application is that the majority of the evidence and nearly all of the evidence that will need to be obtained from people or organizations that are neither parties or family members will be in Ontario. I note that the parties' main asset is their home in Windsor, Ontario. Any evidence with respect to that asset will be most conveniently available in Ontario.
- [63] I was referred to the judgment of Justice Brundrett in *Melich v. Patel*, 2021 BCSC 694. That case involved a father and mother with a young child who had lived in Vancouver for a few years prior to separation, after which the mother moved to Ontario where she had family support. It was argued that the British Columbia court should decline jurisdiction on the basis that with the mother having moved there, the Ontario courts were better able to determine parenting issues. Justice Brundrett dismissed the application to decline jurisdiction.
- [64] Although the decision focuses on the question of appropriate forum rather than jurisdiction, comments made are apposite in a consideration of s. 74(2)(b) of the Family Law Act. As in this case, the wife in *Melich* argued that it was more convenient for the husband to travel to Ontario where she lived to litigate parenting issues (para. 56). Justice Brundrett did not accept that submission. At para. 59 he commented:

[59] With respect to the comparative convenience and expense, it is quite possible that one party or the other may at some point be required to travel to another jurisdiction to testify, though the force of that submission is lessened with advancements in remote video testimony. The respondent's schedule is more flexible than the claimant's because she is not working at the moment.

I would adopt much the same analysis in my consideration of the factors in s. 74(2)(b)(iv).

[65] I conclude that this court should not take jurisdiction pursuant to s. 74(2)(b). The factors in s. (ii), (iii), (iv) and (vi) do not favour the taking of jurisdiction by this court in the absence of habitual residence of British Columbia, in light of the purposes set out in s. 73, and given the factors making Ontario a more appropriate forum.

[66] Section 74(2)(c) requires the court to consider whether this court is satisfied that the child would suffer serious harm if removed from British Columbia. In this case, all that is being sought at this point is an order that would lead to the Ontario court taking jurisdiction. There is simply no basis to believe that the Ontario court is not in a position to adequately protect F.S. from serious harm.

[67] In any event, having reviewed the evidence, I have serious concerns about whether the protection order would have withstood a challenge in any event, even if the British Columbia court had accepted jurisdiction. The evidence of A.K.S. changed substantially from the time of the without notice application on August 24, 2021, to the present hearing. A number of documents produced by the parties called into serious question many of the assertions made by A.K.S. in her initial application. The involvement of the child protection services in Ontario, which appears to be at the insistence of J.S.S., and A.K.S.'s explanation that J.S.S. was simply too quick to call the police when concerned about her conduct, give rise to doubts as to whether J.S.S. in fact poses a risk. More importantly, the texts exchanged between the parties in August in which A.K.S. attempted to persuade J.S.S. to agree to move to Surrey and live with her are simply inconsistent with the allegations of a serious risk of violence.

[68] For all of these reasons, it is my conclusion that the jurisdiction of this court over parenting issues has not been established under s. 74 of the Family Law Act. As well, for purposes of s. 6.2(1)(c) of the Divorce Act, I do not conclude that this court is better placed to hear and determine parenting issues.

## Protection Order

[69] Section 183(1)(a) of the Family Law Act provides that a protection order "need not be made in conjunction with any proceeding or claim for relief under this Act". Assuming without deciding that this would permit a British Columbia court to grant a protection order in a case in which it otherwise does not have jurisdiction (a question not argued before me), I would for the reasons set out above not continue the protection order in any event. The parties are presently thousands of kilometres apart, and either party will presumably have

the opportunity should it deem it appropriate to seek a protection order or an order in respect of conduct from the Ontario court.

## Conclusion

[70] I find that the child F.S. is a habitual resident of Ontario.

[71] I conclude that the British Columbia courts do not have jurisdiction over parenting issues in this action and that those issues are properly resolved in Ontario.

[72] I would set aside the order granted by Master Muir on August 24, 2021.

[73] I also dismiss A.K.S.'s application.

[SUBMISSIONS RE COSTS]

[74] THE COURT: I do not think there is a sufficient basis to depart from the ordinary rule here. I think the result should probably have been reasonably apparent, and that it would have been appropriate to take steps to avoid the costs of this application. Costs to the applicant. If clarity is needed, I would consider it to be a matter of ordinary difficulty.

"Veenstra J."

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Prepared on 26 October 2026 · Esheria