
CANADA / JUDGMENT

Aslanimehr v. Hashemi

2019 BCSC 804

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 804 Aslanimehr v. Hashemi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Aslanimehr v. Hashemi,

2019 BCSC 804

Date: 20190522

Docket: E190337

Registry: Vancouver

Between:

Parham Aslanimehr

Claimant

And

Elma Hashemi

Respondent

Before: The Honourable Justice Branch

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.

April 1 and 2, 2019

Place and Date of Judgment:

Vancouver, B.C.

May 22, 2019

Table of Contents

I. INTRODUCTION. 3

II. THE APPLICATIONS. 4

III. BACKGROUND. 4

A. Periods in B.C. and Ontario. 5

B. The Family's Financial Circumstances. 7

C. The Separation. 7

D. Procedural History of the Litigation. 9

IV. LEGAL FRAMEWORK. 10

A. Family Law Act 11

B. Parens Patriae Jurisdiction. 18

C. Forum Non Conveniens. 19

V. ANALYSIS. 20

A. Jurisdiction under the Family Law Act 20

B. Parens Patriae. 26

1. Ontario's Jurisdiction. 26

2. Iran's Jurisdiction. 28

3. Conclusion on Parens Patriae. 28

C. Forum Non Conveniens. 29

D. Interim Parenting Order 30

VI. DISPOSITION. 31

VII. COSTS. 31

I. INTRODUCTION

[1] This is an application to dismiss a family law claim on the basis that the British Columbia Supreme Court does not have jurisdiction over the child. The issue arises within a complicated factual web, set out in summary form below:

- a) The father and mother are born in Iran;
- b) The father grows up in B.C.;
- c) The father goes back to Iran to marry the mother, where they remain for two years;
- d) In an effort to secure Canadian citizenship for their child, the mother goes to her parents' home in Ontario for the birth, and lives there for four months;
- e) The family then visits B.C. for one month;
- f) The family returns to Iran for eight months;
- g) The family comes to B.C. for a three month holiday, planning to stay with the father's mother, and with return airline tickets to Iran already in hand;
- h) The father and mother separate while on holiday;
- i) The parties do not return to Iran;
- j) The mother takes the child to her parents' home in Ontario; and
- k) The father stays with his mother in B.C.

[2] Does the B.C. Supreme Court have jurisdiction to determine the parenting issues for this child?

[3] For the reasons expressed below, I conclude that the B.C. Supreme Court does not have jurisdiction. However, to guard against any risk that the child might fall through a jurisdictional gap, I stay the proceeding rather than dismissing it outright.

II. THE APPLICATIONS

[4] The claimant father asks the Court to find that the child is habitually resident in B.C. He seeks an order that the child be returned to B.C. and a declaration that the respondent is in breach of s. 66 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] for failing to provide 60 days' notice of her intention to relocate the child. He also applies for an order that neither party remove the child from B.C. without the written consent of the other party or an order of the court. He seeks interim joint guardianship of the child and equal parenting time. Finally, the claimant seeks compensatory parenting time and an order that the respondent be fined for

wrongfully denying parenting time.

- [5] The respondent mother seeks to strike or stay the claim on jurisdictional grounds. She has filed her own family law proceeding in Ontario, and argues that the parenting issues are best addressed within that proceeding.

III. BACKGROUND

- [6] Before reviewing the background, it is important to note that on a jurisdiction application, "it is not the goal of the court to make findings of fact on disputed evidence nor is it proper to decide the merits of the case or do an assessment of the evidence, except as necessary to determine the issues of territorial jurisdiction and forum non conveniens ...": *Fastlicht v. Carmichael*, 2018 BCSC 37 at para. 69.
- [7] The claimant moved to Canada from Iran in 1996 and holds both Canadian and Iranian citizenship. He attended high school and university in Vancouver. The claimant owns property in B.C., but the respondent deposed that he has not lived in it since January 2015 and that it has since been continually rented to a third party.
- [8] The respondent is an Iranian citizen. She lived in Iran through to her marriage to the claimant.
- [9] The parties were married on January 2, 2015 in Tehran. They lived together in Tehran in a jointly owned apartment thereafter, save for certain periods in Canada discussed below.

A. Periods in B.C. and Ontario

- [10] From approximately June to July 2016, the claimant visited his mother's home in Vancouver. He applied for Canadian residency for the respondent during this trip. He then returned to Tehran.
- [11] The parties came to Vancouver again from May 27, 2017 to June 23, 2017. This trip served as the respondent's required landing in Canada for immigration purposes. She obtained permanent residency in Canada at that time. The immigration documents state B.C. as the respondent's "province of destination" and Vancouver as the respondent's "city of destination". The parties also opened a joint bank account in B.C. in 2017.
- [12] On June 23, 2017, the respondent went to Toronto. She was three months pregnant at the time. Her parents, sister, and other extended family members live in Toronto. The respondent obtained a Toronto cell phone number and opened Toronto-based bank accounts during this trip. On August 27, 2017, the respondent returned to Tehran and continued to live with the claimant in their apartment.
- [13] On October 13, 2017, the respondent travelled to Toronto to ensure that the parties' child would be born in Canada. The parties wanted the child to be born in Canada to ensure he was eligible for Canadian citizenship. The respondent stayed in Toronto with her parents thereafter, up until April 29, 2018. The claimant joined the respondent in Toronto on

December 20, 2017. Their child was born on January 4, 2018. On February 10, 2018, the claimant returned to Tehran. The respondent opened a joint bank account in Ontario in her name and in the child's name. The child has a physician in Toronto and an Ontario health insurance card. The respondent also has an Ontario health insurance card.

- [14] The claimant travelled from Tehran to Vancouver on April 19, 2018. On April 29, 2018, the respondent and the child flew from Toronto to Vancouver to meet him. They stayed with the claimant's mother. It appears that in or around this time, applications were made in the respondent's name for B.C.'s early childhood and low income climate action tax benefits. The respondent had previously received tax benefits in Toronto. The application documents assert a change in residence from Ontario to B.C. as of April or May 2018. It is not clear who completed these documents. The respondent did provide a power of attorney to the claimant's mother on May 14, 2018 that allowed the claimant's mother to prepare and file documents on the respondent's behalf. The respondent said that she signed this power of attorney at the claimant's behest. The B.C. address on the tax documents is the claimant's mother's address. The respondent says she never saw these documents before they were filed, and never personally received the funds resulting from these applications.
- [15] The respondent did obtain a B.C. learner's driver's license, which she signed on May 9, 2018. However, she says she has never driven a car in B.C. The claimant also has a B.C. driver's license with his mother's address.
- [16] There is evidence that a bank account was opened in B.C. for the child.
- [17] Notwithstanding this paperwork filed in B.C., the family returned to Tehran on May 21, 2018. The parties and the child continued to live together in their apartment in Tehran until December 21, 2018. The record includes photos of this apartment, which make it clear that it was being used as a family home. It had an elaborate nursery. The evidence suggests that the parties lived a comfortable lifestyle together in Iran.

B. The Family's Financial Circumstances

- [18] The claimant worked for a bank in Canada before the parties were married, but the record suggests that he resigned from this position in 2011. The claimant then accepted a position with his father's company, Iran Medical Equipment Manufacturing Co. There is evidence suggesting that the claimant purchased their apartment in Tehran for nearly \$2 million. There is disputed evidence about whether the respondent ever worked for pay in Iran as an artist. The weight of the evidence is that she was primarily responsible for the child's day to day needs, particularly given that the claimant was working.
- [19] Most notably, I see little evidence that either the claimant or the respondent worked in B.C. after their marriage, or that they made efforts to secure work in B.C. before their separation.

- [20] The evidence suggests that the claimant has access to significant financial resources, either through his own work or through his family. It appears that the respondent's family is also quite well off. However, the balance of the evidence suggests that the claimant has greater access to resources than the respondent given his longer full time work history, and his family's ownership of an operating company.

C. The Separation

- [21] As noted, on December 22, 2018, the parties travelled to Vancouver. The purpose of the trip was to visit the claimant's mother, celebrate the Iranian New Year with family and friends on March 21, 2019, and attend the claimant's sister's wedding also scheduled for March 2019. Their personal possessions largely remained in Tehran, including jewellery, paintings, bank accounts, and a BMW 5 automobile. The parties had return tickets to Iran scheduled for April 30, 2019.
- [22] They stayed with the claimant's mother in her townhouse. The parties and the child shared a single bedroom.
- [23] The parties' relationship collapsed early in the New Year. On January 8, 2019, the respondent's parents flew from Toronto to Vancouver. There was a meeting between the families to try and resolve the difficulties, but it was unsuccessful. Both parties question each other's motives and good faith through this reconciliation effort, but I find it unnecessary to resolve this dispute in order to determine the jurisdictional question.
- [24] After January 8, the respondent moved with the child to the hotel where her parents were staying in Vancouver. The respondent advised the claimant of their location later that same day. Arrangements were made for the child to spend time on January 9 with the claimant.
- [25] On or about January 11, the claimant filed an application for non-removal from B.C. in North Vancouver Provincial Court. However, on his way to serve the respondent, he changed his mind and withdrew the application. He retained counsel in B.C. who delivered a letter to the respondent demanding that the child not be removed from B.C. The respondent did not respond to this, but did retain her own counsel in both B.C. and in Ontario.
- [26] From January 12 to 20, the child went from one party to the other on a daily basis. There was no written agreement governing these exchanges. Arrangements were largely made directly between the parties through text messaging. The respondent claims that she insisted that the child be returned to her in the evenings, but that the claimant simply refused to do so. The text messages during this period were quite civil. The respondent says this is because she did not want to worsen the situation, and not because she was content with the arrangements.
- [27] On January 21, 2019, the claimant advised the respondent that the claimant was sick and that the child should stay with her until he felt better.

- [28] The respondent says that during this period, she was still hopeful that the parties could settle matters. However, when it became clear that this was impossible, she made arrangements to return to Toronto. She says she was unable to remain in Vancouver as she had no family or friends here, and did not have anywhere to stay for the long term. She was also under some financial pressure, as the claimant had yet to provide any financial support.
- [29] The respondent says that prior to leaving Vancouver, she consulted with four family law lawyers in B.C. She says that as a result of the legal advice received, she believed that B.C. did not have jurisdiction over her child. Thus, she understood that B.C. law did not prevent her from removing the child without notice to the claimant.
- [30] On or about January 23, 2019, the respondent and the child flew to Toronto with her parents without notice to the claimant. The respondent and child began living with the respondent's parents in Toronto. The claimant sent a series of text messages to the respondent on January 23, with no response. The respondent says this is because she was travelling most of the day.
- [31] The respondent did respond to the claimant the following day. She advised the claimant to contact his lawyer, as her own lawyer had been in contact. The respondent's lawyer had sent a letter to the claimant's lawyer setting out the respondent's position that the removal provisions of the FLA did not apply because the parties never resided in B.C. The letter also offered to arrange parenting time for the claimant, and advised that the respondent was in the process of commencing legal proceedings in Toronto.

D. Procedural History of the Litigation

- [32] On January 28, 2019, the respondent commenced a proceeding in the Superior Court of Justice of Ontario (the "Ontario Action"), seeking, inter alia, the following:
- a) a divorce;
 - b) custody;
 - c) child support; and
 - d) spousal support
- [33] On the same day, the respondent's lawyer wrote the claimant's lawyer and enclosed:
- a) The Notice of the Ontario Action;
 - b) Information on the claimant's responsibility to attend a Mandatory Information Program session on March 6, 2019; and
 - c) Notice of a Toronto Case Conference scheduled for March 25, 2019.
- [34] On February 8, 2019, the claimant commenced the present proceeding in B.C. The respondent filed a Jurisdictional Response on February 12, 2019, and the application disputing jurisdiction on February 25, 2019.

- [35] On March 1, 2019, Justice Grauer granted an adjournment of the claimant's application on certain terms, including that the claimant have parenting time with the child in Toronto to be arranged between counsel. The parties were not able to arrive at any agreement. On March 14, 2019, Justice Murray granted the claimant parenting time with the child for the purposes of attending his sister's wedding in Vancouver, an extension of the time for the respondent to provide affidavit material, and an order that the respondent not proceed with the Ontario Action pending the hearing of the applications before me.
- [36] At the close of the hearing, the parties agreed to an interim without prejudice parenting time order pending release of this decision. This order essentially provides for a monthly rotation between Toronto and Vancouver, starting with the child being with the respondent in Toronto.

IV. LEGAL FRAMEWORK

- [37] There are two possible sources for this Court's jurisdiction over the parenting arrangements: the FLA or the court's *parens patriae* jurisdiction.

A. Family Law Act

- [38] The B.C. proceeding is intended to be restricted to parenting and guardianship issues. The FLA contains provisions governing territorial jurisdiction in these matters, and hence the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 [CJPTA] does not apply: CJPTA, s. 12; *S.R.L. v. K.J.T.*, 2014 BCSC 597 at para. 22.

- [39] The key provisions of the FLA are ss. 72-74 and 77:

Division 7 -- Extraprovincial Matters Respecting Parenting Arrangements

Definitions and interpretation

72 (1) In this Division:

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

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

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.

Wrongful removal of child

77 (1) This section applies if a court

- (a) may not make an order or declines to make an order under section 74 [determining whether to act under this Part], or
 - (b) is satisfied that a child has been wrongfully removed to, or is being wrongfully retained in, British Columbia.
- (2) In the circumstances set out in subsection (1), a court may do one or more of the following:
- (a) make any interim order that the court is satisfied is in the best interests of the child;
 - (b) stay an application to the court for an order, subject to
 - (i) the condition that a party to the application promptly start a similar proceeding before an extraprovincial tribunal, or
 - (ii) any other conditions the court considers appropriate;
 - (c) order a party to return the child to a place the court considers appropriate and, in the discretion of the court, order a party to pay all or part of the expenses reasonably and necessarily incurred for travel and other expenses of the child and of any parties to or witnesses in the proceeding.

[40] The claimant submits that the B.C. Supreme Court has jurisdiction under s. 74(2)(a) of the FLA. He accepts that s. 74(2)(b) does not apply as the child was physically present in Ontario when his application was brought. Nor does he argue that s. 74(2)(c) applies, as he does not allege that the child will suffer serious harm if the child remains in Ontario.

[41] Under s. 74(2)(a), jurisdiction turns on whether the child was habitually resident in B.C. at the time of the application.

- [42] The FLA contains its own definition of "habitually resident" in s. 72(2), set out above. The court may have regard to common law principles when determining a child's "habitual residence", but the statutory definition "takes priority": *C.L.Z. v. C.G.Z.*, 2018 BCSC 2172 at para. 38.
- [43] Under s. 72(2)(a), habitual residence turns on where the child most recently resided with his parents. "Resided" is not defined in the FLA.
- [44] I agree with Justice Fenlon (as she then was) that "residence" in s. 72(2) means "something more than the place the parties last spent time together": *S.R.L.* at para. 39.
- [45] In the recent case of *Kong v. Song*, 2018 BCSC 1691, *aff'd* 2019 BCCA 84, Justice Mayer adopted the following expression of the test for residence:
- [15] As set out by Justice Boyd in *White-Fourgere v. Holman*, 2006 BCSC 1606 at para. 25:
- [25]... the determination of one's habitual residence is a question of fact to be decided by reference to all the circumstances of the case. A habitual residence is established by residing in a place for an appreciable period of time, with a "settled intention". A child's "habitual residence" will be tied to the habitual residence of his or her custodian.
- [46] The concept of "settled intention" largely derives from case law decided under the Hague Convention. At least until the decision in *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, Hague Convention cases often relied heavily on the question of "settled intention". The parties agree that the Hague Convention does not apply in this case because Iran is not a signatory, and the Hague Convention does not apply to jurisdictional disputes between Canadian provinces. Since the Hague Convention does not apply, the claimant suggests that the question of "settled intention" should not be a factor in the FLA analysis. I disagree.
- [47] In *Kong*, which also did not involve the Hague Convention, the chambers judge clearly considered the issue of "settled intention" in determining residence under the FLA, and this approach was not criticized on appeal: see *Kong* (BCCA) at paras. 62 and 70-77. I find that the issue of "settled intention" is relevant for determining the child's habitual residence under the FLA.
- [48] In *Kong*, the Court of Appeal stated as follows:
- [75] However, the Hague Convention is not engaged in these proceedings. In contrast, the FLA provides a statutory definition for "habitually resident" that appears to codify the jurisprudence on this issue that existed at the time the Act was enacted. That included the parental intention approach to determining the habitual residence of a child who is alleged to have been wrongfully removed or retained by a parent.

[Emphasis added.]

[49] In *Fasiang v. Fasiangova*, 2008 BCSC 1339, Justice Martinson provided a comprehensive review of the concepts of "settled intention" and "appreciable period of time", which review was adopted in *Kong* (BCSC) at para. 20:

Settled Intention

- [60] A settled intention or purpose requires that "the purpose of living where one does [have] 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: *R v. Barnet London Borough Council* (1982), [1983] 2 A.C. 309 at 344 (H.L.), cited in *Chan* at para. 33.
- [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": *Cheshire and North's Private International Law*, 13th ed. (London: Butterworths, 1999) at 166-167, cited in *Chan* at para. 34.
- [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.": *Korutowska-Wooff v. Wooff* (2004), 242 D.L.R. (4th) 385 (B.C.C.A.) at para. 8, 188 O.A.C. 376.
- [63] Madam Justice Stromberg-Stein (as she then was) listed the following factors that may be considered in determining settled intention at para. 36 in *Petnehazi v. Kresz*, [1999] B.C.J. No. 1238 (C.A.) (QL), which 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: *deHaan v. Gracia* (2004), 351 A.R. 354 at para. 32, 2004 ABQB 74.
- [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: Hon. James D. Garbolino, *International Child Abduction: Guide to Handling Hague Convention Cases in U.S. Courts* (Auburn, Cal.: Garbolino, 1997) at § 4.5, cited in *Prioa v. Prioa* (2003), 340 A.R. 363 at para. 21, 2003 ABQB 576.

- [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: *Proia* at para. 19.
- [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: *Mozes v. Mozes* (1999), 239 F.3d. 1067 (U.S. C.A. 9th Cir.), cited in *Prioia* at para. 25.
- [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: *Mozes* cited in *Prioia* at para. 25.

Appreciable Period of Time

- [69] Whether residence has been for an appreciable period of time is a question of fact: *Nessa v. Chief Adjudication Officer*, [1999] 1 W.L.R. 1937 at 1942 (H.L.).
- [70] An appreciable period of time is not a fixed period: *Nessa* at 1943.
- [71] An appreciable period of time could be as short as one day: *Garbolino* at para. 4.6, cited in *deHaan* at para. 42.
- [72] Nine months has been held to be easily long enough: *Chan* at para. 44. One month has also been held to be long enough: *In re F. (A Minor) (Child Abduction)*, [1992] 1 FLR 548 at 555 (U.K. C.A. (Civ. Div.)). The Ontario Superior Court of Justice found that a mother acquired habitual residence in her new location upon arrival, and the children since they acquired their mother's habitual residence also acquired a new habitual residence upon arrival: *Braatelian v. Horning*, [2001] O.J. No. 3799 at para. 4 (Sup. Ct.).
- [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: *Nessa* at 1942.
- [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: *Nessa* at 1943.
- [50] In *S.R.L.*, Justice Fenlon expressed the applicable principles as follows:

- [30] I now turn to the principles governing the determination of ordinary residence.
- a) Preponderance of time spent at a residence is not determinative: *Thomson v. Minister of National Revenue*, [1946] S.C.R. 209 at 224;
 - b) A person may be ordinarily resident without being actually resident: *Hardy v. Hardy*, [1969] 2 O.R. 875 (H.C.J.) at 876;
 - c) It is where a person regularly, normally or customarily lives his or her customary mode of life as opposed to a special, occasional, or casual residence: *Thomson* at 224, 231, *Hardy* at 876-877;
 - d) It is where a person intends to make a home for an indefinite period; an intention to reside there permanently is not required: *MacPherson v. MacPherson* (1976), 70 D.L.R. (3d) 564 (Ont. C.A.) at 570; *Mahar v. Mahar* (1987), 10 R.F.L. (3d) 276, [1987] B.C.J. No. 925 (N.B.Q.B.).
- [51] In general, a trip or vacation will not change a child's residence: *Kozey v. Kozey*, 2015 SKQB 133 at para 22; *A.G.M. v. R.S.M.*, 2018 BCSC 1670 at paras. 20-24, 68-69; *Schubert v. Johnson*, 2017 BCSC 1664 at paras. 5, 41-44; *C.L.Z.* at para 46; *Jiang v. Shi*, 2016 BCSC 2272 at para. 24, *aff'd* 2017 BCCA 276.
- [52] In *Kozey*, the parties were resident in Saskatchewan but separated while vacationing in Russia. The mother stayed with the child in Russia. The court found that Saskatchewan remained the child's habitual residence, stating:
- [21] The child was then removed from Saskatchewan by mutual agreement to allow for the trip to Russia. As indicated, there is no indication on the material before me this specific trip to Russia was for any purpose other than vacation. The respondent indicates in her affidavit there was a long range plan of the family moving to Russia. While that may be, the fact of the matter is that at the time the trip was initiated, there was no plan that it be for the purpose of relocating to Russia.
- [22] In my view, it appears clear from the evidence before me this child was habitually resident in Saskatchewan at the time the parties took the trip to Russia and the fact of the trip did not change that habitual residence. Neither do the events of that trip alter the finding of habitual residence. Accordingly, subject to an analysis of s. 15(4), this Court has jurisdiction with respect to this child and the issues surrounding these proceedings.
- [53] One parent's unilateral decision to relocate or remove a child without the other parent's knowledge or consent does not alter the child's habitual residence: s. 72(3) of the FLA; *S.C. v. H.S.*, 2017 BCSC 277 at para. 23; *C.L.Z.* at para. 48. I pause to note that the respondent does not argue that her move to Toronto caused the child to become habitually resident there. Rather, she argues that Ontario may exercise jurisdiction through a different statutory avenue, as discussed further below.

B. Parens Patriae Jurisdiction

- [54] If jurisdiction is not established under the FLA, the court may still have jurisdiction on matters respecting a child pursuant to its inherent parens patriae jurisdiction: FLA, s. 192(3); *Yassin v. Loubani*, 2006 BCCA 509, leave to appeal ref'd [2007] S.C.C.A. No. 19. The exercise of such jurisdiction is reserved for exceptional circumstances. The Supreme Court of Canada considered the limits of the court's parens patriae jurisdiction in *E. (Mrs.) v. Eve*, [1986] 2 S.C.R. 388 at para. 77:
- [77] Though the scope or sphere of operation of the parens patriae jurisdiction may be unlimited, it by no means follows that the discretion to exercise it is unlimited. It must be exercised in accordance with its underlying principle. Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised; see the passages from the reasons of Sir John Pennycuik in *Re X*, at pp. 706-07, and Heilbron J. in *Re D*, at p. 332, cited earlier. The discretion is to be exercised for the benefit of that person, not for that of others. It is a discretion, too, that must at all times be exercised with great caution, a caution that must be redoubled as the seriousness of the matter increases. This is particularly so in cases where a court might be tempted to act because failure to do so would risk imposing an obviously heavy burden on some other individual.
- [55] In *J.E.S.D. v. Y.E.P.*, 2018 BCCA 286, the Court of Appeal quoted the above statement and went on to state at para. 65 that "[g]reat caution should be exercised in interpreting the parens patriae jurisdiction in a manner that would, effectively, amend the statute". Where legislation exists, the parens patriae power should only be exercised to fill in a gap in the statutory scheme: *M. (L.) v. British Columbia (Director of Child, Family and Community Services)*, 2016 BCCA 367 at para. 33; *J.E.S.D.* at para. 58.
- [56] In *T.T.T.M. v. E.E.Q.*, 2008 YKSC 37, the court stated at para. 31, "it appears to me that invoking the parens patriae jurisdiction should be reserved for unusual cases where the strict statutory requirements would result in an injustice."
- [57] The court has invoked parens patriae jurisdiction over Canadian children residing in Saudi Arabia due to aspects of family law in Saudi Arabia that did not recognize gender equality: *Yassin*. By way of contrast, in *Foulds v. Kelly*, 2011 BCSC 1298, the court found it did not have jurisdiction over a child whom the father argued was wrongfully removed from B.C. to Ontario by his mother. In considering whether the court should take jurisdiction under its parens patriae power, the court stated as follows:
- [54] In the present case, the child is outside of British Columbia, yet within Canada, and the custodial parent has not attorned to the jurisdiction of this Court. I am satisfied that, unlike *Yassin*, this is not the type of circumstance that forms a "rare instance" where the court should exercise its inherent jurisdiction to make an order with respect to a child outside of the jurisdiction of the court. The court with jurisdiction here, Ontario, determines child custody issues on the same principles as this jurisdiction.

C. Forum Non Conveniens

[58] The respondent says that even if the court finds that it has jurisdiction, the court should stay these proceedings pending a determination in the Ontario court as to whether it will exercise its jurisdiction pursuant to s. 22 of the Children Law Reform Act, R.S.O. 1990, c. 12. Alternatively, it should decline to exercise its jurisdiction pursuant to s. 74(3) of the FLA. As set out above, s. 74(3) provides that:

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.

[59] The court set out the approach under s. 74(3) in C.L.Z. 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.

V. ANALYSIS

A. Jurisdiction under the Family Law Act

[60] The core question is whether B.C. was the "habitual residence" of the child as of February 8, 2019. This question is fact-specific. While other cases provide principles, they are not determinative: S.R.L. at para. 37.

[61] I find that B.C. was not the child's habitual residence. The respondent argues that the child's habitual residence was Iran. I agree. As of February 8, 2019:

- a) The parents had travelled from Iran to Ontario so that the child could be born in Ontario for citizenship purposes. The child then lived there for three months with his maternal grandparents;
- b) The child then travelled to B.C. for less than a month in April and May 2018, during which the family stayed with the paternal grandmother;
- c) The child then lived with his parents in Iran in their family home for seven months;
- d) The child travelled to B.C. from Iran for limited purposes, and with a return ticket scheduled for four months later.

- e) The parties' family life was in Tehran. The trips to B.C. and Ontario were of limited duration and for specific purposes.

[62] In fact, the claimant himself deposed that the parties ordinarily resided in Iran:

- a) In his February 7, 2019 affidavit, the claimant deposed as follows:
 - 6. Since the date of marriage we have ordinarily resided in Iran, but made several trips to Canada in 2017 and 2018.
 - 7. In 2017 we were in Canada for 1 month and in 2018 were in Canada for 3 months. We remained in Iran from May until December 21, 2018 at our usual address in Iran, [address redacted], Tehran, Iran.
- 24. We have no connection to Ontario, which is where the Respondent's parents live. Our ordinary residence is in Iran, however, since December 22, 2018 we have resided in Vancouver with the intention to remain in Vancouver until April 30, 2019 .

[Emphasis added.]

- b) The claimant deposed further in his February 27, 2019 affidavit:
 - 22. In reply to paragraph 9 of the Respondent's Affidavit 1, I agree that the respondent led me to believe that it was our mutual intention to return to our home in Tehran at the end of April 2019. It was certainly my intention. I also agree that our ordinary residence or habitual residence, is in Tehran, Iran.
 - 23. In reply to paragraphs 111 and 112 of the respondent's affidavit 1, regarding our residence in Iran, I confirm that our ordinary and habitual resident is in Iran and believe that Iran is the appropriate jurisdiction, or alternatively, the proper jurisdiction is British Columbia.
 - 26. In reply to paragraph 115 of the Respondent's Affidavit 1, I repeat my assertion in paragraph 39 above that the proper place to determine our family law issues is Iran.
 - 80. I had intended to return to Tehran, Iran as a family of 3 with the Respondent and [the child]. However, since the circumstances has [sic] changed and [the child] takes priority, my future plans revolve around [the child] and I want to make sure that I can spend the maximum amount of parenting time with him.
 - 116. In reply to paragraphs 111 and 112 of the Respondent's Affidavit 1, I confirm that our ordinary and habitual residence is in Iran and believe that Iran is the appropriate jurisdiction, or alternatively, the proper jurisdiction is in British Columbia because that is where we both resided and intended to reside for over 4 months and thereafter whenever in Canada. Vancouver was the last place we resided after our separation with [the child], before the respondent took our son away from me.
- c) In his written argument, the claimant stated that:

56. Since the parties' marriage they have resided primarily in Iran at their [Tehran] residence [address redacted].

[Emphasis added.]

- [63] I accept that it is possible for a person to have two residences: *Broad v. Pavlis*, 2015 BCCA 20 at paras. 35-39; *English v. McCurdy*, 2019 BCSC 96 at para. 85. However, the evidence does not provide a principled basis to conclude the child's limited time in Vancouver caused the child to become habitually resident in B.C.
- [64] The circumstances of the trip do not disclose a settled intention to live in Vancouver. The parties agree that the intended four-month trip to B.C. was for the limited purpose of visiting family, celebrating the Iranian New Year, and attending a wedding. The parties did not make their own living arrangements, but rather stayed with the claimant's mother. They did not bring their personal effects beyond those required for a long-term vacation; most of their possessions remained in Tehran. The parties' stay in Vancouver was clearly intended to be temporary given that they had purchased return plane tickets.
- [65] I find that the parties' purpose for being in Vancouver lacked a sufficient "degree of continuity to be properly described as settled": *Rey v. Getta*, 2013 BCCA 369 at para. 32. While the parties certainly took steps to obtain Canadian immigration and tax benefits, I do not see evidence of material, practical steps towards actual residence in B.C. prior to February 8, 2019. In particular:
- a) The parties made no effort to sell their home or other assets in Iran: *C.L.Z.* at para. 41;
 - b) There was no effort to purchase a new family home in B.C.;
 - c) There is no evidence of the parties seeking to find work in B.C.: *C.L.Z.* at paras. 41, 64;
 - d) The child had not visited a physician in B.C.: *Rey* at para. 23;
 - e) There was no effort to register the child in programs in B.C.;
 - f) There was no effort to obtain a B.C. health card for the child until after these legal proceedings commenced.

See *Kong* (BCSC) at paras. 21-55.

- [66] The best that can be said is that there may have been a long term plan to move to Vancouver "eventually". In his second affidavit, the claimant states:
29. Prior to living together in Vancouver, we resided as a family in Tehran with the intention of remaining in Iran until a final plan would be put in place to eventually move to and reside in Vancouver.
- [67] This is an insufficient basis upon which to create residence: *Kozey* at para. 21. In any event, the respondent denies that this was the plan.

- [68] The respondent's conduct in obtaining a B.C. learner's driver's licence is consistent with an effort to buttress an immigration claim. I find it does not indicate a genuine intention to settle in B.C. I draw a similar conclusion in relation to the declarations of intention to reside in B.C. made by the respondent in her immigration documentation. I place little weight on other government filings made in the respondent's name, given the respondent's evidence that these were managed by the claimant's mother under a power of attorney. Declarations regarding a person's address in government documents can be evidence of a person's residence: English at paras. 83-84. However, in the circumstances of this case, I do not find that these formal declarations are reliable evidence of the parties' actual intent.
- [69] At points in oral argument, counsel for the claimant appeared ready to accept that Iran would normally be treated as the habitual residence, but argued that such a finding should nevertheless not be made due to:
- a) policy concerns regarding the legal regime in Iran, or
 - b) the importance of discouraging parents from undermining guardianship rights by removing children without the consent of the other parent.
- [70] I find that neither factor undercuts the proper legal interpretation of s. 72.
- [71] As to the concerns about the legal regime in Iran:
- a) The claimant failed to provide expert evidence about the family law regime in Iran. Thus, the court is unable to properly assess whether the specific parenting issues proposed to be considered by this Court would be treated in a manner contrary to Canadian public policy in Iran: Jiang (BCCA) at paras. 40 and 96; Shortridge-Tsuchiya, 2010 BCCA 61 at paras. 79 and 104, leave to appeal ref'd [2016] S.C.C.A. No. 106. Both parties, neither of whom are lawyers, gave diametrically opposed opinions about the likely approach under Iranian family law. Their testimony is insufficient for the court to make findings about Iranian law: Shortridge-Tsuchiya at para. 79. By way of contrast, in Zargarian-Tala v. Bayat-Mokhtari, 2019 BCSC 448, the court had the benefit of expert evidence on the relevant Iranian law.
 - b) In any event, I find that public policy concerns about the Iranian legal regime are more properly considered under the analysis of the court's *parens patriae* jurisdiction, discussed below.
- [72] I do accept that the provisions in Division 7 under Part 4 of the FLA should be interpreted in light of the purposes set out in s. 73, including the objective of discouraging removal of children without the consent of other guardians. However, the purposes in s. 73 do not require or allow the court to side-step the explicit requirement that the child be "habitually resident" in B.C. in order to establish jurisdiction under s. 74(2)(a).
- [73] The claimant also suggests that the Court should have regard to s. 48 of the FLA in considering the claimant's conduct and the question of jurisdiction. I find that s. 48 is only engaged once the court determines that it has jurisdiction.

- [74] Finally, the claimant suggests that unless this Court concludes that Ontario will in fact take jurisdiction, this Court must take jurisdiction. The FLA does not require this.
- [75] I note that under s. 6 of the CJPTA, there is a residual discretion to take jurisdiction in a case where territorial competence is lacking if (1) there is no court outside B.C. in which the plaintiff can commence the proceeding, or (2) the plaintiff cannot be reasonably required to commence the proceeding in a court outside B.C. As explained in *Aleong v. Aleong*, 2013 BCSC 1428 at para. 82, this residual discretion allows the court to act as a "forum of necessity" or "forum of last resort" under the CJPTA. However, there is no such residual discretion under the FLA. As noted, the FLA governs this application, not the CJPTA.
- [76] By way of contrast, it is s. 74(2)(c) of the FLA that provides "jurisdictional criterion of last resort, one that permits the exercise of jurisdiction based on the combined factors of the child's presence and the risk of serious harm to the child": Vaughan Black, "Choice of Law and Territorial Jurisdiction of Courts in Family Matters", (2013) 32 C.F.L.Q. 53 at 9. In my view, s. 74(2) of the FLA avoids the need for the court to read in an additional residual discretion of the sort found in s. 6 of the CJPTA.
- [77] That said, the presence or absence of other appropriate jurisdictions is relevant to the *parens patriae* and *forum non conveniens* analyses, and hence I have addressed this argument further below.
- [78] In conclusion on the application of the FLA, I find that the child most recently resided with his parents in Iran within the meaning of s. 72(2)(a). Hence, this court does not have jurisdiction under the FLA.

B. *Parens Patriae*

- [79] I do not find that this case amounts to a "rare instance" where the court should exercise its *parens patriae* jurisdiction to protect the best interests of a child otherwise outside its jurisdiction.
- [80] As in *Kong*, I find that the child has two capable guardians to parent him. Further, the FLA provides adequate provision for determining whether the court should take jurisdiction: *Kong* (BCCA) at para. 57.
- [81] I have considered whether the respondent's removal of the child without notice or consent justifies the exercise of the court's *parens patriae* jurisdiction. I agree that, whatever the applicable statutory regime, parents should generally keep each other informed of intended decisions regarding their child, particularly as it relates to removal of a child from a jurisdiction: S.C. at paras 16-17. However, the concerns raised by the respondent's conduct in removing the child from B.C. without the claimant's consent are lessened somewhat by the following:

1. The move was within Canada, and to a reciprocating jurisdiction with a similar family law regime;
2. There was only a travel day's delay before the respondent was advised of the move;
3. The move was to the child's grandparents' home, where the child was born and had already lived for several months, and;
4. The parties were able to agree to an interim monthly parenting time rotation at the hearing of this motion, only two months after removal.

1. Ontario's Jurisdiction

[82] In deciding whether to exercise the court's *parens patriae* jurisdiction, I have considered the claimant's submission that there is a risk that no other court will take jurisdiction.

[83] As noted above, the respondent does not argue that the child's habitual residence is in Ontario. Rather, she advances another avenue for jurisdiction.

[84] Section 22(1)(b) of the Children's Law Reform Act, R.S.O. 1990, c.12, states as follows:

Jurisdiction

22 (1) A court shall only exercise its jurisdiction to make an order for custody of or access to a child where,

- (b) although the child is not habitually resident in Ontario, the court is satisfied,
 - (i) that the child is physically present in Ontario at the commencement of the application for the order,
 - (ii) that substantial evidence concerning the best interests of the child is available in Ontario,
 - (iii) that no application for custody of or access to the child is pending before an extra-provincial tribunal in another place where the child is habitually resident,
 - (iv) that no extra-provincial order in respect of custody of or access to the child has been recognized by a court in Ontario,
 - (v) that the child has a real and substantial connection with Ontario, and
 - (vi) that, on the balance of convenience, it is appropriate for jurisdiction to be exercised in Ontario.

[85] In this case, the child was physically present in Ontario when the respondent filed her proceeding. The fact that the child's mother, aunt, and maternal grandparents are present in Ontario may collectively provide a basis for the Ontario court to conclude that:

- a) "substantial evidence" exists in Ontario (s. 22(1)(b)(ii));
- b) a "real and substantial" connection exists with Ontario (s. 22(1)(b)(v)); and

c) the "balance of convenience" favours Ontario (s. 22(1)(b)(vi)).

[86] As this judgment will stay the only other proceeding, there will be no competing litigation impediments under s. 22(1)(b)(iii) or (iv). Further, s. 22(b)(iii) would not be engaged by the existence of this proceeding in any event as the child is not habitually resident in B.C.

[87] I note that the result in *H.E. v. M.M.*, 2015 ONCA 813, suggests that a finding that one parent took the child to Ontario without the other parent's consent will not necessarily prevent the Ontario court from taking jurisdiction under s. 22(1)(b): see paras. 18 and 90.

2. Iran's Jurisdiction

[88] The parties agree that the courts of Iran would likely have jurisdiction over parenting issues. However, they have both elected not to make use of this jurisdiction. As such, the issue is not that the parties lack an alternate jurisdiction, but rather that they simply do not wish to resolve their parenting issues in that jurisdiction. Put another way, both sides are arguably "forum shopping" by not pursuing their remedies in the jurisdiction of the child's habitual residence. I note that this may be influenced by good faith concerns about the nature of Iran's legal system. However, as noted above, both sides failed to provide expert evidence that would allow me to conclude that it would be contrary to Canadian public policy, or against the child's best interests, for the matters before me to be decided according to Iranian law.

3. Conclusion on *Parens Patriae*

[89] As noted above, the court should only invoke its *parens patriae* jurisdiction to do what is necessary to protect a child. I find that there is no basis to assume *parens patriae* jurisdiction at this time. That said, I accept that it is possible that an Ontario court may decline jurisdiction, order a return of the child to B.C., and/or that neither party will invoke Iran's jurisdiction. As such, the appropriate order is to stay the B.C. proceeding. The analysis of whether this Court should invoke its *parens patriae* jurisdiction could change if another court or courts decline to assume jurisdiction over the child, and/or if the evidentiary framework changes. I will remain seized of any application to lift this stay, unless otherwise ordered.

C. Forum Non Conveniens

[90] Even if I had concluded that B.C. had jurisdiction, I would decline to exercise it in this case on the basis that Ontario is a more appropriate forum under s. 74(3) of the FLA.

[91] The onus is on the party seeking to prove that a more appropriate forum exists and that the court should decline jurisdiction: English at para. 106. I find that the respondent has met this burden.

[92] In terms of the usual factors, the following are neutral:

- a) Given the interim agreement, the child is presently spending equal time in Ontario and B.C.;
- b) The two proceedings were commenced at or about the same time;
- c) There are important witnesses in both jurisdictions;
- d) The law respecting parenting is largely based on the same principles in both jurisdictions; and
- e) Any judgment would be respected in either jurisdiction.

[93] The fact that the respondent took the child from B.C. without the claimant's consent weighs in favour of B.C. as an appropriate jurisdiction: *Shortridge-Tsuchiya* at paras. 61, 65 and 73, although its weight is lessened by the factors discussed above.

[94] I find that the following factors favour Ontario as the preferable jurisdiction:

- a) The claimant agrees that the B.C. proceeding can be treated as addressing parenting issues only, and not property or support. Based on the pleadings as they stand, the Ontario Action will be proceeding in any event given that the B.C. proceeding does not address the issue of support (I accept that the respondent's request for a divorce does not weigh in favour of Ontario at this stage given that she has not resided there for one year: *C.L.Z.* at paras. 28-32). The existing Ontario proceeding can address all of the issues raised by both parties, including support, guardianship and parenting time, thereby minimizing the potential for a multiplicity of proceedings or inconsistent outcomes: *Fastlicht* at para. 118; *Hubrich v. Keil*, 2011 BCSC 1745 at para. 38; *Broad v. Pavlis*, 2015 BCCA 20 at para. 50; *Gordon Estate v. Venables*, 2008 BCSC 501 at para. 25. However, I do temper the weight of this factor somewhat given that Ontario has not yet formally taken jurisdiction: *Coulson Airplane Ltd. v. Pacific Helicopter Tours Inc.*, 2006 BCSC 961 at paras. 68-71; *Gordon Estate* at para. 28.
- b) The evidence suggests that the claimant has easier access to financial resources, making it less onerous for him to travel to Toronto than for the respondent to come to Vancouver: *Fastlicht* at para. 113;
- c) The child was born in Ontario;
- d) The child is under physician care in Ontario; and
- e) The child has spent a longer period of time in Ontario than in B.C.

[95] I find that these factors make Ontario the more appropriate forum.

D. Interim Parenting Order

[96] Despite my conclusion on jurisdiction, both parties agreed that pursuant to ss. 77(1)(a) and 77(2), the Court may make a "stop gap order" pending consideration of the parenting issues by another jurisdiction. I will exercise my discretion in this regard in order to maintain stability in the arrangements. Specifically, I find that the terms of the interim order agreed to by the parties at the conclusion of the hearing should remain in place until an order is made by another court properly exercising jurisdiction.

VI. DISPOSITION

[97] The claimant's motion is dismissed. The B.C. action is stayed. I will remain seized should either party seek to lift the stay. The interim order will continue in place.

VII. COSTS

[98] I find that both parties should bear their own costs given that:

- a) The issues were novel, in that the separation occurred on holiday, and neither party sought to resolve the parenting matters in the jurisdiction in which the child was in fact habitually resident; and
- b) While the respondent was generally successful on the merits, this is offset by the Court's countervailing concern that she removed the child from B.C. without at least notifying the claimant, even if she was not under a strict statutory obligation to do so. The respondent's conduct does not rise to the level of "reprehensible": *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 119 D.L.R. (4th) 740 (B.C.C.A.) at para. 17. However, I do find such conduct should be discouraged and therefore decline to award costs in her favour.

"Branch J."

The Honourable Mr. Justice Branch

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