
CANADA / JUDGMENT

D.L. v. M.Y.

2019 BCSC 881

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Supreme Court of British Columbia

DECIDED

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2019 BCSC 881 D.L. v. M.Y.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.L. v. M.Y. ,

2019 BCSC 881

Date: 20190604

Docket: E170144

Registry: Vancouver

Between:

D.L.

Claimant

And

M.Y.

Respondent

Before: The Honourable Madam Justice Sharma

(In Chambers)

Reasons for Judgment

Counsel for Claimant:

N. Davies

Counsel for Respondent:

E. Walker

Place and Date of Hearing:

Vancouver, B.C.

December 10, 2018

Place and Date of Judgment:

Vancouver, B.C.

June 4, 2019

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I. INTRODUCTION

- [1] The respondent in this family law dispute applies for a stay of proceedings on jurisdictional grounds. He argues that this Court should decline jurisdiction over the dispute in favour of China. In the alternative, he argues that this Court should sever the dispute and solely adjudicate the issues of child support and parenting while declining jurisdiction over the issues of property division and spousal support.
- [2] The claimant argues that the entire dispute should be adjudicated in British Columbia.
- [3] For the reasons that follow, the respondent's application is granted in part. The action is stayed with respect to spousal support and property division, but I conclude that this Court ought to exercise its jurisdiction over the parenting and child support issues.

II. BACKGROUND

- [4] The claimant was born in China and moved to Vancouver in 1999, when she was 11 years old. In January of 2013, when she was 25, she travelled to Beijing to visit family. She met the respondent during that visit. He was also 25, lived in China and, at the time, had no connection to British Columbia. They went on a date.
- [5] The claimant returned to Vancouver only a few days after that date, but stayed in touch with the respondent. In March 2013, she travelled back to China to visit her family and the respondent. She was still in China when, in August 2013, she discovered that she was pregnant. The parties decided to marry. Although there was a marriage ceremony in China on November 24, 2013, their marriage was not registered until January 13, 2014. On November 28, 2013, the parties executed a prenuptial agreement (the "Agreement").
- [6] On January 22, 2014, the claimant returned to Vancouver. The respondent remained in China. It appears that the parties disagreed over where they were to live. In February the respondent travelled to Vancouver. He remained in Vancouver for six months. Their son was born in April.
- [7] The claimant alleged that in July 2014 the parties were fighting and the respondent slapped and pushed her. The respondent agreed that the parties got into a "physical fight" that culminated in the neighbours calling the police, and that he spent the night in custody, though he was not charged.
- [8] At this point, it is clear that the parties were fighting frequently. A major source of friction between the parties was their disagreement about where they should raise their son: Canada or China. This disagreement would remain a major point of contention throughout their marriage.

- [9] In August 2014 the parties travelled back to China. In her affidavit, the claimant described several incidents of physical abuse which occurred over the next four months, including punching, slapping, and kicking. The respondent denies these accusations. By December of 2014, the claimant attested that she was ready to leave the respondent, but decided not to after learning that she was pregnant with a second child. Instead, she and the respondent stayed in China until March 2015, when they returned to Vancouver.
- [10] The respondent, however, only stayed in Vancouver for a month before travelling back to China. Over the course of the next year-and-a-half he would often visit his family in Vancouver, usually staying for several weeks at a time.
- [11] In September 2015, the parties' second child, a daughter, was born.
- [12] In early 2016, the respondent's parents purchased a house (the "Family Home") in Vancouver for the claimant and her children for \$4,150,000. Title to the Family Home is registered as 99% in the claimant's name, and 1% in the name of the respondent's father. Although their positions were not entirely clear from their pleadings, the parties appear to dispute the beneficial ownership of the property. Up until the purchase of the Family Home, the claimant and her children had lived in a condominium in New Westminster.
- [13] The claimant alleged that the respondent's violence towards her continued through the next year. The respondent largely denied these allegations, although he did agree that the parties often lost their tempers and had thrown objects at each other. A major source of tension was the respondent's view that the claimant and their children should live with him in China.
- [14] The claimant claimed that she became concerned about the effect the violence was having on the children and, on January 11, 2017, while the respondent was in Vancouver, the claimant told him she wanted to separate. The respondent returned to China a few days later, and the claimant filed a notice of family claim on January 18, 2017.
- [15] In June, 2017, the respondent again travelled from China to Vancouver. The claimant deposed that he never told her he was coming to visit and that she did not expect him, though the respondent denies this, stating that "[at] the time I considered that we were still a couple." The claimant claimed that he threw rocks at her window and demanded to be let inside, and so she called the police. The respondent says that he asked to be let inside, and, after the claimant refused, he called the police. In any event, the police were called. They let the respondent into the home, but said he should not sleep in the same room as the claimant. The respondent stayed for a few days, sleeping in the basement.
- [16] In August 2017, the parties' son became ill because of a condition that previously required his hospitalization. Concerned the boy would again have to stay in the hospital, the claimant asked the respondent to return to Vancouver, which he did, staying for a few days.

- [17] On September 20, 2017, the claimant travelled from Vancouver to China. The parties dispute why she did so. What is clear is that the claimant and the children ended up living with the respondent in Beijing until November 29, 2017, when the claimant, respondent, and the children flew back to Vancouver. They stayed in Vancouver for less than a week before, returning to Beijing on December 5, 2017.
- [18] The parties present different versions of the claimant's intentions between September 20 and December 5, 2017. The claimant says that she initially decided to travel to China because she had not been there in several years, and wanted to see both her family and the respondent. She claimed that she planned to stay for about a month, initially renting her own apartment. However, she stated that the respondent went to her father's house and took her belongings back to his home, and asked her to stay with him instead. Because there was "more than enough room" and the belongings were already there, she decided this would be best.
- [19] Over the next few months, she came to believe that the respondent had changed, and that he could now control his temper. When she travelled back to Vancouver on November 29, the respondent came with her. Shortly thereafter, she decided to reconcile with the respondent and thus, they flew back to Beijing on December 5.
- [20] The respondent put forward a different version of the claimant's intentions. He understood that when she travelled to China in September, the plan was for the family to settle down in China. He was unaware of her purported intention to only stay for a month and live in a separate apartment. He pointed to their actions, such as arranging child care in China and her bringing her dog to China as demonstrative of their joint intention to reside in China. He purchased a number of household items meant for the children, which he would not have done if there was no plan for the children to stay at his home long term. He submits that when the parties travelled back to Vancouver on November 29, the trip was merely to pack the claimant's belongings - she had already decided to live in China.
- [21] Soon after returning to China in December, the relationship between the parties deteriorated. The parties agreed that within two weeks of their return to China, they had two physical altercations. Following the second altercation, the claimant went to the hospital. A nurse's report recorded that she had bruising on her shoulder and back and a cut lip.
- [22] According to the claimant, a few weeks later, on December 31, another conflict led to her to fear that the respondent would turn violent again, so she left the apartment and called the police. When she returned with the police the respondent packed up some of his belongings and left, returning only on January 15, 2018.
- [23] By that point, the claimant contended she had decided to return to Vancouver once her injuries from the fight with the respondent had healed. However, she claimed that on January 28, the respondent took both her passport and the children's' passports from her. The respondent agreed that he took the children's passports, but denied he took hers.

- [24] The claimant began thinking about how to travel back to Vancouver with the children in secret. On February 9, 2017 the family were staying in Sanya, a popular vacation city in China. The parties had travelled to Sanya with their passports. In the afternoon, while the respondent was taking a nap, the claimant took the children's passports and her passport, went to the airport, and flew to Shanghai and then on to Vancouver. The parties agreed that the respondent was unaware of the claimant's plans, and did not consent to the children leaving China.
- [25] On March 14, 2018, the plaintiff filed a notice of application in the proceeding she had commenced in January 2017. The application sought a series of orders relating to custody and property division, as well as a restraining order against the respondent. On April 26, 2018, the respondent filed a response to family claim as well as a jurisdictional response. On the same day, the respondent filed an application response with respect to the claimant's March 14 application, consenting to many of the orders the claimant had sought on an interim, without prejudice basis, while taking the position that any further determination of the issues was premature given the pending challenge to the court's jurisdiction.
- [26] On July 26, 2018, the respondent filed his own application seeking a stay of proceedings. This decision addresses that application.

III. LEGAL FRAMEWORK

- [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.

A. British Columbia Legislation

- [29] In British Columbia, the usual starting point for considering jurisdiction is the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 [CJPTA]. Section 3 of the CJPTA sets out five categories which can establish territorial competence:
3. A court has territorial competence in a proceeding that is brought against a person only if
 - (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,

- (b) during the course of the proceeding that person submits to the court's jurisdiction,
- (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,
- (d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding, or
- (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

[30] With respect to s. 3(e), s. 10 CJPTA provides a lengthy, non-exhaustive list of facts which establish a presumption of a real and substantial connection between British Columbia and the proceeding:

10 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding

- (a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in property in British Columbia that is immovable or movable property,
- (b) concerns the administration of the estate of a deceased person in relation to
 - (i) immovable property in British Columbia of the deceased person, or
 - (ii) movable property anywhere of the deceased person if at the time of death he or she was ordinarily resident in British Columbia,
- (c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to
 - (i) property in British Columbia that is immovable or movable property, or
 - (ii) movable property anywhere of a deceased person who at the time of death was ordinarily resident in British Columbia,
- (d) is brought against a trustee in relation to the carrying out of a trust in any of the following circumstances:
 - (i) the trust assets include property in British Columbia that is immovable or movable property and the relief claimed is only as to that property;
 - (ii) that trustee is ordinarily resident in British Columbia;
 - (iii) the administration of the trust is principally carried on in British Columbia;
 - (iv) by the express terms of a trust document, the trust is governed by the law of British Columbia,

- (e) concerns contractual obligations, and
 - (i) the contractual obligations, to a substantial extent, were to be performed in British Columbia,
 - (ii) by its express terms, the contract is governed by the law of British Columbia, or
 - (iii) the contract
- (A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and
- (B) resulted from a solicitation of business in British Columbia by or on behalf of the seller,
- (f) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia,
 - (g) concerns a tort committed in British Columbia,
 - (h) concerns a business carried on in British Columbia,
 - (i) is a claim for an injunction ordering a party to do or refrain from doing anything
 - (i) in British Columbia, or
 - (ii) in relation to property in British Columbia that is immovable or movable property,
 - (j) is for a determination of the personal status or capacity of a person who is ordinarily resident in British Columbia,
 - (k) is for enforcement of a judgment of a court made in or outside British Columbia or an arbitral award made in or outside British Columbia, or
 - (l) is for the recovery of taxes or other indebtedness and is brought by the government of British Columbia or by a local authority in British Columbia.

[31] The CJPTA also recognizes that the Legislature or Parliament may create different rules in other legislation for both territorial competence and forum non conveniens:

12 If there is a conflict or inconsistency between this Part and another Act of British Columbia or of Canada that expressly

- (a) confers jurisdiction or territorial competence on a court, or
- (b) denies jurisdiction or territorial competence to a court,

that other Act prevails.

[32] Jurisdiction under the Family Law Act, S.B.C. 2011, c. 25 [FLA] with respect to guardianship, parenting arrangements, and contact (which I will collectively refer to as "parenting") is governed by Part 4, Division 7 of the FLA. Section 73 articulates the purpose of the Division:

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.

[33] Section 74 addresses jurisdiction generally, and subsection 2 establishes that a court may only make an order with respect to parenting if at least one of three conditions is met:

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.

[34] Sections 72(2) and (3) of the FLA defines the test for determining habitual residence:

(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

(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.

[35] Jurisdiction over property division is governed by s. 106 of the FLA, which states:

...

(1) Despite any other provision of this Part, the Supreme Court has authority to make an order under this Part only if one of the following conditions is met:

(a) a spouse has started another proceeding in the Supreme Court, to which a proceeding under this Part is a counterclaim;

(b) both spouses submit, either in an agreement or during the proceeding, to the Supreme Court's jurisdiction under this Part;

(c) either spouse is habitually resident in British Columbia at the time a proceeding under this Part is started;

(d) there is a real and substantial connection between British Columbia and the facts on which the proceeding under this Part is based.

(4) Despite subsection (2), a court may decline to make an order under this Part if the court, having regard to the interests of the spouses and the ends of justice, considers that it is more appropriate for jurisdiction to be exercised outside British Columbia.

(5) In determining whether to decline jurisdiction under subsection (4), the court must consider all of the following:

(a) [Repealed 2014-9-15.]

- (b) the relative convenience and expense for the spouses and their witnesses;
 - (c) if section 108 [choice of law rules] applies, the law to be applied to issues in the proceeding;
 - (d) the desirability of avoiding multiple proceedings or conflicting decisions in different courts or tribunals;
 - (e) the extent to which an order respecting property or debt
 - (i) made in another jurisdiction would be enforceable in British Columbia, and
 - (ii) made in British Columbia would be enforceable in another jurisdiction;
 - (f) the fair and efficient working of the Canadian legal system as a whole;
 - (g) any other circumstances the court considers relevant.
- [36] Section 108 of the FLA sets out a set of rules that must be applied to determine the applicable law in multi-jurisdictional disputes over property division. One of the factors when applying s. 108 is ascertaining the proper law of the relationship pursuant to s. 107. Both sections are reproduced later in this judgment when I address the issue of jurisdiction over property division (see paras. 72-74).
- [37] Because there is no specific provision in the FLA with respect to jurisdiction over support, the jurisdiction provisions in the CJPTA apply: *Fastlicht v. Carmichael*, 2018 BCSC 37 at para. 76.

B. The Divorce Act

- [38] The Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) does not confer jurisdiction over any property disputes associated with a divorce, as the federal government has no authority under s. 91 of the Constitution Act, 1867, to legislate with respect to "property and civil rights" in a province. However, the federal government does have authority with respect to marriage and divorce.
- [39] Pursuant to s. 3(1) of the Divorce Act, British Columbia courts have territorial competence over divorce proceedings where one of the spouses was ordinarily resident in British Columbia for at least one year immediately prior to the commencement of the proceeding:
- 3 (1) A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding.
- [40] The legal analysis of territorial competence under the Divorce Act is not complicated. The proceeding was commenced in January 2017. It is uncontested that the claimant had been ordinarily resident in British Columbia for more than a year prior to that date, and thus she met the requirement under s. 3(1). It is also not contested that because the court has territorial competence with respect to divorce pursuant to s. 3(1), it also has territorial competence with respect to the corollary relief of spousal support, child support, and

parenting under the Divorce Act.

- [41] The Divorce Act is silent on forum non conveniens. Presumably, if s. 3(1) of the Divorce Act is met, this Court could still engage in a consideration of forum non conveniens based on s. 11 of the CJPTA.

IV. ANALYSIS WITH RESPECT TO PARENTING

A. Territorial Competence

- [42] Given the configuration of the applicable statutory provisions, I must first determine the children's habitual residence on the date the claimant filed her application, pursuant to s. 74(2)(a) of the FLA.
- [43] In my view, they were not. Instead, as I will explain, on March 14, 2018 the children were habitually resident in China despite being physically present in Canada.
- [44] Before August 2017, the children and the claimant were habitually resident in British Columbia because they were living with the claimant with the consent of the respondent. However, if, as alleged by the respondent, the parties' habitual residence changed to China in November 2017 and the claimant removed the children from China in February 2018 without his consent, then s. 72(3) may preclude me from finding the children were habitually present in B.C. when the claimant filed her application. However, the same section may nullify that prohibition if the respondent delayed his challenge to their removal.
- [45] The habitual residence of a child is tied to the habitual residence of their parents: *Chan v. Chow*, 2001 BCCA 276 at para. 32. Habitual residence is established by residing in a place for an appreciable period of time with a settled intention: *Chan* at para. 32. 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. Habitual residence is further described in *Rey v. Getta*, 2013 BCCA 369 at para. 32:
- [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" (*R. v. Barnet London Borough Council*, [1983] A.C. 309 (H.L.) at p. 344, adopted in *Chan v. Chow*, 2001 BCCA 276 at para. 33)

- [46] The respondent was obviously habitually resident in China from August 2017 to February 2018, if not for a longer period. It follows that if the claimant became habitually resident in China at some point during that time, then so did the children.
- [47] In my view, the claimant's habitual residence did indeed change at some point during her time in China. In her affidavit, the claimant framed her visit to China that began in September 2017 as a temporary, one-month stay to see family as well as the respondent. She attested that her plan was to stay with her father while she visited. Her position is that she only decided to live as a family with the respondent on a permanent basis just after returning to Vancouver on November 29, 2017.
- [48] I do not find her evidence on this point persuasive. I find it difficult to reconcile three things: her statement that she was merely visiting; her immediate co-habitation with the respondent; and her stated intention to separate from him. The explanation in her affidavit that she moved in with the respondent only because he had already moved some of the children's belongings to his apartment from her father's home, apparently without any prompting or permission, and there was "more than enough room" at his apartment, does not accord with common sense. In my view, these are unlikely reasons to change one's travel plans and live with a spouse during an ongoing separation. It also does not explain why the claimant remained in China for more than two months despite purportedly planning to only stay for one month.
- [49] Instead, I accept the respondent's explanation of events, which is that while he visited Vancouver in August 2017, the parties made plans to reconcile, and specifically the claimant decided to bring their children to China and live with the respondent, something which the respondent had wanted since the beginning of the marriage.
- [50] I find that from September 20, 2017 until approximately early January 2018, the claimant was living in China, on an indefinite basis, for the purpose of reconciling her marriage. I agree with the respondent that the making of child care arrangements is more consistent with a joint desire to live in China than not. I am satisfied that this meets the test of residing in the jurisdiction for an appreciable period of time for a settled purpose. As a result, the claimant became habitually resident in China prior to her fleeing for Vancouver in February 2018, and so too did the children. Pursuant to s. 72(3), the children's return to Vancouver was not enough to revert their habitual residence to British Columbia by March 14, 2018.
- [51] As a result, territorial competence is not established under s. 74(2)(a).
- [52] Nor does s. 74(2)(c) apply. While the claimant alleged she experienced family violence, she did not suggest, nor is there anything in the evidence to suggest, that there would be serious harm to the children if they were to be removed from British Columbia and returned to China.

- [53] This leaves only s. 74(2)(b) as a possible route to establish territorial competence under the FLA over the parenting issues in the dispute. The first five factors are clearly met, and I did not understand the respondent to suggest he had a strong argument against that conclusion. The children were in Vancouver when the application was filed under s. (72(2)(b)(i)). I have no doubt that there is substantial evidence available in the province regarding the children's best interests, given that the children have spent most of their lives in Vancouver (s. 72(2)(b)(ii)). There are no extra-provincial orders or any pending applications before an extra-provincial tribunal for such orders (ss. 72(2)(b)(iii) and (iv)). I am also satisfied that the children have a real and substantial connection to British Columbia given that they were born here, they currently live in British Columbia and they have spent most of their lives here (s. 72(b)(v)).
- [54] Turning to s. 72(2)(b)(vi), I am of the view that this factor essentially raises issues related to forum non conveniens, rather than territorial competence. I find it more convenient to address it when I discuss forum non conveniens.
- [55] Accordingly, I find that there is territorial competence under the FLA with respect to parenting. As noted above, there is also territorial competence under the Divorce Act.

B. Forum Non Conveniens

- [56] I note that the requirement to consider whether it is appropriate for jurisdiction to be exercised in British Columbia, pursuant to s. 74(2)(b)(vi), essentially mirrors the language of s. 74(3) of the FLA, which states that a court may decline to make an order when it "considers that it is more appropriate for jurisdiction to be exercised outside British Columbia". In turn, s. 74(3) essentially engages a forum non conveniens analysis, which requires the court to consider the factors set out in s. 11 of the CJPTA: *Shortridge-Tsuchiya v. Tsuchiya*, 2010 BCCA 61 at paras. 42, 60.
- [57] I am of the view that s. 74(2)(b)(vi) should be treated similarly to s. 73: as essentially a forum non conveniens analysis that requires the court to assess whether it should exercise jurisdiction. I am not sure if there is any difference between, on the one hand, requiring the court to determine that exercising jurisdiction in British Columbia is "appropriate", and on the other hand, requiring the court to determine that there is another jurisdiction which is "more appropriate". If there is such a difference, it is not applicable on the facts before me.
- [58] As noted earlier, the Divorce Act is silent with respect to forum non conveniens, so I have assumed s. 11 the CJPTA could be applied. Accordingly, the analysis for whether this Court should exercise its jurisdiction under the Divorce Act is the same.
- [59] In assessing whether it is appropriate to exercise jurisdiction with respect to parenting, attention should also be paid to the purposes set out in s. 73 of the FLA, which are reflected in the factors set out in s. 11 of the CJPTA: *Shortridge-Tsuchiya* at para. 61.

- [60] As s. 73(c) indicates, one of the Legislature's objectives is to avoid providing parents with an incentive to wrongfully remove a child from a jurisdiction. Consequently, in circumstances where the children have been wrongfully removed from another jurisdiction, a court should be very cautious in determining that the exercise of jurisdiction is appropriate.
- [61] However, the facts of this case are unusual. Although the respondent has asserted that the children were wrongfully removed for the purposes of his stay application, he has not made an application for their return, nor has he expressed an intention to do so. The children have now been in British Columbia for 15 months.
- [62] Section 72(3) of the FLA provides that a wrongful removal cannot change the children'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". This provision prevents a child from being left in a sort of limbo, where the child has been physically present and settled in one jurisdiction for an extended period of time, yet their habitual residence remains in another jurisdiction with which they no longer have any significant connection. Such a situation would be wholly against the best interests of the child.
- [63] For the past 15 months the respondent was aware that the children were in British Columbia, and has had experienced legal counsel throughout that period. In my view, by not seeking the return of the children, the respondent delayed in applying for the return of the children, and has acquiesced and implicitly consented to a reversion of the children's habitual residence to British Columbia.
- [64] As a result, although the children were not habitually resident for the purposes of s. 74(2)(a), because they were not habitually resident in March 2018, they have since become habitually resident in British Columbia.
- [65] In light of this, and accounting for the factors set out in s. 11 of the CJPTA, in my view British Columbia is clearly the most appropriate jurisdiction with respect to determining the parenting issue. The children have spent most of their lives in British Columbia where most of the evidence concerning their best interests will be. There also does not appear to be any issue of applying foreign law, and because the children are present in British Columbia, no issue of enforcement arises.

V. ANALYSIS WITH RESPECT TO PROPERTY DIVISION

A. Territorial Competence

- [66] As explained, the claimant was habitually resident when she commenced the proceeding. Accordingly, there is jurisdiction over property division pursuant to s. 106(2)(c) of the FLA.

B. Forum Non Conveniens

- [67] As I will explain, in my view China is clearly the most appropriate jurisdiction to determine what will likely be a very complex dispute over property division.
- [68] The parties have adopted starkly different views about how wealthy the respondent is. The claimant has taken the position that the respondent is exceptionally wealthy. She points to his luxury apartment in Beijing, which she says is worth about \$4,000,000 CAD. She notes that he owns a Ferrari and other luxury vehicles, and, in general, lives what she describes as an "extravagant" lifestyle. She says that it would be difficult to determine what assets the respondent has in China, because any such assets are likely held in the names of family or friends, something which according to the claimant, is a common practice in China.
- [69] By contrast, the respondent says that his annual income is only about \$24,000 CAD, which he receives as a salary from one of his mother's companies. He says that he used to have a higher salary, but that it was sharply reduced by his mother due to her disappointment over his separation from the claimant. He says that he derives most of his benefits from "third parties", by which he seems to mean his parents, who control a number of investment companies in China. With respect to savings, the respondent reports a relatively modest amount of about \$50,000 CAD.
- [70] It appears that the gulf between the parties stems largely from a single question: is the respondent a wealthy businessman with his significant assets, or is he merely the child of very wealthy parents who provide him with benefits, including employment at one of their investment companies? For instance, in her affidavit the claimant asserts that the respondent is building a financial management company, and points to an expensive office that the respondent is renting "with the help of his father". The respondent says that the office is not rented by him, but by a family company, that he is not a shareholder of that company, and that he derives no benefit from the office.
- [71] This question will need to be answered in the context of the Agreement the parties formed prior to marriage. A translation of the Agreement was provided. Some of the relevant provisions are:
- a) The parties agreed that if a dispute about fulfilling the agreement arose, they would seek to resolve it by consultation, but failing that, either party could start legal action "at a law court of the place where this Agreement is executed". The Agreement was executed in China.
 - b) "Prenuptial property" owned by a party prior to the marriage, as well as income stemming from that property either prior to or after the marriage, will remain the property of the owner. Appendices set out the respondent and the claimant's prenuptial property, which include real property in British Columbia and China for the claimant, and real property in China for the respondent. In addition, the appendix lists the "full capital contributions and interests held by [the respondent]" in an investment partnership.

- c) Any gifts "inherited or received" after by a party during the marriage remain the property of that party.
- d) Wages and bonuses earned during the marriage are "community property".

[72] This matter is further complicated by the law to be applied to the proceeding, which is one of the factors that must be considered in determining whether to exercise jurisdiction. As noted above, the relevant provision of the FLA is s. 108:

108 (1) In this section, "regime of community of property" means a system of law, including a regime of partnership of acquests, in which property owned or acquired and debt owing or acquired during the relationship between the spouses

- (a) are deemed to be owned or owing by both spouses, and
- (b) are divided, on separation of the spouses, as if both spouses equally owned the property or owed the debt,

but does not include a regime of separate property or a system of law under which a spouse's interest is deferred until or after the occurrence of an event that signifies the end of the relationship between the spouses.

- (2) If the Supreme Court takes jurisdiction under this Division, the Supreme Court must act in accordance with the rules set out in this section.
- (3) Subject to subsection (4), if spouses make an agreement respecting the division of property or debt, the substantive rights of the spouses in a proceeding under this Part are determined by the agreement.
- (4) The enforcement of an agreement under subsection (3) is subject to any restriction that the proper law of the relationship places on the ability of spouses to determine the division of property or debt by agreement.
- (5) Subject to subsection (3), if the spouses' first common habitual residence during the relationship between the spouses was in a jurisdiction in which a regime of community of property applies, property owned or acquired and debt owing or acquired during the relationship between the spouses that is property or debt to which the regime of community of property applies must be divided at the end of the relationship between the spouses according to that regime of community of property.
- (6) If neither subsection (3) nor (5) applies, the substantive rights of spouses in a proceeding under this Part must be determined according to the proper law of the relationship.

[Bold emphasis in original, underline emphasis added.]

[73] Section 108 was explained in *Jiang v. Shi*, 2017 BCCA 276:

[31] Section 108 contains three choice of law rules that are to be applied in a hierarchical manner.

- [32] First, if the parties have made an agreement respecting the division of property, the substantive rights of the parties are governed by that agreement.
- [33] Second, if the parties have not made such an agreement, the judge must consider whether the spouses' "first common habitual residence" was in a jurisdiction where a regime of community of property applies. If so, property division must be made in accordance with that regime of community of property.
- [34] If neither of these considerations applies, the substantive rights of the parties must be determined according to the proper law of the relationship, which is defined in s. 107.
- [35] Section 107 then sets out its own set of rules for determining the proper law of the relationship. Once that has been determined, that law becomes one of the factors for consideration as to whether to decline jurisdiction, pursuant to s. 106(5)(c)

[Emphasis added.]

- [74] Here, the parties have made an agreement respecting the division of property. Pursuant to the hierarchy set out by s. 108, that agreement governs. In turn, s. 108(4) provides that the enforcement of that agreement is subject to the proper law of the relationship. Accordingly, it is essential to determine what the proper law of the relationship is by applying s. 107, which states:

The proper law of the relationship between the spouses for the purposes of section 108 [choice of law rules] is

- (a) the internal law of the jurisdiction in which the spouses had their most recent common habitual residence,
- (b) if the jurisdiction under paragraph (a) is outside Canada and is not the jurisdiction most closely associated with the relationship between the spouses, the internal law of the jurisdiction that is most closely associated with the relationship between the spouses, or . . .

- [75] The internal law of the jurisdiction in which the spouses had their most recent common habitual residence is China. Because China is outside of Canada, this raises the issue of which jurisdiction is "most closely associated with the relationship between the spouses".
- [76] The claimant and the children have primarily lived in Vancouver for the duration of the relationship. The respondent has primarily lived in China. The parties visited one another, with the claimant spending approximately the same total amount of time in China over the course of the relationship as the respondent has spent in British Columbia.
- [77] I am of the view that two factors tip the balance in favour of China being the jurisdiction most closely associated with the spouses' relationship. First, the parties met and married in China. Second, although the parties have visited one another, including for extended periods of time, there is no evidence that the respondent ever considered living in British Columbia on a permanent or indefinite basis - his visits were always temporary. In her

affidavit the claimant confirmed that he has never planned on living in Vancouver. By contrast, I have found that the claimant did live in China with the intention of doing so for an indefinite period.

- [78] Thus, the proper law of the relationship is China. Property division is not only subject to the Agreement, but the Agreement is subject to Chinese law.
- [79] To summarize, in order to determine the property division issues between the parties, it appears that a court will have to interpret a contract, signed by the parties in China, drafted in Chinese, and limited by any Chinese law which pertain to marital contracts. It will have to determine what assets the respondent holds as his own, as distinct from assets held by his parents. Then (and subject to Chinese law), the court will have to determine which of these holdings are a "wage or bonus" as indicated by the Agreement, as opposed to a gift or income from an investment property, keeping in mind that the respondent works for his parents, whom he says give him gifts, and given that his parents run investment companies, and that at least some of the assets of these investment companies may have been controlled by the respondent. The court will have to do so while contending with the fact that most if not all of the documents with respect to this issue will be in Chinese, and are located in China.
- [80] In short, the litigation of the property division issues between the parties would be a daunting task for a British Columbia court. Considering the provisions set out in s. 106(5) of the FLA, it is clear to me that China is the more appropriate jurisdiction for the determination of the parties' property rights. In particular:
- a) It will be far easier for a Chinese court to interpret and apply the Agreement as well as any relevant Chinese law.
 - b) It will be far easier for a Chinese court to determine the facts at issue given that the relevant documents will likely be in Chinese (save, perhaps, some of the documents concerning the purchase of the Family Home).
 - c) It will be far more convenient for the parties to avoid the expense of translating what could be an extensive documentary record; and
 - d) If there are any additional witnesses, besides the claimant and the respondent, they are likely to be located in China.

VI. ANALYSIS WITH RESPECT TO SUPPORT

A. Territorial Competence

- [81] As explained above, because the FLA does not contain any provisions regarding support, jurisdiction must be determined pursuant to the CJPTA. Pursuant to s. 3(e), territorial competence can be established where a real and substantial connection is made out, and s. 10 contains a list of possible factors which can create a real and substantial connection.

- [82] I note that the first of these factors, s. 10(a), provides that there is a real and substantial connection where a proceeding "is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in property in British Columbia that is immovable or movable property".
- [83] In this case, there is real property located in British Columbia: the Family Home. The claimant also controls several Canadian bank accounts which contain substantial funds. It appears that the respondent's rights to the Family Home, as well as the rights of the respondent's parents', will be a significant point of dispute in this litigation.
- [84] I recognize that, at least arguably, the Family Home is more relevant to property division than it is to spousal and child support. However, in *Fastlicht*, the existence of property in the jurisdiction was relevant to establishing a real and substantial connection with respect to spousal support: para. 92.
- [85] I am of a similar view here. Because property division and each party's interest in assets can influence spousal support obligations, it would, in my view, be artificial to say that no real and substantial connection exists between the issue of spousal support and British Columbia when the Family Home and some of the claimant's other assets are located here.
- [86] With respect to child support, I note that Madam Justice Fenlon, in *S.R.L. v. K.J.T.*, 2014 BCSC 597 at para. 38 [S.R.L. #1], accepted that the residence of the spouse and the children for a significant period of time created a real and substantial connection with British Columbia. I similarly find here that the fact that the children have lived most of their lives in British Columbia, and currently live in British Columbia, creates a real and substantial connection with British Columbia for the purposes of child support.
- [87] Finally, as noted above, territorial competence is also established pursuant to s. 3 of the Divorce Act.

B. Forum Non Conveniens

- [88] Because there are no specific provisions in the FLA regarding the forum non conveniens analysis of support, s. 11 of the CJPTA applies. I have assumed it also applies with regard to proceedings under the Divorce Act because that legislation is silent with respect to forum non conveniens.
- [89] After considering the factors set out in s. 11 of the CJPTA, I am of the view that spousal support is more appropriately determined in China, largely because, for the reasons I raised with respect to property division (see paras. 79-80), it will be somewhat difficult for a British Columbia court to determine the respondent's income. However, I note that unlike property division, with respect to spousal support, there does not appear to be any issue of applying foreign law.

[90] With respect to child support, in my view British Columbia is the more appropriate jurisdiction, because it is best to determine child support in the jurisdiction where the children are residing. I am aware that the judge in British Columbia will face some of the same difficulties I have described when determining the respondent's income for the purposes of child support. However, in my view it is a far more daunting task to trace the respondent's assets and income over the course of the marriage in the context of the Agreement and the applicable Chinese law, than it is to estimate his capacity to pay child support under Canadian law.

VII. DIVISION OF JURISDICTION

[91] To summarize, when each aspect of the dispute is considered in isolation, I have concluded:

- a) It is clearly more appropriate for the parenting and child support issues between the parties to be resolved in British Columbia;
- b) It is clearly more appropriate for the property division aspect of the dispute to be resolved in China;
- c) It is preferable that the spousal support aspect of the dispute be resolved in China, although the issue of spousal support appears much more manageable for a court in British Columbia than the property division issue.

[92] These conclusions raise the issue of what to do when faced with a dispute where some, but not all aspects of the dispute are better suited for a foreign jurisdiction.

[93] In argument, the respondent acknowledged that there was a strong case for this Court to exercise jurisdiction over parenting and child support. Nonetheless, as his primary argument, the respondent has said that I should decline jurisdiction over the entire proceeding.

[94] I am unwilling to do so. In my view, it would only be appropriate to decline jurisdiction over the entire proceeding if, when considering the proceeding as a whole, it would be "clearly more appropriate" for it to be litigated in China. That is not the case here. The benefits of litigating child support and custody in British Columbia weigh against a complete stay of proceedings, such that the respondent has not met the burden established by Van Breda.

[95] Perhaps realizing that his argument for a complete stay of proceedings was unlikely to succeed, the respondent spent the bulk of his submissions on an alternative argument: that I stay proceedings only with respect to property division and spousal support, dividing the proceeding between China and Canada.

[96] The respondent provided one case where such a division has occurred in British Columbia, in *S.R.L. v. K.J.T.*, 2014 BCSC 1562 [S.R.L. #2], a decision of Madam Justice Fenlon. In *S.R.L. #2*, the respondent sought a stay of proceedings in favour of a Minnesota court, where he had commenced a parallel proceeding. The claimant had appeared before the Minnesota court and similarly sought a stay of proceedings in favour of British Columbia. Both courts

had determined that they had jurisdiction over every issue in dispute, the British Columbia court having done so in S.R.L. #1.

- [97] With respect to forum non conveniens, Madam Justice Fenlon considered each issue separately. She determined that because foreign law would be applicable in assessing property division, because most of the family's property was located in the United States, and because there were issues with a B.C. court valuing the foreign property, it was preferable for property division to be determined by the Minnesota court. Furthermore, because property division could affect the award of spousal support, Madam Justice Fenlon determined that spousal support should be determined by the same court as property division, and accordingly, she declined jurisdiction over spousal support as well. Finally, because the foreign court had indicated a preference for exercising jurisdiction over the parties' divorce, Justice Fenlon also declined jurisdiction over that issue.
- [98] However, the children in that case had lived in British Columbia for the past four and a half years. Furthermore, British Columbia's child support regime was far more generous than Minnesota's. Accordingly, Justice Fenlon determined that with respect to parenting and child support, British Columbia was the more appropriate jurisdiction, concluding at para. 35 that while it was "almost always preferable for one court to hear all disputed matters in a family law case this is one of the rare cases where it is appropriate to divide issues between forums".
- [99] I agree with Madam Justice Fenlon that a division of jurisdiction should be rare. I note that dividing jurisdiction runs contrary to some of the objectives of s. 11 of the CJPTA. Two of the factors set out in s. 11 of the CJPTA are avoiding "conflicting decisions" and a "multiplicity of legal proceedings". Dividing a proceeding into multiple jurisdictions, by definition, creates a multiplicity of legal proceedings. Furthermore, a division of jurisdiction increases the risk of conflicting decisions in terms of factual and legal determinations common to issues before both of the courts: *Quanta Services, Inc. v. Rokstad Power Corporation*, 2017 BCSC 1858 at paras. 23-29; *Broad v. Pavlis*, 2014 BCSC 1496 at para. 67.
- [100] I also note that a division of jurisdiction will often cause added inconvenience and expense for the parties; for example, it is likely that some legal work and testimony will have to be replicated. Furthermore, the respondent's wealth is also relevant to the determination of child support, meaning that some of the challenges that a Canadian court would have faced with respect to determining property division will still be issues.
- [101] There is one last complication. I agree with Madam Justice Fenlon's view that because property division can affect the award of spousal support, both issues should be addressed by the same court: S.R.L. #2 at para. 25. In his argument, the respondent relied on S.R.L. #2 to assert that once I have determined that property division should be determined in China, spousal support should follow. In my view that is not the correct approach. There is no reason that I can see why spousal support should, as a rule, simply follow property division, with no weight given to any other reasons why spousal support might be more

appropriately addressed in British Columbia. Although not an issue on the facts before me, such an approach would fail to account for a situation where there was a strong reason for the British Columbia court to exercise jurisdiction over spousal support. Instead, in my view, the right approach is to consider spousal support and property division together when assessing whether to decline jurisdiction.

- [102] Thus, the question of whether to divide jurisdiction can be framed as follows: has the respondent shown that, despite the fact that child support and parenting will be determined in British Columbia, it is clearly more appropriate that the issues of spousal support and property division be determined in China?
- [103] In my view, he has. The difficulty of assessing property division on the facts of this case is significant enough to outweigh the issues with dividing jurisdiction. A Chinese court is far better suited to distinguish between the respondent's assets and those of his parents, in terms of assessing the contested facts in what may be a complicated financial relationship. A Chinese court is also far better suited to interpret the Agreement and to apply the facts it has found to the Agreement.
- [104] I am aware that this solution carries some disadvantages. As I outlined above, dividing jurisdiction may well cause the parties some inconvenience. Furthermore, I recognize that some of the issues relating to determining property division will also prove a challenge in assessing child support. Nonetheless, I am convinced that overall, dividing jurisdiction is the best option. Therefore, I am granting a stay with respect to property division and spousal support.

VIII. CONCLUSION

- [105] The respondent's application for a stay in this proceeding is granted with respect to property division and spousal support, and is otherwise dismissed. The stay is conditional upon the respondent's undertaking to commence proceedings in China within 21 days of the date of this judgment.
- [106] I consider success on this application was divided and therefore the parties should bear their own costs. However, if there are circumstances that the parties believe may result in a different conclusion, they have leave to seek a brief hearing before me so long as that request is made no later than 30 days from the date of this judgment.

"Sharma J."

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