
CANADA / JUDGMENT

E.G.U. v. A.M.E.S.

2021 BCSC 996

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 996 E.G.U. v. A.M.E.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

E.G.U. v. A.M.E.S.,

2021 BCSC 996

Date: 20210401

Docket: E61380

Registry: New Westminster

Between:

E.G.U.

Claimant

And

A.M.E.S.

Respondent

Before: The Honourable Mr. Justice M. Taylor

Oral Ruling on Family Law Application

In Chambers

The Claimant, appearing in person:

E.U.

Counsel for the Respondent:

M. Brandon

Place and Date of Hearing:

New Westminster, B.C.

February 19, 2021

Place and Date of Ruling:

New Westminster, B.C.

April 1, 2021

- [1] THE COURT: This is an application by the claimant, E.U., for interim orders that:
1. the British Columbia courts have sole jurisdiction to rule on any and all matters related to the best interests, guardianship, parenting time, and parental responsibilities related to his child, E.; and
 2. that the child is habitually resident in British Columbia.
- [2] E.U. has also sought other ancillary parenting orders, but it was agreed at the hearing that these ancillary matters would be addressed at a subsequent hearing if E.U. was successful on the jurisdictional issues.
- [3] The respondent, A.S., brings a cross-application seeking a declaration that her child, E., is not habitually resident in British Columbia, or in the alternative that the court should decline jurisdiction as Denmark is the forum conveniens to hear and determine the family law proceeding.

Background

- [4] E.U., a businessman, is a Brazilian citizen and moved to Canada in 2015. He has permanent resident status in Canada and lives in Burnaby, B.C., but has no family in Canada. A.S. is a citizen of Denmark and is employed as a social health care assistant for a private health care company in Denmark. In 2019, E.U. entered into a romantic relationship with A.S. The parties met in Mexico while A.S. was backpacking and E.U. was vacationing. A.S. visited E.U. briefly in Burnaby in 2020 as a stopover on her travels and then returned to Denmark.
- [5] E. was born to the parties in June 2020 in Denmark. E.U. travelled to Denmark for three months to be there for the birth but could not stay longer in Denmark due to the risk of losing his permanent residency status in Canada. After the birth of E., A.S. took a maternity leave from her employment. She is scheduled to return to work on April 14, 2021.

- [6] A.S. travelled to British Columbia on August 21, 2020 on a tourist visa to spend further time with E.U. in an apartment rented by E.U. in Burnaby. The intention of the parties with respect to this trip is a central subject of dispute on this application. E.U. takes the position that A.S. was travelling to Canada with a view to relocating permanently. A.S. takes the position that she was only visiting temporarily and always intended to return to Denmark where she has a job, an apartment and extended family.
- [7] During the period A.S. was in Canada, the relationship between her and E.U. quickly became strained. The parties separated on November 13, 2020, when A.S. left E.U.'s apartment and began living at safety shelters operated through the Ishtar Transition Housing Society. A.S. alleges that E.U. was controlling and abusive, but this is emphatically denied by E.U. The affidavit evidence before me was insufficient to reach any definitive conclusions with respect to any of A.S.'s more serious allegations against E.U. involving physical aggression, and I make no finding in that regard.
- [8] That said, it is common ground between the parties that E.U. hid E.'s passport for a period of approximately three months commencing in November 2020, after he became concerned that A.S. was going to leave with E. The lack of a passport prevented A.S. from returning with E. to Denmark. In December 2020, A.S. made an urgent application for temporary custody with the Danish Family Courts Agency of Family Law (the "Danish Court"), advising that E.U. was preventing E. from returning to Denmark by retaining her passport.
- [9] The Danish Court wrote by email to E.U. to advise him that it would be making a decision concerning temporary custody and gave him ten days to respond. E.U. responded by email but heard nothing further from the Danish Court. On December 15, 2020, the Danish Court advised the parties that it had granted A.S. temporary custody over E. and determined that both E. and A.S. are resident in Denmark. The Danish Court advised E.U. that he has a right to a review of that decision.
- [10] On February 2, 2021, A.S. also brought an application in British Columbia seeking orders under the Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980, 1343 U.N.T.S. 89, Can. T.S. 1983 No. 35 (the "Hague Convention") for the return of E.'s passport and that E. be permitted to return to Denmark. On February 17, 2021, Madam Justice Watchuk granted A.S.'s application, and E.U. returned the passport. In so ruling, Madam Justice Watchuk found that E. was habitually resident in Denmark under the Hague Convention and that the withholding of the passport was a wrongful retention. On February 18, 2021, the day before this application was heard, A.S. and E. returned to Denmark in accordance with Madam Justice Watchuk's order.

The Applicable Law

- [11] The key provisions of the Family Law Act, S.B.C. 2011, c. 25 [FLA] applicable on this application are ss. 72 to 74:

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.
- [12] Section 74(2) states that a court may make an order respecting guardianship, parenting arrangements or contact with a child if one of the three conditions therein are met. Section 74(3) also states that a court may decline to make an order under this part if the court considers it more appropriate for jurisdiction to be exercised outside British Columbia.

Legal Analysis

- [13] There was no allegation on this application that E. is at risk of serious harm in this case and s. 74(2)(c) of the FLA is therefore inapplicable. I also find that s. 74(2)(b) is inapplicable as there is no substantial evidence concerning the best interests of E. in British Columbia and very little evidence of a real and substantial connection between E. and British Columbia. Since the six requirements set out under s. 74(2)(b) are conjunctive, the subsection is therefore inapplicable on its face in this case. Accordingly, I will proceed to consider the applicability of s. 74(2)(a), which states that the court could exercise jurisdiction if E. were habitually resident in British Columbia when the application was filed.

- [14] Under s. 72(2) of the FLA, "habitual residence" is defined as the place where the child most recently resided with their parents. There is no definition of "reside" in the FLA. However, in *S.R.L. v. K.J.T.*, 2014 BCSC 597 at para. 39, Madam Justice Fenlon, as she then was, found that "residence" in s. 72(2) means something more than the place that the parties last spent time together: *Aslanimehr v. Hashemi*, 2019 BCSC 804 at para 44.
- [15] In *Kong v. Song*, 2019 BCCA 84, a recent decision of the Court of Appeal, the Court of Appeal affirmed Mr. Justice Mayer's decision from the trial court that habitual residence under the FLA is established by residing in a place for an appreciable period of time with a "settled intention." Justice Martinson in *Fasiang v. Fasiangova*, 2008 BCSC 1339 at paras. 60-74, set out a comprehensive review of the concepts of "settled intention" and "appreciable period of time", which review was adopted in *Kong* at para. 20:

Settled Intention

- [60] A settled intention or purpose requires that "the purpose of living where one does has a sufficient degree of continuity to be properly described as settled." But all that is required is that there is a settled purpose. There is no requirement that there be an intention to settle indefinitely: *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 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), this list is not exhaustive:
1. Both parties have relocated to the new state;
 2. The custodial parent is employed in the new state;
 3. The custodial parent had taken steps to satisfy the immigration requirements of the new state;
 4. The children were enrolled in school in the new state;
 5. The parents had purchased one-way tickets to the new state; and
 6. Accommodation has been arranged in the new state.

- [64] Settled intent to change habitual residence is determined just prior to the physical move to the new habitual residence: *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 *Prioia v. Prioia* (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: *Prioia* 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.
- [16] Taking into account the foregoing legal tests, E.U. asserts that E. was habitually resident in British Columbia at the time he filed his application based upon the following facts:
1. A.S. travelled to Canada in August 2020 on a one-way ticket;
 2. A.S. sublet her apartment in Denmark for the period of a full year, and not merely a few months;
 3. E.U. had entered into a lease on an apartment in Burnaby on the expectation that A.S. and E. would be living with him;
 4. While in Canada, A.S. commenced the process of filling out Canadian immigration documents, including an application for permanent residence;
 5. While in Canada, A.S. commenced the process of considering how her work skills could be transferrable to Canada; and
 6. A.S. sold some of the furniture in the Denmark apartment before she left and brought four suitcases and two carry-on-bags filled with personal items on her trip to Canada.
- [17] In my view, the above facts satisfy at least some of the criteria for a settled intention set out in the cases cited above, but not all. As argued by A.S., there were also a significant number of facts that evidenced the opposite conclusion, namely, that the parties had not formed a settled intention that she and E. would relocate to Canada. These facts included the following:
1. A.S. travelled to Canada on a tourist visa which was set to expire in February, 2021 and was never renewed;
 2. She was on a maternity leave from a job in Denmark and is scheduled to return to work in April, 2021;
 3. Although she did sublease her apartment in Denmark, she has not surrendered the lease;
 4. E. was born in Denmark, where A.S. has a wide network of family and friends and has spent more time in Denmark than in Canada during her lifetime;

5. While A.S. did take the step after arriving in Canada to fill out a permanent residence application, the application form was undated and the application was not received by Immigration and Citizenship Canada until after A.S. and E.U. had separated. I note that there was no evidence before me that A.S., as opposed to E.U., actually submitted the application;
 6. The lease on the Burnaby apartment was in the name of E.U. alone;
 7. A.S. took no steps to look for work in Canada or leave her job in Denmark; and
 8. The time that A.S. spent in the apartment with E.U. in Burnaby before she relocated to a shelter was relatively short, namely about three months.
- [18] Settled intention to change habitual residence is determined just prior to the physical move to the new habitual residence: Fasiang at para. 64. In my view, focusing on that timeframe, it is clear on all the evidence that at the time A.S. left Denmark for Canada in August, 2020, the parties, or at a minimum A.S., did not clearly have a settled intention that she would relocate to Canada. I note in the first place that the parties did not relocate together, which would have reinforced E.U.'s argument. Rather, E.U. was already settled in British Columbia, and A.S. made the decision to come to visit with E. Thus, any decision for her to move to British Columbia was obviously far more disruptive for her than for E.U., as it would have involved leaving her job, her apartment, and her family and thus must be scrutinized more carefully. In addition, the communication between the parties about their respective intentions appear to have been very unclear at that time.
- [19] In light of that lack of communication, I am not convinced on all the evidence that A.S. made a final decision to change her habitual residence before she left for the trip. Rather, the evidence indicates that she viewed this trip as an opportunity for E. and her to spend time with E.U. during A.S.'s maternity leave, and also to explore the possibility that if things worked out, she would consider Canada as an option for relocation. In essence, the trip was an exploratory trial run in a relatively fresh romantic relationship to determine if a longer-term commitment was feasible, but it was always time-bound by her six-month tourist visa, her maternity leave timeframe, and her other ties in Denmark, including her apartment.
- [20] Further, I am not convinced that A.S.'s residence in British Columbia was for an "appreciable period of time", as A.S. never had time to establish durable ties with the new country, such as finding a new job. To the contrary, the relationship between the parties declined very quickly after she arrived, and within less than three months A.S. and E. were living in a shelter, with A.S. having no job, no home, and no supporting family. It appears that it was only E.U.'s decision to hide E.'s passport which extended the trip beyond the initial three months.

- [21] Having considered all the evidence, I conclude on balance that E. was never habitually resident in British Columbia. However, even if I had concluded that E. was habitually resident in Canada, I would nevertheless decline to exercise jurisdiction under s. 74(3) of the FLA. I note at the outset that the onus is on the party seeking to prove that a more appropriate forum exists and that the court should decline jurisdiction: Aslanimehr at para. 91. In this case, I find that A.S. has met that burden.
- [22] I start by highlighting that s. 73 of the FLA, which sets out of the purposes of the division, specifies that one of those purposes is to avoid the making of orders respecting the same child in more than one jurisdiction. Another purpose is to provide for the recognition and enforcement of extra-provincial orders.
- [23] Further, in *Stebbing v. Greenleaf*, 2017 BCSC 453, Mr. Justice Bowden reviewed the factors to apply in a forum non conveniens analysis, as set out in the Court in s. 11 of the Court Jurisdiction and Proceedings Transfer Act, SBC 2003, c. 28, which include the following:
- (a) The comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
 - (b) The law to be applied to issues in the proceeding,
 - (c) The desirability of avoiding a multiplicity of legal proceedings,
 - (d) The desirability of avoiding conflicting decisions in different courts,
 - (e) The enforcement of an eventual judgment, and
 - (f) The fair and efficient working of the Canadian legal system as a whole.
- [24] In this case I find it significant that there have already been orders made by the Danish Court finding E. to be resident in Denmark and granting interim custody to A.S., and that E.U. was given the opportunity to make written submissions relating to those orders. If this court were now to assume jurisdiction on the basis that E. is resident in British Columbia, such an order would directly conflict with the order of the Danish Court, in addition to failing to provide for the recognition and enforcement of that order. Further, I note that only two days before this application was heard before me, Madam Justice Watchuk of this court issued an order under the Hague Convention that E. is habitually resident in Denmark and ordered her passport to be returned to enable her to return to Denmark.
- [25] As stated in *Stebbing* above, conflicting decisions in different British Columbia courts are to be avoided. I have taken this principle into account. That said, I note that in *Kong*, the Court of Appeal stated that the legal test for habitual residence may now be different in some circumstances under s. 74 of the FLA than under the Hague Convention. This difference arises from the fact that the s. 74 definition of "habitual residence" is tied to the parental intention test frozen in the legislation, whereas the Hague Convention analysis has been revised to take into account the recent decision of the Supreme Court of Canada in *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 SCR 398, where a hybrid approach was

adopted.

- [26] Thus, I am conscious of the fact that, since Madam Justice Watchuk's decision was not rendered under the FLA but under the Hague Convention, her application of the habitual residence test could theoretically lead to a different result without creating a conflict. That said, I am confident on the facts of this case that both the parental intention and hybrid approach lead to the same result, which is that E. is habitually resident in Denmark. To the extent that the analysis under the Hague Convention and s. 74 converge in this case, I am conscious of the fact that conflicting decisions would not be desirable.
- [27] Finally, with respect to the first factor set out in Stebbings concerning comparative expense and convenience of the parties, the following considerations in my view favour Denmark as the forum conveniens:
1. The number of potential witnesses is clearly greater in Denmark than in Canada, as E.U. has no family in Canada, whereas A.S. has extended family and friends in Denmark;
 2. The Danish Court has already decided that they will take jurisdiction, so there is no issue of a jurisdictional vacuum;
 3. The ruling of the Danish Court is not a final order, and E.U. will have an opportunity to appeal that decision. He will have his day in court in Denmark, if not in Canada;
 4. E.U.'s retention of E.'s passport can arguably be characterized as an attempt to gain a jurisdictional advantage, as it extended E.'s stay in Canada and prevented A.S. from leaving for approximately three months. E.U. should not be rewarded for that on this application; and
 5. From the perspective of convenience, E.U. raises a valid concern that litigating in Denmark will be more difficult for him as he does not speak Danish, whereas A.S. does speak English and therefore would be in a better position to litigate in Canada. However, E.U. can address that concern by retaining Danish counsel in the same manner that A.S. has retained counsel in Canada.
- [28] Finally, as a result of the decision of Madam Justice Watchuk, the facts on the ground are now that A.S. has returned to Denmark with E. I do not have jurisdiction to order their return nor do I believe that such an order would be justifiable under the circumstances. I am very sympathetic to E.U.'s distress arising from his geographical separation from his daughter, but the reality at this stage is that E.U. must allow the Danish process to run its course.
- [29] For all the foregoing reasons, E.U.'s application is dismissed, and A.S.'s cross-application is granted.
- [30] A.S. shall have her costs on this application in the amount of \$1,000, payable within six months of the date of this order.

"M. Taylor J."

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