

CANADA / JUDGMENT

Gill v. Gill

2024 BCSC 346

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Supreme Court of British Columbia

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2024 BCSC 346 Gill v. Gill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gill v. Gill,

2024 BCSC 346

Date: 20240131

Docket: E233294

Registry: Vancouver

Between:

Vikramjit Singh Gill

Petitioner

And:

Anjena Kaur Gill also known as Anjena Kaur Gandham

Respondent

Before: The Honourable Justice Fleming

Oral Reasons for Judgment

(In Chambers)

Counsel for the Petitioner:

C.P. Amundsen

Counsel for the Respondent:

A. Ngom

T.H. Hopman

Place and Date of Hearing:

Vancouver, B.C.

January 22-24, 2024

Place and Date of Judgment:

Vancouver, B.C.

January 31, 2024

[1] These reasons were delivered orally and have since been edited for distribution.

Introduction

[2] The petitioner Vikramjit Gill and the respondent Dr. Anjena Gill are the parents of nine month old K born on April 15, 2023 in Las Vegas, Nevada.

[3] Married in 2020, the parties separated in November 2023. Dr. Gill and K have been living with her parents in their home in Vancouver, since May 21, 2023.

[4] Mr. Gill applies for an order that K be returned forthwith to the United States, pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980, Can. T.S. 1983 No. 35 (entered into force 1 December 1983) [Hague Convention].

[5] In his petition, Mr. Gill took the position that Dr. Gill wrongfully retained K in Canada around August 3, 2023 when, he alleges, she made it clear that she and K would not be returning to Las Vegas later on in August as agreed. At the petition hearing, Mr. Gill also took the position that Dr. Gill wrongfully removed K on May 21, 2023, arguing his consent to K travelling to Vancouver was vitiated by Dr. Gill's deceit. Mr. Gill alleges that despite agreeing to return to Las Vegas within three months, Dr. Gill's actual intention when she removed K was to relocate him to Canada.

[6] Asserting neither the removal nor the retention was wrongful, Dr. Gill denies any deceit or intention for K to remain in Canada until she decided to separate from Mr. Gill. Also denying that she and Mr. Gill ever agreed that K would return to Las Vegas within three months, Dr. Gill alleges the plan instead was that she and K would stay with her parents in Vancouver indefinitely so her mother could support them and Mr. Gill would travel back and forth.

[7] There is no dispute that Mr. Gill drove Dr. Gill's car to Vancouver on or about May 30, 2023, and left it with her along with his dog Whistler. Mr. Gill made a number of further visits to Vancouver up until October 24, 2023.

- [8] Dr. Gill also alleges that Mr. Gill emotionally and verbally abused her throughout the relationship, and her decision to separate, on November 6, 2023, was made after further incidents on October 21 and 23, 2023, when she realized his behaviour was not going to improve and she did not have the support of his family.
- [9] Identifying November 8, 2023 as the first time Mr. Gill demanded that K be returned to the United States, and November 6 or 8, 2023 as the retention date(s), Dr. Gill asserts K was habitually resident in Canada by then and consequently the retention was not wrongful. In the event she is found to have wrongfully removed or retained K here, she argues that Mr. Gill acquiesced to the wrongful removal or retention.

Legal Framework

- [10] Canada and the United States are contracting states or parties to the Hague Convention, which has the force of law in BC pursuant to s. 80 of the Family Law Act, S.B.C. 2011, c. 25.
- [11] The objects of the Hague Convention, set out in Article 1, are "to secure the prompt return of children wrongfully removed to or retained in any Contracting State" and "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States".
- [12] To implement the objects, Article 2 requires contracting states to use the most expeditious procedures available.
- [13] An order for the return of a child under the Hague Convention is not a custody order but an order designed to restore the status quo which existed before the wrongful removal or retention.
- [14] As the Office of the Children's Lawyer v. Balev, 2018 SCC 16, explains one of the purposes of a prompt return is facilitating speedy adjudication of the merits of the custody dispute in the forum of the child's habitual residence.
- [15] Article 12 makes it mandatory to order the return of a child forthwith where they have been wrongfully removed or retained, and less than one year has elapsed from the date of the wrongful removal or retention to the date of the commencement of the proceeding.
- [16] Under Article 3 the removal or retention of a child is wrongful if it was in breach of the rights of custody in the state where the child was habitually resident at the time of the removal or retention, so long as those rights were actually being exercised.
- [17] Article 5 defines rights of custody broadly and inclusively. They include rights relating to the care of the person of the child, and the right to determine the child's place of residence. Dr. Gill does not dispute that Mr. Gill was exercising rights of custody on the dates of removal and retention.
- [18] Habitual residence is not defined in the Hague Convention.

- [19] In *Balev*, the Supreme Court of Canada adopted a hybrid approach to determining a child's habitual residence under Article 3. In doing so, the Court moved away from the parental intention approach, which had dominated Canadian jurisprudence, but also refused to adopt a child centred approach, which determines habitual residence by the child's acclimatization in a given country. In explaining the hybrid approach then Chief Justice McLachlin wrote:
- [42] the hybrid approach holds that instead of focusing primarily or exclusively on either parental intention or the child's acclimatization, the judge determining habitual residence under Article 3 must look to all relevant considerations arising from the facts of the case at hand.
- [43] On the hybrid approach to habitual residence, the application judge determines the focal point of the child's life -- "the family and social environment in which its life has developed" -- immediately prior to the removal or retention: . The judge considers all relevant links and circumstances -- the child's links to and circumstances in country A; the circumstances of the child's move from country A to country B; and the child's links to and circumstances in country B.
- [44] Considerations include "the duration, regularity, conditions and reasons for the [child's] stay in the territory of [a] Member State" and the child's nationality: . No single factor dominates the analysis; rather, the application judge should consider the entirety of the circumstances Relevant considerations may vary according to the age of the child concerned; where the child is an infant, "the environment of a young child is essentially a family environment, determined by the reference person(s) with whom the child lives, by whom the child is in fact looked after and taken care of":
- [45] The circumstances of the parents, including their intentions, may be important, particularly in the case of infants or young children However, recent cases caution against over-reliance on parental intention. The role of parental intention in the determination of habitual residence "depends on the circumstances specific to each individual case"
- [46] It follows that there is no "rule" that the actions of one parent cannot unilaterally change the habitual residence of a child. Imposing such a legal construct onto the determination of habitual residence detracts from the task of the finder of fact, namely to evaluate all of the relevant circumstances in determining where the child was habitually resident at the date of wrongful retention or removal.
- [20] Exceptions to the Article 12 mandatory return are set out in Articles 13 and 20.
- [21] In the event K's habitual residence is found to be the United States, Dr. Gill relies only on Article 13(a):

[the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention

[Emphasis added.]

[22] Katsigiannis v. Kottick-Katsigiannis, [2001] O.J. No. 1598 (Ont. C.A.) provides "consent" and "acquiescence" as used in Article 13(a) should be given their ordinary meaning:

[47] "Consent" and "acquiescence" are related words. "To consent" is to agree to something, such as the removal of children from their habitual residence. "To acquiesce" is to agree tacitly, silently, or passively to something such as the children remaining in a jurisdiction which is not their habitual residence. Thus, acquiescence implies unstated consent.

[23] The Ontario Court of Appeal concluded that acquiescence involves subjective consent determined by words and conduct, including silence, which establishes the acceptance of, or acquiescence in, a child's removal or retention", while also specifying the actual subjective intention of the left behind parent will be disregarded if they have said or done something which is clearly and unequivocally inconsistent with the summary return of the child (para. 48). To prove acquiescence, the taking parent must provide clear and cogent evidence of some conduct on the part of the left-behind parent that is inconsistent with the summary return of the children to their habitual residence.

Overview

[24] The petition record includes approximately 30 affidavits from the parties, their family members, friends, and others. There are countless conflicts in the affidavit evidence regarding a multitude of factual circumstances. Consequently, and in light of the requirement that determining the Hague Convention return applications be determined expeditiously, the overview that follows, although detailed is necessarily incomplete.

[25] For simplicity and clarity only, I refer to some of the affiants by their first names.

[26] I note at this stage, while neither party made submissions on this point, some of the affidavits include inadmissible evidence that I have ignored. For example, Dr. Gill's sister Natasha, who is a child psychiatrist, provides what I would characterize as expert opinion evidence about the nature of K's attachments that is inadmissible, (as well as admissible fact evidence about her observations of his relationships with family members). Some of the exhibits attached to affidavits are admissible for some purposes but not others. I have in mind, for example, contemporaneous text message exchanges that are presumptively inadmissible for their truth but not the fact they were made, under the hearsay rule. Similarly, some of these same exchanges include prior consistent statements, that is, messages sent by an affiant that are consistent with the affiant's evidence. Such statements are generally inadmissible to bolster the affiant's credibility or as corroborating evidence. The general rule is subject to several exceptions. Here several prior consistent statements

relate to Dr. Gill's abuse allegations, which engage an exception that allows them to be admitted to rebut an allegation of recent fabrication, meaning an allegation that the party or witness has made up a false story, after the events in question, to meet the exigencies of the case: *R v. Stirling*, 2007 BCCA 4 at paras. 28-39. Admitted to rebut Mr. Gill's allegation that Ms. Gill (and others) fabricated the allegations of abuse, in that sense only, they are relevant to credibility. Contemporaneous third party documents are also helpful in showing what was said when, as well as, what was not said.

- [27] Mr. Gill is an American citizen. Born in Stockton, California, his parents, his brothers Ranjit and Chamanjit and other extended family members have remained there. His mother is a medical specialist. His father is similarly described as a medical professional. Mr. Gill states he has lived in Las Vegas, Nevada since 2010. Identifying himself as a senior healthcare executive, aspects of Mr. Gill's employment history, including Dr. Gill's allegation about his lack of employment in Las Vegas, are disputed. He deposes to being the CEO of Gill Medical Associates, which is his parents' or his family's company based in California. He is also a fellow in the American College of Healthcare Executives ("ACHE") and elected as Nevada's representative.
- [28] In his evidence and during most of the hearing Mr. Gill emphasized that he is required to reside in the United States because of his other role as captain in the United States Air Force Reserves. After Dr. Gill's counsel raised an issue about his current status and efforts were made to obtain information from his commander during the hearing, he provided a further affidavit that states he is engaged in the process of leaving the military and "in line" to receive an honourable discharge, which could take up to six months.
- [29] Dr. Gill was born and raised in the Vancouver area. Her parents and two sisters, have continued to live in Vancouver. Her father is a medical doctor. Her mother does not work outside the home. Her sister Yasmin, a journalist, resides with their parents in their very large, 12,000 square foot home. Dr. Gill is a psychiatrist. She completed medical school in Ireland in 2015 and a five year residency in psychiatry in Saskatchewan in 2021. She deposes to spending most of her time in Vancouver during her last year of residency due to the use of tele-health during the pandemic and a Vancouver based elective.
- [30] The parties met in late 2018 and were legally married on June 25, 2020 in Stockton, California. In October 2021, they had a religious wedding ceremony in the Napa Valley, California.
- [31] Mr. Gill alleges that when they met, he made it clear he had no intention of ever moving away from Las Vegas, where he had developed a strong professional and personal network and Dr. Gill shared his intention to live in Las Vegas.

- [32] Other evidence indicates there were discussions about the parties spending time in Vancouver and Las Vegas. In addition to practicing medicine, Mr. Gill's father has been involved in real estate development. Dr. Gill's father and some others depose to discussing various business opportunities including construction projects with Mr. Gill.
- [33] Dr. Gill alleges that in July 2021, the parties pursued purchasing a condominium in Vancouver so they could travel back and forth between Vancouver and Las Vegas given that all her family resided in Vancouver and none of Mr. Gill's family lived in Nevada. According to Dr. Gill, after looking at real estate in Vancouver, due to the high prices and Mr. Gill's belief the market was overinflated, he decided they should delay buying in Vancouver and buy in Las Vegas instead, where the market had "bottomed out". Mr. Gill states there was never a plan to buy two homes, and their search for real estate in Vancouver was cursory.
- [34] Ultimately, the parties purchased a house in Las Vegas on October 24, 2022 for approximately \$1.8 Million (USD), far below the original listing price, with 100% financing, resulting in very high monthly mortgage payments ("Las Vegas House").
- [35] Before that, in or about May 2022, they began trying to have a child. Wishing to conceive as quickly as possible, they participated in intra-uterine insemination at a private fertility clinic in Burnaby, BC. K was conceived in or about July 2022.
- [36] Despite being married, the parties did not begin living together until 2022. Mr. Gill says they were living together in his Las Vegas condo by February 2022, when Dr. Gill obtained her "green card" or conditional permanent residence. Dr. Gill says that they started living together after moving into the Las Vegas House and when she started working for Focus Mental Health Solutions ("Focus") in Las Vegas, in or about early November 2022.
- [37] Dr. Gill deposes to working full-time as a psychiatrist at Vancouver General Hospital ("VGH") from February 2022 up to and including October 2022. Her evidence is supported by MSP Practitioner Payment History Reports, which indicate she received income of more than \$270,000 between January and November 2022. Airline ticket receipts for return flights between Vancouver and Las Vegas, none of them for long periods of time, support her other evidence that she made several trips to visit Mr. Gill in 2022.
- [38] As indicated Dr. Gill alleges that before and after moving to Las Vegas in November 2022, Mr. Gill was emotionally and verbally abusive to her on many occasions. She describes being swept off her feet by him when they met and initially feeling safe with him. Dr. Gill identifies and also describes the strong role played by her strong belief that she had to make the marriage work regardless of how she was being treated. She attributes the belief to her upbringing and Indian cultural background, indicating divorce is still seen as taboo in their community. In addition she provides evidence about her ongoing hope that Mr. Gill would get the help and the abuse would stop.

- [39] Mr. Gill denies all allegations of "violence", deposing he has never been charged or convicted of any offence or accused "of any such complaint" in his lifetime. Alcohol and speeding being an aspect of some of the allegations, he also deposes to not "receiving" any speeding or alcohol related violations for at least the past 10 years. Scott Whittemore, who describes himself as very close to Mr. Gill and his family since 2008, says he has never known Mr. Gill to be aggressive or to put anyone in fear. William Van Houweling, his previous employer and apparently also a close personal friend, similarly deposes to always finding Mr. Gill to be caring, compassionate and giving.
- [40] According to Dr. Gill she met and spent time with Mr. Van Houweling only twice.
- [41] In support of his denial, Mr. Gill also alleges Dr. Gill has a "history" of making false and misleading statements, based on a disciplinary proceeding brought by the College of Physicians and Surgeons in Saskatchewan in 2018 during her residency. Dr. Gill was charged with and admitted to writing a prescription for a fellow resident and then denying she had done so in written communication with the College. In response, Dr. Gill readily acknowledges her misconduct, expresses deep regret about both signing the prescription and being dishonest and explains the underlying circumstances. She also provides evidence that Mr. Gill was well aware of the circumstances at the time.
- [42] Dr. Gills' first affidavit details multiple examples of alleged abuse before K was born, between April 2019 and February 2023. I highlight the disputed allegations because they are relevant to credibility in so far as they give rise to a much contested factual issue, the parties' intentions and related to this, Dr. Gill's decision to separate.
- [43] Most of Dr. Gill's examples involve Mr. Gill becoming extremely angry and losing control of himself emotionally and verbally. There are many allegations of him yelling or screaming at her, swearing at her and berating her. Without suggesting abuse can be justified, I note Mr. Gill's alleged abuse is mostly in response to very minor circumstances, such as not getting his way or a perceived slight. Sometimes intoxication is a factor.
- [44] A number of the alleged incidents occurred at family gatherings. During two incidents, one of them at a Thanksgiving dinner hosted by Dr. Gill's family in October 2019, she alleges that in addition to yelling and swearing at her, Mr. Gill pushed her.
- [45] Dr. Gill's sisters, her parents and Jagpaul Sahota an extended family member and close friend to both parties, provide similar, detailed evidence about Mr. Gill erupting in anger and lashing out verbally at Dr. Gill, family members and others such as restaurant staff. Their allegations address some of the same incidents she alleges, as well as additional incidents. Mr. Sahota alleges for example another particular incident at a Las Vegas restaurant which involved Mr. Gill yelling at restaurant staff for not seating them, and then blaming and ridiculing Dr. Gill. After being asked to leave the restaurant, Mr. Gill continued to berate Dr. Gill before locking her out of his "suite" while she pleaded to be let in.

- [46] Yasmin alleges that she often heard Mr. Gill screaming at Dr. Gill over Facetime when he was in Las Vegas and she was in Vancouver at their parents' home. Yasmin alleges he would say things like he did not even want to see her face, and would threaten divorce if Dr. Gill did not listen. In a text message exchange with Natasha on November 11, 2021, Yasmin tells her she can hear Mr. Gill yelling from her room using some of this language.
- [47] Dr. Gill also alleges Mr. Gill engaged in controlling behaviour such as demanding to look through her phone and tracking her location through an air-tag key to her vehicle.
- [48] The allegations related to his abusive behavior toward family members include an incident during a family dinner at a Las Vegas restaurant on December 26, 2022. At the time, Dr. Gill's family was visiting from Vancouver and staying with the parties. Yasmin did not attend the dinner because she was ill. Mr. Gill became very upset when it was suggested they leave before dessert to tend to Yasmin and began insulting each family member. When Dr. Gill's father asked him to stop, Mr. Gill began yelling at him. They were asked to leave the restaurant. Mr. Gill did not return to the Las Vegas House that night.
- [49] Mr. Gill acknowledges disagreeing with the suggestion they leave the restaurant "in the middle of dinner" because of Yasmin, but he alleges it was Dr. Gill's father, not him, who became extremely upset. According to Mr. Gill, Dr. Gill's father began yelling at him for being disrespectful to his wife. Mr. Gill describes himself sitting quietly in response and walking out of the restaurant because he was fearful of a physical altercation.
- [50] Yasmin's evidence includes a text exchange with Natasha who was at the dinner. After a series of texts in a family chat that included Mr. Gill, Natasha asks Yasmin to text her individually. After that Natasha writes: "Vick getting mad now".
- [51] Dr. Gill provides undisputed evidence that the following morning Mr. Gill told her, her family had to leave the Las Vegas House. Dr. Gill went with them to a hotel. She deposes to being fearful and very upset over his abuse of her and her family. Dr. Gill also deposes to deciding to return to Vancouver, Mr. Gill pleading with her to stay, as well as apologizing and telling her he would change.
- [52] According to Dr. Gill, Mr. Gill's parents drove to Las Vegas from California because of his behaviour. They too were apologizing and begging her to give Mr. Gill one more chance. After checking in to her flight at the airport, Dr. Gill says she was convinced to stay.
- [53] Mr. Gill alleges his mother came to Las Vegas because she frequently visited over the years. His mother gives much the same evidence.
- [54] Dr. Gill's evidence about his parents' involvement is consistent however with a text message to her from his mother on December 29, 2022 that includes: " we had a lengthy conversation with your dad and he told us everything. We will talk to him tonight after dinner. He needs help and you can participate and recommend a psychiatrist for him so he can start treatment for his anger issues and depression".

- [55] Mr. Gill's mother deposes that the message was only meant to pacify Dr. Gill who was "quickly trying to diagnose" Mr. Gill.
- [56] His mother's evidence also discusses some of the same family events at which Dr. Gill and her family members allege Mr. Gill behaved abusively. However, his mother does not address the alleged abuse or other alleged incidents at Ranjit's engagement party in September 2023 and a family dinner at Dr. Gill's parents' home in October 2023 that both she and Ranjit attended. Nor does Ranjit in his affidavit.
- [57] Starting January 2023, the parties attended counselling together for a period of time. Mr. Gill alleges the reason for the counselling was Dr. Gill's inability to draw boundaries with her parents regarding their intrusive overinvolvement. He also alleges that Dr. Gill never raised concerns about "violence" during the counselling.
- [58] During a conference call on November 3, 2023 that included her parents and his, according to Mr. Gill, Dr. Gill alleged the counsellor Ms. Toms advised her she should be fearful for her life around Mr. Gill. In a text exchange with Ms. Tom on December 11, 2023, Mr. Gill asks her to email him a release of records for the parties to sign. During the exchange, Ms. Tom writes that she did review her notes and there was nothing mentioning violence but she also references asking safety questions and never knowing how these may be interpreted. Although Dr. Gill does not respond to Mr. Gill's account of what she said about Ms. Tom during the conference call and not raising violence during the counselling, Mr. Gill's evidence does not indicate whether Ms. Tom ever spoke privately with Dr. Gill about issues of safety and whether any discussion of safety included emotional or psychological safety.
- [59] Further, Dr. Gill deposes to sending a text message to Mr. Gill's mother on January 4, 2023, detailing concerns about him minimizing his behaviour. In the message Dr. Gill writes the two of them had their first counselling session the day before and she booked the first psychiatric evaluation available but Mr. Gill was still very ambivalent about individual treatment. Dr. Gill indicates she did not receive a response.
- [60] Dr. Gill also states that she told her employer Jonathon Still about the issues she was having with Mr. Gill and needing to take time off. A text message exchange between the two starts with Dr. Still asking her, on December 28, 2022, if she made it to Vancouver okay. On January 2, 2023 she writes in part, "trying to hang in there and keep my stress level limited for the pregnancy and doing my best to focus on mind and the baby's well being. My husband has agreed to attend counselling but as you can imagine I'm still very disheartened by the whole situation". Dr. Still asks how long she intends to stop working for. Dr. Gill's evidence is she returned part-time in mid-January 2023, working about 20 hours per week.
- [61] Dr. Gill's evidence also includes a letter she sent to counsellor or therapist Warren Wheatly on November 2, 2023, the day before he was scheduled to meet with Mr. Gill. The letter includes a fairly detailed account of abuse in the relationship, including the onset and nature of Mr. Gills emotional and verbal abuse of her and its harmful impact on her, as well as her ongoing desire to work on the marriage. Describing a cycle of abuse that began some

months into the relationship, she refers to Mr. Gill being triggered and becoming a different person who would yell at her, berate her, swear at her and name call. The letter also discusses Mr. Gill behaving in the same way towards family and friends along with the alleged December 2022, September 2023 and October 2023 incidents. In addition, Dr. Gill writes that she blamed herself and would replay the incidents over and over again in an effort to figure out what she had done wrong. Dr. Gill tells Mr. Wheatly she began to walk on eggshells, afraid she would do something to cause him to lose his temper, and exhausted herself by micromanaging every situation, and continuing her efforts after K was born. Dr. Gill speaks of her ongoing love for Mr. Gill and her continued hope that he can be better. Advising Mr. Wheatly she has recently engaged in trauma counselling, she identifies her goal as the two of them working on their marriage.

Birth of K

- [62] Both parties' parents were in Las Vegas when K was born.
- [63] Dr. Gill's parents arrived in Las Vegas one week before. After his birth, her mother stayed with the parties and helped cared for him until returning to Vancouver with Dr. Gill and K on May 21, 2023.
- [64] Dr. Gill and her mother depose to providing K with almost all of his care since he was born. While staying with the parties at the Las Vegas House, Dr. Gill's mother describes sleeping in the master bedroom with Dr. Gill and K. Dr. Gill has always breastfed K, although he has also been bottle fed expressed breastmilk at times. Although she and others dispute the extent of Mr. Gill's care of K's care before and after he left Las Vegas, there is no dispute Mr. Gill loves and adores his son and has had some ongoing involvement. Similarly, although Mr. Gill portrays himself as actively involved in caring for K, he does not dispute that Dr. Gill has been and remains the primary caregiver, or her mother's significant role.

Reasons for Travel to Vancouver

- [65] Mr. Gill alleges that he only agreed to allow K to travel with Dr. Gill to Vancouver after her cousin died unexpectedly in BC and he was "still" breastfeeding. According to Mr. Gill, Dr. Gill had to attend the funeral on May 23, 2023 and to support her family who were in crisis. Mr. Gill describes Dr. Gill and her family as terribly distraught over the cousin's sudden death. He also deposes, "as a father, there would be no reason to allow my young son to leave the Family home, unless there were extreme circumstances such as a death in the family, which is exactly what happened".
- [66] Mr. Gill states the intention always was for K and Dr. Gill to return to Las Vegas at the end of three months or sooner.
- [67] Mr. Gill also says he signed a notarized travel authorization for a "period not to exceed three months" based on a template sent by Dr. Gill. Indicating she has the completed document, he attaches the blank template.

- [68] Dr. Gill acknowledges sending Mr. Gill the template form for him to complete because she thought she would need a travel authorization to cross the border with K. She does not address, however, what happened to the completed form.
- [69] Dr. Gill maintains that she and Mr. Gill never agreed that she and K would return to Las Vegas within three months, nor did they travel to Vancouver due to the death of her cousin, which was not sudden or unexpected. Instead, she alleges the trip was always intended to be indefinite but not permanent.
- [70] She and her cousin's father give undisputed evidence that her cousin suffered from a very long history of substance use disorder and a number of other serious physical health issues. Her cousin remained in hospital, where she was in and out of palliative care and the ICU, following an overdose in February 2023 until her death on May 9, 2023. She died several days after the family decided she would receive comfort care only and her feeding tube was removed. Dr. Gill deposes to visiting her cousin in the ICU during a trip to Vancouver in February 2023 to say her goodbyes.
- [71] According to Dr. Gill before K was born the parties had planned to have her mother come and stay with them in Las Vegas for a few weeks to help with the baby and then travel to Vancouver so they could continue to receive her mother's help because she could not remain in Las Vegas indefinitely.
- [72] Dr. Gill's parents give similar evidence. Dr. Gill's mother also deposes to feeling very trapped in the Las Vegas House because of the numerous security cameras which Mr. Gill was constantly monitoring.
- [73] Dr. Gill's father also deposes that Mr. Gill applied for K's birth certificate on an expedited basis.
- [74] Well before her cousin died, on April 26, 2023, Dr. Gill booked one way tickets on flights from Las Vegas to Bellingham on May 23, 2023, for her and her mother. The plan was to cross the border into Canada by land using K's birth certificate, which they did. Because of the date of her cousin's funeral, the tickets were then changed to May 21, 2023. Documents confirm the airline bookings.
- [75] Both parties provide evidence that Dr. Gill left much if not most of her clothing and other personal belongings including extremely valuable wedding jewelry in the Las Vegas House.
- [76] Dr. Gill's version of events also aligns with the parties' reference an upcoming trip to Vancouver and a flight on May 23, 2023 in a text message exchange on April 24, 2023. They also discuss a hair cut for Mr. Gill's dog Whistler because it is so hot in Las Vegas. Dr. Gill comments, "he will be more comfortable at least until we bring him to Vancouver". During the same exchange, Dr. Gill asks Mr. Gill, "when should I leave?" Further on she refers to "the regular" fare for the "23rd flight already being sold out which is why its more expensive".

[77] Further on May 1, 2023, Mr. Gill sent Dr. Gill a message that they should do a "Babymoon" to Whistler.

The Parties' Intentions: up to Three Months or an Indefinite Stay in Vancouver

[78] As I have indicated, there is no dispute that Mr. Gill drove from Las Vegas to Vancouver in Dr. Gill's car so she would have a vehicle there, bringing Whistler and more belongings, arriving on May 30, 2023.

[79] There is also correspondence between Dr. Gill and Vancouver Coastal Health in January 2023. When they offer to categorize her as on a leave of absence if she planned to do any locum work within the next 12 months, Dr. Gill responds that she will be in Vancouver in the summer to do locums.

[80] Dr. Gill was not entitled to maternity benefits from her position with Focus in Las Vegas, which she ended on June 28, 2023. Responding to an inquiry from Dr. Still about when she would be returning to Las Vegas, Dr. Gill writes she was planning to remain in Canada for the time being and had not yet made plans to return. She also writes given the lack of family support in Las Vegas, when she did eventually return, her desire was to do 100% telepsychiatry so she could remain at home with K.

[81] Mr. Gill says he was unaware of all of this.

[82] Dr. Gill's evidence includes a text message from Mr. Gill sent perhaps around August 9, 2023, where he asks her to ask Focus to take her off their website, "just so I can send the documents back and tell them you don't work there".

[83] She alleges that she and Mr. Gill discussed her returning to work at VGH to do inpatient psychiatry when she was in Vancouver. According to Dr. Gill, Mr. Gill was aware of previous discussions she had with the department head before leaving in October 2022 about retaining her position so she could continue to work at the hospital when she was here, which he encouraged, also appreciating the income.

[84] His evidence includes a text exchange from May 24, 2023 that begins midstream in which she refers to a brief locum in July and changing the status of her BC medical license.

[85] That same day Mr. Gill sent Dr. Gill a letter dated April 28, 2023 from Health Insurance BC, acknowledging her notification of a permanent move from BC and advising her MSP account was closed effective May 31, 2023. In responding she writes: "No longer a Canadian resident".

[86] K had three medical appointments in Las Vegas before leaving for Canada. Mr. Gill deposes that K remains insured for medical care benefits in the United States through his employer.

[87] K's US passport was issued in early July 2022.

- [88] On July 17, 2023, K received uninsured medical treatment in Vancouver to assess a heart murmur, at BC Children's Hospital. Mr. Gill suggests Dr. Gill later applied for MSP coverage surreptitiously. Although she does not identify the date, she deposes to applying because Mr. Gill was angry about the significant cost of K's uninsured medical care in Canada.
- [89] Similarly, Mr. Gill points to Dr. Gill not informing or involving him in an application for K's Canadian citizenship certificate, which she submitted on October 31, 2023, as evidence of her hidden intention to relocate.
- [90] Again, she alleges he was angry she had not applied for the certificate based on his view it was preventing K from receiving MSP.
- [91] K does not have a Canadian passport. According to Dr. Gill this is because Mr. Gill recently objected when she asked that they apply for one.
- [92] After driving to Vancouver on May 30, 2023, Mr. Gill remained here until June 12, 2023. He was also in Vancouver from June 17 to July 2; July 16 to August 3; August 26 to September 25; and October 13 to October 24, 2023. Mr. Gill's parents and Ranjit also came to Vancouver in July 2023 for four days and his mother, Ranjit and Ranjit's fiancé were here from October 19 to 23, 2023.
- [93] Mr. Gill deposes that on July 6, 2023, the parties engaged in a text exchange about opening medical clinics in Las Vegas together in the future.
- [94] He alleges that in or around the end of July and the beginning of August 2023 he began asking Dr. Gill when she would be coming home anticipating a return in August, although she started working at VGH on August 4, 2023.
- [95] The day before, Dr. Gill attended EMR training at VGH and Mr. Gill returned to Las Vegas. When he arrived at the Las Vegas House he found what he says was a small water leak in a guest bathroom. He alleges Dr. Gill told him she was not willing to return with K until the repair was finished, expressing concern about the impact on K's health if he were to be exposed to the repairs. He also says she refused his offer to rent another home while the repairs were being done.
- [96] Dr. Gill denies that Mr. Gill ever asked her to return to Las Vegas with K or having any discussions about a return date in August 2023. There are no written communication between the parties showing they were discussing a return that would accord with Mr. Gill's account.
- [97] The evidence also indicates that the leak and the damage it caused were quite significant. The repair project and a related renovation did not complete until well into October 2023. During that time in text message exchanges Dr. Gill initiates discussions and engages in decision making regarding various aspects of the renovation, arguably inconsistent, as her counsel submits, with an intention not to return.

- [98] On August 8, 2023, Mr. Gill sent Dr. Gill a message that stated, "I'm sad I won't see my family in a while." She responds: "I know, I can tell its been really hard for you. We are sad too. But we will all be back together very very soon."
- [99] On August 11, 2023, the parties exchanged text messages about a potential nanny in Las Vegas, her availability on particular days, Dr. Gill's possible future work schedule, her current work schedule, which she identified as Tues/Wed/Thurs from 12:00 p.m. to 5:00 p.m., as well as Mr. Gill's employment plans. During the exchange, Mr. Gill comments he will be there too and can take care of K but they need to talk about if going back to his previous employer UMC is good or not. Dr. Gill responds with a series of highly supportive texts that include for example, "[o]k no problem we can talk about it. Don't stress about anything now, at the end of the day I just want you to feel happy You have to decide what makes YOU feel happy and fulfilled. That's what's most important". He writes, "I'm meeting with Mason tomorrow and will bring it up again. Let's see what there is. I have a good relationship with him and the board, so that might be my best shot getting back into health care in Vegas. Unless I get into something else not hea[l]thcare". Dr. Gill encourages him to take time out to make the decision and think about all available options. The exchange carries on. Dr. Gill ends with, "[w]e will be ok. We have more than enough money, we have our health, we have a beautiful home, we have an amazing child, we have our family, nothing else matters".
- [100] Dr. Gill deposes that the nanny referred to in the text messages fell through. After which, Mr. Gill suggested her family's nanny in Vancouver, Susan, travelling back and forth to Las Vegas with them.
- [101] After the alleged wrongful retention date, on August 24, 2023, Mr. Gill sends Dr. Gill a text stating he wishes he was there (in Vancouver) to help her but they are in different countries.
- [102] As I have stated, during his trips to Vancouver Mr. Gill stayed with Dr. Gill and K in her parents' very large home. The evidence shows the three of them went on family outings together and starting in August 2023, Mr. Gill would also drive Dr. Gill to and from her job at VGH.
- [103] There is no dispute Dr. Gill has continued to hold medical licenses in Nevada and California. She deposes to continuing to do virtual outpatient work in California for a company called Psychiatric Alternatives and Wellness up to 15 hours per week and occasional consulting work on legal cases in Nevada.
- [104] While Mr. Gill was in Vancouver in September 2023, the parties travelled with K and her parents to California for the weekend to attend his brother Ranjit's engagement party and then back to Vancouver. Dr. Gill deposes to Mr. Gill becoming intoxicated and aggressive, getting into an argument with his parents and yelling at her and her parents about leaving the party. Dr. Gill's mother provides very similar but more detailed evidence about Mr. Gill yelling, screaming and swearing at his parents and yelling and screaming at Dr. Gill as he carried K to the car because she was not walking fast enough.

- [105] Mr. Gill alleges Dr. Gill's evidence on this point is not true and she is exaggerating. He denies being aggressive or intoxicated. Neither his mother nor his brother Ranjit address her allegations or those of her mother.
- [106] Mr. Gill indicates he returned to Vancouver on October 13, 2023 to finalize plans for Dr. Gill and K's return to Las Vegas. Again there are no written communications to this effect. Instead two days prior, Mr. Gill sent a message to Dr. Gill informing her that their wrist bands or tickets to an event in Las Vegas in early November had arrived. During their exchange he asks her is she coming to the event. In response, she states she does not know and has to figure out what is going on with the fertility situation and K. She tells him they could sell the tickets for double what they paid. The parties then discuss and agree on where to sell them and for how much.
- [107] On October 19, 2023, the parties participated in an insemination procedure at the private medical clinic in Burnaby in an effort to conceive another child.
- [108] Mr. Gill alleges that Dr. Gill told him that same day that she had agreed to work at VGH for a brief period ending November 16, 2023, which concerned him because it delayed their return.
- [109] Ranjit deposes to having a conversation with Dr. Gill during dinner one evening while he was visiting Vancouver without specifying the date. He says she spoke about deferring nanny interviews in Nevada because the candidates wanted to start right away and she was "reluctant to articulate a return date".

October Incidents

- [110] Dr. Gill's family hosted a dinner for Mr. Gill's family members on October 21, 2023. Dr. Gill and some of her family members allege that Mr. Gill became upset with her and began yelling at her in front of her mother, their nanny, his mother and K who started to cry. Mr. Gill left with his mother and returned later that night. When he attempted to see K for the first time in two days on October 23, 2024, he was napping. Mr. Gill again began yelling at Dr. Gill, her mother, and Yasmin. His yelling woke K causing him to cry. Mr. Gill left Dr. Gill's parents' home.
- [111] Dr. Gill also alleges that when he returned, he started packing and then left again without seeing K. In a text message sent on October 23, 2023 at 8:58 p.m., Mr. Gill writes:
- I just came back and packed my things. I'm going to rest in the car and will leave it as Sukrit and Natasha's house in the morning. I'll be back some day and turn around and take the rest of my things and Whistler back to Las Vegas. I'll let you know when I can. Give my love to K. I'm sorry for what I said and did to upset you, but I've always tried my best. It's been difficult being away from the family.
- [112] About an hour later he sent another text:

I'm sleeping in the car on a Vancouver sleep and you didn't want to talk to me before I left and now you don't even respond to my messages.

[113] Natasha's evidence includes a text exchange with Dr. Gill on or about this same date. During the exchange, Dr. Gill tells Natasha that she is willing to do whatever it takes to help Mr. Gill get a handle on his emotions and get control of his anger, also stating "he has a problem with his anger management". Dr. Gill also states she is willing to go to counselling with him, to stand by him whatever it takes, but until she sees some initiative from him, she cannot subject K to "this". Natasha agrees something needs to change, otherwise it will keep happening. Natasha also says, "we all want to support you guys in doing whatever it takes".

[114] Mr. Gill deposes to speaking with Dr. Gill about when she and K would be returning after their text exchange on October 23, 2023. Consistent with (other) text messages to Natasha, however, Dr. Gill deposes to having no communication with Mr. Gill until October 27, 2023 at 6:42 p.m. when he sent a message to Dr. Gill asking if she was ready to talk.

[115] She responded that she would call him in 20 minutes. He then writes:

I'm sorry for my actions towards you recently and in the past. I love you with all my heart and never want to hurt you. I want to be a better husband to you and father to K. Please believe me when I say, I always do my best, but I know its not enough. My fear is I'll never reach where you need me to be and what we have will be gone.

[116] At 9:22 p.m., he asks her if she is agreeable to him FaceTiming with K in the mornings moving forward. Dr. Gill agrees. He then asks if they can schedule a time in the evenings as well and suggests she could text him when K wakes up. She responds, "ok will do". Mr. Gill also tells her the renovation of the Las Vegas House finished the day before and he needs to get it cleaned. After further exchanges about the cleaner's phone number and scheduling evening calls, Mr. Gill writes, "can we talk in the morning about your plans on coming back with K. I want to come and bring back Whistler soon as well, followed by ? and Angena ?". She writes, "I'm trying to put K to sleep, we can talk in the morning". He responds:

Sorry, call me when he's up. Have a good night. I love you . you can't even say that back to your husband? I know K is asleep and you ignore my message when I'm trying to be affectionate. It's as if I cheated on you I reached out to you today because I wanted to talk. I appreciate you talking to me, but just ignoring me doesn't help and I'm going to sleep knowing you're purposely trying to hurt me. Why are you ignoring me. You've never ignored me like this. Do you have that much hate in your heart? What if I needed to talk to you and this was an emergency, you'd just ignore my calls?

[117] Dr. Gill says by this point she was uncertain she could remain in the marriage, if Mr. Gill did not change his behaviour.

- [118] On November 2, 2023, Dr. Gill sent a letter to the counsellor Mr. Wheatly that I referred to earlier. Again she outlines the onset and nature of his abuse of her, its harmful impact on her, as well as her ongoing hope he can get better as well as her commitment to work on their marriage. She also tells Mr. Wheatley she has suggested to Mr. Gill they spend time apart working on themselves along with his view this would cause things to get worse.
- [119] Dr. Gill deposes to a distressing speaker phone call that same day involving her parents and Mr. Gill's parents. Dr. Gill alleges that during the call his mother threatened to have her and her parents put in "federal prison" and to ruin her medical careers and her father's and Natasha's. Although Mr. Gill's mother specifically responds to Dr. Gill's affidavit she does not address this allegation.
- [120] According to Dr. Gill, Mr. Gill was non-responsive when she told him about his mother's threats on November 3, 2023. He deposes to listening in on the call and denies that his mother ever made them.
- [121] I refer to this evidence because Dr. Gill relies on it to explain coming to the realization that not much was going to change. Given the history of the relationship, she states she realized how difficult it would be to have stable marriage without the support of both sides of the family. After meeting with her trauma counsellor and further self-reflection, she deposes to deciding to separate from Mr. Gill on November 6, 2023 and informing him the next day.
- [122] Dr. Gill's evidence also includes various allegations of subsequent misconduct by Mr. Gill. I mention only her allegation that he continued to access the security system on her parents' home from Las Vegas.
- [123] Mr. Gill was provided with access to the system which controls the garage door. The security system includes outdoor security cameras and the ability to see and hear inside the house through iPads attached to the walls.
- [124] In response to Dr. Gill's other allegations of tracking her, Mr. Gill deposes using the AirTag on the car keys to find the keys themselves, which Dr. Gill tended to lose. He also deposes both parties had the ability to see the location of the other through their iPhones. Regarding her parents' security system, he states that many times the app on his iPhone would stay open in the background, as he tends not to close apps.
- [125] Dr. Gill's evidence includes however pages of connection logs from her parents' security system that show Mr. Gill's iPhone connecting and disconnecting many, many times on multiple dates from October 25, 2023 up to and including November 8, 2023 and a significant increase in his connections and disconnections starting November 1, 2023, even though the connection logs also show his login being rejected on October 30, 2023.
- [126] The evidence also includes an affidavit from a private investigator who deposes to being retained by Yasmin to conduct surveillance on Mr. Gill in Las Vegas, starting in early December 2023 and continuing on and off for the month. I do not intend to discuss his findings. I also do not intend to discuss the many potentially harmful allegations made

against some of Dr. Gill's family members, all of which, in my view reflects an escalation on both sides, in response to the separation and this litigation which began almost immediately.

- [127] Dr. Gill's green card expires on February 16, 2024. US Immigration Lawyer Patrick Lindemann deposes that Dr. Gill obtained her conditional permanent residence because of her marriage to Mr. Gill. She became eligible to apply for permanent resident status on November 18, 2023. If she does not apply by February 16, 2024 she will lose her current status. Mr. Lindemann states she can apply individually or jointly with Mr. Gill even if they are "physically separated". If they apply jointly both may be required to attend an interview. Although Mr. Gill deposes that Dr. Gill is entitled to permanent resident status, she is only entitled to apply. The government's decision is discretionary. Mr. Gill also deposes he will take any steps that are required to apply for her permanent residency and offers an undertaking to this effect. Dr. Gill alleges that during the marriage, Mr. Gill told her numerous times he would contest her green card extension if she decided to end the marriage.
- [128] In support of his theory that Dr. Gill never intended to return to Las Vegas with K, Mr. Gill suggests Dr. Gill's affidavit of law from lawyer Emily McFarling filed January 8 2023 shows at para. 7 she was given false information that Mr. Gill had agreed to a relocation. Although Ms. McFarling opines that Dr. Gill is not in violation of the Nevada law regarding relocation, I see no such reference. In any event, the affidavit of law was prepared well after the parties separated, Dr. Gill served her notice of family claim and Mr. Gill submitted his return application to the United States Central Authority.

Issues

- [129] The issues for determination include whether Dr. Gill wrongfully removed K on May 21, 2023, based on Mr. Gill's assertion his consent to the removal was vitiated by her deceit. If the removal was not wrongful, I must go on to determine whether Dr. Gill wrongfully retained K in Canada, where a significant issue is the date of retention. Mr. Gill alleges Dr. Gill wrongfully retained K in early August 2023 based on his allegation they agreed Dr. Gill and K would stay in Vancouver for a maximum three months and in early August she made it clear she was refusing to return with K as agreed. In contrast, Dr. Gill alleges that she and Mr. Gill agreed to an indefinite or open ended stay in Vancouver and she did not retain K until November 6 or 8, 2023 when she decided to separate and Mr. Gill submitted his return application. Given the numerous and material conflicts in the evidence, credibility is also a significant issue, which I turn to now.

Credibility

[130] Neither party suggested cross-examination was necessary in order for me to properly assess credibility. I begin with a discussion of the legal principles that contemplate witness testimony, but are equally applicable to an assessment based on affidavit evidence.

[131] Credibility or truthfulness and reliability or accuracy are related but distinct concepts. A truthful witness, for example, may be mistaken about what they observed or in their recollection. Also, credibility and reliability are not all or nothing concepts. I may believe some, all, or none of a witness', here a deponent's, evidence and attach different weights to different parts of their evidence: *R. v. R. (D.)*, [1996] 2 S.C.R. 291, [1996] S.C.J. No. 8 at para. 93.

[132] The basic approach to the assessment of the truthfulness of any interested witness was discussed many years ago in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 (C.A.) at 357:

In short, the real test of the truth of the story of a witness must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[133] *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, identified several factors that may be considered in assessing credibility and reliability. Relevant here are: the capacity and opportunity of the witness to observe the events at issue; the witness's ability to remember those events; the ability of the witness to resist being influenced by their interest in recalling those events; internal and external inconsistency in the witness's evidence, meaning did their evidence change between direct and cross-examination (here between affidavits) or between prior statements and their evidence; whether the witness's evidence harmonizes with, or is contradicted by other evidence, particularly independent or undisputed evidence; and whether their evidence seems unreasonable, improbable or unlikely, bearing in mind the probabilities affecting the case.

[134] Related to the last factor, which captures the Chorny principle, judges are permitted if not expected to rely on their common sense and life experience in assessing reasonableness and plausibility. However, the law prohibits stereotypical reasoning or speculation about human behaviour from affecting the assessment of credibility. Bearing in mind the disputed allegations of family violence, it is well recognized that there is no typical victim, typical perpetrator or typical ways in which a victim or perpetrator will behave.

[135] It follows perhaps that the credibility of a witness (deponent) must be assessed in the context of the evidence as a whole. Lastly, credibility is not a numbers game. The fact that more witnesses say one thing and less say another, is not determinative. Instead it is the force of the evidence of any given witness or deponent that counts.

Discussion

- [136] Focusing on the parties, I expect it is apparent from my overview of the evidence that I have significant concerns about the credibility of Mr. Gill's disputed evidence and limited concern about Dr. Gill's. Of course, her admitted dishonesty to the College of Physician and Surgeons, raises a general concern about her willingness to be untruthful when it protects her interest. At the same time, her unrestrained acknowledgement of her wrongdoing and expression of deep regret impressed me as genuine. In any event and although it is not my role to determine custody or parenting arrangements for K, both parties' interest in the outcome of Mr. Gill's application could not be more apparent. In these circumstances, careful scrutiny of each party's evidence is particularly important. Having done so and as I have attempted to demonstrate, typically, Dr. Gill's account of contested factual circumstances is supported by objective evidence, contemporaneous communication and or it aligns with the probabilities affecting the case. Of course this also means, Mr. Gill's account is inconsistent with objective evidence, contemporaneous communications and the probabilities affecting the case.
- [137] I do not intend to review all the instances that make up this rather marked pattern other than to state they certainly include the dispute over when Dr. Gill actually moved to Las Vegas in 2022, the reasons for Dr. Gill's travel to Vancouver with K, the parties' intentions with respect to the length of stay in Vancouver, and the allegations of Mr. Gill's emotional and verbal abuse of Dr. Gill and similar outbursts of anger at others.
- [138] I will explain my assessment of the disputed evidence of abuse, given its importance to Dr. Gill's intention in particular. First, I was struck by the contrast between the very detailed evidence of multiple incidents and in various circumstances that Dr. Gill and her family members provide. All of their evidence is factual in tone and content as opposed to inflammatory. None of it is unrealistic. On the contrary, Dr. Gill's evidence on its own and in combination with the evidence of her family members provides a believable if not compelling account of non-physical intimate partner violence.
- [139] Mr. Gill's blanket denial of "violence" and the absence of any criminal charges or convictions does not undermine allegations of non-physical violence. Although Mr. Gill does deny certain aspects of some incidents, many are not addressed. As I have also noted, his mother and his brother provide evidence about alleged incidents involving them or that they would have observed. While I recognize Mr. Gill's less detailed evidence may reflect the view that the allegations are not relevant, given Dr. Gill's account of the circumstances leading to her decision to separate and the significance of the dispute over the date of retention, I placed some weight on his less than fulsome response and the lack of response from his family members. Further, I find his mother's evidence that she was only trying to placate Dr. Gill in the text message that Mr. Gill needs help and she could suggest a psychiatrist for him so he could start treatment for his anger and depression, following the December 2022 restaurant incident, frankly unbelievable. I give little weight to the positive character evidence of Mr. Gill close friend and his former employer/friend, because as I

have indicated, there are no typical behaviours for abusers or victims. Assuming both are being truthful, neither deponent was present for any of the alleged incidents. One of these friends, Dr. Gill alleges she met only twice. Further Dr. Gill depicts Mr. Gill as wonderful and loving as well as controlling and abusive in response to flares of intense anger.

[140] I would also characterize Mr. Gill's evidence indicating he would never have allowed K to leave Las Vegas absent extreme circumstances as consistent with Dr. Gill's allegations about his controlling behaviour. The same is true of his frequent connecting to and disconnecting from her parents' security system before and after the separation. Further, his explanation for accessing her parents' security system from Las Vegas makes little sense based on the content of the security records. Additionally, Mr. Gill's text messages to Dr. Gill on October 23 and 27, 2023, are at least consistent with her allegations of emotional abuse generally and her specific allegations regarding the October 21 and 23, 2023 incident(s). Again, Mr. Gill apologizes for what he said and his actions but then quickly escalates when she does not respond to his messages.

[141] There is also Mr. Gill's evidence about the requirement to live in the United States because of his service in the air force reserves that was revealed by his later affidavit to be exaggerated if not misleading.

[142] Ultimately, I conclude Mr. Gill's disputed evidence must be approached very cautiously. In general, where his evidence conflicts with Dr. Gill's evidence I prefer hers, unless his evidence is supported by objective evidence or other evidence I accept and hers is unsupported.

Analysis

[143] To establish that Dr. Gill wrongfully removed K from the United States or wrongfully retained K in Canada, Mr. Gill must establish on a balance of probabilities:

1. When the removal or retention took place;
2. K was habitually resident in the United States immediately prior to the removal or retention; and
3. The removal or retention breached Mr. Gill's rights of custody under the law of the habitual residence.

[144] Central to the parties' positions as I have indicated is a dispute about the parties' intentions regarding the length of travel to Canada, the reasons for the travel and whether as Mr. Gill alleges Dr. Gill deceived him into agreeing.

Wrongful Removal

[145] There is not dispute that K was removed from the United States on May 21, 2023.

- [146] Although Dr. Gill does not concede that K was habitually resident in the United States by that date, she agrees that Mr. Gill was exercising rights of custody at the time of the removal based on Nevada law.
- [147] On this last point, the affidavits of law provided by both Ms. McFarling and Marshal Willick show that under the Nevada Revised Statute 125C.0015, parents have joint custody of a child regardless of marital status until otherwise ordered by the court.
- [148] Again, Mr. Gill takes the position that K removal was wrongful because his consent to K travelling to Canada for up to three months was vitiated by Dr. Gill's deceit, alleging that although she agreed she and K would return to the United States within three months, her actual intention was to relocate him to Canada.
- [149] Dr. Gill argues the evidence establishes that she and Mr. Gill never agreed that she would return to Las Vegas with K within three months. Instead they agreed to an open-ended stay in Vancouver at her parents' home. Their plans were fluid. Until she decided to separate, she asserts she intended to return to Las Vegas with K on a yet to be determined date.
- [150] As I have indicated Mr. Gill's evidence that he would not have allowed Dr. Gill and K to leave Las Vegas absent extreme circumstances such as the death of her cousin and the suggestion she deceived him into agreeing to three month trip, does accord with Dr. Gill's allegations about his abusive behaviour which I have accepted, but I also accept the weight of the other evidence regarding the reasons for the travel and length of stay is one of several reasons I found her evidence credible and Mr. Gill's not. It is clear to me that the trip was planned as alleged by Dr. Gill, that is in advance of her cousin's death and not because of it. Again, for example, the parties discussed an upcoming trip to Vancouver and a flight on May 23 and the tickets were purchased all before her cousin died.
- [151] I also accept the parties felt they needed the support of Dr. Gill's mother in caring for their first baby. It is obvious Dr. Gill has very close relationships with her parents and her siblings but her mother in particular. Even after marriage Dr. Gill continued to reside with her parents in Vancouver in 2021 and for most of 2022. After her move to Las Vegas in late 2022, her family visited both of them in December 2022 and she visited her family in Vancouver in February 2023. Throughout their relationship Mr. Gill also made many visits to Vancouver. The parties have no family in Las Vegas.
- [152] The need for family support is also consistent with the evidence of Mr. Gill less than hands on approach to K. Dr. Gill's mother is the only grandparent who does not work outside the home and available to provide daily help. There is no dispute she was not prepared to remain in Las Vegas indefinitely after K was born.
- [153] Based on my assessment of credibility and the whole of the evidence on this issue, I reject the allegation that Dr. Gill deceived Mr. Gill into agreeing to a maximum three month visit. I find instead that they agreed that she and K would stay in Canada for an indefinite period at her parents' home.

- [154] The missing travel form has given me pause because Dr. Gill's evidence does not address it squarely. However, my concerns about Mr. Gill's credibility are such that even if he did set out a three month period in the travel form, I am satisfied the parties did not actually agree to fixed return date or no more than three months. Apart from the missing travel form, and despite the parties' frequent texting there is no written communication between them indicating or referring to an agreement or plan to limit K's stay in Vancouver to three months. If there was such an agreement or plan and Dr. Gill expressed an unwillingness to abide by it in early August, I would fully expect some communication in writing either at that time or afterward. I am reinforced in this conclusion, by the evidence that Mr. Gill was aware that Dr. Gill planned to and then began doing temporary work at VGH in early August 2023 and she left her job with Focus. The same is true of Mr. Gill's messages during this time expressing his wish to be with them in Vancouver.
- [155] Along with the parties' evidence and absence of evidence, there is no evidence from family members suggesting even an awareness of a fixed return date. Mr. Gill's family members visited here in July 2023 giving rise to the opportunity for this kind of discussion in person before the alleged return date. They also visited Vancouver after the alleged return date in October 2023. Mr. Gill continued to travel back and forth to Vancouver for fairly extended periods until October 24, 2023. During that time Dr. Gill continued to work at VGH. Her evidence he was fully supportive of this is again consistent with an absence of written communication to the contrary.
- [156] The first mention in writing of Dr. Gill returning, actually "going" to Las Vegas, is on October 13, 2023 when Mr. Gill asks her in a text message if she would be coming to a November event in Las Vegas.
- [157] Mr. Gill's comments to Dr. Gill in their text messages on October 23 and 27 also contradict his allegation of a planned or agreed upon return date some months earlier. Again on October 23, 2023, he talks about returning to Vancouver one day to get his dog and the rest of his things. His only mention of K, is give my love to him. On October 27, 2023, he apologizes for his behaviour, escalates as I have said, but also tells Dr. Gill the renovation is finished, her apparent excuse for not returning sooner. But there is no discussion of a return.
- [158] At the same time, the picture of Mr. Gill that emerges from the evidence as a whole is of a highly assertive if not forceful person who would not hesitate to insist on what he wanted and what Dr. Gill had agreed to.
- [159] Mr. Gill's suggestion that Dr. Gill deceived him rests on his allegation he agreed to no more than a three month trip, which I have rejected. I am satisfied that Dr. Gill did not form the intention to remain in Canada with K until she decided to separate.
- [160] Although it is certainly possible Dr. Gill could have harboured a secret plan based on Mr. Gill's history of abuse, she does not allege any significant incidents of abuse or out of control behaviour from in or about February 2023 until Ranjit's engagement party in

September 2023. Further, after that and inconsistent with a secret plan, Dr. Gill arranged for and the parties participated in a fertility treatment here in BC, planning obviously to conceive another child. Although not admissible for its truth but to rebut the allegation of recent fabrication, her contemporaneous private statement to Natasha following the October 21 and 23 incident expresses both her deep concern over Mr. Gill's anger and his need for help and her readiness to do anything it takes to continue the marriage.

[161] Accepting Dr. Gill's intention until she decided to separate on November 6, 2023 was to return to Las Vegas with K on a date yet to be fixed, it is also apparent that by about October 27, 2023 that intention was less certain and dependent in part on her view that Mr. Gill needed to demonstrate a commitment to changing.

[162] Absent any deceit and given Mr. Gill's consent to K travelling to Canada with Dr. Gill for an open-ended stay, I find the removal was not wrongful.

Date of Retention

[163] Dr. Gill relies on *Bearistro v. Cook*, 2018 NSCA 90, for its conclusion regarding the date of retention where the left behind parent consents to open-ended or indeterminate travel. The case involved a mother who travelled from Washington state to her home in Nova Scotia with the parties six week old daughter, following an incident of domestic violence. The father had consented to the travel. He expected her to return to Washington within six months but there was no agreed upon return date. Within four months it became evident she would not be returning.

[164] The Nova Scotia Court of Appeal overturned the decision of the application judge, which found the child habitually resident in the United States and ordered her return. Noting the application judge had not fixed a date or time frame for considering if the retention was wrongful, the Court observed that where the consent is open-ended or indeterminate, the date is usually fixed as of when the left behind parent first formally asserted their right or demanded the child's return. In applying this approach the Court fixed the time for retention based on when the mother clearly communicated her intention to stay in Nova Scotia, which coincided with when the father communicated he no longer consented to the child remaining in Canada.

[165] *Bearistro* is strong persuasive authority. This is particularly so given it was decided post-Balev, the decision includes a careful consideration of the hybrid approach. Further, I was provided with no contrary authority.

[166] Following *Bearistro* and having found Mr. Gill consented to K staying in Vancouver for an open-ended or indeterminate period, I fix the retention date as of November 6 or 8, 2023 when Dr. Gill decided to separate and when Mr. Gill submitted his application for K's return.

Habitual Residence

- [167] The relevant period for determining K's habitual residence is immediately prior to the retention date(s).
- [168] Applying the hybrid approach mandated by Balev and explained in Ludwig v. Ludwig, 2019 ONCA 680, requires K to be the focus of the analysis. I must determine the focal point of his life, namely the family and social environment in which his life has developed up to November 6, 2023. In determining the focal point of K's life, three kinds of links and circumstances are assessed:
1. His links to and circumstances in the United States;
 2. The circumstance of his move to Canada; and
 3. His links to and circumstances in Canada.
- [169] In assessing those links some of the factors to consider include his nationality, the duration, regularity, conditions and reasons for his stay in Canada and the parties' circumstances including their intention.
- [170] On this last point, Balev and Ludwig also provide that parental intention is only relevant as a tool to assess the child's connections to a given country.
- [171] I also highlight Balev's commentary that the hybrid approach is fact-bound, practical and unencumbered with rigid rules, formulas or presumptions.
- [172] A citizen of both the United States and Canada, K was born in Las Vegas on April 15, 2023. After he and Dr. Gill were discharged from hospital, he lived in the Las Vegas House with his parents until he was 37 days old. Mr. Gill's parents visited for three days from April 13 to 16, 2023. Both of Dr. Gill's parents were there for longer before and after his birth. Dr. Gill's mother remained, helping to care for K, until she travelled back to her home in Vancouver with him and Dr. Gill. Before that Dr. Gill's father also returned to the Las Vegas House for a time and Yasmin was there as well before the trip to Vancouver on May 21, 2023.
- [173] Mr. Gill deposes to taking a paternity leave that started before K was born. Dr. Gill deposes to Mr. Gill leaving the home after K was born to attend hockey games in the evening and to travel to California. Nonetheless, I accept Mr. Gill was an almost daily presence in K's life until May 21, 2023, and probably engaged in some aspects of his physical care. Again, there no dispute Dr. Gill was and has remained K's primary caregiver. He has also been cared for every day by her mother. During K's short time in Las Vegas as a newborn, he had no social connections outside of his family. The parties agree he had three medical appointments, typical of newborns in Las Vegas. There is no extended family that lives in Las Vegas. All of Mr. Gill's family live in California.
- [174] Turning to other connections to Las Vegas, the parties purchased the Las Vegas House in or about late October 2022 where they lived together until May 21, 2023 and where Mr. Gill continues to reside. Before that Mr. Gill resided in a condominium. Mr. Gill is a United States citizen who as I understand it has lived in the United States his whole life and in

Nevada since in or about 2010. From the time of the removal to the retention, Mr. Gill was not employed in Las Vegas. His employment was and remains as the CEO of Gill Medical Associate based in California. There is very little evidence about his work schedule for Gill Medical Associates. I infer he works remotely. There is no evidence about what is required of him in terms of time to fulfill his role as the Nevada representative to ACHE. As indicated although Mr. Gill emphasized he must live in the United States because of his position as a captain in the United States Airforce reserves, his most recent evidence indicates he is in the process of ending this position. At the same time, Mr. Gill has no formal status in Canada.

- [175] By the time of the removal, Dr. Gill had been living in Las Vegas since early November 2022. She worked for Focus in Las Vegas until sometime in April 2022. She had and continues to hold medical licenses in Nevada and California. She also had a Nevada driver's license. I do not mention her tax filings because it is clear that most of Dr. Gill's employment income in 2022 was earned in Canada and she worked only part-time for Focus from January 2023 until before K was born.
- [176] I have already found that K travelled to Vancouver with his mother and maternal grandmother for an indefinite stay at his grandparents' home in Vancouver. I have also found the parties' intention in agreeing to an open-ended stay included an intention to return to Las Vegas on a date to be determined. In other words, although they had agreed to an indefinite stay, they did not intend for Dr. Gill and K to move to Vancouver permanently.
- [177] Between October 27 and November 6, 2023, I accept Dr. Gill was uncertain about continuing with her marriage. During this time she remained committed to improving the relationship but also focused the need for Mr. Gill to change. I have found Dr. Gill did not form a clear intention to remain in Vancouver with K permanently until she decided to separate from Mr. Gill on November 6, 2023. After learning of her decision the following day, essentially Mr. Gill revoked his consent and took the almost immediate step of submitting his return application.
- [178] I accept Dr. Gill's evidence that she has continued to hold Canadian bank accounts and credit cards, but she continued to deposit her employment income into the parties joint account from which the mortgage on their Las Vegas house was paid. She was a joint card holder on Mr. Gill's Amex until the separation although she deposes to not using it regularly during the last seven months of the relationship.
- [179] From August 4 to November 6, 2023, Dr. Gill worked about 20-25 hours per week as an in-patient psychiatrist at VGH. Again, she also continued to do some remote outpatient work for Psychiatric Alternative in California and occasional consulting work on legal cases in Nevada. All of her work since her arrival in Vancouver has been facilitated by her family's care of K.

- [180] Since arriving in Vancouver, Dr. Gill and K have remained at Dr. Gill's parents' home. Again, Dr. Gill has been K's primary caregiver but her mother has continued to be involved ever day. Dr. Gill intends to continue breastfeeding K indefinitely. Dr. Gill describes breastfeeding as very soothing for him and instrumental to his sleeping routine. Mr. Gill has not disputed Dr. Gill's evidence that Dr. Gill's father also spends time with K every day, taking him for walks, reading to him and giving him attention and Yasmin who lives in the home, also plays with him everyday and participates regularly in caring for him by feeding, bathing and putting him down for naps. In addition a multitude of other extended family members and family friends who K has interacted with in Vancouver. The list includes Natasha who is pregnant with her first child and her husband. Natasha deposes to seeing K almost daily.
- [181] During K's time to Vancouver Mr. Gill's family members visited twice for short periods. There is no evidence they participated in caring for K while they were here.
- [182] As I have indicated, prior to November 6, 2023, Mr. Gill also made multiple trips of some length to Vancouver, staying with Dr. Gill and K. As I have said it is clear that Mr. Gill loves and adores K. I accept he would have participated to some extent in K's care and the three of them spent significant amounts of time together during his visits. As to Mr. Gill's evidence that he was responsible for K for some time each morning while Dr. Gill slept before they left Las Vegas and has always been actively involved in K's care when he is with him, I prefer Dr. Gill's evidence that his physical care of K and any time alone with him has been limited. Natasha similarly deposes to observing Mr. Gill frequently handing off K to a nearby caregiver when he cries or needs to be fed and Dr. Gill and her mother encouraging him be more involved in the day to day care of K. Accepting Mr. Gill's other evidence about FaceTiming with Dr. Gill and K every day he was not here, I am not sure how meaningful this kind of contact would be for K in his infancy.
- [183] I highlight all of these details because of K's very young age. While I recognize the fact that Dr. Gill has been his primary caregiver on its own is not determinative, both *Balev* and *Bearistro*, which followed a number of international decisions regarding the habitual residence of infants and very young children, highlight that where the child is an infant, "the environment of a young child is essentially their family environment, determined by the people who care for and live with them, also described as the circle of people on whom the child is dependent.
- [184] By November 6, 2023, K was close to seven months old and had spent all but 37 days of his very young life here.
- [185] Considering all of this and applying the hybrid approach as discussed in *Balev* and *Ludwig*, I am satisfied the focal point of K's life by November 6, 2023 was Canada. I reach this conclusion giving some weight to the parties' ongoing intention to an open ended stay in Vancouver prior to November 6, 2023 and significant weight to K's family environment.

[186] I find therefore that K was habitually resident in Canada immediately prior to November 6, 2023. As a result Dr. Gill's retention of him at that time was not wrongful.

[187] Consequently, it is unnecessary to consider the "defence" of acquiescence. I dismiss Mr. Gill's application.

(SUBMISSIONS ON COSTS)

[188] THE COURT: If you cannot agree on costs, then I would ask you to contact scheduling and arrange a short hearing. If the issues are narrow, the hearing could be scheduled for 9:00 a.m. one day, but I leave that to you to assess. It would be helpful, if you could file very brief written submissions in advance of a costs hearing.

"Fleming J."

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