

CANADA / JUDGMENT

Gill v. Kaur

2022 BCSC 2088

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 2088 Gill v. Kaur

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gill v. Kaur,

2022 BCSC 2088

Date: 20221201

Docket: E221544

Registry: Vancouver

Between:

Sukhdip Singh Gill

Claimant

And

Jasdeep Kaur

Respondent

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Claimant:

S.L. Specht

Counsel for the Respondent:

A.N. Riano

Place and Dates of Hearing:

Vancouver, B.C.

October 5-6, 2022

Place and Date of Judgment:

Vancouver, B.C.

December 1, 2022

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Introduction

- [1] The respondent mother in this family law proceeding applies for a dismissal, or in the alternative, a stay of proceedings on jurisdictional grounds. She argues that the British Columbia Supreme Court does not have jurisdiction, or should decline jurisdiction, over this family law dispute in favour of the state of Washington, USA. The matters at issue are parenting arrangements and child support respecting their daughter, M.K.G., who is just shy of three-years-old, spousal support, and property division. The claimant father submits that this Court has jurisdiction over all matters and should exercise it.

- [2] At the time of the October 5-6, 2022 hearing, the claimant had not seen or spoken to his daughter since June 16, 2022. To the parties and their counsels' credit, an agreement was reached to permit the father to have the child up to Surrey, British Columbia ("BC"), where he resides, for a visit with him and his extended family. An interim-interim without prejudice consent order was granted on October 6, 2022, to allow the claimant to pick up the child at the Peace Arch border crossing on Sunday, October 9, 2022, and return the child to Spokane, Washington on Friday, October 14, 2022.
- [3] I understand that the visit went well and both the claimant and his family were able to successfully reacquaint themselves with the child.
- [4] The parties were back before me on November 3, 2022, since further visits between the child and claimant could not be agreed upon. I decided that the claimant would see his daughter for a 10-day visit, to be organized by counsel prior to November 20, 2022. The parties were to equally share the burden of transporting the child. The parties were given leave to appear back before me on November 7, 2022 at 1:30 p.m. if they could not agree. They did not appear.
- [5] For the reasons that follow, I conclude that this Court has jurisdiction and should exercise jurisdiction over all issues. The claimant applies for an order that the child be returned to BC if the Court finds jurisdiction. I will consider that issue as part of the claimant's application for interim parenting and not as part of these reasons.
- [6] I will first review the procedural steps taken in BC and Washington, followed by a review of the relevant facts. The affidavit evidence before me is lengthy: many of the facts are in dispute and both parties raised issues regarding the credibility of the other. I will primarily refer to those facts which impact the jurisdictional issues, and leave aside - except when relevant to my analysis - the facts that primarily address the appropriate primary residence and parenting arrangement for M.K.G.

Overview of Proceedings in British Columbia and Washington

- [7] The parties separated on June 16, 2022, while in Seattle, Washington, with the child. On June 16, 2022, the respondent called the police, reporting that she had been assaulted by the claimant. As a result of that report, the claimant was arrested and charged with one count of assault. The claimant remained in prison for 36 hours and then was returned to Canada.
- [8] On June 16, 2022, the respondent filed a petition for order for protection on behalf of herself and the child in King County Superior Court in Washington. She sought an emergency temporary protection order on the basis that she was worried the claimant would take the child away from her without her consent.

- [9] On June 17, 2022, the respondent obtained a temporary order for protection and notice of hearing, with the next hearing date set for July 1, 2022. This order prohibited the claimant from making any contact with the respondent and the child. This order further granted temporary care, custody, and control of the child to the respondent, restrained the claimant from interfering with the respondent's physical or legal custody of the child, and restrained the claimant from removing the child from Washington.
- [10] On June 17, 2022, the respondent also obtained a domestic violence no-contact order from the Municipal Court of the City of Seattle in the criminal matter for herself and the child against the claimant.
- [11] It is not clear to me when, but the claimant says that he contacted the Central Authority of BC to report that the child was being wrongfully retained in the US. It was his understanding that an Article 16 notice had been filed with the US court.
- [12] On June 25, 2022, the claimant was served with the petition for order for protection and temporary order for protection and notice of hearing, that restrained him from seeing the child.
- [13] On June 28, 2022, the claimant filed a notice of family claim in the Supreme Court of British Columbia ("BC Proceedings"). He sought a divorce, parenting arrangements, child support, spousal support, and property division.
- [14] On June 29, 2022, the respondent filed a petition for divorce in the Superior Court of Washington, County of King ("Washington Proceedings"). She sought an order for divorce, parenting plan, child support, and the division of real and personal property. There was no claim for spousal support. She further sought a protection order for domestic violence or harassment and a restraining order. The restraining order sought included a restriction on the claimant from going within 500 feet of the respondent's home, workplace, school, daycare or school of the child.
- [15] On June 29, 2022, an automatic temporary order setting financial restraints was issued by Chief UFC Judge in the Washington Proceedings. On the same day, Judge Keenan was the assigned judge in the Washington Proceeding.
- [16] On June 30, 2022, the respondent was personally served with the BC notice of family claim.
- [17] On July 1, 2022, the claimant attended court in Washington via video respecting the temporary order for protection, but the matter was put over since the notice of hearing was not properly served.
- [18] In July 2022, the respondent relocated the child from Seattle to Spokane, Washington. The claimant was not advised of this and did not consent.

- [19] On July 2, 2022, the claimant was personally served with the Washington divorce petition and summons. The claimant had within 60 days after the summons was served on him to file a response or notice of appearance.
- [20] On July 6, 2022, the domestic violence no-contact order was modified to allow the claimant to have electronic visits with the child while the child was in the custody of the respondent.
- [21] On July 7, 2022, the respondent filed a jurisdictional response in the BC Proceedings disputing that the BC Supreme Court has jurisdiction over the respondent, or, in the alternative, that the BC Supreme Court ought not to exercise its jurisdiction over the respondent. The jurisdictional response was served on the claimant on July 11, 2022.
- [22] On July 19, 2022, the parties appeared before Commissioner Jonathan Lack of the Superior Court of Washington, County of King, to hear the petition for a protection order that the respondent had filed on June 16, 2022. Commissioner Lack decided to proceed on the merits of the request for a protection order. Commissioner Lack found that the preponderance of evidence was that neither party had proven that any of the behaviour constituted domestic violence, or fell under the coercive control statute. The petition for a protection order was dismissed on the basis that the respondent had not met her burden of proof showing that there was an act of domestic violence. The previously entered temporary order for protection expired on July 19, 2022 at 11:35 a.m.
- [23] On July 25, 2022, the domestic violence no-contact order was modified to exclude the child so that the claimant could have parenting time.
- [24] On August 5, 2022, the respondent filed and served a notice of application in the BC Proceedings seeking a declaration that BC does not have jurisdiction ("Jurisdictional Application"). The Jurisdictional Application was set for hearing on September 27, 2022.
- [25] On August 19, 2022, the parties agreed to reschedule the Jurisdictional Application to October 26, 2022 in order to secure a full day hearing. It was ultimately scheduled for two days, being October 26 and 27, 2022.
- [26] On August 31, 2022, the respondent signed a motion for default in the Washington Proceedings, seeking to have the Court find the claimant in default for failing to file a response.
- [27] On September 1, 2022 at 2:46 p.m., the respondent obtained an order on motion for default against the claimant on the basis that no response to the Washington Proceedings had been made. The order was granted by Commissioner Moore on September 1, 2022. The default order allowed the Washington Court to hold hearings and sign orders without notice to the claimant.
- [28] On September 1, 2022 at 4:11 p.m., the claimant filed a notice of appearance in the Washington Proceedings, which gave notice that the claimant "appears in the proceeding" and requested that all further papers and pleadings, except the original process, be served

upon his attorney, Mr. David D. Goodwin. A copy of the notice of appearance was served on the respondent's US attorney. It is not clear to me whether the default order in the Washington Proceedings was properly granted in light of the fact that a notice of appearance was filed on September 1, 2022 - being 61 days after the summons was served.

- [29] On September 9, 2022, the criminal charge against the claimant was dismissed, and the no-contact order for the respondent was terminated.
- [30] On September 13, 2022 at 9:00 a.m., the respondent filed an ex parte application in the Washington Proceedings seeking: (1) temporary orders granting custodial rights over the child, preventing the child from being removed from Washington, and (2) supervised visits for the claimant ("Custodial Application"). On the same day, the respondent also filed in the Washington Proceedings a document titled "Information for Temporary Parenting Plan", in which she signed and stated that the facts were true, including:

Respondent has been absent from [the child's] life for 3 months now. My attorney reached out to Sukhdip's attorney regarding potential visits, however they never responded. Before then, he was not invested in caring for [the child], even though he stayed at home all day while I worked at the hospital. When [the child] went with him to Canada, Respondent's mother and sisters care for [the child], not Respondent. Respondent has very few emotional ties to [the child] because of this. Additionally, Respondent has a history of yelling at me in front of [the child] and physically pushing me around while I was carrying her. Respondent has also taken [the child] to Canada and refused to let me see her, much to [the child's] distress and against her best interests.

- [31] The hearing date for the Custodial Application was set for September 14, 2022, and then reset for September 28, 2022 at 1:30 p.m. Neither the US attorney, nor the BC counsel for the respondent, advised the claimant's lawyers that the Custodial Application has been filed and a hearing date set. The US attorney took the position that notice to the claimant was not required pursuant to the order on motion for default, and because the claimant had not participated in the case nor responded to communications from the respondent's legal counsel.
- [32] On September 14, 2022, the claimant filed and served in the BC Proceedings an application for interim-interim without prejudice parenting time with the child ("Interim-Interim Application"). The application was scheduled for September 27, 2022, in general chambers.
- [33] The respondent did not file an application response to the Interim-Interim Application. On September 23, 2022, the respondent's counsel advised she was not available for the hearing on September 27, 2022, and requested that it be delayed to October 26, 2022. Counsel for the claimant was not advised that a hearing had been set for the Custodial Application on September 28, 2022 in the Washington Proceeding.

- [34] On September 27, 2022, just prior to appearing in general chambers before me, the claimant found out that the respondent had obtained a default order in the Washington Proceedings on the basis that the claimant had failed to appear within the required time period. He further found out that an order was being sought in the Washington Proceedings the next day at 1:30 p.m. (September 28, 2022).
- [35] Later on September 27, 2022, I was advised that the respondent's counsel was not available for the hearing of the Interim-Interim Application, but was available the week of October 3, 2022. I was further advised that the respondent had filed an ex parte application in the Washington Proceedings that was scheduled to be heard at 1:30 p.m. on September 28, 2022. I requested that the judge hearing the application in the Washington Proceedings be advised of the BC Proceedings. I rescheduled the jurisdictional hearing to October 5 and 6, 2022. I further offered to arrange a conference call with the Washington judge to discuss procedure. I requested that any contact be made through Cindy Friesen, Director of Supreme Court Scheduling.
- [36] On September 28, 2022, the claimant's US attorney appeared in court in the Washington Proceedings. The Custodial Application was denied, with Commissioner Judson stating:
- Based on the circumstances discussed at the hearing the court declines to enter a temporary Order or a Temporary Parenting Plan. The parties are directed to contact the assigned Judge regarding a request for stay of this proceeding or further proceedings regarding the family law case in British Columbia.
- [37] Counsel for the respondent in the Washington Proceedings has agreed to vacate the order on motion for default.
- [38] On September 29, 2022, the claimant filed an application seeking a declaration that the child is habitually resident in BC and that all matters relating to custody, guardianship, parenting time and parenting responsibilities for the child shall be determined in BC Supreme Court ("Declaration Application"). He sought an order that the child be returned to her habitual residence and other interim orders respecting the child. The application was returnable October 5 and 6, 2022.
- [39] On October 3, 2022, the respondent filed an application response objecting to all orders sought in the Declaration Application.
- [40] On October 4, 2022, counsel for the parties in the Washington Proceedings signed a stipulation and agreed order for jurisdiction ("Agreed Order") that was to be provided to Judge Keenan. The terms of the proposed Agreed Order read as follows:

The clerk shall contact Justice Forth of the Supreme Court of British Columbia at earliest convenience to setup a mutually agreeable time for the courts to have a jurisdictional conference and the method by which the conference shall occur. If possible, the conference shall occur on Zoom platform or its equivalent.

The court, the parties, and the parties' attorneys shall participate in the jurisdictional conference. The court shall attempt to come to an agreement with Justice Forth as to whether British Columbia or Washington State, should have jurisdiction over custody of the parties' minor child.

- [41] I note that the last paragraph of the proposed Agreed Order should not be interpreted to suggest that the Washington judge and myself would come to any agreement on which jurisdiction should prevail. Any inter-jurisdictional contact, aside from issues relating to schedules, calendars, court records, and similar matters, would take place in open court, recorded, and with the participation of all counsel: *Hoole v. Hoole*, 2008 BCSC 1248 at paras. 10, 14, and 21.
- [42] It is my understanding that Judge Keenan is waiting to find out what will happen on the Jurisdictional Application in the BC Proceedings before any further steps are taken in the Washington Proceedings.
- [43] On November 21, 2022, a Judicial Case Conference ("JCC") was scheduled to take place in the BC Proceedings. It is not clear to me whether that JCC proceeded on that date.
- [44] On October 5 and 6, 2022, I agreed to hear the jurisdictional issue and ordered that issues relating to the parenting time with the child would be adjourned pending the decision on the jurisdictional issue.
- [45] The trial date of the Washington Proceedings is set for May 30, 2023.
- [46] The trial date in the BC Proceedings is set for five days starting June 12, 2023.

Overview of Facts

- [47] The claimant is 43 years old. The claimant was born in BC and has lived his entire life here, aside from some temporary stays in Seattle to visit the respondent. He is a Canadian citizen. He moved to Surrey, BC, in 1998, to attend Simon Fraser University where he obtained a degree in business. He operates a packing company with his sister in Surrey. The claimant's parents and siblings all live in the Lower Mainland. In 2010, the claimant's father purchased a large piece of property, approximately 26 acres, in Surrey. The family built a large home on the property, which was completed in June 2020 (the "Surrey Home"). The extended family lives there.
- [48] The respondent is 38 years old. She is a physician licensed to practice in the state of Washington. The respondent was born in India, immigrated to the US in 1998, and then became a US citizen. She moved to Spokane, Washington, in 2001. She lived primarily in Spokane, except when attending medical school. After graduation in 2013, she returned to live in Spokane in 2013. On June 28, 2013, the Washington State Department of Health issued the respondent with a Physician and Surgeon License, with an expiration date of April 15, 2024.

- [49] The respondent is working as an internal medicine hospitalist physician. She and the child currently live in Spokane with her mother, who owns and operates a gas station. The respondent's father has passed away.
- [50] There is dispute as to when the parties first met: the claimant says they met online in November 2017, while the respondent claims they first met online in January 2017. The claimant also asserts that though they first connected online in 2017, it was not until January 2018 that they began to text and speak.
- [51] There was also dispute around when the claimant disclosed his marriage history to the respondent. The claimant indicated in his online profile that he had never been married. That was not true, as he had been married in 2007, and divorced in 2008. The claimant admits while he did not put his divorce status in his profile, he did disclose it to the respondent when they started talking. This is confirmed in an email he sent the respondent in November 2017. It appears that the respondent's claim that she did not become aware that the claimant was divorced until September 2020 is not accurate.
- [52] In February 2018, the claimant and his family travelled to Spokane to meet the respondent's mother. The claimant proposed marriage with the families' blessing.
- [53] When the parties met, the respondent was working in Spokane at the local hospital as an internist. The claimant was living and working in the Lower Mainland. The claimant claims that the fact the respondent would be moving to BC after their marriage was the common ground between them. He explains that this was discussed many times, and he would not have married the respondent if he had not believed her assertions that she had every intention of living in Canada.
- [54] The claimant says that there was no discussion of him moving to the US. He asserts he has no status in the US and never intended on living there. The respondent claims that both she and the claimant agreed that they would ultimately reside wherever she was working as a physician. She further claims that this agreement is why she commenced filling out the claimant's application forms for US citizenship in September 15, 2020. These forms were never completed, however, which the respondent says was due to COVID-19 delays.
- [55] The claimant further submits that he advised the respondent that his life and family were in BC. His family had been in Canada since 1906 and he planned to remain in Canada. His business was based in BC and he would not be able to run it from the US.
- [56] The claimant says that the respondent began to explore how to move her career to BC. To this point, the respondent agrees that she inquired about how to get credentialled in Canada, but never submitted any credentialing paperwork to the Royal College in Canada to start the process.
- [57] In May 2018, the parties also sought information on the tax rules for US citizens in Canada.

- [58] The parties married in Vancouver, BC, on November 10, 2018. The claimant says the respondent requested that the marriage take place in Canada as she did not have many friends or family in Spokane. The claimant says that prior to getting married they decided as a couple that Canada would be their home.
- [59] In December 2018, the parties opened joint bank accounts and a joint credit card at the TD Canada Trust bank in Langley, BC. The respondent confirmed to the bank that her permanent residence was in Langley at a house owned by the respondent. The address was later changed to the Surrey Home. The respondent also had tax and personal accounts in Washington. The claimant had no bank accounts in Washington.
- [60] On January 19, 2019, the respondent applied for Permanent Residence status in Canada.
- [61] In April 2019, the respondent was employed as a hospitalist in Spokane. She claims that she reduced her employment from full-time to part-time so she could accommodate the claimant's request that she be the one to travel to BC. She claims that the claimant insisted it was her duty as a wife to visit him at his home and live with him and his extended family. The claimant disputes this. He says the reason the respondent reduced her employment to part-time hours was because she wanted to travel before they had children, which was also why they went on multiple overseas trips.
- [62] The respondent got pregnant in May 2019. During the first two trimesters of pregnancy, the respondent continued to travel back and forth between Washington and BC.
- [63] In 2019, the respondent obtained a Medical Services Plan number in BC and began utilizing it to obtain medical services and prescriptions in Surrey.
- [64] In November 2019, the respondent applied for a job at a hospital in Bellingham, Washington and attended an interview. She later accepted a position there. The respondent suggests that the parties agreed that they would stay in Bellingham, and the claimant would commute to Surrey. This is disputed by the claimant. The claimant claims that the plan was that until the respondent was able to obtain certification to practice medicine in BC, she would work in Bellingham but live in Surrey. Further, the claimant states the respondent was involved in selecting décor for their planned bedroom and their child's bedroom in the Surrey Home.
- [65] The child was born at the end of January 2020 at a hospital in Spokane. The respondent solely covered the medical expenses. The claimant says he offered to pay for the costs but the respondent said she would take care of it. While in Spokane following the birth, the claimant says he and the child slept on a futon on the floor.
- [66] In February 2020, some of the claimant's family members arrived at the respondent's mother's home in Spokane to pick up the respondent and child, as the plan was for the respondent and child to move to BC two to three weeks after her birth. The respondent's mother, however, would not allow the child to leave until six weeks after her birth.

- [67] On March 17 or 18, 2020 (approximately six weeks post-birth), the respondent and child returned to Surrey and resided at the Surrey Home. The Surrey Home contains a bedroom for the child, along with her belongings and toys. The respondent claims that feelings of emotional manipulation, along with COVID-19 fears, pushed her and the child to come to Canada. As a result of COVID-19, the respondent had put the Bellingham job on hold.
- [68] With changes to international travel due to COVID-19, the respondent decided in July 2020 to take a part-time position in Spokane. This new job would allow her to work one week a month, and the child accompanied the respondent in Spokane during the work week. The claimant says that the other three weeks of the month the family resided together in Surrey.
- [69] The respondent claims that while she was living with the child in Spokane, she would make visits back to BC to visit the claimant and his extended family. The respondent says that during this time, she never left the child in Surrey with the claimant and his family. To this point, I note that the claimant has provided a chart outlining when the child was in the US or Canada during the relevant time periods. The chart does not support the assertion that the respondent and child spent three weeks of each month in BC during the period of July 2020 to June 2021.

USA

July 12 - August 25, 2020

Canada

August 25 - September 12, 2020

USA

September 12 - October 5, 2020

Canada

October 5 - October 16, 2020

USA

October 16 - October 29, 2020

Canada

October 29 - November 14, 2020

USA

November 14 - November 28, 2020

Canada

November 28 - December 19, 2020

USA

December 19 - January 17, 2021

Canada

January 17 - February 15, 2021

USA

February 15 - March 14, 2021 (including a trip where the respondent was visiting her sister)

Canada

March 14 - April 24, 2021

USA

April 24 - May 12, 2021

Canada

May 12 - May 26, 2021

USA

May 26 - June 14, 2021

Canada

June 14 - June 21, 2021

[70] In September 2020, the respondent decided that in order to fast-track her career transition to Canada, she should complete a further Fellowship. She applied for a one-year Fellowship in geriatric medicine in Seattle, Washington. At that time the parties were still exploring information on the best way for the respondent to transfer to the Canadian health care system as an internist. The respondent claims that her decision to pursue a Fellowship was multi-faceted. It would allow her to gain new skills while continuing to explore how to work in the US or Canada in the future.

[71] In December 2020, the respondent was accepted for the Fellowship in Seattle scheduled to begin on July 1, 2021. The respondent claims that there was a clear understanding with the claimant that they would stay wherever the respondent had work. This is disputed by the claimant. The claimant says that the plan was that the respondent would spend one year in Seattle to complete the Fellowship and then return to Surrey to reside full-time.

- [72] The respondent had conversations with a number of the claimant's relatives, who confirm that she was taking a Fellowship to help her enter the Canadian medical system, and that after the Fellowship the parties would be together permanently in Canada. The respondent also had a conversation with an optometrist that treated the child on April 23, 2022 regarding her plan for working in Canada.
- [73] The claimant says that the respondent told him that he needed a Green Card to stay in Seattle while she did her Fellowship. She started the process to obtain a Green Card, but stopped once they found out that the claimant could stay in the US for six months of the calendar year. He further submits that since it was known he was only going to be in the US from January-June 2022, there was no need to apply. I note that the petition for alien relative is not completed and not signed by the respondent
- [74] In December 2020 and January 2021, the respondent consulted with a mortgage specialist and realtor in Seattle. She claims the purpose was to purchase a property with the claimant in Seattle or Bellingham. She claims that the claimant wanted to live in the US and agreed with plans to live in Bellingham (after completion of the Fellowship) and commute to Surrey. The claimant, on the other hand, says that the reason for these home inquiries was because the respondent was considering purchasing a place to live in Seattle for her Fellowship instead of renting. Ultimately, however, the respondent decided to rent. The respondent rented a one-bedroom apartment in Seattle on a one-year lease, which ran from June 2021 to the end of June 2022.
- [75] On or about June 25, 2021, the respondent claims that she and the child moved to Seattle from Spokane. Since the claimant did not want the child in daycare, the parties agreed that the respondent would move to Seattle in order to care for the child. Though scheduled to move to Seattle on June 26, 2021, the claimant did not follow through. There is some dispute in the evidence on why the claimant did not also go to Seattle.
- [76] The claimant cites his reason for remaining in Surrey was to provide full-time care for the child: at the time (according to the claimant), she was attending a pre-school with her cousins. The respondent, on the other hand, says that the claimant revealed to her (for the first time) that he had a medical ailment preventing him from moving to Seattle: active ulcerative colitis, a medical condition that requires obtaining frequent out-patient treatment at the hospital on a regular basis.
- [77] The respondent claims that due to this last-minute change of plans, she felt compelled to allow the claimant to care for the child in Surrey. The respondent dropped the child at the Canadian border on June 28, 2021, and the claimant picked her up.
- [78] The respondent says that during this time, the child was mainly looked after by the claimant's family. This is denied by the claimant. He says he was the one that provided care to the child, including preparing and having breakfast and dinner with her, taking morning walks, engaging in playtime, and putting her to bed.

- [79] Between June and November 2021, the respondent made multiple trips to and from BC to pick up and drop off the child for the occasional weekend. She also spent a day with her at the Peace Arch Park.
- [80] As a result of this back and forth, the child has celebrated many events at both the Surrey Home, including her birthday, Halloween, Easter, Christmas and Vaisakhi, and in Spokane and Seattle, such as her second birthday.
- [81] The respondent claims that following the period of July to November 2021, the child developed balding spots, night terrors, and lesions on her eyes. To this point, the claimant claims that the child already had issues with balding prior to July 2021, and produced photographs taken on June 28, 2021 and July 5, 2021 to substantiate that.
- [82] The child has a US birth certificate, and a US passport issued on February 22, 2022. She is also a Canadian citizen. Since her birth, she has received immunizations in both Washington and BC.
- [83] While in BC, the child also obtained a Health Services of BC card, though she has been seen by physicians and other health care practitioners in Washington and BC. One such physician was Dr. Ross Kennedy, a pediatric ophthalmologist who practices in Vancouver, BC. He advised that the ocular lesions could be diagnosed as a chalazion which would disappear with conservative treatment. The claimant understands that this is a hereditary condition that the child inherited from the respondent. The child was scheduled to return to see Dr. Ross Kennedy on August 2, 2022, but she did not attend due to her being in Washington.
- [84] In November 2021, the claimant agreed that that he and the child would spend time with the respondent in Seattle while she completed her Fellowship, with a plan that they would then return to Surrey at the end of June 2022.
- [85] The parties had a text exchange on November 14, 2021, which provided:
- [The claimant writes:]
1. One thing I noticed with the day care I had asked if you can hold off on that till I'm there. I'm not okay with her going without one of us being there for the time being.
 2. And most importantly for me, our home is here in Surrey where we live now, and will be coming back here once your Fellowship is over. [The child] will be going to school here when she's of age and this is our home base.

And yes we both want this to work.

[The respondent responds:]

In regards to the day, care i thought we agreed to using it this week if I am not able to get a day off later this week.

And off [sic] course to the other points.

- [86] The respondent claims that she agreed to the claimant's demands in order for the child to live with her again. She claims that she did not have a true intention to return to Canada. She claims she felt under "duress" to agree to the claimant's demands.
- [87] The claimant says that during the period from November to December 2021, the claimant and the child went back and forth between Surrey and Seattle. The respondent says that she picked up the child on November 15, 2021, and the claimant joined them in Seattle on November 28, 2021.
- [88] The chart provided by the claimant, noted above, indicates that the child and the claimant were in Washington from November 15 to December 19, 2021, and then returned to Canada, where they stayed from December 19 to December 27, 2021.
- [89] From January 15 to June 16, 2022, the claimant and the child stayed in the Seattle rental apartment for approximately 20 days, and for approximately 10 days each month would return to Surrey. While in Seattle, when the respondent was working on her Fellowship, the claimant was looking after the child during the day. He took a leave of absence from the family business to do so.
- [90] On April 1, 2022, the respondent received her Permanent Residence Status in Canada and attended at the Canada Border Services Agency to sign for it. The confirmation listed the respondent's destination city as Surrey. On that day the respondent organized a surprise birthday party for the claimant. The respondent confirmed to the claimant's relatives that they were planning on being back in Surrey at the end of June 2022.
- [91] The respondent claims that she was "forced" by the claimant to sign the paper work for the permanent residency. She further submits that she signed it on the claimant's birthday after he insisted she give it to him as his birthday gift.
- [92] On April 3, 2022, the respondent and the claimant's sister discussed potential pre-schools that the child could enroll in once the claimant and respondent moved to Surrey at the end of June. The claimant submits that the respondent also had conversations with the claimant's relatives about working at the new hospital being planned for Surrey.
- [93] In May 2022, the parties took a family vacation to Hawaii. During this vacation the respondent expressed a desire to start trying for a second child. They returned from holiday on June 6, 2022.
- [94] On June 7, 2022, the claimant and child returned to Surrey. On June 9, 2022, the claimant, the child and some of his family members returned to Seattle for the respondent's Fellowship graduation dinner. The claimant and child returned to Surrey that night since the claimant had an infusion scheduled for June 10, 2022. The respondent claims he took the child without her consent.
- [95] According to the claimant, on June 11 or 12, 2022, he and the child returned to Seattle to prepare for the move to the Surrey Home.

- [96] On June 15, 2022, the respondent came home from work at approximately 8:45 p.m. There are two different versions of what followed next.
- [97] The respondent asserts that the apartment was dirty and the kitchen was full of dishes. She was upset and an argument erupted. The respondent claims that the claimant was using foul language and upsetting the child. She says that she was drinking water and splashed some water on him. The claimant then tried to snatch the glass from her and caused her to suffer a cut on her hand. She also claims that he grabbed the child. She then called his father. She was concerned that the claimant would leave for Canada with the child without her consent. The claimant took the child to the loft to sleep.
- [98] The claimant says that when the respondent came home from work she complained about the state of the kitchen. He says there were a few dishes in the sink. The respondent verbally attacked him and threw hot water - which she was holding in a glass cup - on him. He thought she was going to throw the glass at him so he removed the glass from her. He claims he immediately retreated to the loft with the child to defuse the situation.
- [99] The events of June, 16, 2022 are also in dispute. The claimant says that when the respondent was getting ready to leave for work she took his car keys. He demanded she return them and she refused. As a result, he took her car keys and offered to exchange them. The respondent then called the non-emergency local police line describing the incident. The claimant went into the apartment to wait for the police. His understanding was that the respondent had gone to work, though she had not. She had called the police a second time and reported that the claimant had assaulted her.
- [100] The respondent claims that on June 16, 2022, she was concerned that the claimant would take the child without her consent while she was at work, so she took his car keys. She claims that the claimant chased her down the stairs, caught her at the bottom, and shoved his hands in her pant pockets, tried to rip open her backpack and wrestle the keys away from her. He then grabbed her by the arm and backpack and physically dragged her up the stairs trying to get the keys away. He went into the apartment with the child and did not let her inside. She then called the police.
- [101] The police arrived and arrested the claimant for domestic violence. He spent 36 hours in jail in Seattle, was charged and then returned to Canada on June 17, 2022.
- [102] On July 28, 2022, claimant's counsel wrote to the respondent's BC counsel seeking parenting time for her client.
- [103] On July 30, 2022, the respondent entered into a new employment agreement with Providence Medical Group in Spokane, Washington for a part-time position working seven, 12-hour shifts every other week, with requirements for additional overtime.

- [104] There was no response to claimant's counsel's July 28, 2022 letter, so a follow-up letter was sent on August 2, 2022 by claimant's counsel. The respondent's BC counsel advised on August 3, 2022 that she was only retained for the purpose of filing a jurisdictional challenge and the respondent's US lawyers should be contacted.
- [105] On August 8, 2022, the US attorney for the respondent emailed claimant's counsel to facilitate contact between the claimant and the child. Both the respondent and her US counsel claim that the US counsel received no response or communication from the claimant's BC counsel.
- [106] On August 19, 2022, counsel for the claimant advised that she would be bringing on an application to deal with the parenting situation.
- [107] The claimant says he learned from documents filed in the Washington Proceedings that the child had been relocated to Spokane. He was not consulted and did not consent to her moving from Seattle to Spokane.
- [108] The respondent says that after her Fellowship was completed she returned to Spokane to restart her previous job. She explains that was the only home she had.

Territorial Competence and Forum non Conveniens

- [109] There are two concepts that are addressed in this jurisdictional dispute: (1) territorial competence and (2) forum non conveniens. Thus, determining jurisdiction involves a two-step process.
- [110] First, the court must decide whether it has "territorial competence" over the dispute, meaning, whether the court can hear the matter. The burden of establishing territorial competence is on the party asserting its existence: *D.L. v. M.Y.*, 2019 BCSC 881 at para. 27, citing *Aleong v. Aleong*, 2013 BCSC 1428 at para. 80. This party need only show that there is a good arguable case that the facts that establish territorial competence can be proven: *Y.Q. v. J.D.*, 2021 BCSC 943 at para. 43, citing *Purple Echo Productions Inc. v. KCTS Television*, 2008 BCCA 85 at para. 34; *Melich v. Patel*, 2021 BCSC 694 at para. 11.
- [111] At this stage, if the court establishes its jurisdiction - and there are no objections from the other party - the litigation may proceed before the court of the forum: *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 102 [Van Breda].
- [112] On the other hand, the opposing party may assert that there is another forum that is more appropriate to hear the dispute, thus raising the issue of forum non conveniens and engaging the second step of the analysis. Here, the court determines whether it ought to exercise its established jurisdiction, or whether, instead, there is another jurisdiction that is "clearly more appropriate": *Y.Q.* at para. 34. The burden in this analysis rests with the party asserting that another forum is clearly more appropriate: *D.L.* at para. 28.

Issue 1: Does the Supreme Court of British Columbia Have Jurisdiction Over This Child?

[113] I will first deal with whether BC should take jurisdiction over this matter since the child is currently in Spokane, Washington.

Position of the Respondent

[114] The respondent submits that the child has resided in Washington for most of her life and Washington is the place the child most recently resided with both her parents. She claims that the child has lived in Washington since November 2021 with both her parents, and that the child's primary care has been in Washington. Her position is that the objective evidence supports that the child is habitually resident in Washington.

[115] She submits that pursuant to the Family Law Act, S.B.C. 2011 c. 25 [FLA], the Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3 [DA], and the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 [CJPTA], this court lacks jurisdiction to decide the issues in the BC Proceedings. She claims that a child is habitually resident in the place where the child most recently lived with her parents. In this case that is Washington.

[116] In supporting her claim that the child has lived the majority of time in Washington, she notes the following dates:

- January 2020 - June 2021: the child lived primarily in Spokane with the respondent and spent periods of time visiting family in Canada with her home base in Spokane;
- June 2021 - November 2021: the child resided primarily in Canada with the claimant, with frequent visits to Seattle to spend time with the respondent and her family; and
- November 2021 - date of separation: the child resided primarily in Seattle.

[117] The respondent submits that there was a settled intention for the parties to settle in Washington from November 2021 onwards. An intention to settle does not have to be a long-term intention. As such, Washington was the last jurisdiction where the child was habitually resident.

Position of the Claimant

[118] The claimant's position is that the child is habitually resident in BC and this Court should assume jurisdiction over all matters with respect to her guardianship, parenting responsibilities, and parenting time as between the parties. He claims that the only reason that the child is in Spokane is due to the wrongful withholding and relocation of the child by the respondent.

[119] The claimant disputes that the child lived the majority of the time in Washington. In his assertions he notes the following dates:

- 2020: the child spent approximately 150 days in Washington and the rest in BC;
- 2021: the child spent approximately 135 days in Washington and 230 days in Canada; and

· 2022: the child spent 133 days in Washington based on the express agreement that the parties and the child would move to BC at the end of June 2022.

[120] The claimant disputes that the child lived primarily in Seattle from November 2021- January 2022, claiming that the child went back and forth.

[121] The claimant claims that the parties never had a settled intention to reside in Seattle. Their time there was only a temporary situation.

Analysis

[122] The CJPTA will generally govern issues relating to territorial competence and forum non conveniens: Y.Q. at para. 35. The territorial competence of the CJPTA is set out in s. 3:

3 A court has territorial competence in a proceeding that is brought against a person only if

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

[123] Further, s. 10 expands on s. 3(e) by providing a non-exhaustive list of factors where a real and substantial connection is presumed to exist: Y.Q. at para. 38.

[124] However, the CJPTA expressly provides that it may be superseded by clear legislation to the contrary as provided for in s. 12: C.L.Z. v. C.G.Z., 2018 BCSC 2172 at para. 26.

[125] The DA displaces s. 3 of the CJPTA with regard to territorial competence over parenting orders, child support, and spousal support: Y.Q. at para. 39.

[126] Subsection 3(1) of the DA provides territorial competence to this Court where at least one of the spouses was habitually resident in BC for at least one year immediately prior to the commencement of the proceeding.

[127] The FLA also supersedes the CJPTA with regard to territorial competence over parenting orders and property division: Y.Q at para. 40; Aslanimehr v. Hashemi, 2019 BCSC 804 at para. 38, rev'd in part 2022 BCCA 248 [2022 Aslanimehr].

[128] The question of whether or not the Supreme Court of British Columbia has jurisdiction in this matter is answered by Division 7 of Part 4 of the FLA. The purposes of this Division is set out in s. 73:

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.

[129] Further, under s. 74(2) of the FLA, the court may make an order if one of the three following preconditions 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.

- [130] In the case at hand, if I am to determine that the child is habitually resident in BC when the application was filed, only s. 74(2)(a) applies. Since the child was not physically present in BC when the proceeding was commenced, neither paragraphs (b) nor (c) of subsection 74(2) apply.
- [131] As such, the primary issue is whether this Court should assume jurisdiction given the provisions of ss. 72-74 of the FLA and the comparable provisions in the DA: *A.K.S. v. J.S.S.*, 2021 BCSC 2011 at para. 21.
- [132] The first step is to determine whether the child was habitually resident in BC when the application was filed. The respondent filed the application in early August 2022. At that time the child was living in Spokane, Washington.

Was the child habitually resident in BC when the respondent filed her application?

[133] Section 72(2) of the FLA provides the following definition of "habitually resident":

- (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.

[134] I will first consider s. 72(3), which provides that a parent cannot oust this court's jurisdiction by removing or withholding the child from BC without the other parent's consent: *Stebbing v. Greenleaf*, 2017 BCSC 346 at para. 16. I find that the claimant did consent to the child being in Seattle, but did not consent to the child being taken to Spokane to live in July 2022. As such, I find that the move to Spokane without the consent and acquiescence of the claimant does not affect the child's habitual residence.

[135] I further find that there was no delay on the part of the claimant in taking steps to apply for an order of the court to rectify the situation. After the claimant was removed from the US on June 16, 2022, he commenced the BC Proceedings on June 28, 2022.

[136] Though the statutory definition in the FLA takes priority, the court may also look to common law principles when determining a child's habitual residence: Melich at para. 13; Y.Q. at para 57.

[137] For example, in the decision of Kong v. Song, 2018 BCSC 1691, aff'd 2019 BCCA 84, Justice Mayer adopted the following expression for the test for residence:

[15] As set out by Justice Boyd in White-Fourgere v. Holman, 2006 BCSC 1606 at para. 25:

[25]... the determination of one's habitual residence is a question of fact to be decided by reference to all the circumstances of the case. A habitual residence is established by residing in a place for an appreciable period of time, with a "settled intention". A child's "habitual residence" will be tied to the habitual residence of his or her custodian.

[emphasis added]

[138] The question of settled intention was also commented on in Kong at para. 20, where Mayer J. adopted the approach set out by Justice Martinson in Fasiang v. Fasiangova, 2008 BCSC 1339:

Settled Intention

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

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

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

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

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

- [64] Settled intent to change habitual residence is determined just prior to the physical move to the new habitual residence.
- [65] When both parents share the intention to change the residence of their family, courts have not hesitated to find that the parents' intent controls the location of habitual residence.
- [66] If a family decides to permanently move to another country, and takes the required steps to do so (e.g. sell their house, quit their jobs) the family has effectively changed the habitual residence of their children. If one parent then decides that the move is not really what she wanted, she cannot "simply and unilaterally" remove the children from their new habitual residence.
- [67] In cases where parties no longer agree that they shared the intention to change their child's habitual residence, courts should not take the representations made by parties at their face value. Instead courts should determine, based on all the evidence, whether the parent has already agreed to change the child's habitual residence.
- [68] Settled intention alone is not enough, for habitual residence to be established the child actually has to move and an appreciable period of time must pass.

Appreciable Period of Time

- [69] Whether residence has been for an appreciable period of time is a question of fact.
- [70] An appreciable period of time is not a fixed period.
- [71] An appreciable period of time could be as short as one day.
- [73] Factors to take into account when determining whether residence has been for an appreciable period of time such that habitual residence has been established can include, but are not limited to: bringing personal possession to the new country; taking the necessary steps to establish residence before travelling to the new country; having a right of abode in the new country; seeking to bring family members to the new country; and, having "durable ties" with the new country.
- [74] The threshold for what constitutes an appreciable period of time will be different if the party is resuming habitual residence in a location rather than establishing residence in the location for the first time.

[citations removed]

- [139] Though there is some dispute in the evidence, I find that the child was habitually resident in BC from the time she arrived in March 2020 (when she was six weeks old) until January 2022. The evidence supports the following:

- January 2020 - approximately mid-March 2020: the child and respondent lived in Spokane with the claimant attending on her birth;

- Mid-March 2020 - July 12, 2020: both parties and the child lived in the Surrey Home as a family unit;
- July 2020 - June 2021: it appears that the child travelled back and forth between Washington and BC. The respondent was working one week a month in Spokane. Both parties agree that the child was with the respondent in Spokane, and would then travel to BC to stay in the Surrey Home.
- June 2021 - mid-November 2021: the child was primarily living at the Surrey Home with the claimant, but visited the respondent in Seattle on weekends and day visits; and
- Mid-November - December 2021: the child started to spend more time in Seattle.

[140] In mid-January 2022, there was a change in that the claimant and the child went to Seattle. The family primarily lived there, with multiple visits to Surrey until June 17, 2022. I am not persuaded, however, that this living situation changed the child's habitual residence. In my view, the move to Seattle was a temporary one for all of the parties.

[141] I would view the Seattle move as a time-limited consensual stay. The approach taken by our Court of Appeal that a temporary, or time-limited, stay does not shift the child's habitual residence is applicable: *Sampley v. Sampley*, 2015 BCCA 113 at paras. 7, 17, 21-23.

[142] The respondent moved to Seattle for the purposes of completing a one-year Fellowship. It was not a permanent move as is evident by the leasing of an apartment for the duration of the one-year Fellowship. The claimant and the child moved to Seattle in mid-January 2022 for the remaining duration of the Fellowship so the family could be together while the respondent pursued her education.

[143] The evidence does not support that this family decided to permanently move to Seattle, thus taking the required steps to do so. They did not pack up their belongings and furniture. The child maintained her bedroom at the Surrey Home with her belongings and toys. The claimant did not quit his job, but rather took a leave of absence from it to accommodate the respondent's wishes that the family unit be back together while she completed her education.

[144] When considering this child's habitual residence, it is important to note that she is so young that she does not have any "intentions independent from [her] parents about where [she] would live or the nature of any of [her] connections to a particular community": *Sampley* at para. 17. As such, it is important to emphasize the rationale for determining a child's habitual residence, which was aptly provided by the Supreme Court of Canada in the *Office of the Children's Lawyer v. Balev*, 2018 SCC 16 at para. 37:

The requirement that the child's habitual residence be in the state of the parent seeking return serves to ensure that the state to which the child is returned is the proper state to determine custody. In principle, custody should be determined in the state in which the child is habitually resident. This supports the goals of mitigating psychological trauma to the child, respecting the jurisdiction of the state of habitual residence to make decisions on custody and access, and deterring abductions and wrongful retentions.

[145] In *Balev* the Supreme Court of Canada endorsed a hybrid approach when determining habitual residence that occupies a middle ground between the parental intention approach and child-centred approach (which focuses on the child's specific circumstances). This hybrid approach requires the following, at paras. 43-44:

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.

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".

[citations omitted]

[146] Though *Balev* dealt with the approach when determining habitual residence under the Convention on the Civil Aspects of International Child Abduction, or "Hague Convention", this Court has previously seen it appropriate to apply the hybrid approach under the DA: see Justice Hori's comments in *A.J.L. v. J.G.L.*, 2022 BCSC 1344 at para. 34.

[147] To this point, while our Court of Appeal has found much to commend in the hybrid approach, it noted that when the FLA is triggered, the statutory definition for "habitually resident" must be applied: *Kong* at paras. 74-75. This was the case in *Kong*, when the Court of Appeal dismissed the argument that the chambers judge erred in applying the settled intention test to determine the habitual residence of the child, rather than the hybrid approach as articulated in *Balev*: at para. 50

[148] In the recent Court of Appeal decision of 2022 *Aslanimehr*, the Court noted at para. 25 that the trial judge had used the "settled intention" test in order to analyze the habitual residence of the child. The Court of Appeal found that the trial judge followed "established law" in adopting the "parental intention" approach: 2022 *Aslanimehr* at para. 29.

- [149] As such, I will consider the settled intentions of the parties. The intentions of the parties of why they went to Seattle is not in dispute. It was a short-term arrangement to allow the respondent to complete a Fellowship. I find that the evidence of the claimant is clear: he always intended to return to BC and he never intended to move to Washington. His attendance in Seattle was time-bound to the end of the Fellowship. There was no degree of continuity, but only a set time for the respondent to complete her Fellowship. I find that the claimant never had a settled intention to change his habitual residence, and that of the child, as a result of the temporary move to Seattle.
- [150] I reject the respondent's claim that there was a plan for the claimant to live in Washington on an ongoing basis. Aside from the respondent's assertion, I find no other evidence to support this. I specifically reject that the incomplete and unsigned US Residency Application was made for the purpose of the claimant living and working in the US. As the claimant explained, there was initially a concern that if the claimant came to stay in Seattle for some part of the Fellowship, he would need to apply for a Green Card. When the parties found out that the claimant could stay for a period of six months, the US Residency Application was not proceeded with.
- [151] Unlike in *S.R.L. v. K.J.T.*, 2014 BCSC 597, where the Court found that the family had moved to Vancouver to live for an indefinite period while the mother pursued her career (see para. 32), these parties did not move to Seattle for an indefinite period. Their time was fixed and wholly dependant on allowing the respondent to finish her Fellowship.
- [152] The respondent's evidence is less clear. I accept that she did have an intention to move to Canada and attempt to transfer her medical licence to BC. She indicated her intention to move to BC upon completion of her Fellowship in a number of ways: (1) she specifically told a number of the claimant's relatives of her plans, even as late as May 2022; (2) she confirmed her intention to move with the claimant, verbally and through email correspondence dated November 2021; (3) she discussed the issue of working in BC with a number of professionals; (4) the parties opened joint bank accounts in BC; and (5) in April 2022 she signed for her permanent residency in BC. There was a significant period of time showing the parties had a shared intention to live at the Surrey Home. There was also a planned return date to Surrey for end of June 2022.
- [153] I accept that at some point in time the respondent made the decision that she was not going to live in BC. She changed her mind regarding where she and the child would live. Though it is not clear to me when exactly her intentions changed, it is apparent that they did by mid-June 2022. She did not, however, share that changed intention with the claimant: her decision was unilateral. I find that at no time did the claimant acquiesce to the retention of the child in Washington.

Circumstances of the Child

- [154] I will next consider the child's circumstances as part of the consideration of what is in the best interest of the child, pursuant to s. 73 of the FLA, noting that they will be further addressed in the following section. The Supreme Court of Canada has found that, though "no single factor is determinative", considerations of the child's circumstances may vary according to the age of the child concerned: *Balev* at para. 44. As this child is a toddler, her environment may be determined by reference to those with whom the child lives and by whom the child is looked after and cared for: *Yokey v. Alton*, 2022 ONSC 4037 at para.10. It is my view that the child has developed a significant family and social environment at the Surrey Home. She has young cousins of the same age that she engages in activities with. She attended a pre-school and has numerous relatives to provide support and care. I accept she has formed close bonds with her cousins, grandparents, aunts, and uncles. She has her own bedroom and play area fully fitted with her belongings, as well as a wide assortment of toys. She has family pets to engage with (though I understand the respondent has recently also purchased a puppy for her).
- [155] I reject the respondent's claim that the claimant did not provide care to his daughter. The evidence supports that the claimant was a loving and caring father, actively involved in all aspects of her care. The same applies to the mother, who I have no doubt is a loving and caring mother who deeply cares for the child.
- [156] It is apparent that the child's circumstances in Seattle, while in the care of a loving parent, do not amount to a finding of habitual residence. It was a place to stay while the respondent undertook her Fellowship. It appears that the child had no bedroom and either slept with the claimant in the attic or with the respondent in her bed.
- [157] In considering the entirety of the circumstances, I have concluded that the child's habitual residence is BC and that this Court has territorial competence regarding parenting orders concerning the child.

Issue 2: Should this Court Take Jurisdiction?

Position of the Respondent

- [158] The respondent claims that the Court in Washington is the appropriate jurisdiction to adjudicate this matter given the child's connection to Washington. She claims that the comparative convenience and expense tips in favour of hearing the matter in Washington. The respondent appears to suggest that there is no property in issue located in BC.

Position of the Claimant

- [159] The claimant submits that virtually all of the witnesses who have relevant evidence with respect to the child and the parenting situation are in Canada. In particular, these include his parents, sisters, aunts, uncles, cousins, and friends who were all witnesses to the parties' parenting of the child. In addition, the child has a family doctor, optometrist, and dental care provider in BC.
- [160] He submits that the only witnesses in the US would be the respondent's mother, and potentially her sister.
- [161] There will be no delay in having the matter heard in BC since there is no appreciable difference in terms of any delay.
- [162] The claimant submits that no substantive steps have been taken in the Washington Proceedings and that this Court has heard significant evidence.
- [163] The respondent has not provided any reason as to why the laws in BC would be prejudicial to her legal position on parenting.
- [164] The claimant notes that the only potential property claim is in BC since the respondent owns no property in Washington.

Analysis

- [165] The next step is to decide whether this Court should exercise its jurisdiction. Subsection 74(3) of the FLA provides a broad discretion for a court to decline to exercise its jurisdiction.
- [166] With regard to forum non conveniens, the party seeking to displace the initial choice of forum bears the burden of establishing that another forum is "clearly more appropriate": Van Breda at para. 103; JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd., 2015 BCCA 200 at para. 45.
- [167] Section 11 of the CJPTA outlines a list of factors, though non-exhaustive, that the court may look to when considering whether to utilize its discretion to exercise territorial competence:

Discretion as to the exercise of territorial competence

- 11 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
- (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including

- (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
- (b) the law to be applied to issues in the proceeding,
- (c) the desirability of avoiding multiplicity of legal proceedings,
- (d) the desirability of avoiding conflicting decisions in different courts,
- (e) the enforcement of an eventual judgment, and
- (f) the fair and efficient working of the Canadian legal system as a whole.

[168] The list of factors is inclusive, and may be considered alongside the purposes set forth in s. 73 of the FLA - including the best interests of the child: *Shortridge-Tsuchiya v. Tsuchiya*, 2010 BCCA 61 at paras. 60-61; *King v. Gillingham*, 2020 BCSC 1984 at paras. 21-22, 27. Section 73 of the FLA reads:

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.

[169] The best interests of the child must dominate this analysis. I accept that this child has spent the early part of her life moving between BC and Washington. During the period of time she was living in the Surrey Home, she developed a close relationship with her young cousins. In the Surrey Home she is surrounded by loving relatives.

[170] As noted, the child is currently living with the respondent in Spokane. I have no hesitation in finding that the respondent is a loving and caring mother who wants the best for the child. I do note that due to the respondent's work schedule, and the fact that her mother owns and operates a gas station, the respondent has had to hire two nannies to assist in the child's care.

- [171] With regard to the comparative convenience under s. 11(2)(a) of the CJPTA, I find that there are a smaller number of witnesses in Spokane that have met the child and could give evidence about her best interests. There are none in Seattle. On the other hand, there are a significant number of potential witnesses in BC who can give evidence about the best interests of this child because they have spent time with her and have seen her interact with both parties.
- [172] Further, the respondent potentially has the ability to work in BC, whereas the claimant has no ability to work in the US. There have been no submissions made to support that the respondent will be prejudiced if the parenting issues are determined in BC. It appears that both jurisdictions have regimes with respect to parenting issues based on the best interest of the child.
- [173] Based on the information provided, I see no risk of a conflicting decision in another jurisdiction.
- [174] I accept that that there will be travel necessary for the respondent to attend in Vancouver to provide testimony. I note that the respondent is not working full-time and there is no suggestion that she would be unable to attend at trial or that it would place any type of undue financial burden on her. She has retained competent counsel already in BC who is well-versed on all of the parenting issues.
- [175] I further note that the only potential family property is in BC and any assessment of the value of the respondent's interest in his business would all be based on financial records in BC. If there is a claim made against the claimant's business it is likely that expert evidence would be required to be involved in its valuation. As far as I am aware there is no property in Washington owned by either party.
- [176] I am not persuaded that the respondent has met her burden of asserting that Washington is clearly more appropriate. I further find it is in the child's best interest to have this Court determine the parenting issues. I accept that there have been steps taken by the respondent in the past to limit the ability of the claimant to see the child. Those steps placed a significant barrier on the ability of the claimant to see the child for several months, though I am now confident that the respondent will not continue those efforts into the future.
- [177] Having regard to the applicable factors, including the best interests of the child, BC is the most appropriate jurisdiction to consider all of the issues respecting the child. As such, a consideration of the relevant factors leads to the conclusion that jurisdiction ought not to be declined by this Court.
- [178] I will comment that it is in the child's best interest to have both of her parents in her life. This will have to be accomplished with a recognition that her parents live in two different jurisdictions.

Conclusion

[179] The application of the respondent is dismissed and this Court shall assume jurisdiction in respect to all issues respecting the child.

[180] The claimant has an application filed for interim parenting of the child. I am seized of that application. I am not seizing myself generally of the BC Proceedings. If the parties cannot agree to an interim parenting arrangement, they can seek a hearing before me. I will accommodate hearing an application as early as possible. The parties are advised that I have kept all of the application records provided to date so there is no need to reproduce materials in those application records at an interim parenting application, should one be necessary.

[181] The claimant is entitled to costs of this application in the cause.

"Forth J."

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