

CANADA / JUDGMENT

Johansson v. Janssen

2020 BCSC 469

COURT

Supreme Court of British Columbia

DECIDED

30 March 2020

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2020 BCSC 469 Johansson v. Janssen IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Johansson v. Janssen, 2020 BCSC 469 Date: 20200330 Docket: E192826 Registry: Vancouver Between: Karl Martin Johansson Claimant And Vera Gertrud Janssen Respondent Corrected Judgment: The front page of the judgment was corrected on April 1, 2020 Before: The Honourable Mr. Justice N. Smith Reasons for Judgment Counsel for the Claimant: M. Katsionis M. Salfi Counsel for the Respondent: K. Russ Place and Date of Hearing: Vancouver, B.C. March 24, 2020 Place and Date of Judgment: Vancouver, B.C. March 30, 2020

introduction

- [1] The parties lived together in a marriage-like relationship for approximately six years before they separated in August 2017. They have two children who are now eight and five years old. In late January, 2020, the mother, the respondent in this action, took the children from Pemberton, British Columbia to Germany.
- [2] The claimant now seeks an order that the children be returned to British Columbia after the current international travel restrictions related to the COVID-19 pandemic are lifted. The respondent has filed a jurisdictional response to the claimant's notice of family claim. She says that Germany is her and the children's real home and seeks a finding that this court has no jurisdiction. In the alternative, she says that if this court does have jurisdiction, it should decline to exercise it and recognize Germany as the more appropriate forum.
- [3] This application was heard under the Court's protocol for hearing only urgent matters during the current state of emergency. For the reasons set out below, I have concluded that the matter is not in fact urgent and, that, in the current uncertain circumstances, it would be inappropriate to decide the substantive issues in dispute.

background

- [4] Although the children were born in Canada and are therefore Canadian citizens, their parents are neither citizens nor permanent residents of Canada. The claimant is a citizen of Sweden and the respondent is a citizen of Germany. They have spent significant amounts of time in Canada--both during the relationship and after separation--under a series of work, study, and/or visitors visas.
- [5] The respondent has an outstanding application filed in May 2019 for permanent residence in Canada. She owns a home in Pemberton and the children attend school there.
- [6] The claimant is currently in Sweden. He says he had to leave Canada in September, 2017 because his work visa had expired, but has since returned for two extended stays during which he had parenting time with the children in Pemberton. The most recent of these stays was from April to November 2018. The claimant says he hopes to return to Canada and obtain permanent residence, but there is no evidence of a current application.
- [7] The respondent left Canada with the children on or about January 22, 2020. At that point, they had been in Pemberton since the beginning of the school year in September of 2019. The respondent says she had to leave Canada because her visitor's visa was valid for only six months and would expire in February. No documents confirming that have been put into evidence and I have not been directed to the relevant portions of the governing legislation.
- [8] Whatever the reason was for the respondent's departure, she apparently believed her absence from Canada would be temporary. In an email to the children's school in Pemberton dated January 21, 2020, she said she hoped to return with the children in perhaps as little as three weeks. In a further email dated February 28, 2020, she informed the school that she and the children were still in Germany but "we are hoping our issues resolve soon so that we can return".
- [9] The respondent's affidavits do not say whether she still intends to return to Canada, but the current international travel restrictions obviously preclude any immediate return.
- [10] The respondent had previously been in Germany with the children during the summer of 2019. On July 8, 2019, she obtained what she relies on as "German orders", making her the "sole holder of parental responsibility". Those documents were issued by the youth welfare office of the City of Kempen. The parties differ on whether these documents are equivalent to court orders or whether they are certifications by an administrative agency. the law
- [11] I have not been given satisfactory expert evidence on the status under German law of the documents dated July 8, 2019, but do not need to consider that issue. Even if the documents are to be treated as court orders, counsel for the respondent concedes that they were obtained without notice to the claimant. They are, therefore, not extraprovincial orders that this court is required to recognize under s. 75 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. The relevant portions of that section read: Recognition of extraprovincial orders 75 (1) A court must recognize an extraprovincial order if all of the following apply:

- (b) each party to a proceeding in which the extraprovincial order was made had
 - (i) reasonable notice that the order would be made, and (ii) a reasonable opportunity to be heard respecting the order;
- [12] The central issue on this application is whether the children are "habitually resident" in British Columbia or, if not, whether the alternate grounds for jurisdiction in s. 74(2) of the FLA are satisfied. That section reads: 74 ...
 - (2) Despite any other provision of this Part, a court may make an order under this Part respecting guardianship, parenting arrangements or contact with a child only if one of the following conditions is met:
 - (a) the child is habitually resident in British Columbia when the application is filed;
 - (b) the child is not habitually resident in British Columbia when the application is filed, but the court is satisfied that
 - (i) the child is physically present in British Columbia when the application is filed, (ii) substantial evidence concerning the best interests of the child is available in British Columbia, (iii) no application for an extraprovincial order is pending before an extraprovincial tribunal in a place where the child is habitually resident, (iv) no extraprovincial order has been recognized by a court in British Columbia,
 - (v) the child has a real and substantial connection with British Columbia, and (vi) on the balance of convenience, it is appropriate for jurisdiction to be exercised in British Columbia;
 - (c) the child is physically present in British Columbia and the court is satisfied that the child would suffer serious harm if the child were to
 - (i) remain with, or be returned to, the child's guardian, or (ii) be removed from British Columbia. For purposes of s. 74(2)(b), the "application" is the notice of family claim, which was filed on October 22, 2019, and there is no dispute that the children were physically present in British Columbia on that date.
- [13] If the British Columbia court determines that it has jurisdiction under s. 74(2), s. 74(3) says the court may decline to make an order if it is more appropriate for jurisdiction to be exercised outside of British Columbia.

analysis

- [14] On March 18, 2020, the Chief Justice of British Columbia Supreme Court announced a suspension of all regular court operations due to the COVID-19 emergency, with only essential and urgent matters to be heard (the "March 18 Direction"). Applicants seeking to have matters heard must submit an online form to request an urgent hearing. That form and related materials are reviewed by a judge to determine if an urgent hearing is required.

- [15] In this case, the notices of application and all of the affidavits were filed before the Chief Justice's March 18 Direction, but the matter proceeded to a hearing after that date under the Request for Urgent Hearing (RUH) process.
- [16] The authorization of a hearing under the RUH process does not constitute a final determination that a matter is urgent. It remains for the judge or master hearing the application to determine whether it is in fact urgent and can be appropriately decided during the current state of emergency. Issues to be considered on the question of appropriateness may include the practical utility of any order, difficulties faced by parties in obtaining necessary evidence, and the possibility of changing circumstances as the emergency situation evolves.
- [17] I have concluded this matter is not urgent. An order requiring return of the children to British Columbia would have no immediate practical consequences. The claimant recognizes that it could not be implemented until current international travel restrictions are lifted and no one knows when that may be.
- [18] It appears from the respondent's stated intention at the time of her departure that she may voluntary return to Canada with the children after travel restrictions have been lifted. Whether she is ordered to return or wishes to return voluntarily, her ability to do so will still be subject to her obtaining the appropriate visa. Even if the children were old enough to be put on an airplane unaccompanied, which they are not, there is no parent here to meet them. The claimant is still in Sweden and gives no evidence of when he may be able to return to Canada.
- [19] I also find that it would not be appropriate to decide the threshold question of jurisdiction at this point. I have been given sufficient evidence and authorities to decide whether the children were ordinarily resident in or have a real and substantial connection with British Columbia. But a decision that this court has jurisdiction--if that is what I find--would have no practical meaning without a determination of whether British Columbia or Germany is appropriate forum. That issue may be subject to additional or changed facts by the time current travel restrictions are lifted.

conclusion

- [20] I decline to determine jurisdiction under the current circumstances.
- [21] The claimant's application for return of the children and the respondent's jurisdictional application are both adjourned with leave to reset them for hearing after travel restrictions have been lifted. Because I have heard much of the relevant argument, I will be seized of that application.

- [22] The claimant also seeks a declaration that he is a guardian of the children. Section 39(1) of the FLA states: Parents are generally guardians 39 (1) While a child's parents are living together and after the child's parents separate, each parent of the child is the child's guardian.
- [23] Counsel for the respondent concedes that, as a factual matter, the claimant meets that definition and there is no evidence to the contrary. However, once the jurisdictional question is decided, there may be a further issue of the proper law to be applied. A declaratory order now would presuppose a result on that issue. The most I am prepared to say is that, if and to the extent that the law of British Columbia applies, the claimant is a guardian of the children. "N. Smith J."
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