

CANADA / JUDGMENT

Johansson v. Janssen

2020 BCSC 1738

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 1738 Johansson v. Janssen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Johansson v. Janssen,

2020 BCSC 1738

Date: 20201117

Docket: E192826

Registry: Vancouver

Between:

Karl Martin Johansson

Claimant

And

Vera Gertrud Janssen

Respondent

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for Claimant:

M. Sixta

Appearing on her own behalf:

Vera Gertrud Janssen

Place and Date of Trial/Hearing:

Vancouver, B.C.

October 20, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 17, 2020

- [1] The parties were in a marriage-like relationship for approximately six years before they separated in August 2017. During their relationship, they lived in Canada under a series of visas and were neither citizens nor permanent residents, but their two children were both born in Canada. The children are now eight and six years old.
- [2] The claimant father now lives in Sweden, where he is a citizen. The respondent mother owns a house in Pemberton, B.C. and is currently there with the children, but she is a German citizen and says Germany is their principal residence. The issues on this application are whether this Court has jurisdiction over guardianship and parenting of the children and, if so, whether it should decline to exercise that jurisdiction on the basis that Germany is the more appropriate forum.
- [3] In addition to asking this Court to declare that it has jurisdiction in respect of the children, the claimant seeks a number of orders in exercise of that jurisdiction, including a declaration that the respondent breached the relocation provisions of the Family Law Act, S.B.C. 2011, c. 25 [FLA] by taking the children to Germany on a previous occasion. He has obtained an interim order that prevents the respondent from removing the children from British Columbia pending a decision on this application.
- [4] As I understand the claimant's position, he wants this Court to take jurisdiction so he can bring an application under s. 69 of the FLA to relocate the children to Sweden. If he did so, the respondent could presumably bring a competing application for relocation to Germany.
- [5] The respondent would have standing to bring a relocation application in British Columbia because he would be a guardian of the children by operation of s. 39(1) of the FLA. I was told that, because he and the respondent were never married, he does not automatically have such status under German law, although he can apply to a court for joint custody.
- [6] This matter first came before me on March 24, 2020, about two months after the respondent took the children from Pemberton to Germany. The respondent said she had to leave Canada when she did because her six-month visitor's visa was expiring. The claimant sought an order that the children be returned to British Columbia.

- [7] At the time of that application, the court had suspended normal operations due to the COVID-19 pandemic and had put in place a process for hearing only the most urgent matters. In reasons for judgment indexed at 2020 BCSC 469, I held that the matter was not urgent because international travel restrictions then in force made immediate return of the children impossible. I adjourned the matter with leave to reset it, stating at para. 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 the appropriate forum. That issue may be subject to additional or changed facts by the time current travel restrictions are lifted.

- [8] The claimant says that in early August 2020, he learned that the respondent and the children were back in Canada. He applied without notice for an interim order preventing removal of the children from British Columbia and seizing their passports. An order to that effect was made by Justice Myers on August 6, 2020.
- [9] At the time of the hearing before me in March, the respondent had an outstanding application for permanent residence in Canada. She says that her application has now been approved and she hopes to eventually live here, but a return to Germany is for now a financial necessity. About a month before the hearing of this application, she gave birth to another child, but is separated from that child's father. She says she cannot work because she needs to care for the baby and so needs to return to Germany where she is eligible for maternity benefits. She is not yet eligible for such benefits in Canada.
- [10] In order to bring a relocation application, the claimant must first give the respondent 60 days' notice of relocation under s. 66 of the FLA. Even if he is able to file his application to the Court under s. 69 within that 60-day period, more time would likely elapse before the application could be heard, particularly as the claimant is seeking a viva voce hearing.
- [11] Rule 18-2 of the Supreme Court Family Rules allows a party to file a jurisdictional response asserting that the Court does not have jurisdiction or should not exercise its jurisdiction. The claimant filed his notice of family claim on October 22, 2019 and the respondent filed a jurisdictional response on November 29, 2019.
- [12] The Court's jurisdiction over children is governed by ss. 72(2) and (3), 73 and 74 of the FLA:
- 72
- (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.

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.

74(1) This section applies if an order respecting guardianship, parenting arrangements or contact with a child may be made, respecting the same child, in more than one jurisdiction.

- (2) Despite any other provision of this Part, a court may make an order under this Part respecting guardianship, parenting arrangements or contact with a child only if one of the following conditions is met:
 - a) the child is habitually resident in British Columbia when the application is filed;
 - b) the child is not habitually resident in British Columbia when the application is filed, but the court is satisfied that
 - i. the child is physically present in British Columbia when the application is filed,
 - ii. substantial evidence concerning the best interests of the child is available in British Columbia,
 - iii. no application for an extraprovincial order is pending before an extraprovincial tribunal in a place where the child is habitually resident,
 - iv. no extraprovincial order has been recognized by a court in British Columbia,

- v. the child has a real and substantial connection with British Columbia, and
- vi. on the balance of convenience, it is appropriate for jurisdiction to be exercised in British Columbia;
- c) the child is physically present in British Columbia and the court is satisfied that the child would suffer serious harm if the child were to
 - i. remain with, or be returned to, the child's guardian, or
 - ii. be removed from British Columbia.
- (3) A court may decline to make an order under this Part if the court considers that it is more appropriate for jurisdiction to be exercised outside British Columbia.
- [13] Section 74(2) deals with what is traditionally known as jurisdiction simpliciter, now called "territorial competence" in the language of the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 [CJPTA]. If the court decides it has territorial competence, the next issue is that of forum non conveniens or appropriate forum, which is referred to in s. 74(3).
- [14] The claimant says this Court has jurisdiction under s. 74(2)(a) of the FLA because the children were habitually resident in British Columbia when he filed his notice of family claim. He also says all of the alternative requirements in s. 74(2)(b) are satisfied, including a real and substantial connection with British Columbia.
- [15] The claimant says the children attended daycare, school and other activities in Pemberton and that he and the respondent, during their relationship, had a settled intention to live in Canada. He says the fact the respondent has completed an application for permanent residence indicates she still has that settled intention.
- [16] As for himself, the respondent says he had to "temporarily" leave Canada in 2017 because his visa expired, but returned and saw the children in Pemberton from December 15, 2017 to February 21, 2018 and again from April 21, 2018 to November 5, 2018. He says that after returning to Sweden in November 2018, he "began applying for a new work visa and looking into obtaining permanent residency in Canada".
- [17] However, he also says he is now married and has a step daughter in Sweden. In a separate affidavit, he says that he and his wife took over his parents' farm in the spring of 2019 and he obtained a permanent job nearby.
- [18] The respondent says she has only a German passport and since 2011 has been present in Canada on visitor's visas that required her to leave the country every 180 days. She says she has a residence in Germany, earns all of her income there, pays income taxes in Germany, and has both her main bank account and credit card from German institutions. Her extended family, including her parents, siblings, aunts, uncles, and cousins, all live in Germany.

- [19] She says she received a parental allowance from the German government for the first 14 months of each child's life and continues to receive German government child benefits while receiving no such Canadian benefits.
- [20] The children have both German and Canadian citizenship and passports. They have a treating paediatrician and a treating dentist in Germany, have German medical insurance and, according to the respondent, have never been eligible for British Columbia medical coverage. They have German tax numbers and saving accounts in their names at a German bank. Although the children have attended school in Pemberton, they have also been registered at school in Germany and the eldest child has attended school in Germany.
- [21] The law for determining habitual residence of a child under s. 72 of the FLA was reviewed in *Aslanimehr v. Hashemi*, 2019 BCSC 804. Some of the key factors are:
- a) Residence means more than simply the place where the parties last spent time together: para. 44;
 - b) Habitual residence is established by residing in a place for an appreciable period of time, which can be as short as one day: para. 49;
 - c) The threshold for an appreciable period will be different for a party resuming habitual residence versus establishing residence for the first time: para. 49;
 - d) Habitual residence requires a settled intention to reside in the place, though this need not be an intention to settle indefinitely or permanently: paras. 49-50;
 - e) A child's habitual residence will be tied to the habitual residence of their custodian, and thus the settled intention of the custodian: paras. 45, 48;
 - f) Preponderance of time spent in a location is not determinative: para. 50;
 - g) Habitual residence is where a person regularly, normally, or customarily lives: para. 50;
 - h) A trip or vacation will generally not change a child's residence: para. 51; and
 - i) One parent's unilateral decision to move a child does not change a child's habitual residence: para. 53.
- [22] A conditional intent is not a settled intent: *C.M. v. J.M.*, 2015 BCSC 2339 at para. 59.
- [23] In *White-Fourgere v. Holman*, 2006 BCSC 1606, the custodial parent spent a significant amount of time in Tennessee, but had close ties to British Columbia including immigration status, medical insurance, and friends and family. The court said at para. 25 that the matter could not be resolved by a simple counting of days the child spent in each jurisdiction:

Rather 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.]

(The relevant definition of habitually resident in the former Family Relations Act, R.S.B.C. 1996, c. 128, that was at issue in *White-Fourgere* was the same as what now appears in the FLA.)

- [24] I accept the respondent's evidence that her intention to reside in Canada on a long-term basis was at best conditional at the time the notice of family claim was filed and remains conditional. It was conditional, first, on her obtaining permanent residence and is now conditional on her ultimately being able to work and obtain benefits here. That argues strongly in favor of the habitual residence of the children being Germany because it is tied to the habitual residence of their custodian.
- [25] On the other hand, the children have clearly spent a significant portion of their lives in British Columbia and have strong connections through school and extracurricular activities. I do not agree with the respondent when she attempts to minimize that time as merely "vacation".
- [26] It is possible for a child to have two habitual residences: *A.M. v. D.L.*, 2019 ONCJ 155; *M.M. v. S.T.*, 2014 ABCA 120 at para. 16. I find that is the case here. The factors relevant to determination of habitual residence as between British Columbia and Germany are almost evenly divided and I find the children are habitually resident in both jurisdictions.
- [27] That is sufficient to give this Court jurisdiction over parenting of the children under s. 74(2) (a) of the FLA, but the real question is whether this Court should decline to exercise jurisdiction under s. 74(3).
- [28] The question of parenting time and residence of the children is usually inseparable from that of child support, but unlike Part 4 of the FLA, which applies to care and time with children, and Part 5, which applies to property division, there is no specific provision in the FLA addressing jurisdiction with respect to child support. A finding of jurisdiction to deal with parenting issues may provide a sufficient connection to this jurisdiction to also ground jurisdiction to deal with child support: *Schubert v. Johnson*, 2017 BCSC 1664 at para. 54. But like Justice Warren in *Schubert*, I do not need to decide that point because of my findings below on the issue of appropriate forum.
- [29] Factors relevant to the appropriate forum analysis under s. 74(3) are found in s. 11 of the CJPTA:

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.
- [30] The list in s. 11 of the CJPTA is not exhaustive. A court may also apply considerations arising under the FLA, including the best interests of the children: *Shortridge-Tsuchiya v. Tsuchiya*, 2010 BCCA 61 at para. 61.
- [31] On the unique facts of this case, those factors must be considered in light of what the claimant is ultimately attempting to have the British Columbia court decide: whether the children should live with him in Sweden or with the respondent in Germany. Neither parent wishes to live in Canada in the immediate future.
- [32] The claimant asks this Court to take jurisdiction even though he does not live in British Columbia and apparently has no plans to do so. The respondent is the children's primary caregiver and has been since the parties separated. She is currently in British Columbia only because of the interim order that effectively prevents her from leaving. If the Court takes jurisdiction, that order would likely have to be continued, at least until the claimant's proposed relocation application is heard and decided.
- [33] An underlying assumption in the law relating to jurisdiction over children must be that the person asking a court to take jurisdiction actually wants and is able to exercise parenting responsibilities in that jurisdiction. I confess that neither the FLA nor any case that I am aware of explicitly says that, but it would seem to go without saying.
- [34] Normally, when the court makes an order preventing the primary caregiver from removing children from the jurisdiction, that parent has a choice, albeit a difficult one. The first option is to remain in the jurisdiction with the children. But if they still want or need to leave they can do so, leaving the children behind in the care of the other parent who remains in the jurisdiction.

- [35] Because the claimant does not live in British Columbia, the respondent does not have that choice. The interim order the claimant seeks to continue until the relocation application is heard would effectively force the respondent to remain in British Columbia, where she says she has no source of income. (At one point in argument, counsel for the claimant suggested if the respondent wants to return to Germany she could leave the children in foster care in British Columbia. I did not take that as a serious suggestion.)
- [36] While a court may prohibit a parent from relocating a child, or may make a custody order that indirectly limits a parent's mobility, a court cannot indenture an individual to a community: *McIntosh v. Kaulbach*, 2014 BCCA 299 at para. 16; *Falvai v. Falvai*, 2008 BCCA 503 at para. 40.
- [37] Those considerations go to both the CJPTA issues of convenience and expense and the fair and efficient working of the Canadian justice system.
- [38] On the question of comparative convenience and expense, there are other facts that I find overwhelmingly favour this Court declining jurisdiction in favour of Germany.
- [39] Although the claimant is asking British Columbia to take jurisdiction, I cannot see how litigation in British Columbia is either more convenient or less expensive for him, given the geographical proximity of Germany to his current home in Sweden. Although the respondent now has her permanent residency status in Canada, she is not yet able to work in Canada, she just had a baby, and would be able to live much more comfortably in Germany where she can receive paid maternity leave and have the support of her family. Litigation in Germany would be far more convenient and economical for her. Additionally, both parties have already had communications with, if not yet fully retained, German legal counsel who have knowledge of the central facts and issues of this case.
- [40] There is likely to be more evidence available in Germany related to the best interests of the children. The respondent's family is in Germany, the children have doctors there and the eldest child has attended school there. The children have also attended school in Pemberton, but information from that school could be received by a German court through affidavits or video conferencing testimony, if necessary. The school records have already been compiled and put into evidence on this application.
- [41] Any evidence from the claimant's family or about his living situation in Sweden would also be more easily put before a German court, due to geographical proximity. Neither the claimant nor the respondent earns income in Canada, which would make any effort by this Court to deal with child support a difficult and artificial exercise.
- [42] I find other factors listed in s. 11(2) of the CJPTA are of lesser significance in these circumstances, but are generally either neutral or favour Germany as the appropriate forum.

- [43] The claimant appears to believe he has a juridical advantage if British Columbia law is to be applied because he has automatic standing as a guardian. On the evidence I have been given about the applicable provisions of the German Civil Code, this appears to be much less significant than the claimant believes.
- [44] The translation that has been provided to me speaks of "parental custody" rather than guardianship and does not automatically give parental custody to both parents when they are not married. However, the court may "transfer joint parental custody" to both parents and on an application for such a transfer there is an onus on the party opposing it to show that joint custody is inconsistent with the best interests of the children.
- [45] Both British Columbia and Germany have established law emphasizing the best interests of the children while also placing weight on the benefits of children having contact with both parents.
- [46] The respondent's most recent affidavit includes a letter from her German lawyer indicating there is already a proceeding pending before the District Court of Düsseldorf dealing with the respondent's child maintenance claim. That will presumably also require the German court to consider the issues of parenting time in order to determine the correct entitlement to and quantum of child support. Mr. Hammelstein, the respondent's German lawyer, also says that:

the District Court of Düsseldorf has so far considered itself competent with regard to your habitual residence in Germany and the fact that you are officially registered here, that the children are subject to compulsory schooling, that you pay your health insurance contributions here and that the essential ties of your life have been in Germany since January 2020 at the latest.

- [47] I find that staying the action in British Columbia as it relates to the children would avoid the possibility of both courts asserting jurisdiction and conducting parallel proceedings. I recognize that this Court may still have to deal with the claimant's claim to an interest in the respondent's real property in Pemberton, but find that to be an easily severable issue.
- [48] The issue of enforcement of an eventual judgment must also be considered in light of the fact that neither parent has an immediate wish to live in British Columbia. Any proceedings dealing with the primary residence of the children and parenting time will be inseparable from the question of child support. Germany is a reciprocating jurisdiction for the purposes of the Interjurisdictional Support Orders Act, S.B.C. 2002, c. 29, but Sweden is not. However, both Germany and Sweden, but not Canada, are parties to the Convention on the Recovery Abroad of Maintenance, 20 June 1956, 268 UNTS 3 (entered into force 25 May 1957). This factor also favours Germany.
- [49] I also find Germany to be a more appropriate forum because, in the current circumstances, the return of the children to Germany would be in their best interests. That is because the respondent has been the children's primary caregiver since at least the date of separation. Their best interests cannot be separated from considerations of her own needs and well-

being, particularly as the respondent is not seeking to exercise primary parenting responsibilities in this jurisdiction. The respondent's inability to support herself in British Columbia goes directly to her ability to properly care for the children.

[50] I therefore decline to exercise this Court's jurisdiction and find that Germany is the more appropriate forum to deal with issues involving the children. The claimant's action, as it relates to those issues, is stayed. The claimant's application for orders arising from the exercise of this Court's jurisdiction is dismissed. The non-removal order of August 6, 2020, is vacated and counsel for the claimant will forthwith return the children's passports that were surrendered as a term of that order.

"N. Smith, J."

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