
CANADA / JUDGMENT

King v. Gillingham

2020 BCSC 1984

COURT

Supreme Court of British Columbia

DECIDED

16 December 2020

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2020 BCSC 1984 King v. Gillingham

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

King v. Gillingham,

2020 BCSC 1984

Date: 20201216

Docket: E201462

Registry: Vancouver

Between:

Kristina King

Claimant

And

Ian Gillingham

Respondent

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

In Chambers

Counsel for Claimant:

L. Kahn

Counsel for Respondent:

R. Henderson

Place and Date of Hearing:

Vancouver, B.C.

October 23, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 16, 2020

- [1] The respondent in this family law action asks this Court to decline jurisdiction in favour of the Washington State Superior Court (the "Washington Court"), which has already made consent orders for divorce, division of property, parenting of two children, and child support. He seeks an order dismissing or staying the notice of family claim filed by the claimant.
- [2] The claimant mother commenced proceedings in Washington after she had moved with the children to British Columbia. Orders made by the Washington Court include one that gives the parties joint responsibility for making major decisions about the children's health and education. Less than five months later, the claimant filed the notice of family claim in this court, seeking sole responsibility over those matters.
- [3] The parties were married in British Columbia in 2013, then lived in the United States while they were both pursuing medical education. They separated on June 30, 2019. They are the parents of a six-year-old daughter and the respondent is step father to the claimant's ten-year-old son from a previous relationship.
- [4] At approximately the same time as the parties separated, the claimant returned to British Columbia after completing a residency program in Olympia, Washington. She says she had always planned to do so. She has a new partner and they now have a child together. The respondent is completing his own residency requirements in Tacoma, Washington, and apparently plans to remain there with a new partner.
- [5] On July 23, 2019, the claimant filed a Petition for Divorce in the Superior Court of Washington, County of Pierce. The petition also sought a parenting plan, child support, and division of property. It stated that the claimant and the children were by then living in British Columbia, but pled that Washington had jurisdiction over the divorce because the parties lived in the state while married and the respondent still lives there. It pled that Washington had jurisdiction over the children because :

Washington was the children's home state some time in the 6 months just before this case was filed and a parent or someone acting as a parent of the child still lives in Washington.

- [6] The claimant does not explicitly state in her affidavit why she chose to commence proceedings in the State of Washington when she had already moved to British Columbia, although that was undoubtedly the proper jurisdiction to deal with real property located in the state. Counsel agree that the Washington Court proceedings also gave her the benefit of being able to obtain an earlier divorce. She had just returned to British Columbia and, under s. 3(1) of the Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3, would not have been able to commence divorce proceedings in this jurisdiction until she had been ordinarily resident in the province for at least a year.
- [7] The parties were eventually able to settle matters without the need for contested court applications. Their settlement was incorporated in a series of orders on March 10, 2020. These included a divorce order, division of property, a "Final Parenting Plan", and a child support order. The Washington Court issued "Findings and Conclusions about a Marriage" that included:
- a) The findings and conclusions were based on the spouses' agreement;
 - b) At the time the Petition was filed the claimant did not live in Washington State, but the respondent did, and the court had jurisdiction over the marriage; and
 - c) The Court could approve the parenting plan as it had exclusive and continuing jurisdiction over the children.
- [8] Both parties and their respective counsel signed the findings and conclusions, confirming their agreement.
- [9] The Final Parenting Plan provides for the children to live primarily with the claimant, with the respondent to have parenting time one weekend per month, certain holiday visits, and reasonable telephone access. It says that the parties will jointly make decisions about the children's education and health care and includes a dispute resolution mechanism.
- [10] The child support order requires the respondent to pay USD\$808 per month, based on his reported income. There is no suggestion that the amount of child support, when converted to Canadian funds, is significantly different from what this Court would award under the Federal Child Support Guidelines, SOR/97-175.
- [11] Shortly after the Washington Court orders were made, the Canada-US border was closed due to the COVID-19 pandemic. The closures made it impossible for the respondent to exercise the parenting time contemplated by the Final Parenting Plan.
- [12] On July 22, 2020, the Respondent filed a Motion for Contempt Hearing in the Washington Court, alleging the claimant had not followed the parenting plan. The claimant filed her notice of family claim in this Court two days later.

- [13] The contempt application came before the Washington Court on September 15, 2020. The Court found that while the claimant had failed to provide the children for 16 days of the respondent's parenting time, she had not done so in bad faith, given the COVID-19 pandemic. There was no finding of contempt, but the claimant was ordered to provide 16 days of make-up parenting time within 120 days. These further days would be in addition to the one weekend a month that the Final Parenting Plan requires.
- [14] Counsel for the claimant points out that this would require the children to travel to Washington for each visit with the respondent and, under current COVID-19 related travel restrictions, they would be required to quarantine for 14 days upon their return to Canada following each visit. The children would not be able to attend school, childcare, counselling, extra-curricular activities, see their friends or participate in any activities, and the claimant's entire household would need to quarantine with them.
- [15] Counsel for the respondent conceded before me that compliance with the order for make-up parenting time is currently impossible. The order allows a further application to be made if the parties are unable to agree on dates for the make-up parenting time. If this Court declines jurisdiction, the onus may be on the claimant to make that application and provide the Washington Court with full evidence about travel restrictions and quarantine requirements applicable to Canadian residents.
- [16] In the notice of family claim filed in this Court, the claimant seeks an order that she have all parenting responsibilities and be entitled to make medical and educational decisions for the children.
- [17] The respondent says the effect of that claim is to obtain new orders on the management of parental responsibilities without the need to show a material change of circumstances--the threshold test for a variation of a final order. I find that concern to be more apparent than real. The notice of family claim refers to the consent parenting plan ordered in Washington. Any judge of this court hearing the claimant's application would likely expect her to provide evidence as to why a different order is necessary.
- [18] The claimant says that, subsequent to her filing the notice of family claim, one child has made a disclosure of physical abuse by the respondent. I am not asked to make any finding on that issue on this application. The child in question is now seeing a counsellor in Vancouver, whose current recommendations include a temporary cessation of in-person visits and continued therapy.
- [19] The relevant statutory provisions begin with ss. 73 and 74 of the Family Law Act.

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.

[20] Rule 18-2 of the Supreme Court Family Rules allows a party, after filing a jurisdictional response, to apply to dismiss or stay the proceeding on the grounds that the Court does not have jurisdiction or should not exercise its jurisdiction. The respondent filed a jurisdictional response in this matter on August 6, 2020. There is no question that this Court has jurisdiction to make orders concerning the children, based on their habitual residence in

British Columbia (s. 74(2)(a) of the FLA, quoted above). The issue is whether the Court should decline to exercise that jurisdiction under s. 74(3) of the FLA. Factors relevant to that analysis are found in s. 11 of the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28. [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.

[21] The list in s. 11 of the CJPTA is not exclusive and the 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 [*Shortridge-Tsuchiya*].

[22] In *Shortridge-Tsuchiya*, the Court of Appeal said at para. 38 that there is an underlying assumption in the text of the FLA that the jurisdiction of a child's habitual residence is the jurisdiction best suited to determine the child's best interests. The Court of Appeal recognized that the wording of the relevant statutory provisions reflects similar considerations under international law. However, the legislation is also clear that this presumption is rebuttable, as expressed by the Court's discretion to decline to make an order where it "considers that it is more appropriate for jurisdiction to be exercised outside British Columbia" (s. 74(3) of the FLA).

[23] In *Club Resorts v. Van Breda*, 2012 SCC 17 [*Club Resorts*], the Supreme Court of Canada said at para. 108 that the burden is on the party seeking a stay to show that another forum is clearly more appropriate. The Court expanded on what this burden entails:

[109] The use of the words "clearly" and "exceptionally" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of

his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. But the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules. Forum non conveniens may play an important role in identifying a forum that is clearly more appropriate for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute. (Emphasis added)

- [24] In my view, the onus of proof must be considered in light of the somewhat unusual facts of this case. The Court must consider which jurisdiction is in a better position to deal fairly and efficiently with the litigation. In this case, there is an alternative forum that has already exercised jurisdiction, having been selected by a party who had already moved to British Columbia and now asks this court to take jurisdiction.
- [25] In *Stone v. Shutes*, 2006 BCCA 515 [Stone], the parties were divorced in Washington, with an order that included a parenting plan. A subsequent order by the Washington Court permitted the mother to move to British Columbia with the children while providing for the father's access. After being found in contempt in Washington, the mother commenced action in British Columbia.
- [26] The Court of Appeal noted at paras. 8 and 11 that the mother had participated in the Washington proceedings, that custody and access were integral to those proceedings and the mother intended to continue benefiting from the Washington order for child support. It concluded:
- [16] There is no reason to conclude that the Washington court is any less attuned to the best interest of the children than a court in British Columbia. The process that the Washington court has pursued to address the access issues is very similar to that which a B.C. court would follow. There is no reason to think that all of the issues related to the father's access will not be address by the court appointed psychologist in Nanaimo.
- [17] In these circumstances judicial comity must be accorded substantial weight.
- [27] *Stone* and *Shortridge-Tsuchiya* were both decided under the former Family Relations Act, but it is common ground that the relevant provisions of that statute were to the same effect as ss. 73 and 74 of the FLA.
- [28] The equivalent nature of the Washington and British Columbia courts has been more recently referred to in *Price v. Srivastva*, 2020 BCSC 1109 [Price], at para. 46:

46 Both courts are courts of competent jurisdictions and have robust family law regimes that will be able to determine the issues between the parties in accordance with the best interests of the children. Although there was some suggestion on Mr. Srivastva's part that the British Columbia courts are and will be less favourable to him, I reject that submission. Both this court and the Washington Superior Court are forums in which the issues between the parties will be determined in a fair and just manner on the evidence before them.

[29] In Price, the mother moved to British Columbia after proceedings in Washington had been commenced and just prior to a trial. Following the trial, contested proceedings continued in both jurisdictions. At one point, there was a conflict between the Washington Final Parenting Plan and a British Columbia protection order, resulting in the mother being found in contempt in Washington.

[30] On the facts before her, Marzari J. found British Columbia to be the more appropriate forum, in part because the majority of the evidence relevant to the best interests of the children was located in British Columbia. The claimant asserts the same applies here and says in her affidavit:

39. If there are necessary court proceedings between me and the respondent with respect to the exercise or scheduling of parenting time, facilitating decisions relating the children's health and educational needs or any other matters or decisions relating to the day to day care and support of the children, I believe the best interests of the children are served by these proceedings taking place in British Columbia where the children and I are ordinarily resident and where all of their teachers, health care providers, counsellors and other resource people reside.

[31] The situation described by the claimant already existed, or was entirely foreseeable, when she elected to begin proceedings in Washington. I find the claimant's decision to commence proceedings in Washington after moving to British Columbia to be a key fact that makes this case distinguishable from Price.

[32] I do not ignore the effects of the COVID-19 pandemic, which effectively makes it difficult or impossible for either party to cross the border to attend court proceedings. But there has already been a final order in Washington. There is no suggestion that the variation the claimant now seeks would not be available in a proceeding reliant on affidavit evidence or, if necessary, virtual attendance of witnesses. That would include any evidence necessary from the counsellor who has become involved.

[33] I would also expect the Washington Court to be fully cognizant of the pandemic and to consider evidence of its practical impact on the ability of these children to visit the respondent. When and if the Canada-US border is re-opened without quarantine requirements, the distance between Vancouver, British Columbia, and Tacoma, Washington, will not pose onerous travel requirements on either party if court attendance is required.

[34] I find that the best interests of the children would be equally served by both courts and, in those circumstances, judicial comity becomes the decisive factor. I therefore order a stay of this proceeding.

"N. Smith, J."

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