
CANADA / JUDGMENT

Kular v. Kular

2020 BCSC 1782

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1782 Kular v. Kular

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kular v. Kular,

2020 BCSC 1782

Date: 20201120

Docket: E60499

Registry: New Westminster

Between:

Jaswinder Singh Kular

Claimant

And

Harjeet Kaur Kular

Respondent

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Claimant:

R. Gill (via telephone)

Counsel for the Respondent:

S. Sharma (via telephone)

Place and Date of Hearing:

New Westminster, B.C.

October 22, 2020

Place and Date of Judgment:

New Westminster, B.C.

November 20, 2020

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Introduction

- [1] The parties are the parents of J.S.K. who was born in early December 2019. At issue is whether the claimant father gave consent to the respondent mother to take the child and move to Calgary.
- [2] The respondent says the claimant and his family were aware that she was going to Calgary on May 28, 2020, and agreed to her leaving with J.S.K.
- [3] The claimant denies that he gave consent for the child to be taken to Calgary with the respondent.
- [4] The claimant seeks in his notice of application filed September 9, 2020 ("the September Application") the following:
2. A declaration that the Supreme Court of British Columbia has jurisdiction to determine custody, guardianship, and access of the child, [J.S.K.], born on December [omitted], 2019.
 3. A declaration that the removal of the child, [J.S.K.], born on December [omitted], 2019, from British Columbia by the Respondent was unlawful.
 4. A declaration that the removal of the child, [J.S.K.], born on December [omitted], 2019, from British Columbia by the Respondent was wrongful as it was in breach of the custody rights of the Claimant.
 5. An interim order that the Order that the [sic] Claimant shall have interim sole custody and interim sole guardianship of the child, [J.S.K.], born on December [omitted], 2019.

6. An Order that [the] Respondent shall forthwith surrender to the Claimant the Passport and Birth Certificate for the child, [J.S.K.], born on December [omitted], 2019.
7. An Order that the Respondent shall immediately return the child, [J.S.K.], born on December [omitted], 2019, to the Lower Mainland particularly in Squamish, British Columbia.
8. An Order that any peace officer, including any R.C.M.P. officer, having jurisdiction in the Province of British Columbia or Alberta, shall escort the Respondent, Harjeet Kaur Kular and the child, [J.S.K.], born on December [omitted], 2019, back to the Lower Mainland particularly to Squamish, British Columbia.
9. An Order that any peace officer, including any R.C.M.P. officer having jurisdiction in the Province of British Columbia or Alberta, who on reasonable and probable grounds believes that the Respondent, Harjeet Kaur Kular, is in breach of the terms of this order may immediately arrest that person and bring him [sic] before a judge of the Supreme Court promptly after the arrest, to be dealt with on an inquiry to determine whether she has committed a breach of this order or is in contempt of court, pursuant to Supreme Court Family Rules.
10. An Order restraining and enjoining the Respondent, Harjeet Kaur Kular, from relocating the residence of the child of the marriage, namely, [J.S.K.], born on December [omitted], 2019, from outside the Lower Mainland region of British Columbia (the Lower Mainland being defined as being from Georgia Strait to the West, the Langley/Abbotsford border to the East, the Canada/United States border to the South and to the Northern border of North Vancouver to the North) without the prior written and notarized consent of the Claimant or further Order of this Honourable Court, pursuant to section 63 of the Family Law Act;
11. The Respondent pay the Claimant's costs of this application in any event of the cause, such costs being fixed by the court at the hearing of this application in a summary manner and payable forthwith.
12. Such other relief as this Honourable Court may deem just and fit.

Background

- [5] The parties were married on March 11, 2017 in Punjab, India. On November 6, 2018 the claimant arrived in Calgary from India. At the time the respondent was residing in Calgary. The claimant stayed with the respondent and her parents for ten days. On November 15, 2018 the parties moved to Squamish, BC. From November 15, 2018 until the respondent left and went to Calgary on May 28, 2020 the parties had not returned to Calgary.
- [6] When the parties arrived in Squamish they both secured jobs working as housekeepers at the Legends Hotel in Whistler. The respondent was on maternity leave from her work when she left for Calgary.

- [7] After the child was born the parties lived together in Squamish until the respondent and child left on May 28, 2020. At that time, J.S.K. was 6 months old. There was no agreement or order in place that allowed for the respondent to relocate with the child to Calgary.
- [8] On August 20, 2020, the claimant father filed the notice of family claim. He seeks an order for sole custody, guardianship, and parenting time with the child, and for the respondent to have supervised parenting time.
- [9] On August 26, 2020, the claimant was relieved from the requirement of a judicial case conference prior to serving the September Application.
- [10] On October 13, 2020, the respondent filed a response to family claim. She claims that the child is now a habitual resident of Alberta as of May 28, 2020. She claims that the claimant consented to the respondent going to Calgary and told her to either bring money back from her family or not return.
- [11] On the same day, the respondent filed a counterclaim. She seeks a divorce and asserts that the child was habitually resident in BC from December 1, 2019 until May 28, 2020. She seeks an order that she have sole parenting rights and sole custody of the child. She further seeks an order for child and spousal support.
- [12] The September Application was initially scheduled for hearing on September 30, 2020. It was rescheduled to October 6, 2020. It was rescheduled again for October 20, 2020 and heard before me on that date.

Positions of the Parties

- [13] The claimant's position is that he never gave consent to the respondent to take the child and move to Calgary. Prior to her departure, J.S.K. had lived with both parties and both had been primary caregivers for the child. The claimant seeks to have the child returned to BC and to him so he can resume being his father.
- [14] He explains that he did not initially try and contact the respondent because he hoped to reconcile with her and initially believed she was homesick and needed to spend some time with her family. He now believes the respondent is not planning on returning home and plans to keep the child in Calgary.
- [15] The respondent's position is that the claimant told her to leave and only to return if she came back with money. She claims that he was aware she was leaving and even helped her pack the evening before her departure. She claims that J.S.K. is now habitually resident in Alberta and that he should remain with her in Calgary.

Issues

- [16] The application materials and submissions raise the following issues:
 - 1. Did the respondent remove J.S.K. from BC with the consent of the claimant?

2. Does the Supreme Court of British Columbia have jurisdiction respecting J.S.K.?
3. Should the respondent be required to return J.S.K. to Squamish, BC?
4. What interim parenting orders should be made in J.S.K.'s best interests?

Issue 1: Did the respondent remove the child from BC with the consent of the claimant?

- [17] On the evidence before me, I find that the claimant did not provide consent for the respondent to take the child and relocate to Calgary. The respondent's story is that the claimant not only gave consent, but helped her pack the night before she left. If this is true, it makes no sense why she would call the RCMP on the day she left. The RCMP's involvement and why they visited the family residence remains unclear to me.
- [18] The evidence of the claimant's sister supports that the claimant and his family were not aware of any planned trip to Calgary. Both the claimant and his sister say that they learnt of the respondent's departure from the landlord.
- [19] I conclude that the respondent left with the child without obtaining the consent of the claimant.

Issue 2: Does the Supreme Court of British Columbia Have Jurisdiction Respecting This Child?

- [20] I will first deal with whether BC should be taking jurisdiction over this matter since the child is currently in Calgary, Alberta.

Parties' Positions

- [21] The respondent submits that the child has become a habitual resident of Alberta and it is in his best interests to remain in Calgary.
- [22] The claimant's position is that the child was wrongfully removed from the jurisdiction, without his consent, and this Court has jurisdiction to determine custody, guardianship, and access to the child.
- [23] I note that neither party provided any argument or case authority respecting this Court's jurisdiction over J.S.K.

Does This Court Have Jurisdiction?

- [24] The applicable provisions of the Family Law Act, S.B.C. 2011, c. 25 [FLA] are ss. 72-74:

Division 7 -- Extraprovincial Matters Respecting Parenting Arrangements

Definitions and interpretation

72 (1) In this Division:

"extraprovincial order" means an order of an extraprovincial tribunal that is similar in nature to an order respecting guardianship, parenting arrangements or contact with a child;

"extraprovincial tribunal" means a court or tribunal, outside British Columbia, having authority to make an extraprovincial order.

- (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.

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.

Determining whether to act under this Part

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.
- [25] 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. Pursuant to s. 74 of the FLA, the court may make an order respecting parenting arrangements only if one of the following applies: (a) the child is habitually resident in BC when the application is filed; or (b) the child is not habitually resident in BC at that time, but the court is satisfied that all of the various enumerated criteria in s. 74(2)(b) are established.
- [26] As provided for in s. 72(3), a parent cannot oust this Court's jurisdiction by removing the child from BC without the other parent's consent: *Stebbing v. Greenleaf*, 2017 BCSC 346 at para. 16. I have already found that the respondent did not have the consent of the claimant to remove the child from BC and relocate to Calgary, Alberta.
- [27] In the recent 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.

[28] The child's most recent place of residence with his parents was in BC from December 2019 to May 2020. The claimant did not consent to a change to the child's place of residence when the respondent took him to Calgary in May 2020. The evidence supports that the parties had a "settled intention" of living in BC. They had a home in Squamish and both had jobs in Whistler. I conclude that the child's habitual place of residence is BC.

[29] Accordingly, in my view s. 74(2)(a) applies and this Court may make an order respecting guardianship, parenting arrangements, or contact with the child.

Did the Claimant Acquiesce or Delay in Applying for a Court Order?

[30] I next need to consider whether the claimant either acquiesced or delayed in applying for an order of the court. The respondent's decision to remove J.S.K. from BC without the claimant's consent does not affect J.S.K.'s habitual residence unless the claimant acquiesced or delayed in applying for a court order: s. 72(3) of the FLA.

[31] The respondent left on May 28, 2020 and the claimant filed the notice of family claim on August 20, 2020. The claimant explained that he initially waited before commencing legal proceedings and bringing the application since he wanted to reconcile with the respondent. He initially believed the respondent was homesick and needed to spend time with her family.

[32] It is not clear from the respondent's evidence when she decided to remain in Calgary.

[33] On the evidence before me I am not convinced that the respondent has acquiesced or delayed in this matter.

[34] For the above reasons, I conclude that this Court has jurisdiction over the matters raised in the application.

Should This Court Take Jurisdiction?

[35] The next step is to decide whether this Court should exercise its jurisdiction. Section 74(3) of the FLA provides broad discretion for a court to decline to exercise its jurisdiction:

(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 of British Columbia.

[36] There is no evidence to show that the respondent started any proceedings in Calgary, or that she is seeking any relief respecting the child in any other jurisdiction. This proceeding, started in BC, is the only proceeding involving these parties. I am convinced that I should exercise jurisdiction over this family law case and in particular issues relating to the guardianship, custody, and parenting of J.S.K.

Issue 3: Should the respondent be required to return J.S.K. to Squamish, BC?

Determining the Applicable Sections of the FLA

- [37] There are two possible sections of the FLA that might apply in these circumstances, ss. 46 and 37. Counsel did not make submissions on this point. I have briefly summarized the applicable cases citing whether s. 46 should apply, but ultimately I do not find it necessary to resolve the matter as I arrive at the same conclusion under either s. 46 or s. 37.
- [38] Section 46(1)(c) states that s. 46 only applies if the "child's guardian plans to change the location of that child's residence" in a way that would affect the child's relationship with another guardian, and if the other requirements of s. 46(1) are met. The jurisprudence conflicts on whether the term "plans" in s. 46 encompasses situations where a child has already been moved, as is the case here. Under s. 46, a court must consider the reason for the change in location as well as the best interests of the child, based on the factors in s. 37, in making an order for parenting arrangements.
- [39] If s. 46 does not apply, then s. 37 would apply. Under that section a court must only consider the best interests of the child, and must not consider the reason for the change in location.
- [40] There is another relocation provision in the FLA: Division 6. It does not apply in these circumstances as there is no written agreement or court order respecting parenting arrangements.
- [41] Two decisions of the Supreme Court of British Columbia issued in 2013 arrived at conflicting interpretations of s. 46. A more recent Provincial Court decision discussed the different possible interpretations of s. 46, and concluded that s. 46 should apply when the relocation has already taken place.
- [42] The Court faced a similar situation in the first 2013 decision, *De Jong v. Gardner*, 2013 BCSC 1303. The parties lived together in BC and were parents of a child. The mother went to Calgary for a visit and then decided to stay there with the child. The father sought the child's return to BC. The court found that both parents were good parents who were equally involved in caring for the child. They had done so without problems in the two years between the move and the date of the hearing.
- [43] The Court found that ss. 45 and 46 did not apply because the mother had moved to Calgary before the proceedings were commenced. The Court's analysis turned on the present tense of the term "plans" in s. 46(c). That subsection says that s. 46 only applies if a guardian "plans" to change the child's residence. In that case the mother was not "planning" to change the child's residence since she had already made the move to Calgary: see para. 63. Having ruled out s. 46 and concluded that s. 37 applied, the Court went on to order a shared parenting regime to maximise the contact with both parents, which therefore required the child return to BC.
- [44] A second Supreme Court of British Columbia decision issued a few months later, *S.J.F. v. R.M.N.*, 2013 BCSC 1812, came to a different result on the application of s. 46 despite similar circumstances. The mother relocated with the child to Prince George without informing the

father, who lived in Smithers. The father started proceedings for an order respecting parenting arrangements after the move had occurred. The Court applied s. 46 but did not discuss the tense of the word "plans" in s. 46, or the fact that the move occurred before proceedings were started. The question in that case was whether s. 46 or Division 6 applied, and there was little discussion of the possibility that s. 37 might apply.

- [45] The conflicting interpretations of s. 46 in *De Jong and S.J.F.* was discussed in *P.S.G. v. S.K.G.*, 2017 BCPC 138 at paras. 56-67. Similarly, the mother in *P.S.G.* relocated to Winnipeg with the child and the father sought an order for guardianship. Provincial Court Judge Ferriss preferred the interpretation in *S.J.F.* over that in *De Jong*.
- [46] Judge Ferriss concluded that s. 46 would apply for three reasons. First, an enactment is construed as always speaking, and a provision expressed in the present tense applies to the circumstances as they arise: Interpretation Act, R.S.B.C. 1996, c. 238, s. 7. The past tense "plans" would therefore cover situations where the parent has already moved (paras. 58-59).
- [47] Second, the FLA is social legislation. The purpose of s. 46 is to provide certainty to the parties and to "ensure that the courts consider consistent factors when assessing whether or not a parent should be permitted to move with a child" and to provide certainty to the parties (para. 63). The interpretation in *De Jong* would apply different rules to families in similar circumstances. Where a child's habitual residence is in BC, and the child has not yet been relocated, s. 46 would apply, and a court would consider the reason for the move as well as the child's best interests. Where the relocation has already taken place, s. 46 would not apply, and a court could only consider the child's best interests.
- [48] Finally, Ferriss P.C.J. noted that both the FLA and the Divorce Act, R.S.C. 1985, c. 3 were pleaded in *De Jong*. That case was ultimately resolved under the Divorce Act, and Ferriss P.C.J. considered the comments regarding s. 46 of the FLA to be obiter dicta.
- [49] Another case from the Provincial Court, *D.M.M. v. D.F.*, 2015 BCPC 310, suggested that s. 46 would apply even if an application to the court was made after the relocation (paras. 54-56.) However, that case dealt with a different set of facts. The mother had made the application before relocating with the child. The court differentiated *De Jong* on its facts, and concluded that the mother's application prior to moving meant that s. 46 applied.
- [50] As previously noted, my analysis arrives at the same result regardless of whether I consider the reason for the move under s. 46 or s. 37. For that reason, I do not find it necessary to resolve whether s. 46 would apply to these circumstances.

Best Interests of the Child Test

- [51] The best interests of the child are paramount over all other considerations when making an order for parenting arrangements and contact time.
- [52] With respect to the best interests of the child, s. 37 of the FLA provides:

37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

- (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
- (a) the child's health and emotional well-being;
 - (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;
 - (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
- (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.

[53] The seminal case on relocation or mobility is *Gordon v. Goertz*, [1996] 2 S.C.R. 27. The court found that relocation questions should be decided based on the best interests of the child involved, without presumption or onus in favour of either party. The focus is on the best interests of the child, not the interests and rights of the parents. This test is also discussed in *Orring v. Orring*, 2006 BCCA 523.

[54] The weight to be given to the maximum contact principle was set out in *Orring* at para. 41:

- [41] An underlying assumption in *Gordon v. Goertz* is that the "maximum contact" principle militates against relocation because the proposed move will usually adversely affect the access parent's ability to see the child, which is contrary to Parliament's stated intention of promoting maximum contact between the child and both parents. A court is therefore faced with having to balance the benefits of the proposed relocation against the child's interests in maintaining maximum contact with the access parent and may decide against permitting the move: see *Karpodinis v. Kantas* (2006), 55 B.C.L.R. (4th) 90, 2006 BCCA 272; leave to appeal to S.C.C. refused (16 November 2006). The maximum contact principle is not an absolute one but it is a mandatory consideration when determining whether a proposed relocation is in the best interests of the child. There are cases where the other principles will outweigh the negative effects of decreased contact with one parent and thus the custodial parent is permitted to move. This Court's decision in *Lowcay v. Lowcay* (2000), 8 R.F.L. (5th) 313, 2000 BCCA 447 is an example.
- [55] The underlying purpose of the Divorce Act and the FLA are identical. Both statutes require the court to consider the best interests of the child: *B.D.M. v. A.E.M.*, 2014 BCSC 453 at para. 115. In assessing the best interests of the child, the judge should consider, among other factors:
- 1) The existing custody arrangement and relationship between the child and the custodial parent;
 - 2) The existing access arrangement and the relationship between the child and the access parent;
 - 3) The desirability of maximizing contact between the child and both parents;
 - 4) The views of the child;
 - 5) The custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
 - 6) Disruption to the child of a change in custody;
 - 7) Disruption to the child consequent on removal from family, schools and the community he or she has come to know.

De Jong at para. 68; *Gordon* at para. 49.

- [56] Section 37(2) of the FLA mandates that in determining the best interests of a child, certain specific factors must be considered. I will deal with each in turn.

The Child's Health and Emotional Well-being

- [57] J.S.K. is a healthy baby, and almost one-year-old. No evidence suggests otherwise. He will require constant care and attention from caregivers. There is no evidence of either party neglecting the child's health and emotional well-being. The respondent raised two instances

to suggest the claimant did not provide adequate care to J.S.K. First, the claimant delayed in obtaining a breast pump after J.S.K.'s birth. Second, he did not purchase a small bathtub for bathing the child while the parties were living together. I am not convinced that either example supports that the claimant does not adequately care for the child.

- [58] Living in two different provinces will have a severe impact on the parents' ability to co-parent the child. If J.S.K. remains in Calgary, the claimant will have no ability to attend medical appointments, chose a daycare and preschool, or have any involvement in the child's development. Impeding the ability of both parents to be involved in the child's life is not in his best interests.
- [59] Prior to the respondent's move, the evidence supports that both parents were involved in his care. I accept that since the move to Calgary the claimant has played no role in caring for J.S.K. This is not due to any fault of the claimant but due solely to the respondent's actions.
- [60] In my view, if the child remains in Calgary it would permanently and profoundly alter his relationship with his father.

The Child's Views

- [61] The child is currently just under a year old. He is still too young to express any views.

Relationships between the Child and Significant Persons in his Life

- [62] The two most significant people in J.S.K.'s life should be his parents. The current circumstances deprive the child of a relationship with his father. I accept that the child has a close relationship with the respondent. She has been in his life since birth. Prior to the respondent's departure to Calgary, I accept that the claimant played an important role in J.S.K.'s life and had a good relationship with his son.

History of Childcare

- [63] During the first six months of J.S.K.'s life, the parents were both involved in caring for him. I accept that during this six month period, the respondent was likely providing the primary care since she was on maternity leave so she could be home with J.S.K. For the last six months the childcare has been exclusively provided by the respondent as a result of the move to Calgary.

The Child's Need for Stability

- [64] I see no disruption for a child of this age in respect to leaving Calgary and returning to, or close to, Squamish, BC. At this young age, what is important is that he have a home and parents who can be a part of his life, and not the greater community he lives in. This cannot be accomplished if he remains in Calgary without his father moving to Calgary.

[65] I do recognize that parents have a right to move. However, my view is that stability is best accomplished for this child with his parents both living in the same community as he grows up and attends school. Both parents can be a part of his pre-school, and then his school life, if they are both living in the same community. They will both be able to participate in extracurricular activities with their son. This will foster stability for their son.

Ability of Guardians to Exercise Parenting Responsibilities

[66] Both parents appear capable of exercising their parental obligations. I have no concerns with either parent's ability to carry out their parenting responsibilities.

Impact of Family Violence

[67] Section 37(2)(g) of the FLA specifically requires the court to consider family violence when considering the best interests of the child. An assessment of family violence is set out in s. 38:

Assessing family violence

38 For the purposes of section 37 (2) (g) and (h) [best interests of child], a court must consider all of the following:

- (a) the nature and seriousness of the family violence;
- (b) how recently the family violence occurred;
- (c) the frequency of the family violence;
- (d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;
- (e) whether the family violence was directed toward the child;
- (f) whether the child was exposed to family violence that was not directed toward the child;
- (g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence;
- (h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;
- (i) any other relevant matter.

[68] The respondent says she was a victim of emotional and psychological abuse in that the claimant and his father were under the "dominating influence" of the claimant's sister, J.K.N., and her husband, H.S.N. The respondent She asserts that her brother-in-law H.S.N. has a criminal record and claims he has threatened to slap her. She recounts an incident in which a fight broke out between her brother-in-law H.S.N. and her husband's younger brother, G.K., in September 2019. Other family members had to intervene to stop the fight.

- [69] The respondent claims that she is "afraid and concerned about the safety of my life and limb as well as our child due to the criminal background of [H.S.N.], and his overriding influence on the Claimant and his family". She claims that the claimant would yell at her and threaten to call the brother-in-law H.S.N. She further claims that the claimant controls her activities and her money.
- [70] The respondent further relies on an affidavit of her sister-in-law, S.K.D, who is married to the claimant's younger brother, G.K. This individual, S.K.D., was living in the same basement suite in Squamish with the parties. She has since left Squamish and is also living in Calgary. S.K.D. also claims that the claimant's sister J.K.N. was very dominating. S.K.D. asserts that she was scared of her brother-in-law H.S.N., J.K.N.'s husband. S.K.D. complained of having no freedom to go anywhere or to talk to anyone outside of the family. S.K.D. claims that the respondent threatened to hit her when she refused to get a second job. S.K.D. separated from her husband and has lived in Calgary since March 2, 2020.
- [71] The claimant denies that his sister J.K.N. and her husband H.S.N. make decisions for him and his family. He confirmed that his sister J.K.N. and her husband H.S.N. did not live with them. He denies any type of controlling behaviour toward the respondent.
- [72] I am not convinced that the claimant has committed family violence. The thrust of the respondent's allegations involve actions taken by her brother-in-law H.S.N. and sister-in-law J.K.N. I am not satisfied that the respondent has been subjected to any physical abuse. The allegations of psychological and emotional abuse have been denied by the claimant. On the basis of the affidavit evidence before me I am not persuaded that the respondent has been the subject of intimidation, threats, or unreasonable restrictions of her financial or personal autonomy.

Whether Actions of a Person Responsible for Family Violence Impair their Ability to Care for the Child and Meet the Child's Needs

- [73] There is no evidence that the claimant has been responsible for family violence, nor that his ability to care for J.S.K is impaired.

Ability of Guardians to Cooperate

- [74] It is too early to determine if these parties can work together to care for their child. I believe that they will do so to ensure that J.S.K. is safe and secure, and to uphold his well-being.

Civil or Criminal Proceedings

- [75] In my view this factor is not relevant. The only evidence before me is that the brother-in-law has a past criminal record. This individual did not live with the parties when they resided together in Squamish. The claimant stated that the child was never left in the care of the brother-in-law.

- [76] As noted in De Jong, there are further factors that should be considered in relation to relocation and mobility cases. I will now consider these factors, to the extent they expand on the s. 37 factors.

The Existing Custody Arrangements and Relationship between the Child and the Custodial Parent

- [77] There is no court order or written agreement in place. The respondent relocated to Calgary prior to the parties' separation. The respondent claims there was an oral agreement that allowed her to take the child to Calgary. On the evidence before me, I am not persuaded that the claimant agreed to the respondent taking the child and relocating to Calgary.
- [78] In Calgary, the child has the respondent's family to assist in his upbringing. The respondent states that she has no relatives in BC.

The Existing Access Arrangement and the Relationship Between the Child and the Access Parent

- [79] There has been no access provided to the claimant since the relocation. There has been no proposed arrangement on how the claimant could have access to the child. I accept that it would be very expensive for the claimant to travel from Squamish to Calgary. I further accept that the claimant could not afford the cost of frequent travel to and from Calgary. The claimant says the respondent has refused to facilitate his access to J.S.K. since the relocation. The respondent claims that the claimant has not made a single call to inquire about the health and well-being of J.S.K. since arriving in Calgary. The claimant's explanation is that he wanted to give the respondent some time to be with her family since he understood she was homesick.
- [80] In Squamish, the claimant's father and younger brother, G.K., lived with J.S.K. In addition, the claimant has a three-year-old nephew living in the same town.

Maximizing Contact Between the Child and Both Parents

- [81] I do not see any hope of any personal contact between the claimant and the child with the child residing in Calgary. In *Young v. Young*, [1993] 4 S.C.R. 3, the Supreme Court of Canada stated that maximum contact with each parent is preferred as long as it is in the best interests of the child. Maximum contact gives the child the opportunity to know both parents and benefit from a relationship with each.
- [82] Maximum contact between J.S.K. and his parents can only be achieved with the parents living in the same community or within a reasonable distance so that access can be provided.
- [83] The claimant and respondent decided to make their home in Squamish. They both had jobs and a home to live in. The child also had other relatives, on the claimant's side, in his life.

The Custodial Parent's Reason for Moving

[84] Even when considering the respondent's reasons for moving I find that it is still in J.S.K.'s best interests for him to return to Squamish. It is clear to me that there was no exceptional need for the respondent to move to Calgary in order to meet the needs of the child. She was on maternity leave from her job. I do not accept that her reasons for moving related to the child's best interests. I do accept that she was in an unhappy relationship and that she was homesick for her family in Calgary. This does not justify her removing the child from the jurisdiction and effectively foreclosing his relationship with his father.

Conclusion

- [85] There are four possible parenting scenarios in this case: (i) primary residence with the mother in Calgary; (ii) primary residence with the father in Squamish; (iii) shared parenting in Calgary; or (iv) shared parenting in Squamish or with the respondent living in a community close by. The shared parenting would require one of the parties to move to the other area.
- [86] In my view, the evidence supports that both parents were involved in the care of the child prior to his departure to Calgary. I am convinced that they are both good parents. I do not see that there would be any disruption to J.S.K., at his young age, if he was returned to BC.
- [87] It is also my view that the best interests of the child would be served by both parents residing in the same community, or at least reasonably close to each other.
- [88] I will now compare the shared parenting options.
- [89] If the claimant were to move to Calgary, I accept that he would have to find employment there. He has never worked in Calgary. With the current COVID-19 pandemic he will likely face challenges in securing employment. He would likely face a period of unemployment. He has no family members in Calgary that he could share a residence with.
- [90] If the respondent were to return to Squamish she would likely be able to return to her prior occupation. I assume her maternity leave is not over yet, although it may be ending in January 2021. It may be that she would not want to work at the same hotel as the claimant. With the ski season about to start in the Whistler area, it is likely she could find similar employment as a housekeeper in another hotel.
- [91] I accept that the respondent would lose some of the economic and emotional support her family is currently providing her in Calgary. In essence, she would be returning to the situation she faced when the decision was made by the parties to leave Calgary and move to Squamish in November 2018. I also note that the respondent will not face the same issues she described when living with the claimant's relatives if she is living separate and apart from the claimant.

- [92] In the end, it is my view that the best interests of J.S.K. would be served by his return to, or close to, Squamish, with a shared parenting arrangement. Assuming the respondent chooses to return to BC, it would be appropriate for the child's primary residence to be with her. She has consistently been in the child's life since birth. It is important that she reside in a community that is reasonably close to Squamish in order for the claimant to have regular and generous parenting time with the child. The best option would be for her to return to Squamish, though she is not required to do so.
- [93] Squamish is a small community. The respondent must be allowed to have a home where she will not be in frequent contact with the claimant and his relatives. For that reason, the respondent is permitted to try and find a residence that is reasonably close to Squamish, if she so desires.
- [94] The respondent has until January 15, 2021 to return to BC with J.S.K. This timeline is to permit her to make the necessary living arrangements for herself and the child. She will need to locate a place to live and secure employment. Upon her return to BC, the parties should immediately make arrangements for the claimant to have parenting time with the child. At this time, it is not clear where the respondent will live. The precise nature of the parenting arrangements cannot be established yet. If the parties cannot agree on the parenting arrangement then they can apply to the court for an order.
- [95] If the respondent does not return to BC by January 15, 2021 the claimant should immediately, upon notice to the respondent, return to court and seek an order for the return of the child to BC. The particulars on how to retrieve the child can be resolved at that hearing, if it occurs. In my view, the best method would be for the claimant to go to Calgary to pick up the child to return him to Squamish. I am hopeful that the respondent will decide to return to Squamish with the child. This would minimize any disruption and stress for J.S.K.

Issue 4: Interim Parenting Orders

- [96] The claimant is entitled to have parenting time with the child commencing immediately via FaceTime for up to 30 minutes every other day. The respondent will initiate the FaceTime call. The purpose is to allow the claimant the opportunity to see his son. The times of the calls can be adjusted to allow the claimant to see his son while being fed and while playing.
- [97] The FaceTime parenting time will specifically occur on December 1, 2020, the child's first birthday, and on December 25, 2020.
- [98] The respondent will need financial support to relocate back to BC. The evidence before me establishes that on February 28, 2020 the joint bank account stood at \$47,276.72. The claimant made a series of cash withdrawals on March 2, 2020. He has not provided an explanation of why these withdrawals were made. The claimant should immediately transfer \$20,000 to the respondent on an interim and without prejudice basis.

- [99] In addition, the claimant should immediately, as of November 1, 2020, commence paying child support. The child has a right to child support, and the claimant has a positive duty to pay it. The amount of support should be based on the Federal Child Support Guidelines. I was not provided with the claimant's income so the parties will have to calculate the appropriate amount.
- [100] The combination of the \$20,000 and the three payments of child support that will be due on November 1, December 1, 2020 and January 1, 2021 should enable the respondent and J.S.K. to return to BC, rent a home, and establish a household.

Summary of Orders Made

[101] The following orders are made:

1. The Supreme Court of British Columbia has jurisdiction to determine the custody and guardianship of the child, J.S.K., born on December [omitted], 2019.
2. J.S.K. is a habitual resident of British Columbia.
3. The respondent has wrongfully retained J.S.K. in Calgary, Alberta since May 28, 2020.
4. The Court is satisfied that the claimant, Jaswinder Singh Kular, and the respondent, Harjeet Kaur Kular, are the guardians of the child under s. 39(3) of the Family Law Act.
5. The respondent is ordered to return J.S.K. to British Columbia on or before January 15, 2021.
6. If the respondent remains in British Columbia with J.S.K., J.S.K. will have primary residence with the respondent. The claimant will have liberal and generous parenting time at dates and times agreed upon by the guardians.
7. If the respondent does not return J.S.K. to British Columbia on or before January 15, 2021, the claimant should seek to appear before me, or another judge of the Supreme Court if I am not available, on an urgent basis, with notice to the respondent, to seek orders relating to the return of J.S.K. to British Columbia.
8. The respondent shall forthwith surrender to counsel for the claimant J.S.K.'s passport and birth certificate.
9. The respondent will facilitate a 30 minute FaceTime visit with the claimant on alternating days. The parties can agree on the specific times for the visits. The respondent will initiate the communication via FaceTime.
10. The respondent will facilitate a 30 minute FaceTime visit with the claimant on December 1, 2020 and December 25, 2020.
11. The claimant is entitled to an immediate interim and without prejudice distribution of family property in the amount of \$20,000. This money is to fund her return to BC and her living expenses.

12. The claimant, Jaswinder Singh Kular, will pay to the respondent, Harjeet Kaur Kular, child support for the support of J.S.K. commencing on November 1, 2020 and continuing the first of each month in accordance with the Federal Child Support Guidelines, subject to any further court order.

[102] The need for this application arose due to the unilateral decision of the respondent to remove the child from the jurisdiction without complying with the requirements of the FLA. The claimant is entitled to the costs of this application.

"Forth J."

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