

CANADA / JUDGMENT

Lukas v. Lemos

2025 BCSC 1658

COURT

Supreme Court of British Columbia

DECIDED

27 August 2025

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2025 BCSC 1658 Lukas v. Lemos

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lukas v. Lemos,

2025 BCSC 1658

Date: 20250827

Docket: E251366

Registry: Vancouver

Between:

Sarah Lukas

Claimant

And

Robson Lucio Nogueira Lemos

Respondent

Before: The Honourable Justice Latimer

Reasons for Judgment

Counsel for the Claimant:

Z. Berinstein

Counsel for the Respondent:

M. Plett

Place and Date of Hearing:

Vancouver, B.C.

August 7, 2025

Place and Date of Judgment:

Vancouver, B.C.

August 27, 2025

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Introduction

Facts

- [1] Ms. Lukas is a citizen of France. Mr. Lemos is a citizen of Brazil. Neither party is currently permitted to stay permanently or to work in Canada.

- [2] The parties met in 2023 when they were both residing in British Columbia. They had temporary work permits allowing them to live and work in Canada at the time. Those work permits have since expired.
- [3] The parties were married on November 18, 2023, in British Columbia.
- [4] There is one child of the marriage born in June 2024 in British Columbia ("Child"). The Child is a citizen of Canada and France. Mr. Lemos says the Child is also a citizen of Brazil. Ms. Lukas doubts the adequacy of the proof of this fact.
- [5] The parties moved to the Cayman Islands in November 2024 for Mr. Lemos's work. Mr. Lemos had a temporary work permit for the Cayman Islands. Ms. Lukas and the Child were listed as his dependents.

Judicial History

Cayman Court

- [6] The parties separated on February 27, 2025. On that same date, Ms. Lukas sought to leave the Cayman Islands with the Child. Mr. Lemos initiated court proceedings in the Cayman Islands and obtained an injunctive order from the Cayman Court called a prohibited steps order which prohibited the removal of the Child from the Cayman Islands ("Prohibited Steps Order").
- [7] After the Prohibited Steps Order, both parties were represented by counsel and participated in proceedings before the Cayman Court.
- [8] On March 7, 2025, the parties appeared before the Cayman Court, each represented by legal counsel. Ms. Lukas asked the Cayman Court to consider her application for a Specific Issue Order that would allow her and the Child to travel outside of the jurisdiction for the purpose of relocating back to Canada. She argued Canada was the place of the Child's habitual residence. The Cayman Court dismissed the application.
- [9] On March 7, 2025, by consent, the Cayman Court ordered that:

[Mr. Lemos] shall continue to be solely responsible for the rent and utilities associated with the marital home. [Ms. Lukas] shall not remove or damage any items in the property and shall ensure the property is maintained in the same condition as when [Mr. Lemos] vacated on 10 March 2025

[Mr. Lemos] shall pay the sum of C\$1,500 pcm to [Ms. Lukas] each month in respect of interim child maintenance pending final order. Such sum shall be payable by or on 15th of each month commencing 15th March 2025. If paid in cash, [Ms. Lukas] shall immediately provide [Mr. Lemos] with a signed receipt.

- [10] The parenting schedule imposed by the Cayman Court is not well described in the materials before me; however, Mr. Lemos deposes that on April 11, 2025, he returned to the Cayman Court after Ms. Lukas withheld the Child from him for an entire week in violation of a court order. Ms. Lukas deposes that when she contested the Child having overnight access with Mr. Lemos, the challenge backfired resulting in an extension of Mr. Lemos's overnight time with the Child.
- [11] On April 11, 2025, the Cayman Court made an interim maintenance order.
- [12] On April 23, 2025, Mr. Lemos was terminated from his employment.
- [13] The Cayman Island Department of Children and Family Services ("DCFS") became involved with the family in April 2025. A report was prepared describing handovers of the Child between her parents on April 25 and 29, 2025.
- [14] The parties attended a second hearing before the Cayman Court. Ms. Lukas says the purpose of this hearing was to determine where they would go next. Her position was that the parties should return to Canada; however, she deposes that the Cayman Court determined the Child would move to Brazil.
- [15] On May 2, 2025, the Cayman Court made a final order ("Cayman Order") that provided, in part, as follows:

AND UPON the Court having jurisdiction in this matter by reason of the habitual residence of the Child,

AND UPON it being recognised that the parties share parental responsibility for the Child and both parties are entitled to be kept informed and consulted in all matters pertaining to the child's welfare; and further that it is in the best interests of the child to have equal contact with both of her parents.

AND UPON both parties each confirming their agreement to the terms set out below by their and their attorneys respective signatures below.

BY CONSENT, IT IS ORDERED THAT:

1. There shall be a shared residence order in favour of the parties regarding the Child.
2. The prohibited steps order dated 27 February 2025 is discharged.
3. The interim maintenance order dated 11 April 2025 is stayed.
4. The parties shall be permitted to travel to Canada on 3 May 2025 with the child for a temporary visit for 30 days ("the Temporary Visit"). For the avoidance of doubt, this Temporary Visit shall not alter the child's habitual residence, such that this Court shall continue to retain jurisdiction over the Child.

5. During the Temporary Visit, [Ms. Lukas] shall provide [Mr. Lemos] with reasonable and suitable accommodation for both him and the Child, at [Ms. Lukas's] cost
6. During the Temporary Visit, [Mr. Lemos] and [Ms. Lukas] shall have equal contact with the Child on such basis, which shall be agreed between the parties before their departure to Canada, and as provided to the Court. If the parties cannot agree upon a shared basis of contact, the remainder of the order shall be stayed to allow the Court to determine the matter.
7. During the Temporary Visit, the Child's birth and the parties' marriage shall be registered with the relevant Brazilian Consulate Office in Canada on an Emergency basis. Both parties shall cooperate and carry out all steps required of them to facilitate the said registrations.
8. During the Temporary Visit, other than shall be necessary to complete the registrations provided for above, [Mr. Lemos] shall hold the Child's French passport, [Ms. Lukas] shall hold the Child's Canadian passport.
9. At the end of the Temporary Visit (unless otherwise agreed between the parties in the interim), the parties shall relocate to Brazil with the Child ("the Relocation"). For the avoidance of doubt, should [Ms. Lukas] elect not to travel to Brazil with [Mr. Lemos] and the Child, [Mr. Lemos] shall be permitted to relocate to Brazil with the Child, in any event.
10. During the Relocation [Mr. Lemos] shall provide [Ms. Lukas] with accommodation in a suitable and reasonable self-contained one-bedroom apartment, at [Mr. Lemos]'s cost (to include power, water and internet utilities).
11. During the Relocation, [Mr. Lemos] shall provide [Ms. Lukas] with a cellular telephone account with airtime, at [Mr. Lemos]'s cost.
12. During the Relocation, [Mr. Lemos] shall provide maintenance to [Ms. Lukas] and the Child in the amount of R.1,500 per month (one thousand five hundred Brazilian Reals).
13. During the Relocation, [Mr. Lemos] and [Ms. Lukas] shall have equal contact with the Child on such a basis as shall be agreed between the parties before their departure to Canada and as provided to the Court. If the parties cannot agree upon a shared basis of contact, the remainder of the order shall be stayed to allow the Court to determine the matter.
14. Three months after the Relocation's commencement, the parties agree to review and consider any required amendments to the relocation arrangements provided for in this order.
15. No order as to costs.
16. Liberty to apply with respect to the workings of this Order.
- [16] The Cayman Order was accompanied by an agreed contact schedule which set out parenting time for both parties during the Temporary Visit to Vancouver, and also during the Relocation to Brazil as follows:

1. During the Temporary Visit, [Mr. Lemos] and [Ms. Lukas] shall have contact with the Child as follows (from Monday, 5 May 2025):

Each Monday from 9.00 am until the following Tuesday at 4.00 pm, each Wednesday from 9.00 am until 4.00 pm, each Thursday 9.00 am until 4.00 pm, each Friday 9.00 am until 4.00 pm, and each Saturday 4.00 pm until the following Sunday at 4.00 pm.

2. During the Relocation, [Mr. Lemos] and [Ms. Lukas] shall have equal contact with the Child as follows:

Week 1: From 9.00 am on Monday until 9.00 am the following Monday, the Child shall reside with [Mr. Lemos], save that [Ms. Lukas] shall have contact with the Child between 6.00 pm each Tuesday until 9.00 am the following Wednesday, and from 6.00 pm each Thursday until 9.00 am the following Friday.

Week 2: From 9.00 am on Monday until 9.00 am the following Monday, the Child shall reside with [Ms. Lukas], save that [Mr. Lemos] shall have contact with the Child between 6.00 pm each Tuesday until 9.00 am the following Wednesday, and from 6.00 pm each Thursday until 9.00 am the following Friday.

BC Provincial Court

[17] The parties travelled together with the Child to Vancouver arriving on May 4, 2025.

[18] Ms. Lukas deposes:

I signed the [Cayman Order] solely to secure my return to Canada, a place we knew to be home and familiar, with my daughter and to board our flights scheduled for the following day - flights that had been arranged and paid for by [Mr. Lemos's] employer.

I did not know how else to get to safety and a place where I felt like I would be protected and be allowed to have my concerns heard. During the entire process in the Cayman Islands, my concerns seemed to fall on deaf ears, of both the Judges and my counsel.

[19] Mr. Lemos deposes that once the parties were back in Canada, Ms. Lukas told him that she had applied for a work permit and intended to stay in Canada but that if her application for a work permit was denied, she would take the Child with her to France.

[20] Ms. Lukas's statements to Mr. Lemos are the reason that on May 6, 2025, Mr. Lemos commenced proceedings in the Provincial Court of British Columbia seeking to enforce the Cayman Order.

[21] Mr. Lemos sought to obtain a case management order without notice or attendance. On May 7, 2025, the Provincial Court rejected the order. The reasons for the rejection were:

This Order cannot be filed. It is not clear from the affidavit that there is jurisdiction to make an order concerning this child. See ss. 72 and 73 of the Family Law Act.

An Application About a Family Law Matter (Form 3) must be filed and served on the other parent.

[22] On May 9, 2025, Ms. Lukas withheld the Child from Mr. Lemos.

[23] On May 9, 2025, Mr. Lemos filed an Application About a Priority Parenting Matter for an order to determine matters relating to interjurisdictional issues under s. 74(2)(c) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], and for orders to permit travel and relocation of the Child to Brazil. Ms. Lukas cross-applied for a protection order and orders waiving the requirement for her to serve her own Application About a Priority Parenting Matter. The Provincial Court ruled that Ms. Lukas was required to serve Mr. Lemos with her materials and the application was adjourned until May 14, 2025.

[24] On May 22, 2025, the parties, represented by counsel, appeared in Provincial Court and the Provincial Court ruled on the application for case management order without notice or attendance as follows:

I will not grant the orders sought for the following reasons:

1. The Application For a Case Management Order Without Notice is not granted with respect to waiving the requirement for service on Sarah Lucio Nogueira Lukas of the Application About A Priority Parenting Matter which is to be before the court on May 27, 2025.
2. The Application For a Case Management Order Without Notice is also not granted with respect to having a hearing regarding relocation of [the Child] as it appears this court does not have jurisdiction over the child who is not habitually resident in British Columbia and it appears to be more appropriate pursuant to s.74(3) Family Law Act, for jurisdiction to be exercised by the court in the Cayman Islands which has already made an order in this regard.

[25] On May 27, 2025, the parties appeared before the Provincial Court, represented by counsel. Counsel sought to have the Provincial Court formally determine the jurisdiction issue. In a transcript of that proceeding which has been placed before me, the Court explained that although it did not believe there was jurisdiction, it had not finally decided the issue. Mr. Lemos asked the Provincial Court for a direction that the passport be provided to Mr. Lemos. The Provincial Court stated:

I mean, I think you're in the wrong court. The Supreme Court has some inherent jurisdiction. I'm not saying that they necessarily have jurisdiction over this matter, but they may have. I'm pretty sure this court does not have.

[26] After some discussion, the parties agreed to proceed in this Court and the Provincial Court adjourned all of the applications before it generally.

BC Supreme Court

- [27] On May 26, 2025, Ms. Lukas filed the within notice of family claim seeking orders respecting the Child, and orders for child and spousal support.
- [28] On June 2, 2025, Mr. Lemos filed a jurisdictional response in which he disputed both that this Court had territorial jurisdiction and that this Court ought to exercise its jurisdiction over him.
- [29] On June 24, 2025, the parties obtained a consent order to transfer their family law matter from the Provincial Court to this Court.
- [30] On June 25, 2025, Mr. Lemos filed a notice of application in which he sought a determination of the jurisdictional issues. He also sought among other things, orders:
- a) recognizing the Cayman Order pursuant to s. 75(1) of the FLA;
 - b) permitting him to travel with the Child to Brazil without Ms. Lukas's consent, pursuant to s. 75(2)(b) of the FLA;
 - c) striking Ms. Lukas's notice of family claim.
- [31] The June 2025 application was set in general chambers for July 9, 2025 with an unrealistic one-hour time estimate.
- [32] On July 2, 2025, Ms. Lukas filed an application in response in which she also gave an unrealistic time estimate of two hours.
- [33] On July 9, 2025, this Court adjourned the matter to August 7, 2025 for a full day hearing. Mr. Lemos was directed to file a new notice of application and corrected affidavit by a particular date. Ms. Lukas was directed to respond by a particular date. The parties were directed to exchange written arguments on a particular timetable.
- [34] Pursuant to those directions, on July 18, 2025, Mr. Lemos filed the within notice of application. In it he seeks:
- a) A declaration that the Child has been wrongly removed or, in the alternative, withheld from the State of Brazil and wrongfully retained in British Columbia by the claimant;
 - b) An order pursuant to section 75(1) of the FLA that the Cayman Order is recognized;
 - a) Pursuant to sections 77(2)(c) or, in the alternative, 75(2)(b) of the FLA, that the claimant shall, immediately upon the making of this Order, do all that is necessary to permit the respondent to take the Child to the State of Brazil, including, without limitation, immediately producing and delivering any passport of the Child to the respondent, providing the respondent with the Child, herself, and providing to the respondent any of the Child's toys, belongings, clothing, or such items as are generally used for the parenting of the Child that are in the possession of the claimant;

- a) Pursuant to s. 231 of the FLA, an order that a police officer within British Columbia in any jurisdiction that the Child may be located, the Royal Canadian Mounted Police and/or such law enforcement agencies that may have jurisdiction be directed and authorized to enforce any order of this Court made in this proceeding, including locating, apprehending, and delivering the Child to the respondent or such other designated individual on his behalf;
 - b) Pursuant to Rule 18-2(1)(a) of the Supreme Court Family Rules an order that the notice of family claim filed May 26, 2025 be struck;
 - a) In the alternative, pursuant to Rule 18-2(1)(b), that the within proceeding be dismissed for lack of this Court's jurisdiction over the respondent;
 - a) In the final alternative and pursuant to Rule 18-2(2) of the Rules, that the Court decline to exercise jurisdiction over the respondent in respect of the claim made against him and that the within family law case be stayed.
- [35] On July 25, 2025, Ms. Lukas filed her application response. She opposes all the relief sought by Mr. Lemos.
- [36] The parties exchanged written submissions prior to the hearing of this application. Following the hearing of this application, this Court issued Practice Direction 69 which requires that written submissions be maintained on the court file. The parties' written submissions have therefore been filed as Exhibits A and B to this application.

Issues

- [37] The issues for determination are:
- a) Whether a ground establishing this Court's jurisdiction has been made out and, if so, whether this Court should exercise jurisdiction?
 - b) Whether the Cayman Order should be recognized?
 - c) Whether any ancillary orders should be made under ss. 77 or 231 of the FLA?

Analysis

Jurisdiction

- [38] The first issue that must be addressed is whether this court has jurisdiction to hear this proceeding concerning the Child under the FLA. Part 4 of the FLA allows parents and other persons to apply for a parenting order. Division 7 addresses extraprovincial matters respecting parenting arrangements.
- [39] A substantially similar statutory scheme was recently considered by the Supreme Court of Canada in *Dunmore v. Mehralian*, 2025 SCC 20. This analysis follows the reasoning of the Supreme Court of Canada in that case.

[40] The purposes of Division 7 are set out in s. 73 and are four-fold:

- (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.

[41] A court may only make orders under Part 4 if a ground establishing its jurisdiction has been made out: Dunmore, para. 34.

[42] Section 74 of the FLA contemplates four grounds for the court to exercise jurisdiction:

- 1) The court may exercise jurisdiction in respect of a child that is "habitually resident" in British Columbia when the application is filed (s. 74(2)(a));
- 2) The court may exercise jurisdiction in respect of a child that is not habitually resident in British Columbia but is physically present and meets a number of other enumerated conditions, including that the balance of convenience favours exercising jurisdiction (s. 74(2)(b));
- 3) The court may exercise jurisdiction where the child is physically present in British Columbia and would "suffer serious harm" from certain specified circumstances (s. 74(2)(c)); and
- 4) The court's *parens patriae* jurisdiction is not excluded by Part 4 (s. 192).

[43] To establish that this Court has jurisdiction under the FLA, the applicant need only point to one of these grounds, which may not require finding that the Child was habitually resident in British Columbia: Dunmore, para. 35.

[44] Even where a court does have jurisdiction, taking up that jurisdiction is discretionary -- it may decline to exercise jurisdiction if there is a more appropriate forum for the dispute: Dunmore, para. 36.

[45] Where the court does not have jurisdiction, or declines to exercise its jurisdiction, the court may nevertheless make broad discretionary interim orders under s. 77, which include ordering the return of the child to another jurisdiction: Dunmore, para. 36.

Habitual Residence

[46] Section 74(2)(a) of the FLA provides:

(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;

[47] Section 72 of the FLA provides:

(2) For the purposes of this Division, a child is habitually resident in the place where the child most recently resided

(a) with the child's 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.

[48] Thus, s. 72 makes clear that whether a child is habitually resident in British Columbia at the time the application was filed requires asking whether the child resided at a different point in time on or before that date - "where the child most recently resided" in whichever circumstance enumerated in s. 72(2) last occurred. Section 72(3) makes clear that habitual residence cannot be altered by the removal or withholding of a child except in limited circumstances: Dunmore, para. 40.

[49] The combined effect of ss. 72(2) and 74 is that habitual residence is determined in reference to the most recent time at which both of two conditions were met:

a) The child "resided" in one of the three circumstances enumerated in s. 72(2);

b) The child was not removed or withheld without the consent, acquiescence or undue delay of all guardians.

[50] I will refer to this as the "prescribed time".

[51] These subsections serve Division 7's purposes of dissuading the abduction of children as an alternative to due process. They ensure that if a child has been wrongfully removed or withheld before the filing of the application, it is generally their residence before the wrongful act that is determinative of jurisdiction: Dunmore, para. 43.

- [52] The proper interpretation of "resided", grounded in the text, context and purpose of this Division, is simply living in a place as opposed to merely visiting it. A child resides where they are at home: Dunmore, para. 62. The focus should be on factual connections between the child and the jurisdiction in question such as use of social services, linguistic, cultural, educational and social ties, and the presence of family. As well, courts should look to the circumstances surrounding any movement to and from the jurisdiction such as the duration and reason for being in and leaving the jurisdiction: Dunmore, para. 69.
- [53] Some principles to approaching this question emerge from Dunmore:
- a) Physical presence in a jurisdiction at a point in time is neither necessary nor sufficient to reside in that jurisdiction at that time: Dunmore, para. 64.
 - b) Permanence is not necessary for residence. What the concept excludes are inherently transient situations like vacationing: Dunmore, para. 65.
 - c) For very young children, the ties of those who are taking care of them are likely to weigh more heavily in the analysis. However, parental intention is not the exclusive focus: Dunmore, para. 66.
 - d) A child may reside in more than one jurisdiction at any given time. For example, when both of their parents live in different jurisdictions. In those circumstances, courts can still decline jurisdiction in favour of a more appropriate forum with which the child has a closer connection (s. 74(3)): Dunmore, para. 67.
 - e) Attornment of parents to a foreign jurisdiction is, by itself, irrelevant to where the child is residing for the purposes of ss. 72 and 74 of the FLA: Dunmore, para. 68.
 - f) Citizenship is but one factor, among many. It alone is insufficient to demonstrate a child is habitually resident: Dunmore, para. 72.
- [54] Ms. Lukas argues that the prescribed time is the period leading up to the hearing in the Cayman Islands on May 2, 2025. Mr. Lemos did not address this issue in his written submissions. However, orally, he took the position that the prescribed time was May 2025.
- [55] In this case, the Child resided with both parents until separation on February 27, 2025.
- [56] After February 27, 2025, the parents began living separate and apart. The Child continued to reside with each of them on schedules imposed by orders of the Cayman Court. The last court order made was the Cayman Order dated May 2, 2025.
- [57] Ms. Lukas's evidence, set out above, suggests that she had no intention of complying with the terms of the Cayman Order. She had no intention of relocating to Brazil despite the terms of the Cayman Order. Her travel to Canada was for a purpose ulterior to those set out in the Cayman Order.

- [58] The parties left the Cayman Islands, pursuant to the terms of the Cayman Order, for a Temporary Visit to Vancouver arriving on or around May 4, 2025. Shortly thereafter, and certainly by May 9, 2025, Ms. Lukas stopped adhering to the Cayman Order and its related parenting schedule.
- [59] Given Ms. Lukas had no intention of complying with the Cayman Order upon her return to Canada, I find that May 2 is the date on which the circumstances enumerated in s. 72 last occurred.
- [60] I have also considered that the prescribed time may be May 9, 2025 because, whatever her intentions were, that is the date on which Ms. Lukas stopped adhering to the parenting schedule contemplated by the Cayman Order. I will address this alternative time period at the end of this analysis.
- [61] As I have noted, whether the Child was habitually resident when this application was filed turns on whether she was "residing" in British Columbia on May 2, 2025.
- [62] I find that the Child was not residing in British Columbia on May 2, 2025.
- [63] I say this for the following reasons:
- a) The Child was not physically present in British Columbia on this date. However, physical presence is neither necessary nor sufficient to establish that she resided in this jurisdiction.
 - b) For very young children, like this Child, the ties of those who are taking care of them are likely to weigh more heavily in the analysis. I find this consideration to be neutral. I am satisfied on the record before me that the parties' families do not live in British Columbia or the Cayman Islands. The parties had friends in both locations.
 - c) Ms. Lukas argues that it was never the intention of the parties to make the Cayman Islands their permanent home. This is disputed by Mr. Lemos. I need not resolve this conflict in the evidence because permanence is not necessary for residence. What the concept excludes are inherently transient situations like vacationing.
 - d) The parties' stay in the Cayman Islands was not inherently transient, like a vacation:
 - i. The parties moved to the Cayman Islands for Mr. Lemos's work. Mr. Lemos had a temporary work permit to work in the Cayman Islands for the period of November 7, 2024 to May 6, 2025. Mr. Lemos's employer provided a letter dated March 18, 2025 in which it stated that it planned to apply for his work permit before the expiry date as the project would take approximately three years to complete and Mr. Lemos would be involved until its completion.
 - ii. On January 1, 2025, Mr. Lemos entered into a fixed term one year lease for the family home.
 - iii. The parties moved substantial personal belongings to the Cayman Islands.

- iv. After the onset of the Cayman Court proceedings, Mr. Lemos was terminated from his employment and his work permit was not extended. This necessitated a move from the Cayman Islands, a matter that was addressed in the Cayman Order. However, Mr. Lemos's termination did not make the parties' stay in the Cayman Islands transient. It simply highlights that their stay in the Cayman Islands was not permanent which, again, is not necessary to establish residence.
- e) The parties and the Child's presence in British Columbia beginning in May 2025, was inherently transient and temporary:
- i. The Cayman Order only permitted the Child to travel to British Columbia for 30 days in order that the Child's birth and the parties' marriage could be registered with the relevant Brazilian Consulate Office in Canada on an emergency basis.
- ii. Ms. Lukas deposes that her intention has been to settle permanently in Canada. Upon returning here in May 2025, she obtained short term housing and a job offer. She has applied for permanent residency and a work permit. However, as at the time of this hearing, neither Ms. Lukas nor Mr. Lemos had (or have) any permanent right to stay in Canada past November 2025, nor do they have any right to work here. Ms. Lukas's affidavit evidence contemplates her own future application to relocate with the Child to France in the event that her applications for permanent residency and/or a work permit are refused.
- iii. In any event, again, parental intention is not the exclusive focus of the analysis: Dunmore, para. 66.
- f) Ms. Lukas's alternative position is that the Child resided in both the Cayman Islands and British Columbia in May 2025. She argues the Child's citizenship in Canada is some evidence of this:
- i. While a child may reside in more than one jurisdiction at any given time (Dunmore, para. 67), I do not find that to be the case here.
- ii. As set out above, the parties moved together with the Child to the Cayman Islands. This is not a situation where the Child's parents were each residing in a different location. Neither party resided in British Columbia on May 2, 2025.
- iii. Although Ms. Lukas formed the intention to relocate the Child to Canada, those intentions were contrary to the terms of the Cayman Order. The Child was brought to British Columbia on a temporary basis. Shortly after arriving here, Ms. Lukas stopped complying with the Cayman Order. The Cayman Order did not contemplate the Child remaining in British Columbia for more than 30 days.
- iv. The Child has been held here contrary to the Cayman Order and without the consent, acquiescence or undue delay of Mr. Lemos. In those circumstances, the FLA does not permit me to find that the Child resided in British Columbia at the relevant time.

v. The Child's citizenship is but one factor, among many. It alone is insufficient to demonstrate the Child is habitually resident here: Dunmore, para. 72.

[64] If the prescribed time is May 9, 2025, for substantially similar reasons already set out, I would still not find that the Child was residing in British Columbia at that date. Although the Child was physically present in British Columbia on this date, that is neither necessary nor sufficient to establish that she resided in this jurisdiction.

[65] In all these circumstances, the Child was not "habitually resident" in British Columbia when the application was filed.

Physical Presence and Enumerated Conditions

[66] Section 74(2)(b) provides:

- (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:
 - (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;

[67] I do not find on the balance of convenience that it is appropriate for jurisdiction to be exercised in British Columbia.

[68] In considering this factor, I find the considerations set out in s. 11 of the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 ("CJPTA") to be of assistance in guiding the analysis. That section provides:

Discretion as to the exercise of territorial competence

11 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

- (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
- (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
 - (b) the law to be applied to issues in the proceeding,
 - (c) the desirability of avoiding multiplicity of legal proceedings,
 - (d) the desirability of avoiding conflicting decisions in different courts,
 - (e) the enforcement of an eventual judgment, and
 - (f) the fair and efficient working of the Canadian legal system as a whole.
- [69] These factors are not restrictive, and the court may consider other factors such as the best interests of the child: *L.M.H. v. R.M.V.*, 2024 BCSC 1199 at para. 25.
- [70] As noted above, the parties have already engaged in a court proceeding in the Cayman Islands. Both parties were present in, and represented by counsel in the Cayman Court proceedings.
- [71] Ms. Lukas sought to advance similar arguments before the Cayman Court that she now advances in this proceeding. She specifically argued that she should be permitted to relocate to Canada with the Child. The Cayman Court dismissed that application and determined that the Child should relocate to Brazil.
- [72] Ms. Lukas raises various concerns with the Cayman Court proceedings. She argues the Cayman Court did not undertake a proper jurisdictional analysis and should never have exercised ongoing jurisdiction over a one-year-old child when it was aware that neither party intended to continue residing in the jurisdiction.
- [73] I reject this argument.
- [74] On the face of the Cayman Order, the Cayman Court concluded that the Child was habitually resident in the Cayman Islands. This Court has reached the same conclusion. Further, the fact that the parties intended to relocate and sought a court order to permit this does not meaningfully differentiate the Cayman Islands from this jurisdiction. Mr. Lemos continues to intend to relocate to Brazil. He is not permitted to work here or to reside here indefinitely. He has secured a job in Brazil. Ms. Lukas deposes that she would like to stay in Canada but acknowledges she is not currently permitted to work here and not permitted to reside here after November 2025. If that situation does not change, she would like to relocate the Child to France and will be applying to the court for an order permitting that.

- [75] Ms. Lukas argues that she was concerned that the Cayman Court judge lacked impartiality, that the hearings were brief, and occurred quickly so that she did not have sufficient time to prepare her case. She argues that the Cayman Court should have considered the option of the Child relocating to France, her home country. She says the Court failed to consider the Child's best interests. She further argues that the Cayman Order was made under duress and while she was physically and mentally exhausted, and under intense emotional pressure. She says she felt inadequately represented by her counsel.
- [76] I cannot accede to these arguments.
- [77] The Cayman Order was a consent order. The onus of proof of duress or coercion in relation to consent orders is on the party who alleges it: *Jamali v Gillani*, 2021 BCSC 2134, para. 54.
- [78] I find that Ms. Lukas has not discharged her burden to demonstrate that she was under duress or coerced into agreeing to the Cayman Order, or that the process was such that she did not have an opportunity to be heard.
- [79] The Cayman Court proceedings took place over the course of two months. Both parties participated in those proceedings and were represented by counsel.
- [80] There is no evidence before me that the claimant asked the Cayman Court to consider an application to relocate the Child to France. However, Ms. Lukas did marshal evidence and arguments for other applications.
- [81] Ms. Lukas requested that the Cayman Court judge recuse themselves from this case. She has not provided evidence as to whether she received a formal decision from that request; however, I infer from the fact that she raises the issue again here that the request was rejected.
- [82] Ms. Lukas availed herself of the opportunity to bring an application seeking to relocate with the Child to Canada. That application was dismissed. If reasons for that decision were given, those have not been placed before me.
- [83] Only after that application was dismissed, Ms. Lukas entered into the Cayman Order.
- [84] Ms. Lukas produced no transcript of the Cayman Court proceedings nor of any decisions made by that court. Moreover, despite the fact that she was represented by counsel throughout the proceedings, she did not provide an affidavit from her counsel with respect to her allegations or the circumstances in which the Cayman Order was negotiated.
- [85] There is nothing one sided or oppressive about the Cayman Order. The Cayman Order left room for the parties to negotiate and settle the parenting schedule and permitted them to return to the Court if that issue could not be resolved by consent. It contemplates shared parenting. It also contemplates that the parties can review and consider any required amendments to the relocation arrangements provided in that order after three months.

- [86] With respect to whether the Cayman Court considered the best interests of the Child, Mr. Lemos has tendered the affidavit of Kattina Anglin who is a lawyer in the Cayman Islands. Ms. Lukas objects to the admissibility of the opinion evidence contained in that affidavit.
- [87] The evidence in question is a letter which sets out the relevant Cayman Islands legislation. Ms. Anglin then opines that having compared that legislation to s. 37 of the FLA, it is similar.
- [88] I agree with the claimant that this opinion is not admissible. The opinion requires the interpretation of Canadian law which is not the proper subject of expert opinion. The expert also does not appear to be qualified to offer such an opinion.
- [89] However, to the extent that Ms. Anglin sets out the provisions of the Cayman Island legislation that applies to the Cayman Order, it is admissible.
- [90] That evidence makes clear that in making an order such as the Cayman Order, the Cayman Court is required to consider the child's best interests above all other competing interests: Children Act, (2012 Revision), s. 3; Matrimonial Causes Law (2005 Revision), s. 19.
- [91] I note that the Cayman Order is express in the preamble that the Child's best interests have been considered. That is not surprising given that the Cayman Islands is a contracting state to the Convention on the Civil Aspects of International Child Abduction, 25 October 1980, 1343 UNTS 89 ("Hague Convention"). In its preamble, the Hague Convention confirms that contracting states are deemed to consider the best interest of the child in custody matters.
- [92] I do not accede to the claimant's argument, based purely on speculation, that notwithstanding the preamble to the Cayman Order, the Cayman Court neglected to consider the best interests of the Child because the order was entered into by consent.
- [93] Arguments that the Cayman Court should have considered the option of the Child relocating to France or failed to adequately consider the Child's best interests, are arguments that could be advanced on appeal. Likewise, concerns about procedural fairness or bias are issues for appeal. None of these arguments tilt the balance of convenience in favour of this Court assuming jurisdiction.
- [94] The parties will incur a duplication of costs if that issue is relitigated in this jurisdiction. Such relitigation will also result in a multiplicity of legal proceedings.
- [95] Such relitigation will be inconvenient and costly. Neither party is permitted to stay in Canada past November 2025 nor are they permitted to work here. Therefore, depending on how quickly this matter progresses, the parties themselves may have to travel to attend court. Some anticipated witnesses live in North Vancouver but others reside in the Cayman Islands, Brazil and France. Given these issues have already been litigated in the Cayman Islands, it is anticipated that transcripts of those proceedings and decisions will be necessary.

- [96] Ms. Lukas's aim appears to be to reach a different result than what was achieved in the Cayman Islands. Not only would a different result conflict with the Cayman Order, it would undermine the finality of the Cayman Court proceedings and circumvent normal appeal processes.
- [97] The fair and efficient working of the Canadian legal system requires this Court to respect the jurisdiction and orders of foreign courts. It does not benefit the system to permit parties who are dissatisfied with the outcome in foreign courts to relitigate those same issues in this Court: *Ma v. Li*, 2016 BCSC 469 at para 35.

Physical Presence and Serious Harm

[98] Section 74(2)(c) provides:

74(2) Despite any other provision of this Part, a court may make an order under this Part respecting guardianship, parenting arrangements or contact with a child only if one of the following conditions is met:

- (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.

[99] Ms. Lukas argues that if the Child is returned to Mr. Lemos as contemplated by the Consent Order, the Child would suffer serious harm because:

- a) There are few mechanisms to enforce her parenting time in Brazil.
- b) There is no guarantee the Child will see Ms. Lukas regularly in Brazil including because Ms. Lukas may not be able to reside in Brazil.
- c) There is no evidence that the Child is permitted to relocate to Brazil.
- d) Mr. Lemos will be working in Brazil and the Child will be in an unfamiliar environment under care of people she has not yet met.
- e) If Ms. Lukas is able to relocate to Brazil, she is likely to suffer deterioration of mental health, lack of work and lack of social services.

[100] In *Souhaibb v. Javed*, 2023 BCSC 584, this Court described the analysis under s. 74(2)(c) as follows:

[95] Serious harm is harm which is significant. It can take many forms, such as physical, psychological or emotional harm, or significant damage to property: *Charnock v. Charnock*, 2016 BCSC 44 at paras. 33-34.

- [96] The Supreme Court of Canada, when addressing an Ontario provision analogous to s. 74(2) (c) of the Family Law Act, confirmed the principles outlined in Charnock. The Court held that determining whether serious harm would result is a highly individualized and fact specific exercise. In considering this issue, the court should focus on the particular circumstances of the child: *F. v. N.*, 2022 SCC 51 at para. 69.
- [97] The Supreme Court of Canada in *F. v. N.* noted the following considerations when determining "serious harm":
- a) The child's age, special needs and vulnerability may mitigate or aggravate the harm: at para. 80
 - b) The severity and likelihood of anticipated harm: at para. 71
 - c) Any inconsistencies between family law in foreign jurisdictions and British Columbia (such inconsistencies must be profoundly irreconcilable i.e. a failure to apply the "best interests of the child" principle): at para. 88
- [98] The court must be satisfied on a balance of probabilities that the child would suffer serious harm - the potential for serious harm is not sufficient: *J.K.S. v. M.L.L.A.*, 2022 BCSC 2238 at para. 52.
- [99] The onus is on the "abducting" parent to prove the child would suffer serious harm: *F. v. N.* at para. 69.
- [101] Ms. Lukas has not met her onus to prove the Child would suffer serious harm. The harms identified are largely speculative and not borne out by the record before me.
- [102] The record does not satisfy me that Ms. Lukas will be unable to enforce her parenting time in Brazil. As I have set out above, the Cayman Order contemplates shared parenting. It also contemplates that the parties are at liberty to apply with respect to the workings of the Order. While Ms. Lukas outlines concerns which she says put Mr. Lemos's credibility into question, there is not a sufficient evidentiary basis on which this Court can conclude that Mr. Lemos will fail to abide by the terms of the Cayman Order. The parties were both represented by counsel in the Cayman Islands. Ms. Lukas has not led any evidence from her lawyer or otherwise as to whether the Cayman Court would encounter difficulty enforcing its order.
- [103] The record does not establish that Ms. Lukas will be unable to reside in Brazil. It does not evidence any efforts (successful or otherwise) by Ms. Lukas to obtain the necessary permits to do so.
- [104] Even if it did, I cannot conclude based on Ms. Lukas's evidence that the possibility that the Child and Ms. Lukas will be separated gives rise to "serious harm" as identified in the FLA. The question of whether or not proposed relocation to both Canada and Brazil was in the Child's best interests in all of the circumstances was before the Cayman Court which was required by law to consider the best interests of the child. The Cayman Court concluded

that "it is in the best interests of the child to have equal contact with both of her parents". Nevertheless, the Cayman Court also held that: "For the avoidance of doubt, should [Ms. Lukas] elect not to travel to Brazil with [Mr. Lemos] and the Child, [Mr. Lemos] shall be permitted to relocate to Brazil with the Child, in any event." If Ms. Lukas wishes to dispute those conclusions, her opportunity to do so was in the Cayman Court or on appeal.

- [105] Ms. Lukas has not met her onus of showing that the Child is unable to relocate to Brazil. There is a contest in the evidence as to whether or not the Child is a Brazilian citizen. However, even if the Child is not a Brazilian citizen, the record does not satisfy me that she will not be permitted to relocate to Brazil with Mr. Lemos who is a Brazilian citizen. Indeed, the Temporary Visit to British Columbia appears to have as its end registration of the Child's birth and parties' marriage with the Brazilian Consulate Office in Canada to facilitate such relocation.
- [106] The record does not demonstrate that third-party care will result in serious harm to the Child. Third-party care is not exceptional. Any possibility of such harm is entirely speculative.
- [107] The possibility that Ms. Lukas will suffer a deterioration of her mental health, be unable to work or unable to access social services in Brazil is, on the record before me, speculative.

Parens Patriae

- [108] The court's parens patriae jurisdiction only applies where there is a gap in the legislative regime. Use of parens patriae jurisdiction is not meant to be an avenue for statutory amendment or broad interference with existing laws, and does not create substantive rights: *Jamali v Gillani*, 2021 BCSC 2134, para. 108.
- [109] I have set out above the legislation that governs the issues raised on this application. There is no gap in the legislation. This is not an appropriate circumstance in which to invoke the court's inherent jurisdiction.

Should the Cayman Order Be Recognized in BC?

- [110] Mr. Lemos seeks recognition of the Cayman Order.
- [111] The orders made by the court address a number of issues which were not before me on this application. I will only consider orders 1, 4, 6-9, 13.
- [112] Section 75 of the FLA states:

Recognition of extraprovincial orders

75 (1) A court must recognize an extraprovincial order if all of the following apply:

- (a) the extraprovincial tribunal would have had jurisdiction to make the order under the rules that are applicable in British Columbia;

- (b) each party to a proceeding in which the extraprovincial order was made had
- (i) reasonable notice that the order would be made, and
- (ii) a reasonable opportunity to be heard respecting the order;
- (c) the extraprovincial tribunal was required by law to consider the best interests of the child;
- (d) it would not be contrary to public policy in British Columbia to recognize the order.

[113] I am satisfied that the Cayman Court has jurisdiction to make orders in relation to residence, contact, and relocation of the Child. For the reasons set out above, and despite Ms. Lukas's arguments to the contrary, I am also satisfied that both parties had reasonable notice of and reasonable opportunity to participate in the proceedings in the Cayman Islands and be heard by the Cayman Court.

[114] As noted above, the Cayman Court is required by law to consider the best interests of the child.

[115] Ms. Lukas argues:

there are serious public policy concerns with enforcing the Final Consent Order, as it is counter to many principles found in Dunmore and other jurisprudence. This was a consent order, which puts the child in limbo for months without a habitual residence or without any mechanisms of enforcement without initiating further proceedings in the Cayman Islands.

[116] I find it is not contrary to public policy in BC to recognize these orders. For all the reasons set out above, I reject that the Cayman Order is counter to the principles articulated in Dunmore. I also do not accede to the argument that it puts the Child in limbo or without a habitual residence. While enforcement remains with the Cayman Court, I do not find this to be counter to public policy. Rather, I find it to be the clearly more appropriate forum in all of the circumstances.

Ancillary Orders

[117] Once an extraprovincial order is recognized by a court, it has the same effect and may be enforced as if it were an order made under s. 45 of the FLA: FLA (s. 75(2)(a)) and the Court may, if necessary to give effect to the extraprovincial order, make any order that the court may make under the FLA (FLA, s. 75(2)(b)).

[118] Mr. Lemos asks for the following ancillary orders:

- a) A declaration that [the child] has been wrongly removed or, in the alternative, withheld from the State of Brazil and wrongfully retained in British Columbia by the claimant.
- b) Pursuant to section 77(2)(c) or, in the alternative, s. 75(2)(b) of the FLA, that the claimant shall, immediately upon the making of this Order, do all that is necessary to permit the respondent to take the child to the state of Brazil, including, without limitation, immediately producing the delivering any passport of the child to the respondent, providing the

respondent with the child, herself, and providing the respondent any of the child's toys, belongings, clothing, or such items as are generally used for the parenting of the Child that are in the possession of the claimant;

- c) Pursuant to s. 231 of the FLA, an order that a police officer within British Columbia in any jurisdiction that the child may be located, the Royal Canadian Mounted Police and/or such law enforcement agencies that may have jurisdiction be directed and authorized to enforce any order of this Court made in this proceeding, including locating, apprehending, and delivering the Child to the respondent or such other designated individual on his behalf.

[119] Mr. Lemos says these ancillary orders are necessary because the claimant has a fixed intention not to return to Brazil and is prepared to defy court orders to have her way.

[120] Clause 4 of the Cayman Order permitted the parties to bring the Child to British Columbia for a Temporary Visit. There has been no wrongful removal of the Child.

[121] Once in British Columbia, Ms. Lukas asked both the Provincial Court and this Court to assume jurisdiction over this dispute. The Provincial Court declined to adjudicate the issue. I have set out above the initial difficulties faced by the parties in identifying the appropriate forum for this dispute. I have also set out the difficulties they faced getting heard in light of their initial efforts to have this matter heard in general chambers with an unrealistically short time estimate. Due to these difficulties, this application took some time to come before the Court. Ms. Lukas was entitled to have the jurisdictional issue resolved. I do not find that she has intentionally delayed having this matter adjudicated.

[122] I expect that now that the jurisdictional issue has been resolved, Ms. Lukas will comply with the Cayman Order which has been recognized by this Court. In these circumstances, I consider that it is premature to impose the ancillary orders sought by Mr. Lemos. However, if Ms. Lukas does not immediately comply with the Cayman Order Mr. Lemos has liberty to renew his application for the ancillary orders. I will remain seized of any such application.

Orders

[123] In light of my findings in respect of jurisdiction, pursuant to Rule 18-2, the within family law case is stayed.

[124] Pursuant to s. 75 of the FLA, the following provisions of the Cayman Order are recognized:

1. There shall be a shared residence order in favour of the parties regarding the Child.
4. The parties shall be permitted to travel to Canada on 3 May 2025 with the child for a temporary visit for 30 days ("the Temporary Visit"). For the avoidance of doubt, this Temporary Visit shall not alter the child's habitual residence, such that this Court shall continue to retain jurisdiction over the Child.

6. During the Temporary Visit, [Mr. Lemos] and [Ms. Lukas] shall have equal contact with the Child on such basis, which shall be agreed between the parties before their departure to Canada, and as provided to the Court. If the parties cannot agree upon a shared basis of contact, the remainder of the order shall be stayed to allow the Court to determine the matter.
7. During the Temporary Visit, the Child's birth and the parties' marriage shall be registered with the relevant Brazilian Consulate Office in Canada on an Emergency basis. Both parties shall cooperate and carry out all steps required of them to facilitate the said registrations.
8. During the Temporary Visit, other than shall be necessary to complete the registrations provided for above, [Mr. Lemos] shall hold the Child's French passport, [Ms. Lukas] shall hold the Child's Canadian passport.
9. At the end of the Temporary Visit (unless otherwise agreed between the parties in the interim), the parties shall relocate to Brazil with the Child ("the Relocation"). For the avoidance of doubt, should [Ms. Lukas] elect not to travel to Brazil with [Mr. Lemos] and the Child, [Mr. Lemos] shall be permitted to relocate to Brazil with the Child, in any event.
13. During the Relocation, [Mr. Lemos] and [Ms. Lukas] shall have equal contact with the Child on such a basis as shall be agreed between the parties before their departure to Canada and as provided to the Court. If the parties cannot agree upon a shared basis of contact, the remainder of the order shall be stayed to allow the Court to determine the matter.

[125] The respondent's application for the relief set out at Part 1, paragraphs 1-3 of the notice of application filed July 18, 2025 is adjourned generally. I will remain seized of any application by the respondent to renew this application.

[126] The respondent is entitled to his costs of this application.

"Latimer J."

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