
CANADA / JUDGMENT

Mei v. Li

2019 BCSC 2121

COURT

Supreme Court of British Columbia

DECIDED

29 August 2019

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2019 BCSC 2121 Mei v. Li

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mei v. Li,

2019 BCSC 2121

Date: 20190829

Docket: E190255

Registry: Vancouver

Between:

Huizi Mei

Claimant

And:

Yang Li

Respondent

Before: The Honourable Madam Justice Watchuk

Oral Reasons for Judgment

Counsel for the Claimant:

J.M.W. Cudmore

C. Hocking (A/S)

Place and Dates of Trial:

Vancouver, B.C.

August 6, 7 and 29, 2019

Place and Date of Judgment:

Vancouver, B.C.

August 29, 2019

- [1] THE COURT: These are brief Oral Reasons in this trial in which the claimant is Huizi Mei and the respondent is Yang Li. At this point in the trial the evidence on the guardianship and parental responsibilities of the two children is complete. As the evidence with regard to the property matters is not complete, these reasons address only the issues of guardianship and parental responsibilities for the two children. The property matters are adjourned generally.
- [2] These then are the Reasons with regard to the orders sought today concerning the guardianship and parental responsibilities of the two children of the marriage, Xuanbo and Frank. The claimant also seeks confirmation of the order that the respondent return the children to the care of the claimant in Vancouver, British Columbia. This final order is sought to affirm and replace the previous interim order under the Divorce Act providing for that relief.
- [3] The determination of child support and spousal support, as well as the claimant's claim for a reapportionment of family property outside of China are adjourned sine die. The claimant's application to dismiss respondent's Counterclaim, as well as for special costs are also adjourned sine die.
- [4] Since Mr. Li has obtained a divorce in China without notice to Ms. Mei, Ms. Mei no longer seeks relief pursuant to the Divorce Act and instead advances her claim sought under the Family Law Act, S.B.C. 2011, c. 25 [FLA]
- [5] In setting out the background and the facts, I accept the evidence of the claimant. I find her to be an entirely credible witness. On this basis I make the following findings of fact: The parties were married in China on August 17, 2008. On December 23, 2018, the parties separated. There are two children of the marriage, Xuanbo Li, born in 2009, and Frank Li, born in 2015. Frank is an American citizen, having been born in the United States. The respondent also has an adult son from a prior marriage, Xuanyi Li, born in 2000. No orders are sought by the claimant respecting Xuanyi.
- [6] In September 2016, the claimant and the children, Frank, Xuanbo and Xuanyi became ordinarily resident in British Columbia when the claimant arrived in Canada with temporary resident status. At all material times the respondent has remained a resident of China, but has visited the family from time to time in Vancouver.

- [7] The family is very wealthy, having accumulated many millions of dollars in assets in China during their marriage. They brought some property to Canada and the United States. The separation, as noted above, occurred on December 23, 2018. The claimant alleges, and I accept her evidence, that the separation included abuse by the respondent towards her. In the hours following the separation, the parties discussed a fair division of their assets, but they did not come to a formal agreement within the meaning of section 93 of the Family Law Act. The claimant submits that if there was an agreement, any such agreement was repudiated by the respondent through his abduction of the children. In any event, the terms of that agreement are not known to the claimant, as the respondent has refused to provide a copy of any agreement made between the parties to the claimant or her counsel.
- [8] On or about January 26, 2019, the respondent abducted the children to China and has continued to wrongfully retain the children there. Following the claimant's report of the abduction to the Vancouver Police, charges were laid against the respondent and Xuanyi. Xuanyi pleaded guilty to a lesser included charge of obstruction of justice and is currently serving a sentence, I understand, of probation. The charges against the respondent remain outstanding.
- [9] Ms. Mei gave evidence that the children have not been properly cared for in their time away from her. She was their primary caregiver throughout their lives until January 26, 2019. She had some limited contact with the children in the early days following their abduction, in the form of a video call facilitated by both parents as well as a number of surreptitious phone calls to the claimant made by Xuanbo on his phone from the bathroom of the residence in China. The claimant observed that the children were distressed and not properly dressed. After Xuanbo's calls were discovered by the respondent, Ms. Mei understands that his phone has been taken away and further contact has not been possible.
- [10] On January 30, 2019, Justice Giaschi made an order under the Divorce Act granting interim sole custody of the children to the claimant and requiring that the respondent return the children to Vancouver no later than February 3, 2019. The children were not returned by February 3, 2019. On April 23, 2019, Justice Matthews found the respondent in contempt of court and made an order that he could purge his contempt by returning the children to the claimant by 11:59 p.m. on April 26, 2019. The respondent has to date failed to purge his contempt. The children have not been returned to Vancouver or to the claimant.
- [11] In the course of the application for the order of contempt, Mr. Li, the respondent, obtained an adjournment of the hearing by purchasing air tickets for the return of the children. However, after the adjournment was granted he reneged on the arrangement to return the children. The air tickets were not used; the children remained in China, where it is understood they still remain.
- [12] The respondent retained counsel and filed responding pleadings and a Notice of Application to set aside the orders regarding the children. He discharged his counsel, however, and since May 2019 he has not participated in the proceeding. On the commencement of this trial on

August 6th, an agent attended on his behalf in order to request an adjournment on the part of new counsel. The adjournment was not granted. The trial proceeded. Since then, notwithstanding that the court records indicate the respondent has new counsel, neither new counsel nor the respondent have contacted the claimant's lawyer.

- [13] On or about June 24, 2019, the respondent apparently obtained an order for divorce and custody of the children in a Chinese court without notice to the claimant (the "Chinese order"). The order was fortuitously received by the claimant, as it was mailed to an address at which she no longer resides. The claimant submits that for the sake of her health and the best interests of the children, the matters regarding the children ought to be resolved in the Canadian courts. She therefore seeks orders today regarding guardianship of the children and parenting arrangements. Again, the division of family property and debt and the claim for special costs are adjourned sine die.
- [14] The claimant has abandoned her outstanding claim in the Amended Notice of Family Claim for a divorce in light of the apparent Chinese order to this effect. She brought the claim for divorce in her Notice of Family Claim filed January 30, 2019, and amended May 10, 2019. However, the respondent has since obtained the Chinese order dissolving the parties' marriage in proceedings brought without notice to the claimant.
- [15] Although there is a real question whether the circumstances of the Chinese divorce are such that this court might refuse to recognize it as contemplated in the decision of *Martinson J. in Pitre v. Nguyen*, 2007 BCSC 1161 at paragraph 15, the claimant does not wish to pursue that argument in this court. Rather, as no limitation period or notable difference in substantive relief available under the FLA arises, the claimant does not object to the recognition of the term of the Chinese order granting a divorce. It follows that the claimant adjourns her application for divorce as well as her corollary claims under the Divorce Act. That is because of the well settled law that this court does not have jurisdiction to make orders for corollary relief under the Divorce Act when the parties are divorced by order of a foreign court. That principle is set out in *Virani v. Virani*, 2006 BCCA 63.
- [16] However, notwithstanding the Chinese order, the claimant continues to seek the corollary relief pleaded under the Family Law Act regarding the parenting and financial matters arising from the breakdown of the parties' relationship. There is jurisdiction to proceed in that manner as our provincial legislation, the British Columbia Family Law Act, allows a claim for corollary relief to be advanced in these circumstances. The recognition of the foreign divorce does not bar that claim: *R.N.S. v. K.S.*, 2013 BCCA 406.
- [17] Turning then to the parenting issues, the claimant seeks an order that the respondent's guardianship of the children be terminated and that she remain as a sole guardian of the children. Such an order would make her the only person exercising parental responsibilities for the children. In the alternative, the claimant seeks an order allocating all parental responsibilities to her.

- [18] With regard to jurisdiction over the children, it is Ms. Mei's submission that the terms of the Chinese order granting custody to Mr. Li ought not to be recognized by this court. In any event, she submits that this court has jurisdiction over the children and may make orders respecting guardianship, parenting arrangements, and parental responsibilities. That is primarily because the habitual residence of the children in Vancouver prior to January 26, 2019 was not changed by the abduction.
- [19] Division 7 of the FLA concerns extraprovincial matters respecting parental arrangements. Pursuant to section 74(1), it applies where there is a possibility that an order regarding a child may be made in more than one jurisdiction. As the children resided in British Columbia from September 2016 until their abduction to China in January 2019, Division 7 is engaged. The purposes of the division are set out in section 73:

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.

[20] Under section 74(2)(a) of the FLA, the court may make orders regarding a child if that child is habitually resident in British Columbia. However, if the court considers it more appropriate for jurisdiction to be exercised outside of British Columbia, then under section 74(3) the court may decline to make an order.

[21] A child's habitual residence is determined under section 72(2) of the FLA:

- (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.

[22] Importantly, section 72(3) of the FLA expressly states that a child's habitual residence cannot be changed by the wrongful removal of a child. It states:

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.

[23] Section 72(3) prevents a parent from ousting the jurisdiction of this court by removing a child from British Columbia without the consent of the other parent; *Stebbing v. Greenleaf*, 2017 BCSC 346, at para. 16.

[24] The court's jurisdiction under sections 72 to 74 and 77 of the FLA was considered in the case of *Aslanimehr v. Hashemi*, 2019 BCSC 804, at paras. 38 to 53 by Justice Branch. He affirmed the following principles:

- (a) "The court may have regard to common law principles when determining a child's 'habitual residence', but the statutory definition 'takes priority'..." (para. 42);
- (b) "...'residence'...means 'something more than the place the parties last spent time together'..." (para. 44);
- (c) "... habitual residence is established by residing in a place for an appreciable period of time, with a 'settled intention'." (paras. 45, 47 and 48);
- (d) A settled intention requires a degree of continuity but not an intention to settle indefinitely. It may involve consideration of whether both parties reside in the location; whether the custodial parent is employed in the location and has taken steps to satisfy the immigration requirements; whether the children are enrolled in school, and whether accommodation is arranged (para. 49);
- (e) And, finally, "One parent's unilateral decision to relocate or remove a child without the other parent's knowledge or consent does not alter the child's habitual residence." (para. 53)

[25] Section 75 of the FLA set out the circumstances in which the court must recognize an extraprovincial order. An extraprovincial order is defined in 72(1) as an order of an extraprovincial tribunal that is similar in nature to an order respecting guardianship, parenting arrangements or contact with a child.

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.

[26] Taking into account the statutory provisions as interpreted, I conclude that this court has jurisdiction to make orders respecting parenting arrangements and guardianship under the FLA. The facts that I take into account in coming to that conclusion are as follows:

1. Since September of 2016 the children have been habitually resident in British Columbia, thus falling within the ambit of section 74(2)(a) of FLA.
2. The ordinary residence of the children was not changed by the respondent's abduction and wrongful retention of the children in China in contempt of this court under section 72(3) of the FLA.
3. There is no application before this court to decline jurisdiction under section 74(3) of the FLA.
4. There is no application before this court to recognize the Chinese order under section 75 of the FLA.

[27] In any event, the circumstances under which a court must recognize the Chinese order under 75(1) are not made out on the facts of this case. Ms. Mei did not have notice that the Chinese order would be made or a reasonable opportunity to be heard regarding that order. There is no evidence regarding whether the court that issued the Chinese order was required by law to consider the best interests of the children.

[28] In any case, it would be contrary to public policy to recognize the Chinese order. A central purpose of the division as set out in 73(c) is, "to discourage child abduction as an alternative to determining by due process the guardianship of, or parenting arrangements with respect to, a child." By seeking and obtaining the Chinese order, Mr. Li has engaged in impermissible forum shopping and sought to usurp the jurisdiction of this court to make orders respecting parenting and guardianship in respect of the children habitually resident in British Columbia. As in the Stebbings case, to decline jurisdiction and defer to China would reward Mr. Li for his wrongful withholding of the children.

[29] I would add to these considerations that Ms. Mei did not acquiesce in the removal of the children and did not delay in applying for an order of this court. The removal of the children was effected by a ruse perpetrated by Mr. Li and his eldest son. Ms. Mei attended in court within days of the abduction in order to obtain orders of this court to remedy this most difficult situation.

- [30] I conclude that this court has jurisdiction to make orders respecting parenting arrangements and guardianship under the FLA. I note in coming to that conclusion that in similar cases other superior courts have declined to cede jurisdiction to other courts. The claimant cites the following cases: *Anamur v. Anamur*, 2009 CanLII 72338, from the Ontario Superior Court; *Matrook v. Bani-Ahmad*, 2015 ONSC 1620; *S.I. v. A.S.K.*, 2015 ABQB 797.
- [31] In this case, the mother and children were habitually resident in British Columbia prior to the abduction of the children. The B.C. court has issued orders relating to the children. There is no evidence that the Chinese court considered the best interests of the children, nor is there evidence that the mother, Ms. Mei, was given notice of the application in the Chinese court or an opportunity to be heard in the Chinese court. In these circumstances, this court will not cede jurisdiction to the Chinese court.
- [32] I conclude both that this court has jurisdiction over the children to make orders respecting parenting and guardianship, and that it is in their best interests to do so, notwithstanding the Chinese order.
- [33] I turn next to parenting arrangements for the children, having found that this court has jurisdiction to make such orders with regard to Xuanbo and Frank. Part 4 of the FLA deals with the allocation of parental responsibilities and parenting time. Section 37(1) provides that in making orders respecting guardianship, parenting arrangements, or contact with a child, the court must consider only the best interests of the child. Section 37(2) prescribes certain factors to be taken into account in determining what is in the best interests of the child:
- 37(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.
- [34] The facts relevant to the best interests of the children are as follows: on January 26, 2019, the respondent abducted the children and took them to China, where they have remained despite orders of this court requiring the respondent to return them. The respondent was found in contempt for failing to comply with the return order of this court. Although he had purchased flight tickets to return them, he reneged on those plans.
- [35] I also find as a fact that the claimant mother was always the primary caregiver for the children. There is also evidence that the claimant was the primary caregiver for the respondent's son Xuanyi when he lived with her. Since September 2016 the respondent has not lived with the parties, only visiting once or twice a year on holidays, such as Christmas in 2018 and Chinese New Year in 2019.
- [36] I also accept the evidence of the claimant that her health has been impacted. I attribute this change to losing the care of her children when she had been their caregiver for their entire lives to that point.
- [37] On these unique and most unfortunate facts, the best interests of the children require that Mr. Li lose his guardianship. That status had been bestowed upon him by the Canadian law, pursuant to section 39 of the Family Law Act. He has rebuked Canadian law by his actions. Ms. Mei will be the sole guardian of the children, pursuant to section 39(2) of the Family Law Act. In this extreme situation, such an order is in the children's best interests. An allocation of parental responsibilities under section 41 would not eliminate the risk to the children's best interests: *Lessard v. Mahoney*, 2019 BCSC 551, at paragraphs 143 to 148.
- [38] On the totality of the evidence, therefore, I find that it is in the best interests of the children, Xuanbo and Frank, that their mother, the claimant, Ms. Mei, be their sole guardian. Pursuant to section 39(2), the father is not their guardian. Ms. Mei will, therefore, pursuant to section 41, have the entirety of parental responsibilities. Pursuant to section 40(3), I am making an order that those parental responsibilities be allocated such that they are exercised by one guardian only, that guardian being Ms. Mei. I therefore order that Ms. Mei be the sole guardian of the children Xuanbo and Frank, and as sole guardian have the entirety of the parental responsibilities under section 41 allocated to her.

"The Honourable Madam Justice Watchuk"

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